Investigating European Fraud in the EU Member States

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Best Practices and Operational Models in Financial-Economic Investigations in Europe in View of the EPPO

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A Preliminary Overview of the 'State of the Art' in Regard to the Establishment of a European Public Prosecutor

To an outside observer, the most recent work undertaken toward the establishment of a European Public Prosecutor Office dedicated to combating crimes affecting the Union's financial interests suggests the image of a 'house of cards' resting precariously on a tottering table.[1] If this impression is accurate, we are very far from the fanciful metaphors that have long accompanied the portrayals of yet another much awaited figure on the European scene, allegories that are sometimes reassuring, sometimes threatening, but in any case seek to outline a future for the supranational actor: 'two-headed Janus', 'extended arm', 'two-headed dragon'. In short, the present situation does not bode well for the future of a body whose creation was prepared at length and with zeal by the expert jurists called upon to tackle the issue,[2] until it was eventually consecrated after Lisbon thanks to the legal

[1] We are alluding to the situation, at the time of writing, in the negotiations held up to the beginning of December 2016, during the Slovak presidency of the EU Council. Reference is being made to the text of 2 December 2016 (*Report on the States of Play*, 15200/16, transmitted by the EU Council Presidency), which represents the consolidated version of the draft regulation.

[2] We are mainly referring to M Delmas-Marty, *Corpus juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne* (Paris, Economica, 1997); M Delmas-Marty and JAE Vervaele, *The Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances* (Antwerpen-Groningen-Oxford, Intersentia, 2000); M Wade, 'Euro NEEDs. Evaluating the need for and the needs of a European Criminal Justice System', in *Max-Planck-Institut für ausländisches und internationales Strafrecht, Preliminary Report/January 2011*; K Ligeti (ed), *Toward a Prosecutor for the European Union. A Comparative Analysis*, vol I, (Oxford, Hart, 2013).

basis provided by Article 86 TFEU and the Commission's subsequent exercise of the option of implementation through its proposal for a regulation on the establishment of the European Public Prosecutor's Office, issued on 17 July 2013, COM (2013) 534. Since then, the reference legal text has fallen prey to a multitude of amendments that follow one another incessantly with rotations in the presidency of the European Council: like a constantly unravelled 'Penelope's shroud', wholly altered from its original form and continually rewoven, with no end in sight. Therefore, although no *requiem* has yet been sung for the ambitious project, we think that this is because there is still the fallback of enhanced cooperation among at least nine EU Member States should unanimity not be reached—as appears inevitable.[3] A special procedure is envisaged by Article 86 TFEU, which would provide an opportunity to test, on a reduced scale, the potential of an instrument that has no precedents and has thus aroused understandable concerns, given how much is at stake. The hope would be to subsequently win over the more reluctant Member States.

The building foundations are thus wobbly—as we said at the beginning—since, alongside countries that are leaving the EU, like the United Kingdom, others (Ireland, Denmark) have decided to remain outside the area of freedom, security and justice in which the EPPO would be called on to act. Choices like this are in themselves apt to undermine a design which would be all the more effective the broader the transnational scope of the powers entrusted to the European Public Prosecutor, in consideration of the fact that the crimes committed to the detriment of EU finances are spread equally among a number of sovereign territories and need to be more effectively repressed than is presently the case. It should be added, moreover, that the governments taking part in the ongoing negotiations in the EU Council have largely conflicting—if not diametrically opposed—views concerning the organisational and operational model to be adopted in the design of the supranational prosecuting body.

In consideration of the foregoing, we can presently envisage a dual outcome: on the one hand, a step backwards by some Member States would lead to a fragmentation of the continental area in which the EPPO could exercise its jurisdiction, forcing it to seek the cooperation of the judicial authorities of individual non-participating countries, just as is currently the case for national criminal prosecution authorities. For this purpose, a central role would continue to be played by Eurojust, which would be called on to cooperate and provide judicial assistance not only in cases involving third countries, but also and above all in internal

[3] This point has been recently addressed by M Fidelbo, 'La cooperazione rafforzata come modalità d'istituzione della Procura europea. Scenari futuri di un dibattito ancora in evoluzione', www.penalecontemporaneo.it, 21 November 2016. But a view that the solution of enhanced cooperation was 'inevitable' had already been expressed by L Salazar, 'Il negoziato sulla Procura europea nell'agenda della presidenza italiana dell'Unione Europea 2014' in G Grasso, G Illuminati, R Sicurella and S Allegrezza (eds), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni* (Milano, Giuffrè, 2013) 698.

investigations which, despite being within the boundary of the European Union, embrace countries that are outside the EPPO system. An essential role in this regard will be played by the 'working arrangements' established between the states concerned and the European Public Prosecutor's Office, to which reference is made in Article 59a of the latest published version of the draft regulation; such arrangements are to be made on the basis of the principle of sincere cross-border cooperation enshrined in Article 4(3) TEU.[4] On the other hand, once the ambitious idea of considering the territories of participating Member States as a 'single legal area'[5] has faded, investigations that go beyond a national scope within that circumscribed geographic area will also necessarily take on a cross-border nature and thus require forms—albeit simplified ones—of international judicial cooperation; at present, the envisaged strategy is for the European Delegated Prosecutor handling the case to 'assign' an investigative measure to his counterpart in the Member State from which assistance is requested. However, due to the lack of harmonisation of national legislation on criminal proceedings, if there is no provision for a similar measure in the legal system of the state in which it is to implemented, it will be necessary to rely on the ordinary legal instruments of mutual recognition and cooperation available within the framework of the European Union: the present Article 26(5*a*) of the draft regulation clearly implies the use of means such as—in the cases that most closely concern us here—the European Investigation Order in criminal matters.

