The EPPO's transformative powers on criminal justice in the Member States

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This article analyses the transformative role of the European Public Prosecutor's Office (EPPO) within national criminal justice systems. Despite its supranational nature, the EPPO relies heavily on domestic legal frameworks, producing potential tensions between Regulation 2017/1939 and the intricate legal features of Member States. These frictions illustrate its impact on three levels: legislative reforms, interpretative adjustments of national rules, and cultural change among practitioners. By embedding itself in national systems while reshaping them, the EPPO not only safeguards the Union's financial interests but also acts as a driver of convergence in European criminal justice.

1 Introduction: the integration of the European Prosecutor within national criminal justice systems and the interaction between the EPPO Regulation and national law

To understand whether, and to what extent, the European Public Prosecutor's Office (EPPO) can trigger transformations of Member States' criminal justice systems, it is useful to point out that this body is fully embedded in national legal systems, despite its supranational nature as a body of the European Union.

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This organic and operational integration within the national systems derives first and foremost from the Lisbon Treaty. Article 86(2) of the Treaty on the Functioning of the European Union (TFEU) states that the EPPO shall be responsible for investigating, prosecuting, and bringing to judgment the perpetrators of offences against the Union's financial interests (known as PIF offences, from the French acronym for '*protection des intérêts financiers*')[1] committed in participating Member States. Additionally, it states that the EPPO shall perform the functions of public prosecutors before the competent courts. Consequently, the trial stage shall necessarily take place in national courts.

Furthermore, Member States are still reluctant to give up their sovereignty in criminal matters. Therefore, the EPPO Regulation[2] was only adopted, after heated debates, through an enhanced cooperation procedure, and it significantly diverges from the Commission's 2013 proposal:[3] the structure of the EPPO as eventually adopted is more decentralised and collegial than the one originally proposed by the Commission.[4]

Moreover, and above all, the EPPO Regulation encompasses a significant number of references to national law, totalling approximately 80 references across its recitals and operative provisions.[5] The result is a highly intricate legal framework that heavily relies on the support or integration of national norms (both substantive and procedural rules).[6]

1 PIF crimes, as defined in 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 (PIF Directive), not only affect the Union's financial interests but they also harm its reputation and credibility. Therefore, these crimes include not only fraud related to the EU budget or large-scale VAT frauds affecting more than one State, but also corruption, misappropriation of assets committed by a public official, and money laundering involving property derived from those crimes.

2 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

3 ML Wade, 'The European Public Prosecutor: Controversy Expressed in Structural Form' in T Rafaraci and R Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer 2019) 165.

4 T Rafaraci, 'Brief Notes on the European Public Prosecutor's Office: Ideas, Project and Fulfilment' in Rafaraci and Belfiore (eds) (n 3) 157, 159.

5 L De Matteis, 'The EPPO's Legislative Framework: Navigating through EU Law, National Law and Soft Law' (2023) 14 *NJECL* 6, 7.

6 M Panzavolta 'Responsabilità e concetti: il regime normativo e la scelta della giurisdizione nelle indagini EPPO in cerca di orientamento' in G Di Paolo, L Pressacco, T Rafaraci and R Belfiore (eds), *L'attuazione della Procura europea. I nuovi assetti dello spazio europeo di libertà, sicurezza e giustizia* (Editoriale Scientifica 2022) 93, 94.

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This is one of the reasons why Article 117 of the EPPO Regulation imposes an obligation, on participating Member States, to notify the EPPO (and other Union institutions) of several critical matters:

1) the list of national authorities responsible for implementing the EPPO Regulation;
2) an extensive catalogue of, *inter alia*, national criminal law provisions applicable to the offences outlined in the PIF Directive; and
3) any other relevant national law, including procedural laws.[7]

This comprehensive reporting obligation confirms the relevance of national law in complementing the provisions of the EPPO founding Regulation.

Finally, it should be noted that each participating Member State has already enacted laws or other legal measures amending its national criminal justice system to reflect the existence (and functioning) of the EPPO. In other words, it created an appropriate legal environment to 'host' the EPPO. These legislative amendments concern criminal law, criminal procedure, the relationship with law enforcement agencies, and, in some instances, the digitalisation of justice systems. This last point is crucial to ensuring connection and exchanges between the EPPO's Case Management System (CMS) and national databases and file management systems. These adaptive measures also serve as a 'litmus test' gauging the degree of resistance or adaptation of Member States to the novel challenges introduced by the establishment of the EPPO.

