



FINANCIAL CRIME AND THE OFFICE OF THE EUROPEAN PUBLIC PROSECUTOR

**PROTECTING EU FINANCIAL INTERESTS IN A NEW
INSTITUTIONAL LANDSCAPE**

Edited by
Celina Nowak



Financial Crime and the Office of the European Public Prosecutor

This book examines the realities of the functioning of the European Public Prosecutor's Office (EPPO) along with the actual cooperation with other stakeholders in the EU and in the Member States. The protection of financial interests of the European Union is a Treaty obligation bearing equally on the Member States and the Union itself. In order to increase the effectiveness of the investigations and prosecutions in those areas falling under the PIF Directive, using enhanced cooperation provisions, 22 Member States established the office of The European Public Prosecutor, which came into operation in 2021. Based on examples of five Member States taking part in the EPPO from the beginning – Germany, Italy, Lithuania, Romania, and Slovakia – as well as Poland, which used to be a non-participating Member State and only recently joined the EPPO, this collection analyses the legal framework as well as the practical experience of cooperation in this field. The book will be an invaluable resource for academics and researchers in the areas of EU Criminal Law, EU Law, and EU Constitutional Law.

Celina Nowak is the Director of and Professor at the Institute of Law Studies of the Polish Academy of Sciences, and an experienced criminal law researcher and consultant with 20 years' work experience.



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Financial Crime and the Office of the European Public Prosecutor

Protecting EU Financial Interests
in a New Institutional Landscape

Edited by Celina Nowak

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2 Investigative rules in the fight against organised crime

Domestic peculiarities and European cooperation in Italian criminal procedure

Fabio Nicolichia

1. Investigating organised crime in Italy: general features of the so-called ‘double track’ rationale

In the Italian legal system, the rules of investigation in the field of organised crime suffer from a significant imbalance upstream. In fact, the law has never attempted to codify the concept of ‘organised crime’ in an explicit legal definition, nor has it ever provided a general, exhaustive or unambiguous list of the offences included in that *genus*.

Yet, the fact that the offence being prosecuted belongs to the group of ‘organised crime’ has important procedural consequences which, to a first approximation, can be identified in appreciable deviations from the ordinary statute of preliminary investigations, with a considerable increase in the powers and instruments of the investigator.

The code often links the special regime to the existence of a specific breach included in a significant, rather heterogeneous, and not always coherent, lists of individual offences, which has been consolidated over time in a number of provisions such as, *inter alia*, Article 51(3-*bis*) and (3-*quater*) and Article 407(2)(a) of the Code of Criminal Procedure. If the investigation, in any case, concerns one of those offences considered therein, the maximum duration of the inquiry can be extended to as much as two years, against a physiological duration confined to eighteen months, a choice that is all the more relevant in view of the structural summary nature that should characterise the preliminary investigation prior to the commencement of the action in adversarial systems such as the Italian one. Investigations into offences relating to the whole of ‘organised crime’ also benefit from an *ad hoc* regime for the use of the insidious tool of the so-called *Trojan horse*.¹ Restrictions on the suspect’s access to information concerning the investigation against him or her that can normally be communicated complete the picture,² together with the possibility of

1 Articles 266(2a) and 267 of the Italian Code of Criminal Procedure.

2 Article 335, para. 3 of the Italian Code of Criminal Procedure.

using the invasive investigative means of the so-called ‘agent provocateur’ and undercover operations.³

Although it is outside the scope of the strictly understood rules of investigation, the special rules on precautionary measures also deserve at least a mention as they provide for a significant easing of the conditions for the application of precautionary measures, once again when we are in the presence of criminal phenomena perceived as having particular social alarm. The more widespread use of pre-trial detention also inevitably ends up conditioning the pace and dynamics of the investigation. More specifically, in those cases, a relative presumption of the adequacy of pre-trial detention is established, which is the only applicable measure, unless elements are acquired that can testify to the radical absence of precautionary needs, or in cases that these can be satisfied through the application of another measure.⁴ All the more so, one of the abstractly relevant precautionary requirements listed in Article 274 of the Italian Code of Criminal Procedure is the danger of committing “organised crime offences”.

