Future model or pipe dream – European transnational investigation being both effective and safeguarding fundamental rights of the accused

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The following short contribution is only a concise written analysis of a thought experiment. Its aim is therefore not to compile and/or present the full state of opinion, but simply to pose forward-looking, partly open questions. This does not mean that these questions have not already been asked elsewhere or are not currently being asked. The paper is in no way intended to slow down current developments that are immensely important for the further Europeanisation of criminal justice. After all, we are witnessing the creation and consolidation of a new model of European criminal prosecution that goes far beyond the transnational level under the decisive leadership of the European Public Prosecutor's Office (EPPO). Nevertheless, as a scientist, I cannot help myself: a *stress test* is to be performed from a theoretical point of view, as the introduction of criminal prosecution procedures designed at a European level and structured exclusively on a European basis, with the establishment of direct investigatory powers in all Member States involved in the proceedings, makes it considerably more difficult for the defence to verify that the rights of the accused are being safeguarded.

1 Introduction – Future model or pipe dream

The Europeanisation of criminal justice has improved and continues to improve with a lot: harmonisation now extends not only to contractual relationships between private parties and fundamental rights, but above all to the basis of criminal prosecution. Instead of a multitude of different standards of proof and evidence, and different investigative powers in all states, the EU has already enacted some uniform standards and uniformly

regulated rights of the accused apply to every citizen within the Union,[1] and may still go further. A beautiful vision of the future.

But how far away are we from achieving this goal? At present, the European Union has 27 Member States, including Denmark with a special status, and associations and forms of cooperation with other states such as Norway, Switzerland as well as the United Kingdom. This results in a total of 27.5 different national criminal jurisdictions, all of which differ – to varying degrees – from one another and each of which has its own structures for enforcing the law in theory and in practice.[2]

The good news is that, despite all state sovereignty, the EPPO has been created and started its work in a thoroughly structured and well-designed framework.[3] While political and societal expectations remain high, the EPPO does serve as *a* – if not *the* – decisive 'role model' within the European Union and beyond.[4] That already stems from it being the first of its kind. European Prosecutors (EPs) convene in the College, a Permanent Chamber (PC) monitors, supervises, and directs investigations and files operational decisions, from bringing a case to judgement, dismissing a case, to applying simplified proceedings. European Delegated Prosecutors (EDPs) handle and assist the cases nationally.[5] The entire system is performing well despite the absence of its own European criminal justice system, without a

1 In this direction already M Jahn, 'Fair trial als strafprozessuales Leitprinzip im Mehrebenensystem' (2015) 127 *Zeitschrift für die gesamte Strafrechtswissenschaft* 549, 615.

2 See hereto only M Böse, 'Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?' (2014) *Zeitschrift für Internationale Strafrechtsdogmatik* 152, 158; T Elholm, 'EPPO and a common sense of justice' (2021) 28 *Maastricht Journal of European and Comparative Law* 212, 216; VC Ramos, 'The EPPO and the equality of arms between the prosecutor and the defence' (2023) 14 *New Journal of European Criminal Law* 43, 43.

3 A Ritter, 'Grenzüberschreitende Strafverfahren der EuStA – Erste Einblicke in die Praxis' in T Niedernhuber (ed), *Die neue Europäische Staatsanwaltschaft. Bedeutung, Herausforderungen und erste Erfahrungen* (Nomos 2023) 15, 15 f.; A Mosna, 'Europäische Ermittlungsanordnung und Europäische Staatsanwaltschaft: Die Regelung grenzüberschreitender Ermittlungen in der EU' (2019) 131 *Zeitschrift für die gesamte Strafrechtswissenschaft* 808, 834; I Zerbes, 'Beweiserhebung und Beweisverwertung in EUStA-Verfahren' in Niedernhuber (ed) 70.

4 D Brodowski, 'Strafverfolgung im Namen Europas. Die Europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik' (2022) *Goltdammer's Archiv für Strafrecht* 421, 422.

5 Mosna (n 3) 834; E Duesberg, 'Europäische Strafverteidigung – Ausgewogene Kräfteverhältnisse in transnationalen Strafverfahren' (2022) *Neue Juristische Wochenschrift* 596, 596 f.

European Criminal Code or Code of Criminal Procedure, and without a European Criminal Court.[6] Let's mark it, the EPPO's pole position is safe.

However, scientific discussion is necessary because, as always, a pole position is not enough. But if the EPPO is a role model not only as it is a supranational body first of its kind, but also as a *guardian of the rule of law,* it is also well positioned for the future.

