Collana del Dipartimento di Giurisprudenza
dell'Università di Milano-Bicocca

The EPPO and the Rule of Law

Edited by

Benedetta Ubertazzi

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LIST OF CONTRIBUTORS

BENEDETTA UBERTAZZI, Associate Professor at the University of Milan-Bicocca and Director of the STEPPO Jean Monnet Centre of Excellence of the European Union – The EPPO and EU Law: A Step Forward in Integration.

ROBERTO SAVIANO, Writer and Essayist.

SOFIA MAZZA, Law Graduating at the University of Milan-Bicocca.

FRANCESCO TESTA, European Delegated Prosecutor.

FEDERICA IORIO, Italian Lawyer and Contracted Professor at Collège d'Europe.

LORENZO SALAZAR, Italian Lawyer and Deputy Prosecutor General to the Court of Appeal of Naples.

LUDOVICA TAVASSI, Postdoctoral Researcher at the University of Milan-Bicocca.

OLIVIERO MAZZA, Professor at the University of Milan-Bicocca.

DOREL HERINEAN, Lawyer and Assistant Professor at the Faculty of Law, University of Bucharest.

ALEJANDRO HERNÁNDEZ LÓPEZ, Associate Professor at the University of Valladolid.

PETR KLEMENT, Deputy European Chief Prosecutor.

PIETRO SUCHAN, Professor at the Guardia di Finanza Academy, Former Italian Public Prosecutor and Eurojust Magistrate.

SERENA CACCIATORE, Postdoctoral Researcher at the University of Palermo (UNIPA).

SERENA CRESPI, Associate Professor of European Union Law at the University of Milan-Bicocca.

1.
INTRODUCTION

Benedetta Ubertazzi

1. *EPPO and the Rule of Law*

This text brings together the contributions of speakers at the Conference 'The EPPO and the Rule of Law' organised on 18 April 2023 by the STEPPO Centre of Excellence. The Conference marks the end of the STEPPO Centre of Excellence's second edition of the module 'The EPPO and EU Law: A Step Forward in EU Integration'.

These pages discuss the protection of the Rule of Law in the work of the European Public Prosecutor's Office, the European Public Prosecutor's Office itself and its commitment to defending the fundamental values of the EU. The aim of this text is to examine, from different angles but with a common focus, how the European Public Prosecutor's Office can embody and promote the Rule of Law in its mission to protect the Union's financial interests. The first section starts with an analysis of EPPO's constitution in order to examine its role in the further protection of the Rule of Law. The second section then examines EPPO's investigative and procedural practice, and the respect for fundamental rights in the exercise of its investigative functions. The third and final section is devoted to the cooperation mechanisms between EPPO and other European actors, analysing EPPO's role in developing best practice in defence of the Rule of Law.

2. *EPPO as the New Protagonist in Defending the Rule of Law*

This section examines the constitution and the legal basis of EPPO. It emphasises the fundamental importance of respect for the Rule of Law for its effective functioning.

After the general and introductory analysis of Roberto Saviano, who introduces the contents of the Conference, Francesco Testa provides an in-depth examination of EPPO's legal framework and its integration into EU legal traditions. Federica Iorio extends this examination by considering how the Rule of Law acts as a guide for EPPO's operations, highlighting the institution's potential to reinforce this cardinal principle through its role in regulating and overseeing tax matters. Lorenzo Salazar explains EPPO's function as a supranational body operating across different criminal justice systems, ensuring that the Rule of Law is upheld in the different and sometimes divergent legal landscapes of the 22 participating Member States.

This book opens with Roberto Saviano's article, which provides an in-depth examination of the role of EPPO as a transformative mechanism in the fight against transnational financial crime. Saviano's article highlights the potential of EPPO to be an objective and impartial body that acts with the impartiality required of criminal judges as part of the Rule of Law, both by the Italian Constitution and by the European Convention on Human Rights. The article examines the innovative synergy of national prosecutors working within EPPO, going beyond national borders to fight crime in the EU. Saviano also reveals his surprising involvement in an innovative project of the STEPPO Centre of Excellence, which examines the interaction between EPPO and the Italian mainstream media.

Saviano then turns to the practical side, illustrating the money laundering process and how EPPO's intervention can disrupt established criminal strategies. The author notes the significant achievements of EPPO, as outlined by its chief prosecutor, Laura Kövesi, and suggests that EPPO's ability to facilitate joint investigations between Member States is a step forward in European integration. Finally, the author reflects on the principles of the Rule of Law and the independence of the judiciary within the European Union and highlights the importance of EPPO as a beacon of respect for these principles.

An analytical study by Francesco Testa, Italian Deputy Public Prosecutor for EPPO, critically assesses EPPO's founding legal framework and emphasises the Rule of Law as the guiding principle of its proceedings. Testa's narrative begins with the emergence of EPPO as the embodiment of a new model of prosecution within the EU judicial architecture. Testa examines EPPO's unique role and how it operates within a complex set of legal principles and historical traditions in 22 Member States. Addressing profound questions about the role and operation of EPPO, Testa focuses on the central role of the Permanent Chambers in

overseeing cross-border investigations and decision-making, arguing that EPPO's operational model challenges traditional notions of judicial cooperation and can facilitate the protection of the Rule of Law.

In addition, Testa examines the legal status of European Public Prosecutors and their autonomy, reflects on the transformative potential of EPPO's integration into the EU legal framework and its implications for the Italian legal system, and foresees a future of considerable legal debate and development driven by EPPO's innovative approach.

Federica Iorio's article examines the intertwining of the Rule of Law in EU jurisprudence and the role of the European Public Prosecutor's Office in tax governance. The exploration begins with an account of the historical and functional significance of the Rule of Law as a cornerstone of EU governance. From this basic understanding, Iorio argues that EPPO's work in protecting the Union's fiscal interests is inextricably linked to the preservation and promotion of the Rule of Law. In the course of the article, Iorio critically examines the "conditionality regulation" (Regulation 2020/2092), explaining its salient features and how they dovetail with the statutes that guide EPPO, while also constructively criticising the European Public Prosecutor's Office itself. The examination includes reflections on the future role of EPPO and how it fits into the broader fabric of the evolving EU legal and political landscape. Iorio presents an informed perspective on how EPPO can have a significant impact on strengthening the Rule of Law, particularly through its potential synergies with the European Commission in the application of the conditionality regulation in both Member States and non-Member States.

Concluding this section, Lorenzo Salazar addresses the crucial relationship between EPPO and the Rule of Law within the Union's legal framework. His article affirms EPPO's vital role in upholding the Rule of Law, prosecuting crimes against the European Community and protecting the financial interests of its citizens, thus safeguarding the Rule of Law itself. Salazar underlines the unique position of EPPO as the first supranational judicial body to harmonise the different criminal justice systems of the 22 participating Member States. Using Article 5 of the EPPO Regulation as a guide, he shows how the work of EPPO is inextricably linked to the Charter of Fundamental Rights of the European Union, as well as to the principles of the Rule of Law and proportionality. Salazar also examines the so-called "fourth layer" of protection of the Court of Justice in Luxembourg, which can provide decisive solutions to conflicts of jurisdiction through preliminary rulings or direct intervention, thus strengthening the Rule of Law.

The article also proposes innovative mechanisms at European level to protect the rights of individuals, including the creation of a "Euro Defender" office and a 24/7 legal aid service to facilitate a swift and effective defence against EPPO actions. According to Salzar, EPPO demonstrates the balance between integra-

tion and cooperation in the EU, strengthening the Rule of Law through its independence and interaction with national legal systems.

3. *EPPO's Investigations: Between Problems and Respect for the Rule of Law*

The articles in this section focus on upholding the Rule of Law in EPPO-led investigations. Ludovica Tavassi analyses EPPO's legal framework, its compliance with the Rule of Law and potential risks to the fairness of prosecutions. Oliviero Mazza discusses the impact of EPPO rules on the rights of defendants and offers suggestions for better protection of these rights, while Herinean focuses on the delicate balance between European and national law and its impact on the administration of justice. Alejandro Hernández López provides an in-depth examination of EPPO in Spanish jurisprudence, focusing on procedural fairness and the Rule of Law. Their collective reflections emphasise the importance of maintaining judicial integrity and the Rule of Law in the face of EPPO's extensive procedural powers. A common feature of both authors is their critical analysis of EPPO's work, offering criticisms and possible solutions to ensure that EPPO is indeed a guardian of the Rule of Law and does not violate guarantees in the course of its activities.

In her academic critique, Ludovica Tavassi, Postdoctoral Researcher at the University of Milan-Bicocca, rigorously assesses the EPPO legal framework and sheds light on its potentially precarious foundations. The author identifies fundamental gaps in the clarity of the law and the fairness of the judicial process, which could undermine the equality of arms that is integral to due process and thus to the Rule of Law. Tavassi examines the indiscriminate acceptance of evidence within EPPO's procedural dictates, highlighting concerns about safeguarding the presumption of innocence and the integrity of the adversarial process. The author warns of the dangers of "forum shopping", where procedural leeway could lead to cases being dealt with in jurisdictions that are favourable to the interests of the prosecution, thus calling into question the principle of the pre-established natural judge as enshrined in Article 47 of the Nice Charter. Her analysis also touches on the rules of attribution of jurisdiction, the importance of chronological factors in judicial proceedings and possible obstacles to the right of defence. Tavassi warns that the current legal environment may reinforce inequalities and hamper the ability of the defence to operate effectively in transnational settings, with access to evidence and financial resources playing a disproportionate role.

In his article, Professor Oliviero Mazza of the University of Milan-Bicocca presents a critical analysis of the EPPO Regulation, focusing on its implications for the rights of defendants and the proper administration of justice. Mazza as-

sesses the ambiguities of EPPO's jurisdiction and the exercise of its investigative powers, highlighting potential risks to fundamental rights. The author examines the complexities of EPPO's investigative process and the inherent challenges it poses to the rights of the defence. Through his pragmatic lens, Mazza offers constructive suggestions for improving EPPO's legal framework to better protect these rights and the Rule of Law. Mazza also raises concerns about the criteria used to determine EPPO's jurisdiction, such as the assessment of damages, which often cannot be definitively quantified until the end of the trial. The article also addresses potential conflicts between EPPO and national prosecutors, fuelled by the unclear demarcation of investigative powers and the lack of sanctions for non-compliance with reporting obligations. Mazza's article is a trenchant critique of EPPO's impact on national jurisdictions, highlighting its political influence, which risks undermining key Rule of Law principles.

In his comprehensive analysis, Assistant Professor Dorel Herinean delves into the complexities of EPPO in light of the obligation to respect the Rule of Law in the EU. His examination begins with a detailed consideration of the fundamental role that the Rule of Law plays in the EU framework, a principle that is integral to the harmony between European and national law. Herinean carefully critiques the transposition of the EU's Protection of Financial Interests (PIF) Directive between Member States and outlines the resulting complications in transnational criminal proceedings. He examines the investigative procedures of EPPO, focusing on judicial review and the procedural safeguards necessary to uphold the Rule of Law. The discourse extends to a critical case study of the Romanian statute of limitations, which vividly illustrates the intersection between national laws and European mandates. Through this practical case, Herinean presents EPPO as an example of the EU's commitment to the supremacy of law, reaffirming its role as an instrument to strengthen judicial cooperation between Member States and respect for the Rule of Law.

In his analysis, Alejandro Hernández López, Professor at the University of Valladolid, presents a meticulous examination of the operational and legal challenges faced by EPPO in the Spanish jurisdictional context. López analyses EPPO's material competences, their execution and the intricate process of resolving conflicts of jurisdiction, emphasising the interplay between EU directives and national sovereignty. López critically assesses the procedural dependencies that introduce potential asymmetries in legal protections between Member States, in particular Spain's unique procedural framework and its potential clash with EPPO's supranational jurisdictional. The author offers a detailed critique of the procedural reliance on national systems, which affects the uniformity of rights and obligations between Member States, and presents the provision of Article 42(2)(c) on preliminary rulings as an embodiment of the intricate complexity and potential solutions for jurisdictional disputes, and how this impacts respect for the Rule of Law. This critique is in line with the observations of the

European Commission in the 2023 Rule of Law Report. In that Report, the Commission noted that cooperation between EPPO and national prosecution offices can be complex due to the fragmented nature of national structures.

4. *EPPO and other EU Institutions: Further Protecting the Rule of Law*

This final section examines the role of EPPO in promoting cooperation between European institutions and guiding this cooperation on the basis of the Rule of Law. The authors aim to analyse EPPO's positive leadership role *vis-à-vis* other actors on the European scene in raising Rule of Law standards and protections. Petr Klement outlines the relationship and cooperation between EPPO and OLAF, highlighting the balance needed to fulfil each agency's mandate. Suchan stresses the importance of formal agreements allowing EPPO to draw on the extensive resources and information systems of these organisations, while respecting the Rule of Law and ensuring effective cooperation for the operational success of cross-border investigations. Serena Cacciatore discusses the practical implications of EPPO's activities in Italy and Spain, with a particular view towards improving the effectiveness of investigations within the legal frameworks of Member States. Finally, Serena Crespi provides a comprehensive picture of the framework in which EPPO operates, within which it is called upon to uphold the Rule of Law. The juxtaposition of the perspectives of Klement, Suchan, Cacciatore and Crespi provides an insight into the impact of EPPO on institutional cooperation, which has not only adapted to the standards that preceded its establishment, but also increased respect for fundamental rights, including the Rule of Law.

In his insightful article, Petr Klement looks at the synergy between EPPO and OLAF. The author begins by tracing the development of OLAF since its creation in 1999, highlighting its dual investigative and political role within the European Commission and its achievements, including high-profile cases. Klement criticises the constraints on OLAF, such as the lack of direct judicial control and access to banking information, and highlights the impact these have on the length and effectiveness of OLAF investigations. Klement assesses the preparatory steps taken by OLAF in anticipation of the creation of EPPO and analyses how OLAF has maintained its relevance by supporting EPPO despite the workload and resource constraints experienced after EPPO was established. Klement looks at the structural and functional differences between the two bodies, noting OLAF's broad investigative mandate as opposed to EPPO's focus on prosecution under the PIF Directive. In particular, the author explores the complex terrain of the admissibility of evidence in criminal proceedings arising from OLAF investigations.

Pietro Suchan's article examines the complex relationships and cooperation

strategies between EPPO and key EU bodies such as Eurojust, OLAF and Europol. Drawing on his extensive experience as a magistrate and anti-mafia prosecutor, Suchan explains the importance of these alliances, focusing in particular on the formal agreements that give EPPO access to the vast capacities and data systems of these organisations. This access is crucial for EPPO, particularly when dealing with investigations involving non-participating Member States and third countries. The article goes on to analyse how Eurojust, which is legally considered to be the "mother" of EPPO, will play a crucial role in the support and operational functioning of EPPO. Suchan examines EPPO's collegial management structure, which was preferred to the original proposal of hierarchical management. Suchan examines the various aspects of cooperation between Eurojust and EPPO, such as the joint mission to ensure the proper conduct of investigations and prosecutions, the exchange of information and the support to national police authorities. In addition, the article addresses the critical importance of Eurojust's role in creating a single European evidence base, balancing the validity of evidence gathering and rules of recognition between States, which are key elements in the respect of the Rule of Law.

Serena Cacciatore's research investigates the establishment and operational dynamics of EPPO, highlighting its central role in the advancement of judicial integration within the European Union, with a focus on its incorporation into the judicial frameworks of Italy and Spain. Cacciatore draws on the testimonies of practitioners collected during the Centre of Excellence module 'The EPPO and EU Law: A Step Forward in EU Integration', to shed light on the strategic development of EPPO. It delves into the complexities of investigating transnational crimes and the pursuit of legal harmonisation between Member States, highlighting EPPO's mission to strengthen the criminal protection of the EU's financial interests against fraud, corruption, money laundering and cross-border VAT fraud. The research focuses on the procedural and operational adjustments made by the Member States, emphasising the importance of mutual recognition and judicial cooperation in the field of cross-border investigations as part of substantive compliance with the Rule of Law.

Serena Crespi, Associate Professor of European Union Law at the University of Milan-Bicocca, addresses the issue of the erosion of respect for fundamental EU values over the last fifteen years, in particular the Rule of Law as articulated in Article 2 of the TEU. Highlighting the dynamic interaction between European institutions and national courts in upholding the EU's common values, Crespi proposes improvements to current instruments and the introduction of new mechanisms under the "conditionality regulation" to strengthen the enforcement of the values enshrined in Article 2 of the TEU and to preserve the Rule of Law within the EU legal framework. Professor Crespi's article provides a comprehensive picture of the framework within which EPPO operates on a daily basis and within which it is called upon to uphold the Rule of Law.

5. *Conclusion*

The contributors, ranging from legal scholars to practicing prosecutors, have dissected the legal foundations and operational mechanisms of the European Public Prosecutor's Office, presenting their findings with a critical yet constructive lens. The first section showed us, through an analysis of the EPPO's constitution, its role in further protecting the Rule of Law. The second section investigated the respect for fundamental rights in the exercise of EPPO's investigative functions. By analysing the cooperation mechanisms between EPPO and other European actors, the third and final section demonstrated how EPPO is able to develop best practices in defence of the Rule of Law.

As the EU continues to navigate through evolving legal and political landscapes, EPPO stands as a testament to the Union's commitment to uphold the Rule of Law. Ultimately, this anthology aims to contribute to the ongoing dialogue surrounding EPPO and its fundamental role within the EU's judicial framework. Through their analyses, proposals and forward-looking perspectives, this collection stands as a significant academic and practical contribution to the field of European criminal justice.

SECTION 1

EPPO AS THE NEW PROTAGONIST IN DEFENDING THE RULE OF LAW

2.

THE MEDIA ECHO OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: WHERE ARE WE AT? *

Roberto Saviano

On the occasion of the closing conference 'EPPO and the Rule of Law' at the University of Milano-Bicocca, I had the occasion to comment the very important potential of the competencies of the European Public Prosecutor's Office (EPPO) as a tool for transnational counteraction to financial crimes, as well as a "coordination unit" for financial information among various countries and investigative authorities, among them the Guardia di Finanza and the Customs Agency.

For example, in the case of a heinous crime committed against two girls in the Ponticelli neighborhood of Naples in the 1980s, the Camorra handed over three innocent individuals – true scapegoats. The Italian judiciary was forced to yield to this compromise, under incessant pressure from the press and public opinion, which demanded a swift and strong punitive response from the State.

The existence of a European Public Prosecutor's Office would have been decisive, as it would have had an objective perspective, not subject to undue expectations, "third and impartial". These are not coincidentally essential characteristics of the criminal judge, as provided for in Article 111 of our Constitution, as well as Article 6 of the European Convention on Human Rights.

Another aspect of great interest is that national prosecutors work synergistically on a single case, without limiting themselves to national borders, investigating a problem without perceiving it as local, but rather with an international vocation. This would be a revolution in combating organised crime because with this new tool of coordinated investigations, it would be possible to reconstruct the network or international connections of individual criminal organisations or their emissaries more quickly.

I was very surprised when Professor Benedetta Ubertazzi, Chair of the

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* Il presente contributo è stato scritto in collaborazione con Sofia Mazza, che ringrazio per l'ottimo lavoro svolto.

STEPPO-EPPONFI (think tank of the University of Milano-Bicocca, now Jean Monnet Centre of Excellence, funded by the European Commission), involved me in an ambitious and innovative study project focused on analysing the relationship between EPPO and traditional Italian media.

Despite the significant results achieved by the European Public Prosecutor's Office, operational only since 1 June 2021, this novelty in the community landscape still has little relevance in the national media debate.

How is it possible that an efficient form of reinforced cooperation is not at the centre of the debate? Or why is there little talk about this new authority that is born to protect the economic interests of the Union's citizens?

If we think about it, the European Public Prosecutor's Office has jurisdiction over so-called "white-collar crimes", and in particular has the authority to indict the so-called "PIF crimes" (Protection of Financial Interests) such as fraud, corruption, money laundering, and misappropriation, which can have a negative impact on the ultimate use of European taxpayers' money.

Therefore, I have decided to take up this new, entirely European challenge, always aimed at spreading values to combat financial crime. The subject of my studies is what could be defined as a new "land of fires", but with a community dimension. A land beyond national borders, starting from Luxembourg and involving 22 European Union countries, including Italy, from the North to the deep South, my daily socio-economic context.

However, the focus of the research will not be on illegal landfills or waste fires in agricultural land, but on the illicit use of economic resources, resulting in harm to the financial interests of the European Union.

Thus, the "Media Committee" was established, which now has more than 300 members from all over the world.

Moreover, Italy, now more than ever, is playing a vital role in its development, thanks to the funds of the National Recovery and Resilience Plan (PNRR, in Italian); we cannot underestimate the role of the European Public Prosecutor's Office in protecting them. This new layer of protection is additional to national protection mechanisms, under the care of the Court of Auditors. Here lies the importance of the "Media Committee" and, I hope, of my contribution.

From the beginning, I tried to "sketch" out some answers to the questions above, albeit postulating the presence of doubts about it. Firstly, the European Public Prosecutor's Office cannot be controlled, nor can its actions be directed, as its action does not end within the domestic-national perimeter. Secondly, the reporting of the results achieved by it is not able to generate enough excitement in public opinion, as European issues have always been perceived as distant.

An important step forward in the analysis of these issues is realised when Professor Ubertazzi decides to involve her students from the Department of Law, enrolled in the basic course of European Union Law, M-Z.

In a short time, a virtual meeting is organised in which, after emphasising the relevance of EPPO and its mandates, I decided to briefly illustrate the function-

ing of one of the financial crimes prosecuted by the European Public Prosecutor's Office, included in the PIF directive: money laundering.

How can money, coming from illicit activities, be introduced into the Italian territory and "cleaned"?

Let's imagine an important bar in Milan that is targeted by a criminal organisation. The latter decides to establish a company and buy the property for 2 million euros. Simultaneously, through drug trafficking, it earns 5 million euros and opens a second company, headquartered in an offshore platform and therefore opaque and not very transparent for data and information exchanges. Later, it sells the Milanese bar to the newly established company, officially "cleaning" the 5 million.

In this established mechanism, how can the European Public Prosecutor's Office intervene?

It can essentially map all the strategies of money laundering or evasion, but with European numbers, ideally starting a political battle against offshore platforms and generally against all jurisdictions or countries that are deficient or weak in financial information exchange or communication of data regarding the beneficial owner, although, regrettably, I admit that there is still a long way to go before achieving this goal.

However, the numbers speak for themselves. Chief Prosecutor, Laura Kövesi, at the inauguration of the EPPO Academy on 25 September 2023, emphasised how in just 18 months of operation, 9,000 legal entities involved in a massive VAT fraud were identified, spanning 34 countries and causing an estimated damage of 2.2 billion euros.

Given the increasing relevance of cross-border money flows, the European Public Prosecutor's Office allows different national prosecutors to work together on the same case, without having to stop investigations at national borders.

Why is there such a big difference between prosecutors who have to communicate with each other and a single Prosecutor's Office, with a single horizon and an already international structure, especially designed to overcome the gigantic problem of judges' independence and to act in all territories, without the need for international letters rogatory?

With this aside, I believe that the importance of analysing this new form of reinforced cooperation can be effectively summarised, asking for concrete help from the students, involving them personally in my studies.

They are called upon to analyse, from their point of view, what may be the communicative shortcomings of the Italian media regarding the European Public Prosecutor's Office, without, however, falling into the error of considering an excessively simplified dissemination of this new community body desirable; without resorting, therefore, to the so-called "shortcut of trivialisation". The consequence would be the inevitable spread of fears and misconceptions, given the complexity of the topic.

I want to be influenced by the impressions of the students, the first generation able to experience what I would call "a miracle of law".

Indeed, within all these illicit operations, criminal organisations come into play. We could reach a real "turning point" in the fight against them if only, even through proper communication, greater trust were placed in the European Public Prosecutor's Office and the astonishing results it has achieved. Thus began what could be allegorically termed a "correspondence of intellectual senses" between the young students and me.

In the following months, this "correspondence" begins to produce the first significant results: the students propose news cases selected by them and comment, providing reasons why, from their point of view, too little space is still devoted to the European Public Prosecutor's Office in the public debate. It is immediately emphasised how this form of reinforced cooperation is new, as it does not have a history, and therefore is not yet recognisable, in other words, public opinion has not yet defined its identity.

Added to this is a condition of a tendency toward "apathy", as defined by some students, of the average citizen regarding financial issues, even more so if they are European.

Shifting the focus to professionals, I could see how, unfortunately, the European Public Prosecutor's Office is not perceived as authoritative by journalists, who relegate its activities to a niche topic for experts. This is evident from some news cases. Particularly emblematic is the judicial affair of A.M.A.P. s.p.a., the municipal company managing water services in Palermo.

The Municipal Water Company of Palermo received 20 million euro in financing from the European Investment Bank (EIB) at the end of 2017, as part of a financing plan for small and medium-sized Italian water management companies, aimed at improving the water service offered.

On 25 May 2023, 5 years later, EPPO announces, in the news section of its website, the seizure by the Guardia di Finanza of the same sum. Simultaneously, investigations are opened for the crime of undue receipt of public funds.

The case could certainly become front-page news, not Italian, but European, if not even global. Yet it has not found wide resonance, except at the local level.

On the other hand, I would like to underline an aspect that is anything but secondary, thanks to a suggestion proposed by a student: excessive media exposure of the Prosecutor's Office could undermine its operational effectiveness. In fact, constant presence on social media could convey the idea of a more journalistic institution. Furthermore, as demonstrated by the dissemination *modus operandi* of law enforcement agencies, a neutral approach is preferred, without the exposure of specific individuals, to avoid the average citizen identifying the institution in them, which could potentially undermine its credibility and seriousness.

Also, due to the increasing relevance of cross-border money flows, the European Public Prosecutor's Office has given different police forces the opportuni-

ty to train among themselves. In particular, the Italian Guardia di Finanza will train all the police forces of the EPPO Member States.

The Guardia di Finanza signed an agreement with the Prosecutor's Office on 26 September 2023 in order to oversee the training of all European police forces. This is an important recognition of Italian excellence, of which most of the media does not speak. I like to remember that Italy has a real economic and financial police force, while other countries do not have these levels of specialisation.

Our nation has paid the highest price in terms of human lives for the fight against organised crime. This sacrifice, on the other hand, has over the years allowed for the development of a superior capacity to counteract compared to other countries, which culturally did not associate financial crimes, such as money laundering, with an injustice that required imperative intervention, whereas in Italy all this could culminate in the death of journalists, magistrates or members of law enforcement.

Outside the national perimeter, the crime in question was relegated to a fiscal problem, not even perceived by civil society. This reconstruction allowed Italy to become excellent in terms of laws and investigation into economic and complex crimes, although, at the same time, it is the country with the highest judicial corruption or slowness of trials. It is necessary to note how these two aspects cannot be conceived as contradictions, but rather as consequences. Where there is indeed a constant and complex element of corruption, there is simultaneously an evolution of legal instruments to understand, deal with, and overcome such crimes.

Chief Prosecutor Laura Kövesi addressed words of esteem and appreciation to the Guardia di Finanza at the EPPO Academy inauguration. The working agreement between the European Public Prosecutor's Office and the Guardia di Finanza aims at creating a real school, where high-level training courses are provided for the military employed in this sector, European Delegated Prosecutors, and members of European law enforcement agencies.

As highlighted by Lieutenant General Sebastiano Galdino, Deputy Commander of the Guardia di Finanza, '*tutto ciò con l'obiettivo di realizzare un sistema che consenta un approccio investigativo unitario, in grado di pervenire ad una visuale complessiva e ad ampio raggio di fenomeni più gravi e complessi, evitando frammentazioni o duplicazioni delle indagini*' ('all this with the aim of creating a system that allows for a unitary investigative approach, capable of arriving at a comprehensive and wide-ranging view of the most serious and complex phenomena, avoiding fragmentation or duplication of investigations').

From an organisational point of view, moreover, the Guardia di Finanza has made available to the European Delegated Prosecutors, as it does for the national judiciary, its own operational device, articulated into departments distributed throughout the territory, including the economic-financial police units

located in each provincial capital, as well as on the units of the aeronaval and special components. Among the latter, particular relevance is assumed by the special unit "Public spending and repression of community frauds", established by a community law of 1994, with specific functions of repression of frauds against the budget of the European Union, to which the European law of 2013 has entrusted further and penetrating investigative powers.

I would like to comment on this "Italian pride" with great enthusiasm, recalling a dream conceived by the liberal-socialist democrats, which has spanned several centuries, namely the constitution of the United States of Europe, endowed with a single police force and a single army. The Prosecutor's Office, in this perspective, is the most Europeanist step ever taken, after the European Parliament, for the fight against financial crimes, which are inherently international.

Within the framework of the EPPO Academy, specialists in the banking sector will play a crucial role. As Dr. Luison points out, these experts will work synergistically with law enforcement agents, providing them with the skills and knowledge necessary to understand financial and economic crimes.

These crimes indeed have a continuously evolving nature and exert a significant impact on the budget of the European Union, giving rise to the need to identify individuals prepared to face the complexity of banks, financial systems and economic regulations. 'Banking specialists will provide a unique perspective that will allow EPPO Academy participants to comprehend the intricate mechanisms by which financial crimes are committed and concealed. Their insights will aid in identifying vulnerabilities in the financial sector and devising strategies to safeguard the EU's fiscal interests. Moreover, these specialists will facilitate the acquisition of expertise in tracking illicit financial flows, recognizing money laundering schemes, and understanding the nuances of international financial transactions. Their contribution will enhances the Academy's mission to empower law enforcement officers with the tools required to combat financial crimes, ultimately fortifying the European Union's capacity to uphold its financial integrity and security.' [1]

Another central aspect, previously only hinted at but the subject of profound reflections, is the independence of the judiciary. In this regard, there are numerous references echoing in the halls of the Court of Justice. Even in the Italian Constitution, such a corollary of the Rule of Law finds broad echo: in fact, Article 25 states: '*Nessuno può essere distolto dal giudice naturale precostituito per legge*' ('No one may be removed from the established natural judge by law').

[1] D.A. LUISON, *The EPPO Academy for elite financial investigators and the role of the experts from the banking system*, Subcommittee "Banking insurance and financial authorities", 24 October 2023, *https://www.steppo-eulaw.com/2023/10/25/the-eppo-academy-for-elite-financial-investigators-and-the-role-of-the-experts-from-the-banking-system/*.

More explicitly, Article 111, paragraph II provides that '*ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale*' ('every trial takes place in contradiction between the parties, in conditions of equality, before a third and impartial judge'). Furthermore, Article 104 of the Italian Constitution states: '*La magistratura costituisce un ordine autonomo e indipendente da ogni altro potere*' ('The judiciary constitutes an autonomous and independent order from any other power').

These are perhaps the most explicit references to the topic, but certainly not the only ones, proving that respect for the Rule of Law, substantiated in the need to guarantee autonomy and independence to the judiciary, was an objective already inherent in the consciousness of the founding fathers, concretely ensured by access to such a position through public competition, thus ensuring complete detachment from the political circuit.

On the community level, this contingent independence is recalled by several articles, sometimes only as a formal statement, other times as a prerequisite for the application of pragmatic mechanisms. Among the latter, Article 267 of the TFEU is relevant, dealing with a fundamental competence, still reserved for the Court of Justice alone, namely the prejudicial or referral jurisdiction. It concerns a question arising in a national process, relating to the interpretation of a provision of Union law or the validity of an act of the Union, the solution of which is necessary, prejudicially, for the judgment of the domestic judge. Article 267 of the TFEU provides that the latter suspend the *a quo* process and refer to the Court of Justice. Once the judgment of this Court is handed down, the domestic process is resumed and it is the national judge who, complying with the judgment, decides the case with his or her own pronouncement.

The attribution to the Court of the jurisdiction in question is based on the observation that the national judge is, in a sense, the common or natural judge of Union law, law essentially addressed to private individuals, natural and legal persons, and is therefore intended to apply in national proceedings involving their rights and interests.[2]

What matters for the purposes of the discussion is that the possibility of receiving prejudicial questions, submitted to the Court, is subject to the nature of the judge who makes the referral. Indeed, the Court of Justice, Banco de Santander, C-274/14, 21 January 2020, emphasised how this mechanism can legitimately be activated only by a judicial body that satisfies several requirements, including the legal origin of such a body, its permanent character, the mandatory nature of its jurisdiction, the conduct of proceedings before it in adversarial proceedings, the application, by the body, of legal rules, as well as its independence. As can be seen from this judgment, not isolated moreover (see Case C-

[2] U. VILLANI, *Istituzioni di diritto dell'Unione europea*, in Cap VIII *Le competenze giudiziarie*, p. 417 ff., Cacucci editore, Bari, 2020.

125/04, Denuit, 27 January 2005; see Case C-203-14, Consorci Sanitari del Maresme, 6 October 2015; see Cases C-58/13 and C-59/13, Torresi, 17 July 2014) the independence of the referring judge is an essential requirement for the correct application of the mechanism provided for by Article 267 of the TFEU. National judges, ultimately, must be protected from undue external pressures, even and especially when dealing with the Court of Justice.

Despite these premises, reality shows the presence of different scenarios. For just over a decade, a model of so-called "illiberal" democracy has been spreading, a term coined to emphasise the antithetical opposition to the reference paradigm of modern Western constitutionalism, namely liberal democracy. The principles of liberal democracy are the same as those qualified by the Treaties as the founding values of the Union, within Article 2 of the TEU. This includes the principle of the Rule of Law, the protection of minorities, the principle of legality, the principle of judicial independence and the principle of the separation of powers.

Illiberal democracy first found space in Hungary, starting from the electoral victory of Orbàn's Fidesz party in 2010, and subsequently in Poland, following the electoral victory of the PiS party in 2015. It materialises in a substantial emptying of the concept of democracy, taken away from liberal principles and relegated to a simple procedural rule. Thus, for example, in Poland and Hungary, political power, embodied in the Parliament-Government circuit, began to no longer be limited in its choices by other bodies that do not enjoy the same democratic legitimacy, substantially missing all those mechanisms that act as counter-limits to political power. Laws have then been passed that limit freedom of expression of thought, as well as some civil liberties in society, with the aim of increasingly marginalising the weakest categories.

To give an example, the adoption in Poland of the law of 15 January 2016, granting significant investigative powers to the police and secret services over a very wide range of criminal offences, while allowing surveillance, information gathering, and their retention. This violates the secrecy of both written and verbal communications, including those via the Internet, through the collection of so-called metadata, without the obligation of prior authorisation by the judicial authority, but only of a generic subsequent control, also resulting in a violation of professional secrecy. This legislation is therefore in complete contrast with Article 7 of the Charter of Fundamental Rights of the European Union: 'Everyone has the right to respect for his or her private and family life, home and communications'.

Furthermore, a new abortion law has been passed, the constitutionality of which was confirmed by a subsequent ruling of the Constitutional Court. This legislation establishes an almost total ban on abortion, as it allows such practice only in cases of pregnancies caused by rape or incest, as well as danger to the life of the woman.

The aforementioned political design has created the so-called capture of the judiciary. The term indicates a set of measures aimed at increasingly diminishing the independence of judicial power, making it increasingly tied to the policies of national governments, thus jeopardising the founding values of the Union, provided for in Article 2 of the TEU.

The justification put forward by the two States affected by the phenomenon of illiberal democracies, as well as members of the European Union, is that their policies would be in accordance with community law and that the Union would have an obligation to respect such choices on the basis of Article 4, paragraph 2 of the TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

However, the reasoning is flawed, as also confirmed by the Court of Justice in the "twin" judgments of 16 February 2022. If on the one hand it is true that the Union must protect the constitutional identities of the Member States, on the other hand it must be considered that Article 2 of the TEU cannot be read in opposition to Article 4, paragraph 2 of TEU, since the founding values of the Union are common values to all Member States. In other words, violating the values stated in Article 2 of the TEU would correspond to violating the same fundamental principles of the national legal systems of the Member States. Article 4, paragraph 2 of the TEU cannot, therefore, be invoked to justify unconstitutional national choices that are contrary to European law.

In particular, both the Hungarian Constitutional Court and the Polish Constitutional Tribunal have progressively seen their functions, operability and independence from political power diminish. For example, the Hungarian Court, always known for the breadth of its competencies, the scope of its control object, including cardinal laws, ordinary laws, sub-legislative acts and international treaties, and for the almost unlimited access to its judgment, can no longer be accessed through the *actio popularis*, which allowed anyone to request the constitutional review of any legal norm (legislative or sub-legislative), even in the absence of a personal interest.

The possibility for the Court to proceed *ex officio* is also limited, but only when the norm in question, from a substantive point of view, is closely connected to a legal norm subject to its control.

Finally, the 5th Final Provision establishes that decisions issued by the Court, before the entry into force of the new Fundamental Law, are repealed, even if they do not lose their legal effects, generating a worrying gap between the now well-established Hungarian liberal-democratic tradition, expressed by

the jurisprudence of the Court, and the principles and values contained in the new constitutional text, which are characterised by a nationalistic and illiberal imprint, raising legitimate doubts about the maintenance of qualitative standards for the protection of rights.

Further concerns arise from the appointment procedure of the President of the Court. The election is now the responsibility of the National Assembly with the same modalities provided for the election of judges, appointed by the parliamentary majority. The President remains in office for the entire term with very decisive tasks, such as choosing the rapporteur of the case, defining the work agenda, and composing the judging panels.

Regarding judicial reforms, the retirement age of judges, prosecutors and notaries has been lowered from 70 to 62 years, resulting in the renewal of more than a third of the judges (274 in 6 months), especially in the higher courts. Secondly, the appointment of new judges is entrusted to a competition, whose judging commission is not only composed of experts chosen by the Minister of Justice, in agreement with the President of the OBH, National Office of the Judiciary, but the latter has the possibility to appoint the new judges, subverting the competitive ranking in a completely discretionary manner.

In the face of the phenomenon of illiberal democracies, the European Union has reacted, resorting to the tools available in the Rule of Law toolbox. Initially, political instruments specifically designed to protect the Union's founding values were employed. For example, the Juncker Commission, concerned about the events concerning the Polish Constitutional Tribunal, decided to apply the so-called Rule of Law Framework in January 2016, initiating a constructive dialogue with Polish institutions and simultaneously adopting an opinion on the Rule of Law. Given the lack of improvement, the Commission sent a Rule of Law Recommendation to Poland in July 2016, followed by three more until December 2017. The last recommendation is accompanied by the presentation to the Council of a reasoned proposal under Article 7(1) of the TEU, triggering the preventive alarm procedure against Poland.

A few months later, the European Parliament presented a reasoned proposal under Article 7(1) of the TEU against Hungary, lamenting the existence of an obvious risk of serious breach of the Union's founding values under Article 2 of the TEU. The preventive alarm procedure is thus also activated against Hungary.

The Article 7 procedure consists of two phases: under the aforementioned Article, paragraph 1, the Council, having found the existence of an obvious risk of violation by a Member State of the values under Article 2 of the TEU, by a majority of four-fifths, subject to the approval of the European Parliament, after hearing the Member State, sends one or more simple recommendations.

If these recommendations are unsuccessful, the European Council, by unanimity, may find the existence not only of a mere "risk" but of a "serious and persistent violation" of those values, after inviting the Member State to submit

observations. The third paragraph of Article 7 then provides for the possibility for the Council, by a qualified majority, to suspend some rights of the Member State, including the voting rights of the government representative of that Member State in the Council, taking into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. Nevertheless, the Member State continues to be bound by the obligations arising from the treaties. Currently, the activation of Article 7 of the TEU has not produced any results, but the procedure remains blocked. As evidence of this, the European Parliament adopted a Resolution on on-going hearings under Article 7(1) of the TEU on 16 January 2020, stating that '*l'incapacità del Consiglio di applicare efficacemente l'art. 7, TUE continua a compromettere l'integrità dei valori comuni europei, la fiducia reciproca e la credibilità dell'Unione nel suo complesso*' ('the Council's inability to effectively apply Article 7 of the TEU continues to compromise the integrity of European common values, mutual trust, and the credibility of the Union as a whole').

Given the failure of political instruments, the European Union decided to resort to instruments of a judicial nature, with great success. In particular, the Commission has resorted to the infringement procedure under Article 258 *et seq.* of the TFEU, while the Court of Justice has maximised the preliminary references that Polish and Hungarian judges have raised over time, in an attempt to defend themselves against the illiberal policies of their Governments.

In particular, the Union decided to initiate two infringement procedures against Poland, contesting a law of 2017, which lowered the retirement age of ordinary judges for gender discrimination in the workplace and for violation of the principle of independence, irremovability, and impartiality of judges under Article 19(1) of the TEU (Case C-192/18). The second infringement procedure concerns another law of 2017, which lowered the retirement age of Supreme Court judges for violation of the principle of independence, irremovability, and impartiality of judges under Article 19(1) TEU (Case C-619/18).

The illegitimacy of the provisions allowing judges, once they reach retirement age, to request and obtain an extension of their mandate is contested. This extension is also granted by the Minister of Justice, for ordinary judges, and by the President of the Republic, following the opinion of the KRS, or the Council of Justice, for Supreme Court judges.

The Court first clarified its competence to judge cases concerning the independence of the national judiciary, contrary to what Poland had argued. The organisation of the judiciary is indeed a competence that falls within the exclusive sphere of the Member States; however, in exercising this competence, Member States are required to respect the obligations arising from Union law, specifically Article 19(1), second paragraph of the TEU, which provides for the obligation to guarantee the independence of the judicial bodies. In light of this, the Court upholds the Commission's complaints and considers the mechanism of

extending the mandate of ordinary judges and Supreme Court judges to be in conflict with the principle of judicial independence under Article 19(1) of the TEU. '*La circostanza che un organo quale il Ministro della Giustizia sia investito del potere di decidere o meno di concedere un'eventuale proroga dell'esercizio delle funzioni giurisdizionali oltre l'età per il pensionamento ordinaria non è di per sé sufficiente a far ravvisare l'esistenza di una violazione del principio di indipendenza dei giudici. Tuttavia, occorre assicurarsi che i requisiti sostanziali e le modalità procedurali che presiedono all'adozione di simili decisioni siano tali da non poter suscitare nei singoli dubbi legittimi in merito all'impermeabilità dei giudici interessati rispetto a elementi esterni e alla loro neutralità rispetto agli interessi contrapposti.*' ('The fact that a body such as the Ministry of Justice is empowered to decide whether or not to grant an extension of the exercise of judicial functions beyond the ordinary retirement age is not in itself sufficient to constitute a violation of the principle of independence of judges. However, it must be ensured that the substantive requirements and procedural methods underlying the adoption of such decisions are such as not to give rise to legitimate doubts in individuals as to the immunity of the judges concerned from external elements and their neutrality in relation to conflicting interests.'). [3]

In other words, it is necessary to ascertain that this mechanism provides sufficient guarantees to prevent influences from political powers. In the present case, however, the Ministry of Justice has the discretion to decide whether to authorise the extension, based on criteria that are too vague and unverifiable. Moreover, the Minister's decision does not need to be motivated, i.e., subject to judicial review. The President of the Republic's decision is also discretionary, as its adoption is not delimited by any objective and verifiable criterion, it does not need to be motivated and it cannot be subject to judicial review. From these elements, it follows that both extension mechanisms are likely to '*suscitare legittimi dubbi, segnatamente nei singoli, quanto all'impermeabilità dei giudici interessati rispetto a elementi esterni e alla loro neutralità rispetto agli interessi che possono trovarsi contrapposti dinanzi ad essi*' ('raise legitimate doubts, especially among individuals, regarding the immunity of the judges concerned from external elements and their neutrality with respect to opposing interests'). [4] For this reason, both Polish Regulations are considered contrary to the principle of judicial independence under Article 19(1) of the TEU.

These decisions are particularly important as they pave the way for the fight against the phenomenon of illiberal democracies, taking a different approach from the attempt to use the infringement procedure against Hungary. Indeed, in the case, Commission v. Hungary, the subject of the judgment was a national regulation that lowered the retirement age of national judges; however, the Com-

[3] Point 119, judgment of the Court of Justice, C-192/18.

[4] Point 124, judgment C-192/18 and point 118, judgment C-619/18.

mission and the Court of Justice took an extremely technical approach. The Hungarian regulation's contravention and contravention of the directive prohibiting gender discrimination in the workplace were contested and confirmed, while there was no mention of the necessary independence of the judiciary. At the end of the matter, the 'illegitimately retired judges' only received compensation for damages, not being reinstated in their functions.

Judicial instruments, while effective, have a fundamental limitation. The judgments of the Court of Justice must be executed by the Member State, with the Union lacking a sufficiently strong coercive power to force the Member State to comply with the Court's ruling. For this reason, the problem had to be continually addressed on the political level as well.

Thus, on 16 December 2020, a new instrument of a political nature was adopted: Regulation No. 2020/2092 of the European Parliament and of the Council, which introduces the so-called Rule of Law "conditionality". This is a specific instrument concerning a general regime of conditionality for the protection of the Union's budget and concerning both ordinary resources, such as the Multiannual Financial Framework 2020-2027, and those special ones provided for in Next Generation EU, whose legal basis is found within Article 122 of the TFEU.

The idea, well expressed by the Regulation from the first article, is to condition the disbursement of European funds on the respect for the Rule of Law by Member States. Such respect is indeed '*presupposto essenziale perché il bilancio sia conforme ai principi di una sana gestione finanziaria sanciti nell'art. 317 TFUE, così "condizionando" fondi e risorse, ordinarie e straordinarie. Le autorità pubbliche devono agire in conformità al diritto; alla magistratura deve essere garantita indipendenza ed imparzialità, perché sia assicurata la garanzia giudiziale effettiva prevista dall'art. 19 TUE e dall'art. 47 Carta*' ('an essential prerequisite for the budget to comply with the principles of sound financial management laid down in Article 317 of the TFEU, thus "conditioning" ordinary and extraordinary funds and resources. Public authorities must act in accordance with the law; independence and impartiality must be guaranteed to the judiciary, to ensure the effective judicial protection provided for in Article 19 of the TEU and Article 47 of the Charter'). [5]

Instances of violation of the Rule of Law are mentioned, only by way of example, in Article 3 of the aforementioned Regulation. Among them, we find threats to the independence of the judiciary, failure to prevent, rectify, or sanction arbitrary or unlawful decisions of public authorities, or limitations on the availability and effectiveness of means of redress. According to Article 4, these must be violations that compromise or seriously risk compromising the sound

[5] B. NASCIMBENE, *Stato di diritto, bilancio e Corte di giustizia*, in *rivista.eurojus.it*, Issue No. 2-2022.

financial management of the Union's budget or the protection of its financial interests.

Another relevant aspect is that, lacking a written definition of the concept of the Rule of Law, Article 2, letter A of the Conditionality Regulation assumes a defining relevance. '"[T]he rule of law" refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU'.

The Regulation also provides that, following the establishment of a dispute with the Member State concerned, the Commission may consider violations of the Rule of Law to exist, which actually compromise or risk compromising the sound financial management of the Union's budget or the protection of its financial interests. In response to this, it may decide to suspend payments, which may be revocable, to impose a prohibition on entering into new legal commitments or concluding new agreements on loans or other instruments provided for in the Union's budget.

At this juncture, the significant role that could be played by the European Public Prosecutor's Office in the future must be considered. The proper management of European funds and the fight against corruption, fraud and tax evasion are an essential part of the mandate of this form of enhanced cooperation, as well as an integral part of the actions that Member States must take to ensure the value of the Rule of Law.

In this regard, the role of the EPPO in this "recovery" period is emphasised from various quarters: '*Le competenze della Procura europea EPPO, assumono ancora più rilevanza con l'attuazione della Recovery and Resilience Facility, attraverso il PNR e nell'ambito dello strumento di sostegno Next Generation Eu, ma anche nell'ambito dei Fondi della Politica di coesione che coinvolgono soprattutto le regioni con investimenti sui propri territori e rafforzano i meccanismi di protezione nazionali affidati alla Corte dei conti.*

Tale ruolo della Procura europea di interazione con il controllo delle risorse pubbliche è stato consolidato attraverso uno specifico accordo di cooperazione nel contrasto agli illeciti a danno degli interessi finanziari dell'Unione europea e al contrasto all'utilizzo fraudolento dei fondi europei destinati all'Italia, sottoscritto da EPPO e la Corte dei conti in data 13/09/2021.'

('The competences of the European Public Prosecutor's Office (EPPO) assume even greater importance with the implementation of the Recovery and Resilience Facility, through the RRF and within the framework of the Next Generation EU instrument, but also within the framework of the Cohesion Policy Funds,

which involve especially the regions with investments in their territories and strengthen the national protection mechanisms entrusted to the Court of Auditors.

The role of the European Public Prosecutor's Office in interacting with the control of public resources has been consolidated through a specific cooperation agreement in the fight against offences to the detriment of the financial interests of the European Union and against the fraudulent use of European funds allocated to Italy, signed by the EPPO and the Court of Auditors on 13 September 2021.')[6]

On 16 February 2022, the Court of Justice dismissed the action brought by Poland and Hungary against the conditionality mechanism. The two countries argued that Regulation No. 2020/2092 was contrary to the founding treaty of the Union. The judgments were delivered in plenary session, as provided for in Article 16, paragraph 5 of the Court's statute, when the issues raised are of fundamental importance for the Union. More precisely, paragraph 6 of the same Article states: 'where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate General, to refer the case to the full Court'. The "almost twin" judgments confirm the legitimacy of the Regulation, with the consequent obligation for the Member States concerned to comply with it, so as not to undergo the procedure provided for therein, pursuant to Article 6.[7]

Turning our gaze beyond the briefly outlined epilogue, the pronouncements of the Court of Justice cited are of particular relevance as they reaffirm and carefully outline the values of the European Union contained in Article 2 of the TEU. '*L'Unione rispetta gli Stati e questi rispettano i principi e i valori fondamentali. L'appartenenza stessa all'Unione vincola al rispetto dello Stato di diritto, inteso come obbligo di risultato nel senso di fare tutto ciò che è necessario per garantire l'appartenenza all'Unione, compresa l'esecuzione del bilancio nelle articolazioni che il regolamento prevede, anche precisando i casi indicativi della violazione dei principi*' ('The Union respects States, which respect fundamental principles and values. Membership in the Union itself binds to respect for the rule of law, understood as an obligation to achieve results in the sense of doing everything necessary to ensure membership in the Union, including the execution of the budget in the articulations provided for by the regulation, also specifying indicative cases of violation of the principles').[8] '*La tesi della Corte sui valori ed obbli-*

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[6] A. FORTAREZZA, C. MONTAGNA, *EPPO: seguire il titolare effettivo per la repressione dei crimini finanziari*, 28 August 2023, *https://www.steppo-eulaw.com/2023/08/29/eppo-seguire-il-titolare-effettivo-per-la-repressione-dei-crimini-finanziari/*.

[7] Reference is made, in particular, to the judgments of the Court of Justice *Hungary v. European Parliament and Council*, C-156/21; *Poland v. European Parliament and Council*, C-157/21.

[8] On the obligation of result see point 169 of the judgment *Poland v. European Parliament and Council*.

ghi per gli Stati può essere espressa, in sintesi, in questi termini. I valori sono parte essenziale di quell'ordinamento giuridico autonomo costituito dall'Unione.

I valori rappresentano l'identità stessa dell'Unione; lo Stato di diritto è uno di questi valori ed è ritenuto idoneo a giustificare ovvero "fondare" quel meccanismo di condizionalità, istituito dal regolamento, che rientra nelle competenze legislative del Parlamento europeo e del Consiglio e cioè l'adozione "mediante regolamenti" di "regole finanziarie che stabiliscono in particolare le modalità relative alla formazione e all'esecuzione del bilancio, al rendiconto e alla verifica dei conti.'

('The Court's thesis on values and obligations for the States can be summarized in these terms. Values are an essential part of the autonomous legal system constituted by the Union.

Values represent the very identity of the Union; the rule of law is one of these values and is considered suitable to justify or "found" that mechanism of conditionality, established by the regulation, falling within the legislative competences of the European Parliament and the Council, namely the adoption "by regulations" of "financial rules that establish in particular the methods relating to the formation and execution of the budget, the accounts and the audit.')

The values are part of the very identity of the Union and '*sono concretizzati in principi che comportano obblighi giuridicamente vincolanti per gli Stati membri' (l'art. 19 TUE concretizza, per quanto riguarda la tutela giurisdizionale, l'art. 2 TUE), i quali sono tenuti al rispetto dei principi di solidarietà e di fiducia reciproca, pur riconoscendo loro un margine di discrezionalità nel conformarsi a obblighi che sono indicati dalla Corte come obblighi di risultato*' ('are concretized in principles that entail legally binding obligations for the Member States' (Article 19 of the TEU concretises, as regards judicial protection, Article 2 of the TEU), which are obliged to respect the principles of solidarity and mutual trust, while recognising them a margin of discretion in complying with obligations that are indicated by the Court as result-based obligations').[9] In other words, while respecting national identity and the competence of each Member State, the execution of the budget must ensure respect for solidarity, one of the fundamental principles of Union law, closely related to mutual trust among States.

'*Ai non giuristi, l'oggetto del contendere potrebbe sembrare astratto e artificioso, dato che si tratta del problema della tutela dello Stato di diritto in questi paesi. Ma nessun problema potrebbe essere più concreto e cruciale in Europa, perché la nozione di Stato di diritto, o Rule of law, rappresenta il pilastro centrale della democrazia liberale.*

Esprime l'idea che il governo di un Paese non deve essere nelle mani di un principe, e dunque soggetto al suo arbitrio, ma deve essere retto dalla legge, cioè da

[9] Judgment of the Court of Justice, C-192/18 *cit.*; see points 264, 265 of the judgment and on the obligations of result; on the concretisation achieved by Article 19 TEU, see point 197, citing various judgments (2 March 2021, *A.B. et al.* [appointment of judges to the Supreme Court – Appeals], C-824/18, EU:C:2021:153, points 108, 109; 24 June 2019 and 5 November 2019.

regole predeterminate e chiare. Esprime l'idea che i poteri dello Stato devono essere separati e ben bilanciati in modo che nessuno di essi possa sopraffare gli altri. La preservazione dello Stato di diritto distingue la democrazia dal totalitarismo. L'Ungheria e la Polonia hanno ratificato il trattato UE, dove la centralità dello Stato di diritto è esplicita. L'art. 2 di tale trattato stabilisce che l'Unione si fonda sul rispetto "della dignità umana, della libertà, della democrazia, dell'eguaglianza, dello Stato di diritto e del rispetto dei diritti umani". L'art. 49, che prevede la procedura di adesione, recita: "Ogni Stato europeo che rispetti i valori di cui all'art. 2 e si impegni a promuoverli, può domandare di diventare membro dell'Unione (…).'

('To non-lawyers, the subject of the dispute may seem abstract and artificial, given that it concerns the problem of protecting the rule of law in these countries. But no problem could be more concrete and crucial in Europe, because the notion of the rule of law represents the central pillar of liberal democracy.

It expresses the idea that the government of a country should not be in the hands of a prince, and therefore subject to his discretion, but should be governed by the law, that is, by predetermined and clear rules. It expresses the idea that the powers of the State must be separated and balanced so that none of them can overpower the others. Preserving the rule of law distinguishes democracy from totalitarianism. Hungary and Poland have ratified the EU treaty, where the centrality of the rule of law is explicit. Article 2 of that treaty states that the Union is based on respect "for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". Article 49, which provides for the accession procedure, reads: "Any European state that respects the values referred to in Article 2 and undertakes to promote them, can apply to become a member of the Union (…).') [10]

The Rule of Law is therefore not only the backbone of most liberal democracies, but also of international organisations, including the UN and the Council of Europe, where it constitutes one of the three pillars, alongside democracy and the protection of human rights, as enshrined in the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms.

As can be seen, the principle of the Rule of Law has found wide resonance in the European legal order, albeit in the absence of a true codified definition. The Court of Justice has played a significant role in this regard, invoking the concept in numerous pronouncements and outlining its salient features.

Initially, the Court drew inspiration from the various European traditions, starting from the continental *Rechtsstaat* of Germanic origin, the French *Etat de droit*, up to the Anglo-Saxon concept of the Rule of Law. However, soon the "traditional" concept of the Rule of Law was declined by the Court of Justice in favour of a "community of law", a "community of law" that bases its formal

[10] P. MANZINI, *Una vittoria per l'Ue sullo Stato di diritto*, in *Giustizia, Unioni europea*, 23 February 2022.

(and "internal") legality on its own written Constitution (represented by the Treaties) and on the consequent primacy of community law over the law of the individual Member States. European "Rule of Law" is thus the result of a dialectic between the "natural" integration of community law into the legal systems of the Member States and the integration "by reaction" of constitutional law into the community legal order. [11] The common thread between the new reworking by the Court of Justice and the traditional concept of the Rule of Law is therefore the idea of a legal system '*la cui funzione primaria è la tutela dei diritti delle persone, contrastando a tal fine l'inclinazione naturale del potere all'arbitrio e alla prevaricazione*' ('whose primary function is the protection of the rights of individuals, countering the natural inclination of power to arbitrariness and abuse'). [12]

'*La Comunità, tuttavia, non è solo un insieme di norme ma anche un'organizzazione «effettiva» che si è espressa nella creazione di un apparato di istituzioni incaricate di dare applicazione al diritto comunitario. Si è dimostrata al riguardo cruciale la 'creazione' "di un sistema giudiziario europeo integrato: un circuito Corte di Giustizia-giudici nazionali che 'collabora' nella realizzazione di una 'legalità comune'". Questo sistema integrato è il risultato in primo luogo dell'istituto del rinvio pregiudiziale: della previsione, cioè, dell'obbligo dei giudici nazionali di rivolgere alla Corte di Giustizia ogni dubbio circa la validità e l'interpretazione del diritto comunitario*'. ('The Community, however, is not only a set of rules but also an "effective" organisation that has expressed itself in the creation of a system of institutions responsible for implementing community law. Crucial in this regard has been the "creation" 'of an integrated European judicial system: a circuit Court of Justice-national judges that "collaborates" in the realisation of a "common legality"'. This integrated system is the result primarily of the institution of the preliminary ruling: the provision, that is, of the obligation of national judges to refer to the Court of Justice any doubts about the validity and interpretation of community law'). [13]

As for the relationship between the Rule of Law and the independence of the judiciary, preserving the judicial body from undue and external influences is a prerequisite, as well as a corollary, of the former. Significant in this regard is the judgment of the Court of Justice of 27 February 2018, case Associação Sindical

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[11] F. LOSURDO, *Lo Stato di diritto nell'interpretazione della Corte di giustizia europea* (2010), In: *Studi Urbinati B. Scienze umane e sociali*, Edizioni Quattro Venti, paragrafi II, III e IV.

[12] See the essay by D. ZOLO, *Teoria e critica dello Stato di diritto 1*, in *Stato di diritto*, cit. In these terms, E. GIANFRANCESCO, *Il principio dello Stato di diritto e l'ordinamento europeo*, cit., p. 257 ff.

[13] F. LOSURDO, *Lo Stato di diritto nell'interpretazione della Corte di giustizia europea cit.*, on the creation "of an integrated European judicial system", G. ITZCOVICH, *Integrazione giuridica. Un'analisi concettuale*, in *Diritto pubblico*, 3, 2005, p. 773.

dos Juízes Portugueses (ASJP).[14] The Court focuses on the interpretation of Article 19 of the TEU, which affirms the necessary guarantees of independence and satisfaction of the conditions required by Articles 253 and 254 of the Treaty on the Functioning of the European Union. Furthermore, going beyond the traditional interpretation of the aforementioned Article, it identifies a close correlation with Article 2 of the TEU in the following passage: 'Article 19 TEU […] concretizes the value of the rule of law affirmed by Article 2 TEU'.[15]

For the first time, it is established that the mandate of national judges, aimed at ensuring effective judicial protection, does not derive solely from the principle of loyal cooperation, as well as from Articles 19 of the TEU and 47 of the Charter, but is directly attributable to Article 2 of the TEU. In fact, '*l'esistenza di un controllo giurisdizionale effettivo, atto ad assicurare il rispetto del diritto dell'UE è intrinseco ad uno Stato di diritto*' ('the existence of effective judicial control, aimed at ensuring compliance with EU law, is intrinsic to a rule of law').[16]

The European Union has a strong interest in safeguarding the Rule of Law. As repeatedly emphasised by the Court of Justice, it is a constitutional principle with both formal and substantive components, constituting the prerequisite for defending rights, as well as demanding compliance with obligations arising from the treaties.[17] This was also reiterated by the European Court of Human Rights, which qualified the Rule of Law as an intrinsic concept to all articles of the ECHR.[18]

As highlighted by the Commission, '*il contenuto preciso dei principi e delle norme che scaturiscono dallo Stato di diritto può variare a livello nazionale in funzione dell'ordinamento costituzionale di ciascuno Stato membro, ma dalla giurisprudenza della Corte di giustizia dell'Unione europea ("Corte di giustizia") e della Corte europea dei diritti dell'uomo, nonché dai documenti elaborati dal Consiglio d'Europa, in particolare sulla scorta dell'esperienza della commissione di Venezia, si può comunque desumere un elenco non esaustivo di tali principi e quindi definire il nucleo sostanziale dello Stato di diritto come valore comune dell'UE ai sensi dell'articolo 2 del TUE.*

Si tratta dei principi di legalità (secondo cui il processo legislativo deve essere trasparente, responsabile, democratico e pluralistico); certezza del diritto; divieto di arbitrarietà del potere esecutivo; indipendenza e imparzialità del giudice; controllo

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[14] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*.