Sometimes the specialty derives from the reason that the facts for which proceedings are being conducted can be ascribed to an unnamed and entirely undefined concept of ‘organised crime offences’ which, in theory, could also include violations detrimental to the financial interests of the Union, as is typically the case with the significantly more permissive rules for the use of wiretapping of communications or conversations. In such a case, the interception may be ordered simply in the presence of sufficient evidence of the crime, whereas, on the other hand, the existence of serious evidence is ordinarily required, and wiretapping may be carried out in home spaces even if there is no reason to believe that criminal activity is taking place there and for a longer period of time than in the majority of cases.⁵

A final regulatory reference of some relevance for our purposes is to be found in the admittedly rather vague notion of an ‘organised criminal group’ used in Article 1(1) of Law No. 146 of 16 March 2006, which ratified the UN Convention of Palermo against transnational organised crime in Italy.⁶ Evidently aware of the unease generated by this set-up, case law has, over time, attempted in some way to bridge the definitional gap by affirming that “not only mafia crimes and associative crimes provided for by special incriminatory rules, but any type of criminal association, pursuant to Article 416 of

3 See again Article 9 of Law No. 146/2006 with specific regard to transnational organised crime. Presidential Decree, 9 October 1990, No. 309, Article 97 for what concerns antidrug legislation.

4 Article 275, para. 3 of the Italian Code of Criminal Procedure.

5 Article 13 Decree-Law No. 152 of 13 May 1991. It has to be highlighted that Decree-Law 10 August 2023, No. 105, recently extended that special regime to all offences committed in the conditions described by Article 416 *bis* of the Criminal Code regarding mafia-type organisations.

6 See Article 3, para. 1 of law n. 146/2006.

the Italian Criminal Code, related to the most diverse criminal activities” can abstractly fall within the category here under consideration.⁷ In fact, in the Italian criminal system, the offence of criminal association provided for in Article 416 of the Criminal Code punishes anyone associated in order to commit any of the offences provided for in the Code on a stable basis.

The tendency summarised here is one of the historical features of Italian criminal procedure which, since the mafia emergency of the early 1990s, has been characterised by the creation of a so-called ‘double track’ procedure, in which the ordinary rules laid down for the generality of cases are accompanied by provisions specifically dedicated to the investigation and to the procedure inherent in mafia-type crime, a module that has been extended over time to other types of offences.⁸

Leaving aside the regulatory specialties, it is interesting to add here that investigations regarding organised crime are distinguished even earlier from general investigations for reasons linked to the very nature of the enquiry, even irrespective of the existence of the special rules of procedure that derogate from the general provisions. What is crucial, in this regard, is the physiological complexity of the subject matter of the investigation, a complexity that, to say the least, appears to be exacerbated in cases of organised fraud against the finances of the Union, which is the subject of particular attention here, and which is notoriously characterised by complex fraudulent mechanisms and concatenations.⁹ In these cases, the institutions of the investigation receive special, practical implementation in order to allow the activity to take place. Illuminating in this respect is the example of computer seizures, which often result in a generalised apprehension in the impossibility of making a distinction already on the spot between elements that are relevant or extraneous to the investigative interest,¹⁰ with serious concerns for the effectiveness of the principle of proportionality that should limit the interference of the authority in the sphere of individuals to what is strictly necessary.

The vertiginous rise in the importance of patrimonial sanctions in the repressive techniques of organised crime, in accordance with the trends dictated at supranational and especially European level, is also fully a part of this scenario.¹¹ In the investigative field, asset ablation favours a wide and early

7 Cass., Sez. un., 22 March 2005, Dep. 11 May 2005, No. 117706. On this topic see also A. Zampaglione, *La prova nei processi di criminalità organizzata*, Wolters Kluwer, 2016, p. 67.

8 P. L. Vigna, Fighting Organised Crime, with Particular Reference to Mafia Crimes in Italy, *Journal of International Criminal Justice*, Volume 4, Issue 3, July 2006, p. 522.

9 As it happens for example in the case of the so-called VAT Carousel Fraud.

10 L. Bartoli and G. Lasagni, Antifraud Investigations and Digital Forensics: A Comparative Perspective, in M. Caianiello and A. Camon (eds.), *Digital Forensic Evidence: Towards Common European Standards in Antifraud Administrative and Criminal Investigations*, Wolters Kluwer, 2021, p. 210.

11 For a comprehensive overview, C. Fijnaut, The Strategy of the European Union Against Serious Transnational Crime, in F. Allum and S. Gilmour (eds.), *The Routledge Handbook of Transnational Organised Crime*, Routledge, 2021, p. 522.

recourse to the instrument of seizures, according to a real redundant pattern in the dynamics of investigations into organised fraud, which feeds upstream complex and in-depth asset investigations aimed at identifying the assets that can be seized.¹²

2. Specialisation and centralisation in investigating organised fraud at national level

The structure of relations between the institutional actors in charge of investigations into organised crime at a national level also differs significantly from the usual one envisaged in general cases. This is a further aspect of specialty that can always be traced back to the regulatory evolution generated by the mafia emergency of the early 1990s, which originates a marked centralisation of investigative competence. This is clearly intended to ensure effective coordination between the various bodies involved, guaranteeing synergic action to additionally avoid the dispersion of the knowledge held by the various authorities.¹³

