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Editorial

Immunity and Sincere Cooperation: When the EPPO Challenges the Court of Auditors

1 The Action Brought against the Immunity Opposition

In an action brought on 28 April, the European Public Prosecutor's Office (EPPO) asked the Court of Justice (ECJ) to annul the decision of the European Court of Auditors (ECA), communicated to the EPPO in December 2024.[1] The ECA decision concerned the EPPO's request of 26 September 2024 for lifting the confidentiality of EU officials to be heard as witnesses in the framework of a criminal investigation. This is a sensitive issue that arose during a proceeding launched based on a 2022 OLAF report. The investigation currently involves specific individuals working for the ECA, whom the EPPO allegedly wishes to investigate for possible illegal activities related to the misuse of funds. The allegations in question concern, in particular, unjustified expenses, improper residence or travel benefits, and other financial irregularities charged to the EU budget. The investigations reportedly involve senior officials of the European Court of Auditors, including its President.

This editorial explores the implications of that action for institutional cooperation between the EPPO and ECA.

According to the action proposed by the EPPO, the crux of the problem lies in the duty to cooperate, which the EPPO considers to be incumbent upon the ECA.

1 See *Action brought on 10 February 2025– European Public Prosecutor's Office v Court of Auditors* (Case T-99/25). The document can be consulted at the website https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202502403 (last access November 4th, 2025).

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The latter, on the other hand, raises the privilege of immunity,[2] which is granted to its officials, as was also recognised in a recent ruling by the ECJ.[3] According to the ECA, rather than a duty to obey the requests (or orders?) of the EPPO, there should be dialogue between the two institutions, based on a Working Arrangement signed by both parties in September 2021.[4] In the ECA's perspective, cooperation between the EPPO and the ECA should be based on a mutual exchange of information, which we imagine to be bidirectional (from the ECA to the EPPO, but also vice versa) and on regular meetings, in which representatives of the two EU institutions discuss and seek to find the necessary points of agreement. Therefore, according to ECA, the exchange of information—among which a crucial element is represented by statements that could be given by persons working for the Court—should occur on a coordinated and equal footing, based on a duty of mutual cooperation. Instead, the EPPO's approach to the issue appears to be more vertical. From their perspective, the ECA should merely carry out the orders received from the European Public Prosecutor.

Of course, the two viewpoints seem quite incompatible and rely on opposite assumptions. The EPPO considers that, when criminal investigations are ongoing, the Office is the competent institution to investigate and prosecute. As such, EPPO is hierarchically superior to other EU offices and institutions, including ECA. Differently, as far as we know, ECA seems to move from the premise that it is an institution of the EU, according to Article 13 TEU. Thus, its powers are conferred by the Treaties and must be used in the way prescribed therein. Furthermore, ECA, as well as the other EU institutions, including EPPO—that at the time of the Lisbon Treaty did not exist yet—must practice "mutual sincere cooperation" (Art. 13 para. 2 TEU). This is a crucial concept,

2 Se the *Action Action brought on 10 February 2025*, cit., at para. 5. Unfortunately, the reader will repeatedly encounter a blurring of the concepts of immunity and privileges in this essay. Both issues arise in the action brought by the EPPO. In theory, these legal institutions should be kept separate. As Brodowski observes, immunities are "granted to natural or legal persons, which, in particular, may present an obstacle to investigating and/or prosecuting the individual protected by the immunity [...]. A privilege grants specific rights or specific limitations in relation to (criminal) investigations and prosecutions, but does not exempt a person from the jurisdiction or from the reach of a criminal investigation". See D. Brodowski, 'Article 29', in H.-H. Herrnfeld and D. Brodowski and C. Burchard (eds.), *European Public Prosecutor's Office: Article-by-Article Commentary* (Oxford: Hart, forthcoming).
However, the lack of information on the raised issue does not allow us to form a clear picture of the nature of the safeguard in question.

3 See ECJ, 30 September 2021, case C-130/19, sub para. 3.

4 See *Working Arrangement between the European Court of Auditors ("ECA") and the European Public Prosecutor's Office ("EPPO")*. The document is reachable via the website https://www.eppo.europa.eu/sites/default/files/2021-09/2021.082-Working-Arrangement-ECA-EPPO-signed.pdf

because it depicts the relationship among the EU organs and institutions as coordinated, instead of hierarchical.

