Rethinking Article 37 of the EPPO Regulation: toward a coherent EU approach to evidence admissibility and exclusion

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Article 37 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation) governs the admissibility and assessment of evidence in transnational prosecutions by the European Public Prosecutor's Office (EPPO). While it affirms the free evaluation of evidence and non-discrimination of foreign-gathered material, it lacks substantive rules on exclusion in cases of procedural violations. This paper critically examines the evolution, structure, and systemic role of Article 37, drawing on doctrinal analysis and recent case law, and argues that it does not adequately address the fundamental balance between efficiency, equality, and the rule of law. Reform proposals – including introducing minimum exclusionary rules – are discussed as pathways for the European Union (EU) to define its stance on procedural fairness in criminal matters.

1 Introduction

The question of the inadmissibility of evidence in the EPPO system can be considered from two opposing viewpoints. The initial, authoritatively substantiated perspective, asserts that, upon comprehensive evaluation, the existing system functions effectively in its current state.[1] The article's normative scope is limited to preventing the exclusion of evidence presented by the prosecutor or the defence in EPPO proceedings on the mere ground that it was obtained abroad. Although the present version of Article 37 is

* This work is the result of a joint reflection by the authors, in its entirety. For the purposes of formal division, the following authorship is attributed: paragraphs 2 and 3 to Michele Caianiello, and paragraphs 4 and 5 to Isadora Neroni Rezende. In paragraphs 1 and 6, the contributions of the two authors are, to paraphrase the EPPO's Regulation, inextricably linked.

1 D Brodowski, 'Admissibility of Evidence in EPPO Proceedings' (2023) 14 *New Journal of European Criminal Law* 37.

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minimalist in many respects, it is argued that it is precisely this conciseness that constitutes its strength.[2] On the one hand, it allows Member States to exercise discretion in determining the most appropriate course of action. On the other hand, this arrangement unquestionably acknowledges national traditions, which remain a significant part of the EU system.

At the same time, Member States' legal systems are not as divergent as often assumed. There is a general reluctance in Europe to exclude evidence in criminal proceedings, and significant consideration is given to how the court assesses it.[3] Based on these accurate observations, the first perspective suggests the system could stay in its current form.[4] This approach has also been adopted by the EPPO, as evidenced by its proposed modifications to Article 37. These amendments appear entirely consistent with the notion that only minor changes to the Regulation are needed or that it can even remain unchanged.[5]

However, if we are to consider a significant improvement in the protection of EU fundamental rights in the medium term, an alternative argument could be proposed. From this standpoint, the present version of Article 37 does not adequately address a crucial issue in any criminal procedural system: namely, the conditions under which the acquisition of knowledge must be foregone to safeguard other essential values of the process, such as the accuracy of fact-finding, the fairness of the procedure, and the integrity of the system.[6]

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2 See Section 3.

3 MR Damaška, *Evidence Law Adrift* (Yale University Press 1997) 21. For an example of this trend in Germany, see e.g. T Weigend, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective' in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial?* (Cham 2019) 61; regarding Spain, which has progressively reintroduced limitations to its general exclusionary rule, see L Bachmaier Winter, 'Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing' in SC Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer 2013) 209; on the limited impact of the French nullity regime to sanction illegal evidence, see an example from the data retention saga in A Botton, 'Pouvoirs Du Procureur de La République En Matière de Réquisitions de Données Informatiques' (2022) *La Semaine Juridique* 1178.

4 Brodowski (n 1) 37.

5 European Public Prosecutor's Office, 'PROPOSALS REGARDING THE REVISION OF THE EPPO REGULATION', para 14.

6 On the conflicting values underlying the formation of judicial knowledge, see, *inter alia*, Damaška (n 3); AJ Ashworth, 'Excluding Evidence as Protecting Rights' (1977) *Criminal Law Review* 723; HL Ho, *A Philosophy of Evidence Law* (Oxford University Press 2008). More on this in Section 5.

