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EPPO's Transformative Powers on Criminal Justice in the Member States: The Impact of International and European Law on Criminal Procedure*

Transformacyjne kompetencje Prokuratury Europejskiej w zakresie wymiaru sprawiedliwości karnej w państwach członkowskich. Wpływ prawa międzynarodowego i europejskiego na postępowanie karne

ABSTRACT

The European Public Prosecutor's Office (EPPO) represents a highly symbolic achievement for the EU criminal justice sector. The article aims to collect some examples of instances where potential tensions between Regulation 2017/1939 and the intricate legal features of Member States arise. It also tries to suggest a possible categorization of EPPO's transformative powers in the Member States' criminal justice systems, especially within criminal procedure. Following the normal flow of criminal cases, the examples given concern the "model" of criminal investigations, several investigative measures affecting fundamental rights, the types of prosecutorial decisions (in particular, the dismissal of the case and simplified procedures), trial and appellate remedies.

Keywords: European Public Prosecutor's Office; criminal justice sector; regulation; national law; European Union

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INTRODUCTION

Over the last 30 years, the European Union developed wide competences in criminal matters, with the end-goal of establishing and strengthening the Area of Freedom, Security and Justice. In the first phase, while the so-called Third Pillar was still in force, the impact of European law on Member States' criminal procedure provisions was limited to horizontal cooperation (i.e. the areas of police cooperation and judicial cooperation in criminal matters). Then, the entry into force of the Lisbon Treaty, through Article 82 of the Treaty on the Functioning of the European Union (TFEU), has opened the way to much broader interventions.

On the one hand, we witnessed the development of legal tools based on the mutual recognition principle. At the same time, there was a significant flow of approximation of procedural laws and regulations among Member States.

This was achieved through directives with the goal of establishing minimum standards in fields such as the mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings and provisions regarding the rights of victims.[1] On the other hand, the inclusion – in Article 86 TFEU – of a specific legal basis to establish the European Public Prosecutor's Office (EPPO) made this entity a reality, after more than two decades of discussions.

The EPPO represents a highly symbolic achievement for the EU criminal justice sector: it embodies a form of vertical and integrated cooperation and thus leads to the overcoming of a system where criminal judicial cooperation could only work in a horizontal perspective (i.e. between competent national authorities acting within their respective spheres of competence). The article aims to provide some examples of the transformative powers of the EPPO on criminal justice in the Member States, with a view to suggesting a possible categorisation of them. For that purpose, the author draws attention to the organic and operational integration of the EPPO with national systems, and also highlights the complexity of the legal framework (comprising EU law and applicable national law, including specific implementing rules) that governs the activities of the EPPO. The author identifies specific cases where potential conflicts between Regulation 2017/1939[2] and the intricate legal characteristics of the Member States may arise, or where ambiguous references to national law leave ample room for divergent interpretations. Such examples are identified through the lens of comparative legal studies or by reference to the Italian legal system.

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[1] Article 82 TFEU contains a so-called "general clause" stating that any other specific aspect of criminal procedure identified in advance by a unanimous decision of the Council would qualify for future approximation.

[2] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("EPPO") (OJ L 283/1, 31.10.2017), hereinafter: the EPPO Regulation.

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THE INTEGRATION OF THE EUROPEAN PROSECUTOR WITHIN NATIONAL CRIMINAL JUSTICE SYSTEMS AND THE INTERACTION BETWEEN THE REGULATION AND NATIONAL LAW

To understand whether, and to what extent, the EPPO can trigger transformations of Member States' criminal justice systems, it is useful to point out that this body is fully embedded in national legal systems, despite its supranational nature of European institution.

This organic and operational integration with the national systems derives first and foremost from the Lisbon Treaty. Article 86 (2) TFEU states that the EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of offences against the Union's financial interests (known as PIF offences, from the French acronym for *protection des intérêts financiers*)[3] committed in participating Member States. Additionally, it states that EPPO shall perform the functions of public prosecutors before the competent courts. Consequently, the trial stage shall necessarily take place in national courts.