In this scenario, which does not offer a simple interpretative solution, there is the issue of immunity enjoyed by ECA officers and personnel when performing their duties.[5] Called upon to rule on this matter, the ECJ confirmed what is written in the treaties, namely that the provisions of the Protocol on the privileges and immunities of the European Union applicable to the Judges of the ECJ shall also extend to the Members of the Court of Auditors (Art. 286 para. 6 TFEU). According to Protocol 7, Art. 11, officials and other servants of the Union shall be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. This safeguard continues even after the persons have ceased to hold office.

This is not the first time that tension has arisen between two EU institutions. Nor is this the first time that a critical situation has arisen from a high-profile criminal case. In fact, the ruling adopted by the ECJ in 2021 concerned an anti-fraud investigation involving a ECA official, initiated by OLAF. However, this is the first time that an institution with criminal jurisdiction in the strict sense, like the EPPO, brings an action before the Court seeking annulment of the immunity protection. Put it differently, the Office is claiming vertical investigative powers, and this as such is nothing new. However, the novelty lies in the investigative potential that the law has granted to this office: the EPPO. The other EU institutions that existed prior to the EPPO do not have such effective and penetrating tools at their disposal. It may therefore be interesting to try to imagine how this case might develop, bearing in mind that the information made public is currently relatively sparse.

2 The Reasoning Supporting the EPPO's Action

In its action brought to the ECJ, the EPPO criticises ECA's lack of cooperation, as well as the unfounded nature of its claims of immunity and privileges (specifically those provided for in the Article 19 of the ECA's Staff Regulations). The argument is developed on the basis of five points.

Firstly, it is questioned whether it is legitimate to invoke legal provisions concerning privileges in the matter under investigation. The EPPO claims that the case, which concerns the possible misuse of funds by certain ECA officials,

5 It is worth mentioning that the immunity issue, reading the *Action* brought by the EPPO, was raised by ECA, while EPPO does not seem to agree such protection operates in the case at stake.

is not covered by confidentiality clauses or other forms of privilege. In fact, the law grants these privileges to ECA staff where necessary to protect the interests. However, in this case, the EPPO's actions suggest that the priority should be cooperation and information sharing rather than confidentiality. In the latter case, in fact, the EPPO would be unable to investigate the alleged offences and bring those responsible to justice.

The EPPO's second argument is that the ECA would be in breach of Article 13(2) of the TEU by refusing to cooperate. This legal provision imposes a duty of sincere cooperation on all EU bodies and institutions, which is essential for the proper functioning of the Union and the effective pursuit of its interests. This argument highlights a point of tension, since the EPPO—a body of primary importance under Article 86 TFEU—would be unable to carry out its activities due to the ECA's failure to cooperate. Taking a political and legal view of this issue, we can see the EPPO's assertion in this passage that its role is on par with that of the other institutions mentioned in Article 13 TEU. When this provision was adopted, the EPPO was not included in its meaning as it had not yet been established. However, in light of the EPPO's establishment through the enhanced procedure provided for in Article 86 TFEU, a systematic reading of the treaty texts must now lead us to conclude that Article 13 also refers to the new European Public Prosecutor's Office, as set out in Regulation 2017/1939.

The third argument is that the ECA's approach would compromise the confidentiality of EPPO investigations. If ECA were to demand information before agreeing to cooperate with EPPO's requests, it would jeopardise the secrecy of investigations, which is essential in any criminal proceedings, including those carried out by EPPO prosecutors. In particular, the EPPO considers the ECA's request for additional information, beyond what is necessary to demonstrate that there is no risk of seriously harming the interests of the European Union, to be inadmissible. The central issue here is that of immunities, which are guaranteed to ECA officials and agents by the Treaty (Art. 286 TEU O TFUE?) and Protocol 7. Immunity plays a key role in protecting the interests of the European Union. Put simply, this safeguard is designed to protect the work of agents of European institutions, such as the ECA, enabling them to best promote the interests of the Union. Therefore, it is an immunity *ratione materiae* and it cannot extend beyond this, meaning it cannot offer protection to the individuals themselves (*ratione personae*). Ultimately, the ECA's broad interpretation of immunities and privileges conflicts with the possibility of conducting effective investigations. This is because any information disclosed to the ECA beyond what is strictly necessary to overcome the barrier of immunities risks compromising the secrecy of the investigation (and consequently the effectiveness of the EPPO's investigations).

