The impact of the EU law on Italian criminal procedure law in investigations on EU fraud

ORIGINAL IN ITALIAN.

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A reflection on the issue of the influence of European law on procedure criminal law may instinctively lead to think of the most recent developments in case law at European level that have affected and are affecting also the typical categories of the Italian procedural system.

As an example, the issue of "res judicata" can be taken into account. It is common opinion that its binding effect is gradually eroding as a result of transposition in the internal system of jurisprudential principles established by the European Courts (e.g the cases Dorigo or Scoppola). Another example may come from the "ne bis in idem" principle which is gradually coloring of meanings that were unthinkable a few years ago, also thanks to the role of supranational courts.

But, to be honest, if that had been the subject of my speech, the same would not be fully consistent with the title of the seminar that refers specifically to the influence of the EU law on the domestic criminal procedure law. Indeed in the above mentioned evolutions the ECHR system - which as it is known, is something other than the European Union system - has played and still plays a fundamental role. In this case, therefore, the title of the seminar should have referred to the "European" law in general and not just that of the EU.

I therefore focused my attention on EU law and its impact on criminal investigations in fraud matters within the Community, not only for formal reasons, because it was the specific scope of the seminar, but also for another more substantial reason.

More precisely, all legislative and jurisprudential developments occurred in criminal law and its procedure by supranational European legal systems are substantially aimed at creating a common space of justice, with a view to recognise guarantees, common rights and for the purposes of a better circulation of evidence. If this is true, it does exist an area, a sector, where this process has been already realised or, at least, realised in a better way than elsewhere.

This is precisely the field of protection of the EU financial interests. In this sector, since the late '90s the European Union has put in place a series of legislative instruments to assist the investigations, and in particular the cross-border enquiries, and at the same time to protect the rights of the people involved, with no equal compared to any other field. As such, if the European Union is informed by the will to create, among other issues, also a common space of justice, both criminal and civil – as said in the founding treaty (i.e. Maastricht Treaty, 1992) – then we may affirm that, since more than 16 years, this purpose has been largely achieved, with specific modalities, in the field of the protection of EU's financial interests (hereinafter "PIF Area"), even if just few legal practitioners have realised it.

This was because the PIF sector has always been essential to the existence of the Union and for the accomplishment of its purposes. Without effective protection of its own finances, the Union might not have the necessary funds not only to manage

its administration, but also to grant them to the States or other beneficiaries. Indeed this is necessary for the realization of the great goals the Union intends achieving – sometimes with mixed success – Europe wide and worldwide, such as social cohesion and economic development, the progress of scientific research, environmental protection, the fight against poverty in third countries.

Therefore, the protection of its resources has always been essential for the Union, and since the conducts affecting such interest may constitute both irregularities at the administrative level, and criminal offenses, the relevant legislation at European level has always unfolded in between the so called First and Third Pillar in the European institutional framework after the Maastricht Treaty. In simple words, the First Pillar covered interventions in the Union's own policies that did not concern the criminal law; the Third Pillar, on the contrary, was just about facilitating the judicial cooperation in criminal law.

Nevertheless, before going any further, it has to be clarified what the so called "PIF Area" is, to fill of content concepts that otherwise risk to be only theoretical. For the purpose of this presentation, also to avoid getting into technicalities of the Union's Financial Regulation, with a view to simplifying it may be easier to refer to the Union budget sheet items. Indeed, since the early 70s, the Union has a budget with their own revenues and expenditures.

Revenues consist in customs duties and agricultural levies charged on import and export of goods (the so-called own resources), a percentage of each EU country's standardised value-added tax revenue and an additional sum provided by the Member States proportionally to each respective gross national income. Therefore every kind of conduct tending to avoid the payment and collection of duties and agricultural levies affects the EU financial interests. In our system, such conducts constitute the criminal offence of smuggling. Equally, the conducts aiming at evading the VAT payment are harmful for the EU budget. This category includes, for example, the so-called VAT carousel fraud, which still today are matter of interest for several Italian prosecutor offices, like they have been in the recent years.

