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Editor

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Introduction

Francesca Ruggieri

It is not usual juxtapose criminal justice law and linguistics. The study of the rules of legal process has traditionally been limited to matters of positive law: rarely does it become interdisciplinary and spill over into other realms of knowledge. But as the European Union devotes closer attention to criminal law procedures, it has become necessary to revisit the traditional categories and take a fresh look at certain areas of research that are usually overlooked.

The increase of international crimes is a serious problem, and the consequent efforts of the EU to counter it through judicial cooperation and mutual assistance have obliged criminal law scholars to enlarge their horizons beyond national borders. Knowledge of other countries' legal systems has therefore become an essential qualification. Scholars need to familiarise themselves with foreign legal systems for the practical purpose of optimising the flow of information to repress crime. Similarly, in the framing of Community laws, broad-based knowledge is also necessary for the sake of harmonising legal traditions that are very different from one another.

Legal scholars are used to studying specialised terms and interpreting texts, but in recent times they have also had to strive towards achieving "equivalence" among concepts and institutions that belong to different jurisdictions. The reason for the study of heterogeneous systems is not to discover procedural models that can be used to improve domestic legislation; rather, it is a preliminary, necessary phase to the joint research work that needs to be done into the many different legal systems that will eventually have to coexist in same "area of justice".

The studies collected here are part of the biennial research project "Training action for legal practitioners: fundamental rights, European Union and judicial cooperation in criminal matters through law and language", funded by the European Commission and developed in a series of seminars in Italy and abroad, with the

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participation of representatives from throughout the legal world, linguists, and translators, all of whom are working towards giving some preliminary answers to these developments.

The skill sets of magistrates (GAETA, SPIEZIA), EU officials (GUGGEIS), linguists (GRASSO), academic experts, including scholars of comparative law (BELFIORE, CAMALDO, IORIATTI, DI PAOLO, JACOMETTI, MARCOLINI, MAURO, PERINI, POZZO, RUGGERI, RUGGIERI, TIBERI), persons with training as lawyers (MARCOLINI, RUGGIERI), and others with particular areas of specialisation such as civil law (IORIATTI, POZZO, JACOMETTI) have thus been brought together to create a methodologically sound and comprehensive publication.

The legal framework delineated in the Lisbon Treaty is explored by TIBERI, who looks at the environment in which new European legal scholars will have to operate, including in the area of criminal law. The linguist's (GRASSO's) perspective gives an insight into the difficulties involved in determining a specialist terminology that best serves the purpose of transmitting an accurate understanding of the discrete legal concepts used by different operators in multiple legal systems.

In an analysis of what is in many respects unprecedented legal-linguistic work for the preparation of Community provisions, GUGGEIS explores the complexities of translating texts that, as a rule, have been drafted in English, by now the "lingua franca" of the EU, into different languages, each one of which carries equal weight. An expert in civil law (IORATTI) examines the longer tradition of Community legislation in the area of private law and traces the steps that still need to be taken in the journey towards a common EU terminology of criminal law.

The intricacies and implications of interpreting the different language versions (Italian, English, French, German and Spanish) of the provisions in the Lisbon Treaty dealing with the European Public Prosecutor's Office are explicated by MARCOLINI, MAURO and RUGGIERI, while DI PAOLO and BELFIORE examine the Community laws on personal data. GAETA writes on the issue of EU Directive for the protection of victims of crime; CAMALDO considers the European Investigation Order; RUGGERI contributes again with an essay on the protection of individuals and coercive measures. In a review of Eurojust, SPIEZIA considers the conceptual and practical difficulties of coordinating the activities that Eurojust might have to carry out some day with the European Public Prosecutor's Office.

Civil law experts JACOMETTI and POZZO and the scholar of criminal law, PERINI, examine Community environment provisions, using them as a springboard for reflecting on "the ascending and descending circulation of polysemantic words" and the new importance thereof in the field of criminal law and, consequently, also in the implementing acts of Member States.