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The relevance of the issue of evidence is immediately apparent. Notably, the initial two cases adjudicated by the European Court of Justice (ECJ) about the EPPO involved matters of the rights of evidence and the rules of exclusion.[7] Undeniably, the existence of evidence is a fundamental aspect of the trial process. Irrespective of personal sentiments on the matter, it is inevitable that even the EPPO system – which aims to establish a unique procedural order – will have to address issues related to the exclusion of evidence, sooner or later.[8] The question remains whether this task should be left entirely to the courts (Member States' ones and the ECJ) or whether the legislator can make a positive contribution.

From the perspective advocated in this article, the latter solution is considered optimal for two reasons. The primary contention is that, for the time being, the ECJ has not adopted a consistent and predictable interpretation of the rules of inadmissibility of evidence. Consequently, a (well-drafted) solution by the legislator could probably assist the judges in Luxembourg in formulating more balanced and consistent interpretative solutions for the future.[9] In this sense, it will be argued that introducing flexible exclusionary rules based on the need to ensure the system's integrity (*integrity principle*) and the protection of fundamental rights (*protective principle*) already has solid normative underpinnings in EU law.[10]

To further support the argument, it will be highlighted that an EU legislative intervention in this area could be considered legitimate *vis-à-vis* Member States' national systems. Although national traditions should always be respected, they must not undermine the integrity or overall coherence of the European system. The EU framework could be jeopardised

7 The two cases are ECJ, Case C-281/22 *G. K. and Others (Parquet européen),* ECLI:EU:C:2023:1018, commented *inter alia* by A Mosna, 'Effective Judicial Protection as a Central Issue in EPPO Cross-Border Investigations: The ECJ's First Ruling in G. K. and Others' (2024) 61 *Common Market Law Review* 1345; M Caianiello, 'Sometimes the More Is Less. Transnational Investigations in the Eppo System After the Judgment of the EU Court of Justice' (2024) 32 *European Journal of Crime, Criminal Law and Criminal Justice* 87; H-H Herrnfeld, 'Efficiency Contra Legem?' (2023) *eucrim* 229; N Gibelli, 'Sui Controlli Giurisdizionali Nelle Indagini Transfrontaliere Dell'EPPO: Una Prima Lettura Della Sentenza C-281/22 Della Corte Di Giustizia Dell'Unione Europea' (2024) *Sistema Penale* (3) 31; ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.

8 K Ligeti, B Garamvölgyi, A Ondrejová and M von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU' (2020) *eucrim* 203.

9 See Section 4.

10 See Section 5.

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by the absence of a harmonised, clearly expressed rule on the exclusion of evidence. This gap has the potential to lead to inconsistent judicial decisions at the national level and tempt relevant actors to engage in forum shopping to select the most favourable jurisdiction (a problem already faced by the EPPO).[11] In this sense, introducing some rules of evidence may concur – contrary to widespread belief – to strengthen EPPO's operations in preserving the integrity of the EU budget.

Considering this, the present study posits that the minimalist approach embraced in Article 37 is becoming increasingly untenable. As the EPPO becomes operational and its actions begin to generate case law, the absence of clear rules on evidence exclusion will likely engender legal uncertainty, fragmentation, and potential breaches of fair trial guarantees. Consequently, re-evaluating Article 37 is imperative to ensure a consistent and rights-conscious approach to cross-border evidence.

2 Article 37: between minimalism and pragmatism

As is well known, Article 37 of the EPPO Regulation comprises two brief paragraphs. The first states that both the EPPO and the defence are entitled to present evidence in EPPO proceedings before a court (this includes any court, not only the trial one). Then it also states – what mostly matters in this paper – that evidence cannot be excluded ('shall not be denied admission') on the mere ground that it was gathered in another Member State. The second paragraph affirms that, at trial, the court shall have the power to freely assess the evidence presented by the parties. This formulation seeks to strike a balance between respecting the diversity of national criminal procedure laws and ensuring functional efficiency within the EPPO's transnational structure.[12] It deliberately avoids imposing common standards on evidence admissibility, departing from earlier proposals that envisioned a more integrated model.