Actually, the issue of VAT is very sensitive and it is necessary, for sake of providing with a complete information, to mention that according to an opinion that is strengthening at the level of the Member States, and partly also of the European Parliament, in the negotiations on legislative proposals under way, such tax would be exclusively national, and only indirectly of Union relevance, and for this reason it should be considered outside the PIF area (1). However it must be said that this view is contradicted, for example, in the case law of the Court of Justice that has even recently stated that the application of VAT involves the Union's financial interests (see Akberg Fransson case C-617/10).

As for the expenses, in brief and simple terms, they concern the development of internal cohesion (the so-called structural funds), the development of a common agricultural policy, the development of research projects, of the European and world trade, of the environmental protection and marine resources, aids to non-EU countries, mostly from the African and Caribbean area, and candidate countries for EU membership, as well as, of course, the expenses for the functioning of its internal administration. Therefore all activities, both constituting mere administrative irregularities and crimes, which tend to divert funds from their proper use, so that they do not reach their goal, affect the EU financial interests. In our Italian system they are qualified as fraud, embezzlement or misappropriation of public funds, but also corruption and money laundering, that prevents the recovery of funds. It should be noted, inter alia, that the European nature of the funds, that determines the involvement of the financial interests of the EU, may not appear immediately in an investigation.

Indeed, many of the above-mentioned funds are not distributed directly by the Union to the beneficiaries, but they are transferred to the Member States, which then ensure, through their ministries but also their local entities such as the regions, the distribution to beneficiaries submitting projects of interest. They may then appear at first glance as purely national funds and only a thoroughly examination detects their European nature.

It was noted earlier that in this area there was a development of the legislative process leading to the creation of a common area of justice much more advanced than in other matters, also involving criminal law. This process, in fact, has not begun only or exclusively on the basis of legislation, but, as it often happens, on the basis of case law. It was in fact the Court of Justice the first to claim that the violations of regulations protecting the (then) Community interests had to be sanctioned by the Member States as if they concerned national interests through dissuasive, effective and deterrent measures, which could also involve criminal law in severe cases and when any other sanction could not have these characteristics.

This was affirmed gradually in a series of judgments starting from the so called "greek maize case", dating 1989, and therefore well before the Treaty of Maastricht of 1992. That judgment was about a case where the interest at stake was precisely the financial interest of the Community . The Greek authorities had, in fact, stated that a lot of corn transported from that country to Belgium was of Greek origin, and therefore could move freely within the territory of the then European Community. In reality, the true origin of the goods was from Yugoslavia, imported into Greece, so at the time of introduction into the Community territory, the competent Greek authorities should have collected the customs duties that would represent Community revenue.

The omission and misrepresentation had thus caused damage to the financial interests of the Community, as it did not allow the collection of amounts pertaining to the Community budget. This was the context in which, for the first time, the Court of Justice affirmed the principle mentioned above and began to outline the possibility of severe sanctions for violations of Community interests, (2) the first of which was therefore the protection of the Community's finances.

Even after the entry into force of the Maastricht Treaty and the affirmation of the will to create a common area of justice, the PIF sector was the first in which legislation for that purpose was developed. The protection of Community finances was, in fact, a sector stretching trough the competences of the newly formed Union. It was a Union own policy, although very special, and therefore regulated within the First pillar. At the same time, it clearly involved also criminal law and required interventions to foster the cooperation between national authorities, a typical field of the then Third Pillar.

The legislative production developed, then, both through the adoption of regulations, typical of the first pillar and immediately applicable in the Member States without the need for implementation rules, and conventions, typical acts of the third pillar.
The Regulations of the first pillar aimed at defining the concept of "irregularity" (Reg. EC 2988/95), the powers of the Commission in the execution of the so called "on the spot checks" in administrative inquiries that the Commission's officials could carry out, with or without prior notice, at the premises of economic operators suspected of committing acts detrimental to the financial interests (Reg. EC 2185/96); at facilitating the exchange of information between authorities of the Member States in the course of administrative investigations on allegations affecting the EU financial interests. Among them, a Regulation provided for the exchange of information in the investigation of customs fraud and on agriculture (Reg. EC 515/97 and subsequent amendments), a Regulation for the exchange of information in investigations of fraud VAT (Reg. EC 904/2010).