Milan, Italy — Francesca Ruggieri
28 November 2012

Part III
The Treaty of Lisbon: Constitutional Provisions with an Indefinite Content

The Lisbon Treaty: The Spanish, English and Italian Versions of Articles 82–86 of the TFEU in Relation to Criminal Justice Cooperation

Stefano Marcolini

Abstract The present paper draws a comparison between the Spanish and the Italian versions of Articles 82–86 of the Treaty on the Functioning of the European Union, making also a brief reference to other languages (English and French), in order both to fix some specific problems and to indicate a general method to resolve multilingualism issues. Finally, a reference is made to the perspectives on creating a European Public Prosecutor.

Abbreviations

EU	European Union
LECrim	*Ley de Enjuiciamiento Criminal*
OLAF	European Anti-Fraud Office
TFEU	Treaty on the Functioning of the European Union

1 Purpose of the Paper

This paper has a dual purpose.

Firstly, it draws a comparison between the Spanish and Italian versions of Articles 82–86 of the Treaty on the Functioning of the European Union (TFEU) and makes a few brief references also to other languages (English and French). In this way, a number of practical and interpretative issues are highlighted, and some suggestions are made as to how they might be resolved. The paper, nevertheless, does not seek to indulge in destructive criticism by pointing out the inevitable

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failings that occur when multilingualism is applied to a legal environment but seeks to offer some constructive comparisons and to find out some general guidelines to resolve every juridical impasse.

Secondly, the paper stands for the adoption of a certain meaning of the concept of "minimum rules", expression contained in articles 82 and 83 of the TFEU, which should offer an opportunity to arrive at some more in-depth conclusions.

2 Preliminary Remarks on Spanish Legal System

To understand how a Spanish legal practitioner will view European Community Law, we first need to have a basic grasp of the Spanish system of justice.

To begin with, we must consider first the interesting concept of the *Ley Orgánica*, which is enshrined in Article 81 of the Spanish Constitution. In order to adopt "organic" acts relating to fundamental rights and public freedoms (*derechos fundamentales* and *libertades públicas*), the Spanish legislature must proceed by means of laws approved by an absolute majority of the Congress. This is a legislative safeguard: it constitutes a general and abstract form of protection of fundamental rights, which the Spanish legislature cannot alter on the strength of a simple majority.

A second important feature is the so-called *recurso de amparo*, which is defined in Article 41 ff. of *Ley Orgánica* (Organic Law) No. 2 of 1979, according to which if a citizen believes that one of her/his fundamental rights, as recognised in the first part of the Spanish Constitution (i.e. Articles 14–29), has been prejudiced by the public authorities, she/he may appeal for a remedy to the *Tribunal Constitucional* (which essentially corresponds in function to the Constitutional Court of Italy). This system offers a jurisdictional protection of fundamental rights: therefore not a general and abstract protection but a protection focused on a "case law" perspective.

A third point to be considered is the Spanish criminal process, which is still governed by the *Ley de Enjuiciamiento Criminal* ("LECrim"), the Spanish Code of Criminal Procedure, which dates back to 1882. The Code, of course, has been revised several times since, and a particularly important amendment in 1988 created what Spanish legal practitioners refer to as an *acusatorio formal* or *mixto* criminal justice system. One of its distinguishing features is the survival of the two-pronged procedure in the preliminary phase of the investigation, in which the public prosecutor (known as the *ministerio fiscal*) works in cooperation with the investigating magistrate (*juez de instrucción*).

A final important point to be noted has to do with the prosecution. In Spain, prosecution is truly public in the sense that all Spanish citizens can initiate it. This prerogative is not only affirmed in Article 101 of LECrim but also enshrined in the Spanish Constitution (Article 125). Thus, the public prosecutor in Spain is obliged to pursue a criminal action but does not have a monopoly of power to prosecute. There are, of course, deterrents to prevent individuals from irresponsibly undertaking groundless actions. The deterrents include *fianza*, which is the "deposit" or "bond" a private plaintiff can be required to file to the Court (Article 280 LECrim), and the provision that, in the event of an acquittal of the accused, a charge of calumny may be brought against the original plaintiff, pursuant to Article 638 LECrim.

3 A Comparison Between the Spanish and Italian Versions of Articles 82–86 TFEU. The Concept of "*resolución*" Versus the Concept of "*decisione giudiziaria*"

Article 82.1 TFEU in its Spanish version uses the term "*resolución*", whereas in Italian the term used is "*decisione giudiziaria*" [which is rendered in English by the term "judicial decision"].