11 C Burchard, 'Article 37' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) 346; A Mangiaracina, 'Dalle indagini all'ammissione della prova in giudizio' in G di Paolo, L Pressacco, R Belfiore and T Rafaraci (eds), *L'attuazione della Procura europea: i nuovi assetti dello spazio europeo di libertà, sicurezza e giustizia* (Università di Trento 2022) 216, at https://iris.unitn.it/retrieve/c56a7998-a154-42f9-8d3b-dc66563637df/procura-europea-DEFper%20IRIS-20.12.22.pdf.

12 Brodowski (n 1) 38.

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In particular, the Commission's 2013 draft proposal[13] had included a *sui generis* principle of automatic admissibility, relying on mutual trust and the procedural rule of the *forum actoris* – according to which the laws of the place where the evidence is gathered govern its validity.[14] The draft provision stated that evidence presented by the EPPO to the trial court 'shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence'. However, this model was abandoned due to criticism that it would risk eroding defence rights and exacerbate procedural asymmetries.[15]

The provision would have compelled Member States to amend their legislation to guarantee the admissibility of evidence presented by the EPPO, irrespective of any specific national laws that might preclude its admission.[16] The Commission's proposal demonstrated a conscientious approach in safeguarding fundamental rights, including those of defence and the fair trial. However, given the broad nature of the statement, it fell short of guaranteeing uniformity in handling cases that were comparable but differed in competence. In fact, in the event of two cases pending before the same jurisdiction, one falling within the competence of the EPPO and the other assigned to the Member State, it could have been argued that evidence gathered by the EPPO and presented to the trial court would have had to be admitted in the EPPO proceedings, and instead be excluded in the national proceedings.[17]

This scenario would have jeopardised the fundamental principle of equality, a tenet of paramount importance within the EU system. Furthermore, the divergent treatment of evidence, which would hypothetically have been

13 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

14 Cf S Allegrezza and A Mosna, 'Cross-Border Criminal Evidence and the Future of European Public Prosecutor. One Step Back on Mutual Recognition?' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 145; Burchard (n 11) 349.

15 See, *inter alia,* Allegrezza and Mosna (n 14) 146; S Allegrezza, 'Verso una procura europeaper tutelare gli interessi finanziari dell' unione' (2013) *Diritto Penale Contemporaneo* 7; S Recchione, 'European Public Prosecutor Office. Anche gli entusiasti diventano scettici?' (2014) *Diritto penale contemporaneo* 22.

16 T Elholm, 'EPPO and a Common Sense of Justice' (2021) 28 *Maastricht Journal of European and Comparative Law* 220.

17 A Erbežnik, 'European Public Prosecutor's Office (EPPO) – Too Much, Too Soon, and without Legitimacy?' (2015) 5 *European Criminal Law Review* 218.

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admissible in the EPPO case but excluded in a national one, appeared problematic in light of the subtle distinction that exists within the EPPO Regulation between cases falling within the competence of the EPPO and those falling under the jurisdiction of Member States. In this regard, the complex issue of applying this distinction in practice in cases of inextricably linked criminal offences is particularly salient.

Moreover, Article 30 of the Commission's proposal stipulated that evidence 'presented by the EPPO' must be deemed admissible, thus excluding the defence from the benefits of this presumption of admissibility. The only exception to this rule concerned the need to protect the rights of defence and the fair trial, a clause that applied to EPPO evidence instead.

Considering these criticalities, the final text of Article 37 clearly reflects a pragmatic compromise. It avoids mandating automatic admissibility of evidence presented by the EPPO and refrains from setting substantive rules on what constitutes acceptable or unacceptable evidence. In doing so, it essentially defers all such determinations to national trial courts, under the guidance of domestic regulations and within the overarching protection of the Charter of Fundamental Rights of the European Union (the Charter). While this avoids regulatory overreach, it may also result in legal uncertainty and uneven rights protection across Member States, as described more in detail below.

