

## Article 41 of the EPPO Regulation setting common standards on cross-border EPPO investigations – needs for reform

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Article 41 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) establishes, as its title indicates, a legal framework for the rights of suspects and defendants in proceedings involving the European Public Prosecutor's Office (EPPO) (I.). The provision aims to achieve the protection of defence rights, with Article 41(1) expressly stating that 'the activities of the EPPO shall be carried out in full compliance with the rights of suspects and accused persons enshrined in the Charter, including the right to a fair trial and the rights of defence'. The balance between effective prosecution and safeguarding the interests of the defendant seems to be a general problem of the Europeanisation of criminal law and related cross-border prosecution (II.). However, a closer examination shows that the crucial and undoubtedly necessary introduction of the EPPO in order to make the administration of criminal justice more effective cannot be reconciled with the (comprehensive) protection of suspects and defendants at the same time. Rather, the cross-border nature of not only criminal activities, but also the proceedings to be conducted against the perpetrators in the light of Article 31 of the EPPO Regulation, brings with it new challenges and has the effect of exacerbating existing problems (III.). Currently, this is more likely to be accompanied by a further loss of defendant rights, which Article 41 of the EPPO Regulation, as a merely declaratory provision, can hardly oppose. The demand for the protection of the suspect under national law in actually Europeanised criminal proceedings ultimately remains an empty promise. Rather, there is a need for effective procedural safeguards at the European level as well, be it in the short term through adjustments to the Regulation or in the long term through a system of European investigating judges that would supplement the EPPO and counterbalance its power (IV.).

## 1 Significance of Article 41 of the EPPO Regulation

Article 41 of the EPPO Regulation is the central norm to set common standards for cross-border EPPO investigations and to ensure defendant rights.

The link to the Charter of Fundamental Rights (CFR) in Article 41(1) of the EPPO Regulation arises from the broad understanding of the implementation of EU law within the meaning of Article 51(1) CFR, regardless of the much-discussed meaning of the wording ‘in full compliance’.<sup>1</sup> The link to Union measures under Article 41(2) of the EPPO Regulation also ultimately arises from the transposition of the directives into national law or, subsidiarily, their direct application in favour of the defendant. In this regard, however, it remains essentially the case that the rights of suspects and defendants are governed by the (Europeanised) national criminal procedural law of the state of the handling European Delegated Prosecutor (EDP).<sup>2</sup> One major difference remains: the applicability of the CFR. But simply its applicability does not provide a higher standard of protection, not in relation to the European Convention on Human Rights (ECHR) and not in relation to national constitutions (from a German perspective: to the Basic Law). From the perspective of the defendant, their scope of rights does not differ fundamentally from purely national criminal proceedings; the actual possibilities for criminal defence have even worsened.

## 2 The balance between effective prosecution and safeguarding the interests of the defendant as a general problem of Europeanisation

To get to the bottom of the problem, national criminal procedure codes have traditionally grown for national criminal proceedings. Codes normally do not contain specific legal remedies for cross-border investigative pro-

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1 See for instance D Brodowski, ‘Article 41’ in H-H Herrinfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor’s Office: Article-by-Article Commentary* (Nomos 2021) mn 22.

2 Similar A Mosna, ‘Europäische Ermittlungsanordnung und Europäische Staatsanwaltschaft – Die Regelung grenzüberschreitender Ermittlungen in der EU’ (2019) 131 *Zeitschrift für die gesamte Strafrechtswissenschaft* 808, 843, who largely assumes a confirmation of the status quo.

ceedings.<sup>3</sup> Such are neither developed nor properly known; the manifold challenges and dangers for the rights of the accused can hardly be examined on the drawing board. Rather, there exists a diffusion of responsibility: the European legislator is increasingly creating regulatory regimes that potentially restrict freedom, with recourse to the Area of Freedom, Security and Justice. The implementation of a ‘powerful’ EPPO with additional instruments for the cross-border collection of evidence will strengthen and facilitate criminal prosecution.<sup>4</sup> Measures to make law enforcement more effective are certainly necessary, and there is no question that the cross-border activities of criminals pose new dangers for the victims of crime and new challenges for investigators whose powers are limited by national borders.<sup>5</sup> Nevertheless, in the sense of procedural equality of arms, this ‘more’ of prosecution requires an adequate balance of rights of the accused and possibilities of defence (Article 6 ECHR). However, the Union largely leaves the protection of the procedural subject, which is thus necessary, to the national law of the various Member States in its partly Europeanised guise, for it is not, as such, one of the EU’s core objectives.

