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THE EPPO and EU law: a step forward in integration



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EPPO AND EU LAW: A STEP FORWARD IN INTEGRATION

TOPIC I: THE ROAD TO EPPO

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FOR A NORMATIVE REBALANCE OF EPPO REGULATION



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THE IDEA OF JUSTICE TRANSFUSED IN THE FOUNDING REGULATION OF THE EPPO



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EPPO uncovers €40 million VAT fraud: six arrests and seizures in sting against organised crime

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The European Public Prosecutor's Office (EPPO) in Milan (Italy) have seized assets and arrested six people, believed to be part of a criminal organisation, in a sting against a massive VAT fraud scheme involving several countries, with estimated losses of €40 million.

At stake is a suspected VAT carousel fraud, a complex criminal scheme that takes advantage of EU rules on cross-border transactions between its Member States, as these are exempt from value-added tax (VAT).

The complex investigation uncovered a labyrinthine network through which companies established in Bulgaria, the Netherlands, Poland and Slovakia sold electronics and computer equipment to shell companies in Italy, administered by figureheads, in order to evade the payment of VAT.

According to the evidence, the goods were sold, under-priced, to companies in Italy, making it more difficult to identify the scheme and its perpetrators, while also increasing the illicit profits.

THE IDEA OF JUSTICE TRANSFUSED IN THE FOUNDING REGULATION OF THE EPPO

As highlighted, in the news, reference is made to people - **presumed innocent** - believed to be part of a **criminal organization** who caused damage estimated at around **40 million euros** in a suspected VAT carousel fraud, stigmatized as a complex criminal scheme, based on **investigative evidence**.

From these semantic choices emerges a political **idea of justice based on the fight against certain criminal manifestations** even before verifying them.

THE PRESUMPTION OF INNOCENCE

Art. 48 EU Charter of Fundamental Rights

Presumption of innocence and right of defence:

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

It is also provided by

Art. 6 par. 2 Cedu; Art. 14 par. 2 ICCPR;

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

Art. 27 par. 2 Cost.

THE TREATMENT RULE

The principle of the presumption of innocence
establishes
a treatment rule for the defendant and a judgment rule.

Just based on the first one, before the charge is legally verified, the defendant-presumed innocent cannot be held guilty and therefore punished.

Then, consequently also outside the trial, the presumption of innocence imposes the prohibition of making the defendant appear as a criminal who has caused considerable damage to the EU budget on the basis only of the investigative documents unilaterally collected by the Ped.

AN UNSTABLE REGULATORY BUILDING

The EPPO regulation is built on a regulatory edifice with weak foundations and unstable roof.

About the foundation of the normative building, it failed to define, on the wider European territory, the central core of fundamental rights such as the rules

- for jurisdiction,
- to prosecute a crime
- to guarantee equality between the parties,
- the right of defence,
- and a transversal law of evidence to the whole European territory.

THE LEGAL MEANING OF EVIDENCE

Regarding this last point, in the reported news, we read that «According to **the evidence**, the goods were sold, under-priced, to companies in Italy, making it more difficult to identify the scheme and its perpetrators, while also increasing the illicit profits».

The word “**evidence**” has certainly many meanings.

In each of them, for all the different country involved, there is a very different legal concept which reveals a diverse discipline of the methods of acquiring information for the judicial assessments.

PHASES SEPARATION PRINCIPLE

In our justice system, the art. 526 c.p.p. imposes a rule of exclusion for all those investigative documents that have not been legally prepared.

So, with certain exceptions provided by law, all the investigative documents (evidence) not formed in the discussion with the defense cannot be used by the judge for the evaluation of guilt.

They will be unusable evidence pursuant to art. 191 c.p.p. because they were not trained in compliance with the principle of the adversarial process.

According to art. 111 par. 4 Cost.: The formation of evidence in criminal law trials shall be based on an adversarial process. The guilt of the defendant may not be established on the basis of statements by persons who have willingly refused cross-examination by the defendant or the defendant's counsel.

A "NON-DISCRIMINATION CLAUSE" OF THE FOREIGN EVIDENCE

Article 37 REGULATION (EU) 2017/1939

Evidence

1. Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.
2. The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.

A "NON-DISCRIMINATION CLAUSE" OF THE FOREIGN EVIDENCE

The Eppo regulation does not contemplate the distinction between investigative acts and evidence in the strict sense, nor does it refer to the national rules for the acquisition of evidence.

Rather, it establishes a "non-discrimination clause" of the foreign evidence which re-proposes the traditional model of international rogatory letters, now replaced by the European Investigation Order.

So, evidence presented to a court by the EPPO prosecutors or by the accused is not excluded on the sole ground that it was collected in another Member State or in accordance with the law of another Member State, even if that evidence was formed in breaking the rules on the circulation of evidence from one phase to another, from one State to another.

In this way, the legislative function in the area of the law of evidence is renounced and the faculty of evaluating illegitimate evidence is left to the indiscriminate power of the judge.