3 The strengths and limits of the current model

The minimalist model of Article 37 is not without merit, if one looks at it from the perspective of the subsidiarity principle, the efficiency of the EPPO's prosecutions, and the enduring logics of horizontal cooperation between Member States.

First, in line with the principle of subsidiarity, the provision offers some flexibility by preserving Member States' procedural autonomy in a domain where they often exercise protective measures, while facilitating the integration of the EPPO in national systems.[18] It also avoids imposing a one-size-fits-all model of admissibility that may not suit diverse legal traditions. When considered in relation to Article 5, Article 37 ultimately entrusts national courts with the responsibility of determining the admissibility of evidence. Consequently, each country adhering to the EPPO will be

18 Brodowski (n 1) 38.

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permitted to establish its regulations on evidence exclusion (or admission). Additionally, there is no risk of unjustified differences in treatment between EPPO cases and national ones, since the rules on the admissibility of evidence can remain the same, without changing depending on whether the case falls within the jurisdiction of the EPPO.

Furthermore, by affirming that evidence cannot be excluded solely because it was collected abroad, Article 37 seeks to facilitate cooperation and efficiency in EPPO-led prosecutions. In this sense, it further promotes mutual trust and the tendency, already developed at the level of horizontal cooperation within the European Union, to favour the inclusion rather than the exclusion of evidence gathered abroad. This trend, which dates back at least to the 1990s, is deeply rooted in the logic that has prevailed in judicial cooperation between legally, politically and economically close countries, as is indeed the case with EU Member States.

In EU cross-border cooperation, indeed, there are at least two reasons behind the open attitude of Member States when dealing with evidence gathered elsewhere. Firstly, it is evident that each judge is aware of the fact that, in the event of cross-border acquisition of evidence, a certain degree of compromise must be accepted, given that it is not feasible to demand strict compliance with every rule stipulated by the *lex fori* (i.e. the system in which the evidence is used, assuming that it is different from the one in which it was collected).[19] This assessment remains a relatively straightforward task for countries with divergent regulatory traditions – such as France, Germany and Italy – which adopt a comparable approach when they receive evidence from a court outside their jurisdiction. Generally, these countries tend to admit the evidence rather than exclude it. A salient example of this phenomenon appears in the recent data-driven investigations on the Encrochat and SkyEcc platforms, wherein national States exhibited a marked tendency to acknowledge data transmitted by the authorities that had initially been collected, without giving due consideration to the issue of compliance with the specific regulations on interception and data acquisition within their systems.[20] Overall, compromises are in-

19 Caianiello (n 7) 100. Practitioners even point out that, in many cases, issuing states do not specify the formalities for the execution of the European Investigation Order (EIO), thus allowing executing authorities to use the *lex loci* when executing an EIO, see Ligeti and others (n 8) 205.

20 The light approach taken by the Italian Court of Cassation to the admissibility of cryptophone data gathered and decrypted abroad is a clear example of this phenomenon. By relying on the principle of mutual trust, the Court

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evitable in judicial cooperation, where some level of diplomacy is essential. Suppose a state jurisdiction adopts a strict approach to the admission of foreign evidence. In that case, there is a risk that it will receive progressively less support from other jurisdictions, which may get frustrated from the perception that their efforts to cooperate are not yielding results.

At the same time, the minimalist approach of Article 37 is also subject to major practical drawbacks. While the provision exemplifies the EU's restricted approach in evidence matters, namely the prohibition to rule out evidence based solely on its provenance, it remains silent on procedural sanctions for illegally obtained evidence. There is no guidance on the consequences, on the admissibility of evidence, of breaches of procedural rights, which may include, but are not limited to, the failure to provide legal counsel, violations of privacy, and coercion during interrogations.