Yet the reference to the rights of the accused based on Union law is not sufficient, because even those particular rights – albeit partially harmonised – are not designed for cross-border preliminary proceedings. They were all created without considering the issues raised by the EPPO<sup>6</sup> and other acts of the Europeanisation of criminal proceedings. For example, the right to a defence lawyer, to which Article 41(2)(c) of the EPPO Regulation explicitly refers, is a central right of the accused, which in principle serves to create a level playing field with the prosecuting authorities. Yet, once again, the corresponding directive focuses on purely national criminal proceedings; explicit provisions for cross-border proceedings are not included. However, this would be necessary to create a true level playing field. The specifics

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3 That is already due to the fact that criminal investigation is bound to national competences. However, national codes did develop rules on jurisdiction and on investigating crimes committed outside national territories, see §§ 3 ff. *Strafgesetzbuch* (German Criminal Code – StGB); §§ 153(c) ff. *Strafprozessordnung* (German Code of Criminal Procedure – StPO).

4 Similar L Bachmaier Winter, ‘Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance’ in L Bachmaier Winter (ed), *The European Public Prosecutor’s Office. The Challenges Ahead* (Springer 2018) 117, 120.

5 L Kuhl, ‘The European Public Prosecutor’s Office – More Effective, Equivalent, and Independent Criminal Prosecution against Fraud?’ (2017) *eucri* 135, 135–136.

6 Brodowski (n 1) mn 63.

often require a concept of multijurisdictional defence, as cross-border (e.g. EPPO) proceedings require the support of lawyers from several states.<sup>7</sup> The concepts proposed so far – such as that of the Eurodefender (‘Eurodefensor’)<sup>8</sup> – not only remain unrealistic because criminal defence is freely chosen, provided and follows economic principles, but above all because a state-organised criminal defence would risk being another lawyer for the state instead of for the accused.<sup>9</sup> As things stand at the moment, the increasing Europeanisation – among other things through the implementation of the EPPO – has structurally led to a (necessary) strengthening of criminal prosecution, but the EU did not counter this with any specific rights for defendants.

### 3 EPPO proceedings as a problem amplifier

Of course, just because the cross-border nature of pre-trial proceedings entails specific problems for the rights of the accused, this does not mean that they need to specifically be addressed by the EPPO Regulation. Other EU measures also lead to a shift in the balance of power and equality of arms. An actual equality of arms in the sense of equal rights and opportunities between the prosecutor and the accused is not possible in view of the structural inequality inherent to criminal proceedings.<sup>10</sup> Rather, the aim must be to provide the accused with rights that best counterbalance the inequality.<sup>11</sup> According to the European Court of Human Rights (ECtHR), the principle ‘requires each party to be given a reasonable opportunity

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7 E Duesberg, ‘Europäische Strafverteidigung – Ausgewogene Kräfteverhältnisse in transnationalen Strafverfahren’ (2022) *Neue Juristische Wochenschrift* 596, 599; A Oehmichen, ‘§ 14 Verteidigung in EUStA-Verfahren’ in H-H Herrnfeld and R Esser (eds), *Europäische Staatsanwaltschaft Handbuch* (Nomos 2022) mn 5–6.

