

The EPPO as motor for transformation in the European ‘Area of Freedom, Security and Justice’?

An introduction to EPPO's prospects: expectations, status quo and potential

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This paper reviews the current status and future perspectives of the European Public Prosecutor's Office (EPPO), noting that its establishment – following twenty years of negotiations – was by no means guaranteed. The author emphasises the importance of complementing technical and legal analysis with an interdisciplinary and practical approach. Taking this viewpoint, the article examines issues relating to the EPPO's material competence, its controversial institutional structure and the highly fragmented procedural framework. The structural and operational difficulties of the new office are considered in the context of the long-standing tension between supranationalism and intergovernmentalism within the European Area of Freedom, Security and Justice. It ends by suggesting that establishing the EPPO and dealing with its operational difficulties in its early years represents a major challenge and an outstanding opportunity for the legal community to engage in institutional innovation and implementation of a real European criminal justice system.

1 Eppure si muove – EPPO si muove

On the topic of 'Prospects: expectations, status quo and potential', I will be giving only some brief remarks and would like to begin with a little personal anecdote. The first time I heard someone talking about the European Public Prosecutor's Office (EPPO), I was sitting in the office of a prominent legal scholar, looking for some suggestions about my graduation thesis. It was 2014, and the European Commission had just released the draft regulation on the establishment of the EPPO.¹ When I suggested

* Author's note: This contribution is based on the presentation given on 17 October 2023; the narrative style was maintained.

1 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

analysing this document, the reaction was rather cold. I remember the Professor's comment: 'It will probably never be approved'.

This anecdote reminds us that, despite the numerous challenges encountered during its twenty-year genesis (1997–2017), the EPPO yet moves (*'Eppur si muove'*, to paraphrase the Italian mathematician, physicist, and philosopher Galileo Galilei). At the same time, it shows how difficult it is to make predictions about the complex legal and institutional developments that are unfolding, which leads us back to the topic of our session.

2 *The EPPO at a critical juncture*

Setting aside jokes and personal memories, I fully share the perspective on how the debate on the EPPO should progress at this critical juncture.

First of all, a purely technical analysis of legal texts alone does not seem sufficient to fully understand the changes occurring in the 'Area of Freedom, Security and Justice'. Indeed, we are witnessing a pivotal moment in the harmonisation and integration of European criminal law and criminal procedure, which obliges us to share our analyses with other disciplines, such as economics, sociology, and political science. For instance, it might be difficult to understand the complex structure of the EPPO and its operational practices, if we merely identify the different bodies that make up the Office (both at the centralised and decentralised levels) and their respective powers. The full picture only emerges when we keep in mind the never-ending contrast between supranationalism and intergovernmentalism within the European institutions and, particularly, the debate on the 'new intergovernmentalism' in the Area of Freedom, Security and Justice after the Treaty of Lisbon.²

Secondly, I strongly commend the approach of blending theoretical studies with practical experience, by bringing together academics who specialise in this field and European Delegated Prosecutors (EDPs) who work at the EPPO. Since law comes to life through legal practice, I do not deem it possible to develop sound theories without evaluating the practical consequences of our interpretations. Similarly, I believe it is important for legal practitioners to be fully aware of the systematic implications of their deci-

2 For more on this institutional perspective on EPPO, see J Öberg, 'The European Public Prosecutor: Quintessential supranational criminal law?' (2021) 28 *Maastricht Journal of European and Comparative Law* 164.

sions, while preserving their freedom to proceed in the way they consider most appropriate, according to the rule of law and the circumstances of the case. I think this is especially relevant for the EPPO, since the practice of the Office is evolving in real time.

3 *The EPPO's competences*

After the methodological premises, we can now focus on the topic of '*expectations, status quo and potential*' of the Office. In particular, the first question we need to address concerns the EPPO's competences: 'What can, and what should the EPPO do?'. The question itself presents two distinct angles.

3.1 Material competences

On its face, the question refers to crimes falling within the jurisdiction of the EPPO and to those that might follow the same path in the future. This is a sensitive topic, not only from a legal perspective but also from a political one.

We are aware that the decision to limit the EPPO's scope to crimes affecting the EU's financial interests has been met with criticism from academia and civil society.³ Critics argue that this choice associates this type of offences with the idea of a purely economic and financial Union, paying little attention to the fundamental rights and security of its citizens.