The example is highly serviceable to our purposes here because "*resolución*" is an admirably precise and technical term whose significance in Spanish procedural law leaves no room for doubt. It appears in Article 141 LECrim, which states that "*resoluciones judiciales*" are divided into "*providencias*", "*autos*", and "*sentencias*", in ascending legal complexity. Essentially, it is the equivalent to the Italian "*provvedimento del giudice*" [act of the court or decision of the judge], as defined in Article 125 of the Code of Criminal Procedure, which contains the same list ("*sentenza*", "*ordinanza*", and "*decreto*" [corresponding, roughly, to judgement, order, and decree]), only in descending legal complexity.

There is only one further observation to be made in regard to the differences to the Italian text. The Italian version of Article 82.1 TFEU does not use the expression "*provvedimenti del giudice*" ["acts of the court" or "decisions of the judge"] but, rather, the different expression "*decisioni giudiziarie*" ["judicial decisions"]. For once, this apparent inaccuracy might make sense: much of the judicial cooperation activity, constructed in the shadow of the now-superseded third pillar of Community law, is based on "*mandati*" ("warrants" in the English version), such as in the case of the "*Mandato d'arresto europeo*" (the "European Arrest Warrant"), or on "*ordini*" ("orders" in the English version), such as in the case of the "*Ordine europeo di indagine penale*" (the "European Investigation Order in criminal matters"), which are atypical instruments compared to the triad of "*sentenza-ordinanza-decreto*" ["judgment-order-decree"], and so the loose concept of "*decisioni giudiziarie*" ["judicial decisions"] appears better suited for these new forms of cooperation.[1]

[1] Just two brief observations need to be made here.

The first is that in Italian legal tradition, the two terms ("*ordine*" and, especially, "*mandato*") evoke the terminology of the Code of Criminal Procedure of 1930, which was based on an inquisitorial procedure, until it was replaced by a new Code in 1988, based on an accusatory procedure. It is curious to see how these two terms have now been revived in EU law to refer to the most advanced forms of judicial cooperation. This observation was made by Ruggieri (2012), p. 169.

The second observation is that in Spain, too, the enactment of the sources of the third pillar required the introduction of legal acts whose form is atypical, compared to the triad mentioned in the text ("*providencias*", "*autos*" and "*sentencias*"): see the use of the term "*orden*", such as in the expression "*orden de detención europea*" (the European Arrest Warrant).

4 (Continued). The Difference Between "*magistrado*" and "*magistrato*"

Let us now turn our attention to the concepts underlying the two terms *magistrado* and *magistrato*, which appear, respectively, in the Spanish and in the Italian versions of Article 82.1(c) TFEU, which states that the European institutions shall adopt measures to support the training of the judiciary and the judicial staff.

This is an emblematic case of two similar words that have quite different meanings in their respective languages: what are known as "false friends".

In Italy, *magistrato* refers both to the court judge and to the investigating magistrate—i.e. the public prosecutor. Consequently, both figures enjoy independence from the other branches of government, and their autonomy in this respect is safeguarded by the *Consiglio Superiore della Magistratura* [the Supreme Judicial Council], a constitutionally recognised body.

Not so in Spain. Here, the *Ley Orgánica del Poder Judicial* (No. 6 of 1985) sets out the rules governing the status of *jueces y magistrados* [judges and magistrates], but these offices don't include at all the *ministerio fiscal* [public prosecutor]. The latter office, in fact, is regulated by a different law, namely the No. 50 of 1985, known as the *Estatuto Orgánico del Ministerio Fiscal*. Among other things, it needs to be remembered that the *Fiscal General del Estado* [state prosecutor] is a political appointee (see, on the point, Article 124.4 of the Spanish Constitution).

This alone makes it quite clear that the Italian *magistrato* and the Spanish *magistrado* are very different figures.

Now we can see the problem: the training of the "judiciary", mentioned in Article 82.1(c) TFEU, in Italy can easily refer also to prosecutors but in Spain cannot. The only way of including Spanish prosecutors in training actions is to comprise them, through a broad interpretation, in the second part of the legal text, where reference is made to the "*personal al servicio de la administración de justicia*" ["judicial staff"], even if the expression was probably intended to encompass administrative staff only.