2 Challenges in the interaction between the EPPO Regulation and the national law of the Member States

Most of the complex legal framework (comprising Union law and applicable national law, including specific rules of implementation) that governs the EPPO's activities remains largely untested in practice, either before

7 Member States have fulfilled their notification obligation under Art 117 of the EPPO Regulation in various ways. Some States, such as Slovenia, have taken a broad approach and included in their notification the entire text of their criminal code. Others, like Luxembourg and Latvia, have opted for a more limited approach, only listing provisions of substantive criminal law related to the implementation of the PIF Directive and the competent national authorities deemed relevant for the corresponding articles of the EPPO Regulation. See De Matteis (n 5) 8.

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the competent courts[8] or within the EPPO structure itself. This refers to the Permanent Chambers (PCs), which play a pivotal role in the EPPO's decision-making process, combining the common sense of its members with legal considerations.[9]

However, pinpointing specific instances where potential tension between the EPPO Regulation and the intricate legal features of Member States arises, or where ambiguous references to national law leave ample room for divergent interpretations, may be useful to suggest a possible categorisation of the EPPO's transformative powers in the national criminal justice systems. Identifying compliance issues between national laws and the EPPO Regulation can also help understand and anticipate the challenges ahead for improvement that will likely be on the agenda in the coming years.

2.1 The 'model' of criminal investigations

If we follow the typical flow of a criminal case (investigations, decisions on prosecution, simplified procedures, trial, and appeals) the first example of potential tension between the EPPO Regulation and its implementing measures arises in the 'model of criminal investigations' adopted by the Lisbon Treaty (Article 86 TFEU) and the EPPO Regulation (Article 4).

These provisions reveal a clear political preference for a model in which criminal investigations are solely in the hands (and under the responsibility) of the prosecutor: Pursuant to Article 4, '*[t]he EPPO shall undertake investigations, and carry out acts of prosecution, and shall also exercise the function of prosecutor in the competent national courts, until the case has been finally disposed of*.

8 The reference is to national courts and the European Court of Justice (ECJ). After the drafting of this contribution for the Conference held at Villa Vigoni in October 2023, the ECJ delivered its first ruling on the EPPO system, on judicial authorisation in cross-border criminal cases (ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018).

9 In the EPPO system, the Chambers should balance due respect of national law and national features with unionwide coherency. Only once the EPPO starts to function, it will be appropriate to assess whether the members of the PCs will only uphold national interests or whether they will be able to detach themselves from their sense of justice and develop a true supranational 'European mindset'. See T Elholm, 'EPPO and a Common Sense of Justice' (2021) 28 *Maastricht Journal of European and Comparative Law* 212, 218.

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This model of criminal investigation is similar to the Italian and German models. However, comparative law studies show that many European countries have a legal tradition characterised by the presence of a *'juge d'instruction'* (investigating judge), who plays a crucial role in overseeing investigations and prosecutorial decisions.
Given this distinctive specificity, it is legitimate to question whether jurisdictions that provide for the cohabitation between a prosecutor and a *'juge d'instruction'* – during the investigative phase – comply with the EPPO Regulation and the EPPO responsibilities as defined in the Lisbon Treaty (Article 86 TFEU). Indeed, it could be argued that such jurisdictions are transferring a portion of the control of investigations from the European Delegated Prosecutor (EDP) handling the case to another authority (a national one) and that such a shift could not be deemed acceptable in light of the EPPO Regulation.[10]

2.2 Investigative measures affecting fundamental rights

Another possible area of tension – and therefore another need to adapt national systems – concerns intrusive investigative measures and the minimum safeguards to be provided in the event of serious interferences with fundamental rights.

Article 30(1) of the EPPO Regulation merely requires Member States to enable the EDP to order or request a list of investigative measures in instances where the offence under investigation is punishable by up to 4 years of imprisonment. However, the ECJ, in its first judgment delivered on the

10 See De Matteis (n 5) 14; Panzavolta (n 6) 116 ff. After the drafting of this contribution for the Conference held at Villa Vigoni in October 2023, the European Commission released a first compliance assessment (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/20240118EOT08142). According to this study, 'Member States took different approaches regarding the role of investigative judges and other national authorities. Depending on the approach taken, some Member States were found to not be fully compliant where investigative judges and other national authorities, in certain cases, retain the powers to investigate or prosecute PIF offences, conflicting with the general objectives and tasks of the EPPO' (11, 31).