2 Guardian of the rule of law

Indeed, the instalment of the EPPO changed the entire idea of cross-border cooperation, of cross-border investigation and prosecution, and of national criminal investigation and prosecution in cases with a European dimension.[7] The vision of one European criminal procedure, as *Venegoni* stressed at Villa Vigoni, must be the driver, because the entire structure of European criminal justice is built on cross-border cooperation and communication.[8] In other words, the system of connections between the EPs in the College, in the PCs, and to and between EDPs in the Member States is oriented towards creating and building a community based on both practical and convincing rules of conduct and of fair and just prosecution. In this respect, the EPPO is based on the simple, but central, idea of working together directly on the basis of clear competences and responsibilities – as if one were sitting in a single office under one governmental jurisdiction – even across several national borders.

From the point of view of legal theory, the question arises whether such a sophisticated and differentiated system of cooperation and mutual control naturally grows into a, so to speak, self-generated procedural model in which the EPPO naturally functions as the guardian of the rule of law. The disappointing answer is: 'No'.

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6 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) 121.

7 A Ritter, 'Grußwort von Andrés Ritter zur Eröffnung der Tagungsveranstaltung' in Niedernhuber (ed) (n 3) 11, 12; Bachmaier Winter (n 6) 1.

8 See A Venegoni and H-H Herrnfeld in this volume. See also: A Peters, 'Die Europäische Staatsanwaltschaft – Eine Gefahr für den fair trial-Grundsatz?' (Verfassungsblog, 20 February 2014), at https://verfassungsblog.de/europaeische-staatsanwaltschaft-gefahr-fuer-fair-trial-grundsatz/; A Ritter (n 3) 16 f.

In the following, I raise two questions for future discussion and then propose strategic directions resp. recommendations for further developments in order to maintain the EPPO's pole position.

3 Area 1 – The functioning of the Permanent Chamber

The independence of the EPPO is ensured, among others, by the supervising and monitoring procedures of its PCs.[9] I can fully see the uniqueness of this new, true European procedural element and how it brings added value to (criminal) investigation and proceedings, as well as to the further development of regulations within the EU. The necessary case-related discussions between the PC members broaden the perspective beyond the national level and enable genuine transnational solutions.[10] From a comparative law point of view, I must say that the PC is a great source of inspiration and a 'cooking pot' of criminal law comparison. That indeed comes with the structural problem and some dangers to be aware of:

The PC may exercise equitable jurisdiction while maintaining its inherent discretionary abilities to address new forms of injustice.[11] This could contribute to the development of a separate case law based on decisions of the PCs. However, it is not common law or anything similar and should not be considered as such. The findings of the PC remain the internal findings of the EPPO. Decisions and findings may serve as interpretation guidelines for future decisions of the EPPO. Since the PC may bring discussions to the College, findings may also initiate the possible further adoption or amendment of EPPO-internal regulations, such as the Internal Rules of Procedure. Through their monitoring and supervising function, the PC develop, indeed, 'quasi law in the making'. As much as I am pleased to see a truly transnational decision-making process – taking into account Europeanised and strengthened fundamental rights positions – in which the national perspective (in plenary) is completely disregarded, this exclusively transnational decision-making process is very far removed from the accused, especially in the highly sensitive area of criminal proceedings. This goes hand in hand with the risk of a lack of predictability of the proceedings and of procedural decisions for the accused in the application

9 D Brodowski (in this volume); see also Zerbes (n 3) 70; Mosna (n 3) 834.
10 See in addition Elholm (n 2) 215.
11 Duesberg (n 5) 598; Elholm (n 2) 215.

of the rules and their consequences.[12] The more a decision-making process is therefore geared towards the PC, the more accessible its decision-making operations must be for the accused.

It is true that a judicial body that is part of the systematic structure of the entire authority – in this case the EPPO – can play a decisive role in drawing up and implementing the authority's rules of procedure and in shaping a strong instrument of internal legal control.[13] From a purely internal perspective, however, it cannot define the principles and limits of equity and justice and, at least not alone, develop what is or should be common practice. Legal control, especially over possible infringements of highly sensitive individual rights, can only be carried out by a body outside the authority itself. Equality of arms and fairness cannot be achieved if the protection of the rights and interests of the accused is entrusted solely to the prosecuting authority.[14] If the EPPO does not want to run the constant risk of awaiting European Court of Justice (ECJ) decisions on the possibilities of certain legal interpretations 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) – it must be open to other procedural safeguards.