8 P Asp, E Bacigalupo Zapater, N Bitzilekis, Á Farkas, D Frände, H Fuchs, R Hefendehl, A von Hirsch, M Kaiafa-Gbandi, V Militello, C Nestler, H Satzger, B Schünemann, E Symeonidou-Kastanidou and A Szwarc, ‘Entwurf einer Regelung transnationaler Strafverfahren in der Europäischen Union’ in B Schünemann (ed), *Ein Gesamtkonzept für die europäische Strafrechtspflege. A Programme for European Criminal Justice* (Heymanns 2006) I, 49 ff.

9 Similar Duesberg (n 7) 596.

10 V Costa Ramos, ‘The EPPO and the equality of arms between the prosecutor and the defence’ (2023) *New Journal of European Criminal Law* 43, 44.

11 Costa Ramos (n 10) 44.

to present his/her case under conditions that do not place him/her at a substantial disadvantage vis-à-vis his opponent [...]'.<sup>12</sup>

The general reference to the comprehensive application of rights of the accused and procedural standards, as contained in Article 41 of the EPPO Regulation, without the implementation of special rights, could therefore only suffice if the inequality to the accused is not increased by proceedings involving the EPPO, but remains at the same level as in cross-border proceedings elsewhere, and if the best counterbalance can be exercised without any relation to the EPPO Regulation. However, this is not the case. Despite all understanding for the need for effective criminal prosecution, especially at European level, it must be noted that involving the EPPO as an investigator in particular contains structural changes that imply such a substantial deterioration of the rights of the accused and lead to such a 'substantial disadvantage' that they must be remedied by the EPPO Regulation from a procedural point of view<sup>13</sup>:

### 3.1 The significance of Article 31 of the EPPO Regulation

With Article 31 of the EPPO Regulation, the Union legislator has created a regime for cross-border investigative measures that exists alongside the other mutual legal assistance laws.<sup>14</sup> According to Article 8(1) of the EPPO Regulation, the EPPO is established as a single office, with the result that cross-border operability should not depend on mutual recognition or legal assistance regimes.<sup>15</sup> According to Article 31(6) of the EPPO Regulation, a European Investigation Order (EIO)<sup>16</sup> for the execution of measures should only be issued in exceptional cases. While the EU has committed itself to greater transparency in the context of the EIO, for example, by using forms and a clearly regulated procedure, the latter and, as a result, the

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12 ECtHR, *Nideröst-Huber v. Switzerland* App no 18990/91 (18 February 1997) para 23.

13 In this spirit, R Esser, 'Transnationalität der Strafverfolgung durch die EuStA als Herausforderung für die Strafverteidigung' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 89, 93, who describes Art. 41(3) of the EPPO Regulation as an emergency solution.

14 Similar Bachmaier Winter (n 4) 121, who does not see the concept as one of interstate cooperation in the sense of traditional mutual legal assistance.

15 H-H Herrnfeld, 'Article 31' in Herrnfeld, Brodowski and Burchard (eds) (n 1) mn 4.

16 Governed by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

defendant's ability to exercise control, suffer from the provisions of Article 31 of the EPPO Regulation. Beyond the provisions of Article 31 of the EPPO Regulation, the decentralised structure of the EPPO even promotes the informal exchange of information, for example, by simply calling a colleague in another Member State.<sup>17</sup> This flow of information is not transparent to the defence and is therefore difficult or even impossible to challenge.<sup>18</sup>

In addition, the EPPO was created on the assumption that the national law enforcement authorities are not fulfilling their obligation to effectively protect the EU's financial interests, which follows, among other things, from the principle of equivalence.<sup>19</sup> This may not be entirely unfounded. However, with Article 31, the EPPO Regulation exceeds the objective in that it provides the EPPO with options that are not available to national law enforcement authorities, whether for the protection of the EU's financial interests or in other cases. In fact, Article 31 of the EPPO Regulation amplifies the disparities to the detriment of the accused.