We know, however, that this criticism is at least partly misguided, since the EPPO's primary competence can only focus on the protection of genuine European interests, in accordance with the principles of subsidiarity and proportionality.⁴

Moreover, we could add that protecting the European Union's budget means safeguarding taxpayer's money and fighting against the persisting

3 See S Manacorda, 'Il pubblico ministero europeo e le questioni aperte di diritto penale sostanziale' (2017) *Diritto penale e processo* 660, 663, where the author wonders whether crimes against the European Union's financial interests might have become a new form of '*crimen lesae maiestatis*'.

4 On this matter see – among others – F Madsen and T Elholm, 'The EPPO and the Principle of Subsidiarity', in P Asp (ed), *The European Public Prosecutor's Office. Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2015) 31.

and ever-growing inequalities, as highlighted by Thomas Piketty in his monumental book 'Capital in the Twenty-First Century' (2013).

In any case, Article 86(4) of the Treaty on the Functioning of the European Union (TFEU) allows the potential extension of the EPPO's competence to encompass other serious forms of transnational crime.⁵ Bearing in mind that history is a guide to the present, it is worth recalling that in many countries of the European continent the public prosecution service was created and originally developed with the aim of protecting the fiscal and property interests of the Crown in the emerging nation-states.⁶ These historical roots remain evident even in the names that the Public Prosecutor's Office took in different countries (*Procureur fiscal* or *Procureur du Roi* in the French language, *Fiskalat* in the German world, *Ministerio fiscal* or *Fiscalia* in Spanish-speaking dominions).

I am not suggesting that history is governed by general rules – to quote the German philosopher and epistemologist Carl Gustav Hempel – and thus is destined to repeat itself, albeit in different shapes and forms. However, in order to understand the alternatives available to us today, we need to be aware of the institutional and power dynamics that occurred in the past.

Be that as it may, it is important to acknowledge that establishing a highly specialised body focused on financial investigations, with specific expertise in crimes against the public administration, is one thing, while developing an office with general competence to combat evolving transnational organised crime is quite another. These are different projects with different challenges.

5 It is no coincidence that several authors suggested extending the EPPO's competence to encompass other forms of serious transnational crime, including terrorism, human trafficking, environmental crimes, and so forth. See A Juszcak and E Sason, 'Fighting Terrorism through the European Public Prosecutor's Office (EPPO)? What future for the EPPO in the EU's Criminal Policy?' (2019) *eu crim* 66, 66; C Di Francesco Maesa, 'EPPO and environmental crime: may the EPPO ensure a more effective protection of the environment in the EU?' (2018) 9 *New Journal of European Criminal Law* 191. See also European Commission, 'Communication from the Commission to the European Parliament and the European Council. A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes', COM(2018) 641 final.

6 See M Panzavolta, 'Lo statuto del pubblico ministero europeo (ovvero, ologramma di un accusatore continentale)' in MG Coppetta (ed), *Profili del processo penale nella Costituzione europea*, (Giappichelli 2005) 179, 215; R Orlandi, 'Qualche rilievo intorno alla vagheggiata figura di un pubblico ministero europeo' in L Picotti (ed), *Possibilità e limiti di un diritto penale dell'Unione europea* (Giuffrè 1999) 209, 210.

3.1.2 Exercise of the competences

The second aspect implied by the original question pertains to the way in which the EPPO exercises its powers. There are several specific issues to be considered, which will be explored in more detail in the following contributions. Yet, a number of interpretive issues central to the overall design of the EPPO stand out. For the sake of simplicity, I will only select a few of these that arise at different stages of the criminal proceeding.

Regarding the beginning of the investigation, one may wonder, for example, whether Article 27 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation) requires the EPPO to exercise its competence to take over an ongoing investigation at the national level (if the offence is deemed within its competence), or whether, on the contrary, the Office has a margin of discretion in this respect.⁷ This question is clearly related to the principle of legality which, according to Recitals 66 and 81 of the EPPO Regulation, should inspire the decision of whether to prosecute or not.