4 Area 2 – The Article 31 problem

That takes us to question area No 2. At its core, cross-border cooperation in transnational criminal proceedings depends on the correct interpretation of Article 31 of the EPPO Regulation, titled 'cross-border investigations'. Controversial since its entry into force,[15] by no surprise, this provision was at the centre of the first EPPO-related case the ECJ had to deal with in the case *G.K. and Others*.[16] The case raised questions concerning the very details of the interpretation of Article 31(1) and (2) in correlation with (3). The core underlying question of the Higher Regional Court of Vienna was whether the substantive *ex ante* review to be undertaken in the course of

12 See only Peters (n 8).
13 On the strong internal legal control of the EPPO Brodowski (n 4) 426.
14 Ramos (n 2) 44 f.
15 H-H Herrnfeld, 'Article 31' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 6.
16 The paper was presented when the case was still pending, see now: ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

a required judicial authorisation is a competence belonging to the court or judge in the Member State of the handling EDP – where the investigation proceedings are being conducted – or of the court or judge in the Member State of the assisting EDP – where the required measure is to be enforced.

I am, however, interested in another point – which may yet be a pipe dream. After experiences with the European Arrest Warrant since 2003, the European Evidence Order, and the European Investigation Order, *once again* the (more abstract) question at stake here is the substantive review of the case within the handling state or within the state where the required measure is to be enforced. To make the long story short, it is about the idea of cross-border investigation based on mutual recognition and mutual trust. Measures of investigation carried out in one state shall be accepted within the other. That allows effective proceedings.[17]

But, while mutual trust in civil (private) law expands the possibilities of any contract design and, thus, expands the freedoms of the contracting parties, in criminal law the same trust regime operates to the detriment of third parties,[18] the third party being the accused. And at this stage, indeed, the EPPO proceeding is endangering the rights of the accused.

If in *G.K. and Others*[19], the handling German EDP had not applied for national authorisation (by a national court) as it would have been necessary in a comparable domestic case, and if at the same time, the assisting Austrian EDP had only applied for a national authorisation where only the 'formal requirements' are reviewed, a search and seizure warrant would have been issued and executed without any review of the substance of the case and without determining the proportionality of the measure. A search and seizure warrant remains one of the easiest scenarios in this respect, since most of the Member States do have comparable, if not similar, regulations for such warrants. In light of warrants on wiretapping, undercover investigation, online searches, residential surveillance, long-term observation, or dragnet searches, that may look very different. This analysis does not ignore the fact that the price is high, which is one major reason for the outcome of Article 31 of the EPPO Regulation as it is right now.[20]

17 M Lenk, 'Das Prinzip der gegenseitigen Anerkennung im Strafrecht' (2024) 136 *Zeitschrift für die gesamte Strafrechtswissenschaft* 348, 359 with further references.

18 On the development of the principle of mutual recognition see in addition with further references: Lenk (n 17) 349 f.

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

20 Herrnfeld (n 15) mn 5.

A substantive review within the assisting Member State may require full translations and explanations of the case and of evidential needs.

However, this does not mean that the requirements of the rule of law and the subjective rights of the person concerned could not also be secured in the issuing state – in this case by the handling EDP. After all, Article 31 of the EPPO Regulation aims to ensure that all requirements are fulfilled in the state conducting the proceedings and that they are subject to the corresponding reservation by the judge. But in the case of transnational measures, the territory of the Member State where the investigation and prosecution take place is not affected. However, this territorial bond may be decisive: the state conducting the proceeding can determine the criteria of proportionality only in a more abstract manner than the state where the concrete measure is to be executed, as generally only here one is aware of the concrete situation of the persons concerned, such as the accused.[21]

In other words, the current situation of the law, and its various possible interpretations, provokes the need for involving the ECJ. As a consequence, the prosecution office will be awaiting decisions by the court. It should be emphasized that the problem is not mistrust in the prosecutors' cooperative work, including the EPPO's involvement and investigations conducted by handling and assisting EDPs. The critical consideration is, however, that the individual rights of the accused may be jeopardized in this particular case scenario.[22] *I wonder, why not think about alternatives.*

With the rules it sets out, Article 31 of the EPPO Regulation tries to merge the two worlds. From the perspective of the Member States and the EU, that is understandable. In order to fulfill the task and state duty to conduct criminal proceedings most effectively, proceedings with cross-border dimensions need to show that they are able to work with both harmonised standards and fewer national barriers.[23] If the cooperation within the EU and between Member States is to be based on the concept of mutual trust, this may as such call for increasing harmonised standards and for less double checks due to this trust.[24]

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21 Ramos (n 2) 65.