Furthermore, Member States are still reluctant to give up their sovereignty in criminal matters. Therefore, the EPPO Regulation was only adopted after heated debates through an enhanced cooperation procedure, and it significantly diverges from the Commission's 2013 proposal:[4] the structure of the EPPO as eventually adopted is more decentralised and collegial than the one originally proposed by the Commission.[5]

Moreover, and above all, the EPPO Regulation encompasses a significant number of references to national law, totalling approx. 80 references across its recitals and operative provisions.[6] The result is a highly intricate legal framework that heavily relies on the support or integration of national norms (both substantive and procedural rules).[7]

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[3] PIF crimes, as defined in Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198/29, 28.7.2017), not only affect the Union's financial interests but they also harm its reputation and credibility. Therefore, these crimes include not only fraud related to the EU budget or large-scale VAT frauds affecting more than one State, but also corruption, misappropriation of assets committed by a public official, and money laundering involving property derived from those crimes.

[4] M.L. Wade, *The European Public Prosecutor: Controversy Expressed in Structural Form*, [in:] *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, eds. T. Rafaraci, R. Belfiore, Cham 2019, pp. 166–180.

[5] T. Rafaraci, *Brief Notes on the European Public Prosecutor's Office: Ideas, Project and Fulfilment*, [in:] *EU Criminal Justice…*, p. 159.

[6] L. De Matteis, *The EPPO's Legislative Frameworks: Navigating through EU Law, National Law and Soft Law*, "New Journal of European Criminal Law" 2023, vol. 14(1), p. 7.

[7] M. Panzavolta, *Responsabilità e concetti: il regime normativo e la scelta della giurisdizione nelle indagini EPPO in cerca di orientamento*, [in:] *L'attuazione della Procura europea. I nuovi as-*

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This is one of the reasons why Article 117 of the EPPO Regulation imposes an obligation, on participating Member States, to notify the EPPO (and the other EU's institutions) of several critical matters: 1) the list of national authorities responsible for implementing the EPPO Regulation; 2) an extensive catalogue of, i.a., national criminal law provisions applicable to the offences outlined in the PIF Directive; and 3) any other relevant national law, including procedural laws.[8] This comprehensive reporting obligation confirms the relevance of national law in complementing the provisions of the EPPO founding Regulation.

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

CHALLENGES IN THE INTERACTION BETWEEN THE REGULATION AND THE NATIONAL LAW OF THE MEMBER STATES

Most of the complex legal framework (comprising EU law and applicable national law, including specific implementing rules) that governs the EPPO's activities remains largely untested in practice, either before the competent courts[9] or within the EPPO structure itself. This refers to the Permanent Chambers (PC),

setti dello spazio europeo di libertà, sicurezza e giustizia, eds. G. Di Paolo, L. Pressacco, T. Rafaraci, R. Belfiore, Trento 2022, p. 94.

[8] Member States have fulfilled their notification obligation under Article 117 of the EPPO Regulation in various ways. Some States, such as Slovenia, have taken a broad approach and included in their notification the entire text of their Criminal Code. Others, like Luxembourg and Latvia, have opted for a more limited approach, only listing provisions of substantive criminal law related to the implementation of the PIF Directive and the competent national authorities deemed relevant for the corresponding articles of the EPPO Regulation. See L. De Matteis, *op. cit.*, p. 8.

[9] The reference is to national courts and the European Court of Justice (ECJ). After the drafting of this contribution for the Conference held at Villa Vigoni, Menaggio (Italy) in October 2023, the ECJ delivered its first ruling on the EPPO system, on judicial authorisations in cross-border criminal cases. See judgment of the Court (Grand Chamber) of 21 December 2023 in case C-281/22, *G.K. and Others*, ECLI:EU:C:2023:1018.

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which play a pivotal role in the EPPO's decision-making process, combining the common sense of its members with legal considerations.[10]

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

1. The "model" of criminal investigation in the light of comparative law

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

These provisions reveal a clear political preference for a model where criminal investigations are solely in the hands (and under the responsibility) of the prosecutor: pursuant to Article 4, "the EPPO shall undertake investigations, and carry out acts of prosecution, and shall also exercise the function of prosecutor in the competent national courts, until the case has been finally disposed of".