As far as the progress of investigations is concerned, one of the most delicate issues is the so-called 'ancillary competence' of the EPPO. Recital 54 of the EPPO Regulation refers to respect for the *ne bis in idem* principle to justify the extension of the EPPO's powers beyond the PIF area. The problem arises not when multiple offences are committed by a single act (or omission), but rather when certain offences are linked to others, i.e. when they are committed to perpetrate or conceal other crimes.

In other words, the question is whether the "inextricably linked offence" clause – provided by Article 22(3) of the EPPO Regulation – should be interpreted broadly or narrowly. On this point, there has already been a strong dispute between the EPPO and the Spanish national anti-corruption authority,⁸ highlighting the sensitivity of this issue both for Member States and for national judicial authorities. It is easy to predict that the question

7 See H-H Herrnfeld, 'Article 27' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 8.

8 For further reference on the first positive conflict between the EPPO and national judicial authorities, see B Márton, 'The Conflict of Competence between the European Public Prosecutor's Office and Spanish Prosecutors – Lessons Learned' (2022) *eu crim* 286; L Pressacco, 'I «conflitti di competenza» tra il pubblico ministero europeo e gli organi requirenti nazionali' in G Di Paolo, L Pressacco, R Belfiore and T Rafaraci

will (sooner or later) end up before the European Court of Justice (ECJ), as provided for in Article 42(2)(c) of the EPPO Regulation.⁹ In the meantime, however, the EPPO will have to better determine the scope and implications of its ancillary competence.

At the end of the investigation, the greatest confusion concerns access to the simplified procedures, whose models vary considerably between Member States, raising concerns about forum shopping. The question remains whether the EPPO's guidelines are sufficient to ensure a degree of uniformity and equal treatment of defendants across the Union, as EDPs are still bound by their national laws.¹⁰ A somewhat similar problem concerns the grounds for dismissal, given the ambiguous wording of Article 39 of the EPPO Regulation. In particular, it needs to be clarified whether the EPPO can rely on national provisions that provide reasons for dismissal which do not appear to be listed in the EPPO Regulation.¹¹

Finally, a crucial aspect in understanding the role and, I would say, the identity of the EPPO in the criminal justice system lies in the admission of evidence in court.¹² This is one of the factors that characterises contemporary criminal proceedings as either largely accusatorial or inquisitorial. I am referring, of course, to the separation between preliminary investigations and trial, with the consequent impossibility for the judge to use out-of-court statements, unilaterally gathered by the parties. If this barrier were to collapse, the EPPO would risk retaining only the name of an accuser, but in

(eds), *L'attuazione della Procura europea. I nuovi assetti dello spazio europeo di libertà, sicurezza e giustizia* (Editoriale Scientifica 2022) 161, 185.

- 9 On this point, however, see Tipik and Spark Legal and Policy Consulting, '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')' (Study for the European Commission, 2023), at <https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT0814279-81>.
- 10 See J Della Torre, *La giustizia penale negoziata in Europa. Miti, realtà, prospettive* (CEDAM 2019) 585–594.
- 11 On this matter, see L Luparia and J Della Torre, 'Profili dell'azione penale (e dell'azione) nel sistema della Procura Europea' (2023) *Rivista Italiana di Diritto e Procedura Penale* 347, 367; R Belfiore, 'L'esercizio dell'azione penale da parte dell'EPPO tra legalità e margini di discrezionalità' (2022) *Cassazione penale* 3677, 3684; D Brodowski, 'Article 39' in Herrnfeld, Brodowski and Burchard (eds) (n 7) mn 11-12.
- 12 For further discussion, see D Brodowski 'Admissibility of Evidence in EPPO Proceedings' (2023) 14 *New Journal of European Criminal Law* 34.

substance being transformed into a real investigating judge, with the power to collect evidence, especially abroad.

3.2 The construction of the EPPO

The second fundamental question that needs to be addressed regards the construction of the EPPO, specifically whether the system outlined in the EPPO Regulation is 'slowing down its potential' (or not). This refers to the remarkable changes that occurred during the negotiations on the establishment of the EPPO within the Council of the European Union, as compared to the structure originally envisaged in the draft proposal presented by the Commission.