In detail, Article 51, paragraphs 3-*bis*, 3-*quater* and 3-*quinqüies* of the Italian Code of Criminal Procedure establishes the investigative competence of the district prosecutor for a whole series of offences that can be traced back to the concept of organised crime or that are perceived as being of particular social alarm. These include association for the purpose of international smuggling of foreign tobacco products. Article 372(1-*bis*) of the Code of Criminal Procedure then allows the Attorney General at the Court of Appeal to call off the preliminary investigation if coordination between the different investigations does not appear effective. Article 54-*ter* of the Code of Criminal Procedure, conversely, specifically regulates the eventuality of conflicts of jurisdiction between different offices of the public prosecutor in matters of organised crime, requiring the involvement of the branches of the national anti-mafia and anti-terrorism prosecutor's office.

This office is part of the National Anti-Mafia and Anti-Terrorism Directorate (D.N.A.), set up by Decree no. 367 of 20 November 1991, and exercises, through the powers listed in detail in Article 371-*bis* of the Code of Criminal Procedure, the coordination of the activities of the individual District Anti-Mafia Directorates (D.D.A.) set up in the district prosecutors' offices distributed throughout the national territory in relation to investigations concerning the offences referred to in Article 51(3-*bis*) and (3-*quater*), also making use for this purpose the Anti-Mafia Investigative Directorate (D.I.A.), an

12 More in detail, even with specific regard to the single techniques, G. Furciniti and D. Frustagli, *Le indagini economico patrimoniali nel contrasto alla criminalità organizzata*, Giuffrè, 2013.

13 S. Lorusso, "Superprocura" e coordinamento delle indagini in materia di criminalità organizzata tra passato, presente e futuro, *Dir. pen. cont.*, February 2014, p. 24.

inter-force police department in charge of preventive and judicial investigations relating to mafia crime.

However, the law does not establish exclusive competences of the different police forces in the material execution of investigations concerning organised crime, although the different corps are internally endowed with specialised departments. The Guardia di Finanza, which is particularly relevant from our perspective as it is in charge of the repression of crimes of an economic-financial nature, a group that also includes organised fraud against the European Union, is no exception. For this purpose, a '*Nucleo Speciale Spesa Pubblica e Repressione Frodi Comunitarie*' (Special Unit for Public Expenditure and Repression of Community Fraud) has been set up within the corp, which is responsible for ascertaining the regular use of resources allocated at European level. In its activities, the unit also makes use of the operational relations institutionally maintained with competent Authorities, Bodies and Institutions in the sector. In its activities, the unit also makes use of the *Sistema Informativo Anti Frode* – (S.I.A.F.), an important business intelligence tool created in 2013 as a result of the contribution of the Union with the main objective of strengthening the action against EU fraud. In essence, it is an integrated database of data from different sources through which the military can acquire and analyse useful information to direct and plan investigation activities.

Again, with regard to the provision of useful information to feed investigations, emphasis must be placed on the significant delay accumulated by the Italian legislator in transposing Directive 2019/1937/EU, on the protection of persons who report breaches of Union law, the transposition deadline of which expired in December 2021, and which was finally implemented only by Legislative Decree 10 March 2023, no. 24. Clearly, this is also a crucial tool to ensure the adequate flow of knowledge in favour of the authorities in charge of repressing organised fraud, which often originates in closed contexts that are difficult for investigative bodies to access.

However, it must be said that through Legislative Decree No. 75 of 14 July 2020, the Italian legislator transposed Directive 2017/1371 (the so-called PIF Directive). The implementation of the European source was translated in this case into some amendments to the Criminal Code, essentially aimed at tightening the sanctioning treatment of certain types of offences and extending the criminal relevance of the conduct of embezzlement, fraud and undue inducement to give or promise benefits to cases in which the conduct relates to facts that harm the financial interests of the Union, with damage exceeding EUR 100,000. Additionally it has to be mentioned the expansion of the list of so-called predicate offences capable of giving rise to the concurrent formally administrative liability of legal persons under Legislative Decree No. 231 of 8 June 2001, which now includes, *inter alia*, the offences described in Articles 4 (untrue declaration), 5 (omitted declaration) and 10-*quater* (undue compensation) of Legislative Decree No. 74/2000 provided that they are “committed in the context of cross-border fraudulent schemes and for the purpose of evading value added tax for a total amount of not less than ten million euro”.

