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The role of the national investigating judge in EPPO proceedings

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Abstract

The objective of this paper is to explore the questions and challenges that have arisen or could still arise with regard to the role of the national investigating judge in EPPO proceedings, meaning proceedings in which the EPPO investigates, prosecutes and/or brings perpetrators to judgment. For this purpose this paper studies three national legal systems, more specifically the way in which the position of the investigating judge in these Member States has or has not been affected by the establishment of the EPPO.

Keywords:

Investigating judge, EPPO proceedings, indivisibility, single Office.

I. Introduction

The first of June 2022 marks the first anniversary of the EPPO as an operational EU body. This provides a good opportunity to conduct a first assessment of the EPPO's functioning in practice. In this regard, the 2021 annual report already emphasizes the successes which EPPO has had in the first seven months of its operational existence in the fight against criminal offences harming the financial interests of the Union. By 31 December 2021 the EPPO had opened 576 investigations, in which the damage caused to the EU's financial interests was estimated at 5.4 billion euro's. The report also enumerates the challenges which the EPPO faces in accomplishing its tasks, such as the variety in the level of detection of criminal offences affecting EU revenues and customs fraud in the Member States.¹

Besides these successes and difficulties, the EPPO's first anniversary also offers the opportunity to assess the interaction between the EPPO and the organization of criminal investigations in the Member States. According to the preamble of Regulation (EU) 2017/1939 on the establishment of the EPPO (EPPO Regulation), the creation of the EPPO does not intend to change the Member States' national legal systems with regard to the organization of their criminal investigations.² The question which arises is then to what extent this has proven to be possible in practice. The involvement of the EPPO in a criminal case stretches from the investigation to the trial in which public prosecutors, but also other actors, such as the police as well as judges and courts participate.³ This paper focuses on the role of the investigating judge in investigative proceedings conducted by the EPPO. Furthermore, this paper is part of a broader research project conducted by researchers from Utrecht University. This project focuses on the role of national judges and court in both pre-trial proceedings and trial proceedings in EPPO cases. Subsequent papers and journal articles will discuss the obstacles which the trial judge and the judge in judicial review proceedings (*beklagrechter*) could face.⁴

The objective of this paper is to explore the questions and challenges that have arisen or could still arise with regard to the role of the national investigating judge in EPPO proceedings, meaning proceedings in which the EPPO investigates, prosecutes and/or brings perpetrators to judgment.⁵ For this purpose this paper studies three national legal systems, more specifically the way in which the position of the investigating judge in these Member States has or has not been affected by the establishment of the EPPO. The selected Member States, which are the Netherlands, Germany and Belgium, have allocated (slightly) different roles to the investigating judge in investigative proceedings.⁶ Belgium is on one end of the spectrum, since the investigating judge can conduct his or her own investigation in the form of a judicial inquiry. Germany is on the other side of the spectrum, since the investigating judge can in principle only act on the request of the public prosecutor. The Netherlands has an intermediary position, since the abolition of the judicial inquiry in 2013.

Section 2 provides a short overview of the most important features of the EPPO. Section 3 provides a general explanation of the competences of the investigating judge and his or her relationship with the public prosecutor in criminal proceedings in the three Member States. Section 4 briefly explains how the three Member States have implemented the EPPO Regulation and to what extent they have adapted the role of the investigating judge as a result of the establishment of the EPPO. It also contains a first

¹ EPPO Annual report 2021, p. 10.

² Recital 15 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') OJ L283/1 (hereafter EPPO Regulation).

³ Art. 4 EPPO Regulation.

⁴ The trial judge could, for instance, be confronted with complaints regarding the forum decision and the admissibility of (foreign) evidence.

⁵ Art. 4 EPPO Regulation.

⁶ France will also be included in the final version. Similar to Belgium, the French investigating judge can also conduct a judicial inquiry. However, the EPPO implementation act removes this competence of the investigating judge in EPPO proceedings. The power of the investigating judge are transferred to the delegated public prosecutor who may exercise them in accordance with the rules that are applicable to the investigation. Hence, a public prosecutor will be exercising the powers of a judge. Frédéric Baab, 'Le parquet européen: un projet entre audace et réalisme politique' [2021] *eucri* 45.

exploration of important questions and challenges which arise with regard to the position, powers and tasks of the investigating judge in EPPO proceedings. Section 5 provides preliminary conclusions and observations.