The overall impression one derives, also based on what we will say shortly, is that European institutions are building a cumbersome entity, whose functioning is highly complicated at both a central and decentralised level, so much so as to raise some doubts about its actual ability to improve the performance of Member States when it comes to prosecuting and repressing crimes affecting the financial interests of the Union. Fitting into this general context—which is a cause for pessimism about the success of the initiative—are more specific considerations concerning certain aspects of the phenomenon that are called into question because of the involvement, in the stages leading up to a criminal investigation or in the activities directly related to it, of agencies of a heterogeneous nature and functions. These vary from state to state, but are all liable to establish relations—which are likewise of a highly diverse nature—with magistrates and police authorities having

[4] Art 57 and Recital 102a of the proposal for a regulation. Concerning the impact of the competence of the EPPO on the role of Eurojust, with regard in particular to the relations of mutual judicial assistance with states not belonging to the EPPO area, see C Deboyser, 'European Prosecutor's Office and Eurojust: "Love Match or Arranged Marriage?"' in LH Erkelens, AWH Meij and P Pawlik (eds), *The European Public Prosecutor's Office. An extended arm or a Two-Headed dragon?* (The Hague, TMC Asser Press, 2015) 90 ff. See also V Mitsilegas, 'The European Public Prosecutor's Office facing national legal diversity' in C Nowak (ed), *The European Public Prosecutor's Office and National Authorities* (Padova, Cedam, 2016) 30 ff.

[5] It was the fundamental principle enshrined in Art 25 of the original proposal. On this subject see S Allegrezza, 'Verso una Procura europea per tutelare gli interessi finanziari dell'Unione. Idee di ieri, chances di oggi, prospettive di domani', *www.penalecontemporaneo.it* 31 October 2013.

primary competence to exercise investigative functions. Such relations are often scarcely formalised from a legislative viewpoint, or else governed by convoluted, stratified and tangled regulations; as a result, positive law gives way to operational procedures evolving from practice, sometimes laid down in protocols concluded between the authorities in question, other times left up to unwritten instructions.

We therefore wonder what kind of situation would arise should the European Public Prosecutor actually become operational: in other words, it needs to be verified whether, given the specific characteristics of investigations regarding economic-financial crimes, and especially the disparate array of actors potentially present at the national level, we should welcome the arrival on the scene of yet another protagonist, the European Public Prosecutor, whose own features, in turn, have become increasingly complicated compared to those envisaged in the original proposal for a regulation presented in 2013.

Introduction on the Architecture of the EPPO System: The Scant Attention Paid to the Initial Acquisition of Information Relating to a Criminal Offence

Albeit in a legislative framework dominated by political uncertainty, we shall seek to propose an initial strategy for bridging national experiences and the future establishment of the EPPO, focusing, obviously, on the subject matter of the research conducted here, namely, the operational models of the law enforcement bodies and administrative authorities of the individual Member States involved in combating financial-economic crimes.

It is worth beginning with an observation that may become clearer over the course of the discussion. The development of the system pertaining to the EPPO has so far mainly focused attention on the top, examining, in other words, the structure of the supranational public prosecutor's office and the rules governing its criminal prosecution activities from the moment an investigation is launched.

With respect to the first aspect—as we pointed out earlier—the design of the European Public Prosecutor's Office has undergone an evolution that risks undermining its efficiency as a result of the compromises among the different stances emerging in the Council during the negotiations. As was predictable, Member States have been reluctant to consent to the attribution of extensive powers of investigation for the purpose of criminal prosecution to an entity whose composition is not representative of all the participating nations. The entity outlined in the Commission's original proposal was presented as a result: at the central level, the office was headed by the European Public Prosecutor, with only Deputies to assist him; the European Delegated Prosecutors, located in the various Member States, would act under his direction, in a hierarchical relationship, and according to the 'double hat' principle, ie, as an integral part of the supranational structure while

simultaneously maintaining the investigative and prosecutorial functions typical of the respective national legal systems. A much more complex and cumbersome configuration emerges from the latest drafts of the resolution currently in the process of approval. First of all, the formulation of strategies and general supervision over the activities of the European Public Prosecutor's Office are now entrusted to a collegiate body, which includes a Prosecutor for each Member State. The 'umbilical cord' which connects the central office with the individual States is not limited, however, to this aspect, but rather penetrates deep into the dynamics of the body's functioning through the essential supervisory role played by the 'central' European Prosecutors vis-à-vis the individual European Delegated Prosecutors responsible for handling the cases within the national territory:[6] it should be noted that, despite the explicit opposition of the Commission, there is a pairing here between the two figures, in the sense that both—the supervisor and the supervised—must be from the same Member State.[7] This privileged relationship is tempered by the inclusion of a further central body, of which the European Prosecutors constitute the link with the decentralised level of the structure: the Permanent Chambers, having a plural composition and endowed with the power to direct the conduct of investigations and impart instructions in relation to individual cases in the hands of a European Delegated Prosecutor. These bodies are entrusted with many crucial decisions, which have accordingly been removed from the sole competence of the European Public Prosecutor. Among them we should mention, because of their importance, the choice whether to bring a case to judgment or dismiss it, to impart instructions to initiate an investigation where none has been initiated and to exercise the right of evocation of an investigation falling within the competence of the European Public Prosecutor's Office when proceedings have been initiated by the national authorities.[8] Once the functions have been distributed in this manner, we can see that the Chief Prosecutor, despite preserving the power to organise and direct the office he heads and although he presides over all the collegiate bodies making up the central structure, has fewer prerogatives than were attributed to him in the original design of the Commission, which placed him firmly at the head of the institution.

As for the second aspect, concerning the powers of investigation, we see a considerable reduction in the types of measures that the regulation places directly at the European Public Prosecutor's disposal and which, therefore, the Member States would be bound to introduce into their respective legal systems should they not already be envisaged therein. In the most recent version, the long list contained in the original proposal loses a series of essential instruments, such as, in particular, the power to question suspected persons or witnesses, to undertake covert

[6] A few observations in this regard may be found in A Met-Domestici, 'The EPPO at the European level: institutional layout and consequences on the links with the national level' in C Nowak (ed), *The European Public Prosecutor's Office*, 49 ff.

