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## **Toward the Expansion of the EPPO Competence: From Financial Crimes to Other Cross-Border Offences of Worldwide Interest**

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### **Abstract**

*The establishment of a European Public Prosecutor's Office, in charge to identify, prosecute and bring to trial the perpetrators of crimes affecting the EU's financial interests is certainly an event to be welcomed with great favor, despite the undoubted difficulties both on the substantive and procedural level that brings with it.*

*Its creation certainly represents a step towards overcoming the jealous exercise of criminal prosecution traditionally reserved for the domaine réservé of the State and presents interesting evolutionary perspectives towards further (serious) forms of transnational crimes.*

*The present work aims to reconstruct de iure condito the path of establishment of the European Public Prosecutor's Office and, in particular, the profiles relating to the extension of its competences, and then dwell on the concrete prospects for achieving this expansion, in the light of existing legislation and the state of the art of institutional dynamics.*

### **Keywords**

Criminal Justice, European Public Prosecutor's Office, Financial Crimes, Judicial Cooperation in Criminal Matters, Transnational Crimes.

### **1. Introduction**

The creation of a European area of freedom, security and justice, which has earned with the Treaty of Lisbon a role of absolute centrality in the Community context<sup>1</sup>, has seen the European Union (EU) increasingly challenge itself with the issue of judicial and police cooperation. The absolute centrality of the recognition of judgments and judicial decisions has given way to a progressive consolidation of the idea of an “Euro-centric” judicial area.

In this context, the establishment of the first supranational Public Prosecutor's Office at European level is called upon, not only to stimulate and improve the coordination of investigations and prosecutions conducted by national authorities – as a substantial mandate entrusted to the European Union Agency for Criminal Justice Cooperation

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(Eurojust) and, in other respects, to the European Anti-Fraud Office (OLAF) – but rather to carry out the criminal prosecution traditionally reserved to the *domaine réservé* of the State.

## 2. From the *Corpus Iuris* to the full operativity

As is well known, the creation of a European Public Prosecutor's Office, competent to identify, prosecute and bring to trial the perpetrators of crimes affecting the EU's financial interests<sup>2</sup> (e.g., fraud, money laundering, active and passive corruption, misappropriation), is the result of a long and articulated path, which over twenty years has kept alive the flame of political and academic debate (and probably destined for further nourishment)<sup>3</sup>.

The debate, also academic, has flourished since the publication of the so-called *Corpus Iuris*<sup>4</sup>, the substantial proposal, edited by Mireille Delmas-Marty, on the criminal protection of Community financial interests in 1997, then revised and expanded into four volumes in 2000.

It is precisely from Article III-274 of the Treaty establishing a Constitution for Europe, despite the well-known fate that the Treaty itself had, which derives the current text of Article 86 of the Treaty on the Functioning of the European Union (TFEU).

This article gives the Council the power to establish a European Public Prosecutor's Office from Eurojust, by means of regulations, through a special legislative procedure. The unanimity required within the Council is very soon the first element on which the objective of the creation of the EPPO seems to have to be measured, although this aspect is mitigated by the provision in paragraph 1, second and third paragraphs, of Article 86 TFEU, which allows, in the absence of unanimity, the use of enhanced cooperation pursuant to Article 20 paragraph 2 of the Treaty on European Union (TEU).

The European Council, in the meeting of 9 March 2017, soon had to take note of the absence of agreement pursuant to Article 86, paragraph 1, third paragraph, TFEU, thus opening the door to enhanced cooperation, perfected with Regulation (EU) 2017/1939<sup>5</sup>, as the result (again) of an uphill approval process<sup>6</sup>.

With a considerable financial effort (the budget for 2021 was set at €44.9 million, only part of the total cost of the EPPO, largely covered by the national authorities), which made it possible to support 130 employees, as well as the salaries of around 140 European Delegated Prosecutors, the start of operations became a reality on 1st June 2021.

## 3. Extension of the competences of EPPO: Critical issues and perspectives

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The issue of extending the competences of the European Public Prosecutor's Office, already at the core of the academic debate<sup>7</sup>, is also the subject of concrete institutional initiatives, in particular by the European Commission with regard to instruments to fight international terrorism<sup>8</sup>.

The limitation of the competence of the EPPO to offences affecting the financial interests of the EU, codified in Article 86(1) TFEU, is not without possible exceptions. The European legislator has handed over to the Council, the appropriate and incontrovertible legal basis for enlargement, with an express provision.

In fact, according to paragraph 4 of Article 86 TFEU, it is established that: “*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 [...]*”. A first reading makes it possible to outline the requirements necessary for a new crime to fall within the scope of the powers of the Public Prosecutor's Office: i) gravity; (ii) the transnational nature. But if the identification seems to be easy, the perimeter of the legal meaning is not. Nor the same Article 86 TFEU or Chapter 4 TFEU (in particular Articles 83 and 85 TFEU) – which refers several times to “serious crime” and the “transnational dimension” – provide a definition which makes it possible to circumscribe those criteria.