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EPPO system, concerning judicial authorisation in cross-border cases,[11] has added an interesting new element: the requirement that specific categories of (intrusive) investigative measures – such as searches of private dwellings (home searches), conservatory measures relating to personal property, and asset freezing – will need *ex ante* judicial authorisation in the State of the handling EDP.[12] The requirement for prior judicial authorisation in the handling State for measures that significantly affect fundamental rights, and the express reference to home searches, seem to raise compliance issues in those countries – such as Italy – that do not mandate this practice. In the Italian legal system, a prosecutorial decree is enough to carry out searches and conservatory measures to preserve evidence, which may conflict with the new judicial authorisation requirement.[13]

11 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018. For a comment, see T Wahl, 'Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations' (2023) *eucrim* 319; N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1.

12 In ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, the judges of Luxembourg drew parallels between the cooperation mechanism in Arts 31, 32 of the EPPO Regulation and the scheme of judicial cooperation within the EU based on the principles of mutual trust and mutual recognition, stating that the system of judicial cooperation in the EU is based on a division of competences between issuing and executing judicial authorities. As a consequence, also in the EPPO system, the ECJ established a division of work between national courts, in order to ensure effective judicial protection: it is up to the court of the handling EDP's State to exercise prior judicial review of the conditions relating to justification and adoption of the assigned investigation measures (para 73); it is up to the court of the assisting EDP's State to review matters concerning the enforcement of the measure (para 72). On top of that, the Court also clarified that '[a]s regards investigation measures which seriously interfere with those fundamental rights, such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures' (para 75).

13 According to Franssen (n 11), 'it is highly unlikely that the implementing legislation in all participating Member States is fully in conformity with the ECJ's judgment. It is, therefore, safe to assume that all these Member States will have to urgently review their legislation; Member States, like Germany and Austria, that had foreseen a full judicial review by a court in the Member State of the assisting EDP, will probably have to face up to the new reality and limit that role to the enforcement of the investigation measure. In the same vein, these same Member States will somehow

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2.3 Prosecution decisions

Another example of potential tension between national laws and the EPPO Regulation concerns decisions on the prosecution: the dismissal of the case, on the one hand; simplified procedures, on the other hand.

2.3.1 The dismissal of the case

Regarding the dismissal of cases, two different issues require attention. The first one arises from the interpretation of the EPPO Regulation (Article 39), since it is unclear whether the EPPO Regulation, at the European level, is the sole authority for establishing grounds for dismissing a case, or if it may be integrated by national laws.[14] Additionally, it is left unclear whether the EPPO Regulation permits merely discretionary evaluations or not (referring to the well-known distinction between legality principle, or mandatory prosecution, and opportunity principle, or discretionary prosecution).[15]

The second issue concerns the extent of judicial review on the EPPO's decision to dismiss the case, in light of Article 42 of the EPPO Regulation.

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have to ensure that the *ex ante* judicial review undertaken in the Member State of the handling EDP is recognised as an adequate, trustworthy form of judicial control on the merits of the case at that stage of the investigation, thus allowing the assigned investigation measure to be carried out on their territory. Conversely, those Member States that had not foreseen ex ante judicial control in cross-border EPPO cases may well need to introduce this, leaving aside the previous question as to which judicial authority is best placed to undertake it. Additionally, all Member States may have to try and offer clarity to courts as to which elements concerning the enforcement of the investigation measure, they can take into consideration when they review the assigned measure. Whether this will actually be possible or even desirable without some degree of guidance at the EU level is doubtful.'.

14 See, on this point, 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 H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) 359 ff.

15 In favour of the legality principle (more specifically, of a limited legality principle) see, *inter alia*, L Luparia and J Della Torre, 'Profili dell'azione penale (e dell'inazione) nel sistema della Procura Europea' (2023) *Rivista Italiana di Diritto e Procedura Penale* 347, 354, 355 and 367. By contrast, according to 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 Ahead* (Springer 2018) 103, 113, the EPPO Regulation depicts a limited discretionary principle, in which the margin of consideration left to the EPPO is rather broad, even though it is still subject to the oversight of a collegial body.