On this point, there has been a recent corrective intervention by Legislative Decree No. 156 of 4 October 2022, in substance aimed at extending the confiscation hypotheses already provided for and at broadening the area of punishability for the implementation of cross-border systems aimed at evading value added tax.

Our brief overview of the main attributes of the Italian system of enforcement cannot be said to be complete without at least a mention of the complex so-called ‘anti-mafia’ prevention system under Legislative Decree No. 159/2011. Overall, this consists of a series of personal and patrimonial measures that can be adopted against a large number of persons who are considered to be socially dangerous, even though they are not necessarily the recipients of an actual criminal charge. It should be said that, far from confining its scope to persons suspected of being connected to mafia-type criminal circles, the system today also applies to persons generically considered to be engaged in unspecified criminal activities, in addition to, insofar as it is of particular interest here, those simply suspected of the crime of aggravated fraud to obtain public funds, which, under Article 640-*bis* of the Criminal Code, punishes anyone who procures, by artificial means, public funds or other financial resources, or who is suspected of committing a crime of fraud, punishes anyone who procures through artifice and deception contributions, financing or other disbursements from the State or the European Union.¹⁴

The activities that can be carried out in order to gather elements useful for the application of a measure of prevention are, for the most part, left to the discretion of the prosecuting authority, without being typified in an appropriate regulatory source. It is also for this reason that in the Italian criminal procedure the ideally consecutive phases of the prevention and repression have agglutinated, giving rise to a long continuous line of mixed, amphibious and ambivalent operative techniques, to the detriment of the function of the principle of the rule of law.¹⁵ Only Article 19 of Legislative Decree no. 159/2011 is concerned with specifying the power to carry out investigations into the standard of living, financial resources and assets of candidates for the application of certain prevention measures for the purpose also of identifying sources of income. Such investigations are aimed, in particular, at ascertaining whether the persons, against whom the adoption of a measure of prevention has been proposed, hold licenses or the necessary authorisation to engage in entrepreneurial and commercial activities, including enrolment in professional registers and public registers, whether they benefit from contributions, financing or loans and other disbursements of the same type, however denominated, granted or disbursed by the State, public bodies or the European Union.

14 Article 4 of Legislative Decree 159/2011, lett. i-*bis*.

15 D. Negri, La regressione della procedura penale ad arnese poliziesco (sia pure tecnologico), *Arch. pen.*, 2016, p. 46.

3. Vertical cooperation between national authorities and European institutions: the implementation of the EU regulation 2017/1939 in Italy

In the field of ‘so-called’ vertical cooperation between national authorities and European bodies, attention is today understandably monopolised by the novelty represented by the European Public Prosecutor’s Office, established pursuant to Regulation 2017/1939/EU, which has finally come into operation following the adoption of the body’s internal regulation¹⁶ and the transposition that took place in the national sphere through Legislative Decree No. 9 of 2 February 2021. Indeed, the domestic rules intervene only on the aspects strictly necessary for the material operability of the Public Prosecutor’s Office, postponing, to a later date, the adoption of rules relating to other important profiles, such as the regulation of cross-border investigations carried out with the cooperation of another European Public Prosecutor’s Office based in a different Member State pursuant to Article 31 of the Regulation.

The existing set-up seems to have been proved to be adequately functional if one considers that, according to the statistics released for the year 2021, Italy ranks first among the member countries in terms of the number of investigations opened by the EPPO.¹⁷ However, there is no shortage of critical profiles in the choices made by the national legislator that are abstractly capable of affecting the functionality of the body and, ultimately, the future effectiveness of the strategies to fight crimes against the financial interests of the Union.

Most of the twenty Italian Deputy European Public Prosecutors are already operational, following the conclusion of the special agreement provided for in Article 13(2) of the Regulation. Likewise, the National European Public Prosecutor has already been appointed in accordance with the procedure laid down in Article 16(1) of the same source. In this regard, it is worth noting that Italy, unlike other Member States, has opted to attribute to the delegated prosecutors only prosecutorial functions in the interest of the European Public Prosecutor’s Office, without availing itself of the option of a ‘*part-time*’ appointment also expressly provided for by the regulation in order to preserve for the appointed prosecutors also powers relating to proceedings of purely national importance.¹⁸

¹⁶ Act 2021/C 22/03 of 21 January 2021.

¹⁷ According to EPPO 2021 Annual Report, <https://www.eppo.europa.eu/en/news/eppo-investigates-eu54-billion-worth-loss-eu-budget-its-first-7-months-activity#:~:text=Of%20the%20576%20investigations%20opened,taken%20over%20by%20the%20EPPO>), Italy has 120 active investigations pending.