[15] *Ibid*, paragraph 32.

[16] *Ibid*, paragraph 36.

[17] Court of Justice, case C-50/00 P, *Unión de Pequeños Agricultores*, Collection 2002, p. I-06677, points 38 and 39; joined cases C-402/05 P and C-415/05 P, *Kadi*, Collection 2008, p. I-06351, point 316.

[18] European Court of Human Rights, *cf* case *Stafford/United Kingdom*, 28 May 2001, point 63.

giurisdizionale effettivo, anche per quanto riguarda il rispetto dei diritti fondamentali; uguaglianza davanti alla legge. […] Questo significa che il rispetto dello Stato di diritto è intrinsecamente connesso al rispetto della democrazia e dei diritti fondamentali: non può esistere democrazia e rispetto dei diritti fondamentali senza rispetto dello Stato di diritto, e viceversa. I diritti fondamentali sono effettivi solo se sono azionabili dinanzi a un organo giurisdizionale. La democrazia è tutelata se la funzione fondamentale della magistratura, comprese le corti costituzionali, può garantire la libertà di espressione e di associazione e il rispetto delle norme che disciplinano il processo politico ed elettorale.'

('The precise content of the principles and rules arising from the rule of law may vary at the national level depending on the constitutional system of each Member State, but from the case-law of the Court of Justice of the European Union ("Court of Justice") and of the European Court of Human Rights, as well as from the documents drawn up by the Council of Europe, in particular following the experience of the Venice Commission, it is possible to deduce a non-exhaustive list of such principles and therefore define the substantive core of the rule of law as a common value of the EU under Article 2 of the TEU.

These are the principles of legality (according to which the legislative process must be transparent, responsible, democratic and pluralistic); legal certainty; prohibition of arbitrariness of executive power; independence and impartiality of the judge; effective judicial control, also with regard to the respect of fundamental rights; equality before the law. […] This means that respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law, and vice versa. Fundamental rights are effective only if they can be enforced before a judicial body. Democracy is protected if the fundamental function of the judiciary, including constitutional courts, can guarantee freedom of expression and association and respect for the rules governing the political and electoral process.') [19]

In other words, the Rule of Law assumes particular relevance within the community space, as it constitutes the prerequisite for respecting fundamental rights, as well as the guarantee of national judicial bodies observing and safeguarding the subjective rights recognised by the European Union to its citizens. Respect for the Rule of Law must be guaranteed in all Member States to foster mutual trust among them, especially in the relations between them: '*Oggi, una sentenza in materia civile o commerciale di un organo giurisdizionale nazionale dev'essere automaticamente riconosciuta ed eseguita negli altri Stati membri, così come un*

[19] Comunicazione della Commissione al Parlamento Europeo al Consiglio, *Un nuovo quadro dell'UE per rafforzare lo Stato di diritto*, COM/2014/0158 final, *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A52014DC0158*.

mandato d'arresto europeo emesso in uno Stato membro nei confronti di un presunto criminale deve essere eseguito in quanto tale negli altri Stati membri' ('Today, a civil or commercial judgment of a national judicial body must be automatically recognised and executed in the other Member States, just as a European arrest warrant issued in one Member State against an alleged criminal must be executed as such in the other Member States.') [20]

Since 2020, the Commission has also been tasked with preparing an annual report on the state of the Rule of Law in each Member State and in the EU as a whole. This is in order to safeguard this foundational value of community law, denouncing in time factual threats that could turn into concrete violations in the future. In the 2023 Rule of Law Report the Commission highlighted how an independent and efficient judicial system, as well as the presence of an anti-corruption framework, are key elements in ensuring respect for the Rule of Law. [21]

In this regard, EPPO, as a prosecution body independent from any other institution of the European Union, plays a fundamental role, and the choice of a State to adhere to this form of enhanced cooperation is proof of respect for the Rule of Law: '*tale adesione consente allo Stato di vincolarsi ad un organo giudiziario sovranazionale e imparziale, garantendo un sistema efficace di lotta alla corruzione e rafforzando il diritto ad un'efficace protezione giudiziaria nei settori disciplinati dal diritto dell'Unione. Non è un caso che Stati come l'Ungheria e la Polonia, protagonisti della cosiddetta "crisi dello Stato di diritto", non abbiano aderito all'EPPO*' ('such adhesion allows the State to bind itself to a supranational and impartial judicial body, guaranteeing an effective system for fighting corruption and strengthening the right to effective judicial protection in areas governed by Union law. It is no coincidence that countries like Hungary and Poland, protagonists of the so-called "rule of law crisis", have not joined the EPPO'). [22]

Nevertheless, part of the criminal procedural doctrine highlights the presence of some critical aspects related to the European Public Prosecutor's Office

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[20] *Cf* case C-168/13, *Jeremy F/Premier Ministre*, points 35 and 36.

[21] Comunicazione della Commissione al Parlamento Europeo a al Consiglio, al Comitato Economico e Sociale Europeo e al Comitato delle Regioni, *Relazione sullo Stato di Diritto 2023*, https://eur-lex.europa.eu/legal-content/IT/TXT/?qid=1688825511863&uri=COM%3A2023%3A800%3AFIN.

[22] B. UBERTAZZI, C. FOSSATI, *EPPO and the Rule of Law*, *https://www.steppo-eulaw.com/2023/08/01/eppo-and-the-rule-of-law-by-benedetta-ubertazzi-and-curzio-fossati/*; L. DE MATTEIS, *Autonomia e indipendenza della Procura europea come garanzia dello Stato di diritto*, in *Questione giustizia*, No. 2, 2020; R. UITZ, *The Rule of Law in the EU: Crisis – Differentiation – Conditionality*, in R. UITZ, *The Rule of Law in the EU: Crisis – Differentiation – Conditionality*, 11 April 2022, BRIDGE Network Working Paper No. 20 (2022), available at *https://ssrn.com/abstract=4081601* or *http://dx.doi.org/10.2139/ssrn.4081601*, pp. 8-9; L. PECH, D. KOCHENOV, *Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid*, in *RECONNECT Policy Brief*, No. 1, 2019 (Leuven), University of Groningen Faculty of Law Research Paper No. 28/2019, 13 June 2019, available at *https://ssrn.com/abstract=3403355*, p. 11.

and its discipline, far from strengthening the Rule of Law, and concerning mainly the institution of prescription (with significant differences in various Member States), alternative procedures (provided for in some legal systems and not provided for in others), as well as the language of acts, the system of notifications or the absence of a single Code of Criminal Procedure. In this regard, I consider unfounded the fear that prevails in the academic world: the Prosecutor's Office will not transform into a "super-prosecutor", exempt from the law, violating subjective rights. The role of national jurisprudence and of the Court of Justice will be fundamental in filling the gaps present in the EPPO Regulation today, step-by-step, ruling after ruling. [23]

Thus, once again, the *modus operandi* that animated the Founding Fathers will materialise: *'L'Europa non potrà farsi in una sola volta, né sarà costruita tutta insieme; essa sorgerà da realizzazioni concrete che creino anzitutto una solidarietà di fatto'* ('Europe cannot be made at once, nor will it be built all together; it will arise from concrete achievements that create above all a solidarity in fact'). With these words, on 9 May 1950, French Foreign Minister, Robert Schuman, outlined what would go down in history as the "Europe of small steps". A reading, still today, of a model of variable European integration, sensitive to the characteristics and differences of various societies, which provides efforts proportional to the growing and emerging needs over time, intercepted with precise actions. [24]

[23] B. UBERTAZZI, C. FOSSATI, *EPPO and the Rule of Law cit.*

[24] S. MAZZA, *EPPO: the small steps of the next generation EU*, *s://www.steppo-eulaw.com/2023/06/23/eppo-the-small-steps-of-the-next-generation-eu/*.

3.

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: A STEP TOWARDS EUROPEAN JUDICIAL INTEGRATION

Francesco Testa

As soon as it became effectively operational, the new European Public Prosecutor's Office aroused interest and curiosity among practitioners in several respects: material competence, investigative powers and relations with national judicial authorities are undoubtedly among the most relevant aspects that will engage jurisprudence and doctrine for years to come.

But reflection on the legal aspects introduced by the Regulation establishing the European Public Prosecutor's Office shall, in my opinion, also focus on the "model" of prosecutor that EPPO wants to embody.

As is well known, Regulation (EU) 2017/1939, establishing the European Public Prosecutor's Office, is the result of a long and extremely complex negotiation, in the course of which it was necessary to converge around common rules, legal principles, historical traditions and procedural rules very different from each other.

So what kind of prosecutor is EPPO? What are its rules of operation and the principles to which it must inform its actions? How does the European Public Prosecutor's Office fit into the Italian legal and institutional system?

In an attempt to answer these questions, it seems appropriate to dwell on a few points.

In the architecture of the European Public Prosecutor's Office, a preeminence is attributed to the Permanent Chambers, intermediate bodies between the Central College and the European Delegated Prosecutors (EDPs) in charge of investigations, composed of three European Public Prosecutors who are members of the College, whose primary task is to monitor investigations and ensure investigative coordination in cross-border cases (Article 10 of the Regulation).

Above all, however, the Regulation requires the European Public Prosecutor's Office to "decide" through the Permanent Chambers whether to bring a

case to trial, to dismiss a case, to apply a simplified prosecution procedure, to refer a case to national authorities, or to reopen an investigation after it had been dismissed.

As can be seen, these are all the most relevant decisions concerning a criminal case, which therefore, within EPPO, are referred to the responsibility of the Permanent Chambers and not to the European Delegated Prosecutor in charge of the case (who is entitled, in this regard, to a power of proposal). In addition, the aforementioned Chambers are also vested with the general power to direct investigations and prosecutions conducted by EDPs.

It should be clear that this is an institutional setup strongly oriented toward criteria of collegiality in prosecutorial decisions, in forms unknown in the Italian system thus far.

In addition, the Permanent Chambers have the power to give instructions to the European Delegated Prosecutor in charge of the case, provided that such instructions are given 'in a specific case' and 'in accordance with national law' (Article 10(5) of the Regulation). The exercise of this power, then, is not limited to the preliminary investigation stage, but also extends in theory to the EDP's activity in the hearing.

Application practice will provide more precise indications as to the perimeter with which this provision will be interpreted. What is certain, however, is that the clause of conformity with national law – especially in a system such as the Italian one, which guarantees the autonomy and independence of prosecutors, and in which the prosecutor remains primarily an organ of justice – will be a very important benchmark in this regard.

Does the European Public Prosecutor's Office, then, represent a hierarchical prosecutor? Is it a less autonomous and less independent prosecutor than the "Italian" one?

Probably the question of EPPO's autonomy, posed in these terms, starts from a wrong perspective.

The EU legislator, in outlining the framework of the guiding principles of the new European Public Prosecutor's Office, opted for a wide-ranging choice, establishing a body that should first and foremost be autonomous as a whole, before than its individual actors. After all, the creation of a real judicial authority in the context of a multilateral political and economic organisation, such as the European Union, required first and foremost that this new body be dropped into the organisational context of the EU institutions.

Indeed, the Regulations expresses the concept very clearly (Article 6), stating that all EPPO members shall neither solicit nor accept instructions from persons outside EPPO, from Member States or from Union institutions or bodies, and that conversely each Member State, body or agency of the Union is requested to respect the independence of EPPO and to refrain from any attempt to influence its action.

It is well-known that, in the Italian legal system, both the legislator and the High Council for the Judiciary have often intervened in recent years on the subject of the organisation of the public prosecutor's offices, with the aim of enhancing the role of the Chief Prosecutor as responsible for the prosecution and to provide him with certain functional tools for the exercise of his responsibilities for the correct, timely and uniform prosecution within the prosecutors' office.

A list of relevant provisions might be recalled here, such as those related to the endorsement of requests for precautionary measures adopted by the prosecutors, on the endorsements of the most relevant acts of investigation or on the final disposal of the cases, the power to indicate the criteria to which the designated prosecutor must adhere in handling the proceedings, or even to the power of a Chief Prosecutor to revoke the assignment of a case.

Bearing in mind those provisions, then, the differences in the degree of autonomy of the Italian prosecutors – compared to the "statute" of the European Delegated Prosecutors – are probably less pronounced than might be thought at first glance. No power of prior approval over investigative measures or even precautionary measures of EDPs, in fact, is provided for in the Regulation. On the contrary, special provisions are in place (Article 96 of the Regulation) with regard to the legal status of EDPs, to ensure that Member States refrain from any action or policy that might adversely affect their careers and that their rights with regard to remuneration, social security, pensions and insurance coverage are maintained.

Article 5(2) of the EPPO Regulation (as well as Recitals 65 and 70 of the preamble) defines another of the guiding principles of EPPO's activities, namely the principle of proportionality.

Again, this is not a small novelty for the Italian system.

As is well known, this principle was introduced into the national regulatory framework by Article 7 of Legislative Decree 108/2017, concerning European Investigation Orders. In that text, however, the principle of proportionality was exclusively linked to the execution of a European order of investigation issued by a judicial authority of another Member State. The intention was to avoid that – in enforcing an order of investigation to be executed in Italy – the prosecutor would uncritically dispose of investigative measures that were in fact not justified by the seriousness of the crimes for which the foreign prosecutor was proceeding or by the established penalties.

The EPPO Regulation, while confirming the relevance of this principle in the execution of cross-border investigations by the European Public Prosecutor's Office (Article 31(5)(c) Regulation), however, transfers this principle to a higher stage, making it one of the main criteria/guidelines of the entire activity of the EPPO (Article 2(2) and Article 30(5) of the Regulation).

In Italy, the issue of the "proportion" between the investigative efforts de-

ployed by prosecutors and the associated sacrifices to the individual rights and freedoms of those involved in the investigations, as well as the seriousness of the investigated crimes, is certainly not new. Italian prosecutors have been called to a constant and careful scrutiny in this regard: the need for a well-balanced use of judicial police, technological resources and financial resources (see Article 4 of the Legislative Decree 106/2006) has been in the background of their daily investigative choices for years, constituting almost an implication of the way in which each case file is handled.

However, the modification of the principle of investigative proportionality from a mere "implication" to a fundamental rule is certainly relevant, and will probably lead to significant consequences on the level of EPPO's concrete operational choices.

This is, in particular, if the issue of investigative proportionality is put in relation to the principle of mandatory prosecution. Is the European Public Prosecutor's Office, in fact, subject to the principle of mandatory prosecution as the Italian public prosecutor is?

The EU legal framework, on this point, does not provide a clear response. The issue is explicitly addressed only in Recital No. 81 of the Regulation, which reads: 'Taking into account the legality principle, the investigations of the EPPO should as a rule lead to prosecution in the competent national courts in cases where there is sufficient evidence and no legal ground bars prosecution, or where no simplified prosecution procedure has been applied. The grounds for dismissal of a case are exhaustively laid down in this Regulation.'

Thus, it is up to the interpreter to better define the characteristics of EPPO prosecution.

In favour of the option that EPPO's prosecution should qualify as non-mandatory, we may first recall the "possibilistic" wording of the text of Recital No. 81 above ('the investigations of the EPPO should as a rule lead to prosecution […] where there is sufficient evidence and no legal ground bars prosecution'). Moreover, it should be recalled that the text of the Regulation itself does not contain any provision to this effect and even contains provisions allowing the EPPO to decline its competence on an optional basis if the criminal conduct has caused damage to the financial interests of the Union of less than 100 000 euro (Articles 27(8) and 34(3) of the Regulation).

On the other hand, several factors are in favour of the mandatory prosecution of the EPPO. First, it's mission and the relevance of the interests to be protected, which led to its creation.

Then, the various references in the EPPO Regulation to impartiality as a further fundamental principle of the activity of the European Public Prosecutor's Office (see Recital No. 65 and Article 5(4) of the Regulation). The close relationship between impartiality and equality of citizens before the law, from this

point of view, is a strong argument in favour of this solution.

Again, the different procedural treatment that the Regulation establishes for EPPO decisions to initiate an investigation (a decision referred to the European Delegated Prosecutor) or not to initiate it (a decision reserved instead for the Permanent Chamber, as a collegial body, which decides upon proposals of the European Delegated Prosecutor: see Articles 10, 26 and 27 of the Regulation) certainly reminds the interpreter that the discipline in question is based on the so-called *favor actionis*.

The set of textual and system data recalled above, in my opinion, does not allow for a definitive solution to the question above.

If, however, we want to reconcile the various historical, systemic and textual data that make up the picture just summarised, one may perhaps more pragmatically resort to the definition of "tempered mandatory prosecution" included in the so-called European Commission's 2001 "Green Paper" on the criminal protection of the Union's financial interests.

In fact, despite the years and despite the long and complex negotiations that led to the drafting of the final text of the EPPO Regulation, this conceptual knot has not been solved yet.

And perhaps, at this point, it does not even need to be resolved anymore, especially considering that the Italian procedural system assigns to the judge for preliminary investigations a number of remedies against the prosecutor's (thus also EPPO's) decision not to prosecute.

This brief review of the main features of the European Public Prosecutor's Office can certainly help to understand its innovative scope in the legal systems of all the Member States that have joined the enhanced cooperation.

For Italy, in particular, it will be extremely interesting to see if, and how much, the innovations brought by EPPO can exert their "shaping force" on the legal statute of the Italian prosecutor.

It is not difficult, in fact, to think to the start of a process of rapprochement of our legislation (including the secondary one, under the competence of the High Council for the Judiciary) to the principles, standard and rules to which the European Public Prosecutor's Office is now a mature and profound expression.

The penetrating power of EU law in this segment of the legal system is yet to be tested, it is true, but there will certainly be plenty of points of discussion and legal debate.

4.

COOPERATION BETWEEN EPPO AND THE COMMISSION IN THE FRAMEWORK OF THE CONDITIONALITY REGULATION: CAN EPPO CONTRIBUTE TO ENFORCING THE RULE OF LAW?

Federica Iorio

1. *Introduction*

Enshrined in Article 2 of the TUE, [1] as one of the founding pillars of the EU, the principle of the Rule of Law regulates the use of public powers, by ensuring that such public powers are exercised in accordance with the principles of legality, independency of the judicial system, respect for fundamental rights, equality before the law, democratic legislative process, and prohibition of arbitrariness of the executive powers. [2]

[1] Article 2 TUE: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

[2] The definition of the Rule of Law adopted at the EU level has built on the expertise of the Venice Commission. The Venice Commission reached the conclusion that the notion of the "Rule

The value of the Rule of Law has progressively become dominant in Member States' constitutions. Nevertheless, some Member States have appeared to be at serious risk of systemic violation of this principle and thus unfit to be part of the EU integration. [3]

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of Law" cannot be defined. After having identified the core values of the Rule of Law (namely, legality, legal certainty, prevention of abuse/misuse of powers, equality before the law and non-discrimination), the 106th Plenary Session of Venice Commission on 11-12 March 2016 adopted an "operational list" to assess whether a given State is acting in compliance with the core values of the Rule of Law, CDL-AD(2016)007, available at *s://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e*, last access on 10 January 2024.

At the European Union level, a brief of the notion of the Rule of Law was published in November 2019 by the European Parliamentary Research Service, *Protecting the rule of law in the EU Existing mechanisms and possible improvements*, available at *s://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf*, last access on 25 January 2024.

The Court of Justice of the EU has recalled that an independent and efficient judicial system is the cornerstone to ensure the right to a fair trial which, in turn is necessary to ensure that the value of the Rule of Law will be safeguarded (see, for example, Judgment of the Court (Grand Chamber) of 25 July 2018, *LM*, Case C-216/18 PPU, point 48).

[3] In particular, two Member States experienced a serious Rule of Law crisis: Poland and Hungary.

Concerning Poland, the Rule of Law crisis started in autumn 2015, after the election of *Prawo i Sprawiedliwość* (PiS) when the new President of the Poland refused to swear in the original three judges of the Constitutional Tribunal. The situation was aggravated by the fact that the Prime Minister refused to publish the judgments of the Constitutional Tribunal that confirmed the legality of the election of the three judges whose oath was refused. Subsequently, the government adopted a reform to regulate the Constitutional Tribunal in a way that is considered in breach of the principle of independency of the judicial system, a backbone of the Rule of Law.

On 11 December 2023, Mr. Donald Tusk, former President of European Council, was elected as Prime Minister. For many, Tusk's election marks the beginning of a new era and the end of the Rule of Law crisis in Poland.

In this regard, please see M. WYRZYKOWSKI, *Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland*, in *Hague Journal on the Rule Law*, 11, 2019, pp. 417-422.

Concerning Hungary, the decline of the Rule of Law started in 2010, when Viktor Mihály Orbán – leader of the Fidesz Party – won the elections. In the following decade, Hungary passed a series of reform that undermined the pillars of the democratic state:

– in 2010, an authority made up of members of the ruling Fidesz Party, was tasked with controlling the content of broadcast news and given the power to fine media that infringed the public interest, public order or morality, although these concepts are not clearly defined;

– in 2011, the retirement age for judges was lowered from 70 to 62 years old, in an attempt to replace the members of the judicial body;

– in 2012, the independence of the Hungarian Central Bank was called into question by the merger with a Monetary Committee whose members could be dismissed by the Parliament;

– from 2012, the country passed a series of constitutional reforms to address the provisions that were the object of previous concerns such as the independency of the judges and the central bank; and,

– from 2017, the government took aim at universities and NGOs in order to control the foreign funds that they receive.

In this regard, please see V.Z. KAZAI, *Restoring the Rule of Law in Hungary. An Overview of the Possible Scenarios*, in *Osservatorio sulle fonti*, 3, 2021, pp. 983-1007.

To safeguard the respect of the Rule of Law, Article 7 of the TEU provides for a safeguard mechanism that enables the Council to suspend the voting rights of Member States in serious breach. The procedure starts with the submission of a reasoned proposal by one third of the Member States, the European Parliament or the EU Commission.

The EU Commission's power to initiate the procedure is in line with its role of 'guardian of the Treaties',[4] which, *inter alia*, requires the EU Commission to also oversee the respect of the Rule of Law by the Member States.

Conversely, EPPO's mission is much more limited. EPPO must investigate, prosecute and bring to judgment criminal offences affecting the EU budget. EPPO's mandate, in other words, is restricted to the protection of the EU's financial interests, which seems to have little or nothing to do with the protection of the Rule of Law principles.

In this light, one could consider that the cooperation between the Commission and the European Public Prosecutor's Office, which is also provided for in the EPPO Regulation itself,[5] should only concern financial matters, such as the implementation of the EU budget.

However, the assumption that financial matters should be kept separate from the Rule of Law control has been somewhat defeated by the introduction of Regulation No. 2020/2092 on a general regime of conditionality for the protection of the Union budget (hereinafter the "Conditionality Regulation").[6]

2. *The Conditionality Regulation and the link between the Rule of Law and the EU's financial interests*

As mentioned, Article 7 of the TEU provides for a specific procedure to combat against serious violations of the EU's founding principles, such as the Rule of Law. This mechanism, however, has proven to be ineffective because of the very high voting thresholds.[7] Alliances and political expediency have often been predominant over the willingness to enforce the Rule of Law.

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[4] Under Article 17 TUE, the Commission shall 'oversee the application of Union law under the control of the Court of Justice of the European Union'.

[5] Article 103(1) EPPO Regulation: 'The EPPO shall establish and maintain a cooperative relationship with the Commission for the purpose of protecting the financial interests of the Union. To that end, they shall conclude an agreement setting out the modalities for their cooperation.'

[6] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I, 22 Decembre 2020, pp. 1-10 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).

[7] To trigger the procedure under Article 7 of the TUE, the Commission, the EU Parliament or 1/3 of the Member States must present a reasoned proposal to the Council. The accused Member

Faced with the worsening of the democratic crisis in Hungary and Poland, in 2018, the Commission decided to take action in response to the 'clear request from institutions such as the European Parliament as well as from the public at large for the EU […] to protect the rule of law'. [8]

However, given the limited competences that the EU has in the field of Rule of Law oversight, in order to have the Regulation passed, the Commission had to link the protection of the EU Rule of Law with another objective of EU law, to leverage and use its competence.

Hence, the Commission issued a proposal for a regulation [9] to introduce a general regime of conditionality for the protection of the EU budget in case of breach of the Rule of Law principles and used Article 322(1)(a) of the TFEU as its legal basis. [10]

Although it was clear that the aim was to provide the EU bodies and institutions with an additional tool to protect the Rule of Law, the Commission explained in the Memorandum to the proposal that: 'The potential of the EU budget can only be fully unleashed if the economic, regulatory and administrative environment in the Member States is supportive […] Effective respect for the rule of law is a prerequisite for confidence that EU spending in Member States is sufficiently protected'. [11]

State is then called to answer to the Council, which may – upon approval of the EU Parliament, issue recommendations and vote by 4/5 to identify a breach of the values referred to in Article 2 of the TUE.

In case the Member State persists in the breach, the Commission or 1/3 of the Member States approved by a 2/3 majority in Parliament, calls the country to answer to the European Council again. The European Council must then decide unanimously to propose to the Council the suspension of the certain rights of the State concerned. The Council then votes by qualified majority to suspend rights of the accused Member States country, including voting rights within the Council, as long as the breach continues.

[8] Communication from the Commission to the European Parliament, *A new EU Framework to strengthen the Rule of Law*, 11 March 2024, COM/2014/0158 final.

[9] Commission Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the Rule of Law in the Member States, 2 May 2018, COM(2018) 324 final.

[10] Article 322 TFUE:

"1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts; […]".

For a critical analysis of this legal basis, see M. FISCARO, *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, in *European Papers*, 4(3), 2019, pp. 695-722; J. ŁACNY, *The Rule of Law Conditionality Under Regulation No 2092/2020 – Is it all About the Money?*, in *Hague Journal on the Rule of Law*, 13, 2021, pp. 79-105.

[11] Explanatory Memorandum to the proposal for the Regulation. See Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in

The so-called Conditionality Regulation was finally adopted on 16 December 2020 and entered into force on 1 January 2021.

On 16 February 2022, the Court of Justice of the European Union confirmed that Article 322(1)(a) of the TFUE is an appropriate legal basis for the Conditionality Regulation. [12]

The implementation of the Conditionality Regulation lies in the hands of the Commission. [13] The Commission can:

1. investigate whether there are grounds to consider that there has been a breach of the Rule of Law; and,
2. propose to the Council the adoption of protective measures in case of serious breach of the Rule of Law, such as the suspension of EU funds.

The Council is entrusted with the power to adopt the final decision on the suspension of funds.

According to the Conditionality Regulation, EPPO does not have a role in the decision-making process for the adoption of safeguard measures. Yet the creation of a mechanism that inextricably links the disbursement of European funds to respect for the principles underlying the Rule of Law gives EPPO the opportunity to cooperate with the Commission in the field of human rights monitoring.

In the framework of the Conditionality Regulation, can EPPO play a role for the enforcement of the Rule of Law principles?

3. *EPPO's privileged position for the assessment of the efficiency and fairness of national prosecution, judicial and law enforcement systems*

Efficient administration of justice at all stages is a prerequisite to ensure that the Rule of Law is respected. [14]

Case of Generalised Deficiencies as Regards the Rule of Law in the Member States, 2 May 2018, COM (2018) 324 final.

[12] Judgment of the Court of Justice of the European Union, C-156/21, *Hungary v./ European Parliament and Council*, dated 16 February 2022; Judgment of the Court of Justice of the European Union, C-157/21, *Poland v./ European Parliament and Council*, dated 16 February 2022.

The choice of the legal basis was challenged by Hungary and Poland before the Court of Justice of the European Union. Hungary and Poland argued that Article 322(1)(a) TFEU is not a sufficient legal basis for the Conditionality Regulation and that a condition to cut financial means must be closely linked either to one of the objectives of a programme or of a specific EU action, or to the sound financial management of the EU budget. In addition, the two Member States pleaded other grounds such as the circumvention of the procedure laid down in Article 7 TEU, the European Union having exceeded its powers and breached the principle of legal certainty.

[13] This is logical, since the Commission is in charge of executing the budget and managing the programmes, pursuant to Article 7(1) TUE.

[14] The Council of Europe has issued several studies on the necessary link between the admin-

Concerning the administration of justice in criminal matters, Member States have, for the most part, retained their competence and autonomously established their own prosecutorial, judicial and law enforcement rules, in accordance with the principle of subsidiarity. [15]

Although the introduction of EPPO marked a significant step forward in EU integration in the criminal law field, not even the EPPO Regulation affected national criminal procedure rules, nor the way criminal investigations are conducted or subject to trial.

Yet, EPPO's multi-level organisation offers an important tool for the comprehension of the functioning of Member States' systems.

EPPO's structure essentially revolves around two levels. The central level consists of:

1. the European Chief Prosecutor's Office (currently the Romanian, Laura Codruta Kövesi), who is the head of EPPO as a whole; [16]
2. the College of European Prosecutors who supervise EPPO's activities in general and are responsible for strategic decisions; [17]
3. the Permanent Chambers, in which the Prosecutors sit, with the task of monitoring and directing the investigations conducted by the Deputy European Public Prosecutors. [18]

The decentralised level is composed of the European Delegated Prosecutors (hereinafter "EDPs") at the national level, which are appointed by the College for five years (at least two EDPs per Member State) and are in charge of conducting investigations and prosecutions at the national level, by relying on the national law enforcers.

The central level monitor, direct and supervise investigations and prosecutions conducted by EDPs through the European Public Prosecutor in charge of the supervision and according to the directions and instructions of the competent Permanent Chamber in charge. [19]

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istration of justice and adherence to the principles of the Rule of Law. On the specific role of prosecutors, see Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, available at *s://rm.coe.int/168074738b*, last access on 1 February 2024.

[15] Article 5(2) TUE: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

[16] Article 8 EPPO Regulation.

[17] Article 9 EPPO Regulation.

[18] Article 10 EPPO Regulation.

[19] For a discussion concerning the decentralised structure of EPPO and the cooperation be-

It is thus evident the EPPO is in a privileged position to acquire detailed information on the administration of justice and this makes it an indispensable ally for the Commission in its assessment of national systems and Rule of Law.

In this system, the focal point of contact between the national and supranational level is the EDPs, who wear a "double hat":[20]

1. on the one hand, the EDPs will have to act exclusively on behalf of and in the name of EPPO in the territory of their respective Member State (bound to strict accountability of their work to the European institution); and,[21]
2. on the other hand, the EDPs might also continue to perform the functions of national prosecutors, provided that this does not prevent them from fulfilling their obligations under the EPPO Regulation.

It must not be forgotten that EDPs remain in office for five years,[22] and then return to exercise their national functions: in corrupted or systematically weak national systems this circumstance could end up affecting the quality of EDPs' collaboration with the central level, to the point of permanently compromising their ability to monitor the functioning of the national judicial system.

Hence, efficiency of EDPs themselves could be a first signal as to the efficiency and impartiality of the Member State's justice system.

4. *EPPO's potential contribution to the enforcement of the Rule of Law: the limit of enhanced cooperation*

Given the very limited competence of the EU in substantive and procedural criminal law,[23] the establishment of EPPO was provided for in the form of en-

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tween EPPO and national authorities, see V. MITSILEGAS, *European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law*, in *Maastricht Journal of European and Comparative Law*, 18, 2021, pp. 245-264.

[20] Article 12 EPPO Regulation. The expression "double hat" is widely used in the literature. By way of example, R. BELFIORE, *L'adeguamento della Normativa Nazionale al Regolamento sulla Procura Europea: il Punto della Situazione*, in *Sistema penale*, 7, 2020, pp. 165-181 and K. LIGETI, A. WEYEMBERGH, *The European Public Prosecutor's Office: Certain Constitutional Issues*, in L.H. ERKELENS, *The European Public Prosecutor's Office – An extended Arm or a Two-Headed Dragon*?, pp. 55-77, L.H. ERKELENS, A.W.H. MEIJ, M. PAWLIK (eds.), TMC Asser Press, The Hague, 2014.

[21] Article 6 EPPO Regulation codifies the principle of independence of the European Delegated Prosecutors.

[22] Article 17(1) EPPO Regulation.

[23] The provisions concerning the judicial cooperation in criminal law matters essential allow the mutual recognition of national acts (Article 82 TFEU), while in terms of substantial law, the EU may only 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis' (Article 83 TFEU).

hanced cooperation,[24] which enables a minimum of nine Member States to advance EU integration or cooperation in a particular field within the EU.

Out of all EU Member States, so far, 22 Member States have decided to adhere to the EPPO. At the time of writing, the non-participating Member States are Denmark, Ireland, Hungary, Poland and Sweden.[25]

As a consequence, the way EPPO can cooperate with the Commission for the enforcement of the Conditionality Mechanism will vary from participating to non-participating Member States.[26]

4.1. *EPPO's cooperation with the Commission in the enforcement of the Conditionality Regulation in participating Member States*

When it comes to the implementation of the Conditionality Mechanism in participating Member States, EPPO is called upon to take a leading role.

The Conditionality Regulation expressly refers to the Member States' duty to cooperate with EPPO in its investigations or prosecutions and it indicates that failure to smoothly collaborate with EPPO can be used by the Commission as evidence that the Member State concerned does not guarantee the minimum standards of the Rule of Law: 'For the purposes of this Regulation, breaches of the principles of the rule of law shall concern one or more of the following: […] effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation'.[27]

Thus, the Conditionality Regulation itself requires EPPO to play an active

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[24] Article 86 TFUE.

[25] The reasons why these five Member States refused to join the EPPO are different:

Denmark and Ireland have opted out of the Area of freedom, security and justice altogether;

Hungary and Poland put forward the desire to not give up the sovereignty in the domain of criminal law. On 5 January 2024, Poland filed the request to join the EPPO. The Commission is currently assessing the request. The news was announced by EPPO. See *s://www.eppo.europa.eu/en/news/polish-delegation-visits-eppo-luxembourg*, last access on 8 February 2024; and,

Sweden initially deemed the EPPO system to be contrary to the principle of subsidiarity. However, on 26 January 2024, the Swedish Ministry of Justice announced that the country is undertaking the necessary steps at national level to participate in the EPPO. See *s://www.government.se/press-releases/2024/01/more-effective-law-enforcement-through-swedens-participation-in-eppo/*, last access on 8 February 2024.

[26] For a discussion concerning the effect of the enhanced cooperation on EPPO's ability to effectively conduct its activities, see C. DI FRANCESCO MAESA, *Repercussions of the Establishment of the EPPO via Enhanced Cooperation EPPO's Added Value and the Possibility to Extend Its Competence – EPPO's Added Value and the Possibility to Extend Its Competence*, in *EUCRIM – The European Criminal Law Association's Forum*, 3, 2017, pp. 156-160.

[27] Article (4)(2)(g) Conditionality Regulation.

role in the implementation of the Regulation by reporting to the Commission any uncooperative behaviour from the Member States' authorities in the framework of its investigations.

The modalities of said reporting have been defined in a working arrangement for the cooperation between EPPO and the Commission (hereinafter "Working Agreement").[28] EPPO shall send any relevant information 'regarding individual or systemic issues pursuant to the 'general conditionality' Regulation to the Director-General for Budget in the Commission, with copy to the Director-General for Justice and Consumer and to the Director-General of OLAF'.[29]

Should a Member State refuse to cooperate with EPPO, the Commission must be informed 'without delay'. The communications shall not be generic, having to contain all possible details allowing the Commission to adopt the necessary measures for the protection of the EU budget, including the triggering of investigation for the purposes of the Conditionality Regulation.

Furthermore, regardless of the specific case of uncooperative behaviour, EPPO may still give a contribution for the control of the respect of the Rule of Law. As mentioned above, EPPO will be constantly in contact with national law enforcers and judicial authorities and continuously oversee whether the Member States is compliant with the principles of the Rule of Law. Should that not be the case, EPPO might raise a red flag with the Commission during their regular meetings held to discuss policy issues and matters of common interest such as the implementation of the Conditionality Regulation.[30]

Finally, even outside of the forum of direct discussion with the Commission, it is possible for EPPO to play a role in implementing the Conditionality Regulation. Indeed, EPPO is required to transmit to the Commission (as well as to

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[28] On 28 July 2021, EPPO and Commission signed an agreement establishing the modalities of cooperation between the European Commission and the European Public Prosecutor's Office, available at *s://www.eppo.europa.eu/sites/default/files/2021-07/2021.073_Agreement_EPPO_European_Commission_final.pdf*, last access on 8 February 2024.

[29] Article 14 Working Agreement.

[30] Article 13 Working Agreement: 'Consultations and close cooperation

1. High-level meetings between the Parties will take place regularly to discuss issues falling under this Agreement.

2. The Parties will consult each other regularly on policy issues and matters of common interest for the purpose of realising their objectives and coordinating their respective activities. This may also include consultations on the effectiveness and consistency of measures adopted by the Commission to protect the Union budget following EPPO investigations. The Parties may also exchange information for the purpose of operational and strategic analysis and statistical purposes.

3. With a view to fostering effective cooperation, the Parties will, in consultation with each other, engage to disseminate to their respective staff information about the scope of action, applicable legal framework and working methods of the other Party. Each Party will, in this respect, facilitate the provision by their staff of training to the staff of the other Party. The Parties will also facilitate, when appropriate, the organisation of joint training to their staff on matters of common interest.'

the EU Parliament) its annual report on its 'general activities'.[31] This report contains information about the number of fraud and judicial activities in the Member States participating in the enhanced cooperation that might already reveal some interesting hints about the state of the respect of the Rule of Law principles in the concerned jurisdiction. It would not therefore be surprising to learn that the Commission started to delve into the practice of some Member States with regard to the respect of the Rule of Law, on the basis of the data disseminated by EPPO in its annual report.

After all, the Conditionality Regulation indicates that the Commission's assessment shall be 'objective, impartial and fair and should take into account relevant information from available sources and recognized institutions, including […] Reports of the EPPO'.[32]

Consequently, EPPO's assessment might be determinant at the very early stage of the process (when deciding whether to investigate possible breaches of the Rule of Law principles) as well as at the end of the process (when deciding whether to adopt measures to protect the EU budget).

In light of the above, it is crystal clear that EPPO is equipped to take on an active role in the framework of the Conditionality Regulation and participate in the enforcement of the Rule of Law principles in Member States where it has jurisdiction.

As of today, although there is evidence that the Commission and EPPO have been actively cooperating, there is no data indicating to what extent the Commission has been taking into consideration EPPO's contributions for the triggering of the Conditionality Regulation. After all, the Commission considered the activation of the Conditionality Regulation only against Poland and Hungary, two of the non-cooperating Member States. Hence, the true question is whether EPPO's role can play a part in the assessment of the Rule of Law in Member States that are not participating in the enhanced cooperation.

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[31] Article 7 EPPO Regulation: '1. Every year the EPPO shall draw up and publicly issue an Annual Report on its general activities in the official languages of the institutions of the Union. It shall transmit the report to the European Parliament and to national parliaments, as well as to the Council and to the Commission.

2. The European Chief Prosecutor shall appear once a year before the European Parliament and before the Council, and before national parliaments of the Member States at their request, to give account of the general activities of the EPPO, without prejudice to the EPPO's obligation of discretion and confidentiality as regards individual cases and personal data. The European Chief Prosecutor may be replaced by one of the Deputy European Chief Prosecutors for hearings organised by national parliaments.'

[32] Recital No. 16 Conditionality Regulation.

4.2. *EPPO's cooperation with the Commission in the enforcement of the Conditionality Regulation in non-participating Member States*

As mentioned above, EPPO is based on enhanced cooperation, a mechanism that enables some Member States to set up advanced integration in a particular field within the EU.

The first obvious consequence of this fragmentation is EPPO ability to oversee the functioning of the non-participating Member States is clearly limited. In this respect, the Conditionality Regulation is very clear: the cooperation between the Commission and EPPO for the purpose of adopting safeguard measures must be exercised within the limits of EPPO's competence.

Although the number of non-participating Member States is likely to drop,[33] such circumstance seems particularly worrying if we consider that the only Member State against whom the Council has applied the sanctions provided in the Conditionality Regulation is Hungary, a Member State yet to express any interest in participating in EPPO.[34]

Nevertheless, several mechanisms ensure that EPPO can still give its input to the Commission for the application of the Conditionality Regulation.

First, EPPO can execute working arrangements not only with the other EU bodies and institutions but also with the authorities of non-participating Member States. The aim of such working arrangements is precisely the 'facilitation of cooperation and exchange of information between the parties there-to'.[35] Ironically, the first non-participating Member State having concluded such working

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[33] As mentioned above, Sweden is currently undertaking the necessary steps at internal level to join EPPO, while Poland has already filed a request to join early in 2024. See footnote 49 above.

[34] The Commission initiated proceedings against Hungary on 24 November 2021, by raising its concerns about issues related to the public procurement system such as (i) systemic irregularities, (ii) low intensity in procurement and (iii) lack of prevention and correction of conflict of interests.

After having assessed that the corrective measures undertaken by Hungary were not sufficient to address the structural deficiencies, on 15 December 2022, the Council suspended the 55% of the budgetary commitments under three operational programmes in the Cohesion Policy (namely, Environmental and Energy Efficiency Operational Programme Plus, Integrated Transport Operational Programme Plus and Territorial and Settlement Development Operational Programme Plus). See Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the Rule of Law in Hungary ST/14247/2022/INIT, OJ L 325, 20 December 2022, pp. 94-109 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).

On 24 November 2021, the Commission sent an administrative letter requesting information pursuant to Article 6(1) of the EPPO Regulation also to Poland. Poland replied in January 2022. The Commission decided not to initiate a procedure under the Conditionality Regulation since 'the Commission did not find that it had reasonable grounds to consider that all the conditions for the application of the Conditionality Regulation were fulfilled'. Communication from the Commission to the European Parliament and the Council on the application of Conditionality Regulation, COM(2024) 17 final, 12 January 2024, point 2.2., p. 5.

[35] Article 99 EPPO Regulation.

arrangement is Hungary,[36] i.e., the Member States that not only challenged the regulation before the EU Court of Justice, but that also suffered the suspension of EU funds.[37] The working agreement was executed in April 2021, a few months before the Commission sent a request for information under the Conditionality Regulation[38] and provides, *inter alia*, (i) the obligation for national authorities to co-operate directly at an operational level, (ii) the commitment for the parties to organise regular "high-level meetings" and (iii) a mechanism for the exchange of strategic information. It is thus evident that, if applied, such working arrangement enables EPPO to acquire relevant information regarding the functioning of the criminal system in Hungary. Still, the Council's decision adopting the measures against Hungary makes no mention of EPPO, and it is thus unlikely that EPPO has a role in the triggering of the procedure.[39]

Second, irrespective of the adhesion to the EPPO system or the execution of working arrangement with EPPO, all Member States are required to:

1. cooperate with the EU institutions and bodies (as reminded by the EPPO Regulation);[40] and,

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[36] Working Arrangement on Cooperation between the EPPO and the Office of the Prosecutor General of Hungary, executed on 26 March 2021-6 April 2021. The text of the agreement is available at *s://www.eppo.europa.eu/sites/default/files/2021-04/Working_arrangement_Hungary.pdf*, last access on 31 January 2024.

[37] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the Rule of Law in Hungary, ST/14247/2022/INIT, OJ L 325, 20 December 2022, pp. 94-109 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).

[38] The Commission sent to Hungary a request for information pursuant to Article 6 of the Conditionality Regulation on 24 November 2021, see footnote 58, above.

[39] While the decision adopted by the Council in application of the Conditionality Mechanism mentions the investigations conducted by OLAF and the audits conducted by the Commission audits, there is no mention of EPPO.

[40] Recital No. 110 EPPO Regulation:

'Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO are not bound by this Regulation. The Commission should, if appropriate, submit proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO. This should in particular concern the rules relating to judicial cooperation in criminal matters and surrender, fully respecting the Union acquis in this field as well as the duty of sincere cooperation in accordance with Article 4(3) TEU.'

The principle of sincere cooperation is codified in Article 4(3) TUE:

'3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

2. take all necessary measures to ensure adequate and effective protection of the Union budget, pursuant to Article 325 of the TFEU.[41]

It can be inferred from the above that EPPO, for the purposes of its investigations in the interests of the EU budget, may request the cooperation of national authorities even from States that are not participating in the EPPO.[42] Should a non-cooperating Member State refuse to participate, such reluctance may not be evidence of the violation of the Rule of Law (as it would be in case of participating Member States).[43] Still, a refusal to share information or to assist EPPO in cross-border investigations is still considered to be a strong indicator of a weak juridical system. On the other hand, should the non-participating Member State agree to cooperate with EPPO, the latter will be able to assess the fairness and effectiveness of said Member States' prosecutorial and judicial system.

Finally, Article 105(3) of the EPPO Regulation requires all non-participating Member States to 'notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters'. From a pragmatic viewpoint, this implies that EPPO will be notified of all national acts adopted under the "EIO Directive" or the "EAW" and thus acquire key information on whether and how the Member State is actively

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[41] Article 325 TFUE:

'1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.'

[42] For a discussion on the relation between EPPO and non-Participating Member States see N. FRANSSEN, *The future judicial cooperation between the EPPO and non-participating Member States*, in *New Journal of European Criminal Law*, 9(3), 2018, pp. 291-299; F. GIUFFRIDA, *The relations between the European Public Prosecutor's Office and the Member States that do not participate in the enhanced cooperation*, in *New Journal of European Criminal Law*, 14(1), 2023, pp. 80-99.

[43] See above, § 4.1.

fighting against corruption and, more generally, economic crimes. Hence, while the main purpose of this provision is not to enable the activation of the Conditionality Regulation, it provides for an additional instrument for EPPO to oversee the overall respect of the Rule of Law and thus reduce the gap in control between participating and non-participating Member States.

5. *Conclusions*

Since its establishment, EPPO has been closely cooperating with the Commission with the aim of maximising their action for the protection of the EU budget and resources.

The entry into force of the Conditionality Regulation, however, gives EPPO the opportunity to cooperate with the Commission also in the monitoring of the Rule of Law.

Indeed, EPPO, thanks to its decentralised structure and close cooperation with national authorities, enjoys a privileged position to assess the functioning of systems for the administration of justice in Member States that are participating in the enhanced cooperation.

As for the non-participating Member States, the limitation of competence will not prevent EPPO from accessing key information on the administration of justice, thanks to the working arrangements executed with the national authorities. Furthermore, irrespective of the execution of such working arrangement, non-participating Member States will still be under the obligation to take all necessary steps to protect the EU budget and to loyally cooperate with EU bodies (such as EPPO) if required to do so.

It is thus evident that EPPO has an arsenal of various tools to assess the administration of justice – a cornerstone of the Rule of Law – in all Member States. Whether and how EPPO will actually succeed in carving out a role for itself in implementing Rule of Law monitoring will depend on many factors. First, the loyalty and ability of EDPs to report, centrally, any local dysfunction. Second, EPPO's ability to timely and efficiently inform the Commission of any failure, through the mechanism for exchange of information defined in their Working Arrangement.

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5.

EPPO AND THE RULE OF LAW

Lorenzo Salazar

1. We have to deal with a quite complex subject: the protection of the Rule of Law and its relationship with the European Public Prosecutor's Office (EPPO). We will try to understand if and how this new body of the European Union may contribute to this protection among the different judicial systems of the Union itself. In my opinion the answer to this question is affirmative.

EPPO plays a fundamental role in the protection of the Rule of Law. It prosecutes crimes against the European Union and the financial interests of the European taxpayers and such interests may be well considered as also playing their role in the framework of the protection of the Rule of Law.

2. The European Public Prosecutor's Office is a supranational public prosecutor, a real *première* worldwide, that operates considering the various and different criminal systems of the 22 (and soon 24) participant Member States.

Article 5 of the EPPO Regulation establishes its essential starting point in terms of respect of the Rule of Law. The Article provides that the activities of the EPPO respect the rights enshrined in the Charter of the Fundamental Rights of the European Union and shall be bound by the principles of Rule of Law and proportionality. In June 1999, the European Council adopted the Charter of the Fundamental Rights of the European Union and included in it the general principles stated in the 1950 European Convention on Human Rights and those deriving from common constitutional traditions of the European countries. The European Council agreed upon the rule that not only the institutions of the EU had to respect those principles, but also every single EU body such as EPPO.

3. Alongside the general principles stated in Article 5, the procedural guarantees for the safeguard of the rights of the individual involved in the investigations of the European Public Prosecutor's Office are regulated in Article 41 of the Regulation which states that: 'The activities of the EPPO shall be carried

out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence'.

The procedural rights of the person under investigation and of the defendant are listed in the same provision by means of explicit reference to the EU directives – implemented at national level – and to all procedural rights available to these persons under the applicable national law. In any case, the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request EPPO to obtain such measures on behalf of the defence is guaranteed and safeguarded.

4. As we can see, this is a multi-level system of protection founded primarily on the Charter of Fundamental Rights, which may be invoked in every country of the Union by each individual, secondly on the EU directives, with a potential for different implementations from one Member State to another, and at a third level based on applicable national law. In this regard, the rights and guarantees that an individual can enjoy for her/his defence in a Member State do not necessarily coincide with those available in another State.

Just to make an example, in Italy the solicitor of a person under investigation or of a defendant has the right to conduct defensive investigations. This right obviously persists also in the case of investigations that fall within the competence of EPPO and are conducted by an Italian European Delegated Prosecutor, but the same possibility would not be open in case of investigations conducted in other Member States even in the case of the same defendant whose lawsuit could be transferred to another State's EDP pursuant to Articles 26(5) and 36(3) of its Regulation.

Before the authorities of the newly appointed Member State, the evidence already collected by the defence might face difficulties in being used during the trial. However, such evidence will be able to count on the "umbrella of protection" provided by Article 37(1) of the Regulation, which states that evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.

5. However, we should not forget that there is also a fourth level of protection guaranteed by the case law of the Court of Justice of Luxembourg that can play a decisive role in this matter, as it always did in every aspect of the European Union law. The Court of Justice may intervene after a *recour direct* or by means of preliminary ruling. This is guaranteed by Article 42(2) *et seq.* of the EPPO Regulation and also by way of derogation from the general principle stated in paragraph 1 by virtue of which 'Procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law'.

The role of the Court in the matter of a preliminary ruling will turn out to be crucial in achieving the goals of prevention and conflict resolution in case of disagreements between EPPO and national prosecutor's offices.

Taking Italy and its consolidated experience in fighting organised crime as an example, there is a huge potential for possible conflicts of jurisdiction among national authorities and EPPO in the course of investigations on criminal organisations "focused" on the commission of offences affecting the financial interests of the Union. For the resolution of these possible conflicts, the interpretation that could be offered by the Court of Luxembourg about the expression 'focus of the criminal activity' will be crucial.

The Court has already provided a first important preliminary ruling in a EPPO case, dealing with judicial control on the cross-border investigation measures carried out by national judges (Judgment of the Court Case C-281/22 G.K. *et al.*) and the first cases of conflicts on the allocation of competence between the EPPO and national authorities have already been solved by the competent national authorities. The Court can also intervene, via preliminary ruling, over jurisdictional conflicts between EPPO and the national authorities in compliance with what is provided for by Article 42(2.c) of the Charter.

6. Going back to the thread of discourse on safeguarding of the Rule of Law, another fundamental aspect on which we need to dwell is the potential disparity of position among prosecution and defence if and when the lawsuit is moved from one State to another.

In order to better protect the individual who needs to be defended before prosecutors or judges of a different State, suitable mechanisms to be agreed at EU level have been devised. One of the ideas that has been advanced is the creation of a "Euro-defender" office. Other possible instruments may be the introduction of a Legal Aid service composed of defence lawyers from different countries available 24/7 or the establishment of a European network capable of rapid intervention to provide legal assistance in front of the investigations of the European Delegated Prosecutors (EDPs).

This is, in any case, one of the most important challenges faced by European defence lawyers, who could, and indeed should, take advantage of this crucial innovation in the European judicial area with a view to testing the deployment of new forms of organisations at supranational level.

7. In conclusion, the creation of the European Public Prosecutor's Office leads us to face up with the existence of a prosecutor's office that is supranational by essence and fully independent by nature. It does not report to national prosecutors and surely is in an excellent position for best guaranteeing, together with its independence, the principles of the Rule of Law.

Indeed the European Public Prosecutor's Office is the result of a compro-

mise between integration and cooperation. Nevertheless, the indispensable compromise does not affect its independence in any way. In this respect too, EPPO contributes to the safeguarding and the promotion of the Rule of Law since every Member State, as well as its judicial staff, has to take into account the existence of this new European body.

"Leading by example" is an expression often used in the G20 Framework. EPPO, through its independence from external influence, will represent an example for national judges and prosecutors, also raising their awareness about possible alternative models, different from those that have been used so far. This will encourage a new idea of independence for judges and public prosecutors that should also possibly stimulate them to raise preliminary rulings before the Court of Justice of the EU.

EPPO is a young body capable of shaking up national legal systems in the direction of an ever closer integration: a step forward towards an "Ever closer Union" as it was stated in the motto of the unfortunate 2004 European Constitution.

SECTION 2

EPPO'S INVESTIGATIONS: BETWEEN PROBLEMS AND RESPECT FOR THE RULE OF LAW

6.

FOR A NORMATIVE REBALANCE OF THE EPPO REGULATION TO SAFEGUARD THE ADVERSARIAL PROCESS

Ludovica Tavassi

1. *Introduction*

In a recent update on the official website of the European Public Prosecutor's Office (EPPO) dated 17 February 2023, the semantic choices employed underscored the concept of justice embedded in EPPO's founding Regulation [1]. The release reports the seizure of assets and arrest of six individuals, suspected to be part of a criminal organisation, in a crackdown on a significant value-added tax (VAT) fraud scheme spanning multiple countries, resulting in estimated losses of €40 million.

The alleged VAT carousel fraud, described as a sophisticated criminal scheme exploiting EU rules on cross-border transactions exempt from VAT, involved a convoluted network. Companies established in Bulgaria, the Netherlands, Poland and Slovakia purportedly sold electronics and computer equipment to shell companies in Italy, managed by figureheads, to evade VAT payments. The goods were under-priced when sold to Italian companies, complicating the identification of the scheme and the perpetrators, while maximising illicit profits. In the text, reference is made to people – presumed innocent – believed to be part of a criminal organisation that caused damage estimated at around 40 million euros

[1] See *www.eppo.europa.eu/en/news/eppo-uncovers-eu40-million-vat-fraud-six-arrests-and-seizures-sting-against-organised-crime*.

in a suspected VAT carousel fraud, stigmatised as a complex criminal scheme, based on investigative evidence.

From these semantic choices emerges a political idea of justice based on the fight against certain criminal manifestations even before verifying them.

In the formulation of online press releases, a crucial aspect often overlooked is the fact that recipients of criminal action, prior to a definitive sentence of conviction, are private European citizens entitled to fundamental freedoms and inviolable individual rights. This includes the principle that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law (as articulated in Articles 48, paragraph 1 of the Charter of Fundamental Rights of the European Union and Article 6, paragraph 2 of the European Convention on Human Rights) – a principle commonly known as the presumption of innocence.

Our Italian justice system, as outlined in Article 27, paragraph 2 of the Constitution, underscores that 'the defendant is not considered guilty until definitively sentenced'. This principle establishes both a treatment rule and a judgment rule. The treatment rule asserts that, before the charge is legally verified, the defendant, presumed innocent, cannot be deemed guilty and consequently punished. The judgment rule, extending beyond the trial, imposes a prohibition on portraying the defendant as a criminal causing significant damage to the EU budget based solely on investigative documents unilaterally collected by the European Delegated Prosecutors (EDPs).

In the light of these principles, the pursuit of justice should be primarily grounded in the protection of individual guarantees rather than solely prioritising public interests, especially considering the inherent imbalance of power against a presumed innocent individual. To ensure a fair, or at least equitable process, adherence to the canon of equality of weapons is paramount.

Hence, the true measure of the civilisation of an institution, such as the European Union, lies in the stability of its regulatory framework. This framework should not only safeguard the financial interests of the European Union but, more importantly, uphold the fundamental rights of European citizens. A critical question arises in this context – whether the entry of European prosecutors into the field has indeed axiologically ensured adequate protection for defendants accused of committing transnational crimes, now categorised within a third investigative track.

2. *An unstable regulatory building*

The EPPO Regulation is built on a regulatory edifice with weak foundations and an unstable roof. About the foundation of the regulatory building, it falls short in defining, across the broader European territory, the essential core of

fundamental rights. This includes rules for jurisdiction, the prosecution of crimes, ensuring equality between parties, safeguarding the right of defence, and establishing a uniform law of evidence applicable throughout the European territory[2].

The absence of clear guidelines in these critical areas creates instability within the regulatory structure. The Regulation lacks a solid and comprehensive framework for protecting the fundamental rights of European citizens. Instead, it appears to prioritize financial interests, particularly those of the European Union.

In evaluating the effectiveness and civilisation of EPPO, it is crucial to assess whether the entry of European prosecutors into the field has genuinely ensured the adequate protection of defendants accused of committing transnational crimes, especially within this evolving investigative landscape.

3. *Indiscriminate access to evidence*

In the context of a transversal law of evidence, the news report indicates that 'according to the evidence, the goods were sold, under-priced, to companies in Italy, making it more difficult to identify the scheme and its perpetrators, while also increasing the illicit profits'.

The term "evidence" carries diverse meanings. In each of them, for all the different countries involved, there is a very different legal concept that reveals a diverse discipline of the methods of acquiring information for the judicial assessments. Our legal system is based on the phase separation principle, which distinguishes the preparatory stages – preliminary investigation and preliminary hearing – from the judgment on guilt in the trial hearing.

In the preliminary investigation, which is secretive and not participatory for the defence, the public prosecutor does not collect evidence to prove guilt; rather, he collects information to predict that the judgment will be necessary. That evidence is not guilty proof. To became proof, this knowledge must be subjected to the defendant's refutation, in the only phase – the trial – where the probative method changes because the verification of guilt requires a high quality of proof that can only be achieved through contradictory exchanges between the parties, by the cross-examination technique. So, at the outcome of the preliminary hearing, with certain exceptions provided by law, all the investigative doc-

[2] On it, see S. ALLEGREZZA, A. MOSNA, *Cross-border criminal evidence and the future European Public Prosecutor. One step back on Mutual Recognition?: The challenges ahead*, Springer, 2018, p. 159; G. BARROCU, *La Procura europea. Dalla legislazione sovranazionale al coordinamento interno,* Milano, 2021, p. 150; G. FIORELLI, *Il pubblico ministero europeo, tra poteri investigativi nazionali e regole probatorie 'in bianco'*, in *Proc. pen. giust.*, 2020, 1, p. 196; R.E. KOSTORIS, *Pubblico ministero europeo e indagini "nazionalizzate"*, in *Cass. pen.*, 2013, p. 4742.

uments (evidence) not formed in the discussion with the defence cannot be used by the judge for the evaluation of guilt, least of all to state on the official website that a private citizen belongs to a criminal organisation.

Article 526 of the Italian Code of Criminal Procedure imposes a rule of exclusion for all those investigative documents that have not been legally prepared. They will be unusable evidence pursuant to Article 191 of the Italian Code of Criminal Procedure because they were not obtained in compliance with the principle of the adversarial process[3].

According to Article 111, paragraph 4 of the Italian Constitution: the formation of evidence in criminal law trials shall be based on an adversarial process. The guilt of the defendant may not be established on the ground of statements by persons who have willingly refused cross-examination by the defendant or the defendant's counsel.

