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Editorial

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Sometimes the More is Less. Transnational Investigations in the EPPO System After the Judgment of the EU Court of Justice

1 The Emerging Troubles with Transborder Investigations in the First Two Years of Work

In June 2024, it will be three years since the EPPO started operating as a new EU judicial body with competences in criminal matters. Of course, this new institution has accomplished a lot since the beginning of its mandate, as anyone can recognise by reading the three annual reports, published in 2022, 2023 and 2024 respectively.

For example, the first report[1] (on the EPPO's first months of work) shows the considerable number of investigations opened (576),[2] the extent of the estimated damage to the EU budget caused by the crimes the EPPO is investigating (amounting to €5.4 billion), and the number of seizures made, amounting to a total of considerable assets (147.3 million in seizures).

These figures are certainly positive when one considers that in those same months, the EU States that joined the EPPO were setting up their national structures. A task that involves firstly the selection of the magistrates working for the EPPO, and, secondly, also all the other administrative issues (the place of work, administrative support staff, etc.).

1 See the report at the webpage https://www.eppo.europa.eu/en/news/eppo-investigates-eu54-billion-worth-loss-eu-budget-its-first-7-months-activity.

2 However, one needs to consider that «of the 576 investigations opened in 2021, 298 were new cases initiated by the EPPO, and 278 were so-called backlog cases reported by the national authorities and taken over by the EPPO».

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It is also worth noting that the first report highlighted the «excellent and efficient cross-border cooperation». The report explained in fact that

> Law enforcement actors across the EU have discovered the speed, efficiency and information gains they can expect when working with the EPPO, compared to traditional mutual legal assistance arrangements and cross-border coordination methods. Because of the EPPO's independence and cross-border competences, the organisation of coordinated searches or arrests across borders has been a matter of weeks, instead of months.[3]

The report on the EPPO's second year of operation, as was to be expected, shows larger numbers describing the institution's growth over time.[4] Thus, the amount of opened investigations (865), the extent of the estimated damage to the EU budget (€14.1 billion) and the value of seized assets (amounting to €359.1 million) increase. At the same time, the assessment of the system of cooperation in the conduct of the report could be expected to remain positive, as the overall results were higher than in the first year. In fact, somehow surprisingly, the authors of the report highlight what they consider to be some of the weaknesses of the EPPO system.[5] The focus here is on the legal changes that the EPPO urges the EU legislature to make. These amendments should regard, in the hopes of the EPPO, «the rules concerning cross-border cooperation between European Delegated Prosecutors», since, in particular «*the regime of judicial authorisation of investigative measures*, are already the object of clarification in front of the European Court of Justice, *with the risk of backsliding on the EU judicial cooperation acquis* [emphasis added]».

The picture presented in this specific area thus seems to be the opposite of the one described in the first year. Whereas the 2021 report highlighted the efficiency and effectiveness of judicial cooperation in cross-border EPPO

3 See the 2021 EPPO Report, at page 5.

4 See the report at the webpage https://www.eppo.europa.eu/en/news/annual-report-2022-eppo-puts-spotlight-revenue-fraud. It should be added that the numbers are even more satisfying for the 2023 report (available at the webpage: https://www.eppo.europa.eu/sites/default/files/2024-03/EPPO_Annual_Report_2023.pdf). Here it is sufficient to mention that in 2023 the investigations opened amount to 1371 (58% more than in 2022).

5 This is clear from the very words of the European Chief Prosecutor Laura Kövesi, which are quoted in the report «We are on the right track, but we need to do more. The EPPO is far from having reached its full potential. If we want the EPPO to make a lasting difference, we need *organisational and legal adjustments*. This includes *the revision of the EPPO Regulation*, and the assignment to the EPPO cases of dedicated and specialised financial fraud investigators in all the participating Member States» (italics added).

investigations, the 2022 one sends out a warning signal: if no action is taken, progress in EU judicial cooperation risks being brought to a significant setback.

The 2022 report states that the issue of cross-border investigations in the EPPO system was referred to the EU Court of Justice. This was the first court case originating from the EPPO and was awaited with considerable interest, as the Court's solution would reveal more about the nature of the EPPO and the added value it can bring to cross-border investigations.[6]

In the wishes of the drafters of the Regulation, the EPPO should have constituted "something more" than the solutions previously adopted. Indeed, precisely because of its unitary nature as a single, independent body, the conduct of investigations and the gathering of evidence between one State and another should be quicker than the horizontal judicial cooperation model inspired by mutual recognition. However, some legal provisions adopted on cross-border evidence collection left doubts as to whether this objective could always be achieved, which needed to be addressed by the EUCJ.