¹⁸ See Article 13, para. 3. With some critical remarks on this point, highlighting that on a functional perspective the exclusive competence of the delegated national prosecutor could excessively limit the investigative spaces, R. Belfiore, I procuratori “super distrettuale” per i reati che ledono gli interessi finanziari dell’Unione europea: Un nuovo “terzo binario” investigativo, *Sist. pen.*, December 2021, p. 67.

In relation to proceedings attributed to the European Public Prosecutor, the Italian legislation does not provide for any derogation from the ordinary jurisdiction criteria laid down in the Code. This therefore implies that the proceedings, attributed to the European Public Prosecutor established at the district seat, may well be dealt with at one of the courts in the district, nor is there any provision for the district jurisdiction of the investigating judge existing instead under Article 328(1-*bis*) and (1-*quater*) of the Code of Criminal Procedure for the offences listed in Article 51 paras 3-*bis*, 3-*quater* and 3-*quinqüies*. This choice clearly differs from that made in other European jurisdictions, which have sometimes even centralised jurisdiction for ‘EPPO cases’ at a single national seat. Although a harbinger of organisational problems, the Italian solution appears undoubtedly more sensitive to the principle of the so-called “natural justice” enshrined in Article 25 of the Constitution, and to the principle of equality also laid down in Article 3 of the Constitution.¹⁹ Moreover, pursuant to Article 9(2) of Legislative Decree No 9/2021, Deputy European Public Prosecutors exercise their prosecutorial functions throughout the national territory, regardless of the place of assignment.

An element of a strong divide in the statute of the delegated European Public Prosecutor, compared to the regime of treatment reserved for national colleagues, is that which relates to the independence granted to the former with respect to the domestic system. As is well known, in fact, and as solemnly proclaimed in Article 6 of the regulation, ‘the EPPO shall be independent . . . and . . . shall act in the interest of the Union as a whole’. The national legislation transposes this important principle in the text of Article 9(3) of Legislative Decree No 9/2021, when it expressly states that Deputy European Public Prosecutors are not subject to the powers of hierarchical direction normally conferred on public prosecutors by the relevant provisions of national law. This is, in fact, a very important aspect of functional criticality, which is explicitly stated in the instructions issued by the Italian “Consiglio Superiore della Magistratura” in its resolution on the “organisation of public prosecutor’s offices following the establishment and start of activities of the European Public Prosecutor’s Office”.²⁰ Whilst reaffirming, in principle, the absolute institutional autonomy of the European Public Prosecutor’s Offices, the document in question, in fact, repeatedly refers to the opportunity for a “uniform application, both by national prosecutors and by DEPs, of the organisational circulars of the prosecuting offices adopted in order to implement and ensure the operability of primary rules that relate – directly or indirectly – to the exercise of judicial functions”. It is possible to comprehend plastically in this passage the basic

19 See L. Salazar, L’adeguamento interno da parte italiana al regolamento EPPO alla vigilia dell’avvio delle prime indagini, *Sist. pen.*, April 2021, p. 60, which is afraid of the delays caused by such option.

20 <https://www.csm.it/documents/21768/87316/organizzazione+uffici+requirenti+e+EPPO+%28delibera+28+luglio+2021%29/a01a2429-60bf-cf8f-06fc-10fd1ce9800e>.

ambiguity of the statute of the national representatives of the European Public Prosecutor's Office, upstream deriving from the subjection of the DEP to the law of the Member State in which he or she operates. Moreover, this ambiguity reaches its maximum level in the eventuality contemplated by Article 13(3) of Regulation 2019/1939 itself, i.e. when the hierarchical power of the national authority would be exercisable or not against the same magistrate only depending on the specific capacity held at that particular moment. Beyond this general consideration which is, moreover, not relevant for the Italian context in view of the aforementioned choice to reserve exclusive functions to DEPs operating in the national legal order, the insistence of the Consiglio Superiore della Magistratura on the need for functional and organisational consistency of the offices, in which DEPs are incardinated, is striking. Although these needs are undoubtedly relevant, the markedly innovative nature of the independence of the European body would perhaps have suggested a more cautious approach in relation to this delicate aspect.