Consequently, all issues relating to the protection of individual rights and the protection of fair trial are left to case law, an approach that does not seem suitable for constructing an optimal framework. As evidenced by the only two ECJ decisions regarding the EPPO,[21] the issue of evidence is – and will often be – a pivotal one in the activities of the Office. Although the Court has not addressed the matter directly in both cases, the question of the applicability of an exclusionary rule has always lurked in the background. For example, what would happen if a judicial warrant for a cross-border investigative measure was not adopted, or was adopted by an incompetent judge? What consequences should be anticipated if an

considered that the evidence should be presumed to have been obtained in compliance with fundamental rights, unless the defendant successfully makes allegations to the contrary. See Italian Court of Cassation, United Sections, 14 June 2024, nos 23755 / 23756, commented *inter alia* by G Spangher, 'Criptofonini: Sono 'in Gioco' Diritti Fondamentali' (2024) 64 *Cassazione Penale* 173; M Daniele, 'Ordine europeo di indagine penale e comunicazioni criptate: il caso Sky ECC/Encrochat' (11.12.2023) *sistema penale*, at https://www.sistemapenale.it/it/scheda/daniele-ordine-europeo-di-indagine-penale-e-comunicazioni-criptate-il-caso-sky-ecc-encrochat-in-attesa-delle-sezioni-unite?out=print. A similar approach was adopted by the French Court of Cassation, see Cass. Crim., 7 January 2025, no 24–81.941, and Germany, see German Federal Court of Justice, Order of 2 March 2022 – 5 StR 457/21.

21 ECJ, Case C-281/22 *G. K. and Others (Parquet européen),* ECLI:EU:C:2023:1018 concerned the question of which court, in a transnational case, should adopt the authorizing warrant for a cross-border investigative measure under Article 31, while ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255 focused on whether a witness in an EPPO case can challenge the role in which they are asked to answer questions, if they believe they should be heard as a person under investigation.

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individual were compelled to respond to questioning, despite disagreeing with their designation as a witness and asserting their right to remain silent as a potential suspect?

These examples, directly taken from the cases discussed before the ECJ, clearly show that it would be unwise to completely ignore the issue of rules of evidence, which are increasingly asserting themselves as a matter of practical urgency in EPPO operations. In this context, sticking to the model designed by Article 37 could undermine legal certainty and consistency in evidence matters across the EU. Diverging national practices can lead to scenarios where the same evidence is excluded in one jurisdiction and admitted in another. This state-of-play would contradict the principle of equality before the law and may erode the legitimacy of EPPO proceedings, especially when sensitive data or intrusive investigatory powers are involved.

4 The insufficiency of case law in addressing the matter

Although it is understandable to think that the EPPO Regulation is adequate in its current form and that case law alone may address cases involving the exclusion of evidence, this argument is subject to criticisms, as outlined above. One additional observation can be added to this, specifically related to how the case law of the ECJ seems to be developing on the issue of the inadmissibility of evidence.

As things stand, the jurisprudence of the two European supranational Courts has yet to develop a coherent set of guidelines on the exclusion of evidence. The primary focus of the ECJ – as evidenced in the *data retention saga* and beyond[22] – is ensuring that the defence can provide effective commentary on evidence collected by breaching procedural rules.[23] This approach reflects the long-standing position of the European Court of Human Rights (ECtHR), which is steady in affirming that the Convention

22 For an example of the application of the overall fairness test by the ECJ, see recently ECJ, Case C-348/21 *HYA and Others* ECLI:EU:C:2022:965, commented by A Cabiale, 'Absent Witnesses and EU Law: A Groundbreaking Ruling by the CJEU in Criminal Matters' (2023) 8 *European Papers* 5566; L Bernardini and G Ancona, 'HYA and Others: Reshaping Participation at Criminal Trials in Europe' (2023) 30 *Maastricht Journal of European and Comparative Law* 312.