As we all know, there has been a significant shift from a vertical, top-down organisation, led by the Chief Prosecutor, to a structure in which collegial bodies – in particular the College and the Permanent Chambers (PCs) – play a decisive role. Moreover, the original vision of treating the territories of the Member States as a 'single legal area' has been set aside, with numerous references to national laws on criminal procedure as a consequence.¹³

That being said, the interpretation of these changes varies among academics and practitioners. For some, it is a deeply misguided choice, dictated by the Member States' fierce opposition to a truly supranational body, which they believe jeopardises the EPPO's ability to pursue its main objective, i.e. strengthening and harmonising the prosecution of crimes affecting the European Union's budget in different countries. Others, however, believe that this choice is the result of a wise compromise, in line with the current stage of development of the Union and the broader goals pursued by European legislators.

We should not forget that Article 86 TFEU does not permit the establishment of a federal judicial system within the Union, as the EPPO conducts criminal proceedings before courts and tribunals of the Member States. Consequently, the decision to establish an integrated judicial system, in which EDPs take on double roles (the so-called 'double-hat model') and

13 See L De Matteis, 'The EPPO's legislative framework: Navigating through EU law, national law and soft law' (2023) 14 *New Journal of European Criminal Law* 6, 7; M Panzavolta, 'Responsabilità e concetti: il regime normativo e la scelta della giurisdizione nelle indagini dell'EPPO in cerca di orientamento' in G Di Paolo, L Pressacco, R Belfiore and T Rafaraci (eds) (n 8) 93, 101.

work primarily on the basis of national legislation, appears both logical and, at least to some extent, necessary.

In my opinion, from a pragmatic perspective, this contrast has lost at least part of its original meaning. Without dismissing any concern, it must be recognised that the European Union has demonstrated its ability to manage and coordinate complex structures. On the other hand, the EDPs need the trust and cooperation with police forces and magistrates in all Member States, without which they could not fulfil their mandate.

I believe that, even in this instance, the problem can be observed from a dual perspective.

On the one hand, we can refer to the structure of the EPPO, as outlined in the EPPO Regulation. Several scholars have underlined that it is too complicated and bureaucratic, unable to make swift decisions necessary for conducting complex investigations. Recently, however, new concerns have emerged, regarding the effectiveness of the PCs in crucial coordination tasks, issuing directives, and resolving disagreements on the conduct of investigations by the EDPs. In particular, some scholars have observed that European Prosecutors sitting in the College and the PCs, while supervising the investigations of the EDPs, run the risk of being ‘captured’ by their national interests or, at least, struggling to detach themselves from the practices and legal culture rooted in their own legal systems.¹⁴ If this was the case, obviously, the PCs would lose much of their authority and their ability to effectively guide the EPPO’s activities, ensuring the uniformity and coherence of its strategies and directions.

A second level of the discussion revolves around the regulatory context in which the EPPO carries out its functions. The key question is whether the EPPO can effectively fulfil its institutional tasks, without a strong harmonisation of procedural rules across Member States, which currently seems an unachievable goal. This question becomes particularly intriguing in relation to transnational investigations, which present several regulatory challenges.

At the time of this presentation, a preliminary ruling is currently pending before the ECJ on this very issue, to define the type of control that falls within the jurisdiction of the State where the EDP responsible for providing assistance is based.¹⁵

14 On this matter, see Öberg (n 2) 177.

15 The ECJ has since ruled on the issue with its judgment of 21 December 2023 in ECJ, Case C-281/22 *G. K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

Even in this case, we must consider the broader implications of this matter. The mechanisms of transnational investigative assistance within the EPPO must be compared, on the one hand, with those typical of the European Investigation Order, and, on the other hand, with the concept of a 'federal' type of operational practice, which should ideally go beyond the dynamics of mutual recognition of judicial decisions. These issues are clearly of paramount importance for the future configuration of the European Area of Freedom, Security and Justice.

Once again, I remain particularly curious about the interaction between theoretical reflections and practical perspectives, because institutions 'walk' on the 'legs' of individuals. It will therefore be especially interesting to observe the behaviours of the judges of the ECJ, the members of the EPPO, as well as the reactions of lawyers and legal scholars. We are no longer in the era of large-scale scientific projects, like the past efforts aimed at drafting the *Corpus Juris* or the *Model Rules on Criminal Procedure*. Yet, the legal community faces a great challenge. If we are ready to embrace it with energy and enthusiasm, we will have the opportunity to contribute, each in their own small way, to the construction of a great common enterprise.

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