II. The EPPO in a nutshell

The need for an EPPO followed from the suboptimal investigations and prosecution of serious crimes affecting the financial interests of the EU at the national and EU level. Competent national authorities often do not prioritize these types of criminal actions due to, for instance, a lack of expertise.⁷ In addition, the existing EU bodies, such as Eurojust, Europol and OLAF, do not have prosecutorial powers and primarily facilitate national criminal investigations of crimes affecting EU interests. Despite these convincing reasons to establish an EPPO, the adoption of Regulation (EU) 2017/1939 was preceded by a long and complicated process that started with the Commission's proposal for a Regulation in 2013.⁸ As Member States were quite nervous about the idea of a supranational EU body with prosecutorial powers, a unanimous agreement on the proposal could not be reached in the Council. Hence, the current EPPO Regulation was adopted on the basis of enhanced cooperation in 2017.⁹ Currently, 22 Member States participate in the EPPO.¹⁰

The EPPO Regulation describes the EPPO as 'an indivisible Union body operating as one single Office with a decentralized structure'.¹¹ The two-tier organizational structure of the EPPO includes a Central Office and a decentralized level. The Central level comprises the College consisting of the European Prosecutors and the European Chief Prosecutor, Deputy European Chief Prosecutors, the Permanent Chambers and the Administrative Director.¹² The College does not take operational decisions in specific cases, but is responsible for e.g. strategic matters and the general oversight over EPPO's activities.¹³ Each Permanent Chamber consists of a chair and two European Prosecutors.¹⁴ These Permanent Chambers supervise and direct the investigations and prosecutions conducted by the European Delegated Prosecutors (EDPs). In addition, they coordinate investigations and prosecutions in cross-border cases.¹⁵ The European Delegated Prosecutors comprise the decentralized level of the EPPO. They are responsible for the actual investigations and prosecutions in their respective Member States. For this purpose these EDPs need to be provided with the same powers as national public prosecutors have in purely national cases.¹⁶ This two-tier organizational structure with a central and decentralized level aims to ensure quick and efficient decision-making in criminal investigations and prosecutions. At the same time, it ensures that the traditions of the different Member States are represented and that cases are handled by prosecutors with expertise of their own national criminal system.¹⁷

With regard to its material competence, the EPPO is both responsible and competent for the investigation, prosecution and bringing to judgement of those who have committed so-called PIF offences¹⁸ affecting the financial interest of the Union.¹⁹ Hence, contrary to OLAF and Eurojust, the

⁷ Explanatory Memorandum of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

⁸ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

⁹ The EPPO Regulation entered into force on 20 November 2017.

¹⁰ Denmark, Ireland, Sweden, Poland and Hungary do not participate.

¹¹ Art. 8(1) EPPO Regulation.

¹² Art. 8(3) jo 9(1) jo 10 jo 11 jo 12 jo 18 EPPO Regulation.

¹³ Art. 9(2) EPPO Regulation.

¹⁴ The Permanent Chamber can be chaired by the European Chief Prosecutor, a Deputy European Chief Prosecutor or a European Prosecutor. Art. 10(1) EPPO Regulation.

¹⁵ Art. 10(2-5) EPPO Regulation.

¹⁶ Art. 13(1) EPPO Regulation.

¹⁷ Recitals 20 and 21 EPPO Regulation.

¹⁸ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law OJ L198/29 (PIF Directive).

¹⁹ In addition, the EPPO's competence extends to participation in a criminal organization focused on committing PIF offenses and other criminal offences inextricably linked to PIF offences. Article 4 jo 22(1-3) EPPO Regulation.

EPPO does not merely have administrative powers or the power to facilitate criminal investigations in the Member States. Instead, the EPPO is the first EU body which is competent to conduct criminal investigations, to prosecute and to bring a case before a national court.