[7] Art 11.

[8] Art 9.

surveillance measures, also using electronic and video and audio equipment, to monitor and freeze financial transactions and to order covert infiltration activities. Similar measures have at least in part been transferred under the aegis of the European Investigation Order, which, however, is governed by a Directive (2014/41/EU), and as such needs to be transposed into national legislations. Above all it establishes a mode of cooperation among Member States, facilitated by the principle of mutual recognition of their respective measures. However, the draft regulation for the establishment of the EPPO still includes, for the time being, searches of premises, the production of stored data, freezing of assets subject to confiscation, interception of electronic communications, and the tracking and tracing of an object by technical means, including controlled deliveries of goods, provided that the offence being prosecuted is punishable by a penalty of at least four years of imprisonment.[9]

And yet, while so much effort has been devoted to the organisational architecture and investigative means of the European Prosecutor's Office, less attention has been paid, so to speak, to the lower part of the framework, the bottom, where the criminal investigation has the opportunity to gain momentum thanks to the search and retrieval of information concerning the possible offence.

Indeed, Article 86 (2) TFEU, which provides for the establishment of the EPPO, gives the office the power to investigate, prosecute and bring to judgment anyone who has committed a crime against the financial interests of the Union, as identified by the specific regulation establishing the EPPO. In turn, regulation proposal COM(2013)534 of 17 July 2013, specifically adopted to this end, leaves the task of defining the crimes in question to a particular Directive (Article 12 of the original text; Article 17 of the version drafted during the ongoing negotiations within the EU Council).

This legislation, which is subject to withdrawal, is currently at the proposal level for Directive COM(2012)363, which aims to replace and supersede the so-called PIF Convention of 1995 and its protocols, creating a higher approximation of the Member State's criminal laws on Community fraud.[10] By and large—and leaving aside the thorniest issue regarding the inclusion of VAT-related fraud, for which negotiations are still dragging on[11]—the provisions are intended to harmonise the definitions of criminal conducts such as obtaining European funds by deception

[9] Art 25.

[10] On the complicated legislative process taking place in European institutions in relation to the so-called proposal for the 'PIF Directive', see A Venegoni, 'Il difficile cammino della proposta di direttiva per la protezione degli interessi finanziari dell'Unione europea attraverso la legge penale (c.d. direttiva PIF): il problema della base legale' (2015) *Cassazione penale* 2442 ff. In general terms, in regard to the jurisdiction *ratione materiae* of the EPPO, see A Klip, 'The Substantive Criminal Law Jurisdiction of the European Public Prosecutor's Office' (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 367 ff.

[11] With an opinion destined for the Committee on Economic and Monetary Affairs, on the subject 'Towards a definitive VAT system and fighting VAT fraud' [2016/2033(INI)], the LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs) of the EU Parliament formally requested European institutions to amend the new proposal for a directive on the fight against fraud to the

or omission as the violation of an obligation, misappropriation of funds for purposes other than those for which they were initially granted, fraud in public procurement, embezzlement, abuse of office and corruption and money laundering.[12]

So it is easy to see that the criminal offences outlined by the Directive are rooted mainly in the economic and financial sectors, frequently at the point of contact with public administration actions, so that the crimes in question present a dual peculiarity from the point of view of criminal procedure.

First, these types of crimes, also because of their frequently transnational dimension, reside within a complicated legal framework, give rise to sophisticated accounting issues, involve professionally qualified perpetrators and entail the analysis of a huge number of documents, particularly as regards intricate transaction chains. Accordingly, all these characteristics demand a high level of specialisation from the investigative bodies if we are to combat Community fraud successfully and, therefore, protect the Union's financial interests in a truly effective way.[13]

Secondly, criminal phenomena of this kind rarely exhibit, so to speak, *in rerum natura*, the stigma of criminality. Reports of such offences are not chanced upon by law enforcement bodies out of the blue, nor, in more important cases, do they appear to offer any comprehensive information, right from the start, regarding the constituent elements of the offence, as if ready to be substantiated. Rather, information emerges gradually from a long and complex reconstruction put into focus by experts in the analysis and cross-referencing of data which appear to be neutral if taken in isolation, but reveal the criminal aspect of the facts under examination when specialists vastly experienced in crime detection put it under the spotlight. If a report concerning the suspected commission of a crime is the *prémis* of criminal proceedings, it is commonly accepted that this starting point is actually the final product of a preliminary activity located within the administrative inquiry. It could be said that without this preparatory activity the criminal investigation would be destined, in most cases, never to be launched due to lack of impetus.

Not coincidentally, national legislations frequently call upon the administrative authorities to pursue criminal investigations into the same facts that led to

Union's financial interests by means of criminal law (so-called PIF Directive), which, as highlighted by the LIBE Committee, did not include VAT within the scope of application of the directive. In the Justice and Home Affairs Council meeting of 13–14 October 2016, the majority of Member States declared themselves to be in favour of prosecuting serious cross-border VAT fraud at the EU level on the basis of the PIF directive. On 8 December 2016 the Council reached an agreement on the directive regarding the protection of EU financial interests, which paves the way for a formal adoption of the text. Consequently, Article 20(3)(b) of the Proposal for the Regulation of the Establishment of the EPPO was adapted to ensure that the supranational investigating body had the right to exercise its competence in respect of offences related to EU funds and certain cases of major cross-border VAT fraud, even if the damage to the EU budget is less than that to the national budget.

[12] A Venegoni, 'La definizione del reato di frode nella legislazione dell'Unione dalla convenzione PIF alla proposta di direttiva PIF', *www.penalecontemporaneo.it* 16 October 2016.