22 Duesberg (n 5) 596.

23 M Böse, 'Ein europäischer Ermittlungsrichter – Perspektiven des präventiven Rechtsschutzes bei Errichtung einer Europäischen Staatsanwaltschaft' (2012) *Zeitschrift für rechtswissenschaftliche Forschung* 172, 173 f.

24 See in addition and with further references C Burchard, *Die Konstitutionalisierung der gegenseitigen Anerkennung. Die justizielle Zusammenarbeit in Strafsachen in Europa im Lichte des Unionsverfassungsrechts* (Vittorio Klostermann 2019).

Drawing various outlines of possible alternatives, a proposed solution that (full) judicial authorisation should, in any case, be obtained in the Member State of the assisting EDP is indeed too cumbersome and overly time-consuming, because it will require presentation of the full case file, obtained evidence, the state of investigation and investigative needs (at least in some cases), and will normally include a (partly to full) translation of many documents. The *alternative* of the constant involvement of courts in two Member States would make the system, again, overly cumbersome and time-consuming. There is a clear need that there should always be only one judicial authorisation (cf. Recital 72 EPPO Regulation). Another *alternative* of substantive review within the handling state only may often put the rights of the accused at risk.

The structural problem remains the nationality of criminal law and criminal jurisdictions. Nationally empowered officials lose their authority at state borders. Definitions of crime and linguistics differ, the scope of review and competence differ, as does an understanding of proportionality.[25]

In Germany, there exists a common saying 'hope dies last'. I would like to change it to 'hope is what we've got'. And there are lots of reasons for hope. So, do not let me remain very reserved and only critical, but draw a line into the future which points into another direction: Based on the foundation we already have, we must take responsibility for carefully developing structural rules that are effective for state investigations, when criminals act transnationally. To achieve this, we have to harmonise what is necessary while allowing differences in the judicial systems and respecting various cultures. That includes the necessity to carefully carry out proportionality checks for the parties involved in the proceedings without endangering the functionality and effectiveness of the procedure as well as defendants' rights. The effectiveness of the European administration of criminal justice depends, to a large extent, on the courage of those involved in the proceedings to accept the regulatory diversity of the 27 Member States and to respect the EU-fundamental rights considerations. Those go hand in hand in an overall picture of the Member States' loyalty to the Union and its firmness in terms of fundamental rights.[26] In other words, the concept of handling and assisting EDPs in the recognition of different procedural systems cannot be reconciled with the full enforcement of criminal procedural law in the leading trial state only vis-à-vis the assisting state.

25 Duesberg (n 5) 596; Elholm (n 2) 215.
26 Bachmaier Winter (n 6) 134; Elholm (n 2) 217.

5 Alternatives

This thinking 'out of the box' leads to the following conclusions:

Liberty cannot be developed by a few on behalf of others, nor does it emerge naturally out of practice. Liberty, rule of law, and democracy for all are only to be developed based on commonly constituted basic rights and rules by all parties involved. That necessarily includes the Member States, the prosecuting authorities, but also the accused and the defence, as well as the victims of crime.

Criminal justice is not all about efficiency, but also about the protection of rights[27] on which the EPPO can build safeguards and models, always asserting that criminal justice is not only about efficiency of criminal investigations and its advantages for the state, but also about the rule of law and the protections it provides on the citizens of Europe.

In view of this, a number of consequences should be considered: First, the PCs should publish their findings when investigations are not jeopardised. Transparency allows trust to build.[28] Second, clear procedural safeguards should be installed, and decision-making powers and procedures should be clarified so that the EPPO is less dependent on decisions of the ECJ. Third, the process of cooperation with the ECJ should be accelerated: this would allow both greater effectiveness of proceedings and safeguard the rights of accused in early stages of the procedure, in particular as the ECJ is a supervisory institution outside the EPPO.

Clearly, this includes the introduction of the system of a 'European investigating judge' at the ECJ which acts as a truly European Court and supervises the investigative actions of the EPPO from the outside, parallel to the PC from the inside.[29]

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27 Duesberg (n 5) 600.
28 Ramos (n 2) 45.
29 Böse (n 23) 196.

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