The example of the foregoing makes it fair to say that a deep knowledge of foreign legal systems should be always a *sine qua non* when drafting these supranational rules.[2]

[2] See Selvaggi (2010), pp. 559–560. The case examined by the author concerns an Italian legal practitioner who does not know the Scottish judiciary system: on a mere literal approach, she/he could—wrongly—be led to think that the Scottish "Sheriff's Court" is not a real judge.

5 (Continued). The Ambiguous Concept of "*procedimiento penal*" and the Role of Multilingualism in Determining Its Meaning

We shall now consider the meaning of the Spanish phrase "*procedimiento penal*", which occurs in Article 82.1(d) and again in Articles 82.2(b), 85.1(a), 85.2, and 86.2 TFEU (the expression is variously rendered in the English version as "proceedings in criminal matters", "criminal procedure", and "criminal investigations").

To start, we must observe that even in Italy the term "*procedimento penale*" ["criminal proceeding"] is not entirely fixed, in as much as a "*procedimento*" may refer either to the pre-trial phase only or to the entire process, from the preliminary inquiries all the way to the sentencing. It is in the first sense that, for example, academic authors speak about the "*fase procedimentale*" (pre-trial phase); it is in the latter sense that the term is intended when Article 121 of the Italian Code of Criminal Procedure says that parties can submit to the judge written statements "*in ogni stato e grado del procedimento*" ("at every stage and level of the proceeding").

The Spanish version of Article 82.1(d) TFEU speaks of the need to "*facilitar la cooperación entre las autoridades judiciales o equivalentes de los Estados miembros en el marco del procedimiento penal y de la ejecución de resoluciones*" [in the English version: "facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions"]. However, what does it mean?

The problem of understanding derives from the fact that—unlike the previous examples of "*resolución*" and "magistrado"—"*procedimiento*" is not a technical term even in Spanish. A Spanish legal practitioner is unlikely to use the word. To indicate the preliminary investigative phase, terms such as *sumario* or *diligencias previas* are used; to refer to the entire process from the initial investigation to the intermediate phase and trial, the term *proceso penal* is available.

Acknowledging that it is impossible to attribute an unambiguous sense to the term "*procedimiento*" while remaining within the confines of the Spanish system of law, we find that the best solution is to take advantage of multilingualism: i.e., we need to look at the terms used in other EU language versions of the same law and use them to elucidate the meaning of the Spanish term.

If we begin with the Italian version, we are in for a first surprise: no mention is made of "*procedimento penale*" ("criminal proceeding"), but the text contains the phrase "*in relazione all'azione penale*", which seems to refer to a specific moment of the proceeding: the indictment.

The French text is close to the Italian text, since it uses the word "*poursuites*", a term directly related to the prosecution, i.e. to the act of indictment or (as noted elsewhere[3]) to the opposite decision not to prosecute.

[3] See Mauro (2013), pp. 90–91.

English prefers the vague term "proceedings". If an English practitioner wanted to be more specific, however, she/he would use terms such as "prosecution", "prosecuted", "charge", and "charged".[4]

Attempts at interpretation based on multilingualism would appear to have reached an early impasse. Yet there is a way out, and we can see it in the way the Spanish version uses the expression "*procedimiento penal*" not just once but several times in Article 82 TFEU. Specifically, it recurs as follows:

– "*los derechos de las personas durante el procedimiento penal*" (Article 82.2(b) TFEU);
– "*otros elementos específicos del procedimiento penal*" (art. 82.2(d) TFEU).

For these two passages, the other language versions are consistent: the Italian refers to "*procedura penale*"; the French, to "*procédure pénale*"; and the English, to "criminal proceedings", all of which unequivocally relate to the entire legal process, from the start of investigations to the trial and the final judgment.

Thanks to this systematic and doubly secured interpretation—doubly secured in that it is referred to more than once in the Spanish text of Article 82 TFEU and translated by various expressions in other EU languages—we can conclude that, in keeping with the meaning attributed to the expression with reference to the Italian, French, and English legal systems, the Spanish term "*procedimiento penal*" that appears several times in Article 82 TFEU signifies the legal process in its broadest sense, from preliminary inquiries to final judgment.