This distinction between evidence collected unilaterally by the European prosecutor and proof subject to cross-examination is not considered in the EPPO Regulation. Instead, Article 37 provides that '[e]vidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State'. Rather, it establishes a "non-discrimination clause" for foreign evidence[4], which re-proposes the traditional model of international rogatory letters, now replaced by the European Investigation Order. So, evidence presented to a court by the EPPO prosecutors, or by the accused, is not excluded on the sole ground that it was collected in another Member State or in accordance with the law of another Member State, even if that evidence was collected in a manner that broke the rules on the circulation of evidence from one phase to another, from one State to another. This provision undermines the established principles of the adversarial process, allowing evidence to be admitted without adequate scrutiny of its legality and adherence to fair trial standards. It disregards the Italian legal framework's insistence on excluding evidence that has not been legally prepared, as per Article 526, and risks enabling the use of potentially illegitimate evidence.

By renouncing the legislative function in the area of the law of evidence, the EPPO Regulation leaves the evaluation of evidence to the indiscriminate power of the judge. This poses a significant threat to the rights of the accused, as it

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[3] In this regard, consider the distinctions made by M. DAMASKA, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven, 1986, p. 158.

[4] On it, see S. ALLEGREZZA, A. MOSNA, *Cross-border criminal evidence and the future European Public Prosecutor cit.*, p. 159; G. FIORELLI, *Il pubblico ministero europeo, tra poteri investigativi nazionali e regole probatorie 'in bianco' cit.*, p. 196; G. BARROCU, *La Procura europea cit.*, p. 150; R.E. KOSTORIS, *Pubblico ministero europeo e indagini "nazionalizzate" cit.*, p. 4742.

opens the door to the admission of evidence that may have been obtained in violation of procedural rules, undermining the principles of fairness and due process that are fundamental to a just legal system. It is crucial to address these shortcomings and uphold the principles of the adversarial process to ensure a fair and equitable legal environment within the European Public Prosecutor's Office[5].

4. *Prevent forum shopping*

Moreover, there is a lack of well-defined regulatory limits regarding the rules for prosecuting crimes and selecting the jurisdiction. Determining investigative and judicial competence stands out as one of the most sensitive aspects of the entire construction of the EPPO.

In Italian criminal proceedings, the Constitution imposes the principle of mandatory prosecution under Article 112 of the Constitution, indeed, 'the public prosecutor has the obligation to institute criminal proceedings'. This unavoidable, yet crucial, principle, even if laconic, holds profound value implications: it supports the political choice for a public prosecutor independent of any other State power (Article 101, paragraph 2 of the Constitution). The prosecutor's independence is crucial to ensure the implementation of the principle of equality of citizens (Article 3 of the Constitution) in accordance with the criminal law, free from external interference. In essence, under similar conditions, when there are elements supporting a reasonable expectation of conviction, the public prosecutor is obligated to bring the accused to trial.

In contrast, the EPPO Regulation adopts a model of discretionary prosecution, conflicting with the obligatory principle outlined in Article 112 of the Constitution. This principle translates the ideals of equality and legality into the legal process (Articles 3 and 25 of the Constitution). EPPO's competence is not uniform; citizens accused of the same crime may be treated differently. Some may be investigated by a European Delegated Prosecutor, perhaps in a different State, while others may be under the jurisdiction of the national public prosecu-

[5] The risk of delivering uncertain rules of evidence by relying on the canons of due process and defence rights has also been noted by Z. DURDEVIĆ, *Judicial control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office*, in K. LIGETI (ed.), *Toward a Prosecutor for the European Union, I, A Comparative Analysis*, Oxford-Portland, 2013, p. 998; D. HELENIUS, *Admissibility of Evidence and The European Public Prosecutor's Office,* in P. ASP (ed.), *The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives,* Skriftserien, No. 83, p. 196 ff.; L. PRESACCO, *Indagini e promovimento dell'azione penale del pubblico ministero europeo,* in *Riv. it. dir. proc. pen.,* 2021, 4, p. 1385; I. ZERBES, *Collecting and Using Evidence: a Patchwork of Legal Orders,* in *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives,* Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, Stockholm, 2015, p. 223 ff.

tor according to domestic statutes. While legal action is guaranteed, the methods of enforcement remain unpredictable.

The EPPO's jurisdiction is identified by referring to the macro-category of crimes damaging the financial interests of the Union, pursuant to Directive (EU) 2017/1371 (the PIF Directive). However, the EPPO does not specify the crimes concerned based on precise criteria such as the title of the crime or the statutory penalty's quantity[6]. These requirements vary from Member State to Member State, despite the requirements of the PIF Directive aimed at developing a common definition of fraud which should encompass 'fraudulent conduct on the side of revenue, expenditure and assets to the detriment of the general budget of the European Union, including financial transactions such as borrowing and lending' (Recital 4 of the PIF Directive).

Requirements for identifying VAT fraud within the PIF Directive are outlined in Article 3, paragraph 2, letter d). The EPPO's competence is established only for cases in which related actions or omissions are connected to the territories of two or more Member States and involve a total damage equal to, or exceeding, 10 million euros (Article 22, paragraph 1 of the EPPO Regulation). Notably, there is no specification regarding how to identify the Member State where the conduct is most rooted, and consequently, which national jurisdiction should handle the investigation of the criminal hypothesis. Presumably, the European Delegated Prosecutor who first receives information about the crime or the one better positioned to conduct the investigation or prosecution will be competent (Article 25, paragraph 4 of the EPPO Regulation). However, these criteria, one bold and the other entirely vague, fall short of providing the desired definiteness.

This magistrate will then have the task of establishing whether the damage presumably caused by the conduct that is the object of the crime is equal to or greater than the threshold of 10 million euros. Therefore, a subject of the judgment, the estimation of the damage, is entrusted to an abstract prognosis carried out by the European Delegated Prosecutor who may decide to entrust the ownership of the investigation to the local public prosecutor if he doesn't think the economic limit has been crossed.

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[6] Among the others, compare M. CAIANIELLO, *The Decision to Drop the Case: Res Iudicata or Transfer of Competence?,* in L. BACHMAIER WINTER (ed.), *The European Public Prosecutor's Office. The Challenges Ahed,* Cham, 2018, p. 113; L. LUPARIA, *Profili dell'azione penale europea,* in L. PICOTTI (ed.), *Il Corpus Juris 2000. Nuova formulazione e prospettive di attuazione,* Padova, 2004, p. 236; ID., *Obbligatorietà e discrezionalità dell'azione penale nel quadro comparativo europeo,* in *Giur. it.,* 2002, p. 1752; M. PANZAVOLTA, *Lo statuto del pubblico ministero europeo (ovvero, ologramma di un accusatore continentale),* in M.G. COPPETTA (ed.), *Profili del processo penale nella costituzione europea,* Torino, 2005, p. 181; A. PERRODET, *Quante figure di pubblico ministero…,* in M. DELMAS-MARTY (coord.), M. CHIAVARIO (ed.), *Procedure penali d'Europa (Belgio, Francia, Germania, Inghilterra, Italia). Sintesi nazionali e analisi comparatistiche,* Padova, 2001, p. 413; F. RUGGIERI, *Il pubblico ministero europeo,* in T. RAFARACI (ed.), *L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio tra priorità repressive ed esigenze di garanzia,* Milano, 2007, p. 575.

In fact, the Regulation does not assign exclusive and mandatory competence to the European Public Prosecutor's Office for "PIF crimes". Instead, it grants EPPO the power to act, which, in cases outlined in Article 25, paragraph 3 of the Regulation, may prosecute discretely or not, deciding whether to leave the competence to national authorities. Similarly, Article 27, paragraph 3 of the Regulation asserts only a right of evocation for EPPO, implying no obligation to refer investigations already undertaken by a national public prosecutor concerning a potential crime for which EPPO could be legitimately involved.

5. *Rules of jurisdiction allocation*

The European Public Prosecutor's Office retains the option to proceed within the jurisdiction offering the most lenient conditions, often aligned with legal systems equipped with robust investigative tools, and, in certain cases, in States where authorisation for interim measures is not granted during the preliminary investigation phase.

Member States have communicated to European prosecutors the crimes for which the use of interception of conversations and communications is permitted, with minimal limitations. This subtly encourages the selection, based on this information, of a national legal system that, either on procedural grounds, allows for more expansive investigative capabilities or, on substantive grounds, imposes a more stringent disciplinary treatment.

This legislative approach is undoubtedly at odds with the principle of the natural judge pre-established by law. The right to an effective remedy and a fair trial assert that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented' (Article 47, paragraph 2 of the Charter of Nice) [7].

Similarly, Article 6, paragraph 1 of the ECHR outlines the right to a fair trial in these terms: '1. In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice' [8].

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[7] Some comments were made by F.R. DINACCI, *Giudice terzo e imparziale quale elemento "presupposto" del giusto processo tra Costituzione e fonti sovranazionali,* in *Arch. pen.,* 2017, 3, p. 1 ff.

[8] On this subject, among others, M. CHIAVARIO, *Sub art. 6*, in S. BARTOLE, B. CONFORTI, G.

In this context, the jurisprudence of the Strasbourg Court has clarified that: a) a court must be 'constituted by law' to 'ensure that the judicial system of a democratic society does not depend on the discretion of the executive, but is regulated by a law promulgated by Parliament' (ECHR, 2th section, case Coëme and Others v. Belgium, judgment of 22 June 2000, § 98; ECHR, 4th section, case Richert v. Poland, judgment of 25 October 2011, § 42); and, b) the organization of the judicial system cannot be entrusted to the discretion of the judicial authorities themselves, even if this does not mean that the courts do not have, within certain limits, the possibility of interpreting the relevant provisions of domestic law (ECHR, 2nd section case Coëme and Others v. Belgium, cit., § 98, ECHR, 2th section, case Gorgiladze v. Georgia, judgment of 20 October 2009, § 69)[9].

Therefore, a regulation lacking in jurisdictional rules, as demonstrated by the EPPO Regulation, inherently constitutes a violation of Article 47, paragraph 2 of the Nice Charter and Article 6, paragraph 1 of the ECHR. This is because it fails to establish predetermined criteria for identifying the competent judge and the national legal system within which European Delegated Prosecutors can act, wielding the same powers as national prosecutors (Article 13 of the EPPO Regulation).

These discrepancies necessitate a reference for a preliminary ruling under Article 267 of the TFEU, directing the question of the interpretation and validity of the EPPO Regulation's rules in contrast to Article 47 of the Nice Charter to the Court of Justice, as stipulated by Article 42, paragraph 2, letter b of the same Regulation. Failing this, ample space would be left for the phenomenon of forum shopping to thrive.

Indeed, the Article 267 of the TFUE provides that the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: the interpretation of the Treaties; and, the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Any court or tribunal of a Member State may request such a ruling if it deems it necessary for its judgment. If there is no judicial remedy under national law against the decisions of a court or tribunal, the matter is to be brought before the Court of Justice. In cases involving a person in custody, the Court of Justice acts with the minimum of delay.

RAIMONDI (ed.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2011, p. 186.

[9] See, also, *Jorgic v. Germany*, § 64; *Richert v. Poland*, § 41. Indeed, in a democratic society, a body that was not pre-constituted by law would lack the legitimacy necessary to be able to review individual complaints (*Lavents v. Latvia*, § 114; *Gorgiladze v. Georgia*, § 67; *Kontalexis v. Greece*, § 38).

6. *The significance of the chronological factor*

Article 39, paragraph 1, letter e of the EPPO Regulation establishes, among the dismissal cases, the exceeding of the 'expiry of the national legal term for the exercise of criminal action'. This is an appreciable arrangement because when the prosecution of a transnational crime is proposed, the risk of dispersal of the evidence is higher. Hence, the chronological factor in the criminal trial emerges as a significance variable, determining the effective exercise of the parties' rights and the efficacy of the judicial investigation into the alleged crime.

A legal process extending beyond the reasonable time necessary to reconstruct facts and potential liabilities renders the exercise of the right to defence unprofitable or entirely impossible. It frustrates the right to evidence, renders the adversarial process sterile, and allows punitive responses that no longer align with the constitutionally mandated rehabilitative purpose, thereby lacking social utility.

The containment of procedural timelines cannot rely solely on *ex post* mechanisms such as the prescription of the offence or the non-proceedability due to duration exceeding appeal judgments (as outlined in Article 344 *bis* of the Criminal Procedure Code). Crucially, mechanisms promoting not only meticulous execution of investigations but also urgency, without delays justified by organisational shortcomings, must be introduced during the preparatory phases of the judgment.

The objective is not solely to limit the duration of the defendant's procedural burden to safeguard the right to a trial of reasonable duration, but more importantly, to ensure the cognitive purpose of the trial. Wasting time during investigations jeopardises the feasibility of establishing guilt. The trial becomes a mission impossible.

Therefore, the inclusion of the legal expiry of investigation terms among the grounds for dismissal was a wise move by the EPPO Regulation. The obligation to prosecute a crime implies supporting it in trial, and consequently, reducing investigation times and the period between the crime's commission and its adjudication is crucial for effective criminal prosecution.

A trial conducted many years after the fact, coupled with prolonged investigation periods, makes transforming evidence into results through cross-examination practically impossible. Waiting too long results in acquiring a written compilation of pre-established evidence, akin to inquisitorial systems, violates the best practices for a fair trial according to the contradictory method, which is constitutionally and conventionally upheld as the most effective means to establish truth. In fact, too many years after the fact, we can only be satisfied with acquiring a written compendium of pre-established evidence, which, as in inquisitorial systems, can only be read orally in the presence of the judge, in violation of all the best rules for a fair trial.

The dismissal due to the expiration of the national legal term operates as a distinct deterrent against unreasonable investigation time dispersion, akin to the experience of pre-trial detention terms and the subsequent loss of effectiveness upon exceeding the limit (Article 303 of the Criminal Procedure Code).

Ultimately, as envisioned in the EPPO Regulation, the chronological factor should serve as a starting point to enhance the timeliness of investigations, contingent upon the action being prosecutable. Thus, whenever legal terms for charging are exceeded, the public prosecutor, whatever hat he wears, must request the dismissal of the crime report.

This illustrates the positive effects that harmonising rights in a unified procedural system would have, especially when the coefficient of difficulty of the assessment increases because it is connoted to be a federal crime.

7. *Obstacles to the right of defence*

Regarding the methods of access to trial, institutions, bodies, offices, and agencies of the Union, along with authorities of the competent Member States, are required to promptly communicate to the EPPO, without delay, the criminal facts prejudicial to the economic interests of the European Union.

Article 14, paragraph 3 of Legislative Decree No. 9/2021 establishes a special register for crime reports within the EPPO's competence, but there is no mention of the methods of access for the suspect, for the offended person and for their respective defenders, where they request it. This omission contradicts Article 335, paragraph 3 of the Code of Criminal Procedure, which ensures the accused's right to be informed promptly of the accusation (Article 111, paragraph 3 of the Constitution; Article 6, paragraph 3 of the ECHR; Article 14, paragraph 3, letter a of the International Covenant on Civil and Political Rights; and, Directive 2012/13/EU), a crucial precondition for the effective exercise of the right of defence, especially in a challenging crisis. It constitutes a precondition for the effective exercise of the right of defence in a strong crisis, also for the exorbitant economic resources necessary.

The European legislator has not been particularly interested in the rebalancing of subjective legal situations. The accused bears the cost of a defensive assistance on a European scale. However, it is not only a question of the possibility of carrying out defensive investigations beyond national borders, but also to cover expenses like copying prosecution documents from another State. The practical exercise of the right of defence becomes significantly dependent on the economic capacities of the accused in transnational crimes, violating the condition of equality that should govern the parties.

8. *Future prospective*

Article 119 of the EPPO Regulation allows for additional or more detailed rules on EPPO's setup, functions, or applicable procedures, including cross-border investigations. But this evolution of the Regulation cannot only concern the extension of EPPO powers or the increase in the number of crimes having a cross-border dimension.

Today, the EPPO Regulation represents a give-and-take choice in which the European Union lost the opportunity to form a statute of uniform rules for the prosecution of all significant transnational crimes calibrated on the maximum standard of protection of fundamental rights like the presumption of innocence (rules of treatment for the defendant), obligation to prosecute to ensure equality and legality, equality between the parties, right to defence and prevention of forum shopping.

The goal of harmonisation remained in the pen – better in the feet, using a soccer metaphor – of the European legislator who succumbed to the flattery of a certain result easier to achieve but yielding compared to national legislations not always above the highest standard of protection or in any case not always equipped to prosecute a cross-border crime.

The establishment of the European Public Prosecutor's Office, on the other hand, could have presented an opportune moment to formulate a constitution of rights transversal to the whole of European territory, and not just a regulation which – even within criminal proceedings alone – deals with investigative activities but leaves to the local law the task of integrating the rules of the procedural game. This leaves a good game for the EDPs to choose in which State to investigate, depending perhaps on the most favourable discipline in terms of interceptions, searches and preventive seizures for confiscation purposes.

As widely acknowledged, these are the sharpest weapons with which the European Union can win the fight against fiscal impunity. However, achieving the shortsighted goal of tightening its economic budget involves illegitimately violating personal freedoms.

The overarching objective, as envisioned in Article 86 of the TEU, should be guided by the nucleus of fundamental rights provided in the European Convention for the Protection of Human Rights, the Charter of Fundamental Rights of the Union, and the constitutional traditions common to the Member States. Article 6 of the EU Treaty recognises these as the general principles of the European Union.

Essentially, in fact, the fundamental principles outlined in these three sources of law share a singular purpose: to impose impassable limits on the power of the European Union in criminal matters, specifically, those aimed at restricting freedoms and fundamental rights of those declared guilty.

This comprehensive set of principles should have guided the creation of a

common (minimum) substantive criminal law and a set of procedural rules applicable across the entire European area of freedom, security and justice. This would ensure that determination, stability and legality could flow seamlessly on a unified track!

From this standpoint, advocating for a regulatory review offers an opportunity to abandon the dualist approach where Member States function as strong partners of a seemingly weak institution. This approach, which has hindered the EU from proposing a justice model derived from the synthesis of the best translation of fundamental principles, should make way for the development of a European code of criminal procedure. Such a code would embody a unified vision, providing a cohesive framework for the pursuit of justice within the European Union.

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7.

EPPO AND THE CRISIS OF DUE PROCESS

Oliviero Mazza

At first glance, the Regulation for the establishment and operation of the European Public Prosecutor's Office (EPPO) suggests a regression of several hundred years in the procedural guarantees of the accused.

In formulating this trenchant judgment, the intention is not to engage in a sterile polemic, but to highlight the profound discomfort of the jurist accustomed to reasoning about fundamental rights and well-established dogmatic categories.

Instead, the Regulation is filled with vague concepts, susceptible to the most diverse interpretations, imperfect rights, and significant limitations on fundamental freedoms, all guaranteed by a principle of procedural legality that is merely apparent. It is entrusted to open and indeterminate provisions, which, not coincidentally, go hand in hand with an evident lowering of domestic standards of guarantee.

The examples are countless.

First of all, investigative competence by subject matter includes offences that harm the financial interests of the Union as per Directive (EU) 2017/1371, but also those provided for in Article 3(2)(d) of Directive (EU) 2017/1371, provided that the intentional actions or omissions defined in that provision are connected to the territory of two or more Member States and result in an overall damage of at least 10 million euros. It is truly peculiar to base competence on a vague criterion such as the quantification of damage, which can only be defined at the end of the process. It is no better when referring to participation in a criminal organisation, the definition of which is found in Framework Decision 2008/841/JHA, if the activity of such criminal organisation is focused on the commission of one of the offences harmful to the financial interests of the Union. Viewed from domestic law, the criminal organisation that determines investigative competence is a sort of uncoded *tertium genus* that stands halfway between criminal association and the participation of individuals in the offence, even if continuous.

Competence expands like an oil slick based on the criterion that attracts any other offence indissolubly linked to criminal conduct harmful to the financial interests of the Union. If the *vis attractiva* is clear, the criterion of indissoluble connection remains completely undefined, with the consequent substantial atypicality of the competence thus determined.

Nor is the definition of territorial competence any better. Of the three criteria indicated by Article 22 of the Regulation, only the first is clearly intelligible, while the others refer to a sort of universal competence with tenuous European connections.

Article 23 of the Regulation outlines a foreseeable race for information between EPPOs and national prosecutors, with the variable of the judicial police that could independently report news of interest to EPPOs. A series of powers and duties with no provision for sanctions in case of non-compliance.

Then there is the principle that EPPO exercises its investigative or taking-over powers discretionally based on assessments of opportunity that clash with the constitutional principle of strict legality in criminal action and, backwards, in the pre-investigative activities.

Even more complex and uncertain are the rules for the concrete exercise of EPPO competence stipulated by Article 25 of the Regulation. Just think of sub-threshold offences or the complex determinations of concurrent damages or the edictal frameworks.

The opening of a case by a European Delegated Prosecutor should take place where the centre of the criminal activity is located or, if multiple connected offences falling under EPPO's jurisdiction have been committed, in the Member State where the majority of offences were committed. These indications of intervention by the individual EPPO magistrate do not provide any certainty, with the result that the rules of investigative competence, already fragile in their static profile, end up being uncontrollable in the dynamic moment governed by indications that are anything but exhaustive.

Not to mention the case where a European Delegated Prosecutor from another competent Member State in the individual case wants to initiate or be appointed by the competent permanent chamber to initiate an investigation. Situations in which the exception to the general criteria must be justified by substitute criteria such as the habitual residence of the suspect, their nationality, or the location where the main financial damage occurred.

When EPPO comes into direct contact with national judicial authorities, consider the right to take over (Article 27) or the conduct of investigations (Article 28), the political weight of the European institution is felt, both on the normative level and on that of power dynamics.

It must be admitted that, from its early activities, EPPO has shown a clear moral suasion on domestic judges and even on fellow national public prosecutors.

Europe's punitive claim is such as to induce an almost automatic adherence of national judges to requests for precautionary measures, personal and real, as well as to determine the outcome of trials that, due to their "accounting" nature, hardly lead to guaranteed debate, finding quite different paths of early resolution.

In other words, EPPO significantly conditions internal jurisdictions precisely because of its overwhelming political weight, not balanced in any way by adequate counterweights, thus jeopardising the cardinal principles of due process, such as neutrality, impartiality, and the independence of the judge.

To the situation just described is added the clear disparity between the parties, namely between EPPO and the individual defendant. This disparity is certainly not mitigated by procedural guarantees (Article 41 of the Regulation), once again of an indefinite nature (those of European origin) not to mention apparent (internal ones undermined, as mentioned, by the political weight of the European Prosecution Office).

The nebulous framework of the rights and guarantees of the citizen exposed to EPPO's action is completed by the laconic regulation of evidence. It is intended to ensure full circulation of evidence on a European scale (Article 37 of the Regulation) precisely by virtue of a clause limiting the exclusion rules, according to which evidence presented to a judicial body by EPPO prosecutors or the defendant is not excluded solely because it was collected in another Member State or in accordance with the law of another Member State.

This means undermining the limits to evidence imposed by national law and forgetting that these limits are often based on constitutional counter-limits to the primacy of European law. The entire EPPO structure could collapse on the grounds of evidence, unless the circularity of evidence imposed by Article 37 of the Regulation is understood as a mere possibility conditioned by compliance with domestic law, at least in its fundamental principles.

Even more ambiguous is the provision according to which the Regulation does not prejudice the competence of the trial court to freely evaluate the evidence presented by the defendant or by EPPO prosecutors, as if there were an alternative European legal evidence. It is obvious that even on knowledge imported from other Member States, the principle of free conviction, the free evaluation of evidence, will prevail, but the need to expressly affirm it could also be read as a sort of attribution of probative value to acts that in domestic law should not have such value.

In conclusion, the evidentiary matter demonstrates how the EPPO Regulation is a regulatory work in progress that has not been brought back to the minimum level of procedural legality, not even by Legislative Decree No. 9 of 2021, which adjusts national legislation. Interesting scenarios are thus opened up for any counter-limits based on Article 111 of the Constitution.

A final consideration on the concept of equality of arms, which the great Eu-

rope of rights has taught us should be at the heart of fair proceedings. What happened to the regulation of defence rights in the face of EPPO action? Not a word has been spent on building a European network of defenders capable of effectively opposing, in the logic of adversary proceedings, transnational investigations and proceedings.

Referring to internal regulations alone is not enough. In a completely specular manner to EPPO's action, adequate facilitations must be provided for the conduct of a defence on a European scale, also considering the issue of costs that very few defendants could bear and which, in any case, being a tax matter, in our legal system would not even be attributable to free legal aid.

In a process of parties, one cannot only think of strengthening continental public prosecution; an effective remedy is immediately needed for the imbalance that EPPO has induced in the relationships internal to what must remain the due process.

8.

THE RULE OF LAW WITHIN THE ACTIVITY OF EPPO A TRIPLE PERSPECTIVE

Dorel Herinean

1. *Introduction*

As a basis for any civilized community, the Rule of Law has its special place within any serious institution of law and is one of the main functioning pillars of the European Union and of all the Member States analysed individually. Naturally, the EPPO could be imagined, created and operationalised only by having at its ground the Rule of Law, but the specificity of its activity – performing criminal investigations in the participating Member States – creates a need not only to respect the European Rule of Law, but also each State's Rule of Law. This need is expressly declared in Article 5 of the Council Regulation (EU) 2017/1939 of 12 October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter, referred to as the EPPO Regulation / Regulation 2017/1939), which, after declaring in paragraph 2 that the EPPO is bound by the Rule of Law, in paragraph 5 states firstly that the investigations and prosecutions are governed by the Regulation 2017/1939, while 'national law shall apply to the extent that a matter is not regulated by this Regulation'.

Even so, and even in the context of the primacy of the EU law established through the treaties and developed by the jurisprudence of the CJEU, the relationship between these is complicated and it can never be a closed subject, as the EU, now supported by the EPPO, is a living mechanism or, some may consider, a living organism.

This is why the article is structured, as announced from the titles, in the form of a triple perspective analysis, firstly the general EU legislation, followed by the substantive law and the procedural law. At the end, before reaching the conclusions, we included a very interesting case study in which all the three perspectives merge in regards to what the Rule of Law really means in the EU system in the cases in which the EPPO has the competence to act, that being the recent case of the Romanian statute of limitations dispute (§ 5), which was analysed by the CJEU.

The entirety of the article is designed to analyse these perspectives in order to try to anticipate the direction that the EU Rule of Law might take while governing the activity of the EPPO. Because, as everyone knows, EPPO has been up and running for almost three years now, and this is a major achievement of the Union and an important factor for the future in the general function and ruling of the European Union.

2. *The general EU law perspective*

The first part of our study is dedicated to a wide-view of the EU law governing the creation, the internal functioning and the external activity of the European Public Prosecutor's Office, without involving national laws in the discussion.

With this, we want to analyse the European Rule of Law and how it is able to govern the functioning of this body, while trying to set the ground for the discussions that will be carried out in the following chapters. This perspective is of course the most important for our study, but the specificity of the EPPO's activity can't allow for this pure perspective, as the activity is very tied to the national provisions of the participant Member States where the investigations are actually carried out.

Before going forward, we want to highlight one more aspect: in our opinion, the European Rule of Law can have many facades that are influenced by the domains in which the EU law intervenes: it might differ between the areas where the Union has the exclusive competence, the areas of shared competences and the areas where the Union can support, coordinate or supplement the actions of the Member States. Of course, as our analysis is set within the area of freedom, security and justice, we are analysing the Rule of Law from the shared competences standpoint.

2.1. *The EU Rule of Law and the primacy of the EU law*

As highlighted in the legal literature, the doctrine of the primacy of EU law was not provisioned in the EU Treaty, having no explicit legal basis, but was developed by the CJEU, as it was considered that it would be damaging to the purpose of the EU (a uniform common market) if the EU law could be made subordinate to the internal law of Member States. [1] Of course, the legal basis for this discussion lies in the EU's aims and the necessity for effective means to achieve them.

This relationship between the EU laws and national laws creates a continuing debate among the EU and the Member States, as each is tending towards the preferred option: from the European perspective, as an absolute supremacy of the EU, in which all the EU laws prevails over all national laws, regardless of the hierarchy of the laws; versus the national perspective, where this supremacy is relative, as some national law at least is considered to be beyond the supremacy of the EU law. [2]

Is there, in this debate, an issue regarding the Rule of Law? It depends. If the approach is from a nationalist point of view, it might be said so, as the EU law could be considered to disregard the national Rule of Law. But, of course, such an approach is not one that we can adopt as Member States of the EU. When adhering to the Union, Member States agree to be the subject of another set of laws besides their national ones and should agree that the common interest of the Union will prevail over punctual, national interests, as is the case in any form of functional international cooperation. Therefore, we don't believe that this can be considered a breach of the Rule of Law, but rather a compliance with another Rule of Law, the European Rule of Law.

2.2. *The framework of the EPPO and the Rule of Law*

The EPPO was created through the Regulation 2017/1939 and it started operations on 1 June 2021. The main legal framework of the creation and the general rules of functioning of the EPPO were established through the EPPO Regulation, but a lot of details for its operation were introduced only in the Internal Rules of Procedure of the European Public Prosecutor's Office 2021/C 22/03 (hereinafter, referred to as "IRP" or "Internal Rules").

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[1] P. CRAIG, G. DE BURCA, *EU Law. Texts, cases and materials, Seventh Edition*, Oxford University Press, Oxford, 2020, p. 303. The authors refer to the supremacy of EU law, but we believe that in the context it seems that the two terms are synonyms, even though this is a debated subject. For details over the debate, see T. TUOMINEN, *Reconceptualizing the Primacy-Supremacy Debate in EU law*, in *Legal Issues of Economic Integration 47*, No. 3, 2020, pp. 245-266.

[2] To see more on this subject, refer to R. SCHÜTZE, *European Union Law, Second Edition*, Cambridge University Press, Cambridge, 2020, pp. 119-138.

To quickly go over the structure of the EPPO, it is split between the central level and the national level. Another relevant distinction would be the generic level and the operational level, but this one can be made only at the central level. At the central level, we can find the European Chief Prosecutor, the EPPO College, the Permanent Chambers and the European Prosecutors.[3]

The national level is constituted by the European Delegated Prosecutors, who are supported by the judicial bodies designated from each country. For example, in Romania, the judicial bodies that assist the Romanian European Delegated Prosecutors are grouped within a structure attached to the National Anticorruption Directory,[4] which is part of the Public Ministry. This was previously the institution that had the competence to investigate frauds with EU funds and still investigates those cases in which the EPPO is refraining from exercising its competence, according to Article 25 of the EPPO Regulation.

As is natural in this case, the legal basis and the framework of the EPPO is provided within the EU law, not leaving to the national level any decision on these aspects, because this structure, the functioning and the relationship of the EPPO, was decided by the participating countries and should not be subject to easy changes by internal rules.

2.3. *The decisions emitted by the EPPO and the Rule of Law*

First and foremost, we have to clearly establish what decisions the different organs of the EPPO are competent to take, and what is the legal basis for them.

The European Chief Prosecutor is the head of the EPPO and represents the EPPO in relation to the EU and third parties. The Chief Prosecutor's competence lies mostly in the field of the general functioning of the EPPO, emphasising why compliance with EU laws is the most important in this case. The decisions that can be taken by the European Chief Prosecutor are definitely the subject only of the EU law.

The EPPO College, which is the "general assembly" of the EPPO, is constituted by all the European Prosecutors (one for each participating Member State), is chaired by the European Chief Prosecutor and is the main decision-maker for the general activity of the EPPO. Its decisional procedure is provisioned by the

[3] We are not including here the Administrative Director and other support staff, as they are not part of our study.

[4] In the Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004), published in December 2023 (hereinafter, we will refer to it as The Commission's 2023 Study), the Romanian law was deemed as partially compliant with Article 5(6), as the National Anticorruption Directorate was not notified to the EPPO as a competent authority under Article 117 of the EPPO Regulation.

IRP and it is subject to the rules within the EPPO Regulation. The College has no role in the investigations performed by the EPPO and can only act as a decision-maker on strategic matters and general issues that need to be solved at the central level in order to determine the priorities and the investigation and prosecution policy of the EPPO, according to Article 6 of the IRP.

The Permanent Chambers are the first organ from this list with attributions within specific investigations. The Permanent Chambers consists of three European Prosecutors (one chair and two members) and have the role of overseeing the investigations carried out by the European Delegated Prosecutors, while having the final decision on the issues provided for in Article 10 of the EPPO Regulation. The cases are allocated to the Permanent Chambers in a 'random, automatic and alternating' way by the Case Management System (CMS), but, according to the IRP (Article 19, paragraph 4), by a decision of the College and the Chief European Prosecutor, it can be stated that 'certain categories of cases, based in particular on the type of offence under investigation or the circumstances of the offence, are assigned to a specific Permanent Chamber'. This possibility was criticised in the legal literature,[5] but analysing the decisions adopted until now in this matter, this text has not yet been used.

Going to the national level, European Delegated Prosecutors are responsible for carrying out criminal investigations and are supposed to abide by all the decisions and procedural acts that are provided for in the national procedural law of the Member State that they are operating in. These decisions will be, most of the time, subject to legality analysis only from a national law point of view, as neither the EU Regulation nor the IRP grants European Delegated Prosecutors any special attributions in the performance of criminal investigations, but the College acts as a disciplinary forum for them.

Moreover, Member States are forbidden, according to Article 17 of the EPPO Regulation, from applying their internal rules in disciplinary actions without the consent of the European Chief Prosecutor in relation to a European Delegated Prosecutor for reasons connected with the responsibilities under the EPPO Regulation and, if the reasons aren't connected with these responsibilities, the Member State must inform the Chief European Prosecutor before taking any action. This creates a sort of immunity from the national rules for European Delegated Prosecutors making decisions within the EPPO on the basis of the Regulation.

As we can see, all of the decisions that are taken in relation to the general strategy and the functioning of the EPPO have their legal basis only in the EU law, national law not being able the regulate these. The only part that Member States play in the general function of the EPPO is similar to the role played in

[5] See, for example, A. ȘANDRU, M. MORAR, D. HERINEAN, O. PREDESCU, *European Public Prosecutors' Office. Regulation. Disputes. Explanations,* Universul Juridic, Bucuresti, 2021.

all the EU institutions, i.e., designating representatives – the candidates for the European Prosecutor.

2.4. *An interesting aspect – the liability of legal persons in the EU law*

Attracting the criminal liability of legal persons is not an objective for the EPPO, but it can definitely be a useful mechanism in the fight against fraud in the EU and especially for the purpose of recovering the proceeds of crime, as usually EU funds are granted to legal persons and therefore the highest rate of frauds is done by legal persons or by using different legal entities within the criminal activity.

The PIF Directive defines in Article, 2 paragraph 1(b) the legal persons as meaning 'an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations'. This definition refers to the 'applicable law' recognising the variation in legal personality from State to State. However, as a general provision, the Article includes some exceptions, as Member States, public bodies in exercise of State authority and public international organisations will not be seen as legal entities in the scope of the definition and therefore they are not subjects of the PIF Directive. When it comes to the applicable law, we see that the PIF Directive respects the Member States' Rule of Law and the latter is going to govern this matter. We believe, as we will show below, that this can be a source for debate.

Article 6 of the PIF Directive is entirely dedicated to the liability of legal persons,[6] while the applicable sanctions with regard to legal persons are outlined in Article 9.[7] It is important to notice that this article cannot be the sole grounding

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[6] '1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 3, 4 and 5 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person.

2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission, by a person under its authority, of any of the criminal offences referred to in Article 3, 4 or 5 for the benefit of that legal person.

3. Liability of legal persons under paragraphs 1 and 2 of this Article shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Articles 3 and 4 or who are criminally liable under Article 5'.

[7] 'Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent exclusion from public tender procedures;

for the liability of a legal entity in a criminal trial, and therefore the actual basis for the liability of legal persons will be found in the legislation of Member States. As we have noticed on another occasion while analysing this subject,[8] this article within the PIF Directive is not supposed to introduce a uniform model of liability for legal persons[9] throughout the Member States, but rather to introduce a minimum standard for both the liability and the sanctions. Therefore, as long as the models adopted within the legislation of the Member States are compliant to this minimum model, the European Rule of Law is respected.

Potential issues may arise if EPPO investigations take place in countries with broader definitions of legal persons or more expansive liability frameworks than those in other Member States. In such cases, legal persons operating within Member States with more restrictive models could find themselves subject to different applicable laws if the criminal trial is adjudicated in the first country. This could lead to legal persons being subject to criminal law in the trial jurisdiction, even if they wouldn't be subject to such laws in their home country. This wouldn't pose an issue if those legal entities were operating solely within the first country. However, if their accessory activities to the crime occurred within their territory, we believe this would constitute a scenario lacking a legal basis to permit another Member State to override the rules of the incorporating country. Therefore, these legal persons couldn't be prosecuted or indicted in the first Member State. Probably, the solution the investigators could find in these cases would be to pierce the corporate veil and prosecute only the natural persons behind the veil, but this is not ideal in terms of Article 6 of the PIF Directive.

(c) temporary or permanent disqualification from the practice of commercial activities;

(d) placing under judicial supervision;

(e) judicial winding-up;

(f) temporary or permanent closure of establishments which have been used for committing the criminal offence.'

[8] D. HERINEAN, *Persoanele juridice în investigațiile EPPO – o răspundere penală Schrödinger* (*Legal Entities in the EPPO Investigations – a Schrödinger's Criminal Responsibility*) in A.R. TRANDAFIR, G.A. LAZĂR (eds.), *Răspunderea penală a persoanei juridice. O instituție transatlantică. De la evaluarea vinovăției la aplicarea și executarea sancțiunilor (Criminal Responsibility of Legal Entities. A Transatlantic Institution. From Guilt Assessment to Application and Enforcement of Sanctions)*, Solomon Publishing House, Bucharest, 2021.

[9] As Article 9 clearly states, the PIF Directive doesn't even impose the necessity of introducing the criminal liability of legal entities, allowing Member States to keep their national law tradition of not introducing this institution, as long as they can impose, as administrative sanctions for examples, those mentioned in that text. However, at least when it comes to the judicial winding-up, that can be in most cases be considered a criminal sanction by the European Court of Human Rights by applying the Engel criteria (*Engel and Others v. the Netherlands*). The consequence, however, would be that the proceedings would be considered criminal proceedings within the scope of Article 6 of the European Convention of Human Rights, which doesn't lead to a necessity for this to be requalified in the national law as a criminal sanction.

Because the EPPO Regulation is lacking any special provisions on what concerns legal persons, and because it clearly states in the definition of the term "person" that it means any natural or legal person, it doesn't seem to us that it is a priority of the EPPO to engage the liability of the legal entities more than that of the natural persons involved in the criminal activity.

3. *The substantive law perspective*

Moving aside from the general EU law perspective, we have to always take into consideration that the activity of the EPPO can only be carried out in the Member States of the EU and EPPO cannot be ignorant to, or isolated from, the local legislative specificities in each of these countries.

The offences regulated in the PIF Directive, as is well known, are not incrimination norms, they are just models and minimum standards for the Member States' legislations. We are far from a European criminal law, as in the international criminal law,[10] where offences would be directly regulated by the EU law and could be prosecuted without having to be introduced into the national legislation of the Member States. This applies similarly to all other institutions that typically regulate the general parts (or general principles) of the substantive criminal law.

We presume that integration in the EU is not a total stranger to some level of harmonisation of the judicial systems in relation to Union policy.[11] The creation of EPPO was certainly a major step towards a more hands-on approach of the EU in terms of justice, as justice remains among the shared competences between the EU and the Member States. With the creation of the EPPO, the participating Member States sent a clear signal that the proportionality and the subsidiarity, which characterise the exercise of the EU competence, can be pushed forward in terms of justice.

But until the (very unlikely) moment when justice is taken into the exclusive competence of the EU and is directed and performed at the European level not only at the investigation phase, but also during the entire trial, and until the convictions are pronounced by European Courts,[12] the main guardians of the

[10] We are referring here to the international criminal law as a set of legal rules through which are regulated the offences of international criminal law, as well as the conditions and the consequences of the criminal liability of the individuals in these cases. For this definition, see D. NIȚU, *Drept internațional penal (International criminal law)*, Universul Juridic, București, 2020, p. 14.

[11] See, for example, P. CRAIG, G. DE BÚRCA, *op. cit.*, p. 1012.

[12] This argument is only used *ad absurdum* because, as the author wanted to suggest with the "(unlikely)" mention, which is a personal opinion and not a prediction, the author believes that we are very far from such a moment.

Rule of Law (including the EU law) will remain the national courts that are judging the merits of the cases investigated by the EPPO.

Therefore, since national professionals (be them judges, lawyers or prosecutors) are mainly trained in their national law,[13] the natural tendency would be to take into consideration the Rule of Law firstly from a national point of view and afterwards from the EU point of view. Of course, law professionals know the relation between the two sources of law and when the EU law should prevail over the national one. But this is highly sensitive when it comes to criminal investigations and mainly to the substantive law perspective. The EU took this into consideration when adopting legal acts, as when it comes to substantive law, they are either in the form of directives (for example the PIF Directive) or in the form of recommendations or other soft law sources.

One thing is clear: from the substantive law perspective, the only Rule of Law that can support a criminal accusation is the national law. All the EU law instruments that exist at this point are insufficient to be considered the material basis for a criminal investigation or a criminal conviction. Moreover, as the ground rules for substantive law are set through a directive (i.e., the PIF Directive), they cannot be invoked against an individual unless they are incorporated into the legislation of the Member State.

Therefore, in this substantive law perspective, all the discussions in relation to EU law are viewed as recommendations and the Rule of Law governing the legality of the accusations is seen from a national law perspective. In the following subsections, we will comb thorough different substantive law institutions and analyse them in relation to the investigations that are carried out by the EPPO.

If, in the future, a more cohesive substantive law system is desired, a model could be seen in the international criminal law system and could be adopted by the desiring Member States in the form of more EU treaties or regulations.

3.1. *The incrimination texts in different States*

The PIF Directive doesn't have a direct applicability when it comes to offence implementation and, as we previously mentioned, this part is fully dependant on national laws. Because of this, and as Article 117 of the EPPO Regulation imposed, the participating Member States in the EU provided a list of the relevant offences that are stipulated by their national laws[14] and analysing these we can see that the system in each country differs when it comes to the extent of the incrimination, additional incriminations and the relationships be-

[13] This is, again, a personal opinion of the author, not based on any statistics or evidence.

[14] These lists can be found on the website of EPPO *eppo.europa.eu*, but in most of the cases they can only be found in the language of the Member State who issued the notification.

tween the offences. This might prove to be important in the cases of criminal activities across borders, where multiple EU States will have the competence to prosecute and judge cases and where it will be necessary to choose just one jurisdiction to apply to all the criminal activity. This choice, according to the EPPO Regulation, can be a decision of opportunity taken by the Permanent Chambers and might be based, not necessarily as official reasons, on the severity of the sanctions or on the extensiveness of the offences within one jurisdiction.

However, we don't believe that this is a major issue because, when natural or legal persons involve themselves in cross-border criminal activities, they have to understand that they can be subject to criminal prosecution in any of the countries their activity is connected to and therefore such a decision to choose one of these jurisdictions to be applicable to the entirety of the criminal activity would not be automatically harmful to the Rule of Law. Of course, we wouldn't argue otherwise, as we can't disregard the possibility that the spirit of the Rule of Law may be compromised in certain instances due to the forum shopping permitted by Article 36, paragraph 3.

3.2. *Other substantive law issues*

A relevant discussion can be made in relation to Article 5 of the PIF Directive, which regulates the incitement, aiding and abetting, and attempt.[15] We have to firstly notice that the attempt is only imposed when it comes to some of the crimes mentioned in the Directive, but the participation forms are provisioned for all the crimes in the scope of the act. This might be because there are not many differences between the forms of participation amongst the Member States.

When it comes to the guilt necessary to commit the crimes, Recital 11 of the PIF Directive states that intention is the requisite form of guilt for all crimes outlined within it, explicitly stating that 'the criminal offences which do not require intention are not covered by this Directive'. Of course, this doesn't mean that the States are forbidden from establishing offences that can be committed without guilt. For example, Romanian legislation provides for a crime under Article 18 of the Law No. 78/2000[5] which sanctions the director, the administrator, the decision-maker or the controller of an economic operator who without intent breaches a service duty, by failing to fulfil it or by performing it defectively, if this resulted in the commission of a crime against the EU funds provided

[15] '1. Member States shall take the necessary measures to ensure that inciting, and aiding and abetting the commission of any of the criminal offences referred to in Articles 3 and 4 are punishable as criminal offences. 2. Member States shall take the necessary measures to ensure that an attempt to commit any of the criminal offences referred to in Article 3 and Article 4(3) is punishable as a criminal offence.'

in the same law, by a person who was under its supervision and who acted on behalf of that economic operator. The penalty for this crime is imprisonment starting from 6 months to 3 years or a criminal fine.

This means that the EU Rule of Law is not applicable in such cases of crimes that are not subject to the PIF Directive, even if the national law clearly states that the crimes are committed against the financial interests of the EU, and are provided for in the same law as most of the offences dictated by the PIF Directive.

Another observation that will prove useful in the future is related to the statute of limitations (or limitation period), which is provided by Article 12 of the PIF Directive. This Article stipulates a minimum period of 3 years, or alternatively, a 5-year period, to facilitate investigation, prosecution, trial, and judicial decisions for criminal offences.

3.3. *The sanctions*

Even though the general purpose of the European Public Prosecutor's Office is to protect the financial interests of the Union against offences causing significant financial damage, as the recitals of the EPPO Regulation clearly state, the role of the EPPO is actually not a preventive one, but involves intervention. The EPPO will only be called to action after the crimes we previously discussed, and which cause harm to the financial interest of the EU, are committed.

Therefore, after the investigations carried out by the EPPO are finalised and the cases are judged by the national courts of the Member States, sanctions are applied. For this reason, the PIF Directive establishes the minimum sanctioning frame that should exist in each of the Member States, to ensure a minimum standard of punishment for those who go against the financial interests of the EU.

Articles 7 to 10 of the PIF Directive are integral to its sanctioning system. They cover a wide range of penalties for natural persons,[16] ranging from a min-

[16] '1. As regards natural persons, Member States shall ensure that the criminal offences referred to in Articles 3, 4 and 5 are punishable by effective, proportionate and dissuasive criminal sanctions.

2. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty which provides for imprisonment.

3. Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage.

The damage or advantage resulting from the criminal offences referred to in points (a), (b) and (c) of Article 3(2) and in Article 4 shall be presumed to be considerable where the damage or advantage involves more than EUR 100 000.

The damage or advantage resulting from the criminal offences referred to in point (d) of Article 3(2) and subject to Article 2(2) shall always be presumed to be considerable.

imum requirement of imprisonment of at least four years (the maximum penalty), to specifying the need for imprisonment, to the requirement of criminal sanctions (without specifying which ones), and extending to the allowance of non-criminal sanctions. After these, the Directive provides for the necessity of one aggravating circumstance,[17] consisting of committing the crime within a criminal organisation. Of course, if the laws in a Member State provide a different crime which sanctions the mere creation of, or adhering to, a criminal organisation, we believe that this is enough to be considered an aggravating circumstance, even though it is materialised in a different crime. After this, the Directive outlines the sanctions with regard to legal persons,[18] including freezing and confiscation measures.[19] Particular attention should be granted to these measures,[20] as they are, in our opinion, of utmost importance when it comes to the protection of the financial interest of the EU and, without them being effectively applied in the legal practice, the whole purpose of the creation of the EPPO would be just a formal one and the justice policy carried out through the EPPO would not reach its practical purpose. This is why we believe that an objective in this matter could be set in the activity of the EPPO and that the EU policy might be focusing on the effectiveness of these measures in the following period.

4. *The procedural law perspective*

The procedural law governing EPPO investigations is an interesting topic, as it is a mixture between EU regulations and national law provisions. Even though,

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Member States may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law.

4. Where a criminal offence referred to in point (a), (b) or (c) of Article 3(2) or in Article 4 involves damage of less than EUR 10 000 or an advantage of less than EUR 10 000, Member States may provide for sanctions other than criminal sanctions.

5. Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officials.'

[17] 'Member States shall take the necessary measures to ensure that where a criminal offence referred to in Article 3, 4 or 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA, this shall be considered to be an aggravating circumstance.'

[18] Provisions of which we already discussed. See *supra* 2.4.

[19] Which is mainly a reference to the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29 April 2014, p. 39).

[20] In the Romanian legislation, while freezing of assets can be directly decided by the EPPO during the criminal investigation according to the national procedural law and will be subject to the judicial review of a court only if they are challenged, the confiscation can only be ruled by the court at the end of the criminal trial and can be ruled without the need for a request in this matter from the accusation.

when analysing the substantive law perspective, we said right from the beginning that the only real laws in that matter are those from the national law, this is definitely not the case when it comes to the current perspective.

Even though the entirety of a criminal case carried out in each Member State will be subject to national criminal procedure provisions, in the cases in which the investigations are performed by the EPPO there are the additional procedural rules brought by the EU law, especially by the EPPO Regulation and the IRP which are specific to the functioning of the EPPO and which have to be respected at least until the end of the criminal investigation and before the case is brought to judgment.

This third perspective is crucial in the context of the Rule of Law because it is subject to compliance with rules originating from two different sources that investigations must adhere to.

It is also interesting to note that Article 117 of the EPPO Regulation doesn't mandate Member States to notify about procedural law provisions. It explicitly states 'an extensive list of the national substantive criminal law provisions that apply to the offences defined in Directive (EU) 2017/1371 and any other relevant national law', but of course the States were free to include such provisions as well as other relevant national laws.

4.1. *The general principles of investigations*

Article 5, paragraph 1 clearly states – and the placement in the first paragraph of this Article (called the basic principles of the activity) is a statement *per se* – that the activity of the EPPO should respect the rights enshrined in the EU Charter. [21]

The Rule of Law is a general principle of the EPPO, alongside proportionality, which is mentioned in Article 5, paragraph 2 of the EPPO Regulation. As noted in the legal literature, there are no remedies mentioned in this Article when it comes to the violation of these basic principles, as its role is more symbolic and the remedies are those generally known when it comes to EU law, such as infringement procedures and responses in the national criminal procedures of the Member States participating in the EPPO. [22]

It is widely known that there are two main models of investigation types within legal systems that are compliant with the Rule of Law, those being accu-

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[21] For an excellent analysis of the EU Charter, see S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of fundamental rights. A Commentary,* 3rd ed, Hart Publishing, Oxford, 2021. We will not elaborate more in this paper on the rights provided in the Charter, as it exceeds our study's object.

[22] C. BURCHARD in H.H. HERRNFELD, D. BRODOWSKI, C. BURCHARD, *European Public Prosecutor's Office. Article by article commentary,* Nomos Beck Hart, Baden-Baden, 2021, p. 21.

satorial systems and inquisitorial systems. The provision found in Article 5, paragraph 4 of the EPPO Regulation seems to reject any radical adversarial prosecution models,[23] as it obliges the EPPO to search for evidence both in favour and exculpatory. However, as the same author highlights, this obligation can be seen as a generic one, since there are no procedural rules explicitly stating how and when to gather both types of evidence, and indeed evidence gathering mechanisms are dependant on the legal mechanisms within the Member State in question.[24] These are, in our opinion, general statements on the desired policy of the EPPO within its activity and failing to gather exculpatory evidence *ex officio* would not lead to procedural sanctions within the investigation.

4.2. *The legality of the investigations*

As we said above, the investigations of the EPPO are firstly governed by the EPPO Regulation, then by the IRP and thirdly by the national procedural law from the State where the investigation is performed.

It is important to remember that even though they act as European Delegated Prosecutors, the prosecutors from the national level of EPPO are still national prosecutors, as they have what it was called in the legal literature a "double hat". They can use the national mechanisms; the special measures of investigation and surveillance measures according to the national law, and can only use the preventive measures and freezing orders that are regulated in the national criminal procedural law.

Therefore, they are also subject to the national law and have to be compliant with all the national standards in regards to the conditions for the procedural acts, the measures that can be taken and the rights that have to be granted to suspects or accused persons.

Analysing this framework, we believe that European Delegated Prosecutors don't have more rights than national prosecutors, but they may be considered to have more obligations, as they must comply with further internal rules of conducts within the EPPO.

4.3. *The procedural safeguards*

The EPPO Regulation establishes a base of procedural safeguards, consisting of a set of rights for suspects and accused persons, defined by making reference to the Charter and the Directives' rulings on these matters and the judicial review.

When considering the rights of suspects and accused persons, we believe

[23] *Ibid* p. 29.

[24] *Ibid* p. 30.

that the EPPO should serve as an exemplary model in terms of the respect accorded to them. We firmly believe that the EPPO has the potential to establish the standard for conduct that national investigation bodies should follow.[25] As a consequence, the role of the national courts, and in some cases of the CJEU, in sanctioning the misconducts from the EPPO investigations is crucial for the Rule of Law at the highest European level.

The second procedural safeguard provided is judicial review. The existence of judicial review is an essential part of the criminal investigation process, i.e., the review by the competent national courts of the procedural acts of the EPPO that intended to produce legal effects to subjects of law. Article 42 of the EPPO Regulation clearly states that this judicial review will be performed in accordance with the requirements and procedures laid down by national law. Of course, since EU law influences national laws, EU law will definitely have an impact on this judicial control, especially since countries, when faced with sensitive issues specific to the activity of the EPPO, might have the (healthy, from our point of view) tendency to refer to the CJEU with preliminary questions and "delegate" the sensitive decisions to them. This would be beneficial from the perspective of uniformity among the Member States, but might also be considered detrimental to the traditions within each legal system.

Moving from this minimum set of requirements, more procedural safeguards can be established in each Member State. However, when considering the primacy of EU law and decisions made by the CJEU in various matters, it's possible that additional procedural safeguards, which establish very high protection standards, could eventually be viewed as potentially leading to systemic impunity in one or more Member States. Such safeguards might be considered contrary to provisions of EU law. Therefore, the EU Member States might at this point be incentivised not to elaborate very much on these minimum procedural safeguards' requirements.

As we discussed regarding judicial review, an observation from the Commission's 2023 Study on the EPPO concerns Romanian national law, which stipulates that the decision to reopen a case rests with a judge of the Preliminary Chamber. This study deems this legislation non-compliant with Article 39(2) because it restricts the Permanent Chamber's authority to reopen the case. We see here a clear example where a national standard of protection of the rights, which is clearly superior (as it obliges for the involvement of a judge in the reopening of a case), is deemed contrary to the EPPO Regulation.

On the other hand, in the case of conflicts of competence between the EPPO and national prosecutors, where Romania designated as competent authori-

[25] For the same belief, see G. GUAGLIARDI, M. MORAR, *European Public Prosecutor's Office: lights and shadows of a complex architecture. Prosecuting crimes at the European level with an ambitious approach*, in *Law Review (e-ISSN 2246-9435)*, volume XI, issue 1, January-June 2021, p. 82.

ty the general prosecutor of Romania, the same Commission's 2023 Study found that the Romanian law was not compliant with Article 25(6) of the EPPO Regulation, as the general prosecutor of Romania is not a court or tribunal. Even though, obviously, we don't argue with this latter observation, it is not hard to see, from our point of view, the double standard applied here in relation to when a court should, or should not, be involved in decisions regarding criminal investigations carried out by the EPPO. Yes, the answer might be that the distinction comes from the provisions of the Regulation in this matter – in the first case, the decision remains with the EPPO, and in the second case, the decision should go to an independent court or tribunal, as referred in Article 267 of the TFEU.

4.4. *The criminal trial before a court*

When bringing the cases investigated by the EPPO to court, the national laws will be the main source of disputes, as the EPPO Regulation and the IRP aren't very focused on this part of the criminal trial where the prosecutors are not the main characters anymore, as the governing authority is the court itself.

However, for example in Romania, in cases in which the investigations were carried out by prosecutors, the Public Ministry is represented before the court only by European Delegated Prosecutors. Therefore, the EPPO is involved throughout the entire criminal trial, and European Delegated Prosecutors can participate in the judgment of these cases in accordance with national procedural provisions.

One important debate in Romania at this point in relation to judgments in EPPO cases is about the limitations of the tribunals that can judge cases investigated by the EPPO. Law No. 6/2021 states that only 4 from the total 42 tribunals that operate in Romania can be selected for judging the case in the first instance and only the corresponding 4 courts of appeal (out of 12 in the country) can judge the appeals or, where the personal competence rules impose, the first instance of EPPO cases. Four cities (Bucharest, Cluj-Napoca, Iasi and Timisoara) were selected as the four territorial offices of the EPPO in which the Romanian European Delegated Prosecutors have their headquarters. This might lead to some problems for the territorial competence of domestic courts and the rules for the randomness of the selection of the judges in cases, as the pool of judges is much more restricted when it comes to the cases of EPPO, since they can come from only four courts. This issue, when it comes to the investigation, was highlighted in the Commission's 2023 Study of the EPPO, which concluded that having the territorial division within only four cities is not compliant with Article 13(2) of the EPPO Regulation.

When it comes to the actual judgment, the general rules of the criminal trial are those specific to the Member State, which the European Delegated Prosecu-

tors also know, as they act in their original State. Discussions may arise in areas where EU law needs to be applied to decide on a matter or where a preliminary hearing might be necessary.

In our opinion, when it comes to the application of EU law, the CJEU sent a clear signal to national judges on the primacy of the EU law in the Case C-430/21. In that case it stated that the judges from courts within Member States cannot be held disciplinarily liable for directly applying the EU law interpreted by the CJEU, even though the national provisions joined with the case law of the constitutional court of the Member State in question would indicate a different solution.[26] This definitely represents an incentive for judges in Member States to take a better look at the EU law provisions and the CJEU's jurisprudence, and can prove to be of big importance in the judgment of cases investigated by the EPPO.

Therefore, at this point, we believe that even procedural rules, which may seem somewhat removed from the EPPO's activity during the criminal trial, could eventually occupy a specific position within national legal systems and not be entirely subject to the national Rule of Law.

5. *A case study – the Romanian statute of limitations issue*

Even though this case is complex, we will try to sum up all the relevant aspects to fully understand the issue.

In the Romanian Criminal Code (hereinafter "R.C.C."), which was introduced in 2014, there was a general statute of limitations (3, 5, 8, 10 or 15 years) applicable to the offences based on the main penalty. These general terms were susceptible to suspensions and interruptions, one of the causes of interruptions being 'the performance of any step in the lawsuit' in relation to that crime. When an interruption occurred, a new statute of limitations for that crime would begin. To avoid endless interruptions, there was also a special statute of

[26] '1. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.

2. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.'

limitations, which was double the general one (6, 10, 16, 20 or 30 years) and when calculating this one, no interruptions were considered.

In 2018, the Constitutional Court issued Ruling No. 297/2018,[27] which stated that the interruption case provisioned by the R.C.C. was unconstitutional, basically due to reasons of unpredictability. The majority of the legal practice interpreted this as going back to the provisions before 2014, which stipulated that the interruption occurred with 'the performance of procedural acts which have to be communicated to the suspect'. However, in 2023, the Constitutional Court, with the Ruling No. 358/2022,[28] stated that actually the previous decision didn't impose going back to the old text and only removed the interruption case referred to from the enforceable provisions of the law. As a consequence, combined with the *lex mitior* rule, the Romanian legal system faced a very difficult situation: the special statute of limitations was practically removed from the legislation and, therefore, the general (and short) statute of limitations was applicable in all cases, this meaning that in all criminal cases the applicable statute of limitations was halved.

This led to the impossibility of establishing criminal liability in a whole lot of cases based on the fact that the statute of limitations was reached, including in cases with offences that fall under the PIF Directive. The Romanian courts and the Public Ministry have requested the CJEU to address preliminary questions in multiple cases regarding the issue of the statute of limitations.

Finally, with the judgment of the Court in Case C-107/23 PPU | Lin, the CJEU decided that 'National courts are required, in principle, to disregard national rules or case-law which create a systemic risk of such offences going unpunished'. This decision of the CJEU follows in the footsteps established by the decision in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, where the CJEU ruled against the risk of systematic impunity created through the decisions of the Constitutional Court from Romania in cases in which the EU's financial interest might be affected.

The decisions of the Constitutional Court where the Court declares the unconstitutionality of legal provisions are, in the Romanian system, assimilated to the law when it comes to their effects, being generally applicable and mandatory to all courts from the moment they are published in the Official Monitor.

What makes this even more interesting is that, in the Romanian system, the statute of limitations is regulated as an institution within the substantive law (in which, as we saw earlier, the EU law does not intervene that much), not of the procedural law (even though it obviously produces effects in the procedural area, too). Moreover, the Romanian general statute of limitations is compliant with the minimum recommendations from Article 12 of the PIF Directive and

[27] Published in the Official Monitor (Romania) No. 518, 25 June 2018.

[28] Published in the Official Monitor (Romania) No. 565, 9 June 2022.

there is no provision imposing on the necessity of the interruption causes in the PIF Directive.