This model of criminal investigation is similar to the Italian and German models. However, comparative law studies show that many European countries have a legal tradition characterized by the presence of a *juge d'instruction* (investigating judge), who plays a crucial role in overseeing investigations and prosecutorial decisions.[11]

Given this distinctive specificity, it is legitimate to question whether jurisdictions that provide for the cohabitation between a prosecutor and a *juge d'instruction* – during the investigative phase – comply with the EPPO Regulation and the EPPO responsibilities as defined in the Lisbon Treaty (Article 86 TFEU). Indeed, it could be argued that such jurisdictions are transferring a portion of the control of investigations from the European Delegated Prosecutor (EDP) handling the case

[10] In the EPPO system, the Chambers should balance due respect of national law and national features with unionwide coherency. Only once the EPPO starts to function, it will be appropriate to assess whether the members of the PCs will only uphold national interests or whether they will be able to detach themselves from their sense of justice and develop a true supranational "European mindset". See T. Elholm, *EPPO and a Common Sense of Justice*, "Maastricht Journal of European and Comparative Law" 2021, vol. 28(2), p. 218.

[11] See C. Peristeridou, A. Klip (eds.), *Comparative Perspective of Criminal Procedure*, Cambridge 2024, p. 55 ff.; P.J. Reichel, *Comparative Criminal Justice Systems: A Topical Approach*, New York 2021, p. 125 ff.

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to another authority (a national one) and that such a shift could not be deemed acceptable in light of the EPPO Regulation.[12] The EPPO argued in a similar way also with regard to Belgium, in the investigation into the acquisition of COVID-19 vaccines.[13] According to Belgian criminal procedure, when an investigative judge is involved, it carries out the entire investigation with full investigative powers. Therefore, in offences falling within the competence of the EPPO, the EDPs ought to cooperate with the investigative judge, in accordance with their respective territorial competence. Because of this situation, there are now separate procedures pending before different judicial bodies for complaints concerning the same set of facts (the acquisition of COVID-19 vaccines in the European Union).

[12] See L. De Matteis, *op. cit.*, p. 14; M. Panzavolta, *op. cit.*, p. 116 ff. After the original drafting of this contribution, in September 2023, the European Commission released its first *Compliance Assessment of Measures Adopted by the Member States to Adapt Their Systems to Council Regulation (EU) 2017/1939 of 12 October 2017 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office ("EPPO")*, conducted by Spark Legal and Policy Consulting and Tipik. According to this study, "Member States took different approaches regarding the role of investigative judges and other national authorities. Depending on the approach taken, some Member States were found to not be fully compliant where investigative judges and other national authorities, in certain cases, retain the powers to investigate or prosecute PIF offences, conflicting with the general objectives and tasks of the EPPO" (https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142, access: 10.11.2024, pp. 11 and 31).

[13] See European Public Prosecutor's Office, *Investigation into Acquisition of COVID-19 Vaccines: Clarifications*, 17.5.2024, https://www.eppo.europa.eu/en/media/news/investigation-acquisition-covid-19-vaccines-clarifications (access: 10.11.2024): "On 14 October 2022, while receiving an exceptionally high number of reports and complaints, the European Public Prosecutor's Office (EPPO) confirmed that it was investigating the acquisition of COVID-19 vaccines in the European Union. No further details can be made public about this ongoing investigation, in order not to endanger its outcome. In 2023, several private parties filed similar complaints with an investigative judge in Liège (Belgium). In May 2023, as foreseen under Belgian criminal procedure, the regional prosecution office of Liège transferred a copy of the complaints filed with the investigative judge to the EPPO. The EPPO concluded that the complaints concern facts falling under its material competence. It is therefore now for the EPPO, as competent prosecution office, to take a position on the legality of the complaints filed with the investigative judge in Liège, and for the Court (Chambre du Conseil) to decide on it. This was the object of the hearing scheduled today. The case was adjourned until 6 December 2024. On this occasion, the EPPO would like to make the following clarifications. According to Belgian criminal procedure, an investigative judge has the power to investigate (alleged) offences if the offences are committed in the territory under his competence, or if the suspect is residing in this territory, including offences falling under the competence of the EPPO. According to Belgian criminal procedure, when an investigative judge is involved, the European Delegated Prosecutors ought to cooperate with seven designated investigative judges, in accordance with their respective territorial competence. However, the EPPO has consistently drawn the attention of the European Commission to the manifest lack of compliance with the EPPO Regulation of the Belgian criminal procedure, involving an investigative judge who carries out an entire investigation with full investigative powers. Under applicable EU law, it is for the EPPO to investigate, prosecute and bring to judgment the perpetrators of criminal offences damaging the EU budget. One of the consequences of this non-compliance is that there are now separate procedures pending before different judicial bodies for complaints originating in the same set of facts".