On 21 December 2023, the EU Court of Justice issued its first ruling on the EPPO in the case of cross-border investigations, adopting an undoubtedly pragmatic solution, which somewhat dampens the enthusiasm for the ambition that the EPPO could be something completely distinct from the system built over the past two decades in the field of judicial cooperation.[7] Nevertheless, it remains perhaps plausible that EPPO is something more, if not something different, than what we had before. But is this good news or bad news?

2 Other Pending EPPO Issues

Before delving into the ruling of the EU Court of Justice, it is useful to underline that this is not the only legal issue related to the entry into force of the EPPO Regulation. For instance, a new interpretative referral was raised by Spain, with reference to the treatment of the person called to report the facts as a witness (even if from the evidence gathered, s/he appears to be a potential

6 See A. Venegoni, *The EPPO Faces its First Important Test: A Brief Analysis of the Request for a Preliminary Ruling in G. K. and Others*, in 4 *Eurocrim* 2022, p. 282.

7 EUCJ, Grand Chamber, 21 December 2023, C-281/22 (G. K. and Others v. EPPO). See the first comment on the judgment by T. Whal, *ECJ Ruling on the Exercise of Judicial Review in EPPO's CrossBorder Investigations*, *Eurocrim*, 27 February, 2024, at https://eucrim.eu/news/ecj-ruling-on-the-exercise-of-judicial-review-in-eppos-cross-border-investigations/#:~:text=Against%20this%20background%2C%20the%20ECJ,the%20exclusion%20of%20matters%20concerning. See also N. Gibelli, *La Corte di giustizia sul Sistema dei controlli giurisdizionali nelle indagini transfrontaliere dell'EPPO: una prima lettura della sentenza C-281/22 del 21 dicembre 2023*, 3 *Sistema penale* 2024, p. 31–46.

suspect).[8] According to the observations of the *Juzgado Central de Instrucción of Madrid*, if the person concerned were called to testify in purely domestic proceedings, s/he would be entitled to refuse to answer, invoking her/his right to silence. In particular, under the interpretative referral, the person concerned could challenge the summons before the national court, whereas the Spanish law transposing the EPPO Regulation does not provide for the same remedy. The judges in Madrid doubt whether this is compatible with EU principles, the right to personal freedom and freedom of movement, and therefore ask the Court of Justice for a ruling that resolves the disparity between the two situations.

Other Countries raise new issues. For example, in Italy uncertainties are emerging as to which prosecutor should represent the prosecution in EPPO-initiated criminal trials. While there is no doubt that a delegated European Public Prosecutor (EDP) must conduct and supervise the proceedings before the prosecution begins, it is not clear whether the same applies to the trial phase, which takes place after the prosecution has been brought (and thus formally falls, at least in part, outside the EPPO's sphere of control). Another problem, again from Italy, concerns supervision by the supervising EDP and the Permanent Chamber in cases where the parties have initiated a negotiated procedure (such as plea bargaining). In Italy, in fact, all negotiated procedures (including plea bargaining) take place after the commencement of criminal proceedings (thus, after the formal closure of the investigation). Does this legal specificity per se exclude the power of the supervising EDP and the Permanent Chamber, in the central phase of the EPPO structure, to supervise and authorise access to a negotiated procedure?[9]

The interpretative doubts in this paragraph, while certainly interesting, do not seem to raise serious concerns. As a preliminary remark, it is easy to observe first that the higher the number of open investigations, the greater the possibility of new problematic legal issues emerging. Furthermore, it is nothing new that the EPPO Regulation leaves several elements not fully clarified

8 See *Request for a preliminary ruling from the Juzgado Central de Instrucción No 6 de la Audiencia Nacional* (Spain), lodged on 3 May 2023 – European Public Prosecutor's Office v I.R.O., F.J.L.R, (Case C-292/23).

9 Another possibly interesting question from Italy is whether, with reference to the EAW, the fact that the offence was committed in the territory of the executing State (in this case, Italy), when the arrest warrant was issued by the EPPO, can be invoked as a ground for refusal. Obviously, the response of the Italian Supreme Court was negative. The EPPO model overcomes possible legal objections related to conflicts of jurisdiction that could arise in the framework of an ordinary cooperation between States within the EU. See Court of Cassation, 6th Panel, 17 December 2021, no. 46641.

and that only practice is able to bring them to light. One can hope, of course, that many of the problems that arise will not be too difficult to solve. For example, with reference to the issue raised by the *Juzgado Central de Instrucción* in Madrid and the ones faced in Italian courtrooms, a little interpretative sagacity should be sufficient to overcome the problem. On the one hand, the principle of equality (and the principle of non-regression in the protection of rights) should allow extending also to EPPO investigations the protection granted by the Spanish system to those who are called to testify before the judicial authority or the police as potential suspects or persons of interest. This hermeneutical solution aimed at extending the protection of the right to silence does not seem capable of undermining the efficiency of the EPPO system as a whole.