The message sent out by the CJEU seems to be very clear: the protection of the financial interests of the EU seems to have priority at least over internal legislation issues that might arise, even though those legal provisions (as interpreted by the Constitutional Court for example) are very clear from a national point of view.

We have to mention at this point even though it might be obvious due to temporal reasons that in neither of the cases that led to the preliminary questions being addressed to the CJEU was the investigation carried out by the EPPO, as EPPO started operations only when both cases were in the appeal phase. However, we believe that these decisions are very relevant for predicting the status of files investigated by the EPPO in the future.

To sum up, these decisions of the CJEU seem to lay the groundwork for the future empowerment of the EPPO within national legal systems of the participating Member States, as in the analysed cases, the protection of the financial interests of the EU have been considered more important than complying with some Constitutional Court decisions which, within the national system, were definitely applicable and fell within the Rule of Law. The policy of the EU therefore seems to put the European Rule of Law above the national one, at least in these cases in which EU funds are endangered.

Whether this is a desirable tendency or not and whether this will lead to more cohesive EU cooperation or, on the contrary, prove to be the "Achilles heel" of the EU, only time will tell. To frame this conclusion differently, it seems that EPPO will definitely have a special place in each Member State's jurisdiction and the files that fall within its competence will definitely be handled with more caution by the national judicial authorities, as the EPPO might be considered by some, at least in part, above the national Rule of Law and authorised to cross it as long as it is compliant with the EU Rule of Law.

6. *Conclusions*

In this analysis we tried to offer a perspective on the activity of the EPPO through the lenses of the EU law, substantive criminal law and procedural criminal law, to identify trends that the EPPO and the EU are following.

In this context, it seems that the policy of the EU continues to highlight the European Rule of Law above the national one, as a consequence of the primacy of the EU principle. The creation and operation of the EPPO is about to open a lot more discussions in this area, especially since the criminal investigations field, until now, was mainly analysed in the cases of international judicial cooperation between EU Member States.

There is a lot of potential in these cases in which EU funds are endangered, as the general scope of the EPPO – protecting the financial interests of the EU – is a very noble one, which is common to all the Member States and can justify further developments in this area in regard to the primacy of EU law. This will definitely be a thing to be considered by the Member States not participating in the EPPO when deciding on whether to join this form of enhanced cooperation or not.

Whether this is a desirable tendency or not and whether this will lead to more cohesive EU cooperation or, on the contrary, prove to be the "Achilles heel" of the EU, only time will tell.

9.

SETTLEMENT OF CONFLICTS OF COMPETENCE BETWEEN THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND NATIONAL AUTHORITIES: THE SPANISH CASE

Alejandro Hernández López

1. *Introduction*

The establishment of the European Public Prosecutor's Office (EPPO) is undoubtedly one of the major milestones in the process of European integration. For the first time, a body of the European Union is empowered to autonomously investigate, prosecute and bring to trial the perpetrators of crimes falling within its material scope of competence, currently limited to PIF offences. Such extensive powers with such an impact on the national sovereignty of the participating States have so far not been granted to any other EU institution, body or agency acting in the Area of Freedom, Security and Justice.

The powers currently exercised by the EPPO – in essence, investigation of the offence and prosecution – are therefore equivalent to those exercised by the national prosecutors' offices in most Member States. Nonetheless, this is not the case in Spain since, as a general rule, public prosecutors are not in charge of the investigation phase in criminal proceedings. The persistence of the investigating judge (*juez de instrucción*) in the Spanish legal system, so often questioned in-

ternally,[1] does not substantially fit in with the design of the procedures and the central and decentralised structure of the EPPO. It has forced the Spanish lawmaker to take these singularities into account when enacting the legislation for the implementation of the EPPO in Spain: the LO 9/2021 (LOFE).[2] This law has established a special procedure that applies to criminal proceedings for offences over which the EPPO shall exercise its competence, in which the Spanish European Delegated Prosecutors, unlike their national counterparts, are in charge of the investigation phase.

Determining the competence of the EPPO in practice is not a simple task. Firstly, because the material scope of competence is determined by reference to Directive (EU) 2017/1371 (PIF Directive)[3] as transposed in each national legal system. The EPPO can extend its competence to investigations related to organised crime, as long as its core activities concern PIF offences, and to those offences inextricably linked to the former. Where these criteria are not met, the national authorities of the Member States participating in the enhanced cooperation retain the obligation to investigate and prosecute these kinds of criminal acts. Hence, discrepancies may arise in the interpretation of whether or not specific facts with the appearance of criminality fall or not within the EPPO's material scope of competence. In other words, it is possible for a conflict of competence to arise between the European body and the national authorities of the Member States when investigating the same criminal acts. In fact, the available data shows that several conflicts of competence have already arisen between the EPPO and different national authorities, four of them in Spain. This proves that this issue, far from remaining theoretical, is an actual and relevant phenomenon that is becoming one of the main stumbling blocks for the body in this first stage of operational activities.

Regulation (EU) 2017/1939 (EPPOReg)[4] expressly addresses this issue, referring to the procedure for resolving conflicts of competence in criminal matters provided for internally by each Member State. Hence, the resolution of the conflict will depend, in the first instance, on a decision of a national authority, which will attribute the competence over the case to its own national authority or to the EPPO. Based on this provision, the solution that the Spanish lawmaker has finally opted for is quite singular, giving two completely different authorities the capacity to resolve these kinds of disputes.[5] This complex scheme raises

[1] See the different draft proposals issued in 2011, 2013 and 2020 to replace the Criminal Procedure Law (LECrim) in Spain.

[2] BOE No. 157 of 2 July 2021.

[3] Directive (EU) 2017/1371 on combating fraud affecting the financial interests of the Union through criminal law (OJ L 198 of 28 July 2017).

[4] OJ L 283 of 31 October 2017.

[5] Article 9 LOFE.

numerous doubts between practitioners and scholars from the perspective of its compatibility with EU law. For that reason, this chapter focuses on the analysis of the system for resolving conflicts of competence between the EPPO and the national authorities designed by the EPPOReg, as well as its particular application in Spain. It ends with some *de lege ferenda* proposals for improving the system at both national and European level.

2. *Competence limits and exercise of the competence of the EPPO*

2.1. *Material scope of competence*

The material scope of competence of the EPPO is currently limited to the prosecution of offences against the financial interests of the European Union (PIF offences).[6] The definition of the specific conduct giving rise to this kind of offence, as well as the elements of substantive criminal law, is determined by EU law through the PIF Directive as transposed in each Member State.[7] This category of offences includes a wide range of criminal conduct, such as fraud, active or passive corruption or money laundering.

On the basis of the conduct defined by the PIF Directive, the EPPO has competence to investigate, prosecute and bring to judgment the perpetrators of the offences set out in the PIF Directive as transposed in each Member State, irrespective of whether the same conduct constituting an offence may be classified as constituting another type of offence under the national law of the Member States. However, in cases of VAT fraud, the EPPO shall have competence only where the intentional acts or omissions affect two or more Member States and involve a total damage of at least EUR 10 million.[8] The material competence of the EPPO also extends to offences in which a criminal organisation is involved, provided that the core of its activity is to commit one of the above offences.[9] The EPPOReg also provides that, in certain circumstances, the EPPO may extend its competence to any other offence inextricably linked to conduct constituting a PIF offence.[10]

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[6] Autonomous concept which, according to Article 2(3) EPPOReg, means 'all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them'.

[7] On this particular issue, R. SICURELLA, *The EPPO's material scope of competence and non-conformity of national implementations*, in *New Journal of European Criminal Law*, volume 14, issue 1, 2023.

[8] Article 22(1) EPPOReg.

[9] Article 22(2) EPPOReg.

[10] Article 22(3) EPPOReg. See J.E. GUERRA, *The material competence of the EPPO and the con-*

With regard to its territorial and personal competence,[11] the EPPO shall have competence over the conduct described above only if it is committed in whole, or in part, within the territory of one or more Member States or by a national of a Member State where a Member State has jurisdiction over such conduct when it is committed outside its territory; or when committed outside the territory of the Member States by a person subject, at the time of the commission of the offence, to the staff regulations of officials or the conditions of employment of other servants, provided that a Member State has jurisdiction over such conduct when committed outside its territory.

2.2. *Exercise of competence*

The effective exercise of the EPPO's competence takes place through two main channels: the opening of an *ex officio* investigation or the exercise of the right of evocation in respect of a national investigation already under way. In the first case, where there is *prima facie* evidence to believe that an offence falling within the competence of the EPPO is being or has been committed, a European Delegated Prosecutor would be responsible for opening an investigation in accordance with the rules laid down in his national law. In the second case, the EPPO, after receiving information from a judicial or police authority in a Member State about a national investigation already under way that might fall within its scope of competence, would take a decision on whether or not to exercise its right of evocation or, in other words, to assume or not the investigation or prosecution of the case. The right of evocation can be exercised provided a national investigation has not already concluded and that an indictment has not been submitted to a court. In any event, any citizen can bring to the attention of the EPPO the alleged commission of a PIF offence by filling in an interactive form available on its website.[12]

However, not all criminal acts that could potentially fall within the competence of the EPPO shall lead to the initiation of a criminal investigation conducted by a European Delegated Prosecutor. On the contrary, there are exhaustive rules governing the actual exercise of the competence depending on the quantitative and qualitative characteristics of the criminal conduct allegedly committed. Thus, where the PIF offence is likely to cause damage of less than EUR 10 000, the EPPO can exercise its competence only where the case may

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cept of inextricably linked offences, in *Eucrim*, issue 1, 2021, pp. 49-50; D. VILAS ÁLVAREZ, *The Material Competence of the European Public Prosecutor's Office*, in L. BACHMAIER WINTER (ed.), *The European Public Prosecutor's Office: The Challenges Ahead*, Springer, Cham, 2018, pp. 35-37.

[11] Art. 23 EPPOReg. See L.M. JIMÉNEZ CRESPO, *La competencia material, temporal y personal de la Fiscalía*, in S. GUERRERO PALOMARES (ed.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021*, de 1 de julio, Aranzadi, 2023, Cizur Menor, pp. 325-355.

[12] *s://www.eppo.europa.eu/en/form/eppo-report-a-crime*.

have repercussions at Union level that so require attention, or when officials, other servants of the Union or members of its institutions are under investigation as suspects of having committed the offence. [13]

As regards the exercise of its competence over inextricably linked offences, [14] the EPPO must refrain from exercising competence where the maximum penalty provided for by national law for the PIF offence is equal to or less severe than the penalty provided for one of these offences, unless the latter is to be regarded as instrumental. Nor may it exercise competence if there is any reason to suppose that the harm actually or potentially caused to the Union's financial interests is not greater than the harm caused or likely to be caused to another victim, unless, with the consent of the competent national authorities, it is considered that the EPPO is in a better position to investigate or prosecute. Assessing whether one of these circumstances exists is not a simple task in practice. For that reason, the EPPOReg requires that the final decision be taken after consultation with the competent national authorities, which will assume competence over the case only in the event that the EPPO decides not to exercise it.

3. *Settlement of conflicts of competence according to the EPPO Regulation*

3.1. *Decision at the national level*

Although the European Public Prosecutor's Office's competence over PIF offences should be considered to be prevalent and mandatory under the rules on its exercise based on Articles 25 and 27 of the EPPOReg, the complexity of its material scope of competence makes it possible in practice for conflicts to arise between the European body and the national authorities. Article 25(6) of the EPPOReg expressly addresses this problem, providing that if there is a dispute between the EPPO and the national authorities as to whether or not the facts fall within the material scope of competence of the European body, the question shall be settled by the national authority competent to decide on the attribution of competences concerning prosecution at the national level, which shall be designated by each participating Member State in due course. Three basic ideas can be drawn from the wording of this provision:

i) the scope of possible conflicts of competence between the EPPO and the national authorities is restricted to the specific cases referred to in Articles 22(2) and (3), 22(2) and (3), and 25(2) and (3) of the EPPOReg. Consequently, no

[13] Article 25(2) EPPOReg.

[14] Article 25(3) EPPOReg. See O. MUÑOZ MOTA, *Ejercicio de la competencia*, in S. GUERRERO PALOMARES (ed.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021*, de 1 de julio, Aranzadi, Cizur Menor, 2023, pp. 357-384.

conflict of competence could theoretically arise outside these cases. In particular, when the subject matter of the investigation is limited solely to the possible commission of PIF offences;

ii) conflicts of jurisdiction between the EPPO and the national authorities must be settled, at least in the first instance, by a national authority of that Member State, designated by that same Member State and through the procedure established internally; and,

iii) the national authority designated by each Member State must have the characteristics laid down in Article 25(6) of the EPPOReg and, specifically, be 'competent to decide on the attribution of competences concerning prosecution'.

The main problem with Article 25(6) of the EPPOReg from the Spanish criminal procedure perspective lies in the very definition of the competent authority to resolve the conflict used, as this does not fit neatly with the functions exercised by public prosecutors and judges in Spanish criminal proceedings. Unlike in the vast majority of Member States,[15] in which both the investigation and the prosecution is exercised by public prosecutors, there is no single figure in Spain that fully identifies with the specific characteristics required by the EPPOReg, since the exercise of criminal prosecution, the conduct of the investigation and the settlement of conflicts of competence are distributed among different judicial authorities *lato sensu*, with diverse statutes and powers. Indeed, in Spain, although our Public Prosecutor's Office (*Ministerio Fiscal*) may fit the definition of 'authority exercising prosecution' provided for in the EPPOReg, it does not exercise it exclusively, since in the Spanish system both the victim of the offence and, in the case of public offences, any Spanish citizen, can bring the criminal action autonomously.[16] However, Spanish public prosecutors, as a general rule, do not direct the investigation phase, nor are they in charge of the investigation measures. That task corresponds in Spain to the objectively and territorially competent investigating judges, and it is up to the latter to raise any conflicts of competence – in Spanish terminology, *cuestiones de competencia* – that may arise, conflicts that will be settled by their common hierarchical superior Court.

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[15] There are few European jurisdictions in which the figure of the investigating judge still survives, and even fewer that provide for his or her intervention in a generalised manner in their criminal proceedings. On the Belgian case, see the perspective of A.L. CLAES, A.L. WERDING, V. FRANSSEN, *The Belgian Juge d'Instruction and the EPPO Regulation: (Ir)Reconcilable?*, in *European Papers*, volume 6, 2021, pp. 357-389.

[16] This possibility (*acusador popular*) is based on Article 125 of the Spanish Constitution. However, this figure is not allowed in EPPO-related criminal proceedings since it has been expressly excluded from the new special procedure by Articles 19(3) and 36(5) LOFE.

3.2. *Role of the Court of Justice of the European Union*

While the EPPOReg prescribes that the settlement of the conflict must take place primarily at the national level, it also provides for the possible intervention of the Luxembourg Court in the resolution of potential conflicts of competence between the European body and the national authorities of the Member States. In this regard, Article 42(2)(c) of the EPPOReg provides that the Court of Justice of the European Union (CJEU) shall have jurisdiction to give preliminary rulings on the interpretation of Articles 22 and 25 of the EPPOReg in relation to any conflict of competence between the EPPO and the competent national authorities.

It should be noted that, unlike Article 25(6) of the EPPOReg, Article 42(2)(c) of the EPPOReg extends the scope of cognition of the Luxembourg Court to any question brought before it in relation to the material scope of competence of the EPPO (Article 22 of the EPPOReg) and the exercise of its competence (Article 25 of the EPPOReg). With that said, the actual importance of this provision is that it allows the CJEU to exercise a sort of supranational judicial review on competence matters. In effect, the final decision on the conflict of competence arising between a national authority of a Member State and the EPPO will no depend exclusively on the decision of a national authority of that Member State issued after a procedure established in its domestic law: it would be possible to "review" this decision through a different interpretation of EU law made by the Luxembourg Court.

However, the power of the CJEU to rule on the conflict should not be considered as equivalent to the power to settle the conflict granted to the domestic authorities. What the EPPOReg provides for is just the possibility for the Luxembourg Court to give a preliminary ruling on the interpretation of the provisions on the competence of the EPPO prescribed by the EPPOReg. In view of the limitations inherent in EU law and, specifically, in Article 267 of the TFEU, this prevents the CJEU from ruling *ex officio*, since in order to give a preliminary ruling, a request must be made by a court or tribunal of the Member State concerned. Nor can it resolve the conflict directly, since the answer of the Luxembourg Court will have the limited scope conferred on it by the very terms in which the question was posed, from which the national authorities must draw the consequences applicable to the specific circumstances of the conflict.

Beyond the limitations on the scope of the CJEU's cognition in the preliminary ruling procedure, it is also necessary to bear in mind those relating to the standing limitations to request the ruling. Under the current system, mainly established by Article 267 of the TFEU and Article 93 *et seq.* of the Rules of Procedure of the CJEU, only 'courts or tribunals' of the Member States are authorised to request a preliminary ruling. This, of course, rules out direct requests made by individuals, including the person under investigation – although he/she may suggest to the competent court the submission. But it also rules out any

other type of public or even judicial body that cannot be considered a 'court or tribunal' from the EU law perspective. Determining the jurisdictional nature of the sending authority is, therefore, key to determining, in turn, the possibility to raise the question.

In this regard, the consideration of an authority as a 'court or tribunal' in the context of a reference for a preliminary ruling is not a matter left to the discretion of the Member States. On the contrary, for the purposes of Article 267 of the TFEU, the concept of 'court or tribunal' must be interpreted in accordance with EU law and in the light of the case law of the Luxembourg Court. In this regard, the CJEU has already established an autonomous concept of 'court or tribunal' in relation to references for preliminary rulings which takes into account different factors, such as the legal origin of the body, its permanence, the mandatory nature of its jurisdiction, the application by the body of rules of law using an *inter partes* procedure, its independence, as well as whether in the proceedings in question it is acting in the exercise of judicial activity. [17] On the basis of these factors and bearing in mind the latest case law of the Luxembourg Court on the matter, it seems clear that public prosecutors do not fall within this concept, as they do not exercise a judicial function and would therefore not be entitled to refer questions for a preliminary ruling. Even more problematic would be to grant the EPPO the ability to refer preliminary ruling requests to the CJEU, given that neither its nature – it is not a court or tribunal – nor its legal status – it is not a judicial authority of a Member State, but a European body – seems to met the requirements of Article 267 of the TFEU.

Consequently, the current wording of Article 267 of the TFEU and the actual interpretation given by the Luxembourg Court would prevent the EPPO itself and any of its structures, including the European Delegated Prosecutors, from making a reference for a preliminary ruling. As a result, the supranational judicial review provided for in Article 42(2)(c) of the EPPOReg is not only limited in its purpose due to its preliminary ruling nature, but is also inevitably asymmetrical, since only the national authorities of the Member States – and within these, those that meet the characteristics for being considered a court or tribunal for the purposes of EU law – may refer a request for a preliminary ruling in the event that the disagreement over the competence issue persists.

[17] *Cf* CJEU judgments of 2 September 2021, *XK*, C-66/20, EU:C:2021:670, §§ 33-35; of 21 de January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, § 51; of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, § 27; of 31 de May 2005, *Syfait and Others*, C-53/03, EU:C:2005:333, § 29; of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39.

4. *Settlement of conflicts of competence according to the Spanish law*

4.1. *The heterodox system introduced by the LO 9/2021*

The implementation of the European Public Prosecutor's Office in Spain was expected to be particularly complex due to our uncommon system of criminal procedure, in which the investigating judge prevails. Although the opportunity for a change of model has been discussed for a long time, this change has not yet taken place and is still far from happening: it should be borne in mind that the 2020 Draft Criminal Procedure Law was not finally adopted in the last legislature, which, added to the wide *vacatio legis* period that was proposed in the text (6 years), made any prospect of transition in the short term unfeasible. This forced Spanish lawmakers to enact a specific law for the implementation of the EPPOReg in Spain – the LO 9/2021 or LOFE – establishing a special criminal procedure. [18]

Within the scope of this special procedure created by the LOFE, the Spanish Delegated Prosecutors are in charge of the investigation phase. [19] In contrast, the Central Investigating Judges (*Jueces Centrales de Instrucción*) act in this procedure as a "judge of freedoms" [20] responsible, among other functions, for authorising investigative measures restricting fundamental rights. Thus, the need to apply the EPPOReg in due time and form has forced Spanish lawmakers to establish a kind of exception to the system that prevails in the rest of criminal proceedings in Spain – with the exception of juvenile justice, and which will undoubtedly serve as a test for its possible future extension to all criminal procedures.

Beyond the brief features of the Spanish law described above, what is relevant for the purpose of this chapter is the analysis of the specific formula chosen by Spanish lawmakers to address the resolution of possible conflicts of competence that may arise between the Spanish authorities and the EPPO. In this respect, the LOFE establishes a resolution procedure, differentiating between two different scenarios:

i) When the facts are being preliminarily investigated by the Spanish public prosecutor within the framework of the so-called "*diligencias de investigación del Ministerio Fiscal*". [21] In these cases, where the case has not yet been brought to court and therefore criminal proceedings have not yet been initiated, the con-

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[18] For a review of the main characteristics of this special procedure, see B. VIDAL FERNÁNDEZ, *La actuación de la Fiscalía Europea en el proceso penal español regulada en la LO 9/2021*, in *Revista de derecho y proceso penal*, No. 66, 2022, pp. 139-173.

[19] Article 17 LOFE.

[20] Article 8 LOFE.

[21] Article 9(1) LOFE.

flict between the EPPO and the Spanish authorities will be decided by the Head of the Spanish Public Prosecutor's Office (*Fiscal General del Estado*), after hearing a Board of Chamber Prosecutor through a new procedure provided for in their statute law.[22] The decision on the conflict will be adopted by decree issued by the Head of the Spanish Public Prosecutor's Office.

ii) When the facts are already under judicial investigation by an investigating judge.[23] In these cases, the discrepancy in competence will be considered and settled as a *cuestión de competencia*, the resolution of which will correspond to the Criminal Chamber of the Supreme Court, following a report from the public prosecutor. The decision on the conflict will be adopted by means of an order of the Supreme Court.

Thus, Spanish lawmakers have chosen to implement the obligation deriving from Article 25(6) of the EPPOReg through the establishment of a particular system that empowers two different competent authorities to rule on a possible conflict with the EPPO. The competent body in Spain to decide on the issue will vary depending on whether the investigation carried out at the national level is already judicialised, in which case the Second Chamber of the Supreme Court shall settle the conflict, or whether it is not, in which case the Head of the Spanish Public Prosecutor's Office decides.

The solution introduced by the LOFE seems to consider both scenarios equivalent – a preliminary investigation opened by the public prosecutor and a judicial investigation after the issue of criminal proceedings, when they should be clearly differentiated. Despite their name, the nature and scope of the so-called "*diligencias de investigación*" that prosecutors can carry out in Spain[24] is by no means equivalent to a judicial investigation carried out by investigating judges. In contrast to the latter, they do not have a jurisdictional nature, they precede the initiation of criminal proceedings and only empower the prosecutor to carry out himself or order the Judicial Police to make the appropriate investigative measures to verify the criminal nature of an act or the responsibility of those who may have participated in it. These investigative measures made under the public prosecutor's authority are in no case an alternative to the judicial investigation, but just a mere possibility which, although it may facilitate the initiation of criminal proceedings, in no case replaces it. This is reflected in the numerous restrictions of both a temporal and material nature that Spanish law imposes on the practice of this kind of investigative measures. Specifically, they are subject to compliance with very restrictive time limits – 6 months in general, up to 12 months when the Special Prosecutor against Corruption and Organised

[22] *Cf* Article 15 and 21 *bis Ley* 50/1981 (BOE No. 11 of 13 January 1982).

[23] Article 9(2) LOFE.

[24] *Cf* Article 5 *Ley* 50/1981 and Article 773.2 LECrim.

Crime is acting, and most of the measures depriving fundamental rights, such as the home entry and search or the interception of communications, can never be adopted within this framework. But the key objection is that they are always subject to the non-existence of criminal proceedings on the same facts, in which case they must cease immediately. In other words, a conflict of competence cannot coexist or arise between a preliminary investigation opened by a Spanish public prosecutor and a judicial investigation into the same facts, as the judicial investigation always prevails.

4.2. *Preliminary ruling request*

Besides specifying the competent national authorities and the internal procedure for settlement of conflicts of competence that may arise with the EPPO, Spanish lawmakers have expressly introduced in the LOFE a provision derived from Article 42(2)(c) of the EPPOReg in relation to the possibility of requesting a preliminary ruling on the case before the CJEU. On this point, the Spanish law uses a generic wording of reference to the provisions of the EPPOReg,[25] and it is precisely in this area where the problems of the complex system implemented in Spain are mainly manifested.[26]

In this sense, the scenario contemplated in Article 9(2) of the LOFE, in which the acts are already subject to criminal proceedings in Spain and it is the Spanish investigating judge who raises a *cuestión de competencia* before the Second Chamber of the Supreme Court,[27] is not problematic from the point of view of raising a preliminary ruling request to the CJEU, since there is no doubt that both Spanish authorities – investigating judges and Supreme Court – are to be considered 'court or tribunal' for the purposes of Article 267 of the TFEU. So far, three questions of competence of this kind have already been raised in Spain, and in neither of them has our Supreme Court considered it necessary to refer a question to the Luxembourg Court for a preliminary ruling.[28]

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[25] Article 9(3) LOFE.

[26] Issue that was already exposed in A. HERNÁNDEZ LÓPEZ, *Resolución de Conflictos de Competencia entre la Fiscalía Europea y las Autoridades Nacionales: Sobre la Problemática Bicefalia Española*, in A. MIRANDA RODRIGUES, A. NIETO MARTÍN *et al.* (eds.), *Procuradoria Europeia e criminalidade económico-financiera*, Faculty of Law of the University of Coimbra, Coimbra, 2023, pp. 307-344.

[27] On this particular issue, see C. ARANGÜENA FANEGO, *Cuestiones de competencia entre jueces de instrucción y la Fiscalía Europea*, in *Cuadernos Digitales de Formación*, No. 12, 2023.

[28] *Cf* ATS No. 20136/2023, of 23 February 2023, ES:TS:2023:1764A; ATS No. 20424/2022, of 9 June 2022, ES:TS:2022:9109A. In the latter order, FD 4th, the Second Chamber mentions the possibility of referring a question to the CJEU for a preliminary ruling: '*La normativa alumbrada para delimitar esas competencias es especialmente alambicada sinuosa y oscura. Es preciso en este primer acercamiento analizarla con cuidado; sin que a priori pudiera descartarse una consulta al Tribunal de Justicia de la Unión Europea en caso de surgir alguna duda atinente a normativa europea*'.

However, in the scenario contemplated in Article 9(1) of the LOFE, in which the conflict arises between the EPPO and the Spanish Public Prosecutor's Office in the context of a non-judicial preliminary investigation, it does not seem possible to activate the supranational judicial control of the CJEU. In these cases, it is ultimately the Head of the Spanish Public Prosecutor's Office who decides, so that if the conflict is maintained with the EPPO or there are doubts about the interpretation of the provisions of the EPPOReg on competence, neither of these bodies – Head of the Spanish Public Prosecutor's Office nor the EPPO – would, in principle, meet the necessary conditions to be able to refer the question to the Luxembourg Court for a preliminary ruling.

Indeed, as has already been pointed out above, the referral of questions for preliminary rulings under Article 267 of the TFEU is reserved to courts and tribunals of the Member States, this being an autonomous concept of EU law. So far, the case law of the CJEU has systematically denied the status of a court or tribunal to national public prosecutors. A recent example is the decision of the Luxembourg Court in relation to a question raised by the Public Prosecutor's Office of Trento concerning the execution of a European Investigation Order, in which the question was dismissed on the grounds that the Italian public prosecutor did not exercise a judicial function in the main proceedings.[29]

This problem, initially raised in the abstract, has already arisen in Spain following a particularly high-profile case involving the purchase of facemasks during the pandemic with European funds. After these facts were reported, the Special Prosecutor's Office against Corruption and Organised Crime in Spain opened a non-judicial preliminary investigation for the crimes of embezzlement, influence peddling and forgery of documents. Subsequently, the EPPO considered itself competent to investigate all of the facts and exercised its right of evocation, as it understood that the embezzlement of public funds had been committed with European funds, considering that the rest of the crimes under investigation were inextricably linked offences. After the conflict arose following the Special Prosecutor's refusal to accept the European body's criteria, the Head of the Spanish Public Prosecutor's Office decided to divide the investigation of the facts into two different investigations, in such a way that the EPPO would investigate the embezzlement offence, while the Spanish prosecutor would continue with his investigation of the influence peddling and forgery of documents offences, as she considered that the latter could not be considered to be inextricably linked.

Leaving aside the discussion on the correctness of this solution in terms of procedural efficiency, what is really of importance for the purpose of this contribution is the fact that the EPPO strongly opposed this decision, issuing two different public statements in which it questioned both the Spanish settlement

[29] CJEU judgment of 2 September 2021, *XK cit.*, §§ 33-46.

procedure – in which it was not given a hearing – and the failure to submit a preliminary ruling request to the Luxembourg Court, as it understood that in this case it was appropriate to do so in view of the interpretative doubts.[30]

It is precisely here – the request for a preliminary ruling – where the issue lies. Despite the mandate of Article 42(2)(c) of the EPPOReg, actually none of the parties to the conflict (the EPPO and the Spanish Public Prosecutor's Office) appeared to be entitled to request it, because none of them can be considered a 'tribunal or a court' with the meaning of Article 267 of the TFEU according to the case law of the CJEU. Thus, in the Spanish case, in the context of conflicts that arise between the EPPO and the Spanish Public Prosecutor's Office in the framework of non-judicial preliminary investigations, there is no possibility of requesting a preliminary ruling before the CJEU, which would lead us inexorably to conclude that we are dealing with a possible case of non-compliance with Article 42(2)(c) of the EPPOReg.

Without prejudice to the above conclusion, it could be interpreted that this apparent non-compliance can be remedied at a deferred point in time, since if the non-judicial preliminary investigation ends up in the opening of criminal proceedings, there would be the possibility of raising such a preliminary ruling question then.[31] However, in my opinion, this eventual solution is not even valid for all cases, because non-judicial preliminary investigations carried out by the Spanish public prosecutors do not necessarily lead to the opening of criminal proceedings. And if they do not lead to the initiation of criminal proceedings, the conflict of competence would have been definitively settled by the Head of the Spanish Public Prosecutor's Office through a non-adversarial procedure and without the possibility of requesting a preliminary ruling. Precisely, an example of this scenario was the case of the purchase of the masks mentioned above: three months following the decision issued by the Head of the Spanish Public Prosecutor's Office, the Spanish prosecutor decided to close its preliminary investigation because it found no evidence of a crime having been committed. The EPPO did the same a few months later. In practice, this means that the national part of the investigation was not the subject of any criminal proceedings in Spain and, therefore, there was no possibility of requesting a preliminary ruling at a later stage.

In this case, it might also be asked whether the EPPO could regain competence over the "national part" of the case after the Spanish public prosecutor's decision to withdraw the preliminary investigation. In my opinion, there would

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[30] See the statements made by the EPPO on 28 March 2022, available at *https://www.eppo.europa.eu/en/news/eppos-statement-competence-adjudication-spain*, and on 30 March 2022, available at *https://www.eppo.europa.eu/en/news/eppos-statement-decision-fiscal-general-del-estado*.

[31] In this sense, see C. RODRÍGUEZ MEDEL-NIETO, *La Fiscalía Europea. Primer año de aplicación del Reglamento (UE) 2017/1939 y de la Ley Orgánica 9/2021-LOFE*, Carmen Rodríguez-Medel Nieto,Madrid, 2022, p. 125.

be no obstacle to this, given that the decision to withdraw the case made by the Spanish public prosecutor does not in any circumstance produce the effect of *res judicata*, nor the consequences that might follow from it – in particular, the infringement of the *ne bis in idem* principle.

5. *The way forward: reflections and proposals*

5.1. *At the Spanish level*

After the brief analysis made in the previous sections, it is clear that Spanish law presents some dysfunctionalities in relation to the dispute resolution procedure which, if not solved, could even lead to infringement proceedings. To avoid this, in my opinion, it is necessary to amend or even repeal Article 9(1) of the LOFE. The current dual decision-making system that it establishes, completely unnecessary from a procedural point of view, gives undue significance to the Spanish prosecutor's preliminary investigative measures, equating this scenario, for the purposes of resolving conflicts of competence with the EPPO, to that of an actual judicial investigation. Therefore, any alternative proposal necessarily entails finding a system compatible with the Spanish criminal procedure law and with the EPPOReg.

Prior to the enactment of the LOFE, I had already warned [32] that, given the difficult fit of Article 25(6) of the EPPOReg in the Spanish system, the appropriate procedural solution in our law would consist of forwarding the exercise of this power to settle conflicts of competence by prosecutors through the promotion of a "*cuestión de competencia*" to the competent court. [33] Retrieving this early academic proposal, it would be sufficient to reserve to one single court, the Second Chamber of the Supreme Court, the resolution of all conflicts of competence between the Spanish authorities and the EPPO. This proposal implies accepting that Spanish public prosecutors and European Delegated Prosecutors have different legal and functional status and independence, so that it is not possible for a conflict of competence to arise between them.

Another possible solution, perhaps less drastic, would be to ensure that the decision on the conflict made by the Head of the Spanish Public Prosecutor's Office in cases falling under Article 9(1) of the LOFE could be reviewed by a court. The swiftest option would be to provide for a direct appeal to the Second Chamber of the Supreme Court on the decision taken on the conflict, which would mean adding a new legal remedy to our system. Following a more canon-

[32] A. HERNÁNDEZ LÓPEZ, *El papel de Eurojust en la resolución de conflictos de jurisdicción penal en la Unión Europea. Propuestas legislativas*, Thomson Reuters-Aranzadi, Cizur Menor, 2020, pp. 218-220.

[33] Article 3 *Ley* 50/1981.

ical procedural way, another solution would be to ensure that, in the event of disagreement, the EPPO – through the European Delegated Prosecutor – could reproduce its claim before the competent investigating judge, forcing the initiation of criminal proceedings, a solution inspired by the current Spanish rules on conflicts of criminal jurisdiction between Member States of the European Union.[34] In either of the two options proposed, the underlying purpose is to assure that the final decision on the conflict could be adopted, if necessary, by a Spanish court, which would allow the raising of a request for a preliminary ruling in compliance with Article 42(2)(c) of the EPPOReg.

5.2. *At the European Union level*

In addition to the problems that have been described at the Spanish level, there are good reasons to think that the interpretation of Article 42(2)(c) of the TFEU in relation to Article 267 of the TFEU may also generate problems at the European level. Indeed, many Member States have designated the Head of their Public Prosecutor's Office as the authority responsible for resolving conflicts of competence that may arise between their authorities and the EPPO. As in Spain, the shadow of non-compliance with EU law may hang over these countries if they have not provided for a procedural mechanism that would allow a court to refer the dispute for a preliminary ruling to the CJEU. However, this debate could become completely sterile in the future if certain actions are taken at the European level. In the following lines, we will reflect on some of them in a plainly theoretical view.

Although the current case law of the Luxembourg Court on the autonomous concept of 'a court or tribunal' within the meaning of Article 267 of the TFEU does not appear to be compatible with the referral of questions by national public prosecutors, there is nothing to prevent this restrictive interpretation from changing in the future. In fact, it should not be forgotten that the case law of the CJEU on this particular issue is certainly casuistic,[35] sometimes even recognising the capacity to refer questions for preliminary rulings to bodies of a dubious jurisdictional nature.[36] On the other hand, in recent cases, the CJEU has extended the standing to refer questions for a preliminary ruling beyond what was con-

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[34] On this issue, see A. HERNÁNDEZ LÓPEZ, *Conflicts of Jurisdiction and Transfer of Proceedings in the European Union*, Springer-Giappichelli, Cham-Torino, 2023, specifically pp. 54-64.

[35] In this regard, the words of Advocate General Ruíz-Jarabo Colomer in case *De Coster*, C-17/00, EU:C:2001:366 were particularly graphic: 'The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted.'

[36] *Cf* CJEU judgments of 29 November 2011, *De Coster*, C-17/00, EU:C:2001:651; of 6 October 1981, *Broekmeulen*, 246/80, EU:C:1981:218, §§ 8-17; of 17 October 1989, *Danfoss*, 109/88, EU:C:1989:383, §§ 7-9.

sidered by the majority doctrine, as in the case of the referral of questions for a preliminary ruling by the issuing judicial authority on the execution of a European Arrest Warrant.[37] Hence, a future ruling of the CJEU admitting the referral of a question for a preliminary ruling posed by national prosecutors should not be completely discarded, especially if it considers that they meet the requirements of independence and that the procedure for deciding on the conflict of competence is of a jurisdictional nature for the purposes of Article 267 of the TFEU.

In order for this eventual – and highly improbable – overrule to take place, it would be necessary for one of the national Public Prosecutors' Offices granted with competence to decide on the conflict to ask for a preliminary ruling. Once the question has been raised, the CJEU would be obliged to examine its admissibility on a preliminary basis, in which case it would have the opportunity to consider a possible extension of the interpretation of the concept of 'a court or tribunal' in view of Article 267 of the TFEU. In my opinion, this same scheme could occur even if it is the EPPO itself that eventually decides to raise the question, a scenario that is even more problematic and unlikely given its status as a European body and the contrary position that the body itself currently maintains on this possibility.

If the interpretation of the Luxembourg Court leaves no room for extending the standing of national public prosecutors' offices to refer questions for preliminary rulings, the next solution that could be considered is the opportunity of a future revision of the treaties that would extend the scope of application and standing of Article 267 of the TFEU, thus expressly allowing judicial authorities *lato sensu*, or even the EPPO itself, to request preliminary rulings. The rationale for adopting this measure could lie in the need to adapt the mechanisms for access to the CJEU to the new reality of the Area of Freedom, Security and Justice. The proliferation of mutual recognition instruments, agencies and European bodies, whose complexity and range of functions is also increasing, could motivate the need to give the opportunity to request the interpretation of the Luxembourg Court to bodies which, without being of a jurisdictional nature, do participate and decide actively in this complex system of administration of justice based on judicial cooperation in criminal matters and the application of the mutual recognition principle. However, the possible reform of Article 267 of the TFEU described above, in addition to being chimerical in the current political context, could, in my opinion, completely distort the original meaning and usefulness of the preliminary ruling question. Therefore, although it is feasible in theory, I have serious doubts as to whether it would be an adequate solution in practice.

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[37] *Cf* CJEU judgments of 31 January 2023, *Puig Gordi and others*, C-158/21, EU:C:2023:57; of 25 July 2018, *AY*, C-268/17, EU:C:2018:602.

It is clear from a systematic reading of the EU law and, in particular, Article 42(2)(c) of the EPPOReg, that the intention of the European lawmaker was to provide for a sort of supranational mechanism for the resolution of competence disputes. Certainly, during the negotiations for the adoption of the EPPOReg, the European Parliament pointed out the importance of being able to request direct judicial review by the CJEU.[38] However, the limitations of the current primary law and of the different procedures applicable before the CJEU inevitably led to the establishment of the preliminary ruling procedure as the only feasible procedural channel.

Unfortunately, the current configuration of the preliminary ruling procedure as the main control mechanism is manifestly insufficient. In addition to its limited scope, there is little or no control over the national authority's assessment of the need to request it. Indeed, although Article 267(3) of the TFEU requires a preliminary ruling to be made when the decision issued by the national court is not subject to appeal, the appropriateness and necessity of making such a reference can only be assessed and controlled in practice by the national court hearing the dispute,[39] without the parties or even the EPPO being able to refer questions to the CJEU on their own. This inevitably leads to an asymmetrical interpretation of this obligation by the different courts of the Member States. Furthermore, the response of the Court of Luxembourg is in any event constrained by the specific terms in which the question is put, which may prevent the CJEU from making a sufficiently precise ruling as required to resolve the conflict. Consequently, the preliminary ruling procedure as the main channel for the Luxembourg Court to rule on this matter is not effective for ensuring an adequate supranational judicial review over the resolution of the conflict.

In the light of the current degree of European integration and the extensive powers conferred on the EPPO, the possibility could be considered of creating a new specific procedure for the CJEU to rule directly and bindingly on all conflicts of competence that could be brought before it by any of the parties involved – national authorities or the EPPO. Under the current wording of the treaties, it would be possible to use Article 257 of the TFEU, which allows the creation, by means of regulations adopted under the ordinary legislative proce-

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[38] Resolution on the European Public Prosecutor's Office and Eurojust, Document 2016/2750 (RSP), § 5. See M. PANZAVOLTA, *Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?*, in L. BACHMAIER WINTER (ed.), *The European Public Prosecutor's Office: The Challenges Ahead*, Springer, Cham, 2018, specifically pp. 79-81.

[39] Notwithstanding, it is true that failure to comply with the obligation to make a reference for a preliminary ruling could lead to the initiation of infringement proceedings, as was in CJEU judgment of 4 October 2018, *Commission v France (Income from movable capital)*, C-416/17, EU:C:2018:811. In Spain, our Constitutional Court has declared that the failure to raise a preliminary ruling request when the requirements to apply the "clarified act" doctrine are not met constitutes an infringement of the fundamental right to a due process of law, *cf* STC 58/2019, 6 May 2019, ES:TC:2019:58.

dure, of courts of first instance specialising in certain matters and/or in certain appeals brought in specific areas. On the basis of this provision, the option of creating a court specialised in settling conflicts of competence between the EPPO and the national authorities could be considered. This court, which would be attached to the General Court, would hear such disputes at first instance and its decisions could be subject to appeal or cassation depending on the provisions of the regulation under which it is set up. This, in turn, would imply the reform of the current Article 42 of the EPPOReg to bring it into line with the provisions of the new procedure before the specialised court.

Again, a proposal for a specialisation within the General Court, while theoretically feasible, does not seem reasonable from a practical point of view. The creation of such a new court and/or procedure would not only clash with the current wording of Article 42(2)(c) of the TFEU, forcing its amendment, but would also certainly open an intense debate on the limits of European action in this area in the light of the principles of proportionality and subsidiarity. Hence, it does not seem plausible that the same Member States that have had to establish an EPPO with a hybrid structure and through enhanced cooperation would now agree to completely surrender their sovereignty in relation to the settlement of conflicts of competence. For that reason, this *de lege ferenda* proposal must therefore be regarded as mere academic long-term thinking but extremely unrealistic given the current European context.

6. *Final remarks*

Leaving it to the Member States to determine the authority and procedure for resolving conflicts of competence between the EPPO and their national authorities is a sign of reluctance to cede sovereignty in this area. This reluctance is not only reflected in this specific issue but permeates the EPPOReg: from its structure to the design of its procedures, constant references to national law exist. This inevitably leads to the maintenance of heterogeneous and asymmetrical systems, in which the rights and capabilities of the parties vary ostensibly depending on the Member State in which the conflict settlement procedure takes place.

The preliminary ruling procedure as the main mechanism of supranational control, although it will be key in the future to refine and polish the provisions of the EPPOReg and its application in the Member States, entails assuming its limitations in terms of the subject matter of the question and the standing to raise it. Only through the future case law of the CJEU on this issue will we be able to determine the real impact of its decisions on the resolution of conflicts, a study that unfortunately we cannot undertake now due to lack of decisions in this matter. [40]

[40] So far, the Court of Justice has only had the opportunity to rule on other issues, such as the

Despite the problems noted throughout this work, the reality is that they have not so far had a significant negative impact on the operational work of the EPPO. In fact, by 31 December 2022, the EPPO had as many as 1117 active investigations, which contrasts with the small number of serious conflicts of competence known to date. This demonstrates not only the capacity of the European body to meet its objectives, but also that communication and collaboration with the national authorities is sufficiently fluid and coordinated. This pattern must continue in the future, since maintaining a relationship based on loyal cooperation between the EPPO and the national authorities is crucial to ensure the success and continuity of this European body, as well as its extension to other Member States and the future assumption of new powers and competences. [41]

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regime of cross-border investigations, *cf* CJEU judgment of 21 December 2023, *G. K. and Others (Parquet européen)*, C-281/22, EU:C:2023:1018. In Spain, there is a pending request for a preliminary ruling in relation to the lack of access to an effective remedy in respect of certain decisions of the European Delegated Prosecutors (Case C-292/23).

[41] European Public Prosecutor's Office Annual Report 2022, Luxembourg: Publications Office of the European Union, 2023, pp. 4 and 10.

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SECTION 3

EPPO AND OTHER EU INSTITUTIONS: FURTHER PROTECTING THE RULE OF LAW

10.
OLAF AND EPPO: INTERACTIONS AND COLLABORATION

Petr Klement

1. *Introduction*

In October 1999, Regulation 1073/1998 was enacted by the European Parliament and the Council, leading to the conversion of UCLAF into the present-day European Anti-Fraud Office (OLAF). This transformation bestowed upon OLAF a dual role, functioning both as an investigative office and a policy service within the Commission.

Since then OLAF has proven multiple times its added value; OLAF, with years of experience and a skilled team, uniquely identifies and investigates complex fraud cases to safeguard EU funds. Collaborating with national and international authorities, such as Eurojust and Europol, OLAF is recognised for its expertise in combating fraud and corruption, protecting the EU budget. Its mandate extends to combating tobacco smuggling, coordinating anti-smuggling efforts, and overseeing Joint Customs Operations. Notable investigations include the Volkswagen case, resulting in a penalty and funding restriction, and the UK undervaluation case, revealing €2.7 billion in customs duties losses.[1] Beyond its external duties, OLAF conducts internal investigations within EU entities, targeting fraud, corruption, and unlawful activities that jeopardise the Union's financial interests. These inquiries address significant lapses in professional

[1] M. HOFMANN, S. STOYKOV, *OLAF – 20 Years of Protecting the Financial Interests of the EU*, in *eucrim*, 4, 2019, pp. 268-271.

duties, potentially leading to disciplinary or criminal actions against EU officials or members of institutions and bodies.

OLAF's achievements were coming alongside issues and constraints including lacking direct judicial oversight, limited competences, including lacking access to banking information, lack of clear and effective provisions on managing the length of OLAF investigations,[2] lack of uniform approach in the internal oversight,[3] and questionable impact of OLAF recommendations.[4] Over the more than 20 years of OLAF activities, the office had no immediate feedback from its actions since the execution of OLAF recommendations was up to EU or national authorities. Similarly, and in spite of the Supervisory Committee's monitoring, the length of OLAF's investigations as well as the time necessary for individual investigative acts was governed by the assessments and needs of OLAF.[5]

Meanwhile, EU Member States discussed the establishment of the European Public Prosecutor's Office (EPPO), which resulted in introducing the option in Article 86 of the Treaty on the Functioning of the European Union.[6] After lengthy discussions and the failure of other concepts, the current EPPO model was created. Building on this provision, 22 Member States informed the European Parliament, the European Council, and the European Commission of their intent to establish the EPPO through enhanced cooperation. Consequently, Council Regulation (EU) 2017/1939 (hereinafter also "EPPO Regulation") concerning the establishment of EPPO was adopted and came into effect on 20 November 2017.[7] Later, on 26 May 2021, the Commission adopted its Implementing Decision determining the date of 1 June 2021 as the date on which the EPPO assumed its investigative and prosecutorial tasks.[8] By the start of EPPO's operational activities, OLAF gained a younger yet very powerful sibling.

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[2] The Supervisory Committee of OLAF, Opinion of No. 5/2021, p. 3, *https://supervisory-committee-olaf.europa.eu/supervisory-committee-olaf_en*, accessed 11 November 2023.

[3] *Ibid* p. 16.

[4] See more in: The Supervisory Committee of OLAF, Opinion No. 1/2021*, OLAF's recommendations not followed by the relevant authorities*, *https://supervisory-committee-olaf.europa.eu/supervisory-committee-olaf_en*, accessed 11 November 2023.

[5] Even the mechanism established by Article 7(5)(8) in the Regulation (EU) No 883/2013 for extending time for investigations reflects mainly the needs of OLAF since the 'reasonable time, complexity of the case and circumstances' are still very broad categories. See more in: Court of Justice EU, 8 July 2008, T-48/05, *Franchet and Byk v Commission*, paragraph 274.

[6] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, pp. 82-83.

[7] Council Regulation (EU) No. 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31 October 2017, p. 1.

[8] Commission Implementing Decision (EU) No. 2021/856 of 25 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks, C/2021/3763, OJ L 188, 28 June 2021, pp. 100-102.

2. *OLAF and EPPO – The Codified Affection*

The task of accommodation of OLAF to the establishment of EPPO is reflected in the amendment of the Regulation (EU, Euratom) No 883/2013 (hereinafter "OLAF Regulation" and also "Regulation 883/2013") by Regulation No. 2020/2223.[9] The revision of the OLAF Regulation was necessary for two main reasons. First, it was necessary to adapt OLAF's legal framework to the creation of EPPO, enabling the two offices to work together. Second, the OLAF legal framework had to be updated on several aspects to increase the effectiveness of their investigations, particularly regarding access to bank accounts, procedural guarantees, and the establishment of the controller of procedural rights. The legislator designed the coexistence of the two offices as a close relationship of two bodies, which do not overlap in their investigations and work, and which should be interested to cooperate, support and complement each other.

By duty, EPPO and OLAF shall establish and maintain a close relationship based on mutual cooperation, information exchange, complementarity and the avoidance of duplication.[10] Through such approach, the offices should ensure the highest level of protection of the financial interests of the Union through synergies between them.[11] However, the legislator gives EPPO and OLAF a very limited guidance as to how to achieve this desired state. The two bodies were obliged to establish practical arrangements for the exchange of information, including personal data, operational, strategic or technical information, classified information, and complementary investigations. This objective was reached by signing the Working Agreement on 5 July 2021.[12]

This agreement followed and copied duties and options, which were already set in both regulations. Offices can, according to the Working Agreement, spontaneously or upon request share operational information, adhering to confidentiality and data protection rules. It includes a hit/no-hit approach in case management systems, streamlining work through checks on on-going investigations in partner institutions. OLAF shall transmit cases with possible criminal

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[9] Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations OJ L 437, 28 December 2020, pp. 49-73.

[10] Article 4a of Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18 September 2013, pp. 1-22; Article 101 of the Regulation (EU) 2017/1939.

[11] Recital 3 of Regulation (EU, Euratom) 2020/2223.

[12] Working Agreement between the European Anti-Fraud Office ("OLAF") and the European Public Prosecutor's Office ("EPPO"), 5 July 2021, *https://www.eppo.europa.eu/en/news/eppo-and-olaf-working-arrangement-ensuring-no-case-goes-undetected*, accessed 11 January 2024.

offences falling under the EPPO's mandate, and vice versa. This should ensure no case goes undetected at the Union level, safeguarding the EU's financial interests, without prejudicing national-level actions.

OLAF may support EPPO with operational, forensic, and analytical expertise. EPPO aids OLAF by identifying protective measures during investigations and sharing information on fraud patterns. Finally, the arrangement allows EPPO to request, or OLAF to propose, complementary investigations parallel to criminal probes. This approach should address aspects of speedy recovery, administrative precautions, and systemic recommendations for improvement in administrative investigations. [13]

In September 2021, the Guidelines for Investigation Procedures for OLAF personnel underwent an update to incorporate the provisions of the revised OLAF Regulation and harmonise them with the operational frameworks established in collaboration with EPPO. [14]

In addition to the above duties, OLAF was meant to be a "hub" for evaluating allegations in order to establish whether there are grounded indications that an offence within the EPPO jurisdiction was committed. To determine these elements and to collect the requisite information, OLAF may find it necessary to undertake a preliminary assessment of allegations. This evaluation should be conducted promptly and through methods that do not pose a risk of compromising potential future criminal investigations. Following the completion of this assessment, OLAF is required to report to EPPO if there is a suspicion of an offence falling within its jurisdiction.

Recognising OLAF's proficiency, EU institutions, bodies, offices, and agencies also have the capacity to engage the Office in conducting a preliminary evaluation of allegations reported to them, leveraging the Office's expertise for this purpose. [15]

Such a concept of complementarity and support seemed to be an ideal solution for achieving the common goal of both EPPO and OLAF, to preserve the integrity of the Union budget. [16] However, this concept is quite minimalistic as to details and ways of how the synergy should be achieved. Then, most issues were left upon the agreement and future practice of the two offices, which were different in their nature, mentality, routines and experience, which had different means and powers and which were, at the same time, being reorganised (OLAF) or not organised yet (EPPO). [17]

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[13] See especially the point 6.1 of the Working Agreement.

[14] Guidelines on Investigation Procedures for OLAF Staff, 11 October 2021, *https://anti-fraud.ec.europa.eu/system/files/2021-10/gip_2021_en.pdf*, accessed 10 December 2023.

[15] Recitals 7, 8 and Article 12c of Regulation (EU, Euratom) 2020/2223.

[16] *Ibid* Recital 4.

[17] The OLAF Report 2020, *https://anti-fraud.ec.europa.eu/system/files/2021-12/olaf_report_2020_en.pdf*, accessed 20 January 2024.

3. *Support to the New Model at the Starting Position*

Even after the adoption of Regulation 2017/1939 (hereinafter "the EPPO Regulation") OLAF retained its competence to investigate irregularities and acts on suspicions of fraud, corruption, or any other illegal activity affecting the financial interests of the EU. The Commission was counting on OLAF especially as regards investigations into VAT fraud[18] and the "PIF Directive"[19] broadened OLAF's competence and extended its investigative scope to cover VAT fraud.[20] OLAF retained exclusive powers for internal investigations and continues coordinating Member States' authorities in "coordination cases".[21] They also collaborate in national administrative investigations and participate in mixed inspections.[22] These activities have always constituted a significant portion of OLAF's agenda and only a small percentage of OLAF's workload has involved clearly criminal cases.

In addition to the existing powers and corresponding competences, OLAF was newly tasked to broadly support EPPO as well as EU institutions, bodies, offices, and agencies with the preliminary evaluation of suspicions of offences to be reported to the EPPO. In return, EPPO was obliged to furnish OLAF with information on cases falling outside its competence but warranting administrative follow-up or recovery.[23]

The commission estimated that the creation of EPPO would alleviate OLAF's workload. Granting exclusive jurisdiction to EPPO for investigating offences that impact the EU's financial interests, as outlined in the EPPO Regulation, was expected to decrease OLAF's responsibilities, preventing overlap in investigations. The anticipated reduction in workload corresponded to a decrease in staffing positions, as outlined in the relevant working documents.[24] However, from the above-mentioned reasons, the assumption that the workload of OLAF would be lower, after the EPPO became operational, was questionable.

As Member States unanimously committed to ensuring zero financial impact

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[18] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an Action Plan on VAT, *Towards a single EU VAT area – Time to decide*, COM(2016) 148 final.

[19] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28 July 2017, pp. 29-41.

[20] Article 15 of the PIF Directive.

[21] Article 1(2) of Regulation No 883/2013.

[22] For example, Article 18(4) of Council Regulation No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22 March 1997, p. 1.

[23] See especially the point 5. of the Working Agreement between OLAF and EPPO.

[24] Council Working Paper, EPPO: non-paper on the initial estimates of cost and benefits Analysis of the EPPO at the stage of enhanced cooperation, Doc. WK 5745/2017, 22 May 2017.

for the establishment of EPPO, OLAF bore the brunt of the adverse financial consequences, particularly in terms of human resources. Since 2011, OLAF has rendered 62 official posts (downsizing its establishment plan from 384 to 322, and since 2017, when the EPPO Regulation was adopted, 27 post were lost). Furthermore, the transfer of posts for the establishment of EPPO amounted to 45 over the period 2019-2023. Out of this number, 11 posts were moved in 2021 and 16 were planned to be moved in 2023. An additional transfer of posts was foreseen for the EU Commission synergies exercise, posts were moved from OLAF HR unit, for the central taxation, for staff reintegrating into the Commissions' headquarters after a period of leave on personal grounds, after a period in delegation and after a period in the representations. Finally, no compensation was given in 2021 for long sick leave absences.[25] Moreover, OLAF's total budget for external staff has decreased, which led to the decrease of OLAF's external staff from 59 in 2016 to 45 in 2022.[26]

In 2021, concerns regarding OLAF's human resources were raised by its Supervisory Committee. The Committee deemed it counterproductive to annually assign new responsibilities and tasks (such as EPPO and RRF) to OLAF, while simultaneously implementing a gradual reduction in its human and financial resources.[27] Not only did OLAF have to reserve staff and other resources to comply with the new duties and maintain its effectiveness, but also its internal processes had to be changed accordingly.

OLAF is currently undergoing the second phase of reviewing the Guidelines on Investigation Procedure. This phase will encompass issues covered by other internal OLAF instructions and guidelines, practices established through OLAF's cooperation with the EPPO, recommendations from OLAF stakeholders, and issues identified by OLAF staff over the years. It is anticipated that the second phase will be completed during the course of 2023.[28]

Similar to OLAF, EPPO has also faced challenges due to a lack of resources, both before and after becoming operational. During a debate with members of the European Parliament in October 2021, the European Chief Prosecutor Laura Kövesi informed the Budgetary Control Committee that EPPO urgently required additional human resources to effectively carry out its work. Specifically, at least 130 staff members were needed, including financial investigators, IT specialists, and support staff.[29]

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[25] 17 long term sick absences or absences with more than 365 days of sickness in a 3 year period.

[26] Working Document on OLAF annual reports 2021, European Parliament, Committee on Budgetary Control, DT\1265715EN, PE737.470v01-00, 24 October 2022, *https://www.europarl.europa.eu/doceo/document/CONT-DT-737470_EN.pdf*, accessed 22 January 2024.

[27] The Supervisory Committee of OLAF, Opinion of No. 4/2021, *OLAF's Preliminary Draft Budget for 2022*, *https://supervisory-committee-olaf.europa.eu/supervisory-committee-olaf_en, accessed*, accessed 11 November 2023.

[28] Activity Report of the Supervisory Committee of OLAF – 2022, OJ 2023/C 225/01, pp. 1-11.

[29] Budgetary Committee (CONT) Press Release, 1 October 2021, *https://www.europarl.europa.*

4. *EPPO and OLAF – Similarities and Differences*

Established as a Community body under the first pillar of the TEU, OLAF possesses a hybrid character in accordance with its legal standing. Functioning as an autonomous entity, the Office conducts external investigations in EU and non-EU countries into cases of fraud, corruption and other illegal activities affecting the EU budget. Simultaneously, OLAF conducts internal investigations within EU institutions, bodies, offices, and agencies to uncover significant misconduct by EU officials that may warrant disciplinary or criminal proceedings. Operating as a service within the Commission, OLAF assumes responsibility for formulating policy and legislation in the realm of preventing fraud and safeguarding the financial interests of the EU.

EPPO, on the other hand, was created as a Union body in the field of EU criminal law as set out in Article 86 of the TFEU, which provides for its establishment 'from Eurojust'. EPPO shall conduct criminal investigations, whose final purpose is to determine the presence of a criminal offence listed in the PIF Directive.

Even if OLAF is working with various networks and may have external work places, it is a homogeneous, centralised office with the seat in Brussels close to the main EU institutions. Contrary to OLAF, EPPO's central office in Luxembourg is geographically detached from the EU political environment but it is the decentralised offices, the European Delegated Prosecutors in 22 Member States, which make the main structural difference. Consequently, EPPO is in much closer contact with the environment where the crime occurs as well as with national authorities. Without prejudice to the existence of the Anti-Fraud Coordination Service (AFCOS)[30] and the possibility to carry out on-the-spot checks, most of OLAF's administrative investigations are run from distance in Brussels, which may, at least, cause delays.

As regards the powers of OLAF, the underlying legislation has often been described as "complex", horizontal or variable, especially when OLAF is dealing with external investigations in the Member States.[31] The legal framework within the European Union lacks a comprehensive codification of the powers

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eu/news/en/press-room/20210927IPR13609/meps-vow-to-support-the-eu-public-prosecutor-s-office, accessed 21 November 2023.

[30] EU Member States are required to designate the AFCOS service in line with Article 12a of Regulation 883/2013 to facilitate effective cooperation and exchange of information, including information of operational nature, with OLAF.

[31] M. SIMONATO, *OLAF Investigations in a Multi-Level System, Legal Obstacles to Effective Enforcement*, in *eucrim*, 3, 2016, pp. 139-140; K. LIGETI, M. SIMONATO, *Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept,* in: F. GALLI, A. WEYEMBERGH (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, Editions de l'Université de Bruxelles (IEE), Bruxelles, 2014, p. 82.

vested in the European Anti-Fraud Office; rather, it constitutes a nuanced outcome derived from diverse statutory provisions. Horizontal instruments implemented in the realm of the Protection of the Financial Interests (PIF) have not supplanted the sector-specific instruments hitherto enacted within distinct policy domains such as agriculture, structural funds, customs, among others; instead, these horizontal instruments incorporate references to pre-existing sectoral frameworks. Furthermore, the delineation of OLAF's powers is not exclusively circumscribed by EU legislation; frequently, it defers to national legal provisions, thereby introducing variances and uncertainties.