The notion of transnationality of crime finds its discipline in Article 3 par.2 of the Convention against transnational organized crime of 2003 (so-called Palermo Convention)<sup>9</sup>, moreover ratified by the European Union<sup>10</sup>, which traces the cross-border dimension of a crime to the existence – alternatively – of the following elements: “(a) *It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State*”. It is true that the same Article 86 paragraph 4 TFEU would appear to refer to the transnational nature by considering the “*perpetrators of, and accomplices in, serious crimes affecting more than one Member State*”, giving greater significance to the spatial scope of criminal behavior (so-called transnationality *in re ipsa*), rather than to the specific ways in which the conduct has come to be expressed.

In fact, the Palermo Convention, in Article 2 letter b) also defines the concept of seriousness of the crime in quantitative terms, qualifying “serious crime” the conduct that “*constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty*”. The European legislator has not introduced, however, any particular qualification of seriousness in this sense, preferring in essence to indicate directly – through the well-known “Eurocrimes” referred to in Article 83 TFEU – which crimes are to be considered *ex se* particularly serious, then leaving room for the second paragraph to an extension of these spheres of crime. The European Commission would



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seem to want to follow this approach, since the Communication on the possible extension of the EPPO's competence in the field of terrorism expressly states that: “*This notion [of serious crimes having a cross-border dimension] includes the particularly serious crimes with a cross-border dimension referred to in Article 83(1) TFEU*”<sup>11</sup>.

That said – and without prejudice to the fact that only in relation to the spheres of crime referred to in Article 83 TFEU would seem to be the concrete future prospects for enlargement –, it is clear, however, that the extension could well also cover further forms of (serious) transnational crime and, therefore, include, for example, environmental crimes.

Indeed, another issue that requires reflection is the unanimity required by Article 86(4) TFEU, in order that the Council may adopt a decision – effectively a simplified Treaty amendment procedure – amending paragraph 1 and so extending the powers of the European Public Prosecutor's Office. In particular, the question arises as to whether this unanimity refers only to the Member States participating in the EPPO by virtue of enhanced cooperation or should it involve all Member States. A resolution on this question which favoured the involvement of all the Member States would clearly complicate considerably the chances of enlargement.

According to some scholars, the establishment of the EPPO through enhanced cooperation would effectively exclude the allocation of new competences<sup>12</sup> or would only allow it to be unanimous by all States<sup>13</sup>; A more possibilistic position believes, however, in the light of a comparative reading of parr.1 and 4 of Article 86 as well as Articles 326, 330 and 334 TFEU, that unanimity is to be considered to have been achieved solely with the participation of the Member States participating in enhanced cooperation<sup>14</sup>. In particular, the absence of reference to that circumstance by Article 86 TFEU, namely the fate of unanimity in the event that the institution had intervened by means of enhanced cooperation, would enable the application of Article 330 TFEU, under which “*All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote*”, expressly reiterating that “*Unanimity shall be constituted by the votes of the representatives of the participating Member States only*”<sup>15</sup>.

Nevertheless, in the above-mentioned Communication on the extension of competences to cross-border terrorist offences, the European Commission expressly clarifies that “*The term ‘unanimity’ in Article 86(4) TFEU refers not only to the Member States that participate in the EPPO, but includes also the others*”<sup>16</sup>.

In this way, the paradox would arise for which the vote would involve those countries, which have not only already expressed their negative position with respect to the institution of the Public Prosecutor's Office (and, therefore, to which the founding Regulation does not apply), but with respect to which the decision to extend in practice



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would not explain any automatic effect, given that “*Acts adopted in the framework of enhanced cooperation shall bind only participating Member States*”<sup>17</sup>.

#### **4. Some Final Remarks**

The turning point, also methodological, in judicial cooperation in criminal matters represented by the establishment of a European Public Prosecutor's Office is certainly an event to be welcomed with great favor and that, net of the long journey faced and the multiform reluctance manifested, has positively united the majority of commentators, despite the undoubted difficulties both on the substantive and procedural level that have emerged from many sides and far from finding a resolution that satisfies everyone if not in the medium term.

After all, the premature timing also emerges on the issue of extending the competences of the EPPO not only with respect to terrorist crimes already the subject of the initiative<sup>18</sup>, but also to further forms of transnational crime more or less new such as organized crime, trafficking in human beings, arms trafficking or, again, cybercrimes, and environmental crimes.