This last issue is linked to the fifth ground for complaint, which should also be addressed. From the EPPO's perspective, immunities do not apply to individuals who are required to give evidence as witnesses. Immunities protect persons who are suspects or defendants in criminal proceedings for allegedly committing a crime. Witnesses, on the other hand, are merely sources of information and, in the traditional sense, cannot refuse to testify as *servi iustitiae*. Therefore, they do not enjoy the same protections. A problem may arise if the status of a witness called upon to provide information to the EPPO changes, possibly due to their statements, and they become a suspect or accused person. In such a scenario, immunities would be applicable once again with a *pro futuro* effect (i.e., from that moment onwards, the individual could invoke the privilege of non-cooperation, claiming the protection of Union interests), but also retroactively (i.e., cancelling anything reported up to that point, which should be considered inadmissible as evidence by virtue of immunity).

The fourth point of contention, which was intentionally reserved for final consideration, reveals the crux of the matter. From the EPPO's perspective, the conflict with the ECA and the obstacle represented by non-cooperation based on Article 19 of the Staff Regulations prevent the Office from conducting effective investigations. The EPPO feels that its function is compromised by another EU institution—the ECA—which should simply be treated as an equal, not a superior. Consequently, investigations conducted by the EPPO concerning the Court (and potentially other EU institutions in the future) risk to be limited in scope and efficacy as they are implicitly subject to the supervision of the very body within which the suspected persons operate. Ultimately, according to the EPPO, misuse of privileges and immunities would compromise its independence and the effectiveness of its investigations.

Even if a clearer picture will only emerge after the ECJ has ruled on this conflict, it is not difficult to see how the action promoted by the EPPO constitutes a delicate step that deserves consideration. On the one hand, the effectiveness of the EPPO's investigative action is at stake in an extremely sensitive case, involving officials suspected of betraying their mandate to ensure the sound, legal and efficient management of European financial resources. On the other hand, the arguments presented by the EPPO before the ECJ appear, in certain passages, to be overly drastic, as they seem to render the issue of immunities granted by the Treaties to EU institution officials, including the Court of Auditors, effectively meaningless. Indeed, the EPPO interprets these immunities and privileges as a broad set of protections similar to those granted to persons suspected or accused of committing a crime, including the right to information, the right to remain silent, and the right not to be compelled to cooperate. However, if their scope coincides with that of the prophylactic rules that a legal system normally attributes to *any* suspect or accused person, what is the point of providing for *ad hoc* immunities and privileges?

3 Relevant ECJ Precedents Concerning Immunity

The action brought by the EPPO raises at least two problems. The first relates to the immunities and privileges enjoyed by members of the Court of Auditors under the Treaty. The second concerns the right to remain silent and not be forced to cooperate, both of which are fundamental to a fair trial.

With regard to the first aspect, the "immunity issue", it is difficult to predict what might happen. This is a new case, which presents a novel legal question that does not precisely align with the (few) previously adjudicated cases by the Court of Justice.

In a case concerning the misuse of funds, initiated on the basis of an OLAF investigation and referred to the ECJ under Article 286(6) TFEU, the issue of immunity is only briefly mentioned.[6] The decision is quite relevant, as it elucidates that the ECA lifted the immunity, and subsequent to OLAF's report, initiated proceedings against its own member, who was eventually sanctioned. In particular, at least two conclusions can be drawn from this case. Firstly, the members of the ECA do indeed enjoy immunity, the decision on which lies with the body to which they belong, namely the Court of Auditors. While this conclusion is rather obvious, as the immunity is clearly affirmed in the TFEU, the case reassures the interpreter about the protection afforded by the law to the members of the Court of Auditors. Another interesting aspect relates to evidence. If, during an investigation, immunity is lifted and the investigators—the EPPO in this case and OLAF in the previous one—find evidence of offences other than those for which the immunity was lifted, the investigating institution can still collect and use that information against the person involved, possibly adding a charge against them. Ultimately, from the perspective of the ECJ, the important thing is that the person concerned has a fair opportunity to respond to the evidence produced against them.[7] This assertion is consistent with the general approach of the Court to evidence issues, in particular, with