23 ECJ, Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others*, ECLI:EU:C:2020:791, para 226.

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does not enshrine any rules on the admissibility of evidence and often considers that the right to comment on the unlawfully gathered evidence at trial is enough to ensure compliance with Article 6 ECHR.[24] As is known, the ECtHR interprets the concept of fairness holistically, thus often neutralising the relevance of fundamental rights violations during the investigations.[25]

However, this approach appears inadequate, since allowing the defence the possibility of an actual comment cannot always count as an effective remedy.[26] That is the case when, for example, there is a violation of procedural rules that compromises the integrity of the proceedings and the essence of the fair trial.

To further illustrate this point, consider the instances where an individual with a right to silence is compelled to speak or is deceived and induced to respond through improper conduct by the investigating authorities. In these cases, the opportunity afforded to the defence to comment on the previous statements – which would have never been made if the investigators had behaved correctly – appears to be more of a mockery that exacerbates the damage, rather than a remedy for the violation suffered. Paradoxically, the right to clarify the meaning of the prior declarations can even backfire on the defendant, if they refuse to comment on them despite being urged to do so: in such a case, the judge may interpret this silence as an admission of truth, thereby reinforcing the weight of the previous statements.

Given the shortcomings of the current approach of the European jurisprudence to evidence exclusion, it becomes crucial to explain why, in-

24 See, for example ECtHR, *Garcia Ruiz v Spain* App no 30544/96 (21 January 1999) para 28; ECtHR, *Schenk v Switzerland* App no 10862/84 (12 July 1988) paras 45–46; ECtHR, *Miailhe v France (No 2)* App no 18978/91 (26 September 1996) para 43; ECtHR, *Heglas v the Czech Republic* App no 5935/02 (1 March 2007) para 84; ECtHR, *Hümmer v Germany App no 29881/07* (19 July 2012); ECtHR, *Moreira Ferreira v Portugal (No. 2)* App no 19867/12 (11 July 2017) para 83.

25 M Caianiello, 'You Can't Always Counterbalance What You Want' (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 283; JD Jackson and SJ Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 181.

26 For example, it has been pointed out that the rule elaborated in *La Quadrature du Net* would not likely lead to the exclusion of communications metadata, as it does not constitute highly complex expert evidence stemming from a technical field unknown to the judge, see M Panzavolta and E Maes, 'Exclusion of Evidence in Times of Mass Surveillance. In Search of a Principled Approach to Exclusion of Illegally Obtained Evidence in Criminal Cases in the European Union' (2022) 26 *The International Journal of Evidence & Proof* 205.

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stead, a legislative intervention would be effective in addressing this issue at the EU level, without generating any cultural backlash from Member States.

In fact, while it is accurate to state that the predominant trend in continental Europe continues to favour the admission of evidence, it is also crucial to acknowledge that most EU Member States have recognised, either through legislative measures or established case law, the need for excluding evidence in specific situations. The rules on the exclusion of evidence have been disseminated across most of the globe, encompassing both national and supranational domains.[27] In particular, the idea of waiving evidence to preserve the legal system's fundamental values and principles has long been accepted in some European States, although with varying forms and methods.[28] Overall, a declaration of inadmissibility of evidence is no longer a contentious issue, even within the continental European context.[29] An EPPO provision that sought to guide interpreters towards a uniform approach to the inadmissibility of evidence would therefore encounter a cultural and regulatory backdrop that, at the national level, is ready and willing to welcome and apply it.

Considering this, it seems unlikely that Member States would reject a sufficiently broad and flexible exclusionary rule as a foreign body to their tradition. As a result, the EPPO system would not become unworkable or experience deadlock.

5 Proposals for reform: a flexible yet structured exclusionary framework

For all the reasons expressed above, it is reasonable to consider an amendment to the current version of Article 37, aimed at including an exclusionary rule. This should be flexible in nature and structured so as to incorporate the essential values that provisions on the inadmissibility of evidence

27 See, in a comparative perspective, the work of Jackson and Summers (n 25). Concerning supranational frameworks, relevant is the example of the ECtHR that has developed an exclusionary rule for evidence obtained in violation of Article 3 ECHR, see ECtHR, *Jalloh v Germany* App no 54810/00 (11 July 11 2006); ECtHR, *Gäfgen v Germany* App no 22978/05 (1 June 2010).