After all, Directive 2016/343/EU on the presumption of innocence, that is applicable in EPPO's proceedings via Art. 41 para. 2(d), recognises, at Art. 7, the right to silence to anyone is de facto considered a suspect.[10] While, on the other hand, ECtHR jurisprudence allows to challenge the capacity in which a person is called to testify before the authorities (from the very first police hearings), as is also confirmed in the albeit controversial case *Ibrahim and others v. UK*.[11] In such a framework, it would seem unreasonable, as well as difficult to justify in legal terms, that a person summoned to be questioned before an EDP could not raise her/his right to silence, observing that her/his appropriate status, by way of judicial review, should be that of a suspect and not of a witness.

Similarly, in relation to the Italian practices mentioned above, it should not be complicated to conclude that the EPPO Regulation, in Article 4, requires the prosecution to be represented at trial by a prosecutor working for EPPO, and not by a national prosecutor from outside the EU body. If then, after the prosecution has started at the preliminary hearing or at trial, the defence were to request access to a negotiated procedure, as the rules dictate in the Italian system, the Regulation in at least two passages allow the supervision of the Permanent Chamber. Article 10 par. 2 and 5 in fact prescribes that the duty of the Permanent Chamber is to «monitor and direct the investigations and prosecutions», thus including also the phase opened after the ending of the investigations. Furthermore, par. 3(c) of the same provision confirms that the

10 The EUCJ, somewhat implicitly recognised this in the judgment issued by the Grand Chamber on 21 February 2001, C-481/19, Consob. See on the point G. Lasagni, *The Court of Justice on the right to remain silent in criminal matters* (*and beyond…*), *EU Law Live, 2021* (https://eulawlive.com/op-ed-consob-the-court-of-justice-on-the-right-to-remain-silent-in-criminal-matters-and-beyond-by-giulia-lasagni/).

11 ECtHR, Grand Chamber, 13 September 2016, *Ibrahim and Others v UK*, case no. 50541/08, 50571/08, 50573/08 and 40351/09.

Permanent Chamber shall decide on the matter of simplified prosecution procedures giving instructions to the EDP, without any limitation of its powers in the sole investigations phase.[12]

If, therefore, these brief examples confirm that many legal doubts can easily be resolved by interpretation without calling into question the apex organ of EU justice, it must also be recognised that this is not always the case. This is true, in particular, for legal problems of a cross-border nature, for which only a body with a supranational vision (and capacity to intervene) seems in the right position to dictate the hermeneutic line to be followed. This was the case in the cross-border investigation case referred to the Court of Justice, which was decided at the end of December 2023.

3 The EUCJ Ruling on Judicial Review in Case of EPPO Transborder Investigations

The legal question requiring clarification, referred to the EU Court of Justice, regarded an investigation led by a German EDP concerning fraudulent conduct to circumvent customs duties.[13] During the investigation, the German EDP needed to carry out certain investigative acts in another State, Austria, which is also part of the EPPO. In particular, the handling EDP wanted searches and seizures of the accused's property to be carried out in Austria. The Austrian EDP was then required to oversee this activity, acting as assisting EDP.

When conducting investigations as an assisting EDP, the problem of judicial authorisation emerged. It should be noted that the two countries have a rather homogeneous set of safeguards, since in both national systems searches (and subsequent seizures) must be authorised by a judge in advance. But this is the problem, which judge: the German one, the Austrian one, or both?

Apparently, the EPPO Regulation offers a fairly clear solution, if one limits oneself to the textual expression of the legal provision. In fact, Art. 31 para. 1 states that

12 The only doubt may be represented by the reference to Art. 35 para. 1 made in Art. 40 para. 1. However, it is sufficient to read the reference to Art. 35 as being necessary only for cases of negotiated procedures initiated during the investigation, and not for those initiated after the prosecution has begun.

13 See A. Venegoni, *The EPPO Faces its First Important Test: A Brief Analysis of the Request for a Preliminary Ruling in G. K. and Others*, cit., p. 282.

> Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.

At the same time, para. 3 provides that

> If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.

Finally, the third sentence of para. 3 provides that

> Where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.

These legal provisions are preceded by Recital 72, which clearly emphasises that the judicial authorisation, in the case of cross-border investigations requiring the intervention of a judge, must be one.[14] If we put all the steps together, the solution extrapolated from the literal wording of the legal provisions seems to emerge quite clear.