6 ECJ, 30 September 2021, case C-130/19, ECLI:EU:C:2021:782, *Pinxten*.

7 The issue is somewhat more complex. In certain passages, the ECJ does not rule out the possibility of excluding evidence, even if the person concerned had an opportunity to comment on it. However, the ECJ does state with certainty that, once investigators have been authorised to proceed because immunity has been lifted, they may gather evidence

regards to the matter of the rules of exclusion. Here as well as in other cases—such as the judgment issued on *Encrochat* in 2024[8]—the main reason (perhaps the only one) for striking out an item of evidence from the proceedings is if the defence did not have the opportunity to comment on it effectively.[9]

The other two immunity-related cases adjudicated so far by the ECJ are less relevant to our purposes. In the first one, the Court rejected the request, promoted by the applicants, to annul the decision made by the European Parliament to waive the immunity of one of its representatives.[10] The essence of the decision is, again, that this choice lies with the body entrusted with the determination of immunity (in this instance, the European Parliament). Therefore, in the absence of manifest errors, the Court deems that it should not interfere with the institution that possesses the primary competence over the immunity decision.

In the second case, the Tribunal dismissed an action brought by a Parliament member challenging the EPPO's request to lift her immunity. In the Court's view, however, this was a simple request by the EPPO that did not have effects on third parties. If anything, this characteristic should be attributed to the decision of the relevant institution to waive the immunity granted to one of its members.[11]

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relating to new facts. Therefore, immunity does not operate according to a principle of speciality, whereby proceedings can only be brought for the facts for which authorisation has been requested, unlike extradition. Conversely, once immunity has been lifted by the relevant authority, law enforcement agencies are not prevented from proceeding based on new facts discovered after the immunity has been lifted.

8 ECJ, Grand Chamber, 30 April 2024, C-670/22, ECLI:EU:C:2024:372, *Encrochat*.

9 This may also include questioning the admissibility of the evidence itself.

10 ECJ, 5 July 2023, Case 272/21, ECLI:EU:T:2023:373, *Puigdemont i Casamajó* and others. In this regard it is worth to mention a passage in para. 186: « In the present case, it must be held that the applicants have not established that, by relying on the circumstances referred to in paragraph 183 above in order to rule out the existence of *fumus persecutionis*, the Parliament committed a manifest error of assessment». What deserves highlighting for our purposes is the standard of "manifest error". It confirms the orientation of the Court to intervene only in cases when it considers some very evident mistake occurred in first instance, committed by the institution or the organ having primary competence over the immunity matter.

11 Tribunal, 16 January 2024, T-46/23, EU:T:2024:14, *Kaili*. This passage brings in essence the reasoning of the Tribunal: « the request of the European Chief Prosecutor of 15 December 2022, first, is not capable of producing binding legal effects that may affect the applicant's interests by bringing about a distinct change to her legal situation and, secondly, that it is a preliminary measure which does not constitute the culmination of a special procedure distinct from that opened before the Parliament, the possible illegalities of which could, if necessary, be relied on in support of an action».

Another decision that appears highly relevant to the present dispute is the ECJ judgment in *AB, CE, 'MM investīcijas' SIA*.[12] In that case, which concerned criminal proceedings against the Governor of the Latvian Central Bank (who was also a member of the ECB Governing Council), the Court clarified the functional nature of the immunity provided for in Article 11(a) of Protocol No. 7. This immunity protects the institutional independence of the Union and applies only to acts performed in an official capacity. Significantly, the ECJ held that immunity does not prevent investigative authorities from conducting inquiries, but it may preclude prosecution or coercive procedural acts, unless the relevant institution decides to waive the immunity. Where there is doubt as to whether the contested conduct was performed in the exercise of official functions, national authorities must engage in structured dialogue with the relevant EU institution, which has the power to decide on a waiver. This decision can be subject to judicial review through either a reference for a preliminary ruling on validity (Article 267 TFEU) or, where appropriate, an action for annulment (Article 263 TFEU).[13] This ruling is particularly important in the context of the current dispute, as it confirms that immunities serve institutional independence rather than individual protection, and that cooperation between Union bodies must be based on mutual trust (Article 13(2) TEU). This ECJ judgment is clearly significant in the context of the EPPO, whose investigative powers need to respect the principle of sincere cooperation.