PREVENT THE FORUM SHOPPING

Article 26 REGULATION (EU) 2017/1939

Initiation of investigations and allocation of competences within the EPPO

- 1. Where, in accordance with the applicable national law, there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed, a European Delegated Prosecutor in a Member State which according to its national law has jurisdiction over the offence shall, without prejudice to the rules set out in Article 25(2) and (3), initiate an investigation and note this in the case management system.
- 2. Where upon verification in accordance with Article 24(6), the EPPO decides to initiate an investigation, it shall without undue delay inform the authority that reported the criminal conduct in accordance with Article 24(1) or (2).
- 3. Where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall, under the conditions set out in paragraph 1, instruct a European Delegated Prosecutor to initiate an investigation.
- 4. A case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed. A European Delegated Prosecutor of a different Member State that has jurisdiction for the case may only initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a deviation from the rule set out in the previous sentence is duly justified, taking into account the following criteria, in order of priority:(a) the place of the suspect's or accused person's habitual residence;
- (b)the nationality of the suspect or accused person;
- (c)the place where the main financial damage has occurred.
- 5. Until a decision to prosecute under Article 36 is taken, the competent Permanent Chamber may, in a case concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:(a) reallocate the case to a European Delegated Prosecutor in another Member State;
- (b)merge or split cases and, for each case choose the European Delegated Prosecutor handling it,
- if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor in accordance with paragraph 4 of this Article.
- 6. Whenever the Permanent Chamber is taking a decision to reallocate, merge or split a case, it shall take due account of the current state of the investigations.
- 7. The EPPO shall inform the competent national authorities without undue delay of any decision to initiate an investigation.

THE ITALIAN OBLIGATION TO PERSECUTE A CRIME

Art. 112 Cost.

The public prosecutor has the obligation to institute criminal proceedings.

IMPLICATION OF VALUE BY THE OBLIGATION TO PERSECUTE

This constitutional principle, even if laconic, contains fundamental implications of value: it supports the political choice for a public prosecutor independent of any other State power (art. 101, paragraph 2, Constitution) in order to ensure the implementation of the principle of equality of citizens (Article 3 of the Constitution) according to the (criminal) law free from any external interference.

In other word, at the same condition, whenever there are elements to support a reasonable expectation of conviction, the public prosecutor is obliged to commit the accused to trial.

THE DISCRETION OF EPPO TO PROSECUTE

The Eppo regulation, instead, contains **a model of discretionary prosecution** in contrast with the principle of obligation pursuant to art. 112 of the Constitution not guaranteeing the equality and legality into the process (articles 3 and 25 of the Constitution).

Not all citizens accused of committing the same crime **would be treated in the same way**: some could be investigated by the European Delegated Public Prosecutor, perhaps in a different State, others by the national public prosecutor according to the domestic statute.

If the action is in any case guaranteed, the methods of exercising it remain unforeseeable!!!

THE ALLOCATION COMPETENCE RULES

Also, about the rules to choose in front of which jurisdiction, there aren't there are no well-defined regulatory limits.

The issue of determining the investigative and then judicial competence represents one of the most delicate points of the entire construction of the EPPO in contrast with the PRINCIPLE OF THE NATURAL JUDGE PRE-ESTABLISHED BY LAW.

The European prosecutor can also choose to proceed in the presence of the most permissive jurisdiction, therefore, with the legal system that has the best investigative tools, on the most pleasant assumptions, perhaps in those States where authorization for interim measures is not provided already during the preliminary investigation phase.

THE PRINCIPLE OF THE NATURAL JUDGE PRE-ESTABLISHED BY LAW

Article 47 par. 2 Charter of Nice

Right to an effective remedy and to a fair trial

«Everyone is entitled to a fair and public hearing within **a reasonable time** by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented»

Article 6 par. 1 Cedu

Right to a fair trial

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

COURT OF STRASBOURG JURISPRUDENCE

In this regard, the jurisprudence of the Court of Strasbourg has specified that

- a) court must be «constituted by law» to «ensure that the judicial system of a democratic society does not depend on the discretion of the executive, but is regulated by a law promulgated by Parliament» (ECHR, 2th section, case Coëme and Others v. Belgium, judgment of 22 June 2000, § 98; ECHR, 4th section, case Richert v. Poland, judgment of 25 October 2011, § 42);
- b) the organization of the judicial system cannot be entrusted to the discretion of the judicial authorities themselves, even if this does not mean that the courts do not have, within certain limits, the possibility of interpreting the relevant provisions of domestic law (ECHR, 2nd section case Coëme and Others v. Belgium, cit., § 98, ECHR, 2th section, case Gorgiladze v. Georgia, judgment of 20 October 2009, § 69).