It can be stated that the legislative framework of EPPO is similarly intricate. There are only a few pieces of EU legislation directly linked to EPPO and the EPPO Regulation, together with the PIF Directive they are quite homogenous. However, the 22 systems for criminal proceedings as well as 22 underlying fundamental rules of the criminal substantive law can make the EPPO framework equally challenging, especially for the work of the Permanent Chambers.

Even if the nature of OLAF's investigative competences is labelled "administrative", it is difficult to deny that these competences are closely related to criminal law competences exercised by law enforcement. The OLAF Regulation itself contains several hints to the possibility of OLAF investigations resulting in – and, therefore, being a preparation to – criminal proceedings. Even the name of the Anti-Fraud Office is quite indicative. "Fraud" is a typical substantive criminal law concept, as defined in Article 3 of the PIF Directive. The typically administrative concept is that of "irregularity".[32] The OLAF Regulation itself further provides that OLAF's findings can be used as evidence in criminal proceedings (Article 11(2)(b) of the OLAF Regulation). Therefore, whatever is the formal title of OLAF's competences and actions – these actions and competences are put, subsequently, under the test of the criminal law standards.

In administrative investigations, OLAF investigators do not seek, primarily, to establish whether a criminal offence was committed and they do not work to build up a criminal case. OLAF's remit is not to document and prove in its final reports all elements of a crime (*actus reus* and *mens rea*) beyond reasonable doubt, within the meaning of criminal law principles. The 883 Regulation only indirectly tackles the burden of proof that applies to OLAF, by speaking about information forwarded to the competent authorities in the Member States 'giving grounds for suspecting the existence of fraud', 'facts which could give rise to criminal proceedings', or 'suspected fraud, corruption or any other illegal activity' which may be the subject of a criminal investigation.[33]

However, in criminal proceedings following OLAF's investigations and rec-

[32] As defined in Article 1(2) of the Council Regulation (EC, EURATOM) No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23 December 1995, p. 1.

[33] Articles 1(4), 11(5), 13(1) of OLAF Regulation.

ommendations there is a higher standard of proof beyond reasonable doubt (including the criminal intent – *mens rea*) and so it is there in investigations led by the EPPO.

The most visible difference between administrative investigations led by OLAF and EPPO's criminal investigations is the scope of their powers. OLAF cannot use coercive measures and in that respect, as well as regards knowledge of local habits and customs and practical support, is dependant on national authorities.[34] Similarly, there is no sanction for not appearing for an interview before OLAF investigators, which may lead to incomplete grounds. Even if in some Member States, interviews with witnesses are made directly by prosecutors, in the majority of them police authorities are involved and in that respect EPPO is dependant on national authorities too. However, prosecutors give binding orders and supervise national investigators, which gives them undisputable advantage over their colleagues from OLAF. Moreover, criminal proceedings gives them the possibility to order or directly request interceptions, surveillance, house searches and other measures, which in practice bring the most valuable evidence, especially in investigations concerning certain types of crime like corruption.

EPPO prosecutors and OLAF investigators were trained to deliver different products. OLAF administrative investigations conclude with a report that is sent to the competent authorities of the Member States concerned or to the EU institution, body, office or agency concerned in case of an internal investigation. The report may be accompanied by recommendations on the appropriate disciplinary, administrative, financial or judicial follow-up that should be taken by national and EU authorities.[35] Their non-biding nature, however gives a (too) wide scope for not following them; the EU and national authorities are only obliged to give reasons for non-implementation of the recommendations.[36] Incomplete facts, circumstances and evidence, especially missing comments by the persons concerned or lack of evidence, which could be gathered only by coercive measures, may lead national authorities to conclude early that OLAF's suspicion of fraud is not proven.[37]

Investigations led by EPPO are finalised by filing an indictment to competent national courts or by the simplified procedure,[38] which are under the full control of the European Delegated Prosecutors (EDPs) and Permanent Cham-

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[34] M. LUCHTMAN, J. VERVAELE (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, Utrecht, 2017, p. 124.

[35] Article 11(1) of the 883/2013 Regulation.

[36] Article 11(4)(5) of the 883/2013 Regulation.

[37] The Supervisory Committee of OLAF, Opinion No. 1/2021, *OLAF's recommendations not followed by the relevant authorities*, p. 26, *https://supervisory-committee-olaf.europa.eu/supervisory-committee-olaf_en*, accessed 11 November 2023.

[38] Articles 35, 36 and 39 of EPPO Regulation. Other options for termination of both EPPO and OLAF investigations, especially dismissals, were not taken into account for simplification.

bers. EDPs follow cases in trials before courts of all levels and have immediate feedback from the court proceedings, which continuously helps them to learn from their own actions. Results clearly showing the rate of acquittals and the volume of seized or frozen property makes it impossible for prosecutors to pin the blame for failure of an indictment on other authorities.

The above lines sufficiently demonstrate the shared goal of the two EU bodies, but also highlight the distinct paths outlined by the legislator for each office to achieve it. EPPO and OLAF were designed to be different in terms of their competences, setup, desired results, and mentality, raising questions about their compatibility. Nevertheless, they are mandated by law to develop synergy and complement each other.

5. *The Complementarity Model under the Test*

The legal basis for interactions between EPPO and OLAF is Article 101 of the EPPO Regulation, which is further elaborated upon in the amended OLAF Regulation.[39] According to these provisions OLAF may, on request of EPPO, provide information, analyses (including forensic analyses), expertise and operational support; coordinate specific actions of the competent national administrative authorities and bodies of the EU. The Regulation pertains to what are known as "coordination cases". However, since this coordination occurs within the context of criminal investigations, the question arises as to whether Eurojust should assume this role in cross-border cases. Nonetheless, it should be noted that EPPO has the ambition to independently coordinate its actions without the assistance of Eurojust or OLAF.[40]

Both regulations address the system of complementarity and support, but their formulations may be misleading. Particularly, the wording of Article 101(3)(c) of the EPPO Regulation could suggest that there is no distinction between the support and complementary administrative investigations led by OLAF to assist the EPPO. However, it is important to differentiate between the two, as they adhere to different rules and serve distinct purposes.

5.1. *OLAF Support to EPPO*

The support from OLAF is required upon request of an EDP and in practice

[39] Especially by Articles 12c-12f of the Regulation 883/213.

[40] See for example, Article 53(4) of Internal Rules of Procedure of the European Public Prosecutor's Office as adopted by Decision 3/2020 of 12 October 2020 of the College of the European Public Prosecutor's Office (EPPO) and amended and supplemented by Decision 85/2021 of 11 August 2021 and Decision 26/2022 of 29 June 2022 of the College of the EPPO (2023/C 181/01), OJ C 181/1, 23 May 2023.

it covers searching in COM databases, searching for evidence in other on-going OLAF investigations, providing analysis of data already transferred to EPPO and in fact there is no clear line in the EPPO Regulation made between the request for additional information according to the Article 24(9) of the EPPO Regulation and the request for OLAF support according to the Article 101(3). Therefore, in practice, this becomes a subject of negotiations, with the volume of assistance needed typically serving as the decisive factor.

The scope of OLAF support is not limited by the law, and it may, in fact, conduct the entire administrative investigation.[41] However, the scope is constrained by OLAF's mandate, which, while broad, does not pose an obstacle to handling any request from the European Public Prosecutor's Office.

Another practical consideration involves OLAF's capacity and its ability to deliver the desired results within a specific timeframe. As previously mentioned, OLAF's budget has been reduced in recent years in favour of EPPO, and a similar trend could be observed in the transfer of posts to the EPPO (infra mn 3).

Requests of EDPs may include keeping particular formal procedures and observing particular procedural rights and guarantees, including those resulting from national law (Article 12e(3) of the OLAF Regulation, Article 41(3) of the EPPO Regulation). This is a particularly new field for OLAF, especially because the regulations do not give guidance on where procedures given by the OLAF Regulation and where the EDPs' requested formal requirements prevail.

European Delegated Prosecutors expectations, requirements and needs for OLAF support may significantly differ. These requirements stem out of various rules of the 22 national legal systems, which sometimes also give a fixed period for concluding a criminal investigation. Quality of OLAF support will be therefore measured by the satisfaction of EDPs and, more objectively, by being able to comply with the particular requirements and to deliver results in time.

European Delegated Prosecutors act in line with instructions of (especially) the Permanent Chambers, but in that framework, they are independent. The following requirements may be particularly evident in their requests for support from OLAF:

a) EDPs are presenting new demands that align with various procedural rules, including requirements for comprehensive cover letters and detailed descriptions of how the evidence was collected.

b) EDPs are placing stringent demands on the provision of information and evidence, even within tight time constraints. This urgency is exemplified by instances where the time limits for investigations have to be extended by a judge.

c) They frequently task OLAF with focusing on specific aspects, particularly requesting detailed analyses related to elements of the alleged crimes. This indicates a need for targeted and specialised investigative efforts.

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[41] Article 101(3)(c) of the EPPO Regulation. In practice, OLAF does not conduct large "support administrative investigations".

A notable challenge arises from misunderstandings concerning the concept of *mens rea*, creating complexities in establishing and proving the mental state or intent behind the alleged offences.

Additionally, there is a recurring issue where EDPs occasionally perceive OLAF as being in a subordinate role, akin to a police investigator. This perception can lead to a dynamic where EDPs act from a dominant position rather than engaging in a collaborative and partner-oriented relationship with OLAF. This misalignment in roles and perceptions may contribute to challenges in effective cooperation.

Finally, it should be mentioned that requests of EDPs addressed to OLAF for obtaining evidence (especially) in third countries could be seen by authorities of those States as bypassing bilateral or multilateral conventions relating to judicial mutual legal assistance in criminal matters, which is, by nature, cooperation between States represented by their authorities. One of the main principles of such judicial assistance is that the executing State guarantees the collection of the evidence within the due process of law and it is based on the mutual trust of the States concerned. Collection of evidence by OLAF is not bound by principles of judicial legal assistance since OLAF's mandate is different and may be based (exceptionally) on a contractual basis. [42]

5.2. *OLAF Complementary Investigations*

Complementary investigations should be distinguished from support by OLAF, which is not always the case in practice. First of all, they should be opened upon the initiative of OLAF (EPPO may veto such opening), [43] but EPPO and OLAF agreed that EPPO may also request that OLAF open a complementary investigation. [44] It is important to emphasise that the main purpose of the complementary investigations is not gathering evidence for EPPO and to support EPPO's investigations, but to facilitate the collection of relevant information for the adoption of precautionary measures or the conduct of financial, disciplinary or administrative action taken by other EU and national authorities.

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[42] According to Article 129 of the Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193/1, 30 July 2018, any person or entity receiving Union funds is obliged to cooperate in protecting the financial interests of the EU and is also required to grant OLAF the necessary rights and accesses required, including the right to carry out investigations and to carry out on-the-spot checks and inspections. Therefore, any such contract concluded with an entity receiving EU funds within or outside the EU includes a clause, which refers directly to Regulations governing OLAF investigations.

[43] Article 12f(1) of Regulation 883/2013.

[44] Article 6.2.1. of the Working Agreement between OLAF and EPPO.

EPPO's sole discretion lies in agreeing to conduct an administrative investigation, while the selection of measures and the duration required for conducting and concluding such investigations rest entirely within OLAF's purview. It is also not obligatory to ensure the observance of procedural safeguards of Chapter VI of the EPPO Regulation within complementary investigations. [45]

Complementary investigations should not overlap with the facts under investigation by the EPPO. However, the scope and focus of such investigations are solely governed by OLAF. EPPO may only specify particular modalities for OLAF's complementary investigations, which may be necessary to preserve the integrity of on-going criminal investigations. [46]

OLAF will forward both information and evidence gathered during complementary investigations after the completion of such investigations. EPPO is also included among the recipients of OLAF's final reports, which summarise the findings and may include recommendations.

There were 19 complementary investigations conducted in 2022, [47] some with the intention of aiding the EPPO. However, it is essential to establish a clearer distinction between these investigations and the supporting administrative acts. This distinction is crucial because their purposes, scopes, and rules differ, potentially impacting issues such as the admissibility of evidence, particularly within complementary investigations.

6. *Admissibility of Evidence*

Despite the efforts of the EU legislator to ensure the admissibility of OLAF's final reports and evidence gathered within administrative investigations, their admissibility in criminal trials, and, particularly, their evidentiary value, remain problematic. In certain Member States, evidence collected within (any) administrative proceedings is not admissible in criminal trials, primarily concerning interviews of persons concerned and witnesses. Generally, all actions of OLAF related to gathering evidence will be subject to the test of admissibility under the same conditions and evaluation rules as reports and evidence collected by national administrative inspectors. Differences in the conditions and rules of administrative investigations are directly associated with stricter standards of fundamental rights and guarantees in criminal proceedings, including defence rights, which, in some Member States, may result in the inadmissibility of evidence gathered by administrative authorities. [48] The absence of direct judicial

[45] Paragraph (3) of Article 12e limits its applicability exclusively to this Article.

[46] Article 6.2.6. of the Working Agreement between OLAF and EPPO.

[47] EPPO Annual Report 2022, Luxembourg, 2023, p. 95.

[48] However, according to OLAF, in the cases where recommendations were not followed, the

control over OLAF's actions, coupled with the lack of opportunity for the defence to effectively exercise their rights by being present during the gathering of evidence within administrative investigations, serves as a prime example. Rules regarding the admissibility of OLAF's final reports and accompanying evidence, as stipulated in Article 11 of the OLAF Regulation, are fully applicable to OLAF's complementary investigations, which are concluded with the submission of a final report.

However, as regards support to EPPO investigations,[49] neither the EU legislator, nor the two offices in their Working Agreement dealt with the admissibility of evidence gathered by OLAF in detail. The OLAF Regulation only expresses the aim to protect the admissibility of evidence as well as fundamental rights and procedural guarantees, where OLAF performs supporting measures requested by the EPPO.[50] It seems the legislator was satisfied by expressing the aim and relied on OLAF to observe the procedural safeguards of Chapter VI of the EPPO Regulation. It is unclear whether the rule articulated in Article 11 of the OLAF Regulation regarding the admissibility of evidence under the same standards applies here to evidence collected by national administrative inspectors. Theological interpretation of the relevant provisions of the OLAF Regulation leads to the conclusion that evidence gathered to support EPPO investigations by OLAF should have at least the same value as evidence gathered by national administrative authorities. In addition, the fact that the procedural safeguards of Chapter VI of the EPPO Regulation shall be observed should add on evidentiary value. On the other hand, the duty to observe a higher standard of procedural guarantees opens the door to challenging OLAF's actions (and the resulting evidence) in criminal trials for a failure to observe. Adhering to standards unknown to OLAF, and their potential conflict with processes outlined in the OLAF Regulation and GIPs, could significantly impede support for EPPO investigations. The same challenges may be encountered by the EDPs *vis a vis* arguments of the defence in criminal trials.

It is challenging to accept that, despite the aforementioned strict requirements for OLAF to adhere to the procedural safeguards outlined in Chapter VI of the EPPO Regulation when assisting EPPO, the results are not unconditionally admissible in all Member States. Even if OLAF investigators theoretically manage to adhere to the procedural safeguards designed for criminal proceedings, the evidence collected will retain its "administrative label", and national

procedural standards applied by OLAF were not an issue. More in OLAF's reply to the Supervisory Committee Opinion No 1/2021 on OLAF's recommendations not followed by the relevant authorities. *https://supervisory-committee-olaf.europa.eu/system/files/2021-06/OLAF%20reply%20to%20SC%20Opinion%201_2021.docx.pdf*, accessed 12 November 2023.

[49] In the sense of Article 12e of OLAF Regulation.

[50] Article 12e(3) of OLAF Regulation.

courts will assess it accordingly. This stands in stark contrast to EPPO evidence, which is directly admissible in all cases. Given that national courts are not constrained in their evaluation of evidence[51] and effectively conduct an *ex post* assessment of OLAF's evidence, they should have the discretion to assign greater weight to evidence gathered by OLAF. However, any new attempt to reformulate Article 11(2)(b) of Regulation 883/2013 would entail the risk of potentially lowering the standard by removing the requirement for 'admissibility under the same conditions as administrative reports drawn up by national administrative inspectors'.

On 5 May 2023, the European Law Institute adopted a Proposal for a Directive of the European Parliament and of the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings. This proposal serves as a preliminary draft aimed at guiding the development of future directives concerning the admissibility of evidence in criminal cases. Extensive discussions have taken place with key stakeholders involved in cross-border criminal proceedings within the EU, fostering collaboration to address and harmonise the varied needs and interests of all parties. It would be highly favourable if the EU Commission were to consider this proposal as a foundational framework, facilitating progress towards establishing comprehensive rules governing the admissibility of evidence in transnational criminal proceedings.[52] The EU legislator must acknowledge their responsibility and present a proposal for a directive under Article 82(2)(b-c) of the TFEU, aiming to standardise the criteria for the admissibility and legality of evidence. As for OLAF, it is imperative to undertake further endeavours within the framework of the reform of 883/2013 Regulation. This is crucial because the intricate relationship between EU administrative investigations and the ensuing judicial processes demands meticulous regulation. This regulatory framework must delve into finer details to ensure not only predictability but also the robustness of enforcement mechanisms.

The jurisprudence of the CJEU has established that the transmission of the report to the national competent authorities does not alter the legal status of the individual in question. Therefore, it cannot be contested on this basis before the CJEU.[53] The national courts then remain the only form of judicial control over OLAF actions by subsequently evaluating the evidence. In the new draft, the role of the national courts could be explicitly stated, as well as their capacity to declare OLAF actions and evidence (un)lawful.

The convergence of administrative and criminal proceedings, coupled with

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[51] Article 11(2), last sentence of Regulation 883/2013.

[52] L. BACHMAIER WINTER, *Mutual Admissibility of Evidence and Electronic Evidence in the EU A New Try for European Minimum Rules in Criminal Proceedings?*, in *eucrim*, 2, 2023, p. 223.

[53] CJEU, Case T-261/09 P, *Violetti v Commission*, EU:T:2010:215, paragraph 47.

the challenge of establishing admissibility standards for evidence collected within disparate frameworks, presents a formidable task. It is noteworthy that navigating this intricate terrain would likely prove more complex than conferring upon OLAF a direct role in criminal proceedings.

7. *The Further Development and Topography of Bodies Protecting the Financial Interests of the EU*

The process of acquiring knowledge from the on-going interactions between EPPO and OLAF is anticipated to extend over a considerable span of time, spanning years. This iterative learning process, marked by collaborative efforts, is expected to be continuous, implying that it will persist indefinitely. The full extent of the complexities inherent in daily engagement with prosecutors may not have been entirely apparent to OLAF initially. Thus, the evolving nature of these interactions underscores the need for on-going adaptation and a sustained commitment to mutual understanding and cooperation between the two entities.

Any criminal justice system requires certainty and clarity, embodying the principle of *lex certa*, which encompasses both substantive and procedural aspects of the law. Precision of this principle is indispensable for investigative and prosecutorial authorities to function within well-defined legal parameters, thereby safeguarding fundamental rights and procedural safeguards. From investigations conducted by bodies such as OLAF and EPPO, adherence to such legal clarity is vital. A predefined criminal procedure offers crucial assurances also for suspects and victims who shall be informed in advance about the scope of their rights and the circumstances under which they are applicable.

Even if OLAF has been knocking on the gates of criminal law for some time,[54] we will probably not see dramatic institutional changes in the near future and OLAF will not receive an invitation to the field of criminal proceedings as a criminal investigator. Nevertheless, revision of the OLAF and EPPO Regulations will take place at the same time. By 2026 the Commission shall submit to the European Parliament and to the Council an evaluation report on the application and impact of this Regulation, in particular as regards the effectiveness and efficiency of the cooperation between OLAF and EPPO. Where deemed necessary, the Commission shall present a legislative proposal to the European Parliament and the Council to modernise OLAF's framework and the same relates to EPPO. This proposal may encompass additional or more elaborate regulations regarding the establishment of OLAF, its functions, or the procedures governing its activities. Special attention shall be paid to its cooperation with

[54] P. KLEMENT, *OLAF at the Gates of Criminal Law*, in *eucrim*, 4, 2017, pp. 196-200.

EPPO, cross-border investigations, and investigations in Member States that do not participate in EPPO.[55]

This presents an excellent opportunity to streamline the entire system of EU bodies tasked with safeguarding EU financial interests. Establishing a coordinated system among these bodies, defining their hierarchy within various proceedings, and outlining clear, comprehensive rules for their collaboration, including mutual duties, would greatly enhance efficiency and effectiveness. Otherwise, EPPO will have the tendency to be "as analytical as Europol, as coordinative and far-reaching as Eurojust and as well-informed focal point with the special knowledge of internal investigations as OLAF". This tendency will come naturally and hand in hand with lengthy cooperation procedures governed by unclear rules based on a model of "friendly cooperation". While mutual relations can remain amicable, in the realm of criminal proceedings governed by strict rules and deadlines, there is no latitude for EPPO's partners to independently decide "whether and when" to deliver specific results. Simultaneously, the procedural hierarchy does not preclude the possibility of future institutional independence for the aforementioned bodies. Creating a mega office encompassing EPPO, Eurojust, Europol and OLAF would give birth to a monster, which would be extremely difficult to manage. In that respect, any institutional merging should lead to budgetary savings, clarity and simplification of the rules and processes, not to further complications.

Instead of relying solely on institutional hierarchy, it appears that the pivotal approach lies in establishing clear rules for the PIF axis of Luxembourg – Brussels – The Hague, designating the leading institution for each type of proceeding and defining corresponding responsibilities, duties and deadlines. However, for such a system to be effective, the rules must be stringent.

Moreover, broadening the mandate of OLAF to include certain administrative executive powers would further enhance and refine the landscape of entities safeguarding the EU's financial interests. Instead of confining OLAF to merely issuing recommendations, the path forward could involve granting OLAF the authority to make decisions regarding specific measures currently under the purview of various Commission Directorates General. Simultaneously, empowering OLAF to initiate proceedings at the national level would facilitate a swifter recovery of assets lost to fraud, streamline the system, and truly complement the mandate of EPPO.

[55] Article 19 of Regulation 883/2013, Article 119 of EPPO Regulation.

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11.

EPPO RELATIONS: EUROJUST, OLAF AND EUROPOL PROSPECTIVE OBSERVATIONS

Pietro Suchan

1. *The relationship between EPPO and Eurojust*

EPPO has recently become part (and I should add: at this moment represents one of the most important components) of the European Judicial Cooperation System (such as the JITs and EU Regulation 784/21 concerning EU removal orders, which entered into force throughout the EU legal space automatically on 7 June 2022; such as the recent EU Regulation No. 1543/23 on the acquisition of electronic evidence through the issuance directly by the national AG in the entire and unified EU space of production and preservation orders, with its deferred temporal effect until August 2026; finally such as EU Regulation 1805/2018 concerning the execution of precautionary seizures and confiscations within the EU scope and finally like our Legislative Decree No. 108/17 concerning European Investigation Orders, in implementation of EU Directive 2014/14) and therefore it must develop and strengthen close ties with the classic and I would say "traditional" agencies of judicial cooperation and judicial police: Eurojust, OLAF and Europol.

EPPO, for necessary cooperation and for a concrete possibility of fruitful results within its tasks and competencies, needs Eurojust, but Eurojust also needs EPPO, albeit with the necessity of strict respect for different specific competencies (based on Article 86 of the TFEU).

Eurojust is legally considered the "mother" of EPPO. I don't think realistically that this definition is fully appropriate, but it emphasises the special connection between the two main EU agencies: the "mother" at the moment is in good health, almost perfect, and will surely contribute to EPPO in the near future. Let me speak about their concrete relations and the possible added value of Eurojust for EPPO as follows.

1.1. *Key points of specific interest regarding the relationship with Eurojust*

First of all, it should be noted that a collegial management structure has been strongly favoured over the initial project model of office management in a more hierarchical form by the European Public Prosecutor's Office and its Deputy Prosecutors.

The fundamental definitive choices of a procedural nature are reserved for the Permanent Chambers, while those "strategic" and, in any case, of a general nature, are reserved for the Board, with a strong analogy, as far as this latter management body is concerned, with Eurojust, which, however, mainly performs mediation and coordination functions and not so much direct investigative functions (although now, following the recent entry into force on 12 December 2019 of the new Eurojust Regulation, there have been strong changes, also with respect to this European Judicial Agency). However, according to Article 86 of the TFEU, the European Public Prosecutor's Office was born from Eurojust, even if this formulation does not seem very clear in its concreteness.

Also, the choice (also modifying the original project) to appoint European Delegated Prosecutors representing each Member State recalls the typology of national members of Eurojust.

To what extent will this choice of collegiality (certainly not usual for a Prosecutor's Office, which must make choices, even immediate, for the impetus of judicial activity) undermine the need and value of speed and agility, avoiding deleterious or harmful blockages and delays, represents one of the so-called "open bets"?

Surely Eurojust will be called upon, in the near future, to support the following specific aspects and themes of concrete cooperation between national judicial and police authorities and EPPO as envisaged by Article 100, paragraph 2 of Regulation 1939/17. An impact on the (concretely, for normative and non-functional reasons, limited) availability of national judicial police, whose role is essential for the success of EPPO investigations, is provided by Article 5, paragraph 6: 'competent national authorities shall actively assist and support the investigations and prosecutions of the EPPO'.

Also particularly relevant is the provision of Article 13 of the Regulation: 'European Delegated Prosecutors shall act on behalf of the EPPO in their respective Member States and shall have the same powers as national prosecutors

in respect of investigations, prosecutions and bringing cases to judgment' and therefore it is they who, at least as far as Italy is concerned, concretely – I reiterate from a functional point of view, by means of directives and orders – dispose of national police (even if, in turn, they are in a relationship of dependence on the Permanent Chambers and the national European Delegated Prosecutors).

The provision of Article 28, paragraph 2 of the Regulation can certainly prove to be quite incisive for the exercise of EPPO's real functions, while that of paragraph 1 is broad compared to the competences of the European Prosecutor's Office: 'The European Delegated Prosecutor handling a case may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State' (I would say not only of the Prosecutor's Office, but perhaps also judicial) in according to which '[a]t any time during the investigations conducted by the EPPO, the competent national authorities shall take urgent measures in accordance with national law necessary to ensure effective investigations even where not specifically acting under an instruction given by the handling European Delegated Prosecutor. The national authorities shall without undue delay inform the handling European Delegated Prosecutor of the urgent measures they have taken.'

This specific provision also reflects the current relationship between the national members of Eurojust and national judicial authorities regarding active and passive EIOs. The question that must be asked is whether the measures should or should not be validated by the ultimately competent EPPO – I would certainly say the answer must be: yes.

1.2. *Possible involvements of Eurojust*

There is further involvement, concretely possible or highly probable, of Eurojust regarding the following issues. The creation of a single European evidence requires the need to strike a balance between the rules for the valid assumption of evidence in the state of collection and those of the state of recognition of their admissibility in court. This can be a source of criticality for systems like the Italian one (Article 111 of the Constitution) informed by the general principle of evidence formation in the adversarial process, under conditions of equality, at least formal.

Furthermore, it is worth noting that EPPO is independent of the national prosecutor's office, but the judicial police organs (sections, services and offices in general) depend functionally on the national prosecutors and, from a disciplinary point of view, also on the Attorney General.

The Regulation, finally approved, differs significantly from the original proposal of 2013, particularly regarding the current and effective availability of investigative personnel of the European Public Prosecutor's Office directly avail-

able on-site (essentially coming from OLAF) since a more so-called "intergovernmental" spirit prevailed with European Prosecutors chosen on a national basis, similarly to the national members of Eurojust, and with investigations, so with essential involvement of national judicial police, devolved, substantially on a decentralised basis, to the European Delegated Prosecutors. But the possibility for the Central Office to conduct investigations (essentially of an integrative nature compared to those carried out by the EDP on a territorial basis) is not excluded.

The concrete structure of EPPO is very similar to the structure of Eurojust even if we consider the recent loss of the "double hat" regarding the European Delegated Prosecutors (EDPs) by decision of the EPPO's college.

A further concrete and also informal possible involvement of Eurojust's coordination functions will occur in the following cases in order to avoid or limit even possible cases of conflict. A special discipline, which constitutes a further example of the discretionary exercise of European criminal action, is dictated in the matter of competence for crimes "inextricably" linked to PFI offences of direct competence, Article 25, paragraph 3, letter A: a) in case of greater severity of the related offence – provided that this is not "instrumental" to the commission of the PFI offence; b) in any case – (and therefore, it is presumed, even in case of direct jurisdiction), if there is reason to believe that the actual or potential damage caused to another victim is greater than the actual or potential damage caused to the financial interests of the Union by a PFI offence – and unless – but only, and exclusively in this specific residual case – there is the consent of the national judicial authority: 'if it appears that the EPPO is better placed to investigate or prosecute'.

It is also and always within the competence of the EPPO, in the cases referred to in Article 22, paragraph 2 (which would ordinarily fall within the competence of the national judicial authority, associative offences even if they are more serious than PFI offences as purpose offences) and it is therefore the latter which determine, in these cases, the EPPO's competence, with possible problems in relation to our investigations, which are particularly delicate and complex, concerning the case of Article 416 *bis* of the Italian Criminal Code.

The unhappy formulation of the last paragraph of the same Article 25 – according to which it seems that the decision on competence rests with the National Judicial Authority – however, leads us to the competences concerning the Court of Justice of the European Union, outlined by Article 42, which (besides being competent, as the already existing one at the national level, to assess the conformity of the European Public Prosecutor's Office's activity directly with community law, for the removal of the European Chief Prosecutor or the European Prosecutors, for the compensation of damages caused by EPPO – see our Pinto law) is also competent regarding the preliminary resolution of any conflicts of competence between national judicial authorities and EPPO.

In all other cases, and in particular regarding, specifically, conflicts concerning organised crime offences, connected to offences "inextricably linked" to PIF offences, Article 16 of the Legislative Decree No. 9/21 applies, which assigns competence in this matter to our Attorney General at the Court of Cassation, as national judicial authority to resolve conflicts of competence between EPPO and national judicial authority.

It is almost certain that with the concrete support and involvement of Eurojust (naturally if requested by the Member States and/or by the European Public Prosecutor's Office) the problems mentioned above could be avoided.

Another involvement of Eurojust and also of OLAF will occur in the application of Article 27 of the Regulation which provides and regulates the cases of avocation of national investigations by EPPO, particularly regarding the collection and transmission of the necessary information by national judicial authorities and the possible prior consultations.

Another issue of particular relevance and to be illustrated obligatorily (as it significantly extends to the common European legal space) and that might require the intervention of Eurojust, in terms of at least advisory, propositional and in any case regulating specific concrete situations (thanks particularly to the location in a single extremely functional building in The Hague (Netherlands) of the various national offices, the so-called "close contact" offices), is the regime of acquisition, use and validity of evidence by the EPPO, based fundamentally on the so-called "*lex loci*". Under this fundamental point of view, mention should be made of (a) Article 37, which establishes and fixes a relative freedom – of an undifferentiated nature – to obtain evidence, in particular for the national court (see paragraph 2) and (b) Article 31: in the case of so-called cross-border investigations, since they involve two Member States that have joined the EPPO, a second Deputy European Public Prosecutor is involved for the collection of evidence, within the territorial scope of a second country, and no EIO is required (as is necessary if the evidence were to be collected in a Schengen Member State not belonging to the Enhanced Cooperation Area, e.g., Poland, in which case an EIO must be issued pursuant to Article 31(6)) and a single judicial authorisation is normally sufficient, if necessary, regardless of whether it is issued by the national judge of the referring EDP or by the one with territorial jurisdiction and called upon to assist the former.

Perhaps a small step back from the actual creation of the common European justice space is provided by Article 33, paragraph 2. There is no question about the interpretation of the principle in paragraph 1 (possibility for EDP to order or request the so-called "preventive" arrest, if allowed in similar national cases), while if the person to be arrested is outside the territory of that Member State (and therefore also within the territory of the EPPO common space), in any case, an European Arrest Warrant (EAW) must be issued and executed by the same European Delegated Prosecutor.

To conclude this essential part, I would like to remind you again, as proof of a "shy" creation of the common justice space, leaving aside for a moment the goods of security and freedom, of other people's direct competence, the fundamental principle governing the acquisition of evidence by the EDP which provides assistance within its territorial scope of competence, provided for by Article 32: 'The assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.' It is a principle of balance and "peaceful coexistence between the respective principles of the two distinct legal systems involved", "almost of a compromising nature", within the legal area of "enhanced common cooperation".

Particularly relevant is the discipline provided for by Article 30 of the Regulation regarding the specific acts of invasive investigation that can be adopted. Penalties exceeding four years, respect for the principle of proportionality, and the requirement that they be "serious crimes", such as searches, interceptions, seizures including of computer data and acquisition of banking data, with the further residual possibility of organising technical interception activities in all cases where it would legitimately apply in all similar national cases. Only for interceptions and undercover operations pursuant to Article 9 of the Italian law number 146/06, Article 17 of our Legislative Decree Number 9/21 provides for a reservation of specific national discipline.

Regarding EU Member States that do not participate in the "enhanced cooperation" or with third countries, the EPPO is equated with the national judicial authority of a Member State, and in the former case, the legislation of Directive 2014/14 on Mutual Legal Assistance (MLA) is applicable with the attribution of a fundamental and primary role to Eurojust, while the discipline is different for third countries – see Articles 104 and 105 of the Regulation – through the creation of so-called "working agreements" and contact points, based on Article 99 of the Regulation, but the effects should be profoundly different from those with Eurojust, only with which, in general, personal data can be freely exchanged and, in any case, transmitted by the EPPO.

As already mentioned, with third countries, the so-called "working agreements" are provided for (in addition to Eurojust) directly by the EPPO or international agreements between the EU and third countries, the detachment of liaison officers from third countries at the EPPO, and the establishment of EPPO contact points concerning third countries and/or international organisations. I must emphasise once again that, in the absence of such an international agreement between the European Public Prosecutor's Office, the EU and third countries, the EDP acts with the powers of a national prosecutor.

1.3. *EPPO's independence*

The EPPO remains distinct from Eurojust (although it "starts" from it) and OLAF.

Article 100 provides for and prescribes "close" relations with Eurojust, which will have, in particular, as already noted above, a fundamental role in facilitating relations between the EPPO and the national judicial authorities of the Schengen countries that do not belong to the European Public Prosecutor's Office (and therefore do not belong to the area of "enhanced cooperation"), and the judicial authorities of third countries. These relations, formal and informal, are also outlined in Article 3 of the EPPO Regulation and Article 15 of Directive 1371/17. Eurojust's key function in its relationship with the EPPO is to provide operational technical assistance to national judicial authorities, aiding in the coordination of investigations and enabling the EPPO to effectively exercise jurisdiction over offences listed in Directive 1371/17. Additionally, it's beneficial for the EPPO to receive investigative reports from OLAF (*cf* Article 101), supplementing its knowledge. OLAF refrains from conducting administrative investigations parallel to criminal investigations within the same legal domain and matter, except within the limits requested by the EPPO. Thus, the EPPO effectively "has OLAF at its disposal for its own purposes". However, while OLAF provides special support in computer and forensic matters, it can only conduct supplementary investigations, with national police forces acting under the direction of the EPPO.

On the 5th of July 2021, in this regard, a first cooperation agreement was signed between the EPPO and OLAF. With which, moreover, it was expressly agreed, confirming the above, (a) the suspension of OLAF investigations (fundamentally of an administrative nature) if the EPPO initiates a criminal investigation on the same object and (b) the extension of the EPPO's delegation of investigations to OLAF. But to verify the effective functioning of this principle, it is necessary to wait for its application in practice.

1.4. *Legal basis of the relationship with Eurojust*

The legal basis, in particular regarding the relationship with Eurojust, is constituted by Articles 85, 86, and 325 of the TFEU, Article 3, paragraph 3, Articles 22 to 27, 39, 48, 54, 99, 100 and 113, Regulation 1939/2017, as well as Regulation Eurojust 1727/2018 and EU Directive PIF 1371/2017 (Article 15).

1.5. *Working agreements*

The fundamental principle is the need to conclude working agreements between the EPPO and the European Judicial Cooperation Agency, Eurojust, to regulate their complex relationship. The first of these agreements has already been concluded in February 2021 and mainly concerns the possibility of mutual

access to their respective computer systems with the exchange of informational data – including personal data – and with the main concrete result that the EPPO will acquire a very significant part, or at least a large part, of the crime news within its jurisdiction based on Eurojust data, which thus becomes a valuable if not the main source in this sense. In this regard, Eurojust will also communicate to the EPPO any facts of its interest, while the EPPO will communicate to Eurojust the outcome of its investigations and, in particular, any transfer of its investigations or criminal proceedings due to competence to the competent national judicial authorities and will obtain support in the field of judicial cooperation with third countries or countries not belonging to the enhanced cooperation area through "classic" tools in the field of judicial cooperation (coordination meetings or coordination centres, establishment of Jits, prevention and resolution of conflicts of jurisdiction).

The European Chief Prosecutor and the Eurojust President will meet periodically, while regarding another extremely important aspect: based on a subsequent Eurojust working agreement, Eurojust will be able to provide the EPPO with services, including administrative and training services, of so-called common interest.

Based on the aforementioned working agreement (4 and 11 February 2021), Eurojust has already recently supported the EPPO in some cases concerning criminal investigations within the EPPO's competence against EU Member States that do not belong to the enhanced cooperation area and third countries, and in particular, in one case faced serious difficulties and problems.

Starting from the date on which the European Public Prosecutor's Office has effectively assumed its investigative and judicial tasks (June 2021), in accordance with the provisions of Article 102, paragraph 2 of Regulation (EU) 2017/1939, the agency no longer formally exercises its direct competence (but only supports the EPPO) with regard to offences that harm the financial interests of the Union with the following exceptions: if there is a request from the EU Member State that has not adhered to the area of the so-called "enhanced cooperation" or if the EPPO has decided not to exercise its competence concretely (Article 3, paragraph 1 of the Eurojust Regulation).

Finally, it is worth mentioning the circular of the General Command of the Guardia di Finanza, which establishes the sending of crime information of possible EPPO relevance to the competent national prosecutor and also directly to the EDP. Those two PPO offices will then discuss and determine the final competence.

One final observation in this context: as already mentioned, EPPO in its relations with third countries, international organisations and EU Member States that do not participate in the enhanced cooperation, in the absence of a specific agreement, is considered a competent national judicial authority with strong limitations regarding the management of personal data. The best proposal is to

develop specific cooperation or working agreements in this matter in order to try to solve this problem, or to receive specific authorisation from the Commission stating that a specific third country or international organisation (or part of them), under Article 36 of EU Directive 2016/680, guarantees an adequate level of data protection.

2. *The relationship between EPPO, OLAF and Europol*

Before specifically addressing the relationship with Europol, allow me to reiterate, regarding the specific tasks of OLAF in relation to the European Public Prosecutor's Office, that OLAF must send, if its fundamentally administrative investigation reveals elements of criminal relevance within the competence of the European Prosecutor, an "EPPO Crime Report Template" (ECR). Now allow me to talk about the functions and relevant competencies, especially of these two fundamental European police agencies.

2.1. *Europol*

Europol, composed of over 1000 staff members and more than 100 analysts of criminal phenomena based, like Eurojust, in The Hague in the Netherlands, was established to provide assistance and support for the development of investigations – even if only potentially – of a transnational nature. It currently provides over 40,000 informal reports annually on an international scale mainly to the 27 Member States of the Union (as well as to other agencies and international organisations such as EPPO and also, under certain conditions, to Third Countries). It focuses on the fight against relevant offences ("serious crimes"), represented by terrorism, international drug trafficking, money laundering, and other assets and utilities deriving from organised crime, related tax fraud (and therefore mainly from the so-called "carousel fraud"), counterfeiting of the Euro, and trafficking in human beings with connected or linked offences, as well as cybercrimes.

In order to implement appropriate and concrete forms of combating these criminal phenomena, Europol offers: (a) an operational support centre for the implementation of such effective countermeasures; and, (b) an information centre on criminal activities and analysis.

Under this latter aspect, analysis, the heart of Europol's institutional activity, is carried out at the request of national police forces and mainly concerns the so-called "connections" of national investigations with other investigations carried out elsewhere and considered connected or linked, and studies, like Interpol, the so-called "trends" of the interested criminal groups, indicating the most appropriate tactics and strategies for counteraction.

From an operational point of view, the Europol Operational Centre is active

24 hours a day, 7 days a week, while for individual sectors of crime: (a) the European Cybercrime Centre, "EC3" and the Joint Cybercrime Action Taskforce, "J-Cat"; (b) the European Counter Terrorism Centre, "ECTC"; (c) the European Migrant Smuggling Centre, "EMSC"; (d) Intellectual Property Crime Coordinated Coalition, "IPC3"; and, finally, (e) The European Serious Organised Crime Centre, "ESOCC".

In terms of "secure and confidential" computer and communication systems, Europol has, in addition to the so-called Europol Platform for Experts, "EPE", and the European information system, with the inclusion of all personal identification data useful for the fight against crime, (a) The FIU network – an information technology network that supports the Financial Intelligence Unit, FIU, in the EU in the fight against money laundering and the financing of terrorism; and, finally, (b) in general "Siena" which represents the network for the secure exchange of information with and from all national police authorities.

For the performance of these operational support tasks of the main national investigations, Europol also has a so-called "Mobile Office" equipped to provide, in real-time, the additional data and information necessary, or even just useful, during the execution of relevant transnational measures, especially during a so-called "Action-Day" – simultaneous execution of measures related to the respective investigations in several Member States or even third countries, normally within the framework of a so-called "Coordination Centre" of Eurojust.

Since 1 May 2017, Europol, the EU agency for 'cooperation in the prevention of and fight against the most serious forms of cross-border crime', has been governed by a new regulation that strengthens its powers.

Relevant, in terms of current affairs, is the "Terrorist Finance Tracking Program". Also, since 1 August 2010, always with a view to effective prevention and combating of terrorism on an international and global scale, the EU-United States of America Anti-Terrorism Agreement is in force and Europol is its main actor in Europe.

Based on Article 88 of the TFEU, Europol has become the main holder of data acquired from the computer equipment of all European police forces with the elaboration of strategic plans for the prevention and combating of so-called "serious" crimes to avoid further threats to security and civil coexistence and after analysis by national police forces within the EU, this international information asset, with active operational support through the most advanced techniques, now constitutes a reality of very significant value.

2.2. OLAF

OLAF (the European Anti-Fraud Office) was created in 1999 on the basis of Regulation EC No. 1073/99 and succeeds the previous UCLAF body. It was created at a particular moment when the European Commission itself was hit by

a serious corruption scandal that led to the resignation of the entire European Commission and its President Santer and which required the establishment of an investigative body with penetrating investigative powers in full autonomy.

OLAF is at the level of policing, while EPPO is at the judicial level. It is in fact an independent body within the European Commission, tasked with conducting administrative investigations to a large extent to protect the financial interests of the EU: (a) regarding behaviours that damage the budget of the European Union; as well as (b) regarding the conduct of officials of European institutions that may involve serious irregularities and in particular facts of a corrupt nature with criminal relevance.

The use of OLAF for investigations mainly concerning corruption offences, attributable to EU officials and agents (a hypothesis provided for in our domestic criminal law by Article 322 *bis* of the Italian Penal Code, introduced in Italy with Law No. 300/2000), realises the following advantages and significant benefits for the EPPO, our National Judicial Authorities, and the national police forces:

a) On one hand, it should be noted that European officials and agents enjoy immunity for acts carried out in the performance of their functions and that, without the so-called "waiver of immunity", no authority can legitimately conduct coercive and/or invasive criminal investigations against them. However, concerning OLAF, such a limitation does not exist, neither concerning its own so-called "internal" investigations, nor if requested to provide assistance in conducting so-called "external" criminal investigations, thus facilitating, in terms of further collaboration and coordination, the relationships between different national judicial authorities and the EPPO.

b) Regarding the assistance and coordination to be provided to national authorities and the EPPO, those of OLAF are comprehensive regarding administrative matters, while with reference to those of a criminal nature, they are limited. Indeed, when OLAF's investigations reveal criminal acts, OLAF informs the competent national judicial authorities and the EPPO, without, however, informing the EU institutions, and remains in constant contact with them, providing its support, but it cannot receive a true general delegation of criminal investigations.

c) At the end of its administrative investigations, OLAF prepares a summary report of the investigation results, irregularities detected, and damages suffered by the European Union, which if not of criminal relevance, is transmitted to the Community authorities for the adoption of administrative and disciplinary measures.

d) What matters for national judicial authorities, public prosecutors, and the EPPO is that such a report can be validly used in proceedings (especially criminal ones) in Member States and within the formally strengthened cooperation area, having the same value as documentary evidence – for the national system – and therefore also for the EPPO e.g., Articles 234 and/or 238 of the Italian Code of Criminal Procedure – as reports prepared by national administrative authori-

ties, while OLAF investigators may be, if necessary, summoned as witnesses in the trial.

e) Finally, to validly acquire these reports from OLAF, it is not necessary to carry out (neither for OLAF itself, nor for national judicial authorities, and obviously not even for the EPPO) rogatory letters or the issuance of EIOs or other different formal acquisition instruments, based on the EU Regulation governing the institutional activities of the Office (No. 1073/99 and subsequent), according to the recent guidelines of national judges (Courts of Marsala, Turin, Milan, Florence, Rome, Ancona, Venice and Saluzzo) and the Court of Appeal of Paris.

These principles, together with OLAF's investigative competence – primarily, but not only, of an administrative nature – throughout the EU territory and also partly in third countries, make the office appear as a supranational investigative body of considerable interest and support for national judicial authorities and also for EPPO, particularly for criminal investigations concerning EU agents and officials.

OLAF is competent and, in substance and summary, represents an administrative investigative service body operating within the framework of EU law, but can also use so-called "penetrating" and invasive investigative tools such as the acquisition and analysis of computer data, and is competent to investigate cases of fraud, corruption, and other irregularities, of administrative and criminal value damaging EU financial resources.

It carries out its action in a "partnership" relationship, i.e., in a collaborative relationship with national judicial and police authorities, the only ones endowed with extensive investigative powers, and with the EPPO, in mutual interest.

Cooperation and the evolution of the most up-to-date investigative means are fundamental as transnational fraud, harmful to the financial interests of the EU, and the corruption of EU officials and agents require the so-called "mobility" of assets, services and people between different States and/or the use of sophisticated communication and information means with actions that can only be effectively countered by close cooperation between OLAF and national authorities.

It is certain that in today's globalised society, only through constant transnational dialogue, always respectful of individual national sovereignties, will it be possible to achieve the goal of effective control and combating of transnational crime.

Dialogue and operational cooperation must be based on at least the following four levels:

a) Receipt of reports from Member States leading to the initiation, even formal, of an investigation;

b) Once OLAF has opened an investigation file, the receipt of additional information for the effective development of investigations;

c) Synergy between OLAF's investigation and other so-called "parallel" national investigations; and,

d) Guarantee of real-time or close information flows between OLAF and

other investigative bodies with the main purpose of executing, effectively and promptly, not only in criminal proceedings but also in accounting and administrative proceedings, precautionary measures of a patrimonial nature.

In this regard, of particular interest to national judicial authorities, national public prosecutors and the EPPO is, as already noted, that OLAF can, also thanks to its databases, provide data and guiding elements, both nationally and abroad, with high efficiency and without the need for complex investigative activities and collateral activities of a rogatory nature or without the need for the issuance of an EIO.

The "added value" of OLAF, as well as with reference to the aforementioned so-called "classic" activities of a collaborative and investigative nature (and it would be desirable, within the broader European Judicial Network, their extension), in the immediate future will be expressed also and fundamentally in the contribution that it will provide, pursuant to Article 101, paragraph 3 of Regulation 1939/2017, EPPO's legal basis, to the newly created European Public Prosecutor's Office (active as of 20 November 2020) as a complementary police body, to which, as already noted, send a European Criminal Report (ECR) alongside national public authorities, for the conduct of EPPO investigations, thus increasingly assuming the structure (also) of judicial police.

However, OLAF's investigative action, which can conduct its own investigations, I repeat, by nature and with essentially administrative purposes, without the need for specific authorisation in all Member States, extending also to third countries with which it has concluded specific cooperation agreements and without excluding collaborations, as highlighted above, even in criminal matters, will continue to develop within the framework of administrative investigations for its institutional purposes, connected to the protection of EU economic and financial interests – including that relating to VAT – under this latter aspect acting, pursuant to Article 101 of the EPPO Regulation, as a collateral unit of the EPPO's Public Prosecutor's Office. With the transmission to the EPPO of the *s.c.* "EPPO Criminal Report", in strict compliance with the principles contained in the EPPO-OLAF Working Agreement of July 2021 in particular regarding the suspension of administrative investigations in the event of the initiation of a criminal investigation by the EPPO and with useful specialised investigative support provided to the EPPO in such cases.

2.3. *The working agreement between EPPO and Europol*

Again, with reference to the EPPO-Europol relationship, an important Working Agreement was signed in January 2021 between EPPO and Europol, establishing cooperation relations between the European Public Prosecutor's Office and the European Union Agency for Law Enforcement Cooperation (EPPO-Europol).

Special value, from this point of view, must be reserved for the prominent

and relevant role attributed to Europol under EU Regulation 784/21, which entered into force on 7 June 2022, concerning the execution of removal orders and obtaining data of investigative interest, issued directly against Electronic Data Service Providers in terrorism matters – and I am sure that this Regulation – at least indirectly, due to the lack of direct competence of the EPPO in terrorism matters – may also be of interest to the EPPO.

Allow me to mention the most relevant provisions, principles and rules of this agreement, also for its more common and more general value in relation to other similar working agreements.

> Article 1: The purpose is to exchange 'information between the Parties' to 'establish cooperative relations between the EPPO and Europol'.
>
> Article 5: Each party designates 'a single point of contact through which all exchange of operational information under this Arrangement is undertaken'.
>
> Article 6: Consultations and enhanced cooperation through high-level periodic meetings between the EPPO and Europol shall take place, and in particular EPPO representatives may attend meetings of the heads of Europol's national units as observers.
>
> Article 7: Possible future agreement regarding the detachment of liaison officers or experts.
>
> Article 8: The exchange of information between the parties takes place only in accordance with their respective legal frameworks and the provisions of this Agreement, in particular with regard to compliance with the strict rules of personal data exchange (Articles 9, 13 and 14), excluding sensitive data and the need for their protection.
>
> Article 12: Requirements for assessing the source of information and the information itself.
>
> Article 18: The establishment, implementation and operation of a secure communication line for the purpose of exchanging information between the EPPO and Europol are agreed between the parties in a memorandum of understanding (with liability for any damages caused to the other party).

As already mentioned, this specific operational agreement is similar to others signed by the EPPO with the most important European judicial or police agencies (Eurojust and OLAF), and only the real experience of the near future will determine its concrete and, as we hope, fruitful results in the higher interest of improving a European justice space.

3. *Conclusions*

In this field of strengthening EPPO cooperation with other European agencies, and also with repercussions towards European third countries, much work has already been done, and much work still needs to be done: and we are present.

12.
A PRACTICAL ANALYSIS OF EPPO'S OPERATION

Serena Cacciatore

1. *Introduction*

This paper proposes to analyse the European Public Prosecutor's Office, established by Council Regulation (EU) 2017/1939 on October 12th 2017 (hereafter EPPO Regulation).[1] The enhanced cooperation for the creation of this independent body of the European Union (hereinafter EU) involved the agreement regarding sixteen countries, which were later joined by other Member States, until twenty-three countries were involved.[2] These countries have an obligation to report to the European Public Prosecutor's Office any criminal con-

[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), Official Journal of the European Union of 12 October 2017, No. L. 283/1, pp. 1-71. See L. BACHMAIER WINTER, *La Fiscalía Europea*, Marcial Pons, Madrid, 2018; see also M. BELLACOSA, M. DE BELLIS, *The protection of the EU financial interests between administrative and criminal tools: OLAF and EPPO*, in *Common market law review*, 1, 2023, pp. 15-50. I agree with those who see the European Public Prosecutor's Office as a truly revolutionary phenomenon, the scope of which cannot be underestimated. In this regard, A. DAMATO, *La tutela degli interessi finanziari tra competenze dell'Unione e obblighi degli stati membri*, Cacucci, Bari, 2018, p. 27.

[2] Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia and Spain. According to N. FRANSSEN, *Every euro counts … and so does every second: the EPPO and cross-border cooperation in relation to seizure and freezing in the 23 participating member states*, in *Eucrim: the European Criminal Law Associations's forum*, 3, 2022, pp. 206-212. See also R.A. MÓRAN MARTÍNEZ, *Investigación transfronterizas y cooperación judicial internacional. La Fiscalía Europea*, in *Revista del Ministerio Fiscal*, 9, 2020, pp. 22-51.

duct detrimental to the EU financial statement.[3] In other words, it is a European body that investigates crimes that harm the EU's financial interests such as: fraud, corruption, money laundering, and cross-border VAT fraud.[4] The European Public Prosecutor's Office is destined, therefore, to improve the criminal protection of these interests by providing added value, i.e., overcoming the fragmentation of cross-border crime investigations and establishing a uniform policy for the prosecution of crimes in its sphere of competence.[5]

Before EPPO became operational, only national authorities could investigate these crimes, as their jurisdiction ends at the national border. Today, EPPO conducts cross-border investigations regarding fraud exceeding EUR 10,000 involving EU funds or cross-border VAT fraud cases involving damage exceeding EUR 10 million. Its role is crucial in establishing a uniform prosecution policy between the participating Member States; therefore, it should help to create a common feeling of justice, which, as the European Commission has emphasised, is the main goal of the EU justice area.[6]

The crimes for which the EPPO has jurisdiction are intentional acts, so-called "PIF crimes" that can have a negative impact on the taxes paid by European taxpayers. The same are listed in Directive (EU) 2017/1371 of the European Parliament and of the Council of July 5th 2017,[7] laying down rules 'on the fight against fraud to the Union's financial interests by means of criminal law'. In the Annual Report of the European Public Prosecutor's Office for 2022,[8] mention is made to alleged fraud related to the use and submission of false, in-

[3] See A. VENEGONI, *The EPPO faces its first important test: a brief analysis of the request for a preliminary ruling* in G.K. and others, in *Eucrim: the European Criminal Law Associations' forum*, 4, 2022, pp. 282-285; see also A. MONTESINOS GARCÍA, *La nueva Fiscalía Europea,* in *Revista General de Derecho Europeo*, 53, 2018, pp. 163-196.

[4] See the official website *https://www.consilium.europa.eu/it/policies/eppo/*. See also L. CAMALDO, *Work in progress sulla procura europea: alcuni emendamenti proposti nella recente risoluzione del Parlamento Europeo*, in *Cassazione penale*, 7-8, 2014, pp. 2696-2704.

[5] See S. CACCIATORE, *La politica dell'Unione Europea in tema di criminalità organizzata*, in P.R. SUÁREZ XAVIER, A.M. VICARIO PÉREZ (eds.), *Cooperación judicial civil y penal en la Unión Europea: Retos pendientes y nuevos desafíos ante la transformación digital del proceso*, J.B. Bosch, Barcelona, 2023, pp. 57-86.

[6] See K. AMBOS, *Derecho Penal Europeo*, Thomson Reuters, Cizur Menor, 2017; see also T. ALESCI, *Riparto di giurisdizione e Procura europea,* in *Processo penale e giustizia: Rivista di dottrina e giurisprudenza,* 3, 2021.

[7] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, Official Journal of the European Union, L 198/29, pp. 29-41. See C. DI FRANCESCO MAESA, *Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?*, in *European Papers*, 3, 2018.

[8] Annual Report 2022: EPPO puts spotlight on revenue fraud *https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf*.

accurate or incomplete statements or documents, as a result of which funds administered by the Union were illegally withheld on financial statements. In addition to the most serious forms of VAT fraud (particularly carrousel fraud), VAT fraud through missing traders and fraud committed within a criminal organisation. [9] These fraud schemes occur mainly in the automotive, electronic device and textile sectors and usually involve several companies operating in multiple countries, either as intermediate operators or as missing operators. Existing statistics are general and show that the most common PIF crimes are subsidy fraud and tender fraud.

In the examination of the European Public Prosecutor's Office, starting with its legal nature, one of the most interesting but also most critical aspects of the European Public Prosecutor's Office investigations will be analysed, namely the cross-border investigations governed by Article 31 of the aforementioned Regulation. [10] In addition, concrete and real-life aspects will be examined, incorporating the point of view of practitioners, in order to learn about the progress of this new European body. In this regard, the study will focus on the European and national perspective not only in Italy but also in Spain. [11] The integration of the European Public Prosecutor's Office in different national judicial systems implies a greater respect for the specificities of each Member State that, however, do not conflict with the EPPO Regulation. [12]

The analysis of the perspectives mentioned is the result of fieldwork, namely the interviews conducted as part of the Jean Monnet module entitled 'THE

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[9] S. ALLEGREZZA, *Verso una procura europea per tutelare gli interessi finanziari dell'Unione. Idee di ieri, chances di oggi, prospettivi di domani*, in *Diritto penale contemporaneo*, 2013, *https://archiviodpc.dirittopenaleuomo.org/d/2610-verso-una-procura-europea-per-tutelare-gli-interessi-finanziari-dell-unione*.

[10] From the point of view of S. RUGGERI, *Indagini e azione penale nei procedimenti di competenza della nuova procura europea,* in *Processo penale e giustizia*, 3, 2018, pp. 958-976. See also F. LOMBARDI, *La Procura europea: A) Dal Corpus Juris al Decreto legislativo n. 9 del 2021*, in *Processo penale e giustizia*, 2021, 4, *https://www.processopenaleegiustizia.it/Article/Archive/index_html?ida=970&idn=66&idi=-1&idu=-1*.

[11] The words are from M.J. TRILLO-FIGUEROA MOLINUEVO, *Estudio sobre el proceso de adaptación normativa al ordenamiento jurídico español del reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea*, in *Direito e Justiça: Estudos contemporâneos*, 14, 2022, pp. 282-285. See also L. SALAZAR, *Habemus EPPO!: La lunga marcia della Procura europea*, in *Archivio penale*, 3, 2017, pp. 1-61.

[12] For example, in this area, the figure of the investigating judge and its compatibility or otherwise with the provisions of the Regulation has been analysed by several authors; in Spain, unlike other Member States such as Belgium, it has been decided to abolish this figure. See C. SABADELL CARNICERO, *Retos de la Fiscalía Europea*, in L. FONTESTAD PORTALÉS, A. HERNÁNDEZ LÓPEZ, P. RAMÓN SUÁREZ XAVIER, M.Á. PÉREZ MARÍN, S. GUERRERO PALOMARES (eds.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021, de 1 de junio*, Aranzadi, Navarra, 2023, pp. 127-153.

EPPO and EU law: a step forward in integration'.[13] Projects selected as Jean Monnet modules[14] are chosen on the basis of a competitive process and assigned by the European Commission to institutions, in this case universities, which it considers qualified for their excellence in teaching and research. STEPPO was assigned to the University of Milano-Bicocca,[15] for a duration of four years (2022-2025).[16] The project aims to provide EU citizens with an introductory overview of the European Public Prosecutor's Office through dialogue between prosecutors, EU officials, professionals, academics, students, and the general public.

Specifically, the Interviews Committee[17] is tasked with interviewing experienced professionals in the field of European integration, with a focus on the role of the European Public Prosecutor's Office. To this purpose, we interviewed a number of European Delegated Prosecutors (hereinafter EDPs), as well as lawyers, magistrates and experts in the field, such as Francisco Jiménez Villarejo, Deputy Supreme Court Prosecutor of the Kingdom of Spain and Head of the International Cooperation Unit at the General Prosecutor's Office, as well as Concepción Sabadell Carnicero, at the time of the interview, Prosecutor of the European Public Prosecutor's Office representing Spain, Salvador Guerrero Palomares, lawyer and professor of procedural law at the University of Malaga, as well as interviews with Italian professionals, including EDPs Calogero Ferrara and Amelia Luise, both at the *Procura della Repubblica presso il Tribunale di Palermo*; as well as Stefano Castellani and Pasquale Profiti, the two EDPs from Turin and Bologna, respectively. Among the latest interviewees

[13] The website of the project is available at *https://www.steppo-eulaw.com/*.