Even more, the European Community did not only facilitate the exchange of information between Member States, but created its own investigative body to conduct administrative investigations in the PIF area without territorial limits. This body, created in 1999, was called OLAF (Office pour la Lutte Anti Fraude) and was equipped with its own investigative powers under the Reg. 1073/99, then changed recently with the EU Reg. 883/2013.

Common denominators of these pieces of legislation of the first pillar for administrative investigations, both domestic and OLAF, on conducts involving the financial interests were the possibility to acquire information or collect evidence without territorial limits (as information can be exchanged by the national authorities with no special formalities and OLAF can investigate all over the territory of the Union and even beyond), and the possibility of transferring themselves from the

administrative procedure into the judicial one, including the criminal, and to use them in the latter.

With this set of rules, therefore, it was established already at the end of the 90's a real special area of investigation, covering the field of the protection of the financial interests of the Community; of course, these regulatory instruments were operating at the level of administrative, and not criminal, investigations. However, the possibility to transfer in judicial proceedings, including criminal ones, evidence collected at administrative level that can circulate inside the EU gives judges and prosecutors of the Member State the possibility to use, only in the PIF sector, investigative tools in criminal investigations that could not be used to fight other criminal offenses.

In customs investigations, for example, it is very often necessary to get documentary evidence to prove the real origin of the goods. However, such records are held by the authorities of non-European countries; relations with them are still based on judicial mutual assistance agreements, which are in essence political deals, that often require cumbersome bureaucratic procedures. On the contrary, evidence collected under the above-mentioned regulations, in the EU and outside the EU, by OLAF or by the national authorities can be transferred to the prosecution offices. This avoids, in principle, the need for recourse to rogatory letters.

Besides, Italian case law, in the non-frequent cases where it had to specifically address the problem of the use in criminal proceedings of evidence obtained by administrative authorities through the above legal tools, and in particular by OLAF, has never objected on that, because the text of the OLAF Regulation 1073/99 (now 883/2013), as well as those of regulations on administrative cooperation between national authorities, are clear in this regard. The conclusion is that prosecuting authorities have at their disposal, thanks to such regulations, formidable means to assist investigations, although still little known and little used.

At the same time, as the behaviors affecting the Union's financial interests constitute also criminal offenses in many cases, the Union was concerned to take action in this area even on this side. One of the first legislative acts of the newly born Third Pillar on judicial cooperation, was on the harmonization of substantive criminal law in this field. It aimed at harmonising the definitions of the offenses connected to this sector, in order to facilitate judicial cooperation between national authorities in criminal investigations, in cases they had not obtained evidence through the above-mentioned mechanisms of the first pillar.

It is the Convention on the protection of the financial interests of the European Community of 26 July 1995 and its protocols. It tended to harmonize the definitions of the most harmful criminal offences to the Community's financial interests, namely fraud, corruption and money laundering, as well as dictate general rules on the definition of public official, prescription, ne bis in idem and liability of legal persons.

Just to give an idea of the impact of this instrument in the Italian criminal justice system, not only the transposition Law n. 300 of 2000 has led to some innovations in the Criminal Code, such as the introduction of art. 322-ter and 640-quater C.P. on the confiscation, but was also the enabling law for the adoption of a legislative decree for the introduction in our system of the principle of liability of legal persons. The legislative decree n. 231 of 2001, so well-known and with so wide application now, originates in a legislative European instrument of the PIF area, with the primary purpose to protect EU finances.

Through such interventions in the first and third pillars, the Community legislator created in about four years, between 1995 and 1999, a comprehensive system to regulate investigations to protect the Community's finances, with interventions both at administrative and criminal level. It established, in essence, a special area where the circulation of evidence was easy and where the definitions of offenses were harmonized.