A POSSIBLE CASE OF PRELIMINARY RULING REQUIRED

These discrepancies will make the reference for a preliminary ruling required by article 267 of the TFEU to refer the question regarding the interpretation and validity of the rules of the Eppo Regulation in contrast to article 47 of the Nice Charter to the Court of Justice, as envisaged by the art. 42 par. 2 lett. b of the same Regulation.

Otherwise, ample space would be left for the phenomenon of forum shopping to proliferate.

PRELIMINARY RULING BY COURT OF JUSTICE

Article 267 TFUE

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
- Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
- Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
- If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

THE IMPORTANCE OF THE CHRONOLOGICAL FACTOR

Article 39

Dismissal of the case

1. Where prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, the Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 35(1), decide to dismiss the case against a person on account of any of the following grounds:

- (a) the death of the suspect or accused person or winding up of a suspect or accused legal person;
- b)the insanity of the suspect or accused person
- (c)amnesty granted to the suspect or accused person;
- (d) immunity granted to the suspect or accused person, unless it has been lifted
- **(e) expiry of the national statutory limitation to prosecute;**
- (f) the suspect's or accused person's case has already been finally disposed of in relation to the same acts;
- (g)the lack of relevant evidence.

The art. 39 par. 1, **lit. e)** of the Eppo Regulation establishes among the Dismissal cases the exceeding of the **«expiry of the national legal term for the exercise of criminal action»**.

This is an appreciable arrangement because when the prosecution of a transnational crime is proposed, the risk of dispersal of the evidence is higher, so the chronological factor in the criminal trial is a crucial variable because depends

- the rights of the parties' effective exercise
- the effectiveness of the judicial investigation on the supposition of crime.

A process that exceeds the border of time reasonably necessary to reconstruct the facts and possible responsibilities makes no longer profitable or completely impossible

- the exercise of the right of defense,
- frustrates the exercise of the right to evidence,
- renders the realization of the contradictory sterile and,
- at the same time, it allows any punitive response no longer responds to the constitutionally imposed re-educational purpose and is therefore not socially useful (art. 27 Cost.).

THE OBSTACLES TO THE RIGHT OF DEFENSE

With regard to the methods of access to the trial, to ensure the rights of defense provided by

Art. 111 comma 3 Cost.;

Art. 6 par. 3 Cedu;

art. 14 par. 3 ICCPR

THE RIGHT TO DEFENSE

The art. 14 paragraph 3 of Legislative Decree no. 9/2021 provides for the establishment of a special **register of crime reports** falling within the competence of the European Public Prosecutor's Office, but there is no mention **of the methods of access** for the suspect, for the offended person and for their respective defenders, where they request it, as ensured by art. 335 paragraph 3 c.p.p. in compliance with the accused's right to be informed as soon as possible of the accusation brought against him.

It constitutes a precondition for the effective exercise of **the right of defense** in a strong crisis, also for the exorbitant economic resources necessary

PROSPECTIVE TO REBALANCE THE EPPO REGULATION

What's the point?

PROSPECTIVE TO REBALANCE THE EPPO REGULATION

Article 119

Review clause

1. No later than 5 years after the date to be set by the Commission pursuant to Article 120(2), and every 5 years thereafter, the Commission shall commission an evaluation and shall submit an evaluation report on the implementation and impact of this Regulation, as well as on the effectiveness and efficiency of the EPPO and its working practices. The Commission shall forward the evaluation report together with its conclusions to the European Parliament and to the Council and to national parliaments. The findings of the evaluation shall be made public.
2. The Commission shall submit legislative proposals to the European Parliament and the Council if it concludes that it is necessary **to have additional or more detailed rules on the setting up of the EPPO, its functions or the procedure applicable to its activities, including its cross-border investigations.**



The Review of Eppo Regulation cannot only concern
the extension of Eppo powers

or

the increase in the number of crimes having a cross border
dimension.


PROSPECTIVE TO REBALANCE THE EPPO REGULATION

Today, the Eppo Regulation represents a give-and-take choice in which the European Union lost the opportunity to form a statute of uniform rules for the prosecution of all transnational significance crimes calibrated on the maximum standard of protection of FUNDAMENTAL RIGHTS, like:

- Presumption of innocence (rules of treatment for the defendant)
- Obligation to prosecute to ensure equality and legality
- Equality between the parties
- Right to defense
- Prevention of forum shopping



The establishment of the European Public Prosecutor's Office, on the other hand, could have been an opportunity to draw up a Constitution of rights transversal to the whole of European territory.



The far-reaching goal to be achieved, in order of the purpose foreseen in the art. 86 TEU, instead it is indicated by that nucleus of fundamental rights provided:

in the European Convention for the Protection of Human Rights,

in the Charter of Fundamental Rights of the Union and

in the constitutional traditions common to the Member States,

to which the art. 6 EU Treaty

recognizes

the rank of general principles of the European Union.



**LOOKING FORWARD, AND HOPING FOR THE BEST,
I WANT THANK YOU ALL FOR THE ATTENTION**