In the economy of the profitable functioning of the new body, the management of the flow of criminal information between national authorities and the European Public Prosecutor's Office is obviously crucial. In fact, only a system of orderly allocation of 'cases' can guarantee the effective and timely involvement of the supranational body, whilst avoiding delays and those delays due to possible conflicts with the national Public Prosecutor's Office.²¹

The choice of the national legislation, in this respect, has been that of the so-called 'double entry', i.e. of the simultaneous communication of information concerning offences in respect of which 'the European Public Prosecutor could exercise his jurisdiction pursuant to Articles 22 and 25(2) and (3) of the Regulation shall be submitted or forwarded not only to the national Public Prosecutor but also to the Deputy European Public Prosecutor'. Apart from the case where the DEP expressly waives the exercise of jurisdiction, the national public prosecutor also retains ownership of the file after the expiry of thirty days from the entry of the offence in the appropriate register.²² Nothing is stated, however, about the case in which it is the EPPO that receives directly the report of the fact, a hypothesis which is, moreover, at least residual at present in the practice in our country with only three reports coming from private individuals out of the two hundred sixty-two reports handled by the EPPO in the year 2021.²³

21 Our translation from the original text in Italian. More in general, on the importance of the flow of crime reports already with regard to cooperation between national authorities and OLAF, see D. Negri, Best Practices and Operational Models in Financial-Economic Investigations in Europe in View of the EPPO, in A. Bernardi and D. Negri (eds.), *Investigating European Fraud in the EU Member States*, Hart Publishing, 2017, p. 163.

22 Article 14 Legislative Decree No. 9/2021.

23 See again the EPPO 2021 Annual Report, <https://www.eppo.europa.eu/en/news/eppo-investigates-eu54-billion-worth-loss-eu-budget-its-first-7-months-activity#:~:text=OP%20the%20576%20investigations%20opened,taken%20over%20by%20the%20EPPO.>

The ‘double entry’ option is probably intended to minimise any risk of dispersal of communications relating to criminal offences potentially resulting from a lack of coordination between the national and European bodies. Conversely, the effective operation of the EPPO is largely left to the scruples of the police services first and then of the national prosecutors who, in the face of the rather vague wording of Article 14 of Legislative Decree No 9/2021, which matches the vague criteria for conferring jurisdiction laid down by the regulation, leave intact a substantial margin of discretion in identifying the offences in respect of which the European Public Prosecutor ‘may exercise jurisdiction’.

The delicacy of this aspect is clear in the national context when the emphasis is placed on the advisability of drawing up special documents to better specify the information to be immediately transmitted also to the DEPs.²⁴ Another useful expedient to regulate information flows between police authorities, national prosecutors’ offices and the DEPs is the designation of a special ‘contact point’ in each national prosecutor’s office, responsible precisely for managing communications with the delegated European prosecutors and the centralised structure of EPPO.²⁵

4. Horizontal cooperation inside and outside the EU

Turning now to the analysis of the landscape of horizontal investigative cooperation between European Union Member States, a specific reference has to be made to the European Investigation Order (EIO) governed by Directive 2014/41/EU which still represents the most advanced instrument for the circulation of evidence, with pre-eminence over the provisions of the mutual assistance conventions that may exist between the States bound to the application of the Directive, including Italy. The EIO, unlike its predecessor, represents a mechanism of a tendentially all-encompassing nature, i.e. referring both to actual evidence and to the performance of “all investigative acts aimed at obtaining evidence”.²⁶

The directive does not contain any specific provisions dedicated to investigations into organised fraud and offences affecting the financial interests of the Union. Nevertheless, Chapter IV, dedicated to provisions referring to certain

24 G. Melillo, Il ruolo delle Procure della Repubblica di fronte alla nuova normativa sulla Procura Europea, *Quest. giust.*, 29 April 2021, <https://www.questionegiustizia.it/articolo/il-ruolo-delle-procure-della-repubblica-di-fronte-alla-nuova-normativa-sulla-procureuropea#:~:text=Protocols%20of%20agreement%20or%20convergence,that%20specific%20reato%2C%20but%20also>.

25 As suggested by the document already cited, note no. 20.

26 S. Allegrezza, Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality, in S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe: Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-Border Cases*, Springer, 2014, p. 53.

investigative acts, takes into consideration specific investigative measures that are undoubtedly relevant in the perspective of the investigation dedicated to shedding light on conduct detrimental to the Union budget. One may consider the information on bank and other financial accounts, information on banking and other financial operations and the monitoring of banking or other financial operations that are being carried out through one or more specified accounts considered at art. 26, 27 and 28.²⁷

The Italian legislator implemented Directive 2014/41/EU by means of Legislative Decree No. 108 of 21 June 2017, bringing the acquisition of banking information back to the instrument of seizure from banks and to the duties of documentary exhibition, *pursuant to* Articles 255 and 256 of the Code of Criminal Procedure, and the real-time monitoring of financial transactions back to the institution of interception of communications regulated by Articles 266 et seq. of the national code of procedure.²⁸