The EPPO Regulation is directly applicable and therefore does not need to be implemented into national law to have legal effect. However, the Regulation often refers to the applicability of national law and it does not (fully) regulate all aspects of the criminal investigation, prosecution and subsequent trial proceedings.²⁰ Consequently, many Member States have adopted (complementary) implementation acts which integrate the EPPO in their national criminal laws. One of the matters which is not (fully) regulated by the EPPO Regulation is the role of the investigating judge in pre-trial proceedings. Hence the next sections focus on the (regulation of the) position of the investigating judge in EPPO proceedings in the three selected EU Member States. For this purpose, section 3 first provides a general overview of the tasks and powers of the investigating judge in the three Member States. Section 4 then reflects on the changes which the EPPO has or has not brought about in the three national legal systems with regard to the position of the investigating judge (in EPPO proceedings). It also provides a first discussion on whether the decisions made by the national legislators are in conformity with the EPPO Regulation and the particularities of the EPPO, especially its constitutional structural principles in article 8(1).

III. The role of the investigating judge in the pre-trial procedure

3.1 Belgium

In Belgium, a preliminary investigation (*vooronderzoek*), meaning the proceedings preceding the discussion of the criminal case at trial, can take the form of a preliminary inquiry (*opsporingsonderzoek*) and a judicial inquiry (*gerechtelijk onderzoek*).²¹ Preliminary inquiries are used in the majority of criminal cases and are conducted by the public prosecutor (*procureur des Konings*) and assistant public prosecutors.²² These preliminary inquiries normally end with a decision to summon the suspect before the trial court (*vonnisgerecht*) or a decision not to prosecute.²³ Judicial inquiries are conducted by investigating judges.²⁴ In practice, judicial inquiries are often used when (coercive) investigative actions which fall outside the competence of the public prosecutor, such as telephone taps are necessary.²⁵ Frequently, these judicial inquiries are conducted on the request of the public prosecutor.²⁶ In fact, requesting a coercive investigative measure, which can only be conducted or ordered by the investigating judge, automatically results in a judicial inquiry in which the investigating judge is in charge.²⁷

However, the public prosecutor can also request the investigating judge to conduct an investigative measure without opening a judicial inquiry. This is called a mini-judicial inquiry.²⁸ In case the investigating judge grants the request, he or she is in principle competent to take over and start a full-blown judicial inquiry.²⁹ This does not mean that the public prosecutor ‘loses’ the case completely, since he or she can, for instance, ask the investigating judge to conduct certain investigative actions.³⁰

²⁰ Art. 5(3) EPPO Regulation; BT Druksache 19/17963, 16.

²¹ Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 558-559.

²² Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 880.

²³ Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 558-559.

²⁴ Art. 55 CCP.

²⁵ Art. 28bis(3) CCP.

²⁶ Sometimes victims can also request judicial inquiries. Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 558-559; Ana Laura Claes, Anne Werding and Vanessa Franssen, ‘The Belgian *Juge d’Instruction* and the EPPO Regulation: (Ir)reconcilable?’ (2021) 6 *European Papers* 363.

²⁷ Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 878-879.

²⁸ Still, some (intrusive) investigative powers may only be ordered in the context of a full judicial inquiry. Examples are arrest warrants. Ana Laura Claes, Anne Werding and Vanessa Franssen, ‘The Belgian *Juge d’Instruction* and the EPPO Regulation: (Ir)reconcilable?’ (2021) 6 *European Papers* 364.

²⁹ Art. 28septies CCP; Ana Laura Claes, Anne Werding and Vanessa Franssen, ‘The Belgian *Juge d’Instruction* and the EPPO Regulation: (Ir)reconcilable?’ (2021) 6 *European Papers*, 364.

³⁰ Ana Laura Claes, Anne Werding and Vanessa Franssen, ‘The Belgian *Juge d’Instruction* and the EPPO Regulation: (Ir)reconcilable?’ (2021) 6 *European Papers*, 364.