[13] Similar considerations may be found in L Bachmaier Winter, 'The Potential Contribution of a European Public Prosecutor in Light of the Proposal for a Regulation of 17 July 2013' (2013) 23 *European Journal of Crime, Criminal Law and Criminal Justice* 126 ff.

their own inquiry once information about a possible crime has emerged in the course of the latter. The aim is to prevent the initially collected information from getting lost, be able to rely on specialist analyses and assure, thanks to operational continuity, an effective activity of combating the crimes concerned, which would otherwise risk being suspended or even interrupted if jurisdiction were to pass over exclusively to criminal justice agencies, usually engaged in general crime detection. The dual function approach characterises—for example—the German tax authorities, which are authorised to conduct criminal investigations autonomously right to the very end, at least in the case of less serious offences.[14] Similarly, the Polish system has seen a considerable expansion in the areas of operation of such authorities, to the extent that the public prosecutor has been relegated to the role of a mere supervisor of the investigation.[15] The Italian model, in turn, can exploit the amphibious position of a strategically decisive agency such as the Guardia di Finanza (tax police).[16] In Spain, on the contrary, the leading role is played by the public prosecutor, investigating judge and judicial police, to which the administrative authorities—with a few exceptions—are mostly called on to provide mere support.[17] Different still is the approach chosen by French legislators, who have established multiple judicial police offices, dividing among them the competences related to the activity of combating economic crime in the various sectors in which it manifests itself.

Two Conspicuous Shortcomings: The Failure to Provide for the Establishment of a European Police Force and Disregard for the Part of the Administrative Inquiry Preparatory to the Criminal Investigation

Once the choice had been made to circumscribe the competence of the European Public Prosecutor to crimes affecting the financial interests of the Union, one would have expected supranational legislators to focus their attention on both of the abovementioned aspects, which are closely connected. On the one hand, it would have been wise to emphasise clearly that, in this area, a criminal investigation is almost inevitably a continuation of activities originally undertaken in the administrative realm. The judicial proceedings should thus be viewed in relation to the latter in order to exploit the results with respect both to the complex analyses based on the valuable investigative work carried out and the acquisition of the *notitia criminis*

[14] See M Böse in Part III, Chapter 4.
[15] See C Nowak in Part III, ch 5.
[16] See F Nicolicchia in Part I, ch 1.
[17] See JJ González López and A Nieto Martin in Part I, ch 2.

in the strict sense. Two segments of a phenomenon to be considered unitary on an operational level, despite the different nature of the actions ascribable to each, should have been incorporated into the draft regulation, especially for the purpose of defining the essential link between them. On the other hand, and as a consequence, an effort should have been made to solve the problem of how to enable communication between the centralised structure of the EPPO and the plethora of administrative agencies present in the different Member States, custodians of the documentation collected on the unlawful activity that has come to light. Sometimes, as we have seen, they are also endowed with veritable powers of criminal investigation. Such communication would serve to avoid perpetuating the *status quo* in the dynamics of the fight against Community frauds: if every initiative were to remain in the hands of national magistrates, they would be likely to maintain the same relations as today with the national administrative authorities, even if officially acting in a capacity as delegates of the European investigating body. The existing relations have shown to be—it should not be forgotten—a root cause of ineffectiveness of the repressive action. This, after all, is the reason that led to the proposal to introduce the EPPO, based on the principle of subsidiariety enshrined in Article 5(3) of the EU Treaty.[18]

Neither of these two crucial aspects is covered by the proposal for a regulation establishing the EPPO currently under discussion.

As regards the first aspect, it must be reiterated that the projects under discussion continue to be afflicted, for various economic and political reasons, by a general weakness, in other words, the lack of a European criminal investigation police force. Article 18 of the 2013 proposal (currently Article 23) establishes that the designated European Delegated Prosecutor should directly conduct the investigation or hand it over to the competent authorities of the Member State where he is based. It is easy to foresee that, given their limited number, the European Delegated Prosecutors will hand over inquiries, almost exclusively, to national police forces and will limit themselves to giving impetus to and coordinating investigations which are substantially carried out by others.[19] This prognosis, in relation to the original draft of the regulation proposal, will undoubtedly be confirmed in the text of the ongoing negotiations, which disempowers the EPPO's central office by removing its investigative duties, thereby limiting the role of the Chief Prosecutor to one of mere supervision of his deputies.[20]

[18] In this regard, see generally HBF Madsen Sørensene 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* (Stockholm, Stiftelsen skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, 2015) 31 ff.

[19] On this subject see M Caianiello, 'The Proposal for a Regulation on the Establishment of an European Public prosecutor's Office: Everything Changes, or Nothing Changes?' (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 120, as well as RE Kostoris, 'Pubblico Ministero europeo e indagini "nazionalizzate" (2013)', *Cassazione penale* 2744 ff.

[20] This point has been recently addressed by L Camaldo, 'La nuova fisionomia della Procura europea all'esito del semestre di presidenza italiana del Consiglio europeo' (2015) *Cassazione penale* 807 ff. The problem is addressed in general terms by S White, 'Towards a Decentralised European Public Prosecutor's Office?' (2013) 4(1–2) *New Journal of European Criminal Law* 22 ff.

If this is true in general terms, in the area of economic and financial crime this means that European Delegated Prosecutors, who may be two or more in number for each Member State (as provided for in Article 12(2) of the latest draft of the proposal; according to Article 6 of the original text, there could also be only one) and are isolated and distant due to territorial distribution, will have to deal with a highly fragmented base of criminal investigators charged with acquiring *notitiae criminis*, as well as the problem of their distribution at the decentralised level. This aspect has been highlighted by the national reports included in this volume.[21] The difficulty would increase exponentially in the handling of transnational cases, which involve a vast array of actors in the 'underbrush' of administrative inquiries.

