Why Primacy Operates Differently in the Area of Freedom, Security and Justice

EPPO, Article 67 TFEU and the Limits of Primacy in Criminal Constitutional Law

Philippos-Georgios Kotsalis & Martin Heger

15.04.2026 doi: 10.59704/2ee01c1005e7bc37

The fight against corruption at the EU level is intensifying, with the European Public Prosecutor's Office (EPPO) at the forefront of these efforts. Yet this effort is now creating friction with deeply entrenched national constitutional traditions. A current debate in Greece brings this tension into sharp focus. It centres on Article 86 of the Greek Constitution, which reserves the initiation of criminal proceedings against ministers to Parliament. At first glance, this may look like a local peculiarity. It is not.

The case raises a broader constitutional question: does the expansive logic of EU primacy extend equally in criminal law? Or do the EU Treaties themselves set structural limits in the Area of Freedom, Security and Justice (AFSJ)?

We argue that the latter is the case. In criminal law, primacy does not operate in the same way as in the internal market. Article 67(1) TFEU requires respect for national legal systems and traditions. This matters, and it shapes the limits of EPPO jurisdiction.

The current debate - from Article 16 to Article 86

The current debate builds directly on the Council of State's recent decision on Article 16. For decades, Article 16 had been understood to prohibit the establishment of private universities in Greece. In that ruling, however, the court read the provision in light of EU law and upheld legislation allowing private institutions.

That move now shapes the current debate. The argument is straightforward: if Article 16 can be "adapted" through EU law, why should the same not apply to Article 86? Or, put differently, if EU law can reshape the constitutional meaning of one provision, can it also allow the EPPO to move past the rule that only Parliament may initiate proceedings against ministers?

At first sight, this analogy has some appeal. It promises a coherent and integration-friendly solution. On closer inspection, however, it proves misleading.

Primacy - but of what?

The starting point is familiar. Since *Costa v ENEL* (Case 6/64), the Court of Justice has insisted that EU law cannot be overridden by domestic legal provisions. In *Simmenthal* (Case 106/77), it drew the practical consequence: that national courts must immediately disapply conflicting national law, without waiting for its prior repeal. Primacy is thus not just a formal principle, but a rule of procedural application wherever a genuine normative conflict arises.

At the same time, the Court's later case law shows that primacy operates within a structured constitutional framework. In *Melloni* (C-399/11), the Court held that where EU law has fully harmonised a field (in that case, the European Arrest Warrant), national constitutional standards cannot be invoked to undermine its primacy, unity and effectiveness. In criminal law, however, the Court has taken a more nuanced approach. In *M.A.S. and M.B.* (Taricco II, C-42/17), it accepted that national courts are not required to disapply domestic rules where doing so would violate fundamental principles of criminal legality that form part of constitutional identity.

That difference is telling. Primacy in criminal law does not simply mirror its operation in the internal market. Constitutional constraints matter – and they shape how far primacy reaches.

The question, then, is not *whether* primacy exists, but *how* it plays out across different integration fields.

No clear rule, no automatic primacy

The Greek case shows what this means in practice. Before asking whether Article 86 must give way, a more fundamental question arises: does EU law actually give the EPPO jurisdiction over ministers in this situation?

In its decision of 16 June 2025, the EPPO's Permanent Chamber answered: no. It referred proceedings against two former ministers to the Greek authorities and declared itself not to be competent.

Crucially, the EPPO Regulation contains no rule that directly addresses this scenario. The Chamber therefore relied on an analogy to Article 34(1) of Regulation 2017/1939: where an investigation reveals that the facts fall outside the EPPO's competence under Articles 22 and 23, the case must be referred to national authorities. Faced with a gap concerning constitutionally entrenched ministerial jurisdiction, the Chamber referred the case to the Greek Parliament – the constitutionally competent body.

The use of analogy is revealing, as it confirms that the Regulation does not lay down a clear and unequivocal rule displacing national constitutional jurisdiction in such circumstances. Where Union law itself leaves a regulatory gap, primacy has nothing to attach to.

This is more than a technical procedural detail. It marks an institutional boundary: the EPPO itself stopped where national constitutional jurisdiction began.

A similar pattern appears in Croatia. In the *Beroš* case, a conflict of competence arose between the EPPO and national prosecutorial authorities. Under Article 25(6) of Regulation 2017/1939, the Croatian Prosecutor General decided that the case should remain at the national level. Although the EPPO formally disagreed, it ultimately transferred the case, because EU law itself gives the final word to the national authority. Once again, the EPPO did not override national jurisdiction. It stepped back when national competence was asserted.

As long as Union law does not displace the national allocation of competences, there is no conflict that would automatically trigger primacy.

Criminal prosecution is not the internal market

But the comparison with the Article 16 case is flawed for a deeper reason. That decision arose in the context of the internal market and the fundamental freedoms. It was about the expansion of economic freedom. Notably, the Council of State interpreted EU law on its own, without referring the question to the Court of Justice.