When a judicial inquiry is finalized, the investigating judge gives the case back to the public prosecutor who then indicates in the final submissions whether the case should be brought to trial. After drafting the final submissions, the public prosecutor brings the case to the pre-trial tribunal which decides whether the case will be taken to trial.³¹

So, in Belgian preliminary investigations, investigating judges have two hats. On the one hand, they act as judges who are competent to (on the request of the public prosecutor) order coercive investigative actions which interfere with fundamental rights. On the other hand, they act as investigation magistrates, who claim an active and central role in the criminal investigation.³² However, the distinction between the judicial inquiry and preliminary inquiry may not survive. In 2020, a bill reforming the Belgian Code of Criminal Procedure (BCCP) was sent to Parliament in which the distinction between judicial and preliminary inquiries is erased. The bill suggests the establishment of one pre-trial investigation, led by the public prosecutor. The judicial inquiry is eliminated and (what is now) the investigating judge would be responsible for granting or refusing judicial authorizations for certain investigative measures and for supervising the criminal investigation. Hence, this bill suggests the replacement of the investigating judge with a judge of the investigation.³³

3.2 The Netherlands

The preliminary investigation, which precedes the discussion of the case before the trial court (*eindonderzoek*), can take different forms.³⁴ The main one is the criminal investigation or investigative proceedings (*opsporingsonderzoek*) led by the public prosecutor. This form resembles the Belgian preliminary inquiry.

Until 2013, the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, DCCP), provided, similar to the Belgian Code of Criminal Procedure, the possibility of a judicial inquiry (*gerechtelijk vooronderzoek*), which existed next to the investigative proceedings.³⁵ In this judicial inquiry, the examining magistrate (*rechter-commissaris*) was in charge of the investigation and he or she acted as an investigating judge. The judicial inquiry was replaced with ‘the investigation by the examining magistrate’.³⁶ Consequently, the examining magistrate is now no longer competent to lead his or her own investigation. He or she has a supervisory role.³⁷

Within the context of this supervisory role, the examining magistrate reviews the lawfulness of investigatory actions.³⁸ For several investigative measures in the DCCP, an *ex ante* judicial authorization is required.³⁹ Other coercive measures may exclusively be imposed by the examining magistrate.⁴⁰ In addition, the examining magistrate supervises the progress,⁴¹ balance⁴² and completeness⁴³ of the pre-

³¹ The pre-trial tribunal is not bound by the final submissions of the public prosecutor. In appeal proceedings the pre-trial court makes the decision. Ana Laura Claes, Anne Werding and Vanessa Franssen, ‘The Belgian *Juge d’Instruction* and the EPPO Regulation: (Ir)reconcilable?’ (2021) 6 European Papers, 364; Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 559.

³² The investigating judge does not rule on the merits of the case. He or she merely participates in the pre-trial criminal investigation. Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 610-611.

³³ Wetsvoorstel houdende het Wetboek van Strafprocesrecht 11 mei 2020, Parl.St. Kamer, 2019-2020, nr. 55-1239/001. See eg. Page 24.

³⁴ Art. 132 jo 132a jo 170-241 Dutch Code of Criminal Procedure (DCCP).

³⁵ Wet versterking positie rechter-commissaris, Stb. 2012, 408. See art. 126 DCCP.

³⁶ The third form is the criminal financial investigation, which will not be discussed.

³⁷ Art. 170 DCCP; *Kamerstukken II* 2009/10, 32177, 6, pp. 5-6 *Kamerstukken I* 2011/12, 32177, C, pp.7-8.

³⁸ Geert Corstens, Matthias Borgers and Tijs Kooijmans, *Het Nederlands Strafprocesrecht* (Wolters Kluwer 2021) 381.

³⁹ See article 126m DCCP regarding the interception of telephone communication.

⁴⁰ Art. 63 DCCP (*inbewaringstelling*, which is one form of pre-trial detention).

⁴¹ Art. 180 and 185 DCCP. The examining magistrate is competent to set an end-date for the investigative proceedings or to request the court to close the case (art. 29f DCCP).

⁴² Art. 150b DCCP. When the public prosecutor refuses investigation requests from the defense, such as the appointment of an expert, the defense could request the examining magistrate to grant the investigation requests.