One might wonder, therefore, which police forces would be at the service of the European Delegated Prosecutor, seeing that the supranational draft legislation has not yet addressed the issue. It simply and optimistically places trust in the 'double hat' formula, in the assumption that magistrates, when they act in their capacity as European prosecutors, will have at their disposal the same police units as when they are engaging in ordinary investigative activity.

It is worth observing that the draft regulation leaves the Member States free to assign European Delegated Prosecutors simultaneous functions as national public prosecutors. Admittedly, the possibility of cumulating the two tasks—domestic and European—is subject to the condition that this will not prevent the designated magistrates from 'fulfilling their obligations' on the supranational level (Article 12(3)). It is however likely that, especially in countries where public prosecutors' offices suffer from chronic understaffing and are burdened by an enormous overload of criminal proceedings, the European Delegated Prosecutors would end up in practice being diverted from their duties to protect the interests of the Union in order to deal with the preponderant domestic criminal affairs. And we might well expect the same behaviour on the part of police forces, all the more so given that they are not formally vested with any direct European role.

As regards the relationship between the criminal investigation phase and the administrative inquiry which normally precedes it in the case of financial-economic crimes, the draft regulation omits it entirely, or at least fails to address it explicitly. But, as was said earlier, the smooth running of all these activities and the optimal shift from one area of investigation to the next are crucial to ensure the transfer of information about suspected criminal conduct to the competent judicial authority, which in the future will be—either exclusively or as a matter of priority, depending on the chosen solution—the EPPO.

In truth, a number of border rules are envisaged which give rise to the possibility of a closer connection between the administrative and the criminal fields, rather than just regulating the interaction between these two spheres.

Essentially, what is at issue here are Articles 15, 16, 21 and 58 of the original text of the Proposal for a Regulation for the Establishment of the EPPO.

[21] See above, Part I, ch 1, Part I, ch 2, Part II, ch 3, Part III, ch 5 and Part IV, ch 6.

The first provision concerns the sources through which the EPPO is informed of a crime already detected by others. The rule says nothing about the priority stage regarding the modalities for the initial issuing of a *notitia criminis*, which will be addressed later. It was envisaged, in particular, that all the 'national authorities' of the Member States would be obliged to 'immediately' inform the EPPO of any behaviour which might constitute an offence within its competence. It is unclear whether the first statement, which has remained unchanged in the articles of the negotiated drafts of the proposal, alludes only to judicial authorities (magistrates and, at most, criminal investigation police) or, more generally, all law enforcement authorities, including, for example, tax agencies and customs officials which, in this case, would establish a direct relationship with the EPPO. This second interpretation certainly appears preferable in the context of better safeguarding the financial interests of the Union, as it connects the EPPO with the national bodies that receive the *notitiae criminis* and is therefore a solution capable of increasing the flow of reports towards the EPPO charged with dealing with them more effectively.[22]

Nevertheless, the updated version of this rule (currently Article 19) contains some significant changes. First, no longer are 'all' the authorities of the Member States responsible for informing the EPPO, but only those that are competent according to applicable national law. Therefore, the European rule does not remove the differentiation among sources of reports on criminal conduct by introducing a general obligation to inform not covered by individual laws, but rather acknowledges the existence of many national rules which establish whether or not a particular authority is required to hand over the information in its possession to the person in charge of the criminal proceedings. It is therefore essential, from the point of view of the EPPO, to map the above bodies which are already obliged to transmit information to the judicial authorities of Member States, since the EPPO is destined to take over their role as the final collector of reports and information on criminal conduct. What is more, the direct channel to the EPPO envisaged in Article 12 of the original proposal is made doubtful by leaving it up to individual Member States to decide whether to set up a 'direct' or a 'centralised' reporting system at a national level.

The reporting times indicated also help us to understand how much space the EPPO regulation proposal gives to the administrative inquiry; although they are never expressly mentioned, administrative investigations can be identified implicitly among the activities which give impetus to the criminal investigation. While Article 15 initially imposed an immediate reporting of offences, implying

[22] This topic is thoroughly addressed by J Vervaele, 'La relazione tra OLAF, il futuro EPPO, altri organi europei e le autorità giudiziarie nazionali', in V Bazzocchi (ed), *La protezione dei diritti fondamentali e procedurali dalle esperienze investigative dell'OLAF all'istituzione della procura europea* (Roma, Fondazione Lelio e Lisli Basso Issoco, 2014) 121.

an instant passage from the administrative to the criminal department, the corresponding Article 19 now states that the process must take place 'without undue delay'. A more elastic formula which appears to give national authorities more leeway in carrying out their activities once a crime has emerged during administrative investigations, before handing it over to the EPPO.

On the one hand, the clause in question is better suited to the purpose of verifying whether the crime comes under the jurisdiction of the EPPO, something now made more complex by the envisaged setting of thresholds for the level of damage done to the financial interests of the Union, below which jurisdiction might remain with national judicial authorities if there are no other elements involved which themselves are hard to evaluate, such as possible repercussions at an EU level. On the other hand, extended times means that the report will not be limited to giving the bare bones of a possible crime, but will be able to provide an appropriate description of its intended injurious effect on the subjective position of the individual involved—in other words, the start of a criminal investigation—and supply the EPPO with enough information with which to evaluate the integrity of the report itself. According to the current draft of the proposal the report must contain 'as a minimum'—meaning it could go into further depth—'a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any available information about potential victims, suspects and any other involved persons'.

In fact, the quality of the report is decisive for the launch of a criminal investigation, as identified in the 'reasonable grounds to believe that an offence within the competence of the European Public Prosecutor's Office is being or has been committed'. Thus stated Article 16 of the draft regulation of 2013, with the intention of leaving it up to the EPPO to evaluate what degree of likelihood is required to launch criminal proceedings, making the criteria uniform at a supranational level. However, this aspect has also undergone a rethink following the negotiations, given that the corresponding Article 22 of the updated text specifies that the assessment of 'reasonable grounds' is made 'in accordance with applicable national law'.