Nothing similar happened in other sectors; not in the fight against terrorism, child pornography or human trafficking, to name some serious transnational crimes. If we look at European legislation dealing with such offenses, we will not find a comparable legal framework. In such areas, the Union is trying to develop some legal instruments only in the then Third pillar and therefore, at least until the Lisbon Treaty has not reached its full effect, they did not have same legal value as those of the First pillar. Moreover, they did not concern the acquisition and transfer of evidence inside the EU.

Of course, also in the fight against these crimes steps forward have been made.

When, after the Amsterdam Treaty, cooperation in criminal matters remained part of the Third pillar (unlike the cooperation in civil matters that became part of the first one), new legislative instruments were developed both on substantive and procedural criminal law. Framework decisions were adopted to harmonise the legal definitions of terrorism, child-pornography, organised crime, cybercrime or human trafficking. On the procedural side, the principle of mutual assistance has been replaced by that of mutual recognition.

This occurred initially, partly as a result of serious events of 2001, when it came to regulate the transfer of detainees from one country to another (with the well-known framework decision on the European arrest warrant); very soon it will also regulate in general the acquisition of evidence in another State. In 2014 it was in fact approved the Directive on the European investigation order that must be implemented in all Member States, and therefore also in Italy, by May 2017. It acknowledges the mutual recognition as the general principle of judicial cooperation in the EU in compliance with the provisions of art. 82 TFEU following the Lisbon Treaty.

The fight against fraud has followed the evolution of the EU criminal law and continues to be part of this new legislation. Fraud is, in fact, one of the 32 offenses for which the framework decisions on the European arrest warrant and on the European investigative order do not require double criminality condition to implement requests from other State.

Even after the extension of the Union competences in criminal law further to the Lisbon Treaty, the PIF area continues to maintain a peculiarity that distinguishes it from other sectors. In the current structure of the Treaties, in fact, it is believed that it continues to have a special treatment compared with other policy areas of the EU. According to one interpretation, that the European Commission has chosen in 2012 when it adopted a proposal for a Directive - the so-called PIF Directive - to repeal the PIF Convention of 1995, now all legislative interventions in the PIF area, both at criminal and at administrative level, have the same common legal basis, Article 325 TFEU. This marks a difference with respect to other areas of intervention of the Union in criminal law, as for the other sectors the legal basis has to be found in articles 82 and 83 TFEU respectively for procedural and substantive criminal law.

However, for sake of truth, it should be said that this view is not shared by the EU Council and the European Parliament. They believe that all new legislative initiatives in criminal law, including those in the PFI area, should have the same legal basis, article 82 and 83 TFEU.

As further proof – perhaps the most resounding and evident one – of how peculiar the PIF sector is in creating a common European area of justice, even in criminal law, one has to take into account the future prospects, especially the new legislative proposals, currently being discussed by the EU institutions.

As many legal technicians already know, from September 2013 negotiations on the adoption of the proposal for the regulation on the establishment of the European Public Prosecutor's Office, based on the proposal presented by the Commission in July 2013, are taking place in the institutions.

The first years of negotiations have shown that, if the European Public Prosecutor's Office will be ever created, it will be different, in structure and powers, from the one outlined in the Commission's proposal. Nevertheless, this is not the essential point of this work. What is relevant, instead, is the fact that the European Public Prosecutor's Office will be supposed to mark a relevant improvement in the cross-border criminal investigations at European level: more precisely, it should symbolise not only the supersede of the old principle of mutual assistance, but also of the more recent mutual recognition, on which the European Arrest Warrant and the forthcoming European Investigation Order, mentioned above, are based.

With the European Prosecutor's Office, there would be no mutual recognition anymore: in fact, while mutual recognition entails that the two authorities involved belong to separate and distinct national entities, with the European Prosecutor's Office the exchange of information and the evidence collection would take place between magistrates belonging to a single authority and physically dislocated to the territory in which the EU Prosecutor operates.