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2. Investigative measures affecting fundamental rights and judicial review

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

Article 30 of the EPPO Regulation merely requires Member States to enable the EDP to order or request a list of investigative measures in instances where the offence under an investigation is punishable by up to 4 years of imprisonment.[14] However, the ECJ, in its first judgment delivered on the EPPO system, concerning judicial authorisation in cross-border cases,[15] has added an interesting new element: the requirement that specific categories of (intrusive) investigative measures – such as searches of private dwellings (home searches), conservatory measures relating to personal property and asset freezing – will need *ex ante* judicial authorization in the State of the handling EDP.[16] The requirement for prior judicial authorization in the handling State

[14] Pursuant to Article 30 (1) "At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures: (a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence; (b) obtain the production of any relevant object or document either in its original form or in some other specified form; (c) obtain the production of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15 (1) of Directive 2002/58/EC of the European Parliament and of the Council; (d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation; (e) intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using; (f) track and trace an object by technical means, including controlled deliveries of goods".

[15] Judgment of the Court (Grand Chamber) of 21 December 2023 in case C-281/22, *G.K. and Others*, ECLI:EU:C:2023:1018. For a comment, see T. Wahl, *Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations*, 27.2.2024, https://eucrim.eu/news/ecj-ruling-on-the-exercise-of-judicial-review-in-eppos-cross-border-investigations (access: 11.10.2024); N. Franssen, *The Judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas Tiding of Comfort and Joy but Will That Feeling Last?*, 15.1.2024, https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1 (access: 10.11.2024).

[16] In the so-called "biodiesel case" (case C-281/22) the Luxemburg judges drew parallels between the cooperation mechanism in Articles 31 and 32 of the EPPO Regulation and the scheme of judicial cooperation within the EU based on the principles of mutual trust and mutual recognition, stating that the system of judicial cooperation in the EU is based on a division of competences between issuing and executing judicial authorities. As a consequence, also in the EPPO system, the ECJ established a division of labor between national courts, in order to ensure effective judicial protection: it is up to the court of the handling EDP State to exercise prior judicial review of the conditions relating to

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for measures that significantly affect fundamental rights, and the express reference to home searches, seem to raise compliance issues in those countries – such as Italy – that do not mandate this practice. In the Italian legal system, a prosecutorial decree is enough to carry out searches and conservatory measures to preserve evidence, which may conflict with the new judicial authorization requirement.[17]

3. Prosecutorial decisions – the dismissal of the case

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

Regarding the dismissal of cases, two different issues require attention. The first one arises from the interpretation of the EPPO Regulation (Article 39), since it is unclear whether the Regulation, at the European level, is the sole authority for establishing grounds for dismissing a case, or if it may be integrated by national laws.[18] Additionally, it is left unclear whether the Regulation permits merely discretionary

justification and adoption of the assigned investigation measures (para. 73); it is up to the court of the assisting EDP State to review matters concerning the enforcement of the measure (para. 72). On top of that, the ECJ also clarified that "as regards investigation measures which seriously interfere with those fundamental rights, such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30 (1) (a) and (d) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures" (para. 75).

[17] According to N. Franssen (*op. cit.*), "it is highly unlikely that the implementing legislation in all participating Member States is fully in conformity with the ECJ's judgment. It is, therefore, safe to assume that all these Member States will have to urgently review their legislation; Member States, like Germany and Austria, that had foreseen a full judicial review by a court in the Member State of the assisting EDP, will probably have to face up to the new reality and limit that role to the enforcement of the investigation measure. In the same vein, these same Member States will somehow have to ensure that the *ex ante* judicial review undertaken in the Member State of the handling EDP is recognised as an adequate, trustworthy form of judicial control on the merits of the case at that stage of the investigation, thus allowing the assigned investigation measure to be carried out on their territory. Conversely, those Member States that had not foreseen *ex ante* judicial control in cross-border EPPO cases may well need to introduce this, leaving aside the previous question as to which judicial authority is best placed to undertake it. Additionally, all Member States may have to try and offer clarity to courts as to which elements concerning the enforcement of the investigation measure, they can take into consideration when they review the assigned measure. Whether this will actually be possible or even desirable without some degree of guidance at the EU level is doubtful".

[18] See, on this point, R. Belfiore, *L'esercizio dell'azione penale da parte dell'EPPO tra legalità e margini di discrezionalità*, "Cassazione penale" 2022, vol. 62(10), pp. 3677–3690; D. Brodowski, *Article 39*, [in:] H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office: EPPO Regulation (EU) 2017/1939 Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office. Article-by-Article Commentary*, Baden-Baden 2021, p. 359 ff.

