

THE EPPO and EU LAW: A STEP FORWARD IN EU INTEGRATION

A Digital Collection of Lectures
2021-2022



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FOREWORD

The European Commission (Jean Monnet Module, *The EPPO and EU Law: A Step Forward in Integration*) and the University of Milan-Bicocca (European Union Law Chair) joined forces to organise a series of lessons that were scheduled between March and April 2022 around the topic of the European Public Prosecutor's Office (the EPPO). All lessons were free, and participation was highly encouraged. Lessons were organised so to allow for both online and in person presence, with participants having the opportunity to engage with the sessions as they appeared live, or at a later date. Speakers were selected from among the most relevant scholars and professionals all over the world. Speakers derived from leading EU bodies and institutions, such as the EPPO and Court of Justice of the European Union (CJEU), as well as Italian authorities, including the Bank of Italy and the General Prosecutor's Office of the Court of Auditors.

The situation we live in has highlighted and made unstoppable that which we have long known. That we are heading towards a world in which European Union funds (including those of the NextGenerationEU) will be used to recover from the health, environmental and financial consequences of the COVID-19 pandemic. Further, these funds will prove important in recovering from the humanitarian, energy and environmental crises posed by the Ukrainian-Russian conflict. Therefore, a world where solidarity and sustainable development will be the keywords for the future. So, the following question is posed: If EU funds are increasingly important, how is the EU, and EPPO in particular, duly equipped to respond to the needs of this new world? This issue was addressed by speakers with competence and courage, and we are very proud to present this Digital Collection of Lectures as a step forward in EU integration.



Professor Benedetta Ubertazzi
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Overall, this first cycle of *The EPPO and EU Law: A Step Forward in Integration* was a positive step forward for integration. Between the first session on March 1st and the final session on April 20th, 2022, the program attracted more than 450 participants both in person at the University of Milano-Bicocca, as well as through online modalities. These participants included lawyers, students, academics, trainees, citizens, and the Finance Police.

An important element of our first cycle was the creation of a website: www.steppo-eulaw.com. This website contains all of the lectures from the first cycle, as well as recordings and a regularly updated blog on important and interesting evolutions in the EPPO in the European Community. This website attracted almost 550 new visitors during March and April. Further, the program also benefitted from having a social media presence on Instagram, Facebook, Twitter, and LinkedIn. There are now almost 350 individuals engaging with the program through these social networks. This Digital Collection of Lectures was compiled during the course of the sessions and reflects summarised versions of each author's original presentations. Each presentation is accompanied by links to the author's recordings as well as their slides and other media sources used during the sessions.



Mr. Giovanni Crespi
STEPPO Staff Coordinator

I would like to thank the STEPPO staff who helped considerably in bringing together this first cycle of *The EPPO and EU Law: A Step Forward in Integration*. Particularly, I would like to thank Stanislav Fumagalli, Alessia Pati and Ashleigh White for their hard work on the program. I would also like to thank the staff from Milano-Bicocca School of Law. Please enjoy perusing the Digital Collection of Lectures as much as the team have enjoyed engaging with the content in this Jean Monnet Action, *The EPPO and EU Law: A Step Forward in Integration*.

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The need for having the EPPO arises out from the absence of having in the EU legal system an institution that is capable of bringing into justice criminal fraud related to financial interests. In fact, the legal institution that is established in the TFEU that is the Court of Auditors, cannot carry out such investigation of financial fraud and in that sense, the Court of Auditors of the EU is not the same as the Court of Auditors in Italy. It is very important to understand the difference of functions between the Court of Auditors in Italy and the Court of Auditors in the EU, precisely to understand the relevance of the EPPO for the EU legal system.

The criminal fraud that the EPPO can investigate have several points of contact with the financial frauds that the Court of Auditors in Italy can investigate. So there are several points of contact between the two different institutions. If you go and have a look at article 285 of the TFEU, the Court of Auditors can exercise a control over the budget of the EU but doesn't have any powers related to investigations. So the Court of Auditors cannot carry out investigations in the EU. So if we examine article 287 of the TFEU, we can see that the Court of Auditors just exercises controlling functions. In that sense, it is a parallel to what a College of Auditors or a Board of Auditors does rather than a prosecutor.