### 3.2 The interplay between Article 31 and 41 of the EPPO Regulation

To recap, the interplay between Articles 31 and 41 of the EPPO Regulation is far from clear. It is not clear whether the applicable law within the meaning of Article 41(3) of the EPPO Regulation refers to the law in the state of the handling or the assisting EDP.<sup>20</sup> If one takes the wording of Article 31 of the EPPO Regulation, this seems to be the law of the state of the handling prosecutor.<sup>21</sup> This may be largely true, e.g. the right to a defence lawyer or the right to request evidence can only be reasonably applied according to the law of the country in which the criminal proceedings are conducted.

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17 In general S Gless, 'OHN(E)MACHT – Abschied von der Fiktion einer Waffengleichheit gegenüber europäischer Strafverfolgung?' (2013) *Strafverteidiger* 317, 320.

18 This does not mean that every step of the criminal prosecution must be traceable for criminal defence, but the possible violation of bans on the collection or use of evidence must be at all comprehensible and verifiable, and at least ensure a minimum level of transparency. This is not recognisable here.

19 Also emphasising the lack of and need for equivalent prosecutorial action Kuhl (n 5) 136 ff.

20 R Esser, '§ 11 Beschuldigtenrechte' in Herrnfeld and Esser (eds) (n 7) mn 223.

21 To some extent in this direction A Schneider, 'Die Zusammenarbeit der Europäischen Staatsanwaltschaft mit nationalen Ermittlungsbehörden' in T Niedernhuber (ed) (n 13) 39, 42, due to the installed mechanism that investigations in another Member State may be delegated to the EDP of that state. See also Herrnfeld (n 15) mn 4.

Nevertheless, there are also rights of the accused that the executing side of investigative measures has to allocate. To this day, even with ‘classic’ investigative measures, such as searches and seizures, no comparable convergence of national codes of criminal procedure can be determined.<sup>22</sup>

Take the example of the search ban on residential premises at night: In Germany, such a search is generally not allowed between 9 p.m. and 6 a.m. (§ 104 StPO).<sup>23</sup> If the handling EDP from a state that does not have a comparable limitation in its law instructs the EDP in Germany to conduct a residential search and the latter carries that out at 5 a.m., we have a problem. Is this a breach of rights or not? And in which court can the defendant assert a possible breach? The legality of the execution is governed by the law of the state of the assisting prosecutor, Article 31(2), 32 of the EPPO Regulation. A relevant violation of § 104 StPO therefore exists in principle. If we now combine this with the provision contained in Article 42(1) of the EPPO Regulation, it can be concluded that the order for the respective measure (in this case the search at night) must be challenged before the competent court in the Member State of the handling EDP, while the execution of the measure is subject to the judicial review of the competent court in the Member State of the assisting EDP.<sup>24</sup> This model of separation between law and jurisdiction for the issuing and execution of orders raises significant practical difficulties for the defence due to the associated increase in complexity.<sup>25</sup> To effectively defend their rights, the defence must be knowledgeable in all legal systems involved, overcome language barriers or even consist of an international team.<sup>26</sup> The conduct

22 This has already been criticised by M Böse, ‘Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?’ (2014) *Zeitschrift für Internationale Strafrechtsdogmatik* 152, 158 and still applies.

23 By way of comparison: in Belgium, it is not allowed between 9 p.m. and 5 a.m.; searches between 5 and 6 a.m. may cause unforeseen difficulties.

24 Mosna (n 2) 844; E Wirth, *Die Europäische Staatsanwaltschaft* (Nomos 2022) 333.

25 M Gierok, ‘Anmerkung zu EuGH, Urteil vom 21.12.2023 – C-281/22’ (2024) *Zeitschrift für Internationales Wirtschaftsrecht* 236, 238; Mosna (n 2) 844.