This has led to the problem, still unresolved, of the different criteria each national legal system applies, respectively, when establishing the grounds for initiating an administrative inquiry into a possible tax violation or episode of corruption, on the one hand, and the report of a crime originating from the same source, on the other. No clear stance is taken—with a view to harmonisation—concerning the degree of overlap between the relevant constituent elements of criminal offences in the two realms (administrative and criminal, precisely), or between the respective criteria for determining the likelihood of an offence having been committed (*fumus delicti*), in order to assess whether it might be feasible to proceed with investigations in a unitary fashion and thereby reduce the current juridical and time lag in investigative activities. Thus an essential aspect has not been clarified: whether the joining of efforts in the administrative and criminal realms for the purpose of combating criminal conducts affecting the financial interests of the

EU encounters structural obstacles of an endemic character, or the problems are rather tied to specific features only of certain national legal systems.

The Persistent Coexistence of the Administrative Inquiry and Criminal Investigation

The considerations set forth so far, in light of the evolving regulation, suggest a design for the relationship between the EPPO investigation, on the one hand, and the preliminary activities of national administrative authorities, as well as OLAF, on the other, that is far from that initially envisaged as one of the aims of the establishment of the EPPO: the removal of a two-tier protection of Community finances, in favour of an immediate investiture of the EPPO as the body charged with criminal investigation. The web of national particularities and the numerous autonomous financial-economic crime verification centres, appear, however, to have decidedly come to the fore. If this fragmentation[23] is not tackled with rules harmonising the prerequisites and time limits for reporting criminal conducts, there will be no efficient channel of communication between the individual authorities of the Member States and the EPPO, and its valuable role as a source of information will be lost.[24]

It has been widely stressed that that OLAF's reports and those of the equivalent national agencies must be transferred to the EPPO in good time, even during the administrative inquiry or sidestepping it altogether: in other words, as soon as a possible crime is identified and without waiting for the conclusion of an often laborious phase which might better be immediately replaced by criminal proceedings.[25] This requirement is all the more important in consideration of those legal systems for which the future EPPO might pursue a criminal action, where the period of time after the offence is committed leads to its time restriction regardless of criminal proceedings having been launched in the meantime and thus risks rendering ineffective the duty of care imposed on the Union and the Member States by Article 325 TFEU.[26]

Articles 21(2) and 58(3), of the 2013 draft regulation, respectively dealing with the provision to the EPPO of required information by the national authorities and the cooperation of the EPPO with OLAF, were intended to avoid administrative

[23] The topic is addressed also by P Asp, 'Jeopardy on European Level—What is the Question to which the Answer is the EPPO?' in P Asp (ed), *The European Public Prosecutor's Office* 59.

[24] See P Csonka, 'Istituzione dell'Ufficio del Procuratore europeo' in V Bazzocchi (ed), *La protezione* 93.

[25] On this point, A Venegoni, 'Protezione degli interessi finanziari dell'UE: ripartizione di ruoli tra OLAF e futuro Procuratore europeo' in V Bazzocchi (ed), *La protezione* 105 ff.

[26] As also shown by the recent ruling of the EU Court of Justice of 8 September 2015, Case C-105/14 *Taricco and others*.

inquiries running parallel to, or overlapping with, a criminal investigation.[27] The *ne bis in idem* principle reveals the difficult relationship between the two channels of sanctions—the administrative and the criminal—according to the canons of the European Court of Human Rights and the EU Court of Justice.[28] In fact, the draft regulation seeks to resolve the problem by expressly forbidding OLAF to open any administrative investigations parallel to the criminal ones, where they are related to the same facts (Article 57a (2) of the current text). At the same time, when the European Public Prosecutor's Office has decided not to start an investigation or to dismiss a case, it may (Article 57a (4)) provide information to OLAF so that the latter may assess whether to undertake administrative action accordingly. This provision is related to what is set forth in Article 33(4): 'The dismissed cases may also be referred to OLAF or to competent national administrative or judicial authorities for recovery or other administrative follow-up'.

Undoubtedly, the result of not overlapping the two types of investigation shows a clear reconciliation given the clear definition of the EPPO's exclusive competence, in view of the general obligation to immediately provide information relating to the suspected offence, which is a deterrent to the drafting of reports rich in information and, therefore, inevitably drawn up at the end of a long preparatory period, and given the centralised and uniform substantiation of the crime report necessary to launch the criminal investigation.

The moment each of these controls is loosened and opens itself up to a high degree of discretion, the objective becomes lost. But we must also consider that the need for a speedy administrative inquiry—as has been clarified by European case law—'though legitimate when the facts are clear and likely to be accepted, cannot, nevertheless, justify a partial or selective examination of the possible responsibilities'.[29] It should not be forgotten, in fact, that although the decision to launch criminal investigations against a certain individual does not imply restrictions on personal freedom in a strict sense, it can hardly be excluded from the category of acts which directly and individually regard the accused person and have the effect of modifying his subjective legal situation. Therefore—in our opinion—the

[27] *cf* among others, A Damaskou, 'The European Public Prosecutor's Office. A Ground-Breaking New Institution of the EU Legal Order' (2015) 6(1) *New Journal of European Criminal Law* 149 ff.

[28] *Grande Stevens and others v Italy*, App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/104/3/2014 (ECHR 4 March 2014); *Nykänen v Finland*, App no 11828/11 (ECHR 20 May 2014); EU Court of Justice judgment of 26 February 2013, *Åkeberg Fransson*, Case C-617/10. However, see the more recent judgment in the case *A and B v Norway*, App nos 24130/11, 29758/11 (ECHR, Grand Chamber, 15 November 2016), according to which criminal prosecution and the imposition of a criminal penalty against a party already sanctioned by the tax authorities does not violate the *ne bis in idem* principle, provided that there is a substantially close connection in substance and time between the two proceedings.