So, such a principle, that would clearly represent the true implementation of a common European judicial area, has been turned into a legislative proposal on the establishment of an office whose competence would be, exclusively and at least in the first stage, the protection of Union's financial interests; this will be, in fact, the first competence of the European Public Prosecutor, in compliance with the provisions of art. 86 TFEU.

The European Public Prosecutor's Office was not created with the view to investigate on terrorism, on child pornography or human trafficking, but rather on crimes affecting the EU's financial interests. It is therefore in this sector where the first legislative initiative came up, with the intention of turning into reality the concept of a common European area of justice.

The PIF area, despite the clouds that hang over EU integration, remains the most attractive sector of European criminal law and the most innovative concerning integration, even if, concretely speaking, the situation seems quite different: the ongoing negotiations on the PIF directive, in fact, and even those on the establishment of the European Public Prosecutor's Office endanger the fostering of this common legal area. (3)

However, the matter of the protection of the EU's financial interests has certainly been the most dynamic in terms of European criminal law in 20 years and this is clearly the reason why it has been the subject of specific analyses in seminars*.

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NOTES

1. See the last JHA Council press release: *" The inclusion of VAT in the 'PIF' Directive remains at the heart of the discussion Ministers started by addressing the proposed Directive on the protection of the EU's financial interests and focused, in particular, on the potential inclusion of fraud affecting VAT in the revised legislation. For the record, in 2012, the European Commission put forward a proposal to revise the existing legal framework relating to the fight against fraud to the Union's financial interests. 'This type of fraud is a serious problem which is detrimental to the Union's budget', insisted Félix Braz. According to Commission estimates, suspected fraud amounts to approximately EUR 600 million annually. However, it is a 'sensitive' subject for EU citizens, especially in times of severe budgetary restrictions, said the Minister who is of the opinion that the European institutions 'must react and find effective solutions'. Félix Braz highlighted the fact that negotiations between the Council and the European Parliament had already begun. 'Unfortunately a compromise is yet to be*

reached'. According to the Minister, this stalemate is due to the differing approaches of the co-legislators with regard to the inclusion of fraud affecting VAT within the scope of the Directive: 'On the one hand, the Parliament and the Commission argue for the inclusion of VAT whereas, on the other, the Council opposes it'. Member States 'take the view that VAT revenue is primarily a national issue', he noted. Félix Braz stated the Parliament had 'made it clear' that it considered that the issue had reached a 'temporary stalemate'. 'With this approach, the Parliament runs the risk of causing other stalemates', especially with regard to the establishment of the European Public Prosecutor's Office, said the Minister, who observed that the mandate of the European Public Prosecutor's Office has been set out in the draft regulation with reference to the PIF Directive. He nevertheless considered that the Council 'is also partly responsible'. According to the Minister, 'the Presidency considers it necessary to break the stalemate by working towards finding a solution acceptable to all parties'. The discussions made it possible to explore possible paths and to 'clarify and even qualify' the position of each party. 'Above all, I shall take away the fact that many of my colleagues are willing to explore the possibility of granting the European Public Prosecutor's Office the power to deal with serious cross-border fraud affecting VAT, such as carousel fraud', stated Félix Braz, noting however that the concept of serious fraud 'is yet to be defined'. Experts from the Member States have therefore been instructed to carry the work forward before the subject is again discussed at the JHA Council in October 2015. This is an important step which I hope will enable us to reopen dialogue with the European Parliament', he concluded. The European Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, stressed the need to convince Member States to include VAT in the directive, while highlighting the fact that losses due to fraud affecting VAT amounted to EUR 18 billion in 2014, the same as the annual contribution from VAT to the EU's budget. 'I am holding firm on this point: VAT must be included in the directive', insisted the Commissioner."

2. According to Summary of the Greek Maize Judgment "*..2.Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member State to take all measures necessary to guarantee the application and effectiveness of Community law .For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive . Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws ." (emphasis added)

3. See the relevant posts published on this subject in this blog