The Investigations of the New European Public Prosecutor's Office. The Fight Against Fraud and Corruption Damaging the Financial Interests of the European Union in the Times of the PNRR.

Global Society, Cross-border Mobility and Law

Legal studies of globalisation and cross-border mobility: Rights, institutions, public administrations, and their role in the evolution of national and supra-national legal systems.

1. State of the Art.

The expansion of the European Union's («EU») competences has corresponded with an increase in the available resources to finance its policies. This substantial liquidity has stimulated the 'appetites' of economic and organised crime. To understand the scale of the phenomenon, consider that the EU's long-term budget for the 2021-2027 period includes allocations of 2.07 trillion euros (https://www.consilium.europa.eu/it/policies/eu-long-term-budget/), of which 807 billion are earmarked under the extraordinary recovery instrument Next Generation EU, with Italy being the main beneficiary (receiving approximately 190 billion euros). The increase in fraud and corruption damaging the Union has not always been countered by legislative policies capable of effectively preventing and repressing them. The initial protection system, grounded on administrative cooperation within the EU and on national prosecutions, quickly proved insufficient and, despite States' reluctance, it became necessary to intervene at the European level using the tools offered by criminal law.

In 1997, Professor Delmas Marty proposed for the first time, in her 'Corpus Juris' project, the establishment of a European Public Prosecutor's Office («EPPO») to combat these criminal phenomena in the Union's territory – considered a single legal area for this purpose, where investigations would have been conducted following common procedural and substantive rules. However, EPPO was established in 2017 by the Reg. (EU) No. 1939/2017 («EPPO Reg.» or «Regulation») and became operational in June 2021. It will be part of a network already populated by various European Agencies – such as the European Anti-Fraud Office (OLAF) and Eurojust – but it will be the only one charged with combating offences that harm the financial interests of the Union using the tools offered by criminal law.

It was intended to build a supranational investigative office capable of ensuring high protection of the Union's budget throughout its territory, respecting the legal traditions of the member states and ensuring a high standard for defence rights. The legislative translation of these sharable intentions is not always sharp and coherent, so much so that several scholars immediately identified some regulatory profiles that could jeopardise its mission.

The Regulation has shaped the institutional mandate of the European Public Prosecutor's Office by following the paradigm of normative 'harmonisation' of the offences falling within its material competence over their desired 'unification'. These 'federal' crimes were designed by referring to Directive (EU) 2017/1371, thus subordinating the EPPO's operation to the faithful adaptation of the States. Such a 'variable geometry competence' indirectly incentivises conflicts of competence with the national authorities.

Another operational limitation arises from the fact that the European Public Prosecutor's Office was established through the special procedure of enhanced cooperation provided for in Article 86 TFEU, which means that not all Union States are joining it. This reduced territorial competence

implies that the potential of these 'European' investigations is weakened when they aim to ascertain facts committed partly in non-participating countries, which are not bound by the Regulation. EPPO may perform investigative acts in those states through the negotiation of working agreements (which are stipulated on a voluntary basis) according to Article 105 EPPO Reg., or by means of the operational support of Eurojust and OLAF.

Moreover, the 'weak' harmonisation of the procedural provisions applicable to the EPPO's activities has been met with disappointment. For example, some fundamental junctures of the investigation are essentially left to national procedural laws (for instance, the adoption of precautionary measures). In other cases, the normative technique adopted to achieve 'legal harmony' requires some procedural mechanisms that can only be developed by national parliaments (e.g. the mechanisms concerning the acquisition of criminal reports by national authorities under Art. 24 Reg.). In others, the wording of some regulatory provisions appears susceptible to multiple legitimate interpretations. This legal uncertainty mainly occurs when the investigation has a transnational dimension. For example, the criteria that legitimise the EPPO to choose the country in which to conduct the investigation or prosecute are vague (art. 26 EPPO Reg.), as well as the rules for gathering cross-border investigative elements (art. 31 EPPO Reg.). Concerning Article 31, the Grand Chamber of the EU Court of Justice, in its decision on December 21, 2023, case C-281/22, regarding an investigation conducted in German and Austrian territory regarding the circumvention of customs duties on biodiesel imported from the USA, stated that the judicial authorisation required by the law of the State of the assisting European Delegated Prosecutor «may only relate matters concerning the enforcement of the measure and not those concerning its justification and adoption, which must be subject to prior judicial review in the Member State of the handling Delegate in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the European Union». The scope of this ruling still needs to be further clarified.