As regards the first measure, although undoubtedly this is detrimental to the right to respect for private life and protection of personal data enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the EU, interpreted in the light of Article 8 of the European Convention on Human Rights,²⁹ it must be said that under national law, it can be simply ordered by the public prosecutor, a solution that is hardly compatible with the outcome of certain recent rulings of the Court of Justice, albeit mainly referring to the acquisition of telephone traffic data. Reference is made in this case to the case-law which holds that Article 15(1) of Directive 2002/58/EC on the protection of privacy in the telecommunications sector must be interpreted as precluding national legislation which makes the public prosecutor competent to authorise access to telephone traffic and location data for the purposes of a criminal investigation, at least where he plays the role of a party to the criminal investigation, as is the case in the Italian system.³⁰ The principle also seems *mutatis mutandis* exportable in the field of banking investigations, especially if one considers that, as mentioned earlier, the information thus acquired falls within the sphere of protection of the right to respect for private life.

However, with reference to the rules governing the real-time acquisition of data relating to financial transactions, the significant divergence emerging from the Italian transposing legislation is striking with respect to the classification of similar activities where they are ordered by national authorities. In a purely domestic dimension, they are considered as simple searches or as atypical operations due to the non-communicative nature of the data acquired. If, in one regard, the express reference to the rules on wiretapping by the rules

27 On this regard, G. Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, Springer, 2019.

28 Article 20 of Legislative Decree No. 108/2017.

29 See, among others, ECHR, 27 April 2017, Sommer v. Germany, § 48.

30 See CJEU, 17 December 2020, C-746/18.

implementing the directive of the EIO, from which derives the need for a judge's authorisation and the existence of strict conditions for the execution of the measure, considerably burdens the functionality of the cooperation, in another respect, it appears to be a mandatory solution in order to ensure the compliance of the regulatory framework with the guarantees of the rule of law and proportionality, expressly provided for in Article 52 of the Charter of Fundamental Rights of the Union.

For what constitutes extra-EU cooperation, the rogatory procedure, governed by Articles 723 et seq. of the Code of Criminal Procedure, as reformed by the provisions of Legislative Decree no. 149 of 3 October 2017, is the traditional method for acquiring evidence abroad and providing assistance in investigative matters to foreign counterparts. Letters rogatory may relate to both acts of investigation and evidence in the strict sense. A rogatory can be used to obtain evidence such as witnesses, statements of the accused, searches, seizures, wiretaps or even just for the transmission of documents or other existing objects. Additionally included are those "further activities, mainly pertaining to the investigative phase, that can provide information and documentation that can be used in the trial from which the request originates".³¹ Here, the panorama is extremely wide and varied: it embraces special investigative techniques such as undercover activities, cross-border observation, spontaneous information or controlled deliveries.

Of particular importance today is the possibility of taking statements from defendants or witnesses by resorting to transactional videoconferencing, a highly effective tool that combines respect for defence guarantees with the need to save time and resources, which has recently received specific regulatory attention, albeit only on the passive side of assistance, in the provisions of Articles 726-*quinquies* and 726-*sexies* of the Code of Criminal Procedure.

The request originates from the issuing (or assisted) state and is directed to the issuing (or assisting) state. The traditional distinction runs between active (foreign) letters rogatory, in which the state requests assistance, and passive (or from abroad) letters rogatory, in which, speculatively, the state is requested by another state to offer assistance.

A number of general principles apply: For example, the one expressed by the Latin brocardo *locus regit actum*, which calls for the application of the law of the requested state.

The principle of double criminality also applies, i.e. the impossibility of granting a request for judicial assistance if the act for which the requesting authority is prosecuting is not also a crime under the law of the requested State. This latter limitation on cooperation is less far-reaching, in the case of 'letters rogatory', than its counterpart in the case of extradition: the bilateral prediction of the fact does not represent an insurmountable obstacle, as the

31 M. R. Marchetti, Rapporti giurisdizionali con autorità straniera, in M. Bargis (ed.), *Compendio di procedura penale*, Cedam, 2020, p. 961.

various conventions often do not provide for such a limitation or, even if there is a trace of it, its scope of application concerns only house searches or seizures.

However, both the *locus regit actum* principle and the dual criminality principle are progressively losing their centrality in judicial cooperation in criminal matters. There are more and more exceptions, explicit or implicit, to these traditional principles and how the jurisprudence of the European Courts, both from Luxembourg and Strasbourg, is laying the foundations of a different perspective, oriented towards mutual trust and mutual recognition, which is moreover now expressly emphasised even within the same codified discipline in Article 696-*bis* of the Code of Criminal Procedure.