The EPPO constellation is fundamentally different. This is not about expanding freedom, but about exercising criminal prosecution – about state coercion. This distinction is significant for the EU's model of integration: the internal market expands freedom. Criminal prosecution restricts it. Criminal procedural law is not only a matter of competence, but also of fundamental rights protection. It sets the conditions under which the state may use coercive power and thereby directly engages fundamental rights.

This difference is not only functional but also enshrined in primary law.

The Area of Freedom, Security, and Justice begins with Article 67(1) TFEU, which expressly obliges the Union to respect "the different legal systems and traditions of the Member States." Article 86 TFEU, the legal basis of the EPPO, is located in the same title. This means that the EPPO's powers are systematically subject to an explicit obligation to respect national legal systems and their traditions. There is no comparable clause in internal market law.

This points to a different logic of integration in the AFSJ. It shows that the AFSJ does not follow the same integration logic as the internal market. In criminal law, the Union has opted for a cooperative model that accommodates national traditions.

Special jurisdictions as a legal tradition

Article 86 of the Greek Constitution is part of a long-standing constitutional tradition. Rules on ministerial responsibility already existed in the revolutionary constitutions of 1822, 1823 and 1827 – even before the

modern Greek state was formally established. The current system builds on that history.

Today, Article 86 establishes a specific procedural regime: 1) Parliament decides whether to initiate proceedings, 2) a special parliamentary committee conducts the preliminary investigation, and 3) if Parliament decides to prosecute, a Special Court composed of senior judges tries the case.

This is not merely a political arrangement. It is a fully fledged system of criminal procedure. The constitutional revision of 2019 reaffirmed this model, even after the EPPO Regulation had entered into force. Greece thus deliberately chose to maintain it.

Whether or not this system is normatively desirable is a different question. What matters here is that it is deeply embedded. If Article 67(1) TFEU requires respect for national traditions, then this is precisely the kind of arrangement it has in view.

Not only a Greek matter

This is not uniquely Greek. In Germany, criminal law is also constitutionally sensitive. In its *Lisbon judgment*, the Federal Constitutional Court described it as part of the core of state sovereignty. The Basic Law contains comparable structural rules. For example, Article 46 GG requires parliamentary consent before criminal proceedings may be brought against members of Parliament. Beyond such specific rules, the organisation of prosecution itself reflects constitutional choices – including the balance between executive control and prosecutorial independence. The point is not that these systems conflict with EU law. The point is that they are constitutionally embedded. When EU criminal prosecution powers intersect with such structures, the issue is not technical. It concerns the constitutional design of criminal justice.

This becomes particularly clear where jurisdiction shifts back to national authorities under Article 25(6) of the EPPO Regulation, as in the Croatian case. In such situations, national rules on prosecutorial organisation, including ministerial instructions in Germany, come back into play.

In other words, the organisation of criminal prosecution reflects historically grown and constitutionally entrenched choices about how democratic control over penal power is exercised. When Union competences intersect with these arrangements, the issue goes to the heart of the relationship between Union authority and national constitutional structures.

Conclusion

The Greek debate is not an outlier. It brings into view a broader structural question – one that also affects Germany and the functioning of the EPPO framework more generally.

Article 67(1) TFEU points in a clear direction: the Area of Freedom, Security and Justice does not follow the same logic as the internal market. In this field, the Union must respect the legal systems and traditions of the Member States. Special national competences in criminal law are therefore not political relics. They reflect constitutional choices about how states organise and control penal power.

The EPPO is not the internal market. This is where the argument turns. If we take the Treaties seriously, we cannot simply carry over the logic of primacy developed for the internal market without adjustment. In criminal law, primacy operates within a framework that recognises national constitutional structures. It is here that the limits of an overly expansive understanding of primacy come into view.

ABOUT THE AUTHORS

Philippos-Georgios Kotsalis
Dr. Philippos-Georgios Kotsalis is a postdoctoral researcher and academic staff member at the Chair of Criminal Law, Criminal Procedure, Sanctions Law and Human Rights (Prof. Dr. Erol Pohlreich) at the European University Viadrina Frankfurt (Oder). He holds a doctorate from Humboldt University of Berlin and is admitted to the Greek Bar.
Martin Heger
Martin Heger is Professor of Criminal Law, Criminal Procedure Law, European Criminal Law and Modern Legal History at the Humboldt University in Berlin.

SUGGESTED CITATION

Kotsalis, Philippos-Georgios; Heger, Martin: Why Primacy Operates Differently in the Area of Freedom, Security and Justice: EPPO, Article 67 TFEU and the Limits of Primacy in Criminal Constitutional Law , Verfassungsblog, 15.04.2026, doi: 10.59704/2ee01c1005e7bc37.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260415-173632-0.