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evaluations or not (referring to the well-known distinction between legality principle, or mandatory prosecution, and opportunity principle, or discretionary prosecution).[19]

The second issue concerns the extent of judicial review on the EPPO's decision to dismiss the case, in light of Article 42 of the EPPO Regulation. This provision stipulates that the procedural acts of the EPPO producing legal effect vis-à-vis the parties are subject to judicial review by the competent national court, in accordance with requirements and procedural rules laid down by national laws. It follows that judicial review falls within the purview of national courts.[20]

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

There is a need to question whether this would also apply to EPPO cases. On the one hand, one could argue that judges for preliminary investigations have the same powers they would have in ordinary cases. On the other hand, national provisions could be interpreted in such a way as to limit (or even exclude) the powers of the judge to preserve EPPO's responsibilities and powers, as uniformly defined by EU law at the Treaty level. Scholars have a variety of views on this issue, reflecting differing views on the balance between national judicial oversight and the EPPO's autonomy.[21]

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[19] In favour of the legality principle (more specifically, of a limited legality principle) see, i.a., L. Luparia, J. Della Torre, *Profili dell'azione penale (e dell'inazione) nel sistema della Procura Europea*, "Rivista Italiana di Diritto e Procedura Penale" 2023, no. 2, pp. 354–355, 367. By contrast, according to M. Caianiello (*The Decision to Drop the Case: Res Iudicata or Transfer of Competence*, [in:] *The European Public Prosecutor's Office: The Challenges Ahead*, ed. L. Bachmaier Winter, Cham 2018, p. 113), the EPPO Regulation depicts a limited discretionary principle, in which the margin of consideration left to the EPPO is rather broad, even though it is still subject to the oversight of a collegial body.

[20] Pursuant to Recital 89, the provision of the EPPO Regulation on judicial review does not alter the powers of the Court of Justice to review the EPPO administrative decisions, which are intended to have legal effects vis-à-vis third parties. This namely refers to decisions not taken in the performance of its functions of investigating, prosecuting or bringing to judgment. This Regulation does not preclude the possibility for a Member State of the European Union, the European Parliament, the Council or the Commission to bring actions for annulment in accordance with the second paragraph of Article 263 TFEU and to the first paragraph of Article 265 TFEU, and infringement proceedings under Articles 258 and 259 TFEU.

[21] According to M. Panzavolta (*op. cit.*, p. 120), judicial control must never go so far as to interfere with the strategic and discretionary decisions of the EPPO. Thus, the responsibility conferred on the EPPO in relation to prosecution means that there can be no external interference in these decisions. This does not mean that judicial review of the decision is excluded (which is clear from Article 42 (1) of the EPPO Regulation and even more so from Article 42 (3)), but it does mean that judicial powers of intervention beyond verifying the legitimacy of the decisions taken, such as the obligation to conduct certain investigations or to bring charges, are excluded. To return to the Italian

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4. Simplified procedures, trial and appellate remedies

As anticipated, another example of challenging references to national laws is the application of simplified procedures (Article 40 of the EPPO Regulation), based on an agreement with the suspect (in cases where the application of sanctions is at stake).

The Italian system includes such a procedure, known as *patteggiamento* (plea bargaining), which is available at all stages of criminal proceedings, i.e. both during the preliminary investigations and after the indictment – at the trial stage – if the accused requests it.

This scenario raises several questions, in particular regarding the scope of judicial review in EPPO cases.

For example, and i.a., Article 444 of the Italian Criminal Procedure Code[22] governs the judicial review of the so-called *patteggiamento* based on criteria that partially diverge from those established in the EPPO College's guidelines.[23] According to the latter, in addition to the legality and proportionality criteria, the PC (and, before its decision, the EDP handling the case) also carries out an assessment based on opportunity, which is not provided for in the aforementioned Italian provision.

If the national court disagrees with the decision of the PC, can they reject the *patteggiamento* on national law grounds or is it bound by the PC's decision? It remains unclear who has the ultimate competence in the event of conflicting assessments.