26 In this spirit Duesberg (n 7) 599; Oehmichen (n 7) mn 5–6. On rightful requests for a catalog of concrete minimum rights, a European mandatory defence system with parallel defence based on the division of labor in several legal systems, cf. Esser (n 13) 124; D Brodowski, ‘§ 22 Transnationale Strafverteidigung’ in E Müller, R Schlothauer and C Knauer (eds), *Münchener Anwaltshandbuch Strafverteidigung* (3rd edn, CH Beck 2022) mn 6 ff.; already A Wehnert, ‘Deutsches und Europäisches Strafrecht – Fragen und Widersprüche’ in G Widmaier, H Lesch, B Müssig and R Wallau (eds), *Festschrift für Hans Dachs* (Schmidt 2005) 523, 528 ff.; H Ahlbrecht and O Lagodny, ‘Einheitliche Strafverfahrensgarantien in Europa? – Eine kritische Bestands-

of criminal investigations by the EPPO therefore increases the existing need for a multijurisdictional defence. Even in the aftermath, it remains unclear how the court conducting the proceedings is to decide on the admissibility of evidence if the relevant violation is governed by different laws and thus cannot be comprehended.

### 3.3 Withdrawal of the defendant's rights by turning away from mutual recognition

In contrast to the EIO, Article 31 of the EPPO Regulation does not rest on the principle of mutual trust or mutual recognition, which primarily relates to judicial decisions of other Member States. Despite overlaps, it has to be seen as a system *sui generis*.<sup>27</sup> This follows from the idea of a single office with a decentralised structure, Article 8(1) of the EPPO Regulation.<sup>28</sup> Any order of the handling EDP is an internal directive and, despite the formal integration of delegated public prosecutors, not a judicial decision of the Member State. If mutual recognition is not granted, the reasons for waiving mutual recognition do not apply either.

Article 11 of the EIO Directive, for example, contains grounds for refusing to recognise the order. In other respects, too, the discussion in legal scholarship and case law about the limits of mutual recognition is in full swing.<sup>29</sup> Many of the grounds discussed here relate to the (fundamental)

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aufnahme –' (2003) *Strafverteidiger-Forum* 329; F Salditt, 'Doppelte Verteidigung im einheitlichen Raum' (2003) *Strafverteidiger* 136; J Vogel, 'Licht und Schatten im Alternativ-Entwurf Europäische Strafverfolgung' (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 400, 415 f. On guidelines for EPPO criminal defence, see R Sicurella, Z Durdevic, K Ligeti and M Costa (eds), *D3.1. Handbook – A practical guide on the EPPO for defence lawyers who deal with cases investigated and prosecuted by the EPPO in their day-to-day practice* (2022).

27 In detail Y Vordermark, 'Grenzüberschreitende Beweisermittlungen der Europäischen Staatsanwaltschaft im Vergleich zur Europäischen Ermittlungsanordnung' (2024) 9 *Anglo-German Law Journal* 98.

28 Mosna (n 2) 832.

29 For instance C Burchard, *Die Konstitutionalisierung der gegenseitigen Anerkennung. Die justizielle Zusammenarbeit in Strafsachen in Europa im Lichte des Unionsverfassungsrechts* (Vittorio Klostermann 2019) 609–713; ECJ, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăru v Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198; ECJ, Case C-158/21 *Lluís Puig Gordi and Others*, ECLI:EU:C:2023:57.

rights of the accused.<sup>30</sup> A move away from the principle of mutual recognition thus also means cutting off the entire discussion relevant to the accused. By contrast, Article 31 of the EPPO Regulation sets forth an enforcement rule without grounds for refusal and attempts to overcome potential hurdles through a cooperation mechanism specifically provided for in Article 31(5) of the EPPO Regulation.<sup>31</sup> While this is certainly meaningful and desirable from the standpoint of the investigating authorities, in this case the involved EDPs, for the defendant it means a (drastic) loss of rights. This is because the EPPO Regulation does not provide for any significant possibility of control in the state of the assisting EDP. However, in some cases, this may be countered by the need for judicial approval in the state of the assisting EDP in accordance with Article 31(3) of the EPPO Regulation.<sup>32</sup> Yet this is only partially helpful, if at all:

In a criminal proceeding conducted in Germany, the German handling EDP instructed the Austrian EDP to carry out several searches and seizures in Austria. Under Austrian law, judicial authorisation hereto is required; consequently, the assisting EDP from Austria had to obtain such authorisation (Article 31(3) EPPO Regulation). The Austrian court, asked to authorise, referred the question to the European Court of Justice (ECJ) as to whether the standard of proof relates to the enforcement of the measure only or also to the order itself. The ECJ relied on the former, excluded aspects of the order and its grounds, and justified this essentially by a loss of effectiveness in the event of a full review by the court in the state of the assisting EDP.<sup>33</sup> This not only significantly limits the scope of control, but also raises the question of how a court is to review the enforcement of a measure in advance of its implementation.<sup>34</sup> A considerable potential for

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30 On the interplay between fundamental rights and mutual recognition see for instance M Lenk, 'Das Prinzip der gegenseitigen Anerkennung im Strafrecht' (2024) 136 *Zeitschrift für die gesamte Strafrechtswissenschaft* 348, 364 ff.; J Eisele, 'Grundrechtliche Grenzen des Grundsatzes der gegenseitigen Anerkennung – Eine Betrachtung im Spiegel der Kommentierung des Art. 82 AEUV durch Joachim Vogel' in K Tiedemann, U Sieber, H Satzger, C Burchard and D Brodowski (eds), *Die Verfassung moderner Strafrechtspflege. Erinnerung an Joachim Vogel* (Nomos 2016) 221.

31 Bachmaier Winter (n 4) 122–123.

32 Art. 31(3) EPPO Regulation is less about defence or legal protection of the accused, but rather serves the protection of rights in the assisting Member State, see clearly Herrfeld (n 15) mn 25.

33 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 68.

34 Gierok (n 25) 238.

providing protection in favour of the suspected person is missing. Rather, the constitutionally required legal protection of the suspected person suffers from the implementation of a separate prosecution regime compared to the EIO Directive, which is based on mutual recognition. This means that the increase of efficiency through Article 31 of the EPPO Regulation poses a threat to the principle of equality of arms.<sup>35</sup>

#### 4 Conclusions: Enabling the exercise of defendant rights

In fact, the status quo can be accurately summarised with *Duesberg* to the effect that the EPPO conducts its investigations with the necessary organisational, institutional and normative resources for effective European prosecution, while the European criminal defence begins organisationally and institutionally almost from scratch and/or is at a standstill.<sup>36</sup> Of course, this does not mean that the EPPO itself as an institution is to be questioned; the inequality of arms to the detriment of the defence in criminal proceedings is not a problem that arises only here or is even unknown. Clearly speaking, the introduction of the EPPO is even to be recognised as a significant milestone.<sup>37</sup> Especially offences that fall under the competence of the EPPO are often committed by professional criminals with well-equipped networks. The image of the small, powerless criminal facing state power does not apply here. The EU is therefore assuming a crucial pioneering role in cross-border law enforcement, which is also unprecedented. At the same time, the EPPO's introduction led to a further shift in an existing imbalance to the detriment of the defence. And the recognisable need for efficient prosecution does not justify its boundlessness and does not release it from its constitutional limits.

##### 4.1 Short-term adjustment options

Instead, the strengthening of the defence through a cross-border self-organisation of lawyers, independent of the EU and the European institutions,

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35 Vordermark (n 27) 129 ff.

36 Duesberg (n 7) 600.

37 A Ritter, 'Grußwort von Andrés Ritter zur Eröffnung der Tagungsveranstaltung' in Niedernhuber (ed) (n 13) 11, 12.

remains urgent and necessary and is to be preferred to any state influence.<sup>38</sup> Every state-organised defence is threatened with losses in the fight for defendants' rights, precisely because it is about criminal behaviour that is to be prosecuted and in which fundamental rights must be guaranteed – and individual, state-independent examination is required.

However, the EPPO Regulation – as a problem amplifier – must create the framework conditions for an effective criminal defence. It would therefore be beneficial if further rights of the accused were included within the Regulation. For example, without claiming to be exhaustive, extended possibilities for accessing files, a right to translation of documents, rights to transcript and to interpretation, and an improvement in the position of the defence attorney in proceedings, for example with regard to the right to be present, are to be considered.