Additionally, the reference made by Article 41 of the Regulation to the rights of defence enshrined in the Charter of Nice, European directives and national legislation does not seem to cope with new procedural dynamics. This profile risks undermining the authority of the new EPPO's operations by promoting hostile reactions in national actors capable of compromising its smooth operation.

Thus, national procedural laws continue to maintain a relevant role. Nearly all the adhering countries have adopted their coordination legislation, including Italy with legislative decrees no. 75 of July 14, 2020 and no. 9 of February 2, 2021.

From an institutional perspective, the internal legislation has regulated the procedure for appointing the 'Italian' European prosecutor, his or her delegates, their respective status and the dislocation of the twenty delegates in the national territory in seven 'macro-districts' and providing for the exercise of prosecutorial functions throughout the national territory regardless of their assigned location. However, it is unclear whether this organisational structure will meet the workload of the Italian delegates in the short and long term, especially for Southern Italy districts. The crimes we discuss present a significant 'dark figure' and are often very complex to ascertain due to the nature of the facts, the number of charges and people involved and the natural transnational vocation of these proceedings. Indeed, the EPPO's annual report for 2023 shows that of the 1927 ongoing investigations, 618 were in Italy, with estimated damages of 19 and 7 billion euros, respectively (https://www.eppo.europa.eu/sites/default/files/2024-02/EPPO_Annual_Report_2023.pdf). It seems likely that these proportions will increase following the full implementation of the Italian "Piano Nazionale di Ripresa e Resilienza" («PNRR»).

The legislative decree no. 9 of February 2, 2021, also intervened regarding procedural dynamics. Concerning the reporting of criminal offences, it also provided for notification to 'ordinary' national prosecutors to allow them to perform urgent acts pending the opening of the investigations. The legislator regulated the conflicts of competence between the EPPO and national prosecutors, designating the General Prosecutor at the Court of Cassation as the entrusted authority to resolve them, contemplating the applicability of articles 54, 54-*bis*, 54-*ter*, and 54-*quater* C.P.C. (Italian Criminal Procedure Code) for this purpose and Article 746-*ter* C.P.C. to proceedings originally conducted by delegates from other Member States then transferred to Italian territory.

Less incisive, but not negligible, are the complementary legislative acts adopted by the Union. Both Reg. (EU Euratom) No. 2020/2223 on cooperation between EPPO and OLAF and the new Reg. (EU) No. 2018/1727 of Eurojust introduce provisions aimed at avoiding potential overlaps of competences between offices and promoting inter-institutional coordination – through periodic meetings and planning. Their operational coordination will be developed through the exchange of information based on a 'hit/no-hit' feedback system, the creation of consultative mechanisms on specific cases, and by providing reciprocal reporting obligations.

The dynamism and quantitative uncertainty of the criminal phenomenon, the likely inadequacy of the resources allocated and the complexity and difficult decipherability of the legal framework require careful reflection on the problematic profiles summarised from a national and European perspective.

2. Research Objectives.

The research project's objectives can be summarised as follows:

a. To identify and analyse the problematic profiles of the current legal framework (both, European and national), also in light of the EPPO's short experience. Focus will also be placed on the EPPO's actual capacity to protect the funds allocated under the Italian PNRR, even when regarding investigations that require investigative acts to be carried out in multiple countries (including 'non-EPPO' ones). Emerging criticalities will be addressed by offering feasible interpretative solutions, or where this is not possible, by drafting normative changes capable of remedying them and evaluating their potential impact on these investigations and on the respect of fundamental rights of suspects and defendants. It will be essential to ensure an efficient role for the supranational body without weakening defence guarantees in the new European investigative context, also considering the forum shopping danger – since Article 26 of the Regulation seems to recognise the right of EPPO to choose the national judge before whom to conduct the trial, with implications on the substantive and procedural law applicable to the case.

b. To evaluate the adequacy of the current 'Italian' staffing of the new prosecutorial office. The quantitative analysis of the phenomenon will be conducted by observing the number and complexity of the proceedings handled by the Italian delegates and examining how they fulfil their institutional tasks (including their relationship with the judicial police and the possibility of delegating certain activities to their colleagues). The concrete impact of the current legal framework will be measured by examining indications from living law and interviews with the Italian delegates through a prior inquiry. Monitoring the operational practices developed in the judicial offices called upon to implementation as a further form of verification of the balance between the values at stake is also proposed.

c. Multifactorial cost/benefit assessment. Quantitative elements such as the amount of money involved in frauds affecting the Union's interests and the sums recovered will be carefully considered,

along with qualitative aspects legitimising the cession of sovereignty. The latter include: the statistical incidence of organised crime, the presence of an efficiency surplus, and the involvement of political personalities, such as European and national parliamentarians.