Trying to adapt the essence of this important ruling to the case under examination here, which pits the EPPO against the ECA, it follows that neither the EPPO nor the ECA can impose their institutional logic unilaterally; conflicts must be resolved, in the first instance, through coordinated assessment. However, the final decision lies with the ECJ, as it is the only institution with the authority to resolve the issue through the vertical powers conferred upon it by the Treaties. In the end, this seems a sort of regulated cooperation under judicial supervision.[14]

12 ECJ, Grand Chamber, 30 November 2021, C-3/20, ECLI:EU:C:2021:969, *AB, CE, 'MM investīcijas' SIA*.

13 ECJ, Grand Chamber, 30 November 2021, at para. 75.

14 In concrete terms and in relation to the present case, the EPPO appears empowered to determine, initially, whether immunity or privilege applies. If in doubt, the EPPO must refer the matter to the ECA, which is responsible for deciding whether to waive the protection afforded by privilege or immunity. If the EPPO disagrees with the ECA's decision to waive immunity, it can appeal to the Court of Justice in accordance with Article 263 TFEU. See D. Brodowski, 'Art. 29', cited at ft. 2, which states that the EPPO has the power to decide on immunity and privileges in the first instance.

4 Critical Analysis

The picture emerging from the precedents is insufficient for specific predictions to be made about the decision that the Court of Justice might reach. The cases that have been dealt with are, in fact, quite different from the one under discussion. Specifically, the decisions concerning an official of the Court of Auditors and members of the European Parliament were made based on different premises to those underpinning to the ongoing case. In these precedents, the action was brought after the waiver of immunity. The interested parties therefore sought to overturn the initial decision of the body to which they belonged to regain the protection offered by immunity.

In the case under analysis, however, the premise is diametrically opposed. In fact, it is the EPPO itself that is seeking to reverse the Court of Auditors' decision not to cooperate on the basis of Article 19 of the Staff regulations and on the basis of immunity, on the grounds that this prevents the Office from conducting its investigation in an effective manner. If we assume that the ECJ will follow the line of the abovementioned precedents, this starting point has considerable implications. The EPPO will have to demonstrate the manifest unreasonableness of the Court of Auditors' decision—a task that, at first glance, seems difficult to achieve. Some room for manoeuvre could only emerge if the EPPO were able to demonstrate that the Court of Auditors did not consider all the counterarguments put forward by the Office when making its decision. From this perspective, the ECA's decision may be considered inadequately reasoned, whereas the duty to state reasons is, as we know, crucial for any determination taken by an EU institution. This point was made very clear in the *Puigdemont i Casamajó* case, in which the Court held that Parliament's reasons were adequate and complete in relation to the various grounds of opposition expressed by interested parties. If the ECJ were to annul the ECA's decision and refer the matter back to it for a new, more thorough assessment, the scope for using immunity would be reduced and it would become crucial to re-examine all the issues raised by the EPPO, one by one. Arguably, then, it would be challenging for the ECA to confirm immunity at a political level, as its position could be perceived as self-serving rather than as the neutral application of a legal safeguard. After all, the issues at stake in the *Pinxten* case were not so different from those currently under investigation by the EPPO, insofar as they both concern the misuse of funds and the expenditure of the ECA budget outside the actual functions performed by the public official involved.

Beyond immunity, EPPO's arguments also appear to raise issues relating to the right to silence. The relevant passage of the action is the following

> The immunity provided for under the Protocol on privileges and immunities does not cover witnesses, who do not enjoy any particular immunity under EU law. Only their hearing must be authorised in advance as provided for by the Article 19 of the Staff Regulations.