Firstly, the Regulation's aim is to avoid a double judicial review because this could undermine the unity of the EPPO's action by transforming its investigation into several separate investigations. Such separate investigations should inevitably require coordination, that could be achieved according to the criteria of judicial cooperation, which the EPPO, thanks to the partial unification

14 According to Recital 72, «In cross-border cases, the handling European Delegated Prosecutor should be able to rely on assisting European Delegated Prosecutors when measures need to be undertaken in other Member States. Where judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained, *but in any case, there should be only one authorisation*. If an investigation measure is finally refused by the judicial authorities, namely after all legal remedies have been exhausted, the handling European Delegated Prosecutor should withdraw the request or the order» [italics added].

of the system at supranational level, would have wanted to overcome. Given thus that judicial supervision must (possibly) be single, the problem would then only be which judge should provide such supervision. Article 31 seems to require that it must be the judge in the State of the assisting EDP. This is so, specifically, when the State where the assisting EDP is located provides for a judge's authorisation.[15]

Secondly, while assuming that judicial supervision must be just one, there is a need not to lower the guarantees of the individuals, as an effective and thorough judicial control is crucial to protect the fundamental rights put in tension by the investigative measure ordered by the EDP.[16]

To put it differently, the dilemma is that, on the one hand, one can understand from the Regulation's reading that the EPPO must be "something more" than a mere 3.0 system of judicial cooperation, albeit improved over time within the EU thanks to the reforms achieved with mutual legal assistance (judicial cooperation 1.0) and mutual recognition (judicial cooperation 2.0).[17] In this sense, a dual judicial supervision risks being too clearly reminiscent of the model outlined in the European Investigation Order Directive, which, on the other hand, is an instrument fully rooted in the principles of mutual recognition. On the other, however, this seeking for something more than what the EU experimented before the EPPO needs not to be "something worse", both in the sense of an inferior functioning of the cross-border investigation mechanism, and in the sense of less protection of the defence guarantees.

If these are the terms of the question, it is not difficult to see how the rule laid down in Article 31 is ineffective, if taken too literally.[18]

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15 The picture changes, however, if the law of the assisting EDP does not impose *ex ante* judicial control, whereas this is provided for in the system of the handling EDP. In that case, the situation is reversed, and authorisation must be requested (only) in this system.

16 K. Kremens, *The authority to order search in a comparative perspective: a call for judicial oversight*, 6 *Rev. Bras. de Direito Processual Pena*l, 2020, 1585–1626, p. 1613 s.

17 According to the Advocate General (para. 78), «I must therefore address the arguments of the proponents of Option Two that the EPPO is not a system of mutual recognition but is *something more*. I would make a claim to the contrary: as long as there are no common EU criminal law rules*, the EPPO cannot but operate based on mutual recognition*. However, the levels of mutual recognition differ, and *the EPPO may be seen as the most developed mutual recognition instrument in the area of cooperation in criminal matters yet* [italics added] ». See about it N. Gibelli, *La Corte di giustizia sul Sistema dei controlli giurisdizionali nelle indagini transfrontaliere dell'EPPO: una prima lettura della sentenza C-281/22 del 21 dicembre 2023*, cit., p. 34.

18 See H. H. Herrnfeld, *Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others* (*Parquet européen*), 2 *Eurocrim* 2023, p. 229.

Getting back to the case, the issue became apparent when the accused, after the search was carried out in Austria by the assisting EDP (duly authorised in advance by an Austrian judge), appealed against the search before the Higher Regional Court in Vienna. According to the defence, in fact, the judicial control carried out in the assisting EDP's Country would not be sufficient, because it did not adequately justify the necessity of the investigative measure to be undertaken nor did it ensure effective compliance with the principle of proportionality. Added to this is the fact that defending oneself in a Country other than the one in which the investigation is conducted by the handling EDP implies very severe costs and difficulties, because the defence is forced to operate in a system it is not familiar with. The observations made clearly lead to the view that, from the point of view of the defence, the most appropriate jurisdiction to address the merits of the issue (i.e. whether the measure should be taken and on what grounds) should be that of the handling EDP.