[29] Trib I, 6 April 2006, T-309/03, *Manuel Camos Grau v European Commission*, § 130. On this point, see A Perduca, 'Le indagini dell'ufficio europeo per la lotta antifrode (OLAF) ed I rapporti con le autorità giudiziarie' (2006) *Cassazione penale* 4246 ff.

protection afforded by the possibility of applying to the EU Court of Justice for the purpose of voiding the act concerned under Article 263 TFEU[30] must be upheld.

The Flow of Crime Reports between National Administrative Agencies and the EPPO: A Strategic Role Still to be Played by OLAF

We have to ask ourselves, therefore, whether the problem that the establishment of the EPPO is intended to resolve is linked solely to the low priority given by national judicial authorities to combating crimes against the financial interests of the Union, or whether we should also increase the flow of information relating to these offences which runs from the national administrative agencies to the law enforcement bodies of the Member States, in order to replace these bodies with a more receptive and dynamic figure such as that of the planned EPPO. The first question was addressed by the rules and legislation arising from the original proposal COM(2013)534, particularly in relation to the structure and investigative resources available to the supranational public prosecutor. To give a reply to the second question, overlooked by the legislation now being formulated, our research has attempted to provide an initial design of the institutional and functional complexity of the phenomenon in the different Member States.

In fact, thanks to OLAF's annual report we have knowledge of the number of recommendations which, at the end of its investigations, the European body submits to the national judicial authorities, as well as the percentage of cases which subsequently lead to criminal charges. In the period spanning from 1 January 2008 to 31 December 2015, the average indictment rate was 52 per cent across all EU countries.[31] As is well known, it is precisely the dissatisfaction with this performance—considered insufficient overall, with large discrepancies among the Member States—that has represented the motivation underlying the proposal for the establishment of the EPPO. Nevertheless, what is not clear is the number of *notitiae criminis* regarding crimes against the financial interests of the European Union acquired and transferred by the national administrative authorities directly to the law enforcement bodies of the individual Member States.

Will the EPPO have the ability to become part of this flow, to connect itself effectively with national realities and become the second active player in the

[30] On this issue see my previous observations in D Negri, 'Le contrôle judiciaire du parquet européen dans les traités et la Charte: un "convive de pierre" face à la puissance de l'organe d'enquête supranational' in G Giudicelli-Dèlage S Manacorda J Tricot (eds), *Le contrôle judiciaire du parquet européen. Nécessité, modèles, enjeux* (Paris, Société de législation comparée, 2015) 55–67.

[31] The report is available at the following address: http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2015_en.pdf.

exchange instead of the national judicial authorities? It will be said that the type of connection will be the same as the existing one, since the underlying criterion of the so-called 'double hat' will transform the national judicial authority into the European Delegated Prosecutor.[32] In this case, it is hard to see what the added value of establishing the EPPO might be, at least as regards the crucial point of giving momentum to the investigations with a number of cases sufficient to justify the creation of an organism such as the EPPO. Indeed, as we have suggested previously, the situation risks becoming even worse due to the increased distance which is likely to be created between a deputy of the EPPO who will generally work alone and the myriad of *lato sensu* administrative bodies scattered across national territories acting as potential collectors of reports concerning criminal offences.

The key to the dilemma lies, as far as I can see, in the future role of OLAF, which must remain strategic. The EPPO should not fully absorb the competencies of OLAF, nor should OLAF staff be incorporated into that of the EPPO leading to their complete takeover of criminal investigation tasks. If it is true that the separation between the administrative enquiry and the criminal investigation results artificial as well as risky as regards the prohibition of *bis in idem*, it is also true that the overlapping between them is widespread but not complete. Almost always there is an area in which the administrative enquiry can be conducted outside of and before the emergence of evidence of criminal conduct relating to the same nucleus of facts, which could turn out to be doubly illegal. To be precise, it is the space running between the different requirements, however similar, of the 'sufficient suspicion' which leads to a supposition of 'the existence of fraud' (according to Article 5, EU Regulation 883/2013 on OLAF investigations),[33] on the one hand, and 'having good reason to believe' that a crime under the competence of the EPPO has been committed (current Article 16 of the EPPO draft regulation), on the other hand.

What is more, two requirements must be balanced here. On the one hand, the assumed administrative nature of the investigation must not be an excuse for delaying the granting to the individual involved safeguards that are suited to the substantial criminal nature of the offences the prosecuting authority is seeking to investigate.[34] On the other hand, what must be avoided is that a situation which by its nature affects the rights of the individual, as criminal proceedings do, arises

[32] On the model chosen for the EPPO, see K Ligeti and M Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?' (2013) 4(1–2) *New Journal of European Criminal Law* 12 ff.

[33] On these aspects see R Panait, 'Information Sharing between OLAF and National Judicial Authorities' (2/2015) *EuCrim* 67 ff.

[34] JFH Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor's Office* (Groningen, Europa Law Publishing, 2011) 134 ff. For a review of the case law on the safeguards to be ensured during OLAF investigations see V Mitsilegas, 'The European Public Prosecutor before the Court of Justice. The Challenge of effective Judicial Protection' in G Giudicelli-Delage, S Manacorda and J Tricot (eds), *Le contrôle judiciaire du parquet européen. Nécessité, modèles, enjeux* 80 ff.

without adequate justification, if we consider that the decision to open an administrative enquiry 'could not be done in the absence of sufficiently serious suspicions',[35] and therefore that even the most serious criminal prosecution could not be launched lightly.

By maintaining OLAF's prerogative to conduct administrative investigations, the EPPO system would have powers not foreseen by its establishing framework and no less essential to a more effective protection of the EU's financial interests; in other words the power to take the initiative with regard to acquiring information about the commission of crimes. Whereas the structure envisaged by the proposal for a regulation COM(2013)534 gives us a European Public Prosecutor who is merely a passive receiver of *notitiae criminis* which have already been acquired, a public prosecutor who, in other words, patiently waits for others to give impetus and provide the initial materials for his criminal investigation.

One solution to this problem could actually be to give OLAF a dual role oriented towards helping the EPPO with criminal investigations that have already begun, but above all to supporting, before the launch of criminal prosecution and precisely in order to lend it impetus, the numerous national authorities which can be the source of information concerning suspected criminal conduct, in order to exploit the consolidated experience in this area because of the close links forged over many years of activity.

It is proposed, therefore, to make OLAF an intermediary body between the EPPO and national administrative agencies, a connecting link able to move within the 'grey zone' which precedes the acquisition of reports on alleged criminal offences. On the other hand, the European Parliament recommends that the Council should clarify how to complement the actions of OLAF and those of the EPPO also in the case of 'external' investigations (Resolution of 29 April 2015). All this means that it is necessary to establish and consolidate EPPO's link with national tax or public security authorities, using OLAF as its *longa manus*.[36]

In particular, it appears essential that the initial investigative activity of these agencies, even after the institution of the EPPO, should continue to be the collection—without the use of coercive powers—of documentary evidence which can then be used in criminal proceedings. This is a flexible way of providing information which it would be wise not to reject in the context of an efficient protection of the EU's financial interests, but which could be at risk if one were to consider that the anticipated impetus to criminal prosecution removes the evidence acquired without going through the investigative measures ordered by the judicial authority.

[35] EU Court of Justice, 10 July 2003, Case C-11/00, *European Commission v Central European Bank*, § 141.

[36] As highlighted by L Kuhl, 'L'expérience de l'office européen de lutte anti-fraude' in G Giudicelli-Delage, S Manacorda and J Tricot, *Le contrôle judiciaire* 184, 'reste ouverte la question de savoir si l'OLAF pourrait être chargé par le parquet européen de conduire, sous son contrôle, des mesures spécifiques d'investigation (criminelle)'.

Moreover, this problem will grow exponentially if—as shown following the negotiations—the principle of the *single legal area* is not maintained and there is a return to forms of judicial cooperation based on the example of Directive 2014/41/EU regarding the European Investigation Order in criminal matters.[37] Within a similar context, the administrative investigation preceding a criminal prosecution will once again become attractive in the context of better protection of EU finances, all the more if it continues to benefit from the contacts established with the various national authorities and the evidence collecting activities of a body of inquiry that is hybrid and 'without borders', which is precisely the role of OLAF.[38]

The indications we provided in this regard during our research (culminating in a seminar held in November 2015) had some interesting echoes in the most recent versions of the proposal regarding the establishment of the EPPO. Whereas in the original draft the definition of the relationship between the supranational prosecuting body and the Anti-Fraud Office was relegated to a paragraph of Article 58 (regarding in general to 'relations with other Union institutions, bodies, offices and agencies'), which in turn referred to an agreement aimed at defining the terms of mutual cooperation, the present legislative text dedicates an Article 57a specifically to this issue. It directly provides that the relationship between the two bodies will aim to ensure the use of all available means for the protection of the Union's financial interests through the complementarity and support of OLAF to the Prosecutor's Office. In particular, the cooperation should consist in providing information, analyses (including forensic analyses), expertise and operational support; as well as facilitating coordination of specific actions of the competent national administrative authorities.

Interpreting the last form of support listed in the aforementioned reference provision is more problematic. Indeed, it alludes to the possibility of OLAF also conducting 'administrative investigations'. One the one hand, this provision needs to be coordinated with the one that forbids *bis in idem* and therefore prevents OLAF from opening an administrative inquiry in parallel with the criminal investigation into the same facts; on the other hand, it needs to be fit into the context of operations to support or complement a criminal prosecution activity already undertaken by the European Public Prosecutor's Office, in the course of which such forms of help may be requested of OLAF. It must thus be concluded that the powers of administrative investigation may be exercised not only before but also during the criminal investigation. This appears contradictory, since after a suspected criminal conduct has been reported the actions carried out under the

[37] *cf* S Allegrezza, 'Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality' in S Ruggeri (ed), *Transnational Evidence and Multicultural Inquiries in Europe* (Heidelberg, Springer, 2014) 55 ff.

[38] See also the study by J Łacny, L Paprzycki and E Zielinska, 'The System of Vertical Cooperation in Administrative Investigations Cases' in K Ligeti (ed), *Toward a Prosecutor* 803 ff.

supervision of the supranational investigating body should be exclusively of a judicial nature. However, the singular attribution to OLAF of criminal investigative functions (even if complementary) masked by activities of an administrative nature perhaps betrays the European legislator's awareness of the indispensable role that must be played by the Anti-Fraud Office if we really want to achieve an efficient protection of the financial interests of the Union through the creation of the European Public Prosecutor: OLAF would thus seem to be seen as a sort of 'para-judicial' police;[39] however, it would be better to clearly define the limits and the means that may be adopted in relation to criminal proceedings in order to avoid dangerous confusions of functions of dubious compatibility with the legislative framework of the Treaties.

[39] An observation to this effect is made by K Ligeti and A Weyembergh, 'The European Public Prosecutor's Office: Certain Constitutional Issues' in LH Erkelens and AWH Meij P Pawlik (eds), *The European Public Prosecutor's Office* 70: 'The integrationist view supported by OLAF itself suggested, therefore, that OLAF should become the "police judicière" of the EPPO acting at the central level. It is, however, doubtful whether Article 86 TFEU provides legal basis for such a scenario'. A view in favour of transforming OLAF into a specialised agency endowed with investigative functions of judicial relevance is expressed, however, by G De Amicis, 'I Rapporti della Procura europea con Eurojust, OLAF ed Europol. Le questioni in gioco' in G Grasso, G Illuminati, R Sicurella and S Allegrezza (eds), *Le sfide dell'attuazione di una Procura europea* 652.