28 See, for example, the Italian case, as outlined in G Illuminati, 'Italy: Statutory Nullities and Non-Usability' in Thaman (ed) (n 3) 260; and the Spanish one M Miranda Estrampes, 'La prueba illícita: la regla de exclusión probatoria y sus excepciones' (2010) *Revista Catalana de Seguretat Publica* 131.

29 Damaška (n 3) 12–17.

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typically tend to protect. To achieve this objective, two alternative proposals are presented.

A first – and likely optimal solution – might be *Panzavolta's* proposal to establish a cascade provision that sets out the main rationales upheld in criminal justice to support the exclusion of evidence.[30] The primary concern pertains to the reliability of the evidence that, as famously argued by Bentham, should serve as the fundamental principle governing the fact-finding process in any criminal justice system. To ensure fairness, the decision must build on an accurate reconstruction of the facts. Consequently, a first reason for excluding evidence arises when its credibility is irreparably compromised due to the way it was gathered.

The second proposal pertains to the right to an effective defence, which, in certain circumstances, can be decisive in the admission of evidence (*protective principle*).[31] For instance, a statement extracted under duress should be discredited, as its acceptance infringes upon the defendant's procedural rights. In this regard, it should be underlined that a significant body of EU law already allows for identifying the safeguards that would warrant an exclusion of the evidence in case of a violation. That is the case, for instance, of the Directives on the right to access to a lawyer and the presumption of innocence, which require the relevant guarantees to be accompanied by adequate remedies.[32] The reformulation of Article 37, enabling the judge to exclude evidence obtained in violation of fundamental rights of defence, would therefore be consistent with the EU's *acquis* in the criminal justice domain.

Then, it may be sometimes necessary to withhold information to safeguard the coherence of the judicial system, thus excluding unlawfully gathered evidence that may undermine the moral legitimacy of judicial verdicts.[33] A system abiding by the rule of law, such as the European one,

30 Panzavolta and Maes (n 26) 215–217.

31 On the protective principle, see Ashworth (n 6); Ho (n 6).

32 Art 12 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Art 10 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

33 AAS Zuckerman, *The Principles of Criminal Evidence* (Oxford University Press 1989) 344; A Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in P

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cannot rely on illegal evidence to enforce its punitive powers without compromising the fairness of the trial. This rationale already has significant normative foundations in EU law like the others. First and foremost is the obligation for the EPPO to adhere to the principle of the rule of law, as set out in Article 5(2) of the EPPO Regulation. The need to respect human dignity, a value protected under Article 1 of the Charter, also weighs in favour of excluding evidence gathered by breaching the essence of the rights protected under EU law. Regarding the cases heard by the ECJ, including those involving the EPPO, such a rule would significantly impact real evidence obtained without judicial authorisation. In the interest of upholding the integrity of the system, specifically, the exclusion of evidence may be warranted in instances of serious violations of the right to private and family life, as well as data protection.

Alternatively, the previous version of Article 30 of the Commission's 2013 proposal could be reinstated. The old text stated that evidence could be admitted where it would not affect the fairness of the procedure or the rights of defence, as set out in Articles 47 and 48 of the Charter. This statement is well suited to summarising all the considerations made so far. However, it is noteworthy that the Court's approach appears to lack an explicit delineation of priorities in the field of evidence, a crucial element in the context of case law, particularly that of the ECJ. To date, the Court's exclusive focus on the right to adversarially examine at trial the illegally obtained evidence has been excessive, since not every procedural violation impairs the right to defence as such, but may endanger other fundamental values with which the fact-finding process interferes (for example privacy). In such instances, the violation – which could compromise the integrity of the process itself – cannot arguably be remedied by the right to comment on the evidence alone.