#### 4.2 A glimpse into a future of balance

If, however, and for various reasons, neither the rights of the prosecution – not even in a cross-border context – are to be restricted, nor does the the institutional establishment of state criminal defence seems feasible, a middle ground appears on the horizon and should be pursued in the long term. Hence, the structurally disadvantaged defendant must be empowered to comprehend their respective legal position (also and especially) in a cross-border context and to file a motion to challenge investigations and/or proceedings, without immediately undermining the effectiveness of the prosecution (as such) by means of full judicial review. Based on experiences in national criminal proceedings, this means nothing more and nothing less than the introduction of a court-linked – court-based and court structured – investigative institution that is to be involved in all such cases where the rights of the accused are substantially affected, and that is to independently monitor the rights of the accused and ensure their representation.<sup>39</sup> Elsewhere, a call has already been made for the introduction of a European investigating judge or, according to other similar models, possibly a magistrate.<sup>40</sup> Clearly stating, such an instalment does not mean to designate a single person at the ECJ with this task – for instance, in turns one of the

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38 Duesberg (n 7) 599.

39 See the contribution by Wörner (in this volume).

40 Wörner (in this volume). Suggested for introduction already by M Böse, 'Ein europäischer Ermittlungsrichter – Perspektiven des präventiven Rechtsschutzes bei Errich-

judges at the court – because the EDPs apply various national laws and the institutional central instalment only again runs the risk of leaving the defendant behind. Instead of a single central office that would have to check the legality of the case according to all national legal systems, rather the structure of EDPs created with the introduction of the EPPO could be used herein as well. The European investigating judge (or magistrate) would then retain their role as a national (investigating) judge (or magistrate) and would only be assigned to the ECJ for EPPO proceedings. The decisive advantage would be that investigating judges (or magistrates) could be called in according to the relevance of the proceedings, order and enforcement of measures could be reviewed uniformly by one court, agreements with national defence lawyers would be considerably facilitated, and (not at least) language barriers would be less of an issue; a system of possibilities, in other words. In any case, the standardised review by an investigating judge (or magistrate), even if conducted under the laws of two – the handling and the assisting – states, would allow a determination of whether the investigative measures to be carried out in the assisting state would meet not only the standards of proof of that state but also those of the handling state conducting the proceedings. Therefore, a European investigating judge should be seen as an opportunity to institutionally unite judges from several involved countries and thus counteract the fragmentation of legal protection. This can help to build up trust, acceptance, legal certainty, support the cocreation of mutual recognition, and, with that, effectiveness. At the same time, however, this is an admittance that, although the uniformity associated with the decisive procedural involvement of the EPPO results in a considerably increased effectiveness of criminal prosecution, it is achieved without any further significance of mutual recognition of national procedural regulations primarily on the back of the legal protection of the accused. From the point of view of the accused and the defence, there is even a need for an increased, but transparent mutual recognition. Comprehensive criminal defence across borders requires at least minimum transparency in order to understand investigation and the collection of evidence to be able to prove whether defendant rights are upheld. Effective criminal defence in several Member States is otherwise rather not possible.

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tung einer Europäischen Staatsanwaltschaft' (2012) *Zeitschrift für rechtswissenschaftliche Forschung* 172, 181.

In consequence, this would require more specificity in Article 41 of the EPPO Regulation, possibly including a set of minimum rights, and expanded references to the institution of the investigating judge (or magistrate), to be introduced. What is far more important, however, is – then – that Article 42 of the EPPO Regulation needs to be expanded, namely to the effect that (1) the approval of a European investigating judge (or magistrate) is required for measures that are particularly intensive in terms of fundamental rights and (2) the suspect is granted the right to an ex ante review of the lawfulness of the order for a measure. The EPPO Regulation could therefore become a breeding ground for a European criminal procedure code, which appears to be the ideal solution for the best possible protection of the rights of the accused.<sup>41</sup>

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41 Similarly for a harmonisation: Vordermark (n 27) 134.

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