[14] Jean Monnet is considered the "Father of Europe", referring to the role he played in the early days of the present European Union, having been the first President of the High Authority of the European Coal and Steel Community, under the Schuman Plan. Thereafter, he continued to play an important role in European integration throughout his life. For these reasons, the Module mentioned above is named after him. For more, J.F. BARROSO MÁRQUEZ, *Jean Monnet: la punta del iceberg comunitario*, in *RUE: Revista universitaria europea*, 33, 2020, pp. 79-94.

[15] European Union Centre of Excellence, more information available on the official website at *https://www.steppo-eulaw.com/*.

[16] The coordinator of the Jean Monnet STEPPO module is Professor Benedetta Carla Maria Angela Ubertazzi, the subcommittees are different from each other: Steering Committee, Criminal Lawyers, Prosecutors, Academic, Judicial Bodies, Law Enforcement Agencies, National Institutions, EU Institutions Subcommittee, Connect Subcommittee, Create Subcommittee, Collaborate Subcommitte, Game Subcommittee, Baking insurance and financial authorities, High School Subcommittee, Audit Institutions Subommittee, Real estate transactions, Media Subcommittee, Art & Cultural Heritage Crimes. More information is available at *https://www.steppo-eulaw.com/*.

[17] It is composed of Alejandro Hernández López, professor of procedural law at the University of Valladolid, Cristina Ruiz López, professor of procedural law at the University of Córdoba, Ana Vicario Pérez, doctoral student at the University of Burgos, and Costanza De Caro, doctoral student at the University of Florence.

we have chosen a doctoral student from the Basque Country, Olga Vicente Sarasúa, to find out the point of view of those who, research first-hand on the subject. Through the various interviews we intend to gather practical information such as interesting data and professional experience in this area. The interview form has been translated into the different languages, depending on the interviewee's background, and the interview was in most cases recorded and, of course, authorised by the interviewees. The chapter will conclude with a brief reflection.

2. *The creation of the European Public Prosecutor's Office and its consequences*

After a long period characterised by a lack of awareness, the creation of the European Public Prosecutor's Office has been very well received by practitioners from both the judiciary and the legal profession. After its entry into force on June 1st 2021, it has attracted much attention and curiosity. This has meant firstly, for magistrates, an expansion of their competencies, and secondly, for the legal profession, specific preparation in the field to face this new challenge. [18] It is a unique institution, in that it is a judicial office in its own right; not a cooperative agency like those existing within the EU or other international bodies, nor a court that decides on certain questions of interpretation of the norms. In this case, it is an investigative and prosecutorial judicial office operating in a wide territory in terms of the size and variety of legal systems involved.

In this regard, it should be noted, Article 86 of the Treaty on the Functioning of the European Union (TFUE) (…) provides that 'in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust', in its second paragraph it further elaborates on this idea by stating that the European Public Prosecutor's Office, (…) 'shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the Union's financial interests'. The scope of competence, therefore, relates to offences affecting, as anticipated, the Union's financial interests, and which in turn is also obviously provided for in the EPPO Regulation. However, beyond this expression of a general character, the debates between the European Com-

[18] See J.A.E. VERVAELE, *The European Public Prosecutor's Office (EPPO): Introductory Remarks*, in W. GEELHOED, L.H. ERKELENS, A.W.H. MEIJ (eds.), *Shifting Perspectives on the European Public prosecutor's Office*, Springer, Nueva York, 2018; see also H.H. HERRNFELD, D. BRODOWSKI, C. BURCHARD, *European Public Prosecutor's Office. Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')*, Beck Somon hart, Germany, 2021.

mission and the Member States regarding the specific competence of the European Public Prosecutor's Office and its allocation with national authorities have generated a complex set of rules, described by the Supreme Court as difficult to interpret in an unambiguous and uniform way.[19] It is true that Article 86(4) of the TFUE[20] provides for the possibility of extending the powers of the European Public Prosecutor to 'serious crimes having a cross-border dimension'. This notion would include particularly serious crimes with a cross-border dimension referred to in Article 83(1) of the TFEU, including organised crime, as long as they are serious crimes affecting more than one Member State. As is well known, for this to happen, the European Council should act unanimously, after approval by the European Parliament and consultation with the Commission. The possibility of expanding its scope, therefore, exists and will depend on the results of its operation in its first years; in the following paragraphs we will discuss this issue in detail.

Regarding the material competence of the European Public Prosecutor's Office, in general terms, whereas Article 12 of the EPPO Regulation emphasises a couple of key principles, the European Public Prosecutor's Office should be competent to prosecute PIF crimes in accordance with the principles of subsidiarity and proportionality set forth in Article 5 (paragraphs 3 to 4) of the Treaty on European Union (TEU).[21] Furthermore, in order for the EPPO Regulation to achieve its objectives, it must ensure that its impact on national legal systems and institutional structures is as minimal as possible. This statement is crucial, as the EPPO Regulation opted for a regime of shared competence between the European Public Prosecutor's Office and national authorities in the fight against PIF crimes.

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[19] Especially, the practical application of these rules generates some problems when it comes to deciding whether to initiate the investigation of certain crimes. Indeed, in some States it will be possible to investigate, in others it will not be possible. Interview with Concepción Sabadell Carnicero on 17 November 2022.

[20] Literally: 'The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.' In this regard, F. DE ANGELIS, *The European Public Prosecutor's Office (EPPO). Past, Present, and Future*, in *Eucrim: the European Criminal Law Associations' forum*, 4, 2019.

[21] Literally: '(…) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States Member States, neither at the central nor at the regional and local level, but can, by reason of the scale or effects of the action in question in question, be better achieved at the Union level (…). By virtue of the principle of proportionality, the content and form of Union action shall be limited to what is necessary to achieve the objectives of the Treaties.'

The EPPO Regulation also includes any other crimes related to those to the detriment of the Union's interests (e.g., crimes related to money laundering).[22] In case of extension of the jurisdiction of the European Public Prosecutor's Office, the question of whether the related criminal conduct falls within the material scope of that body's jurisdiction is a sensitive issue. In this regard, there is a need for a doctrine from the Court of Justice of the European Union (CJEU) that will provide more legal stability, on the one hand, and respects the analysis and assessment of the existence of evidence of the commission of the crime by the competent national judicial bodies, on the other. Undoubtedly, from a substantive law perspective, there is a "grey area" in relation to so-called "inextricably linked crimes" as a legal concept that needs to be fully explored and interpreted, as anticipated, by the CJEU, as an autonomous concept of EU law. In my view, the correct approach should be that of factual criteria and functional in line with Articles 54-56 of the EPPO Regulation. The same makes explicit reference to the notion of inextricably linked offences: 'should be considered in light of the relevant case law, which, for the application of the *ne bis in idem* principle, adopts as a relevant criterion the identity of the material facts (…) understood as the existence of a set of concrete circumstances inseparably interrelated in time and space'. Moreover, they should be considered ancillary, in that they are instrumental to the crime affecting the EU interests; i.e., such other crime was committed to procure the material and legal prerequisites and to create the conditions for the commission of the crime affecting the financial interests of the Union.

Regarding the organisational structure of the European Public Prosecutor's Office, it is on two levels: central and national.[23] The first consists of a chief European Public Prosecutor and a college of prosecutors who define the strategy implemented by EPPO and supervise the investigations conducted by the European Delegated Prosecutors at the national level. The second, which is the national level, consists of the Deputy European Prosecutors and the Permanent Chambers; while the EDPs, are responsible for conducting criminal investigations and are independent of their respective national authorities; the Perma-

[22] Another concrete example could be the aggravated fraud to obtain European funds intended to resurface roads. If they used suitable but waste material to resurface this public road and thus we are talking about actual waste, the waste trafficking will be related to the PIF crime. In this case, waste trafficking would not be the responsibility of EDPs but since it is connected to the fraud they will exercise their competence for that as well. See S. KATSANAKI, *The gathering of e-evidence by the EPPO and the relevant admissibility issues*, in *Jean Monnet Network on EU Law Enforcement, working paper series*, 4, 2022, available at *https://jmn-eulen.nl/papers/*.

[23] From the point of view of C. RODRÍGUEZ-MEDEL NIETO, *En el corazón de la Fiscalía Europea: las Salas Permanentes*, in *Revista de Estudios Europeos*, No. extra 1, 2023, pp. 1-27. From a critical point of view, L. PRESSACCO, *Indagini e promovimento dell'azione penale del Pubblico ministero europeo*, in *Rivista italiana di diritto e procedura penale*, 4, 2021, pp. 1353-1395.

nent Chambers monitor investigations by adopting decisions.[24] Both structures coexist and play an active role in cases under the jurisdiction of the EPPO. In other words, while investigations and prosecutions are conducted in the courts of the Member States by the European Delegated Prosecutors; the guidelines and instructions they execute are determined centrally and channelled through the Permanent Chambers, a new collegial body that concentrates the majority of decisions at the operational level.

Article 3(1) of the EPPO Regulation reads, 'The EPPO is hereby established as a body of the Union'. In this regard, it is necessary to dwell on the legal nature and ask whether it can be called an institution, an agency or rather a body.[25] First, it cannot be called an institution, at least so far, although the situation may change in the future, as it is not included in the list of EU institutions in Article 13.1 of the TEU.[26] Nor can it be called an agency, since the European Public Prosecutor's Office 'should be established from Eurojust' (Article 10 of the EPPO Regulation). From the same Regulation it appears that the European Public Prosecutor maintains close relations with Eurojust[27] on the basis of mutual cooperation within the framework of their respective mandates and the development of operational, administrative and management links between them (Article 100 of the EPPO Regulation).[28] A relationship between EPPO and Eurojust is more

[24] See E.C. PÉREZ-LUÑO ROBLEDO, *La nueva fiscalía europea*, in J.M. MARTÍN RODRÍGUEZ, L. GARCÍA ÁLVAREZ (eds.), *El mercado único en la Unión Europea: balance y perspectivas jurídico-políticas*, Dykinson, Madrid, 2019, pp. 1107-1120; see also L. LÚPARIA DONATI, J. DELLA TORRE, *Origen y antecedentes de la Fiscalía Europea*, in L. FONTESTAD PORTALÉS, A. HERNÁNDEZ LÓPEZ, P. RAMÓN SUÁREZ XAVIER, M.Á. PÉREZ MARÍN, S. GUERRERO PALOMARES (eds.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021, de 1 de junio*, Aranzadi, Navarra, 2023, pp. 87-126, specifically p. 88.

[25] See M. JIMENO BULNES, *La Fiscalía Europea: un breve recorrido por la Institución*, in J.M. ASENCIO MELLADO, O. FUENTES SORIANO (eds.) *El Proceso como garantía*, Atelier, Barcelona, 2023, pp. 59-103; see also G. DE AMICIS, *"Competenza" e funzionamento della procura europea nella cognizione del giudice*, in *La legislazione penale*, 2022, pp. 1-37.

[26] Literally: '(…) The Union's institutions shall be: the European Parliament, the European Council, the Council, the European Commission (hereinafter referred to as 'the Commission'), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors.'

[27] Eurojust is an EU agency for judicial cooperation in criminal matters, established to strengthen the principle of mutual recognition and mutual trust. See N. ALONSO MOREDA, *Eurojust, a la vanguardia de la cooperación judicial en materia penal en la Unión Europea*, in *Revista de Derecho Comunitario Europeo*, 41, 2012, pp. 119-157. See also V. COVOLO, *From europol to eurojust – towards a european Public Prosecutor: where does OLAF fit in?*, in *Eucrim: the European Criminal Law Associations' forum*, 2, 2012, pp. 83-88.

[28] The following Articles (Articles 101-102) regulate, respectively, relations with OLAF and Europol. From the point of view of F. JIMÉNEZ VILLAREJO FERNÁNDEZ, *Cooperación de la Fiscalía Europea con Eurojust, Europol y OLAF*, in L. FONTESTAD PORTALÉS, A. HERNÁNDEZ LÓPEZ, P.R. SUÁREZ XAVIER, M.Á. PÉREZ MARÍN, S. GUERRERO PALOMARES (eds.), *Tratado sobre la Fiscalía Europea y el procedimiento penal especial de la L.O. 9/2021, de 1 de junio*, Aranzadi, Navarra, 2023, pp. 675-718.

of proximity than origin. This is further confirmed by Article 3.3 of the same Regulation, which states that 'The EPPO shall cooperate with Eurojust and rely on its support in accordance with Article 100', the European Public Prosecutor's Office therefore, is granted the status of being its own as a body.

2.1. *European perspective*

Article 31 of the EPPO Regulation, mentioned earlier, focuses on one of the aspects defined by many authors as most critical, namely cross-border investigations. That Article establishes the basis for cross-border cooperation in cases with more than one jurisdiction.[29] The key points concern: mutual assistance between EDPs; coordination of the investigations, which can be achieved by exchanging of information and establishing of common strategies; and again, the role of national competent authorities who are personally involved. The EDP is responsible for investigations and decide what steps to take, under the supervision of the European Public Prosecutor of his Member State and the decisions of the Permanent Chamber hearing the case. Alongside the EDP, responsible for cross-border cooperation within the territory in which the European Public Prosecutor's Office operates, there is a delegate in charge of providing assistance. The delegate is located in a participating Member State where the investigative act is deemed useful and necessary for the European Public Prosecutor's Office investigations.

In cross-border investigations,[30] the European Public Prosecutor's Office goes beyond the traditional mechanisms of judicial cooperation. In other words, the European Public Prosecutor's Office does not use the European Investigation Order (hereinafter EIO)[31] to acquire evidence in the territory of another

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[29] See E.C. PÉREZ-LUÑO ROBLEDO, *La nueva fiscalía europea*, in A. SÁNCHEZ RUBIO, J.M. MACARRO OSUNA, J.M. MARTÍN RODRÍGUEZ, L. GARCÍA-ÁLVAREZ (eds.), *El mercado único en la Unión Europea: balance y perspectivas jurídico-políticas*, Dykinson, Madrid, 2019, pp. 1107-1120; see also V. COMI, *Interessi finanziari UE, procura europea, difesa: nessun passo indietro sul piano delle garanzie*, in *Archivio penale*, 2, 2013, pp. 1-18.

[30] See G. FIORELLI, *Il pubblico ministero europeo, tra poteri investigativi nazionali e regole probatorie "in bianco"*, in *Processo penale e giustizia*, 1, 2020, pp. 190-201; see also A. PICARDI, *Aspetti procedurali delle attività investigative oltre i confini della Comunità Europea (le Squadre Investigative Comuni)*, in *Cassazione penale*, 4, 2020, pp. 1764-1778; see also G. ILLUMINATI, *La protección de los derechos fundamentales de los sospechos y acusados en los procedimientos transfronterizos de la Fiscalía Europea*, in L. BACHMAIER WINTER (eds.), *La Fiscalía Europea*, Marcial Pons, Madrid, 2018, pp. 229-252.

[31] In general, and in summary, EIO, from a technical point of view is a judicial decision issued by a competent authority in one Member State (issuing State), to carry out one or more specific investigations in another Member State (executing State) in order to obtain evidence in criminal proceedings. The executing authority must observe the formalities and procedures specified by the issuing authority. The decision on recognition will be taken as quickly as possible, in respect for the fundamental principles of its law. See S. CACCIATORE, *European Investigation order as an*

State. Instead it uses a system defined by the aforementioned standard, according to which it is sufficient to associate the electronic file with the Deputy European Public Prosecutor of the State where the act is to be carried out, for the execution of the same, once the measure has been ordered under the national law of the State in whose territory operates the EDP who is conducting the investigation. [32]

The rules on transnational investigations represent an added value with respect to the existing instruments of international cooperation, since, as reported earlier, they allows for the "circumvention" of provisions on cooperation instruments such as letters rogatory, investigative orders or exchange of information. [33] Although the concept of "mutual recognition" [34] is not explicitly used, the European Public Prosecutor system is based on cooperation among EU Member States; it implies that Member States work together to deal with cross-border legal issues. [35] In addition to this, as some authors have noted, while this system might be effective for the European Delegated Prosecutors involved, it might not be so for the suspects, whose procedural guarantees contained both in national legislation and in EU Directives – a matter that has not been harmonised by the EPPO Regulation – may or may not be applicable in transnational cases. [36]

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instrument for the fight against organised crime, in AA.VV., *The Signicance of EU Criminal LAW in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?*, Vilnius University Press, Vilnius, 2021, pp. 34-38.

[32] A. VENEGONI, *Il rinvio pregiudiziale davanti alla Corte di Giustizia (caso C-281/22): l'EPPO alla sua prima, importante, prova,* in *Giurisprudenza penale*, 12, 2022, pp. 1-6, specifically p. 2.

[33] In fact, as EDP Calogero Ferrara argues, there are a number of issues, for example the fact that the judicial systems are different anyway, and therefore activities that, for example, in Italy the prosecutor can do, in another State are not so. Interview with Calogero Ferrara, 27 July 2022. In this regard, M. FOUWELS, *Cooperation between the European Commission and the European Public Prosecutor's Office: an insider's perspective*, in *Eucrim: the European Criminal Law Associations' fórum*, 3, 2022, pp. 204 206. See also, R. SICURELLA, Z. DURDEVIC, K. LIGETI, M. COSTA, *Manual sobre Fiscalía*, in *Proyecto EU LAW training on EPPO*, Bruselas, 2022.

[34] See S. CACCIATORE, *El reconocimiento mutuo como principio clave para la lucha contra el crimen organizado*, in F. JAVIER GARRIDO CARRILLO (ed.), *Lucha contra la criminalidad organizada y cooperación judicial en la UE: instrumentos, límites y perspectivas en la era digital*, Aranzadi, Cizur Menor, 2022, pp. 171-186. See also R.A. MORÁN MARTÍNEZ, *El papel del Fiscal como defensor del principio de reconocimiento mutuo de resoluciones judiciales europeas*, in *Boletín de información del Ministerio de Justicia*, 2054, 2008, pp. 175-182.

[35] From a critical point of view, V. RUZICKOVÁ, *The role of mutual trast and mutual recognition in the functioning of the European Public Prosecutors's office*, in *Muni Journals*, 1, 2022, pp. 67-89.

[36] A perfect example of this is the Directive on legal assistance, which does not recognise the possibility for the suspect to have legal representation appointed in all the Member States concerned in cross-border investigations, whereas this is possible when a European Arrest Warrant has been issued. Interview with Olga Vicente Sarasúa, Investigadora predoctoral en la Universidad del País Vasco/Euskal Herriko Unibertsitatea.

Regarding the interpretation of Article 31 of the EPPO Regulation, which is the subject of study, we have the first preliminary reference to the Court of Justice ordered by the Vienna court in Case C-281/22, GK14.[37] The EDP in Germany, in a case where it is investigating for breach of customs duties, needs to execute search warrants in Austria. According to German law, the search must be ordered by a judge at the request of the prosecutor, and so occurs. Although the search had already been authorised by a judge in the State of the EDP who was conducting the main investigation in Germany, the Austrian EDP, also acts in accordance with his country's domestic law and, requests validation of the search by the Austrian judge. The trial judge validates the measure.

The subjects under investigation appeal to the superior court stating that the validation should not have been ordered due to the lack of serious indications of the commission of the crime, and thus a matter of merit and not a matter pertaining to the execution of the measure. At this point, the lower court in Vienna raises the question to the Court of Justice for a preliminary ruling. In the preliminary reference, the Austrian court states that the EPPO is a unitary office and a measure, to be enforced in a State other than that of the proceeding EDP, must normally be enforced according to the law of the State where the EDP assisting for execution operates. The standard that the EPPO Regulation provides, however, is always that of the highest level of protection of the rights of the defence, and this is manifested in the standard on the necessity of for court authorisations in investigative acts.[38]

Indeed, Article 31(3) of the Regulation states: 'If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State', and then adds 'However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment'. In this case, Advocate General Tamara Ćapeta, in her opinion submitted on June 22th 2023, proposed that the Court of Justice resolve the questions raised by the Vienna Tribunal, stating that:

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[37] Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria G.), Case C-281/22, delivered on 22 June 2023, ECLI:EU:C:2023:510 available at *https://curia.europa.eu/juris/document/document.jsf?text=&docid=274882&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1336832*. See G. PIAZZOLLA, *Ultime novità in materia di procura europea: la sentenza della corte di cassazione 16 dicembre 2021, n. 46140 e il rinvio pregiudiziale c-281/22 della corte d'appello di Vienna*, in *Cassazione penale*, 3, 2023, pp. 607-613.

[38] A. VENEGONI, *Il rinvio pregiudiziale davanti alla Corte di Giustizia (caso C-281/22): l'EPPO alla sua prima, importante, prova cit.*, p. 4.

> Article 31(3) and Article 32 on enhanced cooperation for the establishment of the European Public Prosecutor's Office, must be interpreted to mean that in cross-border investigations, the court, when it has to validate a measure to be executed in the Member State where the Deputy European Public Prosecutor in charge of providing assistance acts, has the task of assessing only those aspects related to the execution of an investigative measure.

The court of the Member State in which the Deputy European Public Prosecutor is in charge of providing assistance must accept the assessment made by the European Public Prosecutor Delegate in charge of the case, regardless of whether or not the measure has been previously authorised by the courts of the Member State of the Delegated European Public Prosecutor in charge of the case.

Continuing with the analysis of Article 31, concerning the competent authorities for enforcement,[39] are limited to the EDPs of the corresponding Member State, when requesting the execution of an investigative measure from one or more European Delegated Prosecutors in another Member State, the Delegated European Public Prosecutor in charge of the case must simultaneously inform their own European prosecutor responsible for supervision (Article 31(2) of the EPPO Regulation). Regarding coordination for the execution of such cross-border investigative measures, especially when problems or discrepancies arise between EDPs acting in the roles of prosecutor in charge and assistant, coordinated supervision can greatly improve the understanding, quality and effectiveness of the on-going coordination, although the aforementioned Regulations regulate specifically the cases of discrepancies between the Appointed Prosecutor and the Assistant Prosecutor. In such circumstances, the role of Supervising Attorneys should be strengthened. In addition, Article 31.5 of the EPPO Regulation lists four reasons for refusal of execution, similar to the reasons for non-recognition in Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the EIO. These grounds are not directly invoked by the Assistant Prosecutor, since it is up to the Permanent Room to make the refusal decision.

One topic that has always been under discussion concerns the substantive jurisdiction of the European Public Prosecutor's Office, that is, whether it should be extended to crimes that are not limited to the protection of the EU's financial interests or membership in criminal organisations. The EPPO's impact on combating crimes against the financial interests of the EU committed by criminal organisations is undeniable, since it is the first EU organism with the compe-

[39] See D. CECCARELLI, *The EPPO and Fight against VAT Fraud: a Legal Ostacle in the Regulation?*, in *Eucrim: the European Criminal Law Associations'; forum*, 1, 2021, pp. 47-48. See also T. WAHL, *First EPPO case before CJEU*, in *Eucrim the European Criminal Law Associations'; forum*, 3, 2022, pp. 1-96.

tence to directly investigate and prosecute them, unlike OLAF, which can only issue recommendations to the Member States. In cases where organised crime pertains to offences falling within the competence of the EPPO, and thus involves factual associations with lesser crimes under the competence of the European Public Prosecutor's Office, the latter would be fully engaged. It would be desirable for crimes that necessarily involve multiple countries and for the rapidity that characterises investigations in this area. These are transnational environmental crimes,[40] which is one of the big topics under discussion at present, or terrorism,[41] or again, human trafficking. However, this would also require a ceding of jurisdiction by national authorities as well as a strengthening of offices. For these reasons, before extending the jurisdiction of the European Public Prosecutor's Office, one should have a better perspective on its functioning and, most importantly, on its compatibility and understanding with national prosecutors' offices.

2.2. *Spanish and Italian perspective*

The specific modalities of cooperation and coordination between the European Public Prosecutor's Office and national prosecutors' offices may vary among EU Member States, but the overall goal is to ensure a uniform and effective response against financial crimes involving EU funds. The Spanish Public Prosecutor's Office[42] has supported the European Public Prosecutor's Office project ever since the idea of such a proposal was launched and has now become a reality.[43] The Spanish legislature had to anticipate a reform of on-going

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[40] A. VERCHER NOGUERA, *La evolución d ellos delitos contra el medio ambiente en el contexto europeo: la Directiva 2008/99/CE*, in *Diario La Ley*, 10047, 2022, available at *https://diariolaley.laleynext.es/content/Inicio.aspx*.

[41] The Commission proposed in 2018 extending the EPPO's material competence to cover transnational terrorism, which may provoke certain difficulties regarding the organisation and functioning of the EPPO, as some authors have pointed out, since it has been established and oriented towards the investigation and prosecution of PIF crimes. Interview Olga Vicente Sarasúa, Investigadora predoctoral en la Universidad del País Vasco/Euskal Herriko Unibertsitatea.

[42] See T. ARMENTA DEU, *Fiscalía Europea. Su incidencia en el ordenamiento procesal español*, in V. MORENO CATENA, M.I. ROMERO PRADAS (eds.), *Nuevos postulados de la cooperación judicial en la Unión Europea (Libro homenaje a la Prof. Isabel González Cano)*, Tirant lo Blanch, Valencia, 2017, pp. 145-171; see also, J.L. GÓMEZ COLOMER, *La inserción de la Fiscalía Europea en el sistema procesal penal español*, in V. MORENO CATENA, M.I. ROMERO PRADAS (eds.), *Nuevos postulados de la cooperación judicial en la Unión Europea (Libro homenaje a la Prof. Isabel González Cano)*, Tirant lo Blanch, Valencia, 2017, pp. 217-240.

[43] See E. ZANETTI, *La via italiana alla procura europea nella delega per l'implementazione del regolamento (UE) 2017/1939*, in *Processo penale e giustizia*, 1, 2020, pp. 264-278; see also R. BELFIORE, *I procuratori 'super distrettuali' per i reati che ledono gli interessi finanziari dell'Unione europea: un nuovo 'terzo binario' investigativo*, in *Sistema penale*, 12, 2021, pp. 65-81.

criminal proceedings, by the *Anteproyecto de Ley de 2011* (updated in 2020), and with another attempt, which later failed in 2013.

At this point it should be pointed out that the *Ministerio Fiscal* is currently not a figure belonging to the judiciary, with the consequence that it will not be possible to grant it the prerogatives recognised to judges and magistrates. Also worth noting is the dependence of the *Ministerio Fiscal* on the executive power. So, the presence of the investigating judge and the non-independence of the prosecution deny the possibility of transiting to a more accusatory system. For these reasons, a change in the investigative model would be desirable, moving from an investigating judge to an investigating prosecutor. [44]

Reason why, the Spanish legislature was forced to dictate a legal norm that would adapt the Spanish criminal process to the requirements of the EPPO Regulation, giving birth to *Ley Orgánica 9/2021 de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea*, [45] which creates what we can call the *procedimiento penal especial* for the prosecution of offences that harm the financial interests of the EU.

A specific procedure has been established for cases handled by the European Public Prosecutor's Office, where the direction of investigations is properly attributed to it. The *Fiscal Delegado español*, with the collaboration of the judicial police, will be able to carry out the investigations. It is also emphasised that there is no difference in competence between the various EDPs. [46]

The Spanish penal system is described by some authors as "obsolete". [47] The possibility of this project moving forward was seen by many as a hope for overcoming the inherent "immobility" that – in criminal matters – characterises the Spanish state. As anticipated, from June 2021, after overcoming many obstacles at the national and supranational levels, the European Public Prosecutor's Office will operate in Spain as another Prosecutor's Office, although, unlike the territorial and special prosecution offices that have operated in the Spanish criminal justice system, it is a supranational prosecutor's office, acting outside

[44] The *Fiscal General del Estado*, which represents *Ministerio Fiscal*, in Italy is the *Pubblico ministero*.

[45] *Ley Orgánica 9/2021, de 1 de julio, de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea*. In general terms, M. JIMENO BULNES, *La estrategia de la cooperación judicial penal europea en materia de intereses financieros*, in I.B. GÓMEZ DE LA TORRE, N. RODRÍGUEZ-GARCÍA, *Decomiso u recuperación de activos crime doesn't pay*, Tirant Lo Blanch, Valencia, 2020, pp. 267-294.

[46] In this way, the competence for the adoption of precautionary measures is given without the need for judicial intervention, taking into account that they do not affect fundamental rights and are normally urgent and provisional measures, subject to subsequent ratification and the corresponding appeals system.

[47] Interview with Francisco Jimenez Villarejo on 28 October 2022.

the Spanish Prosecutor's Office with its own structure, operational and decision-making means, autonomously and independent.

The difference between the Spanish public prosecution service and those of the rest of the EU countries, including EPPO, is that Spain is the only country where the investigation of criminal cases is not directed by prosecutors, but by judges. A structure, as mentioned earlier, which is awaiting a reform, announced and planned, but which has not yet arrived and which is delaying the homologation of the Spanish criminal justice system with the rest of the European investigation models. As long as this change does not happen, it will be difficult to incorporate European legislation, directly applicable in the Spanish criminal justice system, as did *Ley Orgánica* 9/2021 of July 1st did.

In this regard, the harmonisation efforts made by *Ley Orgánica* 9/2021 of July 1st to align with the rest of the EU Member States where the EPPO Regulation is applied should be commended. We highlight in this regard, the mandatory inclusion of the new figure of the Judge of Guarantee, who, as an external body to the management of the proceedings, assumes the functions of judicial review expressly provided for in the EPPO Regulation, and the power given to the EDPs in the adoption of emergency real precautionary measures, or the unprecedented inclusion of the evidentiary incident, among others.

Italy[48] implemented the Directive with *decreto legislativo del 14 luglio 2020, n. 75*[49] in 2020, and subsequently adapted its domestic legislation to the Regulation with *decreto legislativo del 2 febbraio 2021, n. 9.*[50] It can be anticipated in this regard, that the system that the Italian legislature has envisaged[51] provides for a

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[48] In the preceding paragraphs, mention was made of the jurisdiction of the European Public Prosecutor's Office. There are problems that, for the time being, have not been encountered in practice by practitioners in the field. The reference is to interviewees who are experts in the subject matter, practitioners in the field (see previously mentioned EDPs).

[49] *Attuazione della direttiva (UE) 2017/1371, relativa alla lotta contro la frode che lede gli interessi finanziari dell'Unione mediante il diritto penale. GU n. 177 del 15-07-2020.*

[50] Provisions for the adjustment of national legislation to the provisions of Council Regulation (EU) 2017/1939 of 12 October 2017, concerning the implementation of enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).

[51] A concrete example regarding the conduct of the proceedings in Italy was provided to us by EDP Luise Amelie. The Prosecutor's Office in Palermo obtained the first trial that ended in first instance with a plea bargain sentence for an Article 316 *bis* in Reggio Calabria on 16 June 2022 (Article 316 *bis* c.p. italiano) '*Chiunque, estraneo alla pubblica amministrazione, avendo ottenuto dallo Stato o da altro ente pubblico o dalle Comunità Europee contributi, sovvenzioni, finanziamenti, mutui agevolati o altre erogazioni dello stesso tipo, comunque denominate, destinati alla realizzazione di una o più finalità, non li destina alle finalità previste, è punito con la reclusione da sei mesi a quattro anni*'. Considering six months of investigation without extension, Article 416 *bis* of the Criminal Code. (*Associazioni di tipo mafioso anche straniere*), the indictment and the decree ordering the trial, the technical time for the definition of the trial was short. Continues EDP Amelie Louise: '*In questo caso c'era stata una richiesta di patteggiamento da parte dell'avvocato già durante la fase delle indagini preliminari e quindi nel giro di un anno siamo già arrivati alla definizione di un*

prevalence, where an offence of those referred to in the BIP Directive is found, that the prosecutor reports both to the European Public Prosecutor's Office and to the national prosecutor.[52] The European Public Prosecutor's Office – except in urgent acts and specific cases – carries out a prevalence if it falls among one of the crimes within its jurisdiction. The national prosecutor, on the other hand, must await the decisions of the European Public Prosecutor in this regard.

Subsequent to the decision, the national prosecutor has the possibility, if necessary, to raise a kind of conflict of jurisdiction before the indicated judicial authority, which is the General Prosecutor's Office at the Supreme Court. Again, in cases where there might be an overlap of jurisdiction, the national prosecutor's office previously expresses its opinion on possible jurisdiction, as does the General Prosecutor's Office at the Court of Cassation.[53]

Another issue concerns the authorities responsible for resolving conflicts of jurisdiction. The EPPO Regulation entrusts individual Member States with the identification of the same.[54] In Italy, it will be the Prosecutor General at the Court of Cassation which will initiate the procedure in question, because otherwise there would be no possibility for the competent authority to resolve conflicts of jurisdiction by turning to the Court of Justice for interpretation. Others argue otherwise on the basis of the Court's traditional jurisprudence that judicial authorities are not legitimised to act.[55]

For some Italian EDPs, problems arise when one has to put together the so-called PIF crimes and crimes inextricably linked to those, previously mentioned. This connection inextricably linked can sometimes result in the need to assess which crime is more serious or whether or not a conspiracy is involved or not, which could still cause the jurisdiction to be drawn over EPPO crimes, the boundary is not objectively sharp or easily discernible.[56] Moreover, concrete

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procedimento'. In this regard G. DI PAOLO, S. MARCOLINI, *Verso l'istituzione di una procura europea a protezione degli interessi finanziari dell'Unione: la proposta di regolamento COM (2013) 534 final*, in *Cassazione penale*, 1, 2014, pp. 360-368.

[52] See G. GRASSO, R. SICURELLA, F. GIUFFRIDA, *EPPO material competence: analysis of the PIF directive and Regulation*, in *The European Public Prosecutor's Office at launch Adopting National System, Transforming, EU Criminal Law,* Wolters Kluwer, Milano, 2020, pp. 23-56. See also L.M. ESTÉVEZ MENDOZA, *La instauración de la Fiscalía como cooperación reforzada: problemas orgánicos y procesales*, in *Revista de Estudios Europeos*, 1, 2017, pp. 106-122.

[53] See L. BACHMAIER WINTER, *EPPO versus national prosecution office: A conflicting case of competence with broader dimensions*, in M.J.J.P. LUCHTMAN, F. DE JONG (eds.), *Of swords and shields: due process and crime control in times of globalisation: liber amicorum prof. dr. J.A.E. Vervale*, 2023, pp. 515-523.

[54] L. PRESSACCO, *Indagini e promovimento dell'azione penale del pubblico ministero europeo*, in *Rivista italiana di diritto procedura penale*, 4, 2021, pp. 1353-1395.

[55] This, like others above, are insights suggested by those who, concretely come up against such conflicts of jurisdiction (see previously mentioned EDPs).

[56] Interview with EDP Pasquale Profiti on 6 July 2022.

problems emerge related to the different judicial systems, for example, the activities that in Italy may be carried out by the prosecutor, in another country, as the study addressed shows, will be the responsibility of the judge.

In current events, no major problems have emerged in relations with other national prosecutors' offices, and apart from a few Italian EDPs who have pointed out procedural issues brought up by the defendants' defences, they also do not report exceptions of nullity of the investigation activity carried out by the European Public Prosecutor's Office based on lack of competence. In any case, the relationship with the national prosecutors – from what has emerged – tends to be a relationship of confrontation in which solutions are found without coming to any conflict.

On the other hand, in Spain, the relationship between the European Public Prosecutor's Office and the Spanish Public Prosecutor's Office is close, in the sense that, in light of the principle of loyal cooperation and mutual trust, both offices support each other and regularly exchange information in the area of the promotion of justice, with the aim of combating PIF crimes.

3. *Final consideration*

The European Public Prosecutor's Office aims to improve the protection of the EU budget through the effective detection and prosecution of financial crimes. It assumes a viable starting point on which to build criminal cooperation among Member States, including the integration of EU criminal and procedural laws. The lack of regulatory uniformity means that the EPPO's ability to prosecute crimes against the EU's financial interests is heterogeneous, despite the fact that the sharing of resources among Member States could contribute to more effective management of them.

Being a single European-level prosecutor's office greatly facilitates coordination among the various EDPs. This ease of coordination, as seen earlier, is certainly a factor of great progress. In addition, its dedication to financial crimes could have a deterrent effect on those who might try to commit such crimes, knowing that there is a specific body in charge of prosecuting them. Therefore, it is expected that cooperation between the European Public Prosecutor's Office and national prosecutors will lead to an increase in convictions for cross-border financial crimes.

The possibility of extending the jurisdiction of the EPPO has been another subject of study. Specifically, whether criminal conduct falls within the material scope of EPPO's jurisdiction. Certainly, this is a sensitive issue and one for which there is a need for a doctrine from the CJEU that will provide more legal stability, on the one hand, and respects the analysis and assessment of the existence of evidence of the commission of the crime by the competent national judicial bodies, on the other.

Articles 31 and 32 of the EPPO Regulation respectively govern 'Cross-border Investigations' and the 'Enforcement of assigned measures'. They create a system of cooperation that surpasses all previous instruments in terms of effectiveness and efficiency. However, there may arise questions regarding the violation of fundamental rights or compliance with the case law of the Court of Justice of the European Union.

Another aspect that should be emphasised concerns the accession of European countries that currently have not joined the EPPO. It would be appropriate for all EU countries to join the EPPO; the explicit reference is to those Member States such as, Poland, Hungary, Denmark, Ireland and Sweden who do not participate in the EPPO, but this would seem to be more of an assessment on the political rather than judicial.

For the functioning of the Rule of Law in the EU, particularly in the fight against corruption, and based on the principle of maximum fairness and mutual cooperation, it is essential to establish platforms for mutual collaboration and dialogue. These spaces facilitate overcoming disagreements on jurisdictional matters related to cross-border investigations and associated crimes, thereby laying the groundwork for smooth, stable, and productive relationships between prosecutors.

As for the possibility of extending the scope of EPPO, which has been mentioned, it exists and will depend on the results of its operation in the first years and its ability to resolve disagreements with national prosecutors.

Finally, the Jean Monnet module entitled 'THE EPPO and EU law: a step forward in integration' will conclude in 2025. This means that interviews will continue to be developed by the Interviews Committee, and this will allow for a deepening of the topics covered. The actual impact of the European Public Prosecutor's Office will be evaluated over time based on the actual results of the investigations and trials it will handle.

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13.

THE EU'S RULE OF LAW TOOLBOX BETWEEN EVOLUTION AND REVOLUTION

Serena Crespi

SUMMARY: 1. The foundational and constitutional nature of common values under Article 2 of the TEU. – 2. The notion of "Rule of Law" in light of EU case law. – 3. Tools for preventing violations of common values by Member States: the annual Reports of the European Commission on the Rule of Law. – 4. Following: The peer review system of the General Affairs Council. – 5. Reactive tools to the risk of violation or breach of common values: the mechanism provided for in Article 7 of the TEU. – 6. Following: the infringement procedure referred to in Articles 258-260 of the TFEU between theory… – 7. …And Practice. – 8. Preliminary ruling under Article 267 of the TFEU. – 9. The principle of mutual trust among Member States in EU infringement and preliminary case law: a new weapon to protect the Rule of Law? – 10. The conditionality mechanism: Regulation 2020/2092. – 11. Conclusions… also in light of the recent directive on the protection of persons reporting violations of EU law.

1. *The foundational and constitutional nature of common values under Article 2 of the TEU*

The Rule of Law is one of the common values shared by the Member States – and therefore inherent to the European Union as a whole – listed in Article 2 of the TEU along with 'human dignity, freedom, democracy, equality, the rule of law and respect for human rights' including those of 'persons belonging to minorities'.[1] The European Union is, in other words, a union of values, with re-

[1] On Article 2 TUE, among others, A. VON BOGDANDY, M. IOANNIDIS, *Systemic deficiency in the rule of law: what it is, what has been done, what can be done*, in *Common Mark. Law Rev.*, 2014, p. 59 ff.; D. KOCHENOV, *EU Law without the Rule of Law: Veneration of Autonomy Worth it?*, in *Yearbook Eur. Law*, 2015, p. 74 ff.; J.P. JACQUÉ, *Crise des valeurs dans l'Union européenne*, in *Rev. trim. dr. eur.*, 2016, p. 213 ff.; W. SCHROEDER, *Strengthening the Rule of Law in Europe From a Common Concept to Mechanisms of Implementation*, Oxford/Portland, 2016; R. MASTROIANNI, *Stato di diritto o ragion di Stato? La difficile rotta verso un controllo europeo del rispetto dei*

spect for democracy, the Rule of Law, and fundamental rights being the basis on which Italian and European society, and our common identity as EU Member States, are founded.

The foundational nature of these values is evident not only from the text of Article 2 of the TEU – the Union is 'founded' on them – but also from the fact that they are an essential condition for becoming a member of the European Union. Article 49 of the TEU provides that '[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'.[2] Indeed, the Court of Justice, interpreting Articles 2 and 49 of the TEU in the Wightman Judgment of 2018, emphasised that 'the European Union is composed of States which have freely and voluntarily committed themselves to those values'.[3] The protection of these values as a condition for even initiating negotiations with third countries aspiring to become members of the Union was already applied in the EU system before the codification of Articles 2 and 49 of the TEU following the latest revision of the Treaties, namely the Lisbon Treaty of December 2009. The Copenhagen criteria, adopted by the European Council in 1993, already made the initiation of the accession procedure conditional on the establishment in the third country of stable institutions guaranteeing 'democracy, the rule of law, human rights and respect for and protection of minorities'.[4] However, even before that, accession negotiations, for example, with Greece, Spain and Portugal to the Eu-

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valori dell'Unione negli Stati membri, in E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN, R. VIRZO (eds.), *Dialoghi con Ugo Villani*, Bari, 2017, p. 605 ff.; B. NASCIMBENE, *Valori comuni dell'Unione europea*, *ibid*, p. 631 ff.; E. LEVITIS, *L'Union européenne en tant que communauté de valeurs partagées. Les conséquences juridiques des articles 2 et 7 du traité sur l'Union européenne pour les États membres*, in AA.VV., Liber Amicorum *Antonio Tizzano: De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 509 ff.; L.S. ROSSI, *Il valore giuridico dei valori. L'articolo 2 TUE: relazioni con altre disposizioni del diritto primario dell'UE e rimedi giurisdizionali*, in *federalismi.it*, 2020, p. 4 ff.; G. PITRUZZELLA, *L'Unione europea come "comunità di valori" e la forza costituzionale del valore dello "stato di diritto"*, in *federalismi.it*, 2021, p. iv ff. On the genesis of Article 2 TUE, see the extensive reconstruction by A. CIRCOLO, *Il valore dello Stato di diritto nell'Unione europea. Violazioni sistematiche e soluzioni di tutela*, Napoli, 2023, especially pp. 83-97.

[2] On the specific aspect of common values within the framework of the enlargements of the European Union, B. NASCIMBENE, *La procedura di adesione all'Unione europea*, in M. GANINO, G. VENTURINI (eds.), *L'Europa di domani: verso l'allargamento dell'Unione*, Milano, 2002, p. 3 ff.; M. CARTA, *Lo Stato di diritto alla prova dell'allargamento dell'UE (o l'allargamento della UE alla prova dello Stato di diritto)*, in *Eurojus*, 2022, p. 177 ff.; A. ŁAZOWSKI, *Strengthening the rule of law and the EU pre-accession policy:* Repubblika v. Il-Prim Ministru: case C-896/19, in *Common Mark. Law Rev.,* 2022, p. 1803 ff.

[3] Court of Justice, 10 Dicember 2018, C-621/18, points 62-63. Similarly, the conclusions of Advocate General Kokott of 12 April, 2018, C-561/*16, Saras Energía,* point 75.

[4] The text of the conclusions of the European Council in Copenhagen on June 21-22 1993, is available at the following address: *https://www.consilium.europa.eu/media/21225/72921.pdf*.

ropean Communities were initiated, leading to their respective entry in 1981 and 1986, only after the conclusion of their respective dictatorships, thus demonstrating the implicit foundational nature of the values referred to in Article 2 of the TEU even before their codification in common law. This is understandable given that freedom, democracy and the Rule of Law, even before being EU values, are part of the constitutional traditions of the individual Member States since the post-war period. [5]

The values referred to in Article 2 of the TEU must also be possessed by each State not only at the time of accession to the Union under Article 49 of the TEU but also throughout their membership to the EU system (so-called stand-still condition). This result, already logical in itself, is evident first of all from the letter of paragraph 2 of Article 2 of the TEU. This latter qualifies the values listed in paragraph 1 (human dignity, freedom, democracy, equality, rule of law, human rights) as 'common', thus implying that the States are bound to respect them even when members of the Union. Indeed, the Court of Justice, albeit with regard to respect for one of the values referred to in Article 2 of the TEU, namely the Rule of Law, has clarified that a State cannot, once it has entered the Union, modify its domestic legislation in a way that entails a regression in the protection of the value under consideration (so-called non-regression principle). [6] Generalising, as seems appropriate, the application of this latter principle to every common value, the level of protection of the values referred to in Article 2 of the TEU required of candidate countries and/or potential candidates at the time of their entry into the Union under Article 49 of the TEU must then be maintained even after becoming members of the EU system, compliance with common values being an obligation that derives directly from the commitments made by the Member States to each other and to the Union. [7] This is under-

[5] In this regard, the European Commission's Communication to the Parliament and the Council, *A New Framework for the EU to Strengthen the Rule of Law*, 11 March 2014, COM(2014)158, especially p. 2.

[6] Such principle was first illustrated in Court of Justice, 20 April 2021, C-896/19, *Repubblika*, point 63 regarding the respect for the Rule of Law in Malta. It was then confirmed in further rulings such as, for example, Court of Justice, 18 May 2021, C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, *Asociaţia Forumul Judecătorilor din România*, point 162, regarding the respect for the Rule of Law in Romania. For an analysis of the principle of non-regression in doctrine, see N. CANZIAN, *Indipendenza dei giudici e divieto di regressione della tutela nella sentenza* Repubblika, in *Quaderni cost.*, 2021, p. 715 ff.; A. FESTA, *Indipendenza della magistratura e non regressione nella garanzia dei valori comuni europei. Dal caso* Repubblika *alla sentenza K 3/21 del Tribunale costituzionale polacco*, in *Freedom, Security & Justice. European Legal Studies. Rivista quadrimestrale on line sullo Spazio europeo di libertà, sicurezza e giustizia*, 2021, p. 72 ff.; M. LELOUP, D. KOCHENOV, A. DIMITROVS, *Opening the door to solving the "Copenhagen dilemma"? All eyes on* Repubblika v II-Prim Ministru, in *Eur. Law Rev.*, 2021, p. 692 ff.; A. ŁAZOWSKI, *Strengthening the rule of law cit.*

[7] Court of Justice, 16 February 2022, C-156/21 (*Hungary v. European Parliament and Council*),

standable because Article 2 of the TEU contains common values that are part of the European identity,[8] so that each Member State shares with all other Member States, and recognises that these share with it, a series of common values on which the European Union is founded.[9]

The respect for Article 2 of the TEU and the values mentioned therein is also imposed not only on candidate or potential candidate countries for accession to the Union and those already members thereof but also on EU institutions in the exercise of their internal and external activities, with Article 13 of the TEU providing that '[t]he Union shall have an institutional framework which shall aim to promote its values'. In particular, as regards relations with third countries, Article 3(1) of the TEU lists among the objectives of the European Union the promotion of peace, its values, and the well-being of its peoples, also in relations with the rest of the world, and Article 21(1) and (2) of the TEU reiterates that '[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.[10] Furthermore, in the framework of the Common Foreign and Security Policy (CFSP), Article 42(5) of the TEU establishes that the Council may, through the deploy-

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points 124, 127, 231, 233, and C-157/21, (*Poland v. European Parliament and Council*), points 145, 169, 265. For an analysis in doctrine of these twin judgments, rendered moreover by the plenary assembly of the Court of Justice with regard to the validity of the so-called Conditionality Regulation, as will be discussed further, see J. ALBERTI, *Adelante, presto, con juicio. Prime considerazioni sulla sentenza della Corte di giustizia che sancisce la legittimità del Regolamento condizionalità*, in *Eurojus,* 2022, p. 25 ff.; V. BORGER, *Constitutional identity, the rule of law, and the power of the purse: the ECJ approves the conditionality mechanism to protect the Union budget*: Hungary and Poland v. Parliament and Council: case C-156/21, Hungary v. Parliament and Council and case C-157/21, Poland v. Parliament and Council, in *Comm. Mark. Law Rev.*, 2022, p. 1771 ff.; S. PLATON, *La valeur des valeurs. La confirmation de la validité du mécanisme de conditionnalité «État de droit» par la Cour de justice de l'Union européenne*, in *Cahiers dr. eur*, 2022, p. 197 ff.; H. GAUDIN, *Ce que l'Union européenne signifie: l'identité de l'Union et de ses États membres. À propos des arrêts de la Cour de justice rendus en assemblée plénière, le 16 février 2022*, Hongrie c. Parlement européen et Conseil, C-156/21, et Pologne c. Parlement européen et Conseil, C-157/21, in *Rev. trim. dr. homme*, 2023, p. 17 ff.

[8] Court of Justice, *ibid*.

[9] Court of Justice, Opinion 2/13, 18 December 2014, on the accession of the European Union to the ECHR, points 167-168. In doctrine, L. FUMAGALLI, *Articolo 2*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, Milano, 2014, as well as more recently, L.S. ROSSI, *Il valore giuridico dei valori cit*., p. vi.

[10] Regarding the binding nature of the Rule of Law for EU institutions in the exercise of external dimension, Court of Justice, 27 February 2007, C-355/04 P, *Segi e.a.*, point 51; as well as more recently, 19 July 2016, C-455/14 P, *H v Consiglio*, point 41; 28 March 2017, C-72/15, *Rosneft*, point 72.

ment of civilian and military capabilities of individual Member States, entrust the performance of a Union mission to a group of Member States for the purpose, once again, of preserving common values.

The fact that the values referred to in Article 2 of the TEU, as part of the European identity, pervade every aspect – internal and external – of the construction of the Union and are imposed on all interested parties – candidate countries, members, or third States, as well as EU institutions – has correctly led EU case law to recognise the rule in question as having a "constitutional" nature.[11] In Opinion 1/17, the judges in Luxembourg affirmed that 'Union possesses a constitutional framework that is unique to it' and that 'the founding values set out in Article 2 TEU'[12] are part of this framework, in addition to the values enshrined in the Charter of Fundamental Rights of the EU, the rules on the allocation and distribution of powers between the Union and the Member States, as well as the rules for the functioning of European institutions and the judicial system. This is further confirmed by the placement of the provision in question among the first provisions of the TEU, that is, of the Treaty which, unlike the TFEU, contains the constitutive and constitutional principles of the Union system.

2. *The notion of "Rule of Law" in light of EU case law*

The "Rule of Law", theorised primarily at the national constitutional level[13] and also employed at the ECHR level,[14] is one of the values mentioned in Arti-

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[11] In this regard, L.S. ROSSI, *Il valore giuridico dei valori cit*., p. v) asserts that as an expression of the founding principles and supreme values of the Union, Article 2 TEU is situated at a higher level than all other treaty provisions.

[12] Court of Justice, Opinion 1/17, 30 April 2019, on the conclusion of the international agreement CETA between Canada and the European Union, point 110; as well as the aforementioned Opinion 2/13 on the accession of the Union to the ECHR, point 158.

[13] A. FESTA, *L'Unione europea e l'erosione dello Stato di diritto in Polonia*, in *Freedom, Security Justice*, 2020, p. 145 ff., especially p. 146 reports how the notion of the "Rule of Law" was primarily theorised by German doctrine between the late 18th and early 19th centuries and manifested in England in the form of the so-called Rule of Law, in the United States with the concept of constitutional state, and in France with that of *règne de la loi*. On the differences between the notions of the Rule of Law in continental Europe, R. BIN, *Rule of Law e ideologie*, in G. PINO, V. VILLA (eds.), Rule of Law. *L'ideale della legalità*, Bologna, 2016, p. 42 ff.

[14] See also Article 18 ECHR, Article 3 of the Statute of the Council of Europe, as well as Opinion 512/2009 of the Venice Commission of 4 April 2011 (CDL-AD(2011)003rev). On the Rule of Law in the case law of the ECHR, 28 May 2002, *Stafford v. The United Kingdom*, No. 46295/99, point 63; 23 May 2016, *Mozer v. The Republic of Moldova and Russia*, No. 11138/10, point 134. In doctrine, F. TAN, *The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?*, in *Goettingen Jour. Int. Law*, 2018 p. 109 ff., especially pp. 111-112; S. GIANELLO, *Sul (possibile) utilizzo della CEDU come argine alle sistemiche violazioni dello Stato di diritto*, in *DPCE online*, 2019, p. 2373 ff.

cle 2 of the TEU. However, this provision does not provide a definition of this notion and/or the underlying principles, so their content must be reconstructed in light of the EU case law, which, especially since 2018, has been repeatedly called upon to interpret the aforementioned treaty provision mainly through the judicial instruments of infringement proceedings (Articles 258-260 of the TFEU) and preliminary rulings (Article 267 of the TFEU). Indeed, since Article 2 of the TEU is a primary law provision, modifiable as such only through the procedure provided for in Article 48 of the TEU, the notion of the "Rule of Law" contained therein could not have been specified through means other than judicial ones, such as acts of secondary law. Even those that offer a definition of the "Rule of Law" – such as, for example, the European Commission's communications on the Rule of Law,[15] or the so-called Conditionality Regulation,[16] which links the disbursement of European funds to the respect for common values – refer, in fact, to the EU case law, which is thus the only one able to give content to the notion of primary law in question as written by the drafters of the treaties.[17]

In light of EU rulings, it emerges that the "Rule of Law" is an autonomous notion of EU law,[18] which encompasses a series of different principles,[19] albeit

[15] For example, the Communication from the Commission of 2014, *A New Framework for the EU cit*., particularly p. 2; the Communication from the European Commission to the European Parliament, the European Council, and the Council, *Strengthening the Rule of Law in the Union. The current context and possible new initiatives*, 3 April 2019, COM(2019)163; the Communication from the European Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the Rule of Law in the Union. Action plan*, 7 August 2019, COM(2019) 343.

[16] See in particular recital 3, Article 2, point (a), and Article 3 of Regulation 2020/2092 of the European Parliament and of the Council of December 16, 2020, on a general regime of conditionality for the protection of the Union's budget. In doctrine, M. CARTA, *Strumenti finanziari e tutela della Rule of Law: i recenti sviluppi nell'Unione europea*, in AA.VV., *Temi e questioni di diritto dell'Unione europea. Scritti offerti a Claudia Morviducci*, Bari, 2019, p. 153 ff.; M. FISICARO, *Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values*, in *Eur. Papers*, 2022, p. 697 ff.; I. STAUDINGER, *Usual and Unusual Suspect: New Actors, Roles and Mechanisms to protect EU Values*, *ibid*, 2022, p. 721 ff.; E. MAURICE, *Etat de droit: le pari incertain de la conditionnalité*, in *Question d'Europe. Policy Paper de la Foundation Robert Schuman*, 13 March 2023, p. 1 ff.

[17] Expressly on the definition of the Rule of Law contained in the Conditionality Regulation *cit*., Court of Justice, *Hungary v. European Parliament and Council cit*., point 227; *Poland v. European Parliament and Council cit*., point 323. Similarly, the Communication from the European Commission, *Guidelines on the application of Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union's budget*, OJEU, 18 March 2022, particularly points 10-11 and Annex I.

[18] On the qualification of the Rule of Law as an autonomous concept of EU law, Court of Justice, *Poland v. European Parliament and Council cit*., point 143.

[19] A list of the principles included in the notion of the Rule of Law elaborated by EU case law

complementary to each other. In particular, it requires that all public authorities (legislative, executive and judicial) act within the limits set by law, in line with the values of democracy and in respect of the fundamental rights enshrined in the EU Charter, under the control of independent and impartial judicial bodies.[20] The "Rule of Law" ensures, in other words, that in a context of separation of powers (principle of the separation of powers),[21] the legislative process is transparent, accountable, democratic and pluralistic (principle of legality),[22] that executive power is not exercised arbitrarily (prohibition of arbitrariness),[23] and that the exercise of such powers is always subject to the control of an impartial and independent judiciary,[24] easily accessible to citizens and guaranteeing effective judicial protection,[25] legal certainty,[26] equality before the law/non-discrimination,[27] and the protection of fundamental rights,

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is provided by T. KOSTANTINIDIES, *The rule of Law in the European Union. The Internal Dimension*, Oxford, 2017, especially p. 83 ff.

[20] Thus, the Communication from the European Commission of 2014, *A New Framework cit*., especially p. 4, as well as Article 2, point (a) of the Conditionality Regulation *cit*.

[21] Court of Justice, 22 December 2010, C-279/09, *DEB*, point 58; 10 November 2016, C-477/16, *Kovalkovas*, point 36; 10 November 2016, C-452/16, *Poltorak*, point 35.

[22] Court of Justice, 29 April 2004, C-496/99 P, *CAS Succhi di Frutta*, point 63; 21 June 2022, C-817/19, *Ligue des droits humains v. Council*, point 146. In doctrine, A. ADINOLFI, *Il principio di legalità nel diritto comunitario. Atti del Convegno di studi di scienza dell'amministrazione, Varenna 20-22 settembre 2007*, Milano, 2008, p. 87 ff.

[23] Court of Justice, 21 September 1989, 46/87 e 227/88, *Hoechst*, point 19.

[24] Court of Justice, 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, points 31 and 40-41; 25 July 2018, C-216/18 PPU, *LM*, points 63-67. Regarding the former judgment, see among others, M. CLAES, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary*, in *Eur. Const. Law Rev.*, 2018, p. 622 ff.; A. MIGLIO, *Indipendenza del giudice, crisi dello stato di diritto e tutela giurisdizionale effettiva negli Stati membri dell'Unione europea*, in *Diritti umani e diritto int.*, 2018, p. 421 ff.; M. PARODI, *Il controllo della Corte di giustizia sul rispetto del principio dello Stato di diritto da parte degli Stati membri; alcune riflessioni in margine alla sentenza* Associacao Sindacal dos Juizes Portugueses, in *Eur. Papers*, 2018, p. 985 ff. Regarding the *LM* judgment, see T. KONSTADINIDES, *Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM*, in *Comm. Market Law Rev*., 2019, p. 743 ff.; M. WENDEL, *Indépendance judiciaire et confiance mutuelle: à propos de l'arrêt LM*, in *Cah. dr. eur*., 2019. p. 189 ff.

[25] Court of Justice, *Rosneft cit.*, point 73 and the case law cited therein.

[26] Court of Justice. 12 November 1981, 212/80 a 217/80, *Amministrazione delle finanze dello Stato/Srl Meridionale Industria Salumi e.a.*, point 10; *Rosneft cit*., points 161-162; *Hungary v. European Parliament and Council cit.*, points 136 and 223; 24 July 2023, C-107/23 PPU, *C.I. e.a.*, point 114. According to the Court of Justice, the principle of legal certainty requires, on the one hand, that legal rules be clear and precise and, on the other hand, that their application be predictable. In doctrine, M.L. TUFANO, *La certezza del diritto nella giurisprudenza della Corte di giustizia dell'Unione europea*, in *Dir. UE*, 2019, p. 767 ff.

[27] Court of Justice, 19 January 2010, C-555/07, *Kucukdeveci* (age); 22 January 2019, C-193/17, *Cresco* (religion). In doctrine, L.S. ROSSI, F. CASOLARI (eds.), *The principle of equality in EU Law*, Berlin, 2017.

as indeed happens in every legal system aspiring to be democratic. [28]

As noted by the European Commission, [29] this list is not exhaustive, so it is always possible that further principles may be added to the aforementioned notion of the "Rule of Law", either by the drafters of the treaties through the procedure provided for in Article 48 of the TEU, or by the Court of Justice through interpretation. [30] According to some doctrine, for example, legitimate expectations or *ne bis in idem* could fall within the scope of this examination as they are connected to the principle of legal certainty and effective judicial protection, or the execution of judicial decisions because it is linked to the principle of legality, or even the classic principles of the primacy of EU law, direct effect, or loyal cooperation. [31] Understanding these basic principles of the EU system within this notion is desirable, considering the tendency, as will be discussed further, of constitutional courts of some Member States, among others affected by the violation of the Rule of Law (i.e., Poland and Romania), to deny their applicability at the national level, even though they have been implemented throughout the Union for over sixty years.