Of course, as the saying goes, where there is room for the big, there is also room for the small. The proposal drawn up within the EPPO for minor amendments to Article 37 is entirely compatible with the one under discussion here, and it seems reasonable to support it. At present, it consists of two reform measures.[34] The first aims at equating the evidence gathered by European Delegated Prosecutors (EDPs) with that collected by staff assisting the EDPs and the European Prosecutors. This amendment is

Mirfield and R Smith (eds), *Essays for Colin Tapper* (Oxford University Press 2003) 107.

34 European Public Prosecutor's Office (n 5) para 14.

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essential for preserving the effective functioning of the EPPO, especially in national systems with few or without appointed EDPs. Although such an intervention may not be necessary from a technical standpoint (after all, a little interpretative ingenuity would suffice to reach the same conclusion), it still helps to clarify an uncertain point. Therefore, the amendment would only make the EPPO's actions more effective, without compromising the system's relevant principles or values.

The second proposal by the Office is that national courts should recognise translations of all the documents carried out by the EPPO as equivalent to those carried out under national law, without any further formalities. In particular, it is proposed that '[t]ranslations of documents contained in a case file which are performed by the EPPO or under its responsibility shall be considered equivalent to those performed in accordance with applicable national law'.[35] Unlike the previous one, this amendment does involve a change to national rules (at present, the Member States have ad hoc provisions on translations implementing the Directive 2010/64/EU on the right to interpretation and translation[36]). However, this modification does not appear to compromise the fundamental principle of equality or defence rights. It is important to note that the EPPO is a recently established EU body that possesses both autonomy and legal personality, often involved in cases of a transnational nature. It therefore seems evident that it will have to deal with translations of documents in many cases, which should reasonably constitute official documents of the proceedings. The right of the accused to an interpreter and a translation of effective quality, as protected by Directive 2010/64/EU, must also not be compromised (and the same applies to the victim's position, according to Directive 2012/29/EU[37]). Subject to fulfilling these conditions, no impediments exist to accepting the reforms proposed by the EPPO. However, they arguably bear minor relevance compared to those advocated in this article.

35 European Public Prosecutor's Office (n 5) para 14.

36 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

37 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

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6 Conclusion

The current wording of Article 37 of the EPPO Regulation is a compromise solution that reflects institutional caution and political sensitivity. However, with the EPPO coming into operation, its rules of evidence will need to evolve, as the absence of exclusionary rules not only undermines legal certainty but also risks undermining the legitimacy of cross-border criminal proceedings.

Justice systems, particularly in the criminal law field, base their identity on procedural safeguards. These express when the legal order is willing to give up on some information when its inclusion in the fact-finding process would compromise upholding certain fundamental principles for the system. This applies not only to national frameworks but also to the EU.

This article has provided many reasons in support of a more decisive approach, at the EU level, to the issues of admissibility of evidence. Including a structured yet flexible exclusionary rule would strengthen the Union's commitment to fundamental rights, promote mutual trust, and ensure that efficiency does not come at the expense of procedural justice. At the policy level, a similar reform could also be the starting point for adopting a directive on the mutual admissibility of evidence under Article 82 of the Treaty on the Functioning of the European Union (TFEU).

Given the shortcomings of the current ECJ's approach to evidence matters (even beyond the remit of the EPPO's proceedings), a legislative intervention on Article 37 seems the most viable solution to achieve this objective. The proposed changes, however, would neither undermine the need to protect the financial interests of the Union as enshrined in Article 325 TFEU, nor would they generate any cultural backlash by Member States.

The flexible, albeit rationally structured, nature of the proposed provision would leave some margin of appreciation to the courts called upon to rule on the sensitive issue of the exclusion of evidence only in the most serious cases, where the need to protect the fundamental values of the Union cannot be set aside by the punitive requirements linked to the protection of the EU's financial interests. After all, even at the supranational level, the old saying that 'the chase is worth more than the catch' seems to retain all its meaning.

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