A comprehensive European response to terrorist threats as well as to other multifaceted phenomena of transnational crime through the current single body with the power to conduct criminal investigations, and to bring those responsible before the competent national courts, represents a great potential to contribute substantially to strengthening initiatives to combat these crimes currently undertaken in the European Union. A road that we hope will not remain unturned.

The first months of operation have shown that the EPPO makes a decisive contribution to law enforcement agencies in cross-border investigations. As pointed out in the first Report of the Public Prosecutor's Office<sup>19</sup>, “*without cumbersome mutual legal assistance formalities, organising coordinated searches or arrests across borders has been a matter of weeks, instead of months*”, without considering that access to (operational) information, through its Case Management System<sup>20</sup>, has allowed the EPPO to establish connections between different investigations and unite them, allowing a more effective collection of evidence and a more agile seizure activity.

However, another issue of particular importance is the lack of uniformity both in terms of penalties (in particular for environmental crimes) and in terms of the structuring of crimes.

In this context, a European Public Prosecutor's Office, based on a common set of substantive and procedural rules, would eliminate both the fragmentation of the legal framework and the weaknesses of the current enforcement system, thereby ensuring the effective prosecution of offenders.



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In short, the conferral of additional powers on the European Public Prosecutor's Office is considered a valuable tool in this regard, but it risks being overthrown by the vetoes of those same Member States that did not want it to be set up. This could also be an opportunity for a stricter rethinking of the decision-making process, which places unanimity at the centre of institutional discussion, towards more flexible – and not for that reason less “guarantee” – forms of deliberation, or through a revision of the Treaties (already advocated on many fronts for some time) that entrusts additional areas to qualified majority voting<sup>21</sup>.

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<sup>1</sup> LO SPAZIO DI LIBERTÀ SICUREZZA E GIUSTIZIA A VENT'ANNI DAL CONSIGLIO EUROPEO DI TAMPERE (Angela Di Stasi & Lucia S. Rossi eds., 2020); ANGELA DI STASI, *Il perfezionamento dello spazio europeo di libertà, sicurezza e giustizia: avanzamenti e criticità*, in TUTELA DEI DIRITTI FONDAMENTALI E SPAZIO EUROPEO DI GIUSTIZIA. L'APPLICAZIONE GIURISPRUDENZIALE DEL TITOLO VI DELLA CARTA, 103-47 (2019); ANGELA DI STASI, *Spazio europeo di libertà, sicurezza e giustizia e cooperazione giudiziaria in materia penale: il rispetto dei diritti fondamentali e della diversità tra ordinamenti nazionali e tradizioni giuridiche*, in “SPAZIO EUROPEO DI GIUSTIZIA” E PROCEDIMENTO PENALE ITALIANO. ADATTAMENTI NORMATIVI E APPRODI GIURISPRUDENZIALI, 3-54 (2012).

<sup>2</sup> On the protection of the financial interests of the European Union, see Anna Oriolo, *Crimini transnazionali, interessi finanziari e Procura europea*, 14 (I-2020) ILLYRIUS INTERNATIONAL SCIENTIFIC REVIEW 223-246 (2020); Dino G. Rinoldi, *Principi in materia di politica legislativa penale europea e tutela degli interessi finanziari dell'Unione da condotte di frode*, 4 DIRITTO DEL COMMERCIO INTERNAZIONALE, 1049-1055 (2013); Simone White, *EU Anti-fraud Enforcement: Overcoming Obstacles*, 17(1) JOURNAL OF FINANCIAL CRIME 81-99 (2010); TRANSNATIONAL ENFORCEMENT OF THE FINANCIAL INTERESTS OF THE EUROPEAN UNION (John A.E. Vervaele ed. 1999); Felicetta Lauria, *Tutela degli interessi finanziari e lotta alla corruzione nell'Unione europea*, 9(2) RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 435-482 (1999); Silvia Baldi, *La protezione degli interessi finanziari delle Comunità Europee e gli strumenti adottati nell'ambito del titolo VI del trattato sull'Unione Europea*, 36(1-2) DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 243-253 (1997).

<sup>3</sup> On the European Public Prosecutor's Office, *ex multis*, see LUIGI KALB, *Questioni problematiche in tema di Procura europea*, in LO SPAZIO DI LIBERTÀ SICUREZZA E GIUSTIZIA A VENT'ANNI DAL CONSIGLIO EUROPEO DI TAMPERE, 291-330 (2020); LUIGI PALMIERI, *LA RIFORMA DI EUROJUST E I NUOVI SCENARI IN MATERIA DI COOPERAZIONE GIUDIZIARIA* (2019); SHIFTING PERSPECTIVES ON THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE (Willem Geelhoed, Leendert H. Erkelens & Arjen W.H. Meij eds., 2018); Anna



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<sup>4</sup> CORPUS JURIS PORTANT DISPOSITIONS PÉNALES POUR LA PROTECTION DES INTÉRÊTS FINANCIERS DE L'UNION EUROPÉENNE (M. Delmas-Marty ed., 1997); LA MISE EN OEUVRE DU CORPUS JURIS DANS LES ETATS MEMBERS (M. Delmas-Marty & John A.E. Vervaele eds., 2000).