More specifically, from the analysis of EU case law in the last five years, it emerges that the most investigated principle has been that of the impartiality and independence of national judiciaries. The particular attention of the Court of Justice to these aspects was probably due to a dual practical and legal reason. From a practical perspective, it should first be noted how the setback, starting from 2011, of the Rule of Law, especially in two Member States, namely Poland and Hungary, has affected precisely these aspects. In 2011, for example, the Hungarian Assembly adopted, through a procedure considered

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[28] On the fact that fundamental rights are an essential component of respect for the Rule of Law, only a society based on the latter allowing individuals to fully enjoy fundamental rights, see K. LENAERTS, *The Autonomy of European Union Law*, in *Dir. UE*, 2018, p. 617 ff., especially p. 621. Similarly, *Council conclusions (Justice and Home affairs) on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union,* 6-7 July 2013, especially p. 4.

[29] See, COMMISSIONE EUROPEA, *70 years of EU Law. A Union for its citizens*, in *Unione europea*, 2022, especially p. 39.

[30] On the fact that the realisation of the Rule of Law notion can only be done primarily by the Member States or interpretatively by the Court of Justice, see E. CANNIZZARO, *Il ruolo della Corte di giustizia nella tutela dei valori dell'Unione europea*, in AA.VV., Liber Amicorum *Antonio Tizzano cit*., p. 158 ff., especially p. 161.

[31] The examples are from A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 102. On the understanding of classic EU principles in the context of the examined notion (primacy, direct effect, obligation of conforming interpretation, loyal cooperation), see E. PERILLO, *Il rispetto dello "Stato di diritto" alla luce delle sentenze Ungheria e Polonia sulla clausola di condizionalità finanziaria. Quali prospettive?*, in *BlogDUE*, 16 March 2022, especially pp. 4-5. In this regard, the Luxembourg Court also seems to move in the same direction in the order of 20 November 2017, C-441/17, *European Commission v. Poland*, point 102.

non-transparent,[32] new constitutional rules on the retirement of judges, which resulted in the simultaneous removal of three hundred judges, even when newly appointed.[33] More recently, legislation has provided for the possibility, by the Constitutional Court, to declare the decision of Hungarian judges to refer preliminary questions to the Luxembourg judges as illegitimate, thus limiting a faculty instead directly attributed to them by Article 267 of the TFEU.[34] Similarly, since 2015 the Polish Parliament has introduced the possibility of cancelling the appointment of constitutional judges made in the previous legislature, as well as attributing the appointment of the latter, the Presidents of the Courts and the Courts of Appeal directly to the Ministry of Justice. The appointment of additional judges has also been entrusted not to the National Council of the Judiciary, i.e., the body traditionally responsible for this task to safeguard the independence of judges, but to Parliament. Poland has also established new disciplinary procedures concerning the conduct of members of the judiciary, as well as generic reasons for disciplinary misconduct.[35] In this context, the high number of EU pronouncements on the independence and impartiality of national judiciaries was then determined by the corresponding significant number of cases filed with the Court of Justice by the European Commission (infringement proceedings under Articles 258-260 of the TFEU) or by national judges themselves (preliminary ruling of interpretation under Article 267 of the TFEU) in order to ascertain to the first the incompatibility with Article 2 of the TEU (then mostly effectively ascertained) of Polish and Hungarian legislation on the reorganisation of the judiciary.

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[32] In this regard, A. JAKAB, P. SONNEVEND, *Continuity with Deficiencies: the New Basic Law of Hungary*, in *Eur. Cost. Law Rev*., 2013, p. 102 ff.

[33] In case C-286/12, *European Commission v. Hungary*, although Advocate General Kokot (conclusions of 2 October 2012, points 54-56) had raised doubts about the independence of the judiciary due to this reform, the Court of Justice (judgment of 6 November 2012) declared it incompatible "only" with the principle of non-discrimination on the basis of age under Directive 2000/78 on equal treatment in employment matters, and not with the Rule of Law under Article 2 TEU. For an analysis of violations in Hungary, see A. DI GREGORIO, *Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?*, in *DPCE online*, 2016, p. 175 ff.; A.L. PAP, A. ŚLEDZIŃSKA-SIMON, *The Rise of Illiberal Democracy and the Remedies of Multi-Level Constitutionalism*, in *Hungarian Journal of Legal Studies*, 2019, p. 65 ff.

[34] Court of Justice, 23 November 2021, C-564/19, *IS*. In doctrine, A. CORRERA, *Il giudice nazionale deve disattendere qualsiasi prassi giurisdizionale interna che pregiudichi la sua facoltà di interrogare la Corte di giustizia*, in *BlogDUE*, 12 January 2022.

[35] For a reconstruction of the Polish violations, see A. ANGELI, A. DI GREGORIO, J. SAWICKI, *La controversa approvazione del "pacchetto giustizia" nella Polonia di "Diritto e Giustizia": ulteriori riflessioni sulla crisi del costituzionalismo polacco alla luce del contesto europeo*, in *DPCE online*, 2017, p. 787 ff.; F. GUELLA, *Indipendenza della magistratura polacca e stato di diritto in Europa: malgrado l'irricevibilità di questioni ipotetiche, la garanzia di una tutela giurisdizionale effettiva prescinde dalle attribuzioni dell'Unione*, in *DPCE online*, 2022, p. 2917 ff.; A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 159.

Considering then that, as emerges from the European Commission's Rule of Law Reports to be discussed below, the reforms of national judicial systems initiated in recent years also in Member States other than Hungary and Poland (e.g., Spain, Slovakia, Bulgaria, Romania, Malta) equally raise concerns about the independence and impartiality of the judiciary, it is probable that Luxembourg judges will also be called upon to deal with these aspects in the future. [36]

However, in fact, the particular interest of the Court of Justice in the aforementioned aspects may also have been due to the fact that the independence and impartiality of internal judges are protected in the EU legal system by rules additional to Article 2 of the TEU – namely Article 19(1), paragraph 2 of the TEU ('Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'), Article 267 of the TFEU (preliminary references may only be made by national judicial bodies that possess, among other things, these characteristics), [37] and Article 47 of the Charter (right to an effective judicial remedy before an impartial tribunal) [38] – which multiplies the opportunities to invoke their respect before national and/or EU jurisdictions. The importance of these principles in EU law is not surprising given that, according to longstanding and consolidated EU case law, [39] national judges are the natural judges of the EU system, so the failure to respect their independence in domestic legal systems also affects the European system. These aspects are not, in other words, purely national issues, as they can undermine the correct and uniform application by internal judges of EU law in the Member States. Moreover, as will be seen later, the rulings of the Court of Justice, assuming that Articles 19 of the TEU and 47 of the Charter concretise the content of Article 2 of the TEU, tend, at least for the moment, to assess the compatibility of national regulations with the principles of independence and impartiality of the judiciary underlying the Rule of Law precisely in light of the combined provisions of Articles 2 of the TEU, 19 of the TEU, and/or 47 of the Charter. [40]

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[36] Regarding this, see paragraph 3 of this contribution.

[37] Regarding the fact that the preliminary ruling mechanism under Article 267 TFEU can only be activated by a body responsible for applying Union law that meets, in particular, the criterion of independence, see Court of Justice *Associação Sindical dos Juízes Portugueses cit.*, point 43; as well as 21 January 2020, C-274/14, *Banco de Santander*, point 56.

[38] Court of Justice, 26 March 2020, C-542/18 *RX-II* and C-543/18 *RX-II*, *Simpson v. Council* and *HG v. Commission*, points 69-71, where it is stated that 'under this provision [i.e., Article 47 of the Charter], everyone is entitled to have their case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law.'

[39] In this regard, the landmark judgment of the Court of Justice on 9 March 1978, *Simmenthal*, 106/77, point 16.

[40] The first EU judgment to establish a connection between Articles 2 and 19 TEU was the aforementioned judgment of *Associação Sindical dos Juízes Portugueses cit.*, points 30 and 34. On Article 47 of the Charter, see Court of Justice order of the President of the Court of Justice of 15

The independence and impartiality of the judiciary have not, however, been the only principles related to the Rule of Law addressed by Union judges. In a recent infringement proceeding,[41] for example, the European Commission requested the Court of Justice to ascertain the incompatibility with Article 2 of the TEU and, more specifically, the principle of non-discrimination, which is fully encompassed in the definition of the Rule of Law,[42] of the so-called Hungarian "anti-LGBTQIA+" laws, which, in the name of protecting minors against paedophiles, prohibit minors from accessing content, including advertising materials, promoting or depicting a presumed deviation from the gender identity assigned at birth, sex change, or homosexuality; require media to classify all programs whose defining element is the presentation of deviation from the gender identity corresponding to that assigned at birth, sex change, or homosexuality; and, prohibit certain professions from promoting deviation from the gender identity corresponding to that assigned at birth, sex change, or homosexuality. As will be seen later, in Hungary,[43] unlike in Poland, violations of EU law have not mainly concerned the independence and impartiality of the judiciary, but also many aspects of society (secondary education, taxation, media freedom, non-discrimination, protection of minorities, etc.).

3. *Tools for preventing violations of common values by Member States: the annual Reports of the European Commission on the Rule of Law*

In order to protect common values and the Rule of Law, the European Union system has established a variety of different tools aimed at preventing the deterioration of these common values in national legal systems and at restoring respect for them in case of violation. In particular, depending on the function performed by these tools, they can be distinguished between means of (i) preventing violations of

November 2018, C-619/18 *Commission v. Poland*, points 20-21, where it is stated that 'the requirement of judicial independence concerns the essential content of the fundamental right to a fair trial, which is of cardinal importance as a guarantee of the protection of all the rights derived from Union law to which individuals are entitled and the safeguarding of the values common to the Member States set out in Article 2 TEU, in particular, the value of the rule of law.' In doctrine, K. LENAERTS, *The Court of Justice as the guarantor of the rule of law within the European Union*, in G. DE BAERE, J. WOUTERS (eds.), *The Contribution of International and Supranational Courts to the Rule of Law*, Leuven, 2015, p. 242 ff. On the fact that Article 19 TEU is also strengthened in the light of Article 2 TEU, see L.D. SPIEKER, *Berlaymont is back: the Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations*, in *EU Law Live*, 22 February 2023.

[41] In this regard, the landmark judgment of the Court of Justice, *Simmenthal cit.*, point 16.

[42] Court of Justice, *Hungary v. European Parliament and Council cit.*, point 229; *Poland v. European Parliament and Council cit.*, point 324.

[43] Regarding this, see paragraph 5 of this contribution.

Article 2 of the TEU, (ii) reacting to these violations, or (iii) supporting those who report failures to comply with common law and therefore also with common values. While bearing in mind the functional diversity among these remedies, the EU system regarding violations of Article 2 of the TEU must nevertheless be evaluated in its unity, each of the instruments composing the aforementioned categories contributing, to varying degrees, to achieving the same objective, namely the protection of common values and the Rule of Law in the European system.

Among the remedies that respond to the adage "prevention is better than cure" first and foremost are the European Commission's annual Reports on the Rule of Law, which since 2020 measure the degree of compliance (and violation!) of this (only) common value in individual national legal systems.[44] To this end, every year (between February and April), the European Commission (DG Justice and Consumers, in collaboration with other services) initiates a dialogue, defined by itself as "open and frank", with the Member States to assess the level of protection of the Rule of Law ensured in each State. These dialogues involve not only government authorities but also representatives of the judiciary, regulatory authorities, non-governmental organisations (NGOs), as well as professional organisations (journalists' or lawyers' associations) and civil society, in order to objectively ascertain, based on EU legal rules, the level of protection and non-compliance with the Rule of Law in a certain national system regarding four areas, namely (i) the independence, quality, and effectiveness of the judiciary system; (ii) the fight against corruption; (iii) freedom and pluralism of the media; and, (iv) the so-called checks and balances, i.e., the existence of internal checks and balances to ensure respect for the principles underlying the Rule of Law. Since 2022, the European Commission's annual Report on the Rule of Law also contains recommendations addressed to the Member States.

Although this tool does not have binding effectiveness, the dialogue established between the Member States and the European Commission during the drafting of the annual Report, and the recommendations contained therein, have indeed already produced positive results. In 2023, for example, Ireland, France, Spain and Finland increased the number of judges in order to reduce judicial backlog and shorten lengthy legal proceedings.[45] Moreover, considering that, to

[44] COM(2020)580; COM(2021)700; COM(2022)500; COM(2023)800. The 2023 report of the European Commission on the Rule of Law was published on 5 July 2023, and presented to the General Affairs Council on 10 July 2023. On 24 July 2024 the European Commission published its fifth annual Rule of Law Report (COM(2024)800 final). https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_en?filename=1_1_58120_communication_rol_en.pdf. For the first time, the Rule of Law Report contains an evaluation of the protection of the Rule of Law in some accession (Serbia, Albania, North Macedonia and Montenegro see p. 190 and 191).

[45] See the 2023 report of the European Commission on the Rule of Law, section 'Initiatives to improve the quality and efficiency of justice'.

ensure the independence of the judiciary, the methods and criteria for selecting domestic judges must dispel any doubts about their immunity from external influences and their neutrality in judgment,[46] Luxembourg modified the appointment process of its Judicial Council to make it more transparent.[47] The European Commission's annual Report on the Rule of Law does not only objectively evaluate the level of protection of the latter but also fulfils the additional function of encouraging change and constructive reforms at the national level. The fact that many of the recommendations contained therein are, even if only in part, implemented by the Member States[48] demonstrates the ability of the Report in question to promote the correction of national initiatives or practices (perhaps not the most serious and systemic ones) that may endanger the respect for the Rule of Law.

Also considering these positive results, the views of those who consider this annual Report,[49] because it is based on mere dialogue between Member States and the European Commission, ineffective – and therefore somewhat useless – in solving the longstanding issue of respect for EU values by Member States, do not seem justified. The effectiveness of this protection would be subject to the activation of additional mechanisms (i.e., those reacting to violations of the Rule of Law), which are the only ones truly capable of offering effective and direct protection. Moreover, given the complementarity between the various remedies provided by the European Union system to combat violations of Article 2 of the TEU, the tools specifically designed to react to violations of Article 2 of the TEU intervene where dialogue between Member States and the European Commission and/or the latter's recommendations have not led to fruitful outcomes.

Moreover, the fact that the European Commission's annual Report is just one of the remedies for situations of non-compliance with EU law based on dialogue between Member States and European institutions – as is also the case

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[46] In this regard, see the following judgments: Court of Justice, 19 November 2019, *AK*, C-585/18, C-624/18, and C-625/18, points 137 and 138; 2 March 2021, *AB* (Appointment of judges to the Supreme Court), C-824/18, points 66, 124, and 125; 20 April 2021, *Repubblika*, C-896/19, point 66; 15 July 2021, *European Commission v. Poland*, C-791/19, points 98-108. For a doctrinal analysis, see P. MORI, *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi*, in *federalismi.it*, 2020, p. 166 ff.

[47] See the 2023 Report of the European Commission on the Rule of Law, section 'Perception of Independence'.

[48] From reading the 2023 Report of the European Commission on the Rule of Law, it appears that a significant number of recommendations formulated in the 2022 report have indeed been implemented by the Member States. According to the representation of Italy to the European Union (*https://italy.representation.ec.europa.eu/notizie-ed-eventi/notizie/relazione-sullo-stato-di-diritto-2023-progressi-sul-65-delle-raccomandazioni-ma-occorrono-ulteriori-2023-07-05_it*), 65% of the recommendations from the 2022 report have been fully or partially addressed in 2023.

[49] In this regard, see E. CANNIZZARO, *Il ruolo della Corte di giustizia cit*., especially p. 166.

within the Council to promote respect for the Rule of Law,[50] or the evaluations of the *s.c.* "European Semester" regarding the effectiveness of the judicial systems and public administration of the Member States,[51] or even the EU Justice Scoreboard by the European Commission, which presents an annual overview of indicators regarding the efficiency, quality and independence of judicial systems[52] – does not make the latter superfluous or, even more, a source of uncertainty.[53] On one hand, the violations of the Rule of Law identified in the European Commission's Report take into account the information collected within the framework of the justice assessment.[54] On the other hand, they form the basis of the political dialogues of the Council to promote respect for the Rule of Law, the evaluations of the European Semester, as well as the use of the so-called reactive tools to failures to comply with EU values (e.g., infringement proceedings and the Conditionality Regulation).[55] This is understandable given that the European Commission's annual Reports, also given that it is drafted by an institution independent of the Member States, contain, unlike the political assessments of the Council and the European Council, an objective and detailed assessment of the actual respect for the Rule of Law, which is presented as technical, not political.

Finally, it is worth noting how, according to some scholars, the Reports in question should, on one hand, focus on the analysis not only of the protection of the Rule of Law but also on the resilience of democracies and the respect for

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[50] Regarding this, see paragraph 4 of this contribution, and in doctrine, T. CONZELMANN, *Peer Reviewing the rule of law? A new Mechanism to safeguard EU Values*, in *Eur. Papers*, 2022, p. 671 ff.

[51] In the first six months of the year, the Council, upon recommendation from the European Commission and with the favourable opinion of the European Council, can issue specific recommendations to each Member State if, from the analysis of State conduct in the areas of structural reforms and public finances, there are critical issues regarding the fight against corruption, the effectiveness of judicial systems, and public administration. In the subsequent six months, Member States make the necessary corrections, taking into account the aforementioned recommendations. For more information, see *https://www.consilium.europa.eu/it/policies/european-semester/*.

[52] This tool monitors the health of the judicial systems of the Member States, comparing them in terms of independence, quality, and efficiency, based on shared indices such as the number of pending cases, duration of proceedings, *ratio* of cases concluded to new ones in a year, training of judges, etc. The information gathered may lead to the adoption of recommendations by the Council at the request of the European Commission. For more information, see *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_it*.

[53] In this sense, see A. CIRCOLO, *Il valore dello Stato di diritto cit.*, especially p. 152.

[54] *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_it#scoreboards*.

[55] In this regard, the European Commission explicitly stated in the *2022 Rule of Law – Questions and Answers*.

EU fundamental rights,[56] and on the other hand, involve the collaboration of additional actors such as, for example, the European Parliament or the Fundamental Rights Agency (FRA).[57] However, it seems appropriate to question whether these objective and subjective novelties would not burden and slow down the drafting of the Report, whose success has so far been precisely the timeliness and clarity of the charges raised. Furthermore, even if the categories of values (Article 2 of the TEU) and fundamental rights (Article 6 of the TEU) are distinct from each other, certain principles included in the former are referenced in the latter, thus attesting to an objective connection between the two areas, already highlighted by the mention in Article 2 of the TEU of EU fundamental rights. The principles of independence and impartiality of the judiciary underlying the Rule of Law are, for example, also protected in Article 47 of the Charter, and the principle of non-discrimination in Article 21 of the Charter is fully part of the definition of the Rule of Law. Therefore, verifying non-compliance with the latter effectively amounts to verifying, at least to a large extent, non-compliance with the latter as well. Moreover, as it clearly results from the methodology followed for the drafting of the Rule of Law Reports, such a methodology is in fact also based on information collected by the FRA with respect to fundamental rights. It is also worth recalling that since 2010, the European Commission has published an annual Report on the application of the Charter. In addition, the European Commission's assessment on the Rule of Law takes into account information collected by several international organisations (e.g., case law of the ECHR; Council of Europe and its Commission for the Efficiency of Justice as well as the Venice Commission; World Bank; OECD; OSCE; UN; Word Economic Forum); as well, as far as the chapter on anti-corruption is concerned, data from the European Anti-Fraud Office, the European Public Prosecutor Office, the Group of States against Corruption, and the Committee of Experts on the Evaluation of Anti-Money Laundering measures of the Council of Europe.

Nor would an expansion of the content of the European Commission's annual Report be necessary to ensure its alignment with the procedure under Article 7 of the TEU, which allows the Member States, gathered in the Council and the European Council, to ascertain violations of every common value under Article 2 of the TEU. As will be seen later, the procedure under Article 7 of the TEU is, in fact, the specifically provided instrument in the treaties to identify

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[56] Similarly, J. JARACZEWSKI, *The European Commission's Rule of Law Report in 2022 – progress or more of the same?*, in *EU Law Live*, 26 September 2022.

[57] Similarly, A. CIRCOLO, *Il valore dello Stato di diritto cit.*, especially p. 151. On the possibility of expanding the mandate of the FRA to enhance the protection of common values and the Rule of Law, see also G.N. TOGGENBURG, G. GRIMHEDEN, *The Rule of Law and the Role of Fundamental Rights. Seven Practical Pointers*, in C. CLOSA, D. KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Oxford, 2016, p. 147 ff., especially p. 169.

and possibly sanction violations of common values, so it understandably has a broader objective scope than purely preventive instruments, which focus only on the core of common values. The traditional adoption of resolutions by the European Parliament commenting on the annual Report on the Rule of Law allows the latter to highlight additional issues to those raised by the European Commission, which are then often taken into consideration by the latter in the subsequent annual Report. [58]

The President of the European Commission, Ursula Von der Layen, seems convinced of the importance and effectiveness of the European Commission's annual Report on the Rule of Law. On 13 September 2023, in her State of the Union address, she indeed qualified these Reports as 'a key priority' of the European Commission, extending their use from 2024 also '… to those accession countries who get up to speed even faster' in this sector, [59] i.e., currently Albania, North Macedonia, Montenegro and Serbia. This represents a rather rare example of the use of a Union instrument in situations that are not yet part of the Union.

The positive considerations just made about the effectiveness of the preventive tool under review do not exclude, however, that the Rule of Law is deteriorating also in Member States other than Hungary and Poland. As indicated in the European Commission's 2023 Report, serious concerns have been raised, for example, regarding the appointment and dismissal procedures of judges carried out by the High Council of the Judiciary in Spain, Slovakia and Bulgaria. In Slovakia, there is concern about the offence introduced for judges of abuse of right in judicial decisions, which can indeed limit their independence. In fact, the same offence has in the past led to investigations and disciplinary proceedings in Hungary and Poland regarding the content of judicial decisions, often only to limit the independence of the judiciary. In Bulgaria and Romania, the Judicial Inspectorate, which is responsible for overseeing the work of judges and proposing the opening of disciplinary proceedings against them, continues to be exposed to executive influence. The shortage of judges and the low level of their remuneration, as well as that of officials of regulatory authorities, i.e., elements that can cause their bias or corruption, are then highlighted in Lithuania, Slovakia, Greece, Croatia and Romania. In Hungary, Slovenia and Poland, concerns persist regarding the independence of regulatory authorities from undue political influences on the appointment process or their operation. In Mal-

[58] See, for example, the resolution of the European Parliament of 19 May 2022, on the European Commission's 2021 Rule of Law Report (P9_TA(2022)0212). The European Parliament highlighted aspects of concern regarding the Rule of Law that were only briefly mentioned by the European Commission, particularly regarding the situation in Malta concerning freedom of information and corruption investigations, as noted by T. CONZELMANN, *Peer Reviewing cit*., especially p. 683.

[59] *https://ec.europa.eu/commission/presscorner/detail/it/speech_23_4426*.

ta, Romania and Slovakia, freedom of information is in a state of considerable difficulty (limited independence of public media, lack of protection for journalists, and rules on access to documents), and investigations into cases of high-level corruption rarely end in convictions. The 2024 Rule of Law Report of the European Commission has essentially confirmed these concerns.

4. *Following: The peer review system of the General Affairs Council*

The European Commission's annual Reports on the Rule of Law are the basis for a further tool for preventing violations of the values referred to in Article 2 of the TEU, namely dialogues within the General Affairs Council.

In particular, thanks to an initiative by the Belgian, German and Dutch foreign ministers in 2019,[60] starting from 17 November 2020, this Council now dedicates a portion of its meetings to a dialogue on the Rule of Law. During each meeting, which usually begins with a brief introduction by the European Commission to illustrate the results contained in the annual Report on the Rule of Law, the ministers for European affairs from the twenty-seven Member States discuss, based on the chapters for each Member State contained in the aforementioned Report,[61] the specific situation regarding the respect for the Rule of Law of at least groups of five countries: Belgium, Bulgaria, the Czech Republic, Denmark and Estonia (17 November 2020); Germany, Ireland, Greece, Spain and France (20 April 2021); Croatia, Italy, Cyprus, Latvia and Lithuania (23 November 2021); Luxembourg, Hungary, Malta, the Netherlands and Austria (12 April 2022); Portugal, Romania, Slovenia and Sweden (18 October 2022); Belgium, Slovakia, Bulgaria, Finland and the Czech Republic (21 March 2023); Denmark, Ireland, Estonia, Germany and Greece (24 October 2023). As evidenced by the conclusions of the General Affairs Council on 23 November 2021 and 12 December 2023, the Member State undergoing the hearing, which lasts half an hour per country and is conducted in accordance with the principles of objectivity, non-discrimination and equal treatment, has the opportunity to present national developments regarding the Rule of Law. Ministers from other Member States subsequently have the opportunity to present their observations in turn, also sharing their experiences and best practices.

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[60] Similarly, D. REYNDERS, M. ROTH, S. BLOK, *Fundamental Values Check-Up: Let's Intensify Our Dialogue*! (28 November 2020) Federal Foreign Office *www.auswaertiges-amt.de*. On the origins of the mechanism under consideration, O. PORCHIA, *Le Conclusioni del Consiglio del 16 dicembre 2014 "Rafforzare lo Stato di diritto": un significativo risultato dalla Presidenza italiana*, in *Eurojus*, 2015; L.S. ROSSI, *Un nuovo* soft instrument *per garantire il rispetto della* rule of law *nell'Unione europea*, in *SIDIBlog*, 2015.

[61] In this regard, see the conclusions of the General Affairs Council of 19 November 2019, points 8, 10 and 15.

The considerations expressed on this occasion by the ministers for EU policies are not binding on the Member State under scrutiny. The dialogue established there is, in fact, a soft law tool based on political peer review.[62] The General Affairs Council does not even adopt formal recommendations to the countries audited, as instead happens in the European Commission's annual Report. Despite lacking strictly prescriptive effects, this mechanism is not devoid of efficacy, creating indeed so-called peer pressure, i.e., continuous and reciprocal surveillance among Member States regarding respect for the Rule of Law,[63] as well as an exchange of best practices to improve the protection of the Rule of Law on certain issues. In other words, these States are induced to respect this common value or to resolve any violations thereof because they know that cyclically (every two and a half years) they will be called upon to account for the conformity of their national legislation before a peer group.

The undeniable positive results that a real and constant comparison between Member States has in protecting, even only preventively, the Rule of Law – especially if we consider the weak role played, at least until now, by the General Affairs Council in the main tool for reacting to violations of the Rule of Law, namely that provided for in Article 7 of the TEU – lead to proposing certain improvements to the procedure in question in order to enhance its deterrent and corrective effects. In fact, the General Affairs Council itself seems to be convinced of this, in its conclusions of 12 December 2023, having stated that 'while considering the current content and structure of the dialogue satisfactory, it should be further improved to better reflect the Council's commitment to strengthening the rule of law and contributing to the prevention of emerging and existing challenges regarding the rule of law, in an inclusive and constructive manner, through discussion and exchange of best practices and lessons learned'. Moreover, already in the conclusions of 23 September 2019, the General Affairs Council had foreseen a reassessment of the functioning of the procedure by the end of 2023 based on the experience gained in the period 2019-2023.

In particular, and although the pace of hearings of Member States (every 2 and a half years) is in line with that of similar mechanisms used, for example, in the Organisation for Economic Cooperation and Development (OECD), intensifying them could increase pressure on Member States to respect the Rule of

[62] Indeed, this characteristic of the dialogue under consideration is reiterated five times in just the two and a half pages that make up the evaluations of the annual dialogue on the Rule of Law annexed to the conclusions of the General Affairs Council of 12 December 2023.

[63] On the essential role of peer pressure in peer review mechanisms at the international level, see F. PAGANI, *Peer Review is a Tool for Co-operation and Change: an Analysis an OECD Working Method*, in *African Secutirty Rev.*, 2002, p. 15 ff., especially pp. 16-17; G. DIMITROPOULOS, *Compliance through collegiality: peer review in international law*, in *Loy. LA Int'l & Comp. L. Rev*, 2015, p. 275 ff.

Law.[64] For the same reason, the duration of Member State hearings within the General Affairs Council, currently only half an hour, could be aligned with that conducted, albeit in other matters, by the United Nations Human Rights Council (three and a half hours) or the World Trade Organisation (half a day).[65] It would also be appropriate to dedicate separate meetings of the General Affairs Council to the examination of the respect for the Rule of Law, as discussing such a sensitive issue in a normal working session, together with other agenda items, would make it difficult to have an in-depth discussion between governments on respecting the Rule of Law.

Now, as indicated by the Assessment of the annual dialogue on the Rule of Law (point 8) attached to the conclusions of 12 December 2023,[66] the General Affairs Council seems oriented to at least intensify specific discussions for each Member State, which will go from twice a year for five States per meeting to three times a year, i.e., two in the first half and one in the second half, each focusing on the situation in four Member States. This will lead to the analysis of twelve Member States per year, instead of the previous ten. As for the possibility of dedicating separate meetings to the examination of respect for the Rule of Law, the General Affairs Council has only specified that 'discussions on one or more particular horizontal rule of law themes could be organised in the General Affairs Council, when deemed appropriate and necessary' (point 15 of the assessment of the annual dialogue on the Rule of Law). In this regard, however, it seems appropriate to clarify that, in the second half of each year, the General Affairs Council now usually holds a meeting dedicated to a dialogue on the overall situation of the Rule of Law in the Union, always using the European Commission's annual Report.[67] The Justice and Home Affairs Council has also developed in recent years a series of specific thematic debates on issues related to the Rule of Law.[68] However, while these initiatives are commendable, they do not compensate for the lack of separate meetings of the General Affairs Council concerning the situation of the Rule of Law in individual Member States.

In order to increase the deterrent effect of peer review, the General Affairs

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[64] The example is from T. CONZELMANN, *Peer Reviewing cit*., especially p. 689. Regarding the OECD, see F. PAGANI, *Peer Review cit*., p. 15.

[65] Similarly, T. CONZELMANN, *Peer Reviewing cit*., especially p. 690; also see V. CARRARO, T. CONZELMANN, H. JONGEN, *Fears of Peers? Explaining Peer and Public Shaming in Global Governance*, in *Cooperation and Conflict*, 2019, *https://journals.sagepub.com/doi/full/10.1177/0010836718816729*.

[66] Point 8. Discussions within the General Affairs Council between November and December 2023 did not lead to unanimous agreement on the adoption of this text. As indicated by the conclusions of the General Affairs Council of 12 December 2023, it received support from only 25 delegations.

[67] Similarly, the conclusions of the General Affairs Council of 12 December 2023 *cit*.

[68] *Ibid.*

Council could consider introducing specific recommendations on respect for the Rule of Law for the individual Member States audited, compliance with which could then be subject to assessment in subsequent meetings. However, the need to avoid duplications with the recommendations of the European Commission, which could lead to misunderstandings and uncertainties, could simply lead the General Affairs Council to consider more explicitly the observations of the European Commission, thus reinforcing the useful synergy between the interventions of the two EU institutions in the field of the Rule of Law. In this regard, the assessment of the annual dialogue on the Rule of Law only specifies that the General Affairs Council commits to 'devote this dialogue to analysing' the data contained in the European Commission's annual report (point 9) and takes 'note that, in practice, this dialogue will continue to be based on the Commission's annual rule of law report, creating synergies between the institutions, and we note the inclusion of recommendations in the report as a way of highlighting specific issues requiring further attention from Member States' (point 10). Member States could then be induced to respect the observations formulated within the General Affairs Council if the results of the government-to-government comparison were made public,[69] the report of the meetings currently being published on the website of the European Council and/or in its conclusions being indeed particularly concise.

Finally, as for the criteria on which the General Affairs Council chose to conduct the hearings of Member States, it might be perplexing that it still specifies that the dialogue respects the 'national identities of the Member States inherent in their fundamental political and constitutional structures, including the system of local and regional autonomy, and their essential functions, in particular the functions of safeguarding the territorial integrity of the state, maintaining public order, and protecting national security'.[70] In this regard, the Court of Justice, in the judgments Hungary v. European Parliament and Council and Poland v. European Parliament and Council, has indeed stated that 'even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another'.[71] In other words, the protection of common values cannot vary within

[69] In this regard, see also L. RAVO, *EU governments' upcoming rule of law peer review: better get off on the right foot*, in *Euractiv*, 2020, *https://www.euractiv.com/section/justice-home-affairs/opinion/eu-governments-upcoming-rule-of-law-peer-review-better-get-off-on-the-right-foot/*.

[70] Similarly, the conclusions of the General Affairs Council of 12 December 2023 *cit.*

[71] On these aspects, see G. DI FEDERICO, *The Potential of Article 4/2)TUE in the Solution of Constitutional Clashes Based on Alleged Violation of National Identity and the Quest of Adequate*

the Union by invoking the (alleged) need to protect one's national identity. This EU case law also applies to Article 2 of the TEU, a general principle of EU law concerning Article 4 of the TEU according to which decisions taken by national systems even in areas of exclusive competence do not render Union law inapplicable when they compromise the compelling, uniform and effective nature of Union law that comes into contact and conflict with measures adopted by Member States in areas of national exclusive competence. [72]

However, the possible improvements to the dialogue within the General Affairs Council do not exclude the positive aspects inherent in the constant and robust application of this instrument. The regularity since 2020 of a structured dialogue on the Rule of Law within the Council has finally made respect for the Rule of Law a "normal" topic of discussion among governments, [73] which could well contribute to strengthening the responsibility of Member States in the matter under examination. This is particularly important considering the weak role played by the latter until now in the use of the main means of countering violations of the values referred to in Article 2 of the TEU, namely the procedure provided for in Article 7 of the TEU.

5. *Reactive tools to the risk of violation or breach of common values: the mechanism provided for in Article 7 of the TEU*

Article 7 of the TEU, introduced into the EU system by the Amsterdam Treaty of 1999 (Article 7 of the TEU and Article 309 of the TEC), as a response, for the first time in Europe since the end of World War II, to the participation of an extreme right-wing party in the Austrian government, [74] provides for a specific procedure that can be activated when there is a risk of violation or an

(Judicial) Standards, in *Eur. Public Law*, 2019, p. 370 ff.; K. LENAERTS, *National identity, the equality of Member States before the Trieties and the primacy of EU Law*, in AA.VV., *Identità nazionale degli Satti membri*, *primato del diritto dell'Unione europea, Stato di diritto e indipendenza dei giudici nazionali. Giornata di Studio Corte Costituzionale e Corte di giustizia*, Roma, 2022, p. 9 ff., especially. p. 11 ff.

[72] This principle has also been used in the Court of Justice in the following cases: 20 March 2018, C-187/16, *Commission v. Austria* (State Printing House), points 75-76; 2 April 2020, C-715, 718 and 719/17, *Commission v. Poland*, *Hungary and the Czech Republic* (Temporary relocation mechanism for asylum seekers), points 143 and 170; 6 October 2020, C-511/18, C-512/18, C-520/18, *La Quadrature du Net, French Data Network and Ordre des barreaux francophones et germanophone*, point 99, Case C-623/17, *Privacy International*, point 44.

[73] In this regard, see L.S. ROSSI, *Un nuovo* soft instrument *cit*.

[74] Similarly, R. CAFARI PANICO, *Le sanzioni europee nel caso Hider*, in *Dir. pub. comp. eur*., 2000, p. 202 ff.

on-going violation of the values set out in Article 2 of the TEU in a particular Member State.[75]

In particular, in the current version of the provision in question, subsequent to the latest Lisbon Treaty revision of 2009, Article 7 of the TEU stipulates that the European Commission, the European Parliament, and one-third of the Member States can request the (General Affairs) Council to determine and establish, by a four-fifths majority, an obvious risk of serious violation of the values set out in Article 2 of the TEU by a Member State. The Council, after hearing the Member State in question in accordance with the principle of adversarial procedure, may address recommendations to it, deliberating according to the same procedure (Article 7, paragraph 1). If, on the other hand, the situation is more serious and there is already a violation underway, one-third of the Member States or the European Commission (but not the European Parliament, which, on this occasion, only needs to give approval) can request the European Council to determine and establish, unanimously, the existence of a serious and persistent violation by a Member State of the aforementioned common values, after inviting that Member State to present its observations (Article 7, paragraph 2). If the European Council finds a violation under paragraph 2 of Article 7 of the TEU, the General Affairs Council, deliberating by qualified majority, can then decide to suspend some of the rights deriving to the Member State from the application of the treaties, such as those of the government representative of that Member State in the Council (essentially legislative and budgetary functions). In this regard, Article 354, paragraph 1 of the TFEU specifies that the representative of the Member State subject to a procedure under Article 7 of the TEU is excluded both from participation in the vote and from the calculation of the constitutive and deliberative quorum. However, the Member State in question continues to be bound by the obligations deriving from the treaties (Article 7, paragraph 3), for example, participation in the budget of the European Union.

Article 7 of the TEU establishes a procedure specifically aimed at determining and, if necessary, sanctioning violations, actual or potential, of each common value. It has a broader objective scope of application compared to prevention tools, such as the European Commission's Reports on the Rule of Law and dialogues within the General Affairs Council, which instead focus on violations of the Rule of Law alone. In this regard, it has already been observed how this misalignment is justified by the difference between preventive remedies and reactive ones to violations of Article 2 of the TEU. This seems even more true considering that not every violation of common values can

[75] On the origins of Article 7 TEU, see, among others, B. DE WITTE, *The impact of Enlargement on the Constitution of European Union*, in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford, 2003, p. 209 ff.; L.F.M. BESSELINK, *The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives*, in *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715943*, 2016, p. 3 ff.

lead to the opening of a procedure under Article 7 of the TEU, paragraph 2 providing that it must be 'serious and persistent'. In the absence of further indications in the treaties, this double cumulative condition has been understood by doctrine,[76] the European Commission,[77] and the Court of Justice[78] as synonymous with a "systemic" or "structural" or "generalised" violation of EU values, to be assessed on the basis of qualitative (object and result of the violation) and quantitative (duration and size of the violation) criteria.[79] Furthermore, 'the fact that a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights …, and has not demonstrated any intention of taking practical remedial action is a factor that could be taken into account'.[80] Likewise, repeated findings, for example, in EU infringement or interpretative judgments, or in the European Commission's annual Reports on the Rule of Law, also seem to at least support the initiation of the procedure under consideration.

In this regard, it is irrelevant to verify the intentionality of the violation by a Member State (intent or negligence), the latter being assessed only according to objective parameters, as is also the case within the context of "non-compliance" at the basis of the infringement procedures under Articles 258-260 of the TFEU.[81] Although one-off violations, lacking the requirement of persistence and therefore of being systematic in nature, should in principle be excluded from the scope of Article 7 of the TEU, even particularly serious individual violations (adoption of "anti-LGBTQIA+" legislation) or minor but repeated non-compliances over time (abusive disciplinary measures against individual judges) seem to create prejudice to common values liable to the procedure under consideration.

The procedure provided for in Article 7 of the TEU was conceived as a particularly burdensome mechanism for the Member States – 'a nuclear weapon'

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[76] Similarly, A. VON BOGDANDY, M. IOANNIDIS, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, in *Comm. Mark. Raw Rev.*, 2014, p. 59 ff.; A. VON BOGDANDY, *Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States*, *ibid*, 2020, p. 705 ff.; L.S. ROSSI, *Il valore giuridico cit.*, p. xiv.

[77] European Commission Communication of 2014, *A New Framework for the EU cit.*

[78] Both the Court of Justice (25 July 2018, *LM cit.*, point 69) and Advocates General (Tanchev in his conclusions of 24 September 2019, C-558/18 and C-563/18, *Miasto Łowicz* (Disciplinary Procedure for Magistrates), point 125 concerning Article 19 TEU and the independence of the judiciary in Poland) use this term, albeit without providing a definition.

[79] In this regard, Commission Communication to the Council and the European Parliament regarding Article 7 TEU, *To Respect and Promote the Values on which the Union is Founded*, COM(2003)0606, points 1.4.3 and 1.4.4.

[80] *Ibid* point 1.4.4.

[81] See also, Court of Justice, 1 October 1998, C-71/97, *European Commission v. Spain*, 4 March 2010, C-287/08, *European Commission v. Italy*.

according to then-President of the European Commission Barroso [82] – the mere threat of activating it should have induced them to spontaneously respect the values set out in Article 2 of the TEU. [83] The suspension of voting rights in the Council would, in fact, have relegated the Member State subject to the procedure under examination to a situation of 'regulation without representation', [84] as still being subject in any case to acts adopted during the suspension period. The fact that this sanction is only referred to as an example – 'the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council' – does not exclude the possibility of applying additional sanctions, such as the suspension of the right to receive structural funds or funds from the European Investment Bank (EIB), [85] as well as those attributed by Articles 20 *et seq.* of the TFEU to the citizens of the Member State subject to the procedure under Article 7 of the TEU. [86] But the latter cannot lead to the expulsion of the Member State from the Union, paragraphs 3 and 4 of Article 7 of the TEU providing for the application of measures of a non-definitive nature – 'the Council may subsequently decide to amend or revoke the measures adopted pursuant to paragraph 3, to respond to changes in the situation that led to their imposition' – and this even when the violation of common values persists for a considerable time and/or after the ineffective application of suspension sanctions. However, the fact that compliance with common values is a necessary condition for the accession of a new Member State to the Union (Article 49 of the TEU) could induce the Member States to introduce, through the revision procedure under Article 48 of the TEU, the possibility, alongside the voluntary withdrawal of a Member State from the Union (Article 50 of the TEU), to expel a Member State that systematically violates the Rule of Law. [87] Naturally, such extreme conflict situations could not be managed by EU institutions alone, but should also involve national parlia-

[82] Speech by the President of the European Commission, José Manuel Barroso, on the State of the European Union in 2012, Strasbourg, 12 September 2012, *https://ec.europa.eu/commission/presscorner/detail/fr/SPEECH_12_596*.

[83] On the sanctioning system of Article 7 TEU, see E. HELLQUIST, *Ostracism and the EU's contradictory approach to sanctions at home and abroad*, in *Contemporary Politics*, 2019, p. 393 ff.

[84] The phrase is mentioned by A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially. p. 131. This possibility seems to have been threatened at the European Council meeting on 2 February 2024 in order to allow the unanimous adoption of new aid to Ukraine.

[85] Regarding this, see the European Commission's Reflection Paper on the *Future of EU Finances* dated 28 June 2017, COM(2017)358.

[86] Similarly, A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 131.

[87] On expulsion from international organisations, see K.D. MAGLIVERAS, *Exclusion from Participation in International Organisations: The Law and Practice Behind Member States' Expulsion and Suspension of Membership*, The Hague-London-Boston, 1999.

ments.[88] In this case, Article 2 of the TEU would finally acquire the same legal value for candidate/potential candidate countries and Member States.

The determination of violations of common values by Member States under Article 7 of the TEU is left to a political and intergovernmental procedure. This is deduced from a dual element. On the one hand, decision-making powers are attributed to the European institutions representing the Member States within the Union, namely the Council and the European Council. On the other hand, European institutions that are independent of the Member States and represent the common interest have only a marginal role. Article 7 of TEU, paragraph 1, assigns, in fact, to the European Commission and the European Parliament the mere function of procedural initiative, albeit in competition with the Member States, and paragraph 2 of the same provision allows, in the decision-making phase, the European Parliament only to approve the decision of the Council. Furthermore, and precisely because of the political nature of the decisions adopted there by the Council and the European Council, Article 269 of the TFEU excludes the ability to challenge these decisions before the Luxembourg judges for a substantive examination. This provision stipulates, in fact, that the 'Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article'.[89] As already noted by authoritative doctrine,[90] the absence of independent judicial control over political decisions in areas where the interests of the States dominate risks favouring the adoption of arbitrary decisions, not necessarily coinciding with justice.

As is known, the procedure provided for in Article 7 of the TEU was activated (only two times in the history of the European Union) in 2017 and 2018 respectively by the European Commission[91] and the European Parlia-

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[88] In this regard, B. DE WITTE, G. TOGGENBURG, *Human Rights and Membership of the European Union*, in S. PEERS, A. WARD (eds.), *The EU Charter of Fundamental Rights*, Oxford, 2004, p. 59 ff., especially p. 72; L.S. ROSSI, *Un nuovo* soft instrument *cit*.

[89] According to EU case law (*Hungary v. European Parliament and Council cit*., point 32), acts of EU institutions requesting the opening of the procedure provided for in Article 7 TEU are challengeable, such as the resolution of the European Parliament of 12 September 2018. In fact, these acts are final and produce legal effects vis-à-vis third parties, thus possessing the objective characteristics to be subject to an action for annulment under Article 263 TFEU.

[90] In this regard, see A. TIZZANO, *L'azione dell'Unione europea per la promozione dei diritti umani*, in *Dir. UE*, 1999, especailly p. 264. It is noted that the treaty project elaborated by Altiero Spinelli in 1984 provided, in Article 44, for the competence of the Court of Justice to address serious and persistent violations of treaty provisions.

[91] European Commission Proposal for a Council Decision on the establishment of an evident risk of a serious breach of the Rule of Law by the Republic of Poland, COM(2017)835 of 20 December 2017.

ment [92] against Poland and Hungary in the face of the deterioration of the Rule of Law in these Member States. However, although, in the last five years, these two Member States have been repeatedly heard by the General Affairs Council, as provided for in Article 7 of the TEU, paragraph 1 – the last time still in November 2023 [93] – the Council and the European Council have never adopted decisions in this regard. [94] This is despite, on the one hand, the European Parliament having repeatedly urged the Council to advance the procedures under Article 7 of the TEU, most recently with a resolution of 15 September 2022, [95] and on the other hand, the European Commission having, also in November 2023, illustrated to the Ministers for European Affairs the continuing serious concerns regarding the Rule of Law in both Poland (operation of the Constitutional Court and Judicial Council; failure to implement the reform of the disciplinary regime applicable to judges undertaken to align with European standards) and Hungary (independence and pluralism of the media; rights of migrants and people belonging to minorities such as Roma, Jews and LGBTQIA+; pressure on civil society; extensive use of emergency powers by the government). Despite repeated urging, the General Affairs Council has only noted 'the importance of addressing all the issues regarding judicial independence and rule of law in Poland and voiced their support to the Commission as regards the concerns raised, expressing the hope that Poland will soon address them'. Similarly, as for Hungary, it has 'urged Hungary to continue to address all the issues raised'. In May 2024, the European Commission decided to close the Article 7(1) of the TEU procedure for Poland. In 2024, the Prime Minister Donald Tusk launched a series of legislative and non-legislative measures to address the concerns of independence of the justice system, the primacy of EU law and the implementation of all EU judgments on Rule of Law. The European Commission considers thus that there is no longer a clear risk of a serious breach of the Rule of Law in Poland.

The thresholds provided for in Articles 7, paragraphs 1 and 2 of the TEU to adopt decisions of the General Affairs Council (four-fifths of the members) and

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[92] European Parliament Resolution of 12 September 2018 on a proposal inviting the Council to determine, in accordance with Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131 (INL)) P8_TA-PROV(2018)0340.

[93] Council Conclusions on General Affairs of 30 May 2023 (fifth hearing) and then 15 November 2023 (sixth hearing).

[94] On this ineffectiveness, in doctrine, see R. MASTROIANNI, *Stato di diritto o ragion di Stato? La difficile rotta verso un controllo europeo del rispetto dei valori dell'Unione cit.*, p. 605 ff.; B. NASCIMBENE, *La violation grave des obligations découlant du traité UE. Les limites de l'application de l'art. 7*, in AA.VV., Liber Amicorum *Antonio Tizzano cit.*, p. 678 ff.

[95] European Parliament Resolution of 15 September 2022 on the proposal for a Council decision on the determination, in accordance with Article 7(1) TEU, of the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2018/0902R(NLE), P9_TA(2022)0324.

of the European Council (unanimity) have certainly an impact on the (in)effectiveness of this procedure.[96] In the latter case, it was in fact sufficient for Hungary to use its veto power in the procedure concerning Poland, and vice versa, to effectively make the adoption of the decision and/or the application of sanctions impossible.[97] Moreover, considering that unanimity is used in several sensitive areas of EU law (multiannual EU budget or CFSP), the adoption of a decision under Article 7 of the TEU by four-fifths of the members of the Council could lead to decision-making paralysis in these sectors as a result of "retaliatory" measures. The activation thresholds required by paragraphs 1 and 2 of the provision under consideration have, in other words, made Article 7 of the TEU a tool of difficult utilisation,[98] which would justify its revision under Article 48 of the TEU in order to introduce the use of qualified majority, already provided for in Article 354 of the TFEU as regards the decisions under paragraphs 3 and 4 of Article 7 of the TEU. This seems all the more important considering that the political nature of the decisions of the Council and the European Council makes it impossible to initiate an action for failure to act (Article 265 of the TFEU) against them when, as observed in the cases of Poland and Hungary, they do not adopt the aforementioned decisions under Article 7 of the TEU.[99]

However, the inability of the Council and the European Council to reach a decision is also due to a difficulty of the Member States to point the finger at each other especially when it comes to violations of common values and the Rule of Law. In this context, the dialogue initiated within the General Affairs Council on the Rule of Law, especially if based on an objective and real assessment of the shortcomings highlighted by the European Commission in its annual Report, could then lead in the future Member States to greater responsibility in this regard and moreover in the use of the procedure provided for in Article 7 of the TEU.

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[96] In this regard, see A. VON BOGDANDY, L. LANCY, *Suspension of EU Funds for Member States Breaching the Rule of Law – A Close of Tough Love Needed?*, in *Max Planck Institute for Comparative Public Law & International Law* (MPIL) *Research Paper No. 2020-24*, 2020, p. 9 ff.

[97] In order to overcome the risk of this type of alliances between Member States, K.L. SCHEPPELE (*Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too*, in *Verfassungsblog*, 24 October 2016) suggested the activation of Article 7 TEU against multiple Member States simultaneously. This is despite the wording of Article 7(1) TEU stating that 'the Council may determine that there is a clear risk of a serious breach by *a* Member State of the values referred to in Article 2 TEU' (emphasis added).

[98] In this regard, see P. MORI, *Strumenti giuridici e strumenti politici di controllo del rispetto dei diritti fondamentali da parte degli Stati membri dell'Unione europea*, in A. TIZZANO (ed.), *Verso i 60 anni dai trattati di Roma, stato e prospettive dell'Unione europea*, Torino, 2016, p. 199 ff., especially p. 207. Similarly, C. BLUMANN, *Le mécanisme des sanctions de l'article 7 du traité sur l'Union européenne: pourquoi tant d'inefficacité*, in AA.VV., *Les droits de l'homme à la croisée des droits. Mélanges en l'honneur du Professeur Sudre*, Paris, 2018, p. 70 ff.

[99] See P. MORI, *La questione del rispetto dello Stato di diritto cit*., p. 166 ff.

6. *Following: the infringement procedure referred to in Articles 258-260 of the TFEU between theory…*

The ineffectiveness of the main reaction tool to violations of Article 2 of the TEU, namely the procedure provided for in Article 7 of the TEU, [100] has thus induced doctrine and the European Commission, [101] as the guardian of the treaties and therefore also of the respect for the Rule of Law, to reconsider the framework of safeguards provided by the EU system to protect its founding values, in order to try to identify alternative remedies in the treaties that allow to ensure effective protection of the rights that individuals derive directly from common law.

Among the instruments traditionally used by the Union system, it was decided first of all to enhance the use of the infringement procedure governed by Articles 258-260 of the TFEU. [102] As is known, in order to ensure the correct and uniform application of EU law in national legal systems, the latter, which consists of a pre-litigation phase carried out by the European Commission and a contentious phase before the Court of Justice, aims to ascertain in a judgment, the violations by Member States of the obligations that derive from the non-compliance, incomplete or incorrect implementation at the national level of EU law, in particular secondary legislation adopted in specific areas (competition, industry, agriculture, fisheries, etc.). The use of the infringement procedure also to verify the non-compliance by Member States with rules of primary law and constitutional rank, as is precisely Article 2 of the TEU, [103] was admitted by the Luxembourg judges in

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[100] For instance, see K.L. SCHEPPELE, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case of Systematic Infringement Action*, in *Verfassungsblog*, 2013; M. SCHMIDT, P. BOGDANOWICZ, *The infringement procedure in the rule of law crisis: how to make effective use of article 258 TFUE*, in *Common. Mark. Law Rev*., 2018, p. 1061 ff.; K.L. SCHEPPELE, D.V. KOCHENOV, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook Eur. Law*, 2020, p. 3 ff.

[101] In this regard, see the European Commission's Communication of 2014, *A New Framework for the EU cit*.

[102] Regarding this judicial instrument in general, refer to C. AMALFITANO, *La procedura di «condanna» degli Stati membri dell'Unione europea*, Milano, 2012; L. PRETE, *Infringement Proceedings in EU Law*, Alphen aan den Rijn, 2017; M. CONDINANZI, C. AMALFITANO, *La procedura di infrazione dieci anni dopo Lisbona*, in *federalismi.it*, 2020, p. 217 ff.

[103] On the use of the infringement procedure under Article 2 TEU, see M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective use of Article 258 TFEU*, in *Common Mark. Law Rev.*, 2018, p. 1061 ff.; M. ARANCI, *La procedura d'infrazione come strumento di tutela dei valori fondamentali dell'Unione europea*, in *Eurojus*, n. 3, 2019, p. 49 ff.; A. ŚLEDZIŃSKA-SIMON, P. BÁRD, *The Teleos and the Anatomy of the Rule of Law in EU Infringement Procedures*, in *Hague Journal on the Rule of Law*, 2019, p. 445 ff.; S. MONTALDO, F. COSTAMAGNA, A. MIGLIO (eds.), *EU Law Enforcement: The Evolution of Sanctioning Powers*, Ox-

the aforementioned judgment of Associação Sindical dos Juízes Portugueses of 2018.[104] In a dispute that required verifying the (subsequently excluded) incompatibility of the salary reduction measures for judges deliberated by the Portuguese government for budgetary reasons with the independence of judges enshrined in Articles 2 and 19 of the TEU, the Court of Justice affirmed for the first time that such provisions create an obligation on the part of the Member States to ensure effective judicial control in their legal systems before an independent and impartial judge, thus paving the way for the use of the infringement action against violations also of treaty provisions of constitutional rank.[105] The infringement procedure requires that the violated norm be mandatory for the Member States, so the formalisation of the attribution to Article 2 of the TEU of this legal characteristic has in fact authorised the European Commission to use this tool also in the context of protecting common values. And indeed, precisely on the basis of this premise, in 2019, only three months after the ruling Associação Sindical dos Juízes Portugueses, the judges of Luxembourg declared admissible the infringement actions brought by the European Commission against Poland regarding the reform of the Polish judicial system, which undermined the independence and immovable nature of the judiciary.[106]

But in fact, the use of the procedure under Article 258 of the TFEU in the matter at hand required the Court of Justice to overcome a further obstacle related to the already highlighted general, abstract, and non-exhaustive nature of both the common values listed in Article 2 of the TEU and the principles underlying the notion of the Rule of Law. Since non-compliance with common rules can be detected in the exercise of judicial instances only if they impose on Member States a legal obligation in a clear and precise manner, the judges of the Union have thus subordinated the use of Article 2 of the TEU as a criterion of legitimacy of national law to the reading of the latter in combination with Article 19 of the TEU or with Article 47 of the Charter.[107] As already mentioned, in fact, these provisions – but indeed any other rule of the treaties, of the Charter or of the derived law that recalls the principles underlying the Rule of Law[108] –

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on, 2021; M. BONELLI, *Infringement Action 2.0: How to Protect EU Values before the Court of Justice*, in *Europe. Const. Law Review*, 2022, p. 1 ff.

[104] Court of Justice, *Associação Sindical dos Juízes Portugueses cit*.

[105] *Ibid* especially points *29-38.*

[106] Court of Justice, 24 June 2019, C-619/18, *Commission v. Poland* (Independence of the Supreme Court); 5 November 2019, C-192/18, *Commission v. Poland* (Independence of Ordinary Courts).

[107] On the use of the Charter of Fundamental Rights in the context of infringement proceedings, see P. MORI, *L'uso della procedura di infrazione a fronte di violazioni dei diritti fondamentali*, in *Dir. UE*, 2018, p. 363 ff.; L. PRETE, B. SMULDERS, *The age of Maturity of Infringement Proceedings*, in *Comm. Mark. Law Rev.*, 2021, p. 285 ff., especially p. 289.

[108] For the list of norms referring to the values of Article 2 TEU, see European Commission, *70 years of EU Law cit.*, especially pp. 51-53.

concretise the content of the instead abstract Article 2 of the TEU and the generic notion of the Rule of Law, thus transforming them into legal obligations *stricto sensu*. And in fact, the EU case law, both on infringement and on preliminary rulings, concerning the Rule of Law has in fact ascertained the compatibility of legislation mostly Hungarian and Polish in the light not so much of Article 2 of the TEU alone, but of the latter in combination with Article 19 of the TEU and/or Article 47 of the Charter. [109]

The fact, moreover, that, precisely in light of the numerous EU rulings that in recent years have dealt with the Rule of Law, the Court of Justice has progressively defined the scope of Article 2 of the TEU and the notion of the Rule of Law, leads one to wonder whether these latter have not in fact lost, through judicial interpretation, their general and abstract nature, which would allow their invocation autonomously in the future. [110] The qualification of Article 2 of the TEU, in the judgments Hungary v. European Parliament and Council and Poland v. European Parliament and Council, as 'not… a mere statement of political orientations or intentions, but…, also because it contains common values that are part of the same European identity, an obligation of result that derives directly from the commitments undertaken by the Member States towards each other and towards the Union' seems to go precisely in this direction. [111] It is then

[109] For example, see Court of Justice, *Associação Sindical dos Juízes Portugueses cit*., point 30; 24 June 2019, C-619/18, *Commission v. Republic of Poland*, point 47.

[110] They appear optimistic, S. PLATON, *Le Respect de L'Etat de Droit Dans l'Union Européenne: La Cour de Justice A la Rescousse?*, in *Rev. dr. liberté fond*., 2019, *http://www.revuedlf.com/droit-ue/le-respect-de-letat-de-droit-dans-lunion-europeenne-la-cour-de-justice-a-larescousse*; L.S. ROSSI, *Il valore giuridico dei valori cit*.; L.D. SPIEKER, *Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, C. TABOROWSKI, M. SCHMIDT (eds.) *Defending Checks and Balances in EU Member States. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Berlin, Heidelberg, 2021, p. 237 ff. On the contrary, B. BUGARIČ, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, in *Question' Discussion Paper Series*, 2014; D. KOCHENOV, *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, in *Polish Yearbook of International Law*, 2014, p. 145 ff.; D. KOCHENOV, L. PECH, *Renforcer le respect de l'état de droit dans l'UE: Regards critiques sur les nouveaux mécanismes proposés par la Commission et le Conseil*, in *Question d'Europe*, 2015; M. BONELLI, M. CLAES, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses*, in *Eur. Const. Law Rev*., 2018, p. 622 ff. Similarly, for example, Advocate General P. Pikamäe (conclusion of 11 December 2019, C-457/18, *Slovenia v. Croatia*), where it is stated (point 132): 'I wonder whether… a criticism based on the value of the Rule of Law enshrined in Article 2 TEU is admissible under the infringement action pursuant to Article 259 TFEU. In this regard, the Court has recently referred to this value in numerous cases. However, I note that in the case law, this value has not been invoked autonomously, but always together with a rule that 'concretizes' it or constitutes "a specific manifestation" of it, namely Article 19 TEU'.

[111] Court of Justice, *Hungary v. European Parliament and Council cit.*, point 264; *Poland v. European Parliament and Council cit.*, point 232.

perhaps not a coincidence that, following these judgments, the European Commission, in the aforementioned infringement action against the Hungarian "anti-LGBTQIA+" laws, asked the Court of Justice to ascertain their incompatibility with Article 2 of the TEU.[112] Although this action also raises other profiles of incompatibility of the aforementioned internal regulations with EU law (Directives 2000/31 on electronic commerce, 2006/123 on services in the internal market and 2010/13 on audio-visual media services; Regulation 2016/679 on the protection of personal data, Articles 1, 7-8, 11 and 21 of the Charter concerning the inviolability of human dignity, freedom of expression and information, the right to private life and data protection, and the principle of non-discrimination) it is clear that the European Commission's intention is to at least prompt the Union judges to reflect on this matter. If the latter accept this interpretation, Article 2 of the TEU would thus acquire the same weight when applied to candidate/potential candidate states for accession to the Union or to already acceded Member States. In light of the current approach, in fact, while the former cannot join the Union if they do not respect the common values of (only) Article 2 of the TEU, the full respect of the latter for the latter is instead subject to the consideration of additional EU rules of primary or secondary law.

