The cultural and legal impact of the EPPO: the perspective of the Italian system

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In anticipation of the European Commission proposal for a Regulation establishing a European Public Prosecutor's Office (EPPO), the author examines various hypotheses. More specifically, she considers that, in the absence of an ad hoc legal basis, a European judge cannot be assigned the office of Judge of Freedom. As regards the contribution of the Italian Presidency of the EU to the discussions on this issue, the author identifies some particularly important aspects which need to be examined: provisions for the (internal or external) review of EPPO actions, the identification of criteria for determining the competent court and the role of defender.

EPPO: AN INSTITUTION STILL TO BE CREATED WHICH GOES BACK IN HISTORY

In order to reconstruct the possible impact on the Italian legal system of the future EPPO, it is obviously essential to try to understand precisely the nature of future European Public Prosecutor's Office.

Although, as far as we know, the EPPO statute will probably not be made public before the beginning of July, the debate on the nature of this office must continue, especially as it has been going on for almost the last twenty years.

The main sources are well known: the first and second version of the *Corpus Juris*, from 1995 and 2000[1], respectively; the 2001 *Green Paper*[2], the 2007 Spanish Presidency revisions[3], the communications of the Parliament and of the Council[4], the recent Luxembourg University project[5].

1 See the four volumes of Delmas-Marty M., Vervaele J., (Eds.) 2000 *La mise en œuvre du dans les Etats membres Corpus Juris (The Implementation of the Corpus Juris in Member States)*, Intersentia, Antwerpen – Groingen Oxford

2 See the documents and the reports on the responses to them, respectively, at: http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-document/green_paper_it.pdf
http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-suivi/follow_up_en.pdf

3 See J. A. Espina Ramos and I. V. Carbajosa (eds) *The Future European Public Prosecutor's Office*, available free for download *on line*.

4 See *ex multis*, emblematically, 2000 COM (2000) 608 final, Brussels, 29.09.2000, *Communication from the Commission. Additional Contribution to the Intergovernmental Conference on Institutional Reforms. The criminal protection of the Community's financial interests: a European Prosecutor*, and, after the entry into force of the Lisbon Treaty, Council of the European Union, Brussels, 15 April 2010 (16/04) (OR. es) 8614/10 JAI 306 COPEN 99 EUROJUST 43 *Notes from Presidency to Delegations, Subject: The European Public Prosecutor's Office in the European judicial area.*

5 See *Draft Model Rules, The European Model Rules for the Procedure of the European* Public *Prosecutor's Office*, also available in French at the University of Luxemburg website, http://www.eppo-project.eu/ and the book *Toward a Prosecutor for the European Union, volume 1, A Comparative Analysis*, ed. *K. Ligeti*, Hart Publishing, 2012, which includes the contributions of the countries involved.

We also know which points are relatively uncontroversial and those that have been hotly debated from the beginning. In this regard, Article 86 TFEU, although ambiguous in many respects, gives us an outline of the first points and provides the basis for the solution of the second. The public prosecutor will be an organ of the Union; it will be able to act in a judicial sphere comprising the sum of the areas of all participant member countries; initially, at least, it will only prosecute crimes against the financial interests of the Union before individual national criminal courts.

It will then be up to the regulations instituting the office to define its organizational structure and set the rules under which it is to operate. They will specify the guarantees of a judge for its investigative measures that restrict individual rights [such wiretapping] and, more broadly, the forms of judicial review for EPPO power to bring the case before the court or to dismiss it. They will also specify the relationship between the new institution and individual national authorities, "*from*"[6] Eurojust.

It is of no specific significance from the standpoint of this reflection, in anticipation of the measure drafted by the Commission, which actions will be subject to judicial review and whether there will be any mitigation of the principle of mandatory prosecution, which, for example, could be regarded as precluded in the case of compensation for damages.

It is certain that, lacking a juridical basis for the creation of a new European judge, the "*judge of freedoms*", with more or less extensive competences up to the beginning of the trial stage[7], will be a national judge, in accordance with the model outlined in the *Corpus Juris* and then in part adopted in the measure concerning the European arrest warrant, which, not by chance was issued shortly after the second version of the abovementioned study on comparative law.

Equally high is the probability that, irrespective of the individual regulations that are still being drafted, the Union will opt for a central body, a collegial structure, where the representatives of individual Member States will operate through national delegates, who will have, according to a colourful but effective expression, a "double hat": having the powers typically granted to them under national law, powers that delegated public prosecutors will use to investigate crimes against the Union's financial interests specifically and those under their own domestic law[8].

6 On the problems of the various versions of the Treaty of Lisbon, and the language in general, from the viewpoint of linguists and comparative law specialists, see the contributions contained in Various Authors *Criminal Proceedings, Languages and the European Union, Linguistic and Legal Issues*, Springer-Verlag Berlin Heidelberg, 2013, and, as regards Article 86 TFUE, the analyses of Mauro, Marcolini and, if you wish, Ruggieri, on the versions of the Treaty in French, Spanish, and German (compared to Italian and English).