It is true that the Court of Auditors can assert their legitimacy and regularity of their entrance and expenses, but it doesn't exercise any investigation action for fraud. And in any case despite all of that the need of the European Union to carry out investigations to tackle financial fraud was immediately perceived in the treaty as well and precisely in article 325. So that article mentions that there is a need to tackle financial crimes, however the institution that can do that is not the Court of Auditors. The relevant body that was appointed to carry out such financial investigations was OLAF, which was instituted in 1999 with a Decision. What is OLAF, however? It is not a prosecutor as the EPPO, and the Italian Court of Auditors are, but carries out a

function of liaison between different relevant judicial bodies. This is explicitly mentioned in the Decision instituting OLAF. Article 2 of the Decision instituting OLAF mentions what OLAF is doing to connect different legal institutions.

Article 3 mentions that OLAF has independence of investigative functions. So like a court, it has independent characteristics, but OLAF is not a court. In that sense, OLAF is not something that substitutes the EPPO and our Court of Auditors. On the contrary, it is something that complements both institutions. In fact, in 2006, there was an agreement between OLAF and the Italian Court of Auditors. Yet, we would risk having something like a confusing image of what those institutions are if we didn't carefully analyse the same functions of each institutions. So, we need to analyse the functions of each institution to have a clearer image in mind. In fact, if in the European legal system, fraud is to be investigated and therefore intentional activities on behalf of OLAF and the EPPO, so both institutions are investigating intentional activities such as fraud, the Italian Court of Auditors is not only competent for fraud but also for which damages arise for the State.

It is important to carefully analyse which are the functions and the responsibilities of each and every institution. We also have to take into account that in Italy we have a peculiarity, which is not present in the EU. This peculiarity is precisely that we have a body, the Court of Auditors, that carries out investigative activities and carries out prosecutions for crimes at the same time. So the EPPO just carries out investigations, however the Court of Auditors in Italy also adjudicates crimes, so they do something that is different than the EPPO. Also, the Court of Auditors in the EU does something that is different to the Court of Auditors in Italy, because the Court of Auditors of the EU does not carry out investigations. On the one side, we have criminal fraud that is investigated and adjudicated by the EPPO. On the other side, we have damages to the State that are investigated and adjudicated by the Court of Auditors in Italy. So the

difference between criminal fraud and damages to the State is the element of intentionality. The Court of Auditors in Italy carries out an activity that is not limited to intentionality but is also comprising of negligence and even gross negligence, but not necessarily intentionality. Of course the damages to the State can also include crimes that are committed with intentionality. The difference is that criminal fraud can only be committed with intentionality, and in contrast, damages to the State can be committed also just by having negligence or gross negligence, without intentionality.

Having rendered clear the premises, if we think about the role of the EPPO, I would like to offer a suggestion. If we look at Directive (EU) 2017/1371, we can see in the recital of the Directive, you can see that number one mentions that the protection of the EU's financial interests concerns not only the management of budget appropriations but extends to all measures which negatively affect or which threaten to negatively affect its assets and those of the Member States to the extent that those measures are of relevance to Union policies. If we take this recital one of this Directive, it includes a notion of financial interests of the EU which is completely analogous to relevant notions in the Italian legal system, and in particular in as much the Italian Court of Auditors can assert the relevant crimes and damages to the State that are related to similar financial interests of the Italian State.

However later on, in the text of the articles in this Directive relating to financial crimes is reduced a bit. If you have a look at Article 3 of the Directive, it mentions that Member States shall take the necessary measures to ensure that fraud affecting the Union's interests constitutes a criminal offence when committed intentionally. The element of intentionality is inserted in Article 3, which reduces the scope of recital one, and distinguishes financial fraud of the EU to those of the Court of Auditors in Italy, which are related to a broader notion where intentionality does not play an exclusive role. It is interesting to analyse intentionality, taking the crimes related to paragraph 2 of the same article and in particular paragraph 2(c). The EU adopts a notion of revenue that is restricted in comparison to that adopted by the Italian legal system, which includes a notion of revenues which is broad enough to include all relevant revenue for the Italian State.

As you can see through this comparison, the adoption of several definitions by the EU serve to limit the scope of their application, when compared to such notions in the Italian legal system. These include what criminal conduct is captured by the notion of financial crimes, as well as that which is captured by the notion of revenue under the Directive (EU) 2017/1371. As such, we need to ensure that we are conducting a thorough analysis of these institutions both at the EU level and Italian national system to compare and contrast how notions of fraud and financial crimes affecting the EU have been interpreted and applied by these institutions.



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