3. Theoretical and Methodological Framework

The research project aims to reconstruct the current legal framework, examine its functionality and organicity, analyse regulatory criticalities and, where appropriate, formulate interpretative corrections or legislative integrations. The work will follow a fact-based approach, where the indispensable 'qualitative' legal analysis will be flanked by a statistical-quantitative one, concerning the actual impact of normative choices and an empirical investigation 'in the field'.

Firstly, the high degree of interaction between the two legal systems calls for a joint examination. After studying the relevant European acts, an assessment of the complementary Italian ones will be carried out. Where appropriate, the analysis will be supplemented by: micro-comparisons concerning the regulatory choices made by systems similar to the Italian one; in-depth studies of relevant case law precedents, including those from other legal systems; and scientific contributions that elaborate on the subject. In this first phase, the aim is to identify possible points of normative friction between the legal systems, the existence of obstructive factors to the efficient service of the EPPO and the presence of interpretative remedies capable of safeguarding all interests involved.

Subsequently, the intent is to verify whether the identified criticalities also reflect on concrete cases. Monitoring the available statistical data to observe – also through the involvement of the competent judicial offices – how the legal provisions are enforced, measuring the gap between legal theory and practice and investigating its causes, is critical. It is intended to verify, for example, how the EPPO's internal regulation, its guidelines and the Italian regulatory circulars issued by CSM or by Prosecutor's Offices (which do not have the value of a primary source) may fill certain legal loopholes. The research will be led – on the empirical side – also by conducting semi-structured (and anonymous, unless the interviewees expressly wish otherwise) interviews with the protagonists of the trial (mainly lawyers and European delegated prosecutors). This research profile will be particularly useful in evaluating the persistence of criticalities overlooked by practice and legislators.

4. Research Design.

The first phase of the study will be devoted to the research and analysis of the legal discipline, case-law and relevant scientific contributions. The essential in-depth study of the legislative primary sources regulating the work of the European Public Prosecutor's Office will be complemented by secondary regulatory acts and other relevant documents (such as, for instance, the Italian documentation related to the disbursement and management of PNRR resources). This phase will roughly coincide with the first two semesters of study.

The second stage will consist of research 'in the field', beginning with the collection of data – including statistical ones – that cannot be obtained through ordinary research. It will be necessary to involve the competent judicial offices, requesting their operational data in accordance with the provisions of Regulation (EU) 2016/679, as well as to carry out anonymised interviews with the main actors of this process of change. To this end, it will be necessary to interact with the seventh commission of the Superior Council of the Judiciary as the organisational unit responsible for monitoring the workflow of the judicial offices. Participation in national and international scientific conferences focusing on the EPPO is also planned at this stage. The information to be obtained

concerns the research objectives mentioned above, including data on the fight against PNRR fraud in Italy.

Before the research thesis is written, the third step will involve attendance at scientific conferences and staying in foreign academic institutions for research purposes and the constant updating of the extensive material already obtained, which is a crucial stage to implement the partially matured research results and deepening alternative models from legal traditions different from the Italian one, also to reform the most controversial points of the founding Regulation. The consequences of the EPPO's establishment in these countries and their internal adaptation will be examined to identify the existence of European criticalities and national virtuous examples that can be exported to the Italian system.

5. Expected results.

After the research has been conducted, the aim is to answer the following questions: Is the new EPPO capable of safeguarding the trillions that the Union allocates in its multi-annual budget?; Are some interpretative or normative corrections appropriate to allow for more effective protection of the European budget?; Is a new cession of competences in favour of the new euro-unitary body desirable? In the case of a positive answer, some criminal offences and suggestions for efficient implementation will be identified.

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