Thanks also to these legal inventions, since 2018 the task of ensuring respect for common values and the Rule of Law in the Union has also been entrusted to the European Commission and the Court of Justice, i.e., to the EU institutions that are independent of national governments and act in the common interest. In this way, the judicial and objective control of the European Commission and the Court of Justice under Article 258 of the TFEU has been added to the political and often arbitrary control of the Council and the European Council referred to in Article 7 of the TEU.

One could not object to the coexistence of the procedures under examination, despite the fact that the treaties reserve the determination of violations of the Rule of Law to the procedure provided for in Article 7 of the TEU and therefore to the competence of the Member States gathered in the General Affairs Council. This is not only implicitly deducible from the decision of the judges of Luxembourg to declare admissible the infringement actions filed already in 2018 by the European Commission against Poland, but is also deducible from the absence of indications in this regard in the treaties. In fact, the latter, on the one hand, did not provide for a prohibition on the concurrence of the procedures under examination, and on the other hand, did not even exclude the use of the infringement action with respect to Article 2 of the TEU. In the silence of the treaties, it therefore seems more reasonable to authorise the use of the procedure under Article 258 of the TFEU in the context at issue, a different

[112] Regarding the case from 2022, *European Commission v. Hungary*, as previously mentioned.

solution would have made common values less protected than other mandatory provisions of the treaties or seconded law, which can instead always be the subject of an infringement procedure. [113] Moreover, given the ineffectiveness of the mechanism under Article 7 of the TEU to ensure compliance with Article 2 of the TEU, the exclusion of the infringement procedure in this latter area would have left common values devoid of any protective mechanism.

The cumulative use of the two procedures under examination is also justified by their different nature – Article 7 of the TEU is political and intergovernmental; Article 258 of the TFEU is judicial and at the Union level – which also excludes the possible configuration of a "double judgment". Even in the case where the two mechanisms lead to the joint application of sanctions – Article 258 of the TFEU is pecuniary; Article 7 of the TEU uses the suspension of voting rights within the Council – the violation of this principle could well be avoided by balancing the sanctions imposed for the infringement of the same rule. [114]

Moreover, although with regard to the concurrence between Article 7 of the TEU and the financial regime established by the Conditionality Regulation which will be discussed below, the Court of Justice, in the judgment Poland v. European Parliament and Council, specified that contrary to what Poland, supported by Hungary, asserted, in addition to the procedure provided for in Article 7 TEU, numerous provisions of the treaties (such as, for example, Article 19 TEU, Articles 8 and 10, 19, paragraph 1, 153, paragraph 1, letter i), Article 157, paragraph 1 of the TFEU, Articles 6, 10-13, 15, 16, 20, 21 and 23 of the Charter) confer on the Union institutions the competence to examine and ascertain violations of the values enshrined in Article 2 TEU committed in a Member State. [115]

7. … *And Practice*

Once the Luxembourg judge admitted the possibility of using the infringement procedure also in the context of common values, the European Commission began to use it to scrutinise national conduct contrary to these values. In the period 2019-2022, for example, the European Commission initiated five infringement procedures – more than one per year – against Poland in order to counter the judicial reforms adopted there that put at least at risk the independence and immovability of Polish judges. [116] Although Article 259 of the TFEU

[113] See L.S. ROSSI, *Il valore giuridico dei valori cit*., especially p. xxxiii.

[114] In this regard, A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 198.

[115] Regarding this, Court of Justice, *Poland v. European Parliament and Council cit.*, point 195.

[116] C-192/18 (Independence of Ordinary Courts); C-619/18 (Independence of the Supreme Court); C-791/19 (Disciplinary Regime of Judges); C-204/21 (Private Life of Judges); C-715/17 (Temporary Mechanism for the Relocation of International Protection Applicants).

also authorises Member States to initiate the contentious phase of the procedure in question against other Member States for violation of EU law, at the moment all actions have been filed before the Luxembourg judges by the European Commission under Article 258 of the TFEU. The decision of the Dutch parliament in 2020 requesting the government to initiate proceedings under Article 259 of the TFEU against Poland for the latter's failure to comply with the infringement judgments of the Court of Justice that found a violation of the Rule of Law did not result in an actual action under Article 259 of the TFEU. [117]

Furthermore, in February 2023, the European Commission lodged another infringement procedure against Poland, [118] this time for the Constitutional Court, now controlled by the Polish government, [119] having adopted in 2021 a series of rulings challenging the primacy of EU law over national rights, [120] namely a principle that has governed the balance between EU and internal systems for over sixty years. [121] Moreover, in the judgment K 7/21 of March

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[117] The example is from A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 209. In general, on the use of Article 259 TFEU in the context of common values, G. DI FEDERICO, *Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca):* et nunc quo vadis?, in *BlogDUE*, 13 October 2021, especially p. 8.

[118] The European Commission's infringement procedure has been registered with the Court of Justice under number C-448/23. In November 2023, the European Commission filed another infringement case against Poland (INFR(2022)0332) for the incomplete transposition of Directive 2013/48 of 22 October 2013, regarding the right to access a lawyer in criminal proceedings and the execution of the European arrest warrant, the right to inform a third party upon deprivation of personal liberty, and the right of persons deprived of liberty to communicate with third parties and consular authorities.

[119] In this regard, A. PLOSZKA, *It Never Rains But it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, in *Hague Jour. Rule of Law*, 2022, especially pp. 4-5; previously A. MLYNARSKA-SOBACZEWSKA, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, in *Eur. Public Law*, 2017, p. 489 ff.; J. SAWICKI, *Prove tecniche di dissoluzione della democrazia liberale: Polonia 2016*, in *Nomos*, No. 1/2016, *www.nomosleattualitaneldiritto.it*.

[120] The Polish Constitutional Tribunal judgments that denied the principle of primacy are from 14 July 2021 (P7/20, especially paragraphs. 27 and 33) and 7 October 2021 (K 3/21, paragraph 2). On these rulings, see F. CASOLARI, *The judgment of the Polish Constitutional Tribunal in case K 3/21: What can the Member States do to shield the EU values?*, in *EU Law live*, 9 November 2021; A. CIRCOLO, *Ultra* vires e *rule of law: a proposito delle recenti sentenze del Tribunale costituzionale polacco sul regime disciplinare dei giudici*, in AA.VV., *Quaderni AISDUE*, Napoli, 2021, p. 117 ff.; G. DI FEDERICO, *Il Tribunale costituzionale polacco cit*.; A. FESTA, *Indipendenza della magistratura e non regressione cit*. On the relationship between the Court of Justice and Constitutional Courts, including the Italian one, see R. MASTROIANNI, *Da Taricco a Bolognesi, passando per la Ceramica Sant'Agostino: il difficile cammino verso una nuova sistemazione del rapporto tra Carte e Corti*, in *Osservatorio sulle fonti*, 2018, p. 1 ff.

[121] Regarding this matter, refer to the landmark judgment of the Court of Justice of 15 July 1964, 6/64, *Costa v. ENEL*. In doctrine, A. ARENA, *From an unpaid electricity bill to the primacy of EU law: Gian Galeazzo Stendardi and the making of* Costa v. ENEL: C-6/64, in *Eur. Jour. Int. Law*, 2019 p. 1017 ff.

2022, the Polish supreme judge similarly stated that judgments of the Strasbourg Court based on Article 6 of the ECHR regarding the right to a fair trial ('everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…') are not binding on Polish authorities. [122]

The infringement procedures initiated by the European Commission in 2018 all ended with the Court of Justice finding violations, in certain cases with the payment of penalty payments, including of considerable amount. [123] Poland's non-compliance with the orders of the President of the Court in July 2021 to suspend, on a precautionary basis, the application in Poland of certain national provisions on the organisation of the judicial system contested in the main proceedings led to the condemnation of the latter to pay a late payment penalty of one million euros per day, later reduced to 500,000 euros per day. [124] The possibility of applying, even in infringement procedures concerning, among other things, the violation of common values and the Rule of Law, interim measures and/or financial penalties in the event of non-compliance with previous interim orders has made the protection of Article 2 of the TEU even more effective. [125] This was not obvious given that Article 260 of the TFEU admits the possibility of imposing fines only in judgments on the merits concluding procedures under Article 258 of the TFEU, and Article 279 of the TFEU allows the adoption of interim measures exclusively for actions under Articles 263 (annulment), 265 (failure to act) and 268 (liability) of the TFEU and therefore not within the framework of infringement proceedings. Furthermore, through the interim order, the Luxembourg judges can instruct a Member State to suspend national rules that are highly

[122] See A. PLOSZKA, *It Never Rains But it Pours cit*. concerning the judgment of the Polish Constitutional Tribunal of 14 November 2021, K 6/21.

[123] On *interim* protection in general, M. CONDINANZI, *La protezione giurisdizionale cautelare avanti al Giudice dell'Unione europea: l'efficacia e l'equilibrio*, in AA.VV., Liber Amicorum *Antonio Tizzano cit*., p. 190 ff. On *interim* measures in the context of protecting values, see D. SARMIENTO, *Provisional (And Extraordinary) Measures in the Name of the Rule of Law*, 24 November 2017, *https://despiteourdifferencesblog.wordpress.com/2017/11/24/provisional-and-extraordinary-measures-in-the-name-of-the-rule-of-law/*.

[124] Court of Justice order of 27 October 2021, C-204/21 R, *European Commission v. Poland*, states that Poland is ordered to pay 'a periodic penalty payment of EUR 1 000 000 per day, from the date on which the present order is notified to the Republic of Poland and until such time as that Member State complies with the obligations arising from the order of the Vice-President of the Court of 14 July 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:593), or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21'. This order, challenged by Poland under Article 163 of the Court of Justice's Rules of Procedure, led to the penalty being reduced to EUR 500,000 per day (Vice-President Court of Justice order of 21 April 2023, C-204/21 R-RAP). The controversy concluded with the Court of Justice judgment of 5 June 2023, C-204/21, *European Commission v. Poland*, confirming Poland's infringement.

[125] See D. SARMIENTO, *Provisional (And Extraordinary) Measures cit*.

likely to be incompatible with common values, thus further increasing the deterrent effect against Member States violating Article 2 of the TEU.

Moreover, in accordance with Regulation 2018/1046, if a Member State fails to pay the pecuniary penalties imposed following interim or final proceedings in the context of infringement actions, the European Commission may deduct them from the funds distributed by the European Union to the Member States. [126] This happened in the case of Poland, which saw 360 million euros suspended for non-payment of the late payment penalty at the end of the precautionary proceedings in 2021.

The same approach was taken by the European Commission towards Hungary. From 2018 to 2022, the Commission initiated eight infringement procedures against Hungary, [127] which ended with Hungary's failure to comply with various aspects: for prematurely ending the mandate of the data protection supervisory authority, [128] for abolishing the usufruct rights held by non-Hungarian citizens on Hungarian agricultural land, [129] for restrictions imposed on funding of civil organisations by entities established outside Hungary, [130] for the amendment of higher education law, which led to the closure of the Central European University in Budapest, [131] for the unjustified limitation of access to international protection procedure, irregular treatment of applicants in transit zones and exe-

[126] In particular, Articles 101 and 102 of Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018, which establishes the financial rules applicable to the general budget of the Union, amends Regulations 1296/2013, 1301/2013, 1303/2013, 1304/2013, 1309/2013, 1316/2013, 223/2014, 283/2014, and Decision 541/2014/EU, and repeals Regulation 966/2012, OJEU L 193 of 30 July 2018. Before the adoption of the Regulation in question, this possibility was doubted due to the silence of Article 260 TFEU on the matter. For example, see the conclusions of Advocate General Colomer of 28 September 1999, C-387/97, *Commission v. Greece*, point 1. Pecuniary sanctions paid by Member States under Articles 258-260 TFEU flow into the EU budget under 'other revenue' (Article 311 TFEU).

[127] In fact, the European Commission initiated twelve infringement procedures during the period considered. However, Cases C-587/22 (Court of Justice 7 December 2023, *Commission v. Hungary*) on urban wastewater treatment; C-856/19 (Court of Justice 25 March 2021, *Commission v. Hungary*) on cigarette excise rates; C-400/19 (Court of Justice 11 March 2021, *Commission v. Hungary*) on food product sale prices; C-771/18 (Court of Justice 16 July 2020, *Commission v. Hungary*) on access conditions to electricity and gas transmission networks, while always concluding with the finding of infringement, did not raise issues strictly related to the protection of common values and/or fundamental rights. In 2023, the European Commission initiated a new infringement procedure against Hungary ([INFR(2020)2364]) for voting against the Union's position on the World Health Organisation (WHO) recommendations concerning the scheduling of cannabis in two United Nations conventions, as prescribed by Council Decision 2021/3.

[128] Court of Justice 8 April 2014, C-288/12, *Commission v. Hungary* (personal data).

[129] Court of Justice 21 May 2019, C-235/17, *Commission v. Hungary* (usufruct rights).

[130] Court of Justice 18 June 2020, C-78/18, *Commission v. Hungary* (associative transparency).

[131] Court of Justice 6 October 2020, C-66/18, *Commission v. Hungary* (higher education).

cution of return procedures without recognition of due guarantees,[132] as well as for violating common rules on recognition and revocation of diplomatic protection status.[133] Unlike in Poland, the violations of EU law by Hungary have affected not only the independence and impartiality of the judiciary, but more generally many aspects of social life, which has mostly led the European Commission to initiate such infringement procedures against Hungary to challenge not only the violation of Articles 2 and 19 of the TEU, but the non-compliance with EU rules of secondary law, different from Article 2 of the TEU and related to specific areas such as education, taxation, international protection, or usufruct rights. As rightly pointed out by scholars,[134] this does not exclude, however, that these violations can still be attributed to Article 2 of the TEU, as they are indeed evidence of Hungary's systematic tendency to threaten common values and the Rule of Law.

On 27 January 2023, the European Commission also filed another appeal under Article 258 of the TFEU[135] against Hungary for adopting the already mentioned "anti-LGBTQIA+" laws in 2021. In this regard, it has already been observed that on this occasion the European Commission expressly requested the Union judges to ascertain the incompatibility of these laws directly with Article 2 of the TEU alone for the first time. The outcome of this judgment will then allow us to establish whether this provision can be used as an independent validity parameter for national and EU conduct. Moreover, with regard to this case, it is worth noting that the European Commission has obtained the support of fifteen

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[132] Court of Justice, 17 December 2020, C-808/18, *Commission v. Hungary* (international protection), and 16 November 2021, C-821/19, *Commission v. Hungary* (international protection). In this case, Hungary had allowed, in violation of Directive 2013/32 on common procedures for granting and withdrawing international protection status, the rejection of an application for international protection on the grounds that the applicant had entered its territory through a State where they were not exposed to persecution or a risk of serious harm. Additionally, it criminalised the actions of any person who, as part of an organisational activity, provided assistance in submitting or forwarding an asylum application within its territory. In the judgment of 2 April 2020, C-715/17, C-718/17, and C-719/17, *Commission v. Hungary, Poland, and the Czech Republic*, the Court of Justice found that 'by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who could be relocated swiftly to its territory' Hungary (as well as Poland and the Czech Republic) had failed to fulfil its EU obligations.

[133] Court of Justice, 22 June 2023, C-823/21, *Commission v. Hungary* (international protection status). Hungary, by requiring certain third-country nationals or stateless persons who are on Hungarian territory or at its borders to submit a declaration of intent at a Hungarian embassy in a third country and obtain a travel document allowing them to enter Hungarian territory before they can apply for international protection, has failed to fulfil its obligations under Directive 2013/32 on common procedures for granting and withdrawing international protection status.

[134] In this regard A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 181 and the doctrine cited therein.

[135] 2022 lawsuit, *European Commission v. Hungary*, C-769/22 *cit*.

Member States (not including Italy), which will intervene in the infringement procedure alongside it to protect the founding values of the Union. [136] Although the threshold of 4/5 set out in Article 7(1) of the TEU (i.e., 22) is still far away, the participation for the first time of such a high number of Member States in favour of the Rule of Law is certainly a sign of the greater willingness of the Member States to counter threats to common values and the Rule of Law.

8. *Preliminary ruling under Article 267 of the TFEU*

Similarly to what has been observed regarding the infringement action, the inefficacy of Article 7 of the TEU to ascertain, remedy and possibly sanction violations of the Rule of Law by Member States has also led national judiciaries – and foremost the Polish one, which was among the first to suffer the consequences of State non-compliance with common values – to seek protective measures that, in addition to the mechanism under Article 258 of the TFEU, allowed for the verification by the Luxembourg judges (and the declaration of incompatibility!) of controversial internal legislation aimed at limiting the independence and impartiality of national judges with Article 2 of the TEU (at least for now) jointly with Articles 19 of the TEU and/or 47 of the Charter. [137]

In this context, the judicial instrument that has proven most suitable is the preliminary ruling provided for in Article 267 of the TFEU. Based on the cooperation between the Union judge and national judges, it allows the former to assist the latter in the delicate task of verifying the compatibility of domestic legislation with EU law, which results, in case of incompatibility, in the inapplicability of the latter in the national judgment by virtue of the primacy principle. [138]

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[136] *https://www.ansa.it/europa/notizie/rubriche/altrenews/2023/04/07/pe-e-15-stati-ue-contro-la-legge-ungherese-anti-lgbt_deea374d-eac5-4e42-832a-7016fd3c8734.html*.

[137] In this regard, it has already been observed that, at least under current EU case law, Article 2 TEU is not in principle an independent validity parameter for national and EU law. However, the situation could change, as the European Commission has just filed an infringement action with the Court of Justice, requesting for the first time that it assesses the compatibility of the so-called Hungarian "anti-LGBTQIA+" legislation solely with Article 2 TEU (*European Commission v. Hungary*, C-769/22 *cit*.).

[138] On preliminary rulings in general, see, among many others, E. CIMIOTTA, *L'ambito soggettivo di efficacia delle sentenze pregiudiziali della Corte di giustizia*, Torino, 2023; A. CORRERA, *Natura ed effetti delle sentenze pregiudiziali della Corte di giustizia*, Napoli, 2023; F. FERRARO, C. IANNONE (eds.), *Le renvoi préjudiciel*, Bruxelles, 2023; B. NASCIMBENE, *Il rinvio pregiudiziale innanzi alla Corte di giustizia dell'Unione europea: disciplina e indicazioni pratiche*, in *federalismi.it*, Paper 12 July 2023. For a reconstruction of the preliminary ruling mechanism in the context of the protection of EU values and fundamental rights, see R. BARATTA, *Droit fondamentaux et valeur dans le processus d'integration européenne*, in *Revue juridiche étudiants Sorbonne*, 2019, p. 11 ff.

Moreover, given that the preliminary ruling can only be made by independent judicial authorities of the Member States,[139] the references made to the Court of Justice by national judiciaries to ascertain the incompatibility of internal judicial reforms with Articles 2 and 19 of the TEU have simultaneously protected the functioning of the preliminary mechanism, that is an essential instrument to ensure the uniform and correct application of EU law in internal systems.[140] It has thus become not only a means of safeguarding the independence and impartiality of national judiciaries but also the object of protection offered in such occasions by the Luxembourg judges.[141]

Now, the fact that the preliminary ruling, unlike the infringement action which is left to the initiative of the European Commission, allows national judges to directly request Union judges to ascertain the compatibility of controversial internal legislation with common values has led national judiciaries, feeling threatened by judicial reforms in the Member States, to frequently use this mechanism even with respect to infringement procedures initiated in the same context and timeframe. In the last five years (2018-2023), the Polish judiciary, for example, has made thirty-two references to the Court of Justice concerning the protection of the Rule of Law[142] – more than six per year – that is, six times the number of actions initiated in the same period under Article 258 of the TFEU. The first preliminary ruling of the Polish judiciary regarding Articles 2 and 19 of the TEU and 47 of the Charter (August 2018) was almost simultaneous with the first infringement action filed by the European Commission (May 2018). This is understandable since even to activate the reference in question it was necessary to preliminarily ascertain that Article 2 of the TEU, although in conjunction with other EU rules, could serve as a legitimacy parameter for domestic law.

As for the outcome achieved in the preliminary rulings made by the Polish judiciary, although some of them were withdrawn,[143] or declared inadmissi-

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[139] Similarly, the landmark judgment Court of Justice, 30 June 1966, 61/65, *Vaasen-Goebbles*.

[140] In this sense, see also, A. ADINOLFI, *I fondamenti del diritto dell'UE nella giurisprudenza della Corte di giustizia: il rinvio pregiudiziale*, 2019, especially p. 213, *https://www.aisdue.eu/wp-content/uploads/2019/11/Adelina_Adinolfi.pdf*.

[141] See A. CIRCOLO, *Il valore dello Stato di diritto cit*., especially p. 231.

[142] C-522/18, 558/18, 563/18, C-585/18, C-624/18, C-625/18, C-668/18, C-824/18, 508/19, C-748/19 to C-754/19, C-132/20, C-387/20, C-491/20 to 496/20, 506/20, C-509/20, C-511/20, C-615/20, C-671/20, C-181/21, C-269/21, C-718/21. In general, on these judgments, see G. CAGGIANO, *La Corte di giustizia sulla tutela dell'indipendenza della magistratura nei confronti di sanzioni disciplinari lesive dello Stato di diritto*, in *Studi integraz. eur*., 2020, p. 249 ff.; P. MORI, *La questione del rispetto dello Stato di diritto cit*., p. 166 ff.; A. ANGELI, *Il principio di indipendenza e imparzialità degli organi del potere giudiziario nelle recenti evoluzioni della giurisprudenza europea e polacca*, in *federalismi.it*, 2021, p. 4 ff.

[143] Similarly, in cases C-522/18 (Court of Justice order of 29 January 2020) and C-668/18 (Court of Justice order of 3 December 2019).

ble,[144] or ended with a declaration of compatibility,[145] on twelve occasions the Luxembourg judges verified the incompatibility of the principles of independence and impartiality of judges underlying the notion of the Rule of Law with Polish legislation,[146] which were sometimes the same as those subject to infringement proceedings initiated by the European Commission.[147]

The same activism is to be noted also in Romania. In the last four years (2019-2023), Romanian judges have made twelve preliminary references to the Court of Justice[148] – that is, three per year – asking it to verify the incompatibility – then effectively ascertained – of the laws reforming the Romanian judicial system concerning disciplinary and appointment proceedings of judges with the principles of independence and impartiality of the judiciary under Articles 2 and 19 of the TEU. In fact, as already observed, the progressive degradation of the Rule of Law in this country emerges clearly from the annual reports of the European Commission. Considering also that the Romanian Constitutional Court, aligning with the Polish one, has recently held that domestic judges are obliged not to disapply internal rules contested by the Court of Justice when the Constitutional Court confirms their compatibility with the Romanian Constitution,[149] the Luxembourg judges, on nine occasions, had to remind that 'the

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[144] In this sense, in cases C-181/21, C-269/21 (Court of Justice judgment of 9 January 2024); C-491/20 to 496/20, C-506/20, C-509/20 and C-511/20 (Court of Justice order of 22 December 2022); C-387/20 (Court of Justice order of 1 September 2021); C-508/19 (Court of Justice judgment of 22 March 2022); C-558/18 and C-563/18 (Court of Justice judgment of 26 March 2020), C-718/21 (Court of Justice judgment of 21 December 2023).

[145] Similarly, Court of Justice judgment of 29 March 2022, C-132/20.

[146] In this regard, see Court of Justice, 19 November 2019, C-585/18, C-624/18, and C-625/18, *AK* (on the dependency of the National Council of the Judiciary and its Disciplinary Chamber of the Supreme Court); 2 March 2021, C-824/18, *AB* (on the appointment of judges to the Supreme Court made directly by the President of the Republic and not subject to appeal); 19 November 2021, from C-748/19 to C-754/19, *WB* (on the secondment or revocation of secondment by the Minister of Justice at any time, according to non-public criteria and without a reasoned decision); 13 July 2023, C-615/20 and C-671/20, *YP and others* (on the suspension and initiation of criminal proceedings against domestic judges for alleged violations of domestic law).

[147] For example, the legislation on the Disciplinary Chamber has been the subject of both the infringement dispute *Commission v. Poland* (disciplinary regime for judges) *cit*. and the preliminary ruling *AK* (independence of the Disciplinary Chamber of the Supreme Court). In this sense, see also A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 236.

[148] Cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19 concluded with Court of Justice judgment of 21 December 2021, *PM*; C-859/19, C-926/19, and C-929/19 resolved with Court of Justice order of 7 November 2021, *FX*; C-216/21 concluded with Court of Justice judgment of 7 September 2023, *Asociația "Forumul Judecătorilor din România"*; C-430/21 resolved with Court of Justice judgment of 22 February 2022, *RS*; C-817/21, resolved with Court of Justice judgment of 11 May 2023, *RI*; C-107/23 PPU, resolved with Court of Justice judgment of 24 July 2023, *CI*.

[149] Similarly, the judgments of the Romanian Constitutional Court No. 33 of 23 January 2018;

principle of the primacy of EU law … prevents national legislation or practice according to which national judges are bound by the decisions of the national constitutional court and cannot disapply, on their own initiative, the case-law resulting from such decisions, where they consider, in light of a judgment of the Court of Justice, that such case-law is contrary to [EU law]'. [150] Consequently, the fact that the domestic judge in question applied EU law, as interpreted by the Court of Justice, deviating from the case law of the Constitutional Court, cannot be considered a disciplinary offence. [151]

Despite the concerns raised by the respect for the Rule of Law also in Bulgaria and Malta, judges from these two Member States have so far made only one preliminary reference each, both of which have ended with the finding of compatibility with Articles 2 and 19 of the TEU of the national legislation under EU scrutiny. In particular, as regards Bulgaria, the Court of Justice noted that 'the adoption of general provisions of civil or commercial law relating to the compensation regime within the framework of a bank failure, even if retroactive, is not capable, per se, of violating…' the principles of independence of the national judiciary under Article 19 of the TEU. [152] Similarly with regard to Malta, the judges of Luxembourg found that Articles 2 and 19 of the TEU do not preclude national provisions which, as in the case of Malta, give the Prime Minister a decisive role in the process of appointing judges, since, in this procedure, an independent body responsible for evaluating candidates also intervenes and provides an opinion to the Prime Minister. [153]

No preliminary ruling has ever been made by Hungarian judges. Considering that the number and quality of references also serve, among other things, to measure the level of awareness and reaction of society and the judiciary to violations of the Rule of Law in their own country, this data, also in light of Hungary's clear non-compliance with EU values for more than ten years, raises many concerns. This seems all the more true considering that the apparent inertia of

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No. 104 of 6 March 2018; No. 390 of 8 June 2021. In literature, see C. SANNA, *Dalla violazione dello Stato di diritto alla negoazione del primato del diritto dell'Unione nel diritto interno: le derive della questione polacca*, in *Eurojus*, 31 Dicember 2021; B. SELEJAN-GUTAN, *A Take of Primacy. The ECJ Ruling on Judicial Indipendnece in Romania*, in *VBolg*, 2 June 2021; D. GALLO, *Primato, identità nazionale e stato di diritto in Romania*, in *Quaderni cost*., 2022, p. 374 ff.; P. FILIPEK, M. TABOROWSKI, *From Romania with Love. The CJEU confirms criteria of independence for constitutional courts*, in *Verfassungsblog*, 14 February 2022; S. SCIARRA, *First and Last Word: Can Constitutional Courts and the Court of justice of the EU Speak Common Word?*, in G. CONTALDI, R. CISOTTA (eds.), *Courts, Values and European Identity*, in *Numero speciale Eurojus,* 2022, p. 69 ff.

[150] Similarly, the aforementioned cases C-357/19, C-379/19, C-547/19, C-811/19, and C-840/19, *PM*; C-859/19, C-926/19, and C-929/19, *FX*; C-107/23 PPU, *CI*.

[151] In this sense, the aforementioned case C-430/21, *RS*.

[152] Court of Justice (order) 15 November 2022, C-260/21, *Corporate Commercial Bank*.

[153] Court of Justice, *Repubblika cit*.

Hungarian society and the judiciary with regard to the so-called bottom-up protection of the Rule of Law is only partially compensated by the top-down one provided through the infringement procedures of the European Commission against Hungary. On the one hand, the number of procedures (and therefore also of findings of incompatibility!) that the latter can initiate alone to monitor compliance with the Rule of Law in the twenty-seven Member States is by nature lower than that of preliminary referrals, which are instead made by judicial bodies of every level (justice of the peace, courts, courts of appeal, supreme courts, etc.) and matter (civil, criminal, administrative, labour, tax, etc.) of a Member State. On the other hand, unlike the procedure under Article 258 of the TFEU which allows to ascertain non-compliance with EU values after a long and complex process (about 5 years), the preliminary ruling procedure, despite lacking the possibility of imposing pecuniary sanctions, allows, in shorter times (on average one and a half years), national judges to (at least in principle) immediately disapply the national legislation considered to be in conflict with Articles 2 and 19 of the TEU. The protection of EU values, even more in the absence of interventions in this regard by the Council and the European Council on the basis of Article 7 of the TEU, therefore requires both the joint action of national and EU actors, and the contribution of all judicial instruments useful for this purpose.

9. *The principle of mutual trust among Member States in EU infringement and preliminary case law: a new weapon to protect the Rule of Law?*

In the aforementioned judgment of Associação Sindical dos Juízes Portugueses of February 2018, the Court of Justice, reiterating principles already expressed in Opinion 2/2013 concerning the draft international accession agreement of the Union to the ECHR, affirmed that the European legal construction is based on the 'fundamental premise according to which each Member State shares with all other Member States, and recognises that these share with it, a series of common values on which the Union is founded, as specified in Article 2 TEU'.[154] Based on this premise, the judges in Luxembourg, in the Achmea judgment of March 2018, deduced that 'it is the duty of the Member States to ensure, within their respective territories, the application and respect of Union law [and therefore also of EU values], and to adopt, for this purpose, any measures capable of ensuring compliance with the obligations arising from the treaties or acts of the EU institutions'.[155] From the combined reading of these

[154] Court of Justice, *Associação Sindical dos Juízes Portugueses cit.*, point 30, as well as opinion 2/13, also *cit.*, points 167-168.

[155] Court of Justice, 6 March 2018, C-284/16, point 34. For a commentary on the judgment

judgments, it emerges that each Member State has confidence that other Member States also recognise the common values and ensure their respect in their own legal systems. The Luxembourg judge applies, in other words, to Article 2 of the TEU, the principle of mutual trust among the Member States in the simultaneous and complete application at the national level of the EU *acquis*, which is at the basis of the European integration process, as well as the functioning of the single market and the area of freedom, security and justice. [156]

In this context, even a transient asymmetry in compliance with EU law and the values referred to in Article 2 of the TEU – a Member State systematically violates the Rule of Law, reducing the independence and impartiality of its judiciary – breaks the trust pact at the basis of the European integration process, thus justifying reactions by other Member States and the European Union system. Hence, with regard to the arrest warrant issued by a Polish judge, the Court of Justice, echoing principles already underlying the LM Judgment, [157] specified that if there are serious and proven reasons to believe that, in the event of the surrender of a suspect, the recognition of the right to an effective remedy before an independent judge could be denied, the executing judicial authority, in an entirely exceptional manner, may refrain from executing the aforementioned warrant. [158] Similarly, in the NS judgment, the Union judges admitted that the Member State where an asylum seeker is located (the United Kingdom) may refuse to transfer the latter to the competent State to consider the asylum application whenever there is a risk that, due to proven systemic deficiencies in

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with specific regard to the principle of mutual trust, see N. PIGEON, *Autonomie de l'ordre juridique de l'Union européenne: confiance mutuelle entre États membres et arbitrage d'investissement: commentaire de l'arrêt de la Cour de justice du 6 mars 2018*, Achmea, *aff. C-284/16*, in *Ann. français dr. int.* LXIV/2018, 2019, p. 471 ff.

[156] In this sense see L. FUMAGALLI, *Articolo 2 cit.*, and L.S. ROSSI, *Il valore giuridico dei valori cit.*, especially p. vi. On the principle of mutual trust in general, see K. LEANERTS, *La vie après l'avis: exploring the principle of mutual (yet not blind) trust*, in *Comm. Market Law Rev.*, 2017, p. 805 ff.; P. MORI, *Quelques réflexions sur la confiance réciproque entre les États membres: un principe essentiel de l'Union européenne*, in Liber Amicorum *A. Tizzano cit.*, p. 651 ff.; J.P. JACQUE, *État de droit et confiance mutuelle*, in *Rev. trim. dr. eur.*, 2018, p. 239 ff.

[157] Thus, see Court of Justice, *LM cit.*, points 60-79, regarding the extradition of a suspect to Poland by the Irish authorities. The *LM* judgment draws, by analogy, on the previous Court of Justice ruling of 5 April 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*. On the Rule of Law in criminal matters generally, see M. CARTA, *Unione europea e tutela dello Stato di diritto negli Stati membri*, Bari, 2020.

[158] In this sense, see Court of Justice, 22 February 2022, C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie* (Court established by the law of the issuing Member State). In literature, F. GAZIN, *Mandat d'arrêt européen. Indépendance des juges et droit à un procès équitable*, in *Europe*, 2022, number 4, comm. 108. Similarly, with regard to Poland, see Court of Justice, 17 December 2020, C-354/20 and C-412/20 PPU, *Openbaar Ministerie* (Independence of the issuing judicial authority); 26 October 2021, C-428/21 *PPU* and C-429/21 PPU, *Openbaar Ministerie* (Right to be heard by the issuing judicial authority).

the protection of fundamental rights (Greece), the asylum seeker may be exposed to inhuman and degrading treatment.[159] More recently, in the Sped-Pro Judgment, the Tribunal annulled a decision of the European Commission, which had rejected the request of a whistle-blower under Article 102 of the TFEU because it considered that the competence to hear the case lay with the Polish Office of Competition and Consumer Protection under Regulation 1/2003, as it had failed to ascertain whether the said national authority was able to ensure satisfactory protection of the rights of the whistle-blower.[160] According to the latter, in Poland, also, the competition authority is dependent on the executive, so that the handling of the complaint by the whistle-blower of an abuse of dominant position by a company controlled by the Polish State would not have taken place in accordance with Articles 2 and 19 of the TEU and Article 47 of the Charter.

The joint reading of these judgments seems to suggest that the violation of common values and EU fundamental rights may, at least in principle, entail the further "sanction" consisting in the suspension of forms of cooperation (asylum and international protection; cooperation in criminal matters; competition) based on mutual trust between Member States.

However, precisely because this calls into question the effectiveness of the principles of mutual trust and mutual recognition underlying the single market and the area of freedom, security and justice, the Court of Justice subject their application to strict conditions to be interpreted restrictively. And so, a Member State can derogate from these latter 'only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case', moreover to be carried out on the basis of 'objective, reliable, specific and properly updated evidence', that there are 'there are substantial grounds for believing' that there is 'real risk that that person's fundamental rights will be breached'.[161] However, proving the existence of these cumulative

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[159] See Court of Justice, 21 December 2011, C-411/10 and C-493/10, *NS*. In literature, see G. MORGESE, *Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso* N.S. e altri, in *Studi integraz. eur.*, 2012, p. 147 ff.; P. GARCÍA ANDRADE, *La responsabilidad de examinar una solicitud de asilo en la UE y el respeto de los derechos fundamentales: comentario a la Sentencia del TJUE de 21 de diciembre de 2011 en los asuntos* N.S. y M.E y otros, in *Rev. general der. eu.*, 2012, p. 1 ff. See also Court of Justice, judgment of 19 March 2019, C-163/17, *Jawo*.

[160] See General Court, 9 February 2022, T-791/19, *Sped-Pro v. European Commission*, point 71. In literature, see L. TERMINIELLO, *La sentenza* Sped-pro c. Commissione: *sull'importanza del rispetto dello Stato di diritto per la tenuta del sistema d'applicazione delle regola antitrust dell'Unione*, in *BlogDUE*, 20 March 2022; M. BERNATT, *Economic frontiers of the rule of law:* Sped-Pro v. Commission*: case T-791/19*, in *Comm. Market Law Rev*., 2023, p. 199 ff.

[161] On the test developed in *LM* (Court of Justice, *LM cit*., points 60-68), see S. BIERNAT, P. FILIPEK, *The Assessmen to Judicial Independence Following the CJEU Ruling in C-216/18*, *LM*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI, M.

elements is not a simple operation. In fact, while in Sped-Pro (competition), the Tribunal left this complex assessment to the European Commission, in the Cases LM and Openbaar Ministrie (arrest warrant) and NS (asylum), the Court of Justice excluded that the gravity of the situation justified *a priori* the suspension of cooperation between Member States, that is, in the absence of an evaluation of the specific case. And this even though the LM, Openbaar Ministrie and Sped-Pro Cases concerned Poland, i.e., a Member State that has been violating the Rule of Law for years.

Moreover, the fact that Recital 10 of Framework Decision 2002/584 establishing the European arrest warrant [162] provided that 'may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof', led the Court of Justice to clarify, in the LM Judgment concerning the execution of a Polish arrest warrant, that the initiation of a procedure under Article 7(1) of the TEU does not justify the refusal to execute the latter, this possibility being subject to a concrete assessment of the specific case demonstrating the existence of systemic deficiencies in common values. [163] If, on the other hand, the Member State has been the subject of a decision by the European Council pursuant to Article 7(2) of the TEU which has established a serious and persistent violation of Article 2 of the TEU, the judicial authority of another Member State is obliged to automatically refuse its execution, without the need in this case to carry out a concrete assessment of the real risk that the person concerned will see the essential content of his fundamental right/common value to a fair trial compromised. [164] The persistence of violations of the Rule of Law in Hungary and Poland and the degradation of this common value even in Member States other than these should, however, lead the Court of Justice to lighten the evidentiary regime currently provided for in order to allow its use when infringements of the values referred to in Article 2

SCHMIDT (eds.), *Defending Checks and Balances in EU Member States cit*., p. 403 ff., especially p. 413; C. DUPRÉ, *The Rule of Law, Fair Trial and Human Dignity: The Protection of EU Values After* LM, *ibid*, p. 431 ff.; A. FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the* LM *Case*, *ibid*, p. 443 ff.; M. BONELLI, *Intermezzo in the Rule of Law Play: The Court of Justice's* LM *Case*, *ibid*, p. 455 ff. By analogy, also see Court of Justice, *NS*, points 80 ff., and more recently, Court of Justice, 31 January 2023, C-158/21, *Puig Gordi and others*.

[162] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as last amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[163] In this sense, see Court of Justice, *LM cit*., points 69-72. In this sense, also see Advocate General Rantos (opinion of 16 December 2021) in the cited case *Openbaar Ministerie* (Court established by the law of the issuing Member State), point 71.

[164] *Ibid*.

of the TEU by a certain Member State have already been found in the context of preliminary references. [165]

The above cannot be put into question by the argument that, in the LM Judgment, the Luxembourg judges conditioned the non-execution of the European arrest warrant on the finding of a violation of the Rule of Law through the mechanism provided for in Article 7 of the TEU. On the one hand, in subsequent judgments, the Court has admitted the coexistence of the latter with other means of ascertaining failures to comply with Article 2 of the TEU, such as the infringement procedure and the so-called Conditionality Regulation. On the other hand, the link between Articles 2 and 7 of the TEU established in the LM Judgment is based on the interpretation of a specific provision of a framework decision, which cannot limit the scope of Article 2 of the TEU. This EU case law does not seem, therefore, to give rise to any general rule capable of imposing that the violation of common values can be invoked only if the EU institutions have initiated or concluded one of the procedures provided for in Article 7 of the TEU. In this context, and as already noted by the Court itself in the LM Judgment, the reasoned proposal addressed by the European Commission, the European Parliament, or a third of the Member States to the Council pursuant to Article 7(1) of the TEU – and even more so the decision of the Council and the European Council pursuant to paragraphs 1 and 2 of this same provision – constitute elements of particular relevance for the assessment of the violation of Article 2 of the TEU, [166] in competition therefore with the judgments of the Court of Justice pursuant to Articles 258 and 267 of the TFEU.

10. *The conditionality mechanism: Regulation 2020/2092*

On the proposal of the European Commission in 2018, on 16 December 2020, the Union legislator adopted Regulation 2020/2092 (the so-called "Conditionality Regulation") during negotiations for the adoption of the 2021-2027 multiannual budget and the financing of so-called NextGenerationEU. This Regulation, which entered into force on 1 January 2021, [167] aims to protect the

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[165] Critically on the *LM* test, see A. FRĄCKOWIAK-ADAMSKA, *Drawing Red Lines cit*., as well as the literature cited on p. 141 of A. CIRCOLO, *Il valore dello Stato di diritto cit*.

[166] Thus, see Court of Justice, *LM cit*., point 61.

[167] Regulation 2020/2092 *cit*. For an analysis, see B. NASCIMBENE, *Il rispetto della* rule of law *e lo strumento finanziario. La "condizionalità"*, in *Eurojus*, 2021, p. 172 ff. On the use of conditionality in the Union, even before the regulation in question, mostly in the external dimension, see A. TIZZANO, *L'azione dell'Unione europea per la promozione dei diritti umani*, in *Dir. UE*, 1999, p. 149 ff.; L. BARTELS, *Human Rights Conditionality in the EU's International Agreement*, Oxford, 2005, p. 60 ff.; M.E. BARTOLONI, *Politica estera e azione esterna dell'Unione europea*, Napoli, 2021, especially. p. 79 ff. As noted by A. CIRCOLO, *Il valore dello Stato di diritto cit*., p. 303, conditionali-

Union's budget by making access to every European fund by Member States contingent upon respect for the Rule of Law. This is based on the premise that violations of the values set out in Article 2 of the TEU undermine the proper management of European funds, such as when there is a lack of independent and impartial judicial oversight of procurement procedures for projects funded by the European Union.[168] Indeed, the fight against corruption was already an element used by the European Commission in its annual reports to assess compliance with the Rule of Law in national legal systems. For example, in the 2022 report on Italy, eight out of the total twenty-eight pages are dedicated to these aspects, with explicit references to the need for that country to more effectively combat corruption resulting from the infiltration of organised crime into the Italian legal economy.[169] Furthermore, Italy's decision to join the European Public Prosecutor's Office (EPPO), unlike Hungary, which is specifically tasked with prosecuting offences against the EU budget, was positively evaluated by the European Commission in the aforementioned report as a signal of Italy's willingness to combat corruption in the use of European funds and thus protect the Rule of Law.[170]

Specifically, the Conditionality Regulation applies when the European Commission identifies a violation of the principles underlying the Rule of Law – not every common value – such as 'legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law' (Article 2, letter a of the Conditionality Regulation). Article 3 of the Regulation further specifies that relevant behaviours include 'endangering the independence of the judiciary; failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or

ty had indeed already been employed internally, for example, in the good agricultural and environmental conditions introduced in the CAP by Regulation 1307/2023, and in the set of rules of the financial stability mechanism. For the use of conditionality in the accession of new States to the Union, see D. KOCHENOV, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Field of Democracy and the Rule of Law*, the Hague, 2008.

[168] Thus, the rationale of the European Commission's proposal for the Conditionality Regulation of 2 May 2018, COM(2018)324 final.

[169] *https://commission.europa.eu/system/files/2022-07/29_1_194038_coun_chap_italy_en.pdf*, especially pp. 21 and 25.

[170] *Ibid* p. 4. Poland notified the European Commission of its intention to participate in EPPO on 5 January 2024. The European Commission Decision 2024/807 of 19 February 2024 confirmed the participation of Poland in the enhanced cooperation on the establishment of the EPPO. In July 2024, the European Commission adopted a decision (2024/1952 of 16 July 2024) on Sweden's membership of the European Public Prosecutor's Office (EPPO).

failing to ensure the absence of conflicts of interest; limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law'. [171] However, it has already been observed that, for the Court of Justice, this enumeration does not exhaustively define the Rule of Law, but merely specifies, for the purposes of its application, various principles that it encompasses and that are the most relevant to ensuring the protection of the EU budget. As also evidenced by Recital 15 of the Regulation in question, the relevant violations are not only those that are general and systemic, as with Article 7 of the TEU, but also individual ones. [172]

In addition to these conditions, Article 4 of the Regulation states that the European Commission must prove the existence of a direct causal link between the violation of the Rule of Law and the harm to the EU budget, which includes all European resources ('resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094, and through loans and other instruments guaranteed by the Union budget' regardless of the method of implementation used by the Member States) as stated in Recital 7. The Regulation in question is therefore not applicable to every violation of the Rule of Law, but only to those, whether systemic or individual, that have a direct causal relationship with the harm caused to the Union's budget.

Once these conditions are established, the European Commission, after giving the Member State the opportunity to present its defences (Article 6) and informing the European Parliament (Article 8), proposes to the ECOFIN Council the adoption of an implementing decision containing measures to protect the EU budget (Article 6), which may consist of the total or partial suspension of payments or the repayment of loans, or the prohibition of concluding new agreements on loans and other instruments guaranteed by the EU budget, or even the suspension of the approval of financing programs (Article 5). The Council then adopts the decision by qualified majority (Article 6). Upon proposal by the European Commission, it can also adopt a decision revoking the measures taken (Article 7).

The creation, for the first time in the history of the European Union, of a legal mechanism that subordinates the disbursement of European funds to respect for the Rule of Law has immediately led reaction from those Member States that have been violating this common value for years. Only three months

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[171] In this regard, see Court of Justice, *Hungary v. European Parliament and Council cit*., point 227; *Poland v. European Parliament and Council cit*., point 323, as well as the European Commission Communication, *Guidelines on the Application of the Regulation cit*., points 10-11 and Annex I.

[172] In this sense, explicitly point 13 of the aforementioned European Commission Communication, *Guidelines on the Application of the Regulation cit*.

after the adoption of the Regulation in question, the latter was, in fact, challenged by Hungary and Poland before the Court of Justice to request its annulment pursuant to Article 263 of the TFEU, which was rejected with a ruling on 16 February 2022.[173] This ruling was decided by the Union judges sitting as a full court – i.e., by all twenty-seven judges that make up the Court of Justice, therefore including the Hungarian and Polish judges – thus attesting to the latter's desire to send a signal to Hungary and Poland of the compactness of the EU system in the protection of the common values referred to in Article 2 of the TUE.[174]

In confirming the validity of the Conditionality Regulation, the Court first rejected the argument of the applicants that this EU act would deal with issues related to national identity and the exercise of essential and constitutional functions of the Member States, which, under Article 4 of the TEU, fall within the scope of national law. In this regard, the Court, citing established EU case law, simply clarified that even the exercise of an exclusive competence of the Member States must be carried out in accordance with the obligations they have under Union law. In other words, even if the application of the Regulation in question could indeed affect the exercise of essential functions of the Member States, the Union retains the right to adopt every means to protect the values set out in Article 2 of the TEU, which constitute the identity of the common system.

As for the alleged impossibility of adopting additional Rule of Law protection instruments to Article 7 of the TEU, the Luxembourg judges, adopting a reasoning similar to that followed with regard to Article 258 of the TFEU, instead admitted their coexistence due to the different subject matter of the procedures in question. While the former allows any violation to be determined, provided it is serious and persistent, of any value set out in Article 2 of the TEU, the latter focuses exclusively on one of these, namely the Rule of Law, regardless of its systemic or individual nature.[175] Unlike the procedure

[173] The actions *Hungary v. European Parliament and Council* and *Poland v. European Parliament and Council* cited above were introduced on 11 March 2021. Pending the EU ruling, the European Commission decided not to apply the regulation, also because the European Council (conclusions of 11 December 2020) stated that '[s]hould hould an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice…'. *Contra*, the European Parliament, which in June 2021 threatened to use an action for failure to act (Article 265 TFEU) against the inaction of the European Commission. Thus, the minutes of the JURI committee meeting of 14 October 2021 (JURI_PV(2021)1014_1). On the illegitimacy of the European Council's conclusions, see, *inter alia*, K.L. SCHEPPELE, L. PECH, S. PLATON, *Compromising the Rule of Law while Compromising on the Rule of Law*, in *Verfassungsblog*, 13 Dicember 2020.

[174] Court of Justice, *Poland v. European Parliament and Council cit*., points 268 ff.

[175] *Ibid* points 212 and 213; *Hungary v. European Parliament and Council cit.*, points 173 ff.

provided for in Article 7 of the TEU, which aims to protect common values, the Regulation in question primarily aims to ensure the protection of the budget in case of violation of the principles underlying the Rule of Law, rather than sanctioning, even through the Union budget, failures to comply with the Rule of Law. [176]

Although the Court did not refer to it, the decision adopted by the Council under Article 6 of the Conditionality Regulation, unlike that of the Council or the European Council under Article 7 of the TEU, can be challenged before the Court of Justice. Unlike the latter, the one devised under the Conditionality Regulation operates within the framework of judicial protection. [177]

Once the validity of the Conditionality Regulation was established, the European Commission then applied the mechanism provided for therein towards Hungary. On 15 December 2022, the latter saw a reduction of 55% of the budgetary commitments of three operational programs for the period 2021-2017 for an amount of approximately 6 billion euros. [178] On the other hand, considering that Hungary has adopted a series of institutional reforms to restore the independence of the judiciary in Hungary in 2023, the European Commission authorised the partial disbursement of EU funds in December 2023. On 25 March 2024, this decision was challenged by the European Parliament before the Court of Justice to request its annulment. As has indeed emerged from the Resolution of the European Parliament on 19 April 2024, the violations in Hungary of the values of Article 2 of the TEU, among other things through the adoption in December 2023 of a law on the protection of national sovereignty and the establishment of the Sovereignty Protection Office (SPO), are considered as being of a too serious nature, including in different areas from that of the independence of the judiciary, to justify easing the pressure on that Member State. As has al-

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[176] In this regard, see A. CIRCOLO, *Il valore dello Stato di diritto cit.*, pp. 328-330 and the literature cited therein.

[177] Thus see A. VON BOGDANDY, J. ŁACNY, *Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?*, in *Max Planck Institute for Comparative Public Law & International Law (MPIL)*, Research Paper No. 2020-24, 21 July 2020, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3638175*.

[178] The European Commission had indeed proposed to the Council (proposal for a Council implementing decision of 18 September 2022, COM(2022)485 final) the suspension of 65% of commitments for a total of 7.5 billion euros. However, COREPER proposed to the Council to reduce the suspension of funds. On 15 December 2022, the Council confirmed, in Decision 2022/2506, the suggestion of the Member States' ambassadors, also due to the adoption by Hungary of two so-called omnibus laws that responded to some EU requests (an integrity authority; a working group to fight corruption operating within the framework of a general anti-corruption strategy for the period 2021-2027; an audit mechanism for the use of EU funds). In this sense, see E. MAURICE, *Etat de droit cit.*, especially p. 3. Part of these funds were "unfrozen" in December 2023 in light of Hungary's (alleged) justice reform, which supposedly aligned with the EU's. In this regard, *https://www.euronews.com/my-europe/2023/12/13/brussels-releases-10-billion-in-frozen-eu-funds-for-hungary-amid-orbans-threats*.

ready been observed, in fact, the European Parliament, in this latest resolution, hopes that the European Commission will initiate the procedure provided for in paragraph 2 of Article 7 of the TUE.

Due to the difficulty of proving the causal link between the violation of the Rule of Law and the prejudice to the EU budget, [179] the European Commission instead gave a favourable opinion on the disbursement of European funds to Poland and Romania, [180] albeit subjecting it to the adoption in these Member States of institutional reforms in line with the common values referred to in Article 2 of the TUE. Furthermore, given that Poland has never paid the penalty payment of one million euros (later reduced to 500,000 euros) per day imposed in the infringement proceeding ruling, European Commission v. Poland 2021, the European Commission has deducted these sums from the European funds to be paid to that Member State. [181] The actual disbursement of funds to Poland will in any case only take place in the course of 2024 precisely as a result of the adoption of a series of reforms in line with Article 2 of the TEU decided by the newly elected Prime Minister Donald Tusk (13 December 2023). In January-February 2024, in fact, the latter presented a national plan to the main EU institutions to restore respect for the Rule of Law in Poland. This plan includes joining the European Public Prosecutor's Office (EPPO), as well as applying the EU Charter of Fundamental Rights and the principle of the primacy of EU law over national law. In this regard, it has already been observed how the implementation of the latter had been denied by the Polish Constitutional Court in a series of rulings in 2021.

As for Romania, the situation could change if it decides to enhance the principle developed by the Court of Justice in the aforementioned PM ruling of 2021. According to this principle, the jurisprudence of the Romanian Constitutional Court, which denies the principle of the primacy of EU law, may pose a systemic risk of impunity in relation to acts constituting serious crimes of fraud against the financial interests of the EU or corruption. [182]

The conditionality procedure has not yet been applied to the recovery and resilience funds, despite Recital 7 of the Regulation in question mentioning that 'resources allocated through the European Union Recovery Instrument' are considered applicable to such funds, as also noted by both the European Commission and the European Parliament. [183] The national recovery and resilience

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[179] In thise sense, E. CANNIZZARO, *Editorial – Neither Representation nor Values? Pr, "Europe's Moment" – Part II*, in *Eur. Papers*, 2022, p. 1102 ff.

[180] *https://ec.europa.eu/commission/presscorner/detail/fr/ip_22_4223*.

[181] Court of Justice, order C-204/21 *cit*.

[182] Court of Justice, C-357/19 *cit*., points 200 and 203.

[183] In this sense, see the Press Release of 6 October 2021, *Hungary and Poland plans should be approved only if concerns are addressed*. Similarly, in the literature, see I. STAUDINGER, *The Rise and Fall of Rule of Law Conditionality*, in *Eur. Papers*, 2022, p. 721 ff., especially. p. 736 ff.

plans of Poland and Hungary were authorised, in fact, in June and December 2022 respectively by the ECOFIN Council,[184] following a somewhat turbulent process: the European Commission repeatedly postponed the adoption of a positive opinion on these national plans, which in the case of Poland also occurred without the consent of the two Executive Vice Presidents of the European Commission, Timmermans and Vestager; on one hand, the European Parliament asked the Council not to approve the Polish NRRP until compliance with EU law and values was guaranteed, and on the other hand, it threatened a motion of censure against the European Commission, which had ultimately given a positive opinion on the Polish plan; the Council's decision to authorise the Polish plan was made with the abstention of the Netherlands,[185] whose parliament had urged the government to initiate infringement proceedings against Poland precisely for violation of the Rule of Law.

Moreover, in August 2022, the main judicial associations representing judges in Europe initiated annulment proceedings before the General Court against the Council's June 2022 implementing decision to approve the Polish NRRP for manifest violation of the Rule of Law.[186] If this action were to overcome the admissibility hurdles under paragraph 4 of Article 263 of the TFEU,[187] the judgment to be rendered in this case could provide useful insights into the value of the protection of the Rule of Law also within the framework of Regulation 2021/214 establishing the Recovery and Resilience Facility. Although the plans of Hungary, Poland and Romania were approved by the Council on condition that reforms to protect the Rule of Law were implemented – strengthening the independence of the judiciary in Poland and Romania; protecting the LGBTQIA+ community in Hungary[188] – that Council decision, somewhat surprisingly, does

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[184] Articles 18-20 of Regulation 2021/214 establishing the Recovery and Resilience Facility, OJEU L 57 of 18 February 2021.

[185] For a reconstruction on this topic, see A. ALEMANNO, *Cesuring von der Leyen's Capitulation on the Rule of Law*, in *Verfassungsblog*, 8 June 2022; M. LANOTTE, *L'azione di annullamento proposta dalle associazioni giudiziarie contro la decisone del Consiglio di approvare il PNRR di Varsavia*, in *BoGDUE*, 26 October 2022. See also the European Parliament resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan (NRP) (2022/2703(RSP)).

[186] Cases T-531/22, *International Association of Judges (Rome, Italy) v. Council*; T-532/22, *Association of European Administrative Judges (Trier, Germany) v. Council*; T-533/22, *Stichting Rechters voor Rechters (The Hague, Netherlands) v. Council*. See T. SHIPLEY, *European Judges v. Council: The European Judiciary Stands Up for the Rule of Law*, in *eulawlive.com*, 30 August 2022.

[187] On the possibility for legal persons to challenge an EU Council implementing act, see M. CONDINANZI, R. MASTROIANNI, *Il contenzioso dell'Unione europea*, Torino, 2009; C. AMALFITANO, *Standing (Locus standi): Court of Justice of European Union (CJEU)*, in *Max Planck Encyclopedia of International Procedural Law*, 2021.

[188] Regarding Hungary, 2022/0414 (NLE) of 5 December 2022, point 2. For Poland, 2022/0181 (NLE) of 14 June 2022, point 2. These modifications would indeed be merely cosmetic according to J. SAWICKI, *Le milestones della Commissione europea sull'indipendenza dei giudici: presupposto per migliorare le condizioni della rule of law o misure puramente cosmetiche*, in *Nomos*, 2022.

not mention the Rule of Law, limiting itself to requiring compliance with environmental, climate and digital transition objectives (Articles 3 and 4).

11. *Conclusions… also in light of the recent directive on the protection of persons reporting violations of EU law*

Since 2018, the Union's system has progressively strengthened both preventive and reactive tools to safeguard common values and the Rule of Law, aiming to protect its identity and meet the expectations of EU citizens who, at least according to data from the Eurobarometer,[189] consider it necessary for these values to be equally respected in all Member States. In particular, the analysis of the mechanisms provided for this purpose highlights how the most active watchdogs in identifying violations of Article 2 of the TEU have been not only the Union institutions representing the common interest – the European Commission and the Court of Justice – but also members of civil society and the legal community, as evidenced by the numerous preliminary rulings referred to the Union judges to provoke an assessment of compatibility with Article 2 of the TEU of controversial national legislation, as well as the action for annulment likewise introduced by associations representing European magistrates to verify the illegitimacy of the Council's implementing decision to authorise, despite the established non-compliance with the Rule of Law in Poland, the recovery and resilience plan of that Member State.

The need to strengthen "bottom-up" enforcement of every violation of EU law has also motivated the European Commission to propose, and the EU co-legislator to adopt, Directive 2019/1937, which, starting from the premise that individuals are often the first to become aware of common law infringements, introduced minimum safeguards in all national systems (prohibition of retaliation; actions of financial, psychological, and judicial support; sanctions for those who intimidate) to protect whistle-blowers, i.e., those who report violations of even fundamental common rights, which also damage European financial interests (Article 2). Although the directive in question does not expressly mention common values, the implementation of the latter in Article 2 of the TEU seems justified by the already highlighted connection between fundamental rights and common values. The reference to harm to European financial interests also recalls the Conditionality Regulation, which is applicable precisely in case of violations of Article 2 of the TEU. The importance of this instrument among the remedies aimed at combating infringements of this provision is further evidenced by the fact that the European Commission, in February 2023, lodged an

[189] *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_it*.

infringement action against eight Member States (namely the Czech Republic, Germany, Italy, Estonia, Spain, Luxembourg, Hungary and Poland) that have not yet correctly transposed, more than two years after the deadline, Directive 2019/1937 into their national legal systems. [190]

The undeniable progress made, especially in the last five years, in combating violations of common values should not, however, make us forget the weak role played therein by the Member States, both unilaterally considered and when gathered in the Council and the European Council. Since it is unrealistic for the latter to amend, at least in the short term, Article 7 of the TEU in the context of treaty revision – by lightening, for example, the deliberative quorums provided therein – the further strengthening of the protection of Article 2 of the TEU then depends on a more incisive and effective use of the tools already available to them: not only Article 7 of the TEU, but also dialogues within the Council and the application of the Conditionality Regulation, among other things within the framework of national recovery and resilience plans.

Even the role of the European Parliament could be more decisive. Although the latter has repeatedly criticised violations of the Rule of Law by Member States, it effectively initiated the procedure under Article 7 of the TEU against Hungary only after the European Commission had lodged a similar request against Poland. In light of the Council's decision to authorise the Polish recovery and resilience plan, instead of challenging as a privileged applicant this act before the Court for annulment, the European Parliament chose to threaten the use of a motion of censure against the European Commission, which had given a favourable opinion on the adoption of the said Council decision.

A "more frontline" position of the European Parliament would thus support the European Commission and the Court of Justice in the delicate task of assessing and sanctioning violations of common values, which burden, at least until now, primarily rests on their shoulders. This seems even more important considering that, in the face of the deterioration of the Rule of Law in many Member States other than Hungary and Poland, the latter will likely be called upon to open new avenues of protection for Article 2 of the TEU, transforming, for example, Article 2 of the TEU into an autonomous legitimacy parameter of domestic and EU law, or applying the "sanction" consisting in the suspension of forms of cooperation based on mutual trust between Member States.

[190] See regarding [INFR(2022)0043], [INFR(2022)0052], [INFR(2022)0055], [INFR(2022)0073], [INFR(2022)0106], [INFR(2022)0119], [INFR(2022)0093], and [INFR(2022)0150].

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