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example, it follows that domestic law should not be completely abandoned, but, at the same time, it cannot be applied without some adaptation to the EPPO regime. In practice, it appears from a series of informal interviews that Italian EDPs have moved towards asking the GIP for dismissal of the case, but this practice leads to an overlap between the PC and the judge for preliminary investigations. It remains to be seen who has the final say in the event of a disagreement.

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

[23] European Public Prosecutor's Office, *Decision of the College of the European Public Prosecutor's Office of 21 April 2021 Adopting Operational Guidelines on Investigation, Evocation Policy and Referral of Cases as Amended by Decision 007/2022 of 7 February 2022 of the College of the EPPO*, https://www.eppo.europa.eu/sites/default/files/2022-02/EPPO_Operational_Guidelines_College_Decision_029.2021_as%20amended_by_College%20decision_007.2022.pdf (access: 10.11.2024).

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Moreover, Italian national rules require prosecutors to justify their rejection of a defendant's proposal of *patteggiamento*. Because of this obligation, the court has the power, at the end of the trial, and in the event of a conviction, to review the lawfulness of the prosecutors' denial of consent and to apply the reduced sentence originally requested by the defendant. We need to raise attention to the question whether the national trial court, faced with an EPPO case, keeps the same powers as in national cases. In the alternative, the interaction between national provisions, the founding Regulation, and the College Guidelines may radically transform the judicial review of national courts on *patteggiamento* in European cases.

Similar challenges or possible transformations can also arise at the trial stage, particularly during the sentencing phase. In the event of a conviction, the EPPO could try to influence the sanctions and the sentence, seeking a certain degree of repression to achieve coherence at the EU level, triggering a possible transformation of the sentencing criteria.[24]

Finally, the EPPO should be able to perform its functions across the entire criminal proceeding, from the preliminary investigation to the trial at first instance and through to the appeal phase. However, in some States, such as France and Italy, the EDP may be prevented from participating in hearings before higher courts, such as the Court of Cassation, due to specific legal constraints. These limitations on the EPPO's prerogatives are hard to reconcile with the EPPO Regulation, suggesting the need for amendments to enable the EPPO to fully exercise its powers at all levels of the various appeal systems within the EPPO's scope of competence. This shall include cases where the sole matter for adjudication is the correct application of the law. To this end, Italy signed a supplementary agreement for the appointment of two additional EPPO prosecutors at the Prosecutor General's Office working with the Court of Cassation and is awaiting their appointment by the Superior Council of the Judiciary (CSM).[25]

5. Basic principles of EPPO's activities and data protection

The final example of possible transformative factors concerns the basic principles guiding the EPPO's activities according to the Regulation (Article 5: the principle of proportionality and the impartiality of the Prosecutor) and the great emphasis on data protection (more than 40 provisions). These principles are (largely) unknown in many Member States, but it is reasonable to anticipate that, in the long term, these

[24] According to T. Elholm (*op. cit.*, p. 224), the EPPO might try to influence the sentencing level by claiming a specific sanction/sentence or presenting the court with guidelines and legal practice from other Member States and ECJ case law in EU fraud cases.

[25] R. Belfiore, *L'articolazione funzionale e territoriale della Procura europea in Italia*, [in:] *L'attuazione della Procura europea…*, p. 54.

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innovations will influence the mindset of practitioners and lawmakers well beyond the EPPO cases, affecting the daily work also in ordinary, non-European cases.

CONCLUSIONS

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

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

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

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

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ABSTRAKT

Prokuratura Europejska stanowi wysoce symboliczne osiągnięcie dla unijnego wymiaru sprawiedliwości. Celem artykułu jest zebranie pewnych przykładowych przypadków występowania potencjalnych napięć pomiędzy rozporządzeniem 2017/1939 a zawiłościami systemów prawnych państw członkowskich. Jest też próbą zasugerowania ewentualnej kategoryzacji kompetencji transformacyjnych Prokuratury Europejskiej w systemach wymiaru sprawiedliwości państw członkowskich, zwłaszcza w zakresie postępowania karnego. Opierając się na normalnym przebiegu spraw karnych, podane przykłady dotyczą „modelu" śledztwa, kilku środków dochodzeniowych wpływających na prawa podstawowe, rodzajów decyzji prokuratora (w szczególności umorzenia postępowania i postępowań uproszczonych), postępowania sądowego i środków odwoławczych.

Słowa kluczowe: Prokuratura Europejska; wymiar sprawiedliwości karnej; rozporządzenie; prawo krajowe; Unia Europejska