



The Italian way to EPPPO

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Legislative Decree N.9

- In Italy the status and the powers of the European Prosecutor and European Delegated Prosecutors (EDPs) are regulated by the Legislative Decree n. 9 of the 2nd of February 2021.
- The European Prosecutor and the EDPs are members of the **Italian Judicial Order**.
 - They have all prosecutorial powers provided under the Italian legislation,
- Unlike other national prosecutors, and in accordance with Art. 6 of EPPO Regulation:
 - when European Prosecutor or EDPs perform their functions under the EPPO Regulation, they are independent and subject to the special discipline provided by the Regulation and by Legislative Decree 9/2021 and also concerning hierarchical and disciplinary issues.

Criminal Cases

Criminal cases within the competence of the EPPO are under jurisdiction of the national Tribunals and Courts

This is in accordance to the principle of the natural judge and in application of the provisions of the Italian criminal procedure code.

EPPO is competent for offences that are also:

- Criminalized under national law; and
- Fall within the minimum definition contained in the PIF-Directive (Art. 3 et. seq)
- Article 22(1) determines the EPPO's scope of competence through a dynamic reference to the PIF Directive's criminal offences affecting the financial interests of the Union, by stating that the EPPO
 - “shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371”
- Amendments to the PIF Directive might indirectly impact the competence of the EPPO as well, except for VAT frauds and any change in the Directive which is not related to the protection of the Union’s financial interests
- The Directive does not contain self-standing criminal provisions [cfr. Article 83 (1) and (2) TFUE]; instead, it describes the minimum common elements of the conducts that the Member States are obliged to criminalise through their national laws. Then, each Member State is responsible for incorporating them into its legal system, even by adopting more stringent rules.

PIF Directive

- The PIF Directive requires the criminalization of four offences, all requiring an *intentional behaviour* (thus excluding recklessness and gross negligence). A common definition of intent is not available, so it will be up to national courts to provide it (Hernnfeld, 2021).
- The four offences at stake are:
- **EU fraud (including VAT Fraud over the threshold)**
- **Money laundering involving property derived from the (other) criminal offences covered by the PIF-Directive**
- **Active and passive corruption**
- **Misappropriation of funds**

Italian Criminal Code

- Criminal offences against the financial interests of the EU are not systemized in a separate chapter or section of the Italian Criminal Code.
 - Some of the crimes are also disciplined by special legislation as it happens for Tax crimes related to VAT.
- One of the reasons for the lack of systematization is the diversity of the criminal activity that concerns the financial interests of the EU.
- Under Italian Criminal Code all these crimes are described in their corpus delicti as:
 - Crimes against the means from funds belonging to the European Union or provided by the European Union.
 - This legal construction of crimes meets the criteria of definitions of financial interests of the EU provided for in Art. 2, para. 1 of the PIF Directive and of Art. 2, para. 3 of the EPPO Regulation.

Italian Criminal Code

According to Italian Criminal Code:

- all crimes against the financial interests of the EU are intentional crimes,
- the attempt and implication in their participation are always punishable.

Some of these crimes are defined as acts against the property / means from funds belonging to the European Union or provided by the European Union

Some include an additional element – the property or means may have mixed character

- part of them belong to the EU and part – of other public bodies.

Many of them can possibly leave a competence dispute between national authority and EPPO.

Criminal Offences

- Criminal offences against the financial interests of the EU can be at least presented in two groups.
- The first one includes crimes that directly affects the financial interests of the EU in accordance with the art. 3 (2) of PIF Directive.
- The second group of criminal offences includes the criminal activity in accordance with Art. 4 of the PIF Directive and art. 22 (2) of EPPO Regulation that falls within the competence of EPPO only if they are related with PIF offences.
- Art. 117 of the EPPO Regulation references a national list of crimes that falls in the competence of the EPPO when conditions are met.