⁴³ Art. 181-183 DCCP.

trial criminal investigation. For the purpose of this supervisory role the examining magistrate can *ex officio* or on request of the public prosecutor or defense conduct certain investigative measures.⁴⁴ However, article 182 DCCP limits the power of the examining magistrate to conduct or order investigative measures *ex officio* to situations in which the suspect is in pre-trial detention. Furthermore, the scope of his or her investigation is restricted to the criminal offense on which the pre-trial detention is based and the investigatory actions must be necessary.⁴⁵ Despite these limitations in the Dutch Code of Criminal Procedure, it has been argued that the examining magistrate can also act *ex officio* after having received requests for investigatory actions from the defense or public prosecutor.⁴⁶

It follows from the above that the position of the examining magistrate as an investigating judge is not completely abolished. However, the parliamentary documents regarding the bill which changed the position of the examining magistrate clearly state that the possibility of the examining magistrate to conduct investigative measures *ex officio* does not shift the functional leadership over the criminal investigation from the public prosecutor to the examining magistrate. The investigative measures conducted by the examining magistrate should be viewed as complementary or verificatory to the investigation by the public prosecutor.⁴⁷ Hence, the replacement of the judicial inquiry with a primarily supervisory role for the examining magistrate, which is reflected in the limited possibilities for the examining magistrate to investigate *ex officio*, lead to the conclusion that the Dutch examining magistrate is somewhere in between the investigating judge and a judge of the investigation (*rechter in of van het vooronderzoek*).⁴⁸

3.3 Germany

In Germany, the criminal process comprises three phases, namely the criminal investigation by the public prosecutor, the intermediate phase which starts when the public prosecutor has filed a formal accusation, and the trial. Public prosecutors are in charge of the pretrial criminal investigation, also referred to as investigation proceedings, in the context of which they can exercise their own investigative competences.⁴⁹ In case the public prosecutor concludes that sufficient grounds for prosecution exist, he or she files an accusation with the trial court. In the intermediate phase, the trial court decides whether the case should be decided on at trial.⁵⁰

During the investigative proceedings the public prosecutor can request the German *Ermittlungsrichter* (investigating judge) to carry out judicial investigative actions.⁵¹ These actions cover both simple actions and coercive measure, which interfere with fundamental rights. The investigating judge has a twofold role in the investigative proceedings.⁵² Firstly, the public prosecutor can request the investigating judge to conduct certain investigative powers, which the public prosecutor can also

⁴⁴ When the examining magistrate exercises his or her powers, the investigative proceedings in which the public prosecutor is in charge continue. Discussion exists regarding the question whether investigations by the examining magistrate can be viewed as part of the investigative proceedings in which the public prosecutor is in charge. According to the definition of investigative proceedings in article 132a DCCP these proceedings are led by the public prosecutor, but he or she can by definition not exercise authority over the examining magistrate.

⁴⁵ The necessity requirement also illustrates that the *ex officio* power of the examining magistrate intends to complement the investigation conducted by the public prosecutor. Geert Corstens, Matthias Borgers and Tijs Kooijmans, *Het Nederlands Strafprocesrecht* (Wolters Kluwer 2021) 393.

⁴⁶ Geert Corstens, Matthias Borgers and Tijs Kooijmans, *Het Nederlands Strafprocesrecht* (Wolters Kluwer 2021) 390.

⁴⁷ *Kamerstukken II* 2009/10, 32177, 6, pp. 5-6 *Kamerstukken I* 2011/12, 32177, C, pp.7-8

⁴⁸ Geert Corstens, Matthias Borgers and Tijs Kooijmans, *Het Nederlands Strafprocesrecht* (Wolters Kluwer 2021) 380; *Kamerstukken II* 2009/10, 32177, 3, p. 2.

⁴⁹ See art. 160 jo 161 German Code of Criminal Procedure (*Strafprozeßordnung*, hereafter GCCP).

⁵⁰ Art. 199 jo 200 jo 203 GCCP. Thomas Weigend, 'Germany' in Katalin Ligeti (ed), *Towards a prosecutor for the European Union volume 1: A comparative analysis* (Bloomsbury Publishing 2012) 264. The trial court checks, for instance, whether it is likely that the trial results in a conviction.

⁵¹ Art. 162(1) GCCP. The examining judge at the *Amtsgericht* (local court) in whose district the public prosecutor's office has its seat is in principle the competent one. There are, however, some exceptions laid down in article 162 GCCP. BeckOK StPO/von Häfen, 42. Ed. 1.1.2022, StPO § 162 Rn. 2.

⁵² Thomas Weigend, 'Germany' in Katalin Ligeti (ed), *Towards a prosecutor for the European Union volume 1: A comparative analysis* (Bloomsbury Publishing 2012) 