It can be inferred that the persons whom the EPPO requests to hear as witnesses are arguably afraid of being suspected or becoming suspects as the investigation progresses. In this interpretation, the Court of Auditors' use of immunity would highlight a lack of trust, primarily on the part of those called upon to make statements to the EPPO, but also on the part of the ECA itself. By confirming immunity, the ECA would appear to share the fears of its own staff. Essentially, in the event of a potential infringement of the right to silence, ECA is prudently protecting its personnel by affording them immunity until the EPPO's investigative objectives are clarified. While such a choice might be understandable from a political and strategic point of view, it could be legally questionable. The criticism, more precisely, lies in the fact that legal instruments must be used appropriately. Both immunity and the right to remain silent undoubtedly protect individuals from prosecution in criminal cases. However, these are clearly two distinct legal concepts—the latter safeguarding individual autonomy, the former institutional independence. Therefore, anyone suspected of having committed a crime should be able to exercise their right to remain silent and refuse to answer questions or cooperate with the investigating authorities. The immunities and privileges enjoyed by the institutions of the Union and their members are, however, a different matter. They serve to preserve the independence of the institutions and the individuals working within them, ensuring they are not subject to any interference that could compromise their freedom of action. They furthermore serve to preserve the interests of the Union, when they may be compromised by disclosing some information that needs to remain confidential. In short, immunities and privileges are protections that are vital to the Union's independence and interests, and they must be kept separate from the right to remain silent, which is grounded on individual dignity, the presumption of innocence, and the right to defence.

Despite the possible misuse of the immunity protection, it must be conceded to the ECA that the picture emerging from the action taken by the EPPO is not entirely clear. Reading between the lines of the motion, it seems impossible to rule out a scenario where some of those who currently appear to be merely witnesses may in fact turn out to be suspects (hypothetically, we imagine this could be due to the answers they might provide if they agreed to be questioned, or on the basis of the documents they might have to disclose upon EPPO's request). What guarantees should then the system provide in this case? The current rules at the EU level do not offer an answer to this question. The EPPO is required to comply with Directive 2016/343/EU, but this does not offer clear solutions to the current situation. Can statements obtained from a person who has been formally heard as a witness, but who is under investigation, be used, or must they be excluded? Unsurprisingly, the directive is unsatisfactory on such a crucial issue.[15] The OLAF Regulation, which could be taken as a model in the absence of anything else, is not reassuring either. Article 9(2) states that self-incriminating statements made to OLAF agents cannot be used without first giving the person who made them the opportunity to comment on them. However, upon closer examination, this provision is also deemed to be unsatisfactory. This is because, in many cases, the opportunity to comment on a statement once it has been made is unlikely to be an effective safeguard against the damage that has already been sustained by the defence.[16]

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15 Regarding the EU reluctance to rely on procedural sanctions to effectively enforce rights and safeguards of the accused, see A. Soo, (*Effective*) *Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study*, in 2018 *Utrecht Law Review*, vol. 18, Issue 19, p. 18 and seqq.; M. Caianiello, *To Sanction* (*or not to Sanction*) *Procedural Flaws at EU Level? A Step forward in the Creation of an EU Criminal Process*, in 2014 *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 22, Issue 4, p. 317 and seqq.

16 Some relevant points remain uncertain in the normative provisions. On the one hand, for example, Article 9 of the Regulation states that the Office may not use the statements against the person who made them, without first giving them the opportunity to comment on them. This provision suggests that, if the person concerned had the chance to present observations regarding their previous statements as a witness, the Office may make use of them. However, the Guidelines (Article 16, paragraph 6) state that, where a person was previously interviewed as a witness, the investigation unit shall not use her/his past statements against them in any way. Reading this second provision seems to render the first provision invalid. Article 9 of the Regulation on the admission of previous statements, regardless of whether the person had the opportunity to comment on them. However, such an interpretative inference seems incorrect, as the Guidelines are subordinate to the Regulation and can therefore never cancel or render a higher-level provision invalid. One possible interpretation is that the Regulation is what matters. While the guidelines merely set out what could be desirable. Under this interpretation, once the person interviewed as a witness gives self-incriminating answers, their statements can be used if the safeguards provided by the Regulation are respected. The guidelines simply give OLAF discretion not to use those statements if they deem it appropriate due to the specificity of the case.
The precedent passage was taken from an essay that I published in 2021. You can find the essay on the following website: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3743329#:~:text=Michele%20Caianiello,-University%20of%20Bologna&text=The%20normative%20set%20of%20principles,%2Dcalled%20'compensative%20measures'.
Regarding the right to silence in the directive 2016/343, EU, see A. Pivaty, A. Beazley and Peggy ter Vrugt, *Opening Pandora's box: The right to silence in police interrogations and the Directive 2016/343/EU*, 2012 *New Journal of European Criminal Law*, vol. 12, Issue 3, p. 328 and seqq.