The term "*procedimiento penal*" does not occur only in Article 82 but also in other parts of the same Treaty, which immediately raises the question whether the meaning is the same as that we have just explicated.

Unfortunately, the answer is no.

The Spanish term "*procedimiento penal*" also carries a more technical and specific meaning. We can glean this meaning from the provisions relating to Eurojust and its tasks. Article 85.1(a) TFEU states that regulations will be needed to determine, among other things, the tasks of Eurojust, which must necessarily include "*el inicio de diligencias de investigación penal, así como la propuesta de incoación de procedimientos penales por las autoridades nacionales competentes*" ["the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities"].

The Spanish terminology is highly technical: "*diligencias de investigación*" is the specific expression used to indicate the inquiry phase of the process; the term that immediately follows, "*incoación de procedimientos penales*", unquestionably refers to the start of a criminal prosecution.

The confirmation is to be found by adopting a multilingual approach. The other language versions create a sort of concordance, which inhibits any other interpretation: the Italian speaks of "*azioni penali*"; the French, of "*poursuites*"; and the English, of "prosecutions".

[4] The same terminological observations are also available in Selvaggi (2010), p. 554.

The term "*incoación de procedimientos penales*" as given in Article 85.1(a) TFUE refers therefore to the decision to prosecute: and the provision says that this prerogative does not fall within the remit of Eurojust, whose power is restricted to proposing the judicial authorities of Member States to initiate this type of action.

The same meaning is to be found in article 86.2 TFEU in relation to the future powers of the European Public Prosecutor's Office. Here, the Spanish text affirms that the European Public Prosecutor's Office may "*descubrir autores (...), incoar un procedimiento penal y solicitar la apertura de juicio contra ellos*".

The same passage in Italian reads: "*individuare, perseguire e rinviare a giudizio*"; the French reads: "*rechercher, poursuivre et renvoyer en jugement*." Perhaps the English is clearest of all: "investigating, prosecuting and bringing to judgment". All three languages refer to a progression in which the first term relates to the preliminary inquiry ("*individuare*", "*rechecher*", "investigating"); the second and third terms relate to the start of the judicial process, which, in turn, shades into two areas: the first alluding to the indictment or pressing of charges ("*perseguire*", "*poursuivre*", "prosecuting"), the second to the opening of the court trial itself ("*rinviare a giudizio*", "*renvoyer en jugement*", "bringing to judgment").[5] The conceptual differences between the latter two areas can emerge whenever there is a disconnect between the taking of action by the prosecutor and the actual bringing to trial, such as occurs in the Italian system, which provides for an "*udienza preliminare*" [preliminary hearing], at which a preliminary court examines the merits of the case in order to decide whether there are grounds for granting the prosecutor's request and open the trial phase or not.

The course we have followed to determine a meaning for the Spanish expression "*procedimiento penal*" provides us with an interpretative template for other doubtful cases: if a particular piece of legislation is not clear in one language (Spanish, in this case), then the presence of official and approved versions of the same text but in different languages can undoubtedly provide additional help for the interpreter. The conclusion we may draw from this is that we would do well to renounce the traditional monolingual interpretation we have used hitherto, which is restricted by the autarky of a given country's legal system, and open ourselves to a consciously multilingual interpretation.

[5] Article 86.2 TFEU raises a series of other issues that have taken root in more recent times. While the Italian, Spanish, and French versions seem to imply that the European Public Prosecutor's Office shall be entrusted solely for the drafting and presentation of the act of indictment, the English version is equivocal, declaring that the Office "shall exercise the functions of prosecutor in the competent courts of the Member States", which seems to suggest that the Office not only initiates prosecution but then proceeds to support the charges by participating in the trial begun in the relevant Member State, which, in effect, is something quite different.

6 The Concept of "Minimum Rules"

We now look at the concept of "minimum rules". For our purposes here, we shall look at the reference made to them in Article 83, paragraphs 1 and 2 of TFEU, where they are mentioned in reference to the need to harmonise areas of substantive criminal law, and in Article 82.1, where the reference is to the approximation of other areas of criminal procedural law.

What we are dealing with here, however, is not a linguistic mismatch or imprecision but rather an ambiguity intrinsic to the concept itself. What is meant by "minimum rules" of harmonisation? It is a particularly difficult legal problem.