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This provision stipulates that the procedural acts of the EPPO producing legal effect *vis-à-vis* the parties are subject to judicial review by the competent national court, in accordance with requirements and procedural rules laid down by national laws. It follows that judicial review falls within the purview of national courts.[16]

In the Italian legal order, the constitutional principle of mandatory prosecution (Article 112 of the Constitution) implies that decisions to waive prosecution are generally subject to judicial review by the judge for preliminary investigations ('*GIP*'). The GIP has the power to direct the prosecutor to conduct further investigations, or even to bring the case to trial, filing an indictment, when the GIP determines there are sufficient grounds for doing so.

What about EPPO cases? Do judges for preliminary investigations have the same powers they would have in ordinary cases? Or should national provisions be interpreted in such a way as to limit (or exclude) the powers of the judge, to preserve the EPPO's responsibilities and powers, as uniformly defined by Union law at the Treaty level? Scholars have a variety of views on this issue, reflecting differing views on the balance between national judicial oversight and the EPPO's autonomy.[17]

16 Pursuant to Recital 89, the provision of the EPPO Regulation on judicial review does not alter the powers of the Court of Justice to review the EPPO administrative decisions, which are intended to have legal effects *vis-à-vis* third parties. This namely refers to decisions not taken in the performance of its functions of investigating, prosecuting, or bringing to judgement. The EPPO Regulation does not preclude the possibility for a Member State of the European Union, the European Parliament, the Council or the Commission to bring actions for annulment in accordance with Art 263(2) TFEU and Art 265(1) TFEU, and infringement proceedings under Arts 258, 259 TFEU.

17 According to Panzavolta (n 6) 120, judicial control must never go so far as to interfere with the strategic and discretionary decisions of the EPPO. Thus, the responsibility conferred to the EPPO in relation to prosecution means that there can be no external interference in these decisions. This does not mean that judicial review of the decision is excluded (which is clear from Art 42(1) of the EPPO Regulation and even more so from Art 42(3)), but it does mean that judicial powers of intervention beyond verifying the legitimacy of the decisions taken, such as the obligation to conduct certain investigations or to bring charges, are excluded. To return to the Italian example, it follows that domestic law should not be completely abandoned, but, at the same time, it cannot be applied without some adaptation to the EPPO regime. In practice, it appears from a series of informal interviews that Italian EDPs have moved towards asking the GIP for dismissal of the case, but this practice leads to an overlap between the PC and the judge for preliminary investigations. It remains to be seen who has the final say in the event of a disagreement.

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2.3.2 Simplified procedures, trial, and appellate remedies

As anticipated, another example of challenging references to national laws is the application of simplified procedures (Article 40 EPPO Regulation), based on an agreement with the suspect (in cases where the application of sanctions is at stake). The Italian system includes such a procedure, known as '*patteggiamento*' (plea bargaining), which is available at all stages of criminal proceedings, i.e. both during the preliminary investigations and after the indictment – at the trial stage – if the accused requests it. This scenario raises several questions, in particular regarding the scope of judicial review in EPPO cases.

For example – and *inter alia* – Article 444 of the Italian Code of Criminal Procedure[18] governs the judicial review of the so-called '*patteggiamento*' based on criteria that partially diverge from those established in the EPPO College's guidelines[19]. According to the latter, in addition to the legality and proportionality criteria, the PC (and, before its decision, the EDP handling the case) also carries out an assessment based on opportunity, which is not provided for in the aforementioned Italian provision. Can the national court disagree with the decision of the PC and reject the '*patteggiamento*' on national law grounds, or is it bound by the PC's decision? Ultimately, who has the final say in the event of conflicting assessments?