Conversely, the possibility of commenting previously gathered evidence appears to be the recurring theme that characterises the prevailing interpretative approach to the rules on the exclusion of evidence in the ECJ's case law. As we have seen, the Court has indeed opted for a cautious approach to the inadmissibility of evidence in several cases, only agreeing to exclude evidence when the defence has been unable to exercise its right to comment effectively.

If the actual situation is not too different from how it was outlined here, we must admit that we are facing a critical scenario. The EPPO demands cooperation because, otherwise, its ability to conduct investigations would be compromised, as would its independence (if we understand the latter as freedom of action and the ability to effectively achieve the objectives entrusted to it by the Treaty). However, it appears that the Office has not provided those involved in the investigation with all the necessary information to enable them to understand whether they should consider themselves suspects or mere witnesses, who have nothing to fear from cooperating with the EPPO. When faced with uncertainty, it is comprehensible that the Court of Auditors—whose officials are called upon to testify or produce documentary evidence—opts to invoke immunity. This may also be a means of obtaining more accurate information from the EPPO and indirectly supervising it, or, at least, limiting the Office's capacity to pursue the goals conferred on to it by Art. 86 TFEU.

Ultimately, neither party to the conflict appears immune to criticism. At the same time, their positions seem logical and well-justified. The EPPO's decision to wait before revealing its hand is understandable, given that the essential role that investigative secrecy plays in the success of the investigation. Similarly, the ECA's decision to take time to assess the potential risks of self-incrimination to its agents, which could have irreparable consequences for the defence, is a prudent course of action. ECA's approach is certainly more susceptible to criticism due to its exploitation of institutional privilege—that is, immunity—for defensive purposes.[17] However, it is hard not to think that things would be simpler if the right to silence were protected by more rigorous exclusion rules that extend beyond merely providing the defence with the opportunity to comment on the statements that incriminate them. Perhaps the ECJ, which will have to resolve the issue, could leverage this opportunity to provide a clearer statement on a subject that has been addressed too timidly by all bodies and institutions of the European Union until now.

17 It could be argued that immunity is always a form of defensive action. However, the ideal—albeit often ignored—is that immunity should only be invoked when permitted, in line with the scope of the relevant provision and the objectives of this type of safeguard. In this case, the objective is to protect the EU's interests, rather than to provide the most effective defence for EU officials involved in criminal proceedings.

5 Lesson Learned (?)

It is too early to draw conclusions on an ongoing case. Given the novelty of the whole affair, it is normal for the issue to appear controversial. The EPPO is a new institution that has only recently appeared on the scene. Its powers are certainly more disruptive than those of other institutions with jurisdiction in criminal matters and raise new legal questions and institutional? tensions. At the same time, we need to prepare for the recurrence of situations of this nature. After all, in the *Kaili* case, an investigation directed by the EPPO, we faced a contrast between the European Prosecutor and a member of the Parliament, another sovereign EU institution.

In this context, the ECJ is presented with the prospect of intervening and restoring legal clarity, on two distinct levels. First, it could have the opportunity to develop its own case law on immunity by verifying that the privilege has not been invoked inappropriately or for overly defensive purposes. From the legal perspective, this interpretation would be a difficult to defend, and it would not be politically commendable. Second, EU judges could finally take the chance to clarify the consequences of violations of the right to silence, building on their *obiter dicta* relating to the admissibility of evidence (starting with the same *Pinxten* case[18]). Ultimately, supreme courts—and the Court of Justice is certainly one—have the function of putting things in their proper place. This is essentially the Roman concept of justice, *unicuique suum*.

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18 See for example the same Judgment issued in *Pinxten*, cited supra, ft. 6, at para. 104 and 143. A more drastic approach inadmissibility, when evidence was assumed improperly, may be found in ECJ, 17 December 2015, Case C-419/14, ECLI:EU:C:2015:832, *WebMindLicenses Kft*, at ruling no. 4.