7 When the decision is made about prosecution or dismissal. The lack of a legal basis for a (new) EU criminal judge would make it impracticable to implement Delmas-Marty's proposal, suggested at the end of the work of the second version of the *Corpus*, concerning the establishment of at least one (common) 'preliminary investigation judge" who would examine the grounds for prosecution or dismissal. This option would allow for a judicial review of a case at a very delicate moment: i.e. the 'European action without European jurisdiction' of the future European Public Prosecutor's Office, to identificate the national jurisdiction for the trial to be held.

8 For the different hypotheses, see most recently and in detail (including helpful summary tables) S.White, *A Decentralised European Public Prosecutor's Office Contradiction in Terms or Highly Workable Solution?* in *Eucrim* 2012 n.2 p. 67 ff., ibid also further studies, for example in the context of substantive criminal law as regards offences affecting the financial interests of the Union (an issue of the magazine devoted entirely to the EPPO is available at http://www.mpicc.de/eucrim/archiv/eucrim_12-02.pdf).

THE INFLUENCE OF THE NEW BODY ON THE LEGAL SYSTEMS OF MEMBER COUNTRIES.

Despite the fact that, or perhaps precisely because, the new organ will necessarily be the result of compromise between legal traditions that are very different from one another[9], the impact on our system will primarily be of a cultural nature, in the broad sense. Whatever solution is chosen, it is clear that our country, like all other member states, will have to adapt to a certain extent when it transposes the provisions of the Union.

As partly already happens in Eurojust, the Italian representative, who by necessity will be a "magistrate" (i.e. not a simply police officer)[10], will have to work with colleagues who do not necessarily have the same role in their country of origin or with officials that might not have any legal experience as "magistrates", operating in jurisdictions that are very different from ours. Although the representatives of member states will try to simplify things as much as possible by delegating the various preliminary investigation activities to their local counterparts, who will apply their respective national procedural rules, they will inevitably have to contend with procedures that may be quite different from their own.

Even today, as we know, within the limits of the functions and roles of Eurojust, in which framework decisions have been made to implement the principle of mutual recognition, international judicial cooperation has to contend everyday with different worlds and multicultural scenarios. However, what today is a complex and often occasional tangle of relations between offices of different sovereign systems, based on principles that still echo the traditions of a model of cooperation between states that is "horizontal", future cooperation will necessarily have to come in the form of a much more ductile "vertical" approach[11], with all the problems that such an approach involves: from the different levels of subordination between the central and local offices to the limited but common discipline regulating prosecution and, above all, the choice of competent national court[12].

The scenario created by the EPPO can be effectively described by what in future will be qualified as a an area of justice (i.e. the territory of the Union's Member States considered as a single legal area), which will not be the simple sum of the sovereign territories of Member States. It will be the result of a form of coop-

9 The use of English as a "lingua franca", which is now a long way from the technical vocabulary of Great Britain, is functional to creation of an extremely flexible working tool, allowing the various representatives of Member States to easily determine the institute which is in part or wholly equivalent to one proposed in the EU measure.

10 Not being applicable the ruling of Italian Constitutional Court in sentence 6.4.2011, n. 136, which upheld the legitimacy of the rule concerning the national member of Eurojust since the latter is an authority which does not exercise judicial functions. (For a comment on this ruling, see C. Prota, *La Corte costituzionale esclude la natura giudiziaria di Eurojust*, in *Cass. pen.*, 2011, p. 4278 e G. De Amicis, *La Corte costituzionale nega la natura giudiziaria di Eurojust: una pronuncia discutibile*, in *Forum di quaderni costituzionali*, 2011).

11 For these concepts, which have now become traditional cf. *The implementation of the Corpus Iuris in the Member States*, M. Delmas-Marthy, J.A.E. Vervaele (eds), Vol. IV, Ed. Intersentia, Antwerpen – Groingen Oxford, 2001.

12 For a summary of these issues, in the light of the provisions of the *Corpus Juris* in 1997 (and therefore limited to the fifteen Member States, before the enlargement of the third millennium) see *La mise en oeuvre de Corpus Iuris dans le Etat Membres* M. Delmas-Marthy, J.A.E. Vervaele (eds), Ed. Intersentia, Antwerpen – Groingen Oxford, 2000, vol I , pp. 317 ff. for the introduction of M. Delmas-Marthy and J. Spencer and then the various summaries of the national reports and the compatibility tables (ibid, ff 341, 364-5, where the individual systems, in comparison with the provisions of the *Corpus* are considered to be *totalement compatible, compatible après modification dans législation nationale, compatible après modification Constitutionnelle, compatible après modification dans le* Corpus juris, ovvero ancora *compatible après autres modification.*

eration in which national bodies will act in the interests of the EU, in an ever closer synergy involving all the EPP's assistant prosecutors. In terms of numbers, though significant in relation to the total budget of the Union[13], the quantity of proceedings, at least initially, will not be that great. However, the impact this kind of *modus operandi* may have in practice on each Member State should not be underestimated, in particular as regards the creation of a common European consciousness.