The literal solution emerging from the EPPO Regulation then lends itself to further criticism, in addition to that expressed so far, regarding two profiles, although hypothetical and not recurrent in the case examined. The first concerns the transmission of the investigations file and its translation. If it is in fact a judge of the assisting EDP Member State who must decide on the authorisation, s/he needs to have all the necessary information to be able to make an informed decision. In practice, this means transmitting all the relevant elements gathered by the handling EDP and translating them, which may be necessary if the judge who is required to grant the warrant does not speak the language of the Country where the investigation is conducted.[19]

The problem is then likely to be amplified, of course, in the case of multiple cross-border investigations, to be conducted in different countries. On the one hand, translations could be more than one, if the judges of the various assisting EDPs do not speak the language of the handling EDP. It also increases the risk of conflicting judicial decisions. Indeed, if similar investigative acts must be conducted in more than one Country other than that of the handling EDP, e.g. if several searches must be carried out in different jurisdictions, the Regulation requires that each different assisting EDP obtains the necessary judicial authorisation. It is not a given at all, in such cases, as is quite easy to imagine, that every judge in the various jurisdictions involved will grant it. It follows that conflicting choices could arise, whereby some of the assisting

19 This was not the case in Germany and Austria, of course. However, there is no doubt that such a problem arises when different languages are spoken in the countries involved in EPPO investigations.

jurisdictions might refuse to issue the judicial warrant, while in others it might be granted.

Hence the referral to the Court of Justice issued by the Higher Regional Court in Vienna. The debate between the parties intervening in the proceedings before the EUCJ was immediately perceived as interesting. On the one hand, the EPPO submitted to the EUCJ the hypothesis of adopting a solution that was more creative and less faithful to the literal text of the Regulation, consisting of transposing into the EPPO system a model close to that provided for in the European Investigation Order Directive. As suggested by the EPPO, therefore, the judicial authority of the handling EDP could have been given the power to authorise the most relevant elements of the investigative measure to be carried out (those pertaining to the justification of the measure itself). In this way, only control over the merely executive elements of the measure should have been left to the jurisdiction of the assisting EDP. With this solution, the EPPO system would have appeared perhaps less unified, but also easier to manage, reducing the risks of conflicting judicial decisions and the problems of transferring copies of the investigation file translated into the language of the assisting EDP. On the other hand, the Austrian and German Governments, with some good reason, opposed the solution promoted by the EPPO, preferring one more faithful to the text of the regulation.[20] In this view, judicial authorisation in the case of cross-border investigations should be carried out by the judge operating in the Country of the assisting EDP (in cases where an authorisation is provided in the EDP assisting State). While acknowledging that this option might have caused some problems in practice, the Austrian and German Governments considered it more correct because it was more respectful of the principle of legality. As the AG wrote, «In the words of the representative of the German Government, the Court of Justice is not a

20 A paradox should also be noted. Austria and Germany, during the preparatory work on the Regulation, had indeed pointed out that a system with only one judicial supervision would have been too problematic to implement, precisely because, after all, the EPPO does not constitute a plain unitary legal system. Nevertheless, once the existing solution was adopted, both the Countries changed their national legal provisions to adapt their system to the EPPO Regulation. See H. H. Herrnfeld, *Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others* (*Parquet européen*), 2 *Eurocrim* 2023, p. 231. Even more paradoxically, Germany implementing the EPPO Regulation had prescribed not to obtain authorisation in its own jurisdiction, if an authorisation had already been provided for in the law of the assisting EDP's State, as in the case commented on here.

repair shop for faulty products. Instead, the faulty product should be returned to the manufacturer for improvement, in our case, the legislature».[21]

The solution adopted by EUCJ, which largely implements the interpretation promoted by EPPO, is perhaps a little less exciting than the one consisting of issuing a single court order for cross-border investigations under the EPPO Regulation, but more realistic and pragmatic. The solution would consist in adapting the provisions of Directive 2014/41 on the European Investigation Order to the EPPO. In this way, thanks to a systematic interpretation (which, if one wishes, finds some legal support in the text of the Regulation[22]), the judicial authorisations end up being two. A more relevant one, adopted in the jurisdiction of the handling EDP, containing the justification of the measure to be adopted (*id est*, its necessity with respect to the investigation conducted and the respect of the principles of legality and proportionality); the other, less demanding, to be issued in the Country of the assisting EDP, focused only on the observance of the procedural rules of the cross-border jurisdiction where the measure is to be materially executed. The solution obviously has repercussions regarding remedies. In this set-up, the defence must appeal the warrant before the judge of the handling EDP, as far as it intends to challenge the justification of the measure, its proportionality and, of course, compliance with the legal provisions laid down in that system. In the jurisdiction of the assisting EDP, on the other hand, it may challenge more limited aspects, such as, principally, compliance with the rules for carrying out the required measure and, perhaps, the respect of the proportionality principle *in concreto* (that is in the implementation of the investigative operation carried out).[23]

21 See H. H. Herrnfeld, *Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others* (*Parquet européen*), cit., p. 229.