Article 727 of the Code of Criminal Procedure regulates the modalities of the active rogatory request: it must go through the Minister of Justice, who will forward it via diplomatic channels, unless the conventional rules allow direct contact with the foreign judicial authorities. The new Article 727(2), of the Code of Criminal Procedure, downsizes the role of the political authority when, if the request for assistance is addressed to a Member State of the European Union, it allows the exercise of the so-called ministerial blocking power only in the cases and within the limits established by the conventions in force and by Union law.

The procedure that regulates passive, rogatory letters provides that the request from the foreign State is received by the Minister of Justice (unless contractual law provides for direct contact between judicial authorities). If the request for cooperation comes from another EU Member State, however, ministerial control over the appropriateness of executing the request degrades to a mere eventuality that can only be exercised in the cases and within the limits contemplated by European sources.

Certain deliberations, of an exquisitely political nature, are the responsibility of the minister alone when the request for assistance comes from a third State: he must reject the request if there is a risk of compromising 'the sovereignty, security or other essential interests of the State' or if, in the case of the summoning of a witness, expert or defendant before a foreign authority, the foreign State does not offer 'an appropriate guarantee of the immunity of the person summoned' or when the principle of reciprocity is not respected. In two other cases, the review is the responsibility of both the minister and the judicial authority: the request for 'letters rogatory' must be refused if it is clear that the acts in question are prohibited by law or contrary to the fundamental principles of our legal system, or if there is a risk of contributing to a discriminatory process, unless the person concerned consents. If the decision is taken by the political body, it can only be based on the 'socio-political situation of the requesting state'.

If the application is deemed admissible, the Minister shall forward it, within thirty days, to the public prosecutor at the court of the district capital in which the activities requested are to be performed. In the event of multiple activities to be carried out in several districts, the prosecutor of the district in which the greatest number of acts is to be carried out, or, in the event of numerical

parity, the prosecutor of the district in which the act of greater investigative importance is to be carried out. The 2017 reform, in fact, scaled down the operation of the criticised, preventive filter mechanism of the Supreme Court of Cassation, the result of a 2001 reform, which had aroused strong reservations mainly due to the fact that a decision to entrust a judge with a choice with wide margins of discretion was in conflict with Article 25(2) of the Constitution. Pursuant to Article 724(6) of the Code of Criminal Procedure, the involvement of the Court of Cassation is still provided for only in the event of a dispute concerning cases in which the involvement of the judge in the rogatory procedure is necessary.

The most significant innovation made by Legislative Decree No. 149/2017 is, in fact, undoubtedly represented by the remodeling of the so-called *exequatur* procedure. In fact, the representative of the prosecution will now be able to decide, autonomously, on the admissibility of the request for assistance by possibly executing it with a reasoned decree, the intervention of the judge being confined to specific hypotheses.

5. Conclusions and recommendations

It must be acknowledged at this point that the latest national developments on the subject of investigative cooperation, aimed at combating fraud detrimental to the financial interests of the Union, created a well-structured regulatory framework and to a positive commencement of the activities of the new European Public Prosecutor within the Italian legal system. Despite the fact that statistics seem to show that national provisions are of course adequate to ensure EDPs operativity, the real effectiveness of the normative framework should probably be assessed on a longer period, when more data on prosecution and adjudication will also be available.

With the sole exception of the association aimed at smuggling foreign processed tobacco, the strategies to combat so-called PIF fraud at national level still tend to be outside the so-called ‘double track’ scheme, a historical trait of the national establishment in terms of criminal investigations still very much focused on the fight against mafia crime.

The extension of that special regime to this type of offence could undoubtedly result in strengthening the coordination and incisiveness of the action to combat these phenomena. However, this option would introduce a further significant element of fragmentation into the system, with correlative sacrifices for the prerogatives of the subjects involved in the investigations. Additionally, the irresistible rise of the *praeter delictum* prevention system, as has been observed for some time now, is also dedicated to those who are simply suspected of the crime of aggravated fraud for the purpose of obtaining EU financial disbursements. That system gives rise to significant concerns for the protection of the rights of those affected by the preventive measures, mainly in view of the incisiveness of such sanctions in the face of the almost total vagueness of the prerequisites that lead to their application.

More in general, and still adopting a right oriented perspective, it has to be said that the vague wording of many provisions of the European regulation might give raise to serious concerns for defence rights. It is true that art. 41 of the EPPO regulation recalls the *acquis communautaire* on the protection of the accused's rights; However, provisions are thought of for a purely national context, not for a system where the European prosecutor might exercise its competence throughout the whole continental territory.

Apart from normative solutions which could be in the future introduced by legislators, it is probably the development of mutual trust between the EPPO and EDPs from one side, and national enforcement authorities on the other side, that will play a major role in ensuring the functioning of the European prosecution model.