<sup>5</sup> Council Regulation (EU) 2017/1939 of 12 October 2017, *implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')*, of 12 October 2017, in OJ L 283, of 31 October 2017, p.1.

<sup>6</sup> For a more in-depth analysis on the institutional path of the EPPO, see Rosaria Sicurella, *Spazio europeo e giustizia penale: l'istituzione della Procura europea*, RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 845 (2018); Andrea Venegoni & Massimiliano Mini, *I nodi irrisolti della nuova Procura Europea*, 12 GIURISPRUDENZA PENALE WEB; Lorenzo Salazar, *Habemus Eppo! La lunga marcia della Procura europea*, n 3 ARCHIVIO PENALE 1 (2017).

<sup>7</sup> In dottrina, v. Adam Juszcak & Elisa Sason, *Fighting Terrorism Through the European Public Prosecutor's Office (EPPO)? What Future for the EPPO in the EU's Criminal Policy?*, 1 EUCRIM 66-74 (2019); Costanza Di Francesco Maesa, *EPPO and Environmental Crime: May the EPPO Ensure a More Effective Protection of the Environment in the EU*, 9(2) NEW JOURNAL OF EUROPEAN CRIMINAL LAW 191-215 (2018); Gianluca Borgia, *Pubblico ministero europeo: tra presente e passato, nuove prospettive alla luce dei recenti atti di terrorismo*, 2 ARCHIVIO PENALE (2016).

<sup>8</sup> 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. A contribution from the European Commission to the Leader's meeting in Salzburg on 19-20 September 2018*, COM/2018/641.

<sup>9</sup> United Nations Convention against Transnational Organized Crime, Dec. 15, 2000.

<sup>10</sup> Council Decision 2004/579/EC, *on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime*, of 29 April 2004, in OJ L 261, of 06 August 2004.

<sup>11</sup> See Di Francesco Maesa, *supra*; Francesco De Angelis, *The European Public Prosecutor's Office (EPPO) Past, Present, and Future*, in 4 EUCRIM 272-276 (2019).

<sup>12</sup> JULIAN J.E. SCHUTTE, *Establishing Enhanced Cooperation Under Article 86 TFEU*, THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE. AN EXTENDED ARM OR A TWO HEADED DRAGON?, 195-208 (2015); KATALIN LIGETI, *Introduction*, in TOWARDS A PROSECUTOR FOR THE EUROPEAN UNION. VOLUME 1. A COMPARATIVE ANALYSIS, 2 (2013).

<sup>13</sup> Juszcak & Sason, *supra*, p. 69.

<sup>14</sup> Di Francesco Maesa, *supra*, pp. 200-201.



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<sup>15</sup> As confirmed by the conforming interpretative jurisprudence of the Court of Justice of the European Union. See *Kingdom of Spain and Italian Republic v. Council of the European Union*, C-274/11 and C-295/11 (Court of Justice of the European Union, Apr. 16, 2013).

<sup>16</sup> 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*, *supra*, p. 3.

<sup>17</sup> Art. 20, para. 4, TEU.

<sup>18</sup> The oft-cited Commission Communication, which invited the European Council, in view of the Sibiu Summit on 9 May 2019, to pursue this initiative together with the European Parliament and to take action, has never seen European leaders discuss the extension there. What began with the State of the Union address by the then President of the European Commission Jean-Claude Juncker in 2017, in the wake of the then recent terrorist attacks in Paris, still tragically current in light of the very recent further terrorist events, seems to remain in a silent phase of stagnation.

<sup>19</sup> European Public Prosecutor's Office (EPPO), *2021 Annual Report* (2022), [https://www.eppo.europa.eu/sites/default/files/2022-03/EPPO\\_Annual\\_Report\\_2021.pdf](https://www.eppo.europa.eu/sites/default/files/2022-03/EPPO_Annual_Report_2021.pdf), p. 10.

<sup>20</sup> Also according to art. 44 of the Regulation (EU) 2017/1939, the Case Management System (CMS) support the management of investigations and prosecutions conducted by the EPPO, ensure secure access to information on investigations and prosecutions, allow for the cross-referencing of information and the extraction of data for operational analysis and statistical purposes and facilitate monitoring. Furthermore, the CMS contain a register of information, an index of all case files and all information from the case files stored electronically.

<sup>21</sup> See State of the Union Address 2020 of the President of the European Commission Ursula von der Leyen (Sept. 16, 2020).