22 In fact, Art. 31 states that the justification of the investigative measure, as well as its adoption, are the responsibility of the State of the handling EDP. From a strictly literal point of view, this legal passage leaves room for the assumption that the judicial authority in the State of the assisting EDP is only left with the supervision of the execution of the measure, whereas the original decision as to which measure to take and how to justify it does not belong to it (while, on the contrary, to the handling EDP's jurisdiction). See on this N. Gibelli, *La Corte di giustizia sul Sistema dei controlli giurisdizionali nelle indagini transfrontaliere dell'EPPO*, cit., p. 38.

23 It must be admitted that this solution does not resolve all possible doubts. For instance, it is unclear in which forum the defence could challenge the admissibility of the evidence, assuming that some crucial provision was violated in the Country of the assisting EDP (and that this was recognised by the judicial authority of that jurisdiction).

Finally, to limit the risk of unequal guarantees, the Court concluded by encouraging EPPO States Parties to implement similar protections of fundamental rights when it comes to investigative measures.

> As regards investigation measures which seriously interfere with those fundamental rights, such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures.

4 Some Positive and Some Critical Points of the EUCJ Ruling

The judgment of the Court of Justice has important consequences insofar as it states that the control over the adoption and motivation of the investigative measure is attributed to the system in which the handling EDP operates. It is in fact up to the judicial authority in this system to verify and authorise the investigative act as to its necessity, proportionality, and conformity with the principle of legality. In this way, the margin of control that remains in the hands of the judicial authority in which the assisting EDP operates ends up being much more limited than the text of the Regulation would suggest.

This solution certainly has merits. It centralises the most important review (concerning the adoption and justification of the measure) in a single jurisdiction, leaving any other marginal legal issues to the peripheral offices, those of the assisting EDPs. In turn, this set-up helps the defence, which will be able to express its most important arguments in a single forum, the one where the investigation is rooted, without having to challenge the merits of the measures in several different jurisdictions. It also keeps the investigation file unitary, as it remains entirely in the hands of the handling EDP, and facilitates its disclosure to the defence, which will always be able to access the file by turning to the prosecutor in charge of the investigation.

Moreover, this reduces potential judicial clashes. In fact, the risk of different judicial authorities adopting conflicting solutions on crucial issues such as the merits and justification of an investigative measure is reduced to practically zero. At most, in peripheral locations, where the specific operation required by the handling EDP needs to be carried out, there may be practical problems

(e.g., that a certain investigative measure is not available, but there would be another similar one possible; or again, that specific formalities must be observed in order to carry out the investigative operation required by the handling EDP, due to the rules in force in the executing State). These are obviously problems worthy of consideration, the importance of which no one wants to underestimate, but not so serious as to compromise investigative operations planned at headquarters of the handling EDP, as might have been the case had a more literal interpretation of the EPPO regulation been adopted.

From the remarks made so far, it seems easy to see the analogy with the discipline provided for in the EIO Directive, in particular with reference to Articles 6 and 9. The type of supervision carried out by the issuing judicial authority recalls, in fact, that which, in the commented decision of the Court of Justice, must now be attributed to the judge in the State of the handling EDP; on the other hand, the control carried out by the judge where the assisting EDP operates, resembles in broad strokes that provided for with regard to the executing State under Article 9 of the EIO Directive.

This analogy, which the Court of Justice itself openly acknowledges (see paras. 62 and 63 of the judgment), transforms the nature of EPPO's cross-border investigations (or, if the Court is deemed to have merely "interpreted" the Regulation in the most correct manner,[24] reveals its true nature). Far from being a unitary system, the EPPO operates, when investigations must be conducted in more than one jurisdiction, as a system of judicial cooperation.[25] Being part of the European Union, it applies, in *sui generis* manner, the principle of mutual recognition of judicial decisions. Paradoxically, having wished to regulate it as "something more" than a horizontal cooperation system would have risked producing more harm than good. Staying within the sphere of influence of mutual recognition – of which, according to the Court's words, there are many different shades – makes its action safer.

A unified system is probably unthinkable until the Treaties allow the EPPO system to be regulated in its entirety, i.e. including the investigation, prosecution and even trial phases. Moreover, to have real unity, it would be useful for the EPPO to also have a police agency, without which it is impossible to

24 The Court's choice, as noted in the preceding footnote, has a literal justification, insofar as it emphasises the passage whereby the EDP handling is responsible for deciding on the adoption of the measure and for deciding on its justification.

25 Except for when no authorisation for the measure is provided in either State. In such cases, the more streamlined procedure of mere "allocation" to the assistant EDP seems applicable.

operate with that unity of action in practice that legitimises the unified regulation of a system. Since art. 86 TFEU is far from allowing this arrangement to be achieved, it is realistic to accept that when conducting cross-border investigations the EPPO will have to keep within the framework of cooperation, and for this reason make use of the typical instruments developed by the EU in this field (albeit with some adapting to the peculiarities specific of the EPPO's system). In short, to return to the flagship statements, it is better to settle for "something less" if at the same time "something more workable" is achieved.