In the area of substantive criminal law, the interpreter at least has some pointers in as much as the European legislator specifies that the "minimum rules" concern "the definition of criminal offences and sanctions" (Article 83.1 TFEU).

Much more problematic is finding any definition in the field of criminal procedure, to which the minimum rules are supposed to refer. According to Article 82.1 TFEU, the minimum rules are to refer to several areas such as the admissibility of evidence, the rights of the person, the rights of the victims, etc., but it is far from clear what degree of specificity is intended, there being several different models available (maximum standard, better law, prevailing orientation, lowest common denominator).

The conclusion is that, at least as far as criminal procedure is concerned, it is certainly appropriate to "force" the concept of minimum rules and to build them into a set of norms as detailed as possible (the adjective "minimum" notwithstanding): this, in order not to frustrate the harmonisation effort, which runs the risk of getting lost in the folds of 27 separate Member States legal systems.[6]

7 From Legal Pluralism to the Birth of a Unified European Criminal Procedure

Our consideration of the concept of minimum rules allows us to draw some final conclusions.

Multilingualism is certainly an "ontic" fact: that is to say, it exists in reality.

It also has a "deontic" value, that is to say, it contains prescriptive elements and has the potential to exalt "the beauty of diversity". The Charter of Fundamental

[6] For a more elaborate justification of the concept of "minimum rules" in the broadest possible sense, see Marcolini (2011), pp. 537 and 540.

The same idea is also put forward in the responses provided by Insubria University to the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility (Brussels, 11 November 2009, COM 2009—624 final). The document is available at http://ec.europa.eu/justice/news/consulting_public/news_consulting_0004_en.htm (accessed 4 December 2012).

Rights recognises multilingualism (Articles 21–22), and European institutions both concern themselves with it and promote it (the European Economic and Social Committee in several recent opinions, the European Council in a Resolution dated 21 November 2008, and the Committee of the Regions). As we have seen, multilingualism is useful also for the purposes of legal interpretation.

Without repudiating what we have said above and without advocating an unlikely scenario of mandatory linguistic and cultural homogenisation, we nonetheless must have the intellectual honesty to admit the unfortunate fact that multilingualism is also a barrier to the free circulation of judicial products.

Since law, language, and culture are inextricably entwined, having 27 Member States means having 27 different legal systems, each of which is continuously and autonomously evolving. Think of what the European Arrest Warrant is today: a tool linking the 27 legal systems, each of which remains distinct, each of which preserves its own peculiarities, and each of which is subject to changes in domestic legislation. It is like a jigsaw puzzle in which the individual pieces can change shape and form, even if only slightly.

Given the current situation, no real breakthrough, I believe, will come from the slow and incremental (but never complete) harmonisation of the 27 different legal systems or even from the pragmatic and, at the same time, ingenious principle of mutual recognition, though both these remain very important elements of progress. Rather, it will come about as a result of the creation of the first unequivocally European organ of criminal justice.

An interesting example comes from the European Anti-Fraud Office (OLAF). In order to allow it to carry out its investigations, which are merely administrative rather than criminal,[7] operational procedures needed to be established and, with them, a set of guarantees (such as the right of a defendant to a lawyer). Naturally, OLAF envisages a single set rather than 27 different sets of procedures and guarantees, and this is the point.

A European Public Prosecutor's Office and, hopefully, a European judge in charge of deciding on matters of custody, as well as a European defence advocate, all of whose initially limited responsibilities would gradually increase over time, would represent true judicial innovation and serve as a very valuable laboratory of law.

This value comes from the circumstance it would be a single unified laboratory rather than 27 separate more or less diverse laboratories, and within this laboratory of law, work could begin on the lengthy task of forging the first common legal concepts relating to diverse forms of investigative acts, matters of jurisdiction, the rights of the defence, the right to interpreters, and so on, through the medium of a unified and unique language that is capable of capturing these new concepts.[8]

We have a long way to go, but the longest journey begins with a single step.

[7] See Perduca and Prato (2006), pp. 4242 ff.

[8] On this point, see the project of the University of Luxembourg to create model rules for the procedure of the European Public Prosecutor Office (http://www.eppo-project.eu/).

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