Especially if, as is likely, the initial proposals will tend to be "minimalist" so as to achieve the greatest degree of consensus, the double role of the national representatives will represent a particularly incisive instrument to foster a shared culture of investigation. We know the Union is built primarily on ever deeper reciprocal knowledge, which is at the heart of the principle of mutual recognition.

INDICATIONS (AND HOPES) FOR THE ITALIAN SEMESTER

What then could Italy contribute, in juridical terms, to a discussion which will probably reach its climax during our country's semester in 2014?

As we know, within a scenario made up of a variety of European systems, ours has a history all of its own. Moulded on the French model at the time of Italian Unification (1860), drawn towards the German and Austrian systems during the Finocchiaro-Aprile reform (1913), partially reworked back to the French model with the 1930 code, and finally influenced by the process of *common law* during the recent Republican reform (1989)[14], our criminal trial can rightly be considered to be a melting pot of experiences and, in particular, a kind of bridge between the culture of *civil law* and the Anglo-Saxon tradition.

Our public prosecutor's office, though still organised internally according to French tradition but no longer dependent on the executive power as far as external organization is concerned, has to contend every day with a principle, that of mandatory prosecution, which is applied less and less in practice. Bringing our experience on this subject, which cannot be summarized here[15], to the European debate means sensitizing future European lawmakers to the principle of equality in criminal prosecution: namely, the need to guarantee a trial (a decision from a judge), even in the context of different jurisdictions, whenever the preliminary investigations of the EPP come up with sufficiently strong elements for prosecution.

This can be achieved, irrespective of the principle of mandatory prosecution (impossible in practical terms in any Western system because of lack of resources), only by means of an appropriate system of controls. Whether these controls are from within the EPPO or preferably entrusted to a judge, the essential thing is not to assign the EPP an autonomous and self-sufficient power to prosecute or to dismiss.

Also with regard to the principle of "natural judge"[16], which has a long tradi-

13 The data can be easily derived from the annual reports of Olaf and Eurojust.

14 See, if you wish, F.Ruggieri, *L'italiano giuridico che cambia: il caso della procedura penale*, in *Cass.pen.* n.3/ 2012, § n. 402, pp. 1131 ff. for a summary of the different phases of studies on comparative law in criminal proceedings, with regard also to the various codifications made since the 1865 Code.

15 See, most recently, the column *Opinioni a confronto* on the subject of mandatory prosecution (involving Botti Marzaduri and Miletti) in *Criminalia* n. 5/2010 and, if you wish, F. Ruggieri, *Pubblico ministero (diritto processuale penale)*, in *Enciclopedia del diritto, Annali II*, volume I, *Giuffrè*, Milan, 2008, pp. 998 ff. and Eadem *Azione penale*, in *Enciclopedia del diritto, Annali III*, Giuffrè, Milan 2010, pp. 129 ff.

16 As regards Europe, see M. PANZAVOLTA, *Il giudice naturale nell'ordinamento europeo: presente e futuro*, in M. G. COPPETTA, *Profili del processo penale nella Costituzione europea*, Turin, 2005, p. 110.

tion in our legal system, the Italian perspective can make a strong contribution to the debate in Europe. The problem that arises in (European) prosecution without a judge of the same level (i.d. only domestic) is the identification of the (national) court before to which to bring the case. Even if we may presume that the establishment of the EPPO will also involve a high degree of harmonization of crimes against the Union's financial interests, and even if, inevitably, there will have to be some form of "common" circulation of evidence collected by the EPP between one system and another, it is equally clear that national courts will keep many of their own characteristics. Thus, in practice, the option of one country rather than another (even if only for the sake of efficiency) will tend to affect the choice of the domestic judge, something which should be done in a way that is absolutely disinterested. The criterion of *locus commissi delicti*, apparently the most reliable, must take into account the difficulty of identifying the place where an offence was committed in complex cases of fraud, which usually involve not only several states but also, and above all, several parties (physical and legal). Italy's experience in this could play a significant role.

Finally, our legal system, because of its dual nature of an "adversarial" system with a continental tradition, could contribute to defining the role of lawyer: both in relation to "mandatory defence" (i.e. a laywer must be always in criminal trial: something which not all member countries are acquainted with and which could also be imposed less rigidly, for example depending on the severity of an offence), and, in particular, with reference to investigations carried out by the defendant's lawyer, something which is by no means unheard of in most *civil law* systems.