As things stand, in conclusion, the best possible option is to fall back on mutual recognition, which has been tried and tested for almost 25 years now.[26] The Court of Justice therefore did well to derive the solution described above from the interpretation of Article 31 of the EPPO Regulation.

Of course, the arrangement reached now does not solve every problem. On a first reading, in fact, at least three critical points seem to emerge, which will have to be addressed over time. The first is expressed by the Court of Justice itself and concerns the harmonisation of safeguards on the protection of rights. The second concerns the model of mutual recognition suitable for EPPO, since, as the Luxembourg Court wrote, there are many different shades of this principle. The third, finally, concerns the ability of mutual recognition as such to endure over time, considering how many exceptions and limitations it has been subjected to in the last 10 years.[27]

The harmonisation of safeguards for sensitive investigative measures (*in primis*, searches and seizures), is a general problem dating back to when the EU started to promote enhancement of judicial cooperation in criminal matters. However, the issue is particularly delicate for the EPPO system, which has the ambition to strive for unification. Indeed, while in horizontal cooperation between states, the supervision of executing judicial authorities can temper uneven national levels of rights protection, paying an acceptable tribute to national identities in the name of fairness in cooperation procedures, this argument is politically less effective regarding the EPPO. Here, the loss of efficiency that the system must suffer due to the double judicial control (in the Country of the handling EDP and in that of the assisting EDP) reveals some weakness of the supranational construction, which, for the first time, aspires to unity. The risk is that, perceiving that EPPO is neither something more than mutual recognition, nor something else either, one may end up wondering whether

26 See on this regard L. Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer, 2017, p. 41 ss.

27 See L. Klimek, *Mutual Recognition*, cit., p. 585 s.

it is useful to maintain a centralised structure just to conduct investigations (actually, to coordinate investigations led by a national prosecutor, although working under the EPPO umbrella) and prosecute those responsible before national authorities. To put it another way, the option for dual judicial review in the EPPO can work if the jurisdictions are largely similar, so that national judges in most cases simply give a pass to investigative measures coming from EDPS of another jurisdiction. At the same time, there is a risk that, aware of the problem, the EPPO promotes an interpretation according to which judicial control is already ensured by the EPPO itself. For instance, with reference to searches and seizures, that an order adopted by the EPPO is sufficient to consider the requirements of the EUCJ fulfilled.[28]

If this were the solution to end up being established in practice, there would be a significant risk of a general lowering of the protection of fundamental rights. Many jurisdictions, in fact, provide for the supervision of a judge in the strict sense of the word even in matters of searches and seizures. This is the case, for instance, in Germany and Austria, the countries from which the EUCJ decision originates. Although *impartial*, in fact, the EPPO is not *super partes*, having the task of prosecuting those responsible in court. Entrusting this body with the *ex ante* legal control of searches and seizures could therefore be perceived as a downward choice for those countries that already provide for a proper judicial supervision. It can also be doubted whether EPPO control alone is compatible, or at least not entirely compatible, with the jurisprudence of the European Court of Human Rights. For it, in fact, even in the field of searches and seizures, control of a judge *stricto sensu* is essential and guarantees respect for the right to private and family life.[29] Moreover, in the field of personal data and metadata, the EUCJ has been clear in denying the nature of a judicial body to national prosecutors, even when, according to the rules of their Country, they are recognised as independent from other powers of the State and they have a duty to conduct investigations impartially.[30] It is true that the field of personal data is different, at least in part, from that of private and family life. However, it is easy to foresee that if the hermeneutic idea that the EPPO is sufficient to exercise judicial control were to be imposed, the EU system would

28 This is the most probable scenario, according to N. Gibelli, *La Corte di giustizia sul Sistema dei controlli giurisdizionali nelle indagini transfrontaliere dell'EPPO*, cit., p. 43–44.

29 ECtHR, 27 September 2018, *Brazzi v Italy*, case no. 57278/11.

30 EUCJ, Grand Chamber, 2 March 2021, Case no. C-746/18 (*Prokuratuur*).

not appear entirely consistent regarding the effective and equal protection of fundamental rights.[31]

As for the type of mutual recognition EPPO should implement, then, it is worth pointing out that EU legal production has already proposed new forms, more developed and apparently more efficient than those foreshadowed in the judgment of the Court of Justice in the EPPO case. For example, in the system devised with the European Production Order (EPO) Regulation, the judge (or prosecutor) of one State is allowed to directly issue orders, through his own decision, to a company located in another EU State.[32] In this set-up, judicial control in the executing State is possible and triggered only by the request of the legal entity, reached by the judicial decision of the issuing State. The question that arises is, once one accepts the idea that the EPPO is nothing more than a sui generis system based on mutual recognition, whether, on balance, it is plausible to think of a nuance, among the many made possible by the principle in question, that is more modern and effective than the EIO Directive as an ideal model.