Moreover, Italian national rules require prosecutors to justify their rejection of a defendant's proposal of '*patteggiamento*'. Because of this obliga-

18 Art 444(2) Code of Criminal Procedure: 'If the party who has not submitted the request agrees with the request and delivery of the judgment of dismissal is not required in line with Article 129, the court shall order the application of the punishment by issuing a judgment, stating, in its operative part, that the parties have submitted the request. The judgment on the application of the punishment shall be delivered only if, based on the available elements of evidence, the court believes the *legal definition of the criminal act, the application and comparison of the circumstances adduced by the parties are correct and the requested punishment is adequate* [*in the light of the constitutional principle of the re-education of the convicted person*]. If a civil party has joined the criminal proceedings, the court shall not decide on his request for compensation; the accused shall in any case be ordered to pay the costs incurred by the civil party, unless there are valid grounds for full or partial setoff. […]' For this translation (and for an unofficial translation of the CPP, updated to 5th July 2017) see M Gialuz, L Luparia and F Scarpa (eds), *The Italian code of criminal procedure. Critical Essays and English Translation* (Wolters Kluwer Italia 2017) 116–565.

19 Decision 029/2021 of the College of the European Public Prosecutors's Office of 21 April 2021 Adopting operational guidelines on investigation, evocation and referral of cases as amended by Decision 007/2022 of 7 February 2022 of the College of the EPPO.

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tion, the court has the power, at the end of the trial, and in the event of a conviction, to review the lawfulness of the prosecutors' denial of consent and to apply the reduced sentence originally requested by the defendant. What about EPPO cases? Has the trial court the same powers as in national cases? Or does the interaction between national provisions, the EPPO Regulation, and the College Guidelines radically transform the judicial review of national courts on '*patteggiamento*' in European cases?

Similar challenges or possible transformations can also arise at the trial stage, particularly during the sentencing phase. In the event of a conviction, the EPPO could try to influence the sanctions and the sentence, seeking a certain degree of repression to achieve coherence at the Union level, triggering a possible transformation of the sentencing criteria.[20]

Finally, the EPPO should be able to perform its functions across the entire criminal proceeding, from the preliminary investigation to the trial at first instance and through to the appeal phase. However, in some States, such as France and Italy, the EDP may be prevented from participating in hearings before higher courts, such as the Court of Cassation, due to specific legal constraints. These limitations on the EPPO's prerogatives are hard to reconcile with the EPPO Regulation, suggesting the need for amendments to enable the EPPO to fully exercise its powers at all levels of the various appeal systems within the EPPO's scope of competence. This shall include cases where the sole matter for adjudication is the correct application of the law. To this end, Italy signed a supplementary agreement for the appointment of two additional EPPO prosecutors at the Prosecutor General's Office working with the Court of Cassation and is awaiting their appointment by the Superior Council of the Judiciary (CSM).[21]

2.4 Basic principles of the EPPO's activities and data protection

The final example of possible transformative factors concerns the basic principles guiding the EPPO's activities according to the EPPO Regulation (Article 5: the principle of proportionality and the impartiality of the Prosecutor) and the great emphasis on data protection (more than 40 pro-

20 According to Elholm (n 9) 224, the EPPO might try to influence the sentencing level by demanding a specific sanction/sentence or presenting the court with guidelines and legal practice from other Member States and ECJ case law in EU fraud cases.

21 R Belfiore, 'L'articolazione funzionale e territoriale della Procura europea in Italia' in Di Paolo, Pressacco, Rafaraci and Belfiore (eds) (n 6) 47, 54.

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visions). These principles are (largely) unknown in many Member States, but it is reasonable to anticipate that, in the long term, these innovations will influence the mindset of practitioners and lawmakers well beyond the EPPO cases, affecting the daily work in ordinary, non-European cases as well.

3 Final remarks

Coming back to the title of this paper, the examples outlined above suggest that the EPPO's transformative powers on Member States' criminal justice systems manifest on three distinct levels.

The first transformation is very visible at the normative level. As previously mentioned, each participating Member State has enacted laws or other legal measures to adjust its national criminal justice system, to accommodate the EPPO, but some improvements are still possible and necessary.

The second, less visible, level concerns the interpretation of national rules. Although the national (written) provisions remain the same, they must be reshaped through interpretation, to align with the prerogatives and powers of the EPPO as a Union body. The metaphor of 'old wine in new bottles' is not appropriate in the EPPO system: in the EPPO's new bottle, the old (national) rules will have to change their content.

The third level is the cultural level: given the structural integration with national systems, many innovations brought about by the EPPO will likely have an impact on the way practitioners perform their daily work, even in ordinary cases beyond the scope of the EPPO's material competence. Over time, the EPPO's operations may foster a new mindset and way of thinking, which could be another possible added value of this supranational body as it becomes more established.

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