Italian List of Offences (Part I)

- The List of offences provided by the Italian Legislation that may be covered by the European Public Prosecutor's Office according to the criteria set out in Directive (EU) 2017/1371 include:
- any offence, committed or attempted, resulting in the misappropriation or diversion of funds or property from the budget of the Union or budgets managed by it, or on its behalf
 - (Art.s 316-bis , 316-ter, 356, 640, 2nd paragraph no. 1), 640-bis, 640-ter, 2nd paragraph of the Criminal code, Art. 2 of Law no. 898 of 23 December 1986, Art.s 282 et seq. of the decree no. 43 of the President of the Republic of 23 January 1973, n. 43);

Italian List of Offences (Part II)

- any offence, committed or attempted, affecting VAT revenue and resulting in a reduction in the resources of the Union budget or budgets managed by it or on its behalf, provided that the act or omission is committed in cross border fraudulent schemes (hence, also in part on the territory of another Member State of the European Union) and the overall damage caused to the financial interests of the Member States concerned and the Union, excluding interests and penalties, amounting to at least ten million euros
 - (Art.s 2, 3, 4, 5, 8, 10, 10-quarter, 11 of the Legislative Decree no. 74 of 10 March 2000);
- any offence, committed or attempted, by a public official or a person entrusted with a public service who, directly or indirectly, requests or receives advantages of any kind, or accepts the promise thereof, with a view to performing or refraining from performing an official act or service which has the effect of prejudicing or endangering the European Union's financial interests
 - (Art.s 317, 318, 319, 319-ter, 319-quarter, 320, 322, 322-bis of the Criminal Code);

Italian List of Offences (Part III)

- any offence, committed or attempted, by a person promising, offering or procuring for a public official or a person in charge of a public service, any advantage whatsoever to perform or refrain from performing the acts mentioned in the previous paragraph
 - (Art. s 319 quater, paragraph 2, 321, 322 and 322-bis of the Criminal Code);
- any offence, committed or attempted, by a public official or a person entrusted with a public service who is, directly or indirectly tasked with the management of funds or assets, appropriates them or allocates them for purposes other than those intended, where this causes damage to the Union's financial interests
 - (Art.s 314, 316, 323 of the Criminal Code; Art. s 379, 12-bis, 648, 648-bis, 648-ter and 648-ter.1 of the Criminal Code in cases where the conduct referred therein is detrimental to the financial interests of the European Union or is related to money and properties that are the proceeds of the offences referred to above);
- Association offences aimed at the commission of offences mentioned in the previous paragraphs.

EPPO's Competence

In accordance with art.2 (2) of PIF Directive, the EPPO shall be the competent authority if the criminal activity meets the criteria of art. 3 (2)(d) of the Directive.

The legal entities' liability is administrative, not criminal one and it is provided for in Legislative Decree n. 231 of 2001. In accordance with art. 6 (3) of the PIF Directive:

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

Legislative Decree n.9

- The Legislative Decree n. 9 of February 2021 establishes
 - powers, procedural acts and control over the acts of the European Prosecutor and EDPs, considering both their status as national prosecutors and as bodies of the EPPO.
- The Italian legislator limited their intervention to what is strictly necessary to:
 - define the procedure for the designation of the European Prosecutor and the EDPs,
 - regulate the flow of communication of the offence notices,
 - solve the conflicts of competence.
- Consequently, the discipline relating to investigations is minimum due to the decision not to merely reproduce the European regulation.

Art. 9 of Legislative Decree n.9

- Art. 9 of the Legislative Decree establishes, *in accordance with the special status of European prosecutor and EDPs* (provided by EPPO Regulation) that the superior national authorities **cannot exercise** control of European prosecutor and EDPs when they perform functions under Regulation (EU) 2017/1939.
- Therefore, the EDPs do not operate under the direction of the heads of the national public prosecutor's offices and are not subject to the supervision of the General Prosecutor at the Court of appeal.

Inapplicable provisions

- Therefore, a series of provisions of the criminal procedure code are inapplicable:
 - Art. 53, concerning autonomy of the public prosecutor at the hearing,
 - Art. 371 *bis*, concerning the coordination activity of the national anti-mafia and anti-terrorism prosecutor,
 - Art. 372, 412, 413, 421 *bis* in the matter of avocation of the investigations by the General Prosecutor at the Court of Appeal.
- In proceedings where the EPPO starts an investigation or exercises the right of evocation, EDPs operate, *exclusively and until the end of the proceeding*, in the interest of the EPPO but with the functions and the powers of the national prosecutors.
- This means that all provisions related to investigation, admissibility of evidence and judicial review that are applicable to national prosecutors apply.

Competence Conflicts

Some special rules are provided by the Art. 14 of the Legislative Decree for the offence notices for crimes that fall under the competence of the EPPO.

The choice of the Italian legislator was oriented in the sense of **double communication**, with copies addressed to both the competent national prosecutor and communication to the EPPO.

Therefore, the offence notices should be transmitted not only to the national prosecutor but also to the EDP.

Competence Conflicts

- The national prosecutor provides for the registration of the offence notices in the register indicated by the Art. 335, *first paragraph of the Italian Criminal Procedure Code* if the EPPO has **not** already communicated the exercise of its competence and it is necessary to proceed with urgent acts or there is in any reason to believe that a delay in initiating investigations could compromise their results.
- Apart from this case, the national prosecutor provides for the registration in a specific register for the EPPO crimes offence notices. If the EPPO communicates that it intends not to exercise its competence and, in any case, thirty days pass from the registration in the register for the EPPO crimes offence notices, the national prosecutor should provide **immediately** for the registration in the register indicated by the Art. 335 of the Italian Criminal Procedure Code.

Investigative Measures

- Regulation 2017/1939 provides that EDPs should always have a selected number of investigative measures ensured to them by the Member States in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment.
- In this perspective, Art. 17 of the Legislative Decree n. 9/2021 establishes, according to the Art. 30 (1) (3) of the EPPO Regulation, that the EDPs are **authorized** to order or to request the wiretapping of conversations and the controlled deliveries of goods, within the limits and conditions of the current legislation.
- Consequently, the Legislative Decree establishes the notification to the European Public Prosecutor's Office of a list of crimes for which the current Italian regulations allow the use, for criminal investigation purposes, of the interception of conversations and controlled deliveries of goods.

Personal Freedom

- The powers of the EDPs are disciplined by the European Regulation through a substantial reference to the powers available of the prosecutors in accordance with the national law of each Member State applicable in personal freedom cases.
- This means that they are able to :
 - directly request the issue of arrest or pre-trial detention orders,
 - to issue or request a European arrest warrant if the requested person is in another Member State.
- To this end, the Legislative Decree, at the Art. 15, provides only that the delivery procedures relating to European arrest warrants issued by EDPs are regulated by the current Italian legislation on the matter.

Competence Disagreements

- Art. 25 (6) of the EPPO Regulation provides that, in the event of a disagreement between the EPPO and the national prosecutors concerning competence, the conflict must be solved by the competent **national** authorities.
- Art. 16 of the Legislative Decree n. 9/2021 establishes that the general prosecutor at the Supreme Court is competent for the resolution of the dispute. The proceeding concerning the conflict of competence is regulated by the Italian Criminal Procedure Code.
- The same Authority is competent to give the authorization to EPPO in the cases provided for by the Art. 25 (4) of the EPPO Regulation
 - (offenses falling under the material competence of the EPPO that would be excluded because the damage caused or likely to be caused to the Union's financial interests **does not** exceed the damage caused or likely to be caused to another victim, but for which appears that the EPPO is better placed to investigate or prosecute).

Competence

The General Prosecutor of the Supreme Court is also the authority to which the Permanent Chambers refer to when:

- The competent national authorities do not accept to take over the case and
- The specific conditions for the exercise the competence of the EPPO are no longer met.

The Permanent Chambers shall also refer to the General Prosecutor when:

- the EPPO considers a dismissal, and
- the national authority so requires (article 34 (5) (6) of the EPPO Regulation).

National Competence

- Art. 42 of the Regulation provides that in the event of failure to settle the conflict, the Court of Justice may give a preliminary ruling on the interpretation of the Art. 22 and 25 of the Regulation.
- According to the Art. 19 of the Legislative Decree n. 9/2021 when, *because of the decisions of the General Prosecutor at the Supreme Court*, the proceedings characterized by investigations made by EDPs of other member States is transferred to Italy, rules of the **Italian Criminal Code** concerning the assumption of proceedings from **abroad** apply
 - (article 746-ter, para. 3, 4, 5, 6, 7).
- This disposition applies also when the transferring of the proceeding to Italy is due to the decisions of the Permanent Chambers of the EPPO.