Finally, about the success of the mutual recognition model, one must ask oneself whether it is destined to last. While it is indeed true that new forms of implementation of the principle, such as in the EPO Regulation, have been conceived and should be implemented in the near future, it is undeniable that the principle, in itself, has also undergone relevant limitations, due to a growing mistrust expressed by the Member States (and acknowledged, at least in part, in the judgments of the Court of Justice).[33] Thus, the possibility of

31 See on the point H. H. Herrnfeld, *Yes Indeed, Efficiency Prevails. A Commentary on the Remarkable Judgment of the European Court of Justice in Case C-281/22 G.K. and Others* (*Parquet européen*), 4 *Eurocrim* 2023, preprint at the webpage https://eucrim.eu/articles/yes-indeed-efficiency-prevails/#docx-to-html-fn48 (latest access on April 5th, 2024). According to Herrnfeld « the "prior judicial review", which the EUCJ requires in its concluding statement in paragraph 78 would have to be exercised by a judge or court of the handling EDP's Member State and not merely by the EPPO itself – irrespective of the fact that a prosecution office may be considered being a judicial authority for the purpose of applying certain instruments on mutual recognition».

32 See S. Tosza, *All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European Investigation Order and the European Production Order*, 11 *New Journal of European Criminal Law* 2020, issue 2, p. 161–183. S. Tosza, *The E-Evidence Package is Adopted: End of a Saga or Beginning of a New One?*, 9 *European Data Protection Law Review*, Issue 2, 2023, p. 163–172.

33 See A. Frackowiak-Adamska, *Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P*, 59 *Common Market Law Review*, Issue 1, 2022, p. 113–150. C. Saenz-Perez, *What about fundamental rights? Security and fundamental rights in the midst of a rule of law breakdown*, 13 *New Journal of European Criminal Law*, Issue 4, 2022, p. 526–545.

refusing cooperation on grounds derived from the principles of the Treaties and the Charter of Fundamental Rights has accumulated over time. One wonders: will this also be the case for EPPO in the medium term?

5 Conclusions

The scenario opened by the Court of Justice's ruling in the first EPPO case is, however one wants to see it, of great interest. With it, the Court certainly solves a legal problem, through an interpretation that is less faithful to the text of the Regulation, but perhaps more consistent with the EU criminal justice system as a whole. At the same time, the first EPPO case brought to the attention of the Court of Justice highlights problems and shortcomings, inevitable when we consider how this body has been conceived and implemented over the past two decades (and more). New scenarios then open up, which again bring all the institutions of the Union into play: the legislator, in the first place, which can take advantage of the Court's judgment, and, if it sees fit, may intervene, to adapt the system in a normative way, choosing which version of mutual recognition best suits the EPPO, and which safeguards can be better regulated, so as to ensure, as the Court requires, a better and more consistent protection of fundamental rights. Secondly, the EUCJ itself, which will realistically in the not-too-distant future be called upon to clarify what is to be understood by the supervision of a judicial authority (especially if the legislature is slow to act or fails to act at all). The choice, as we have seen, is not an easy one, since, as so many times, the efficiency of the new system is at stake, on the one hand, and, on the other hand – and this is more important – the rigour in the protection of fundamental rights.

It was clear that its establishment that the EPPO would only be the beginning of a journey, which would be completed in time. Now, if you will, the most difficult challenge begins, in which the European institutions must clarify which identity to pursue with this new prosecutorial organ, and which policy to implement through this one-of-a-kind EU body. The EPPO should represent a turning point, from which a chain reaction towards unification can be triggered. Perhaps instead, considering the ruling adopted and the other questions that are or will be submitted to the Court of Justice, it represents only a step forward from the past, on a path whose destination is still far to be reached. Understanding where one is, where one wants to go, and how to get there, is always the basis for actions – both at legislative and a judicial level – that are qualitatively up to the challenge. Otherwise, the risk is that, as a big-hearted sceptic like Oscar Wilde would have said, the more ends up being the less.

In the long run, it is difficult for the Court of Justice to continue making up for slip-ups and blunders like a modern Mr. Bunbury (or, as the German government more brutally put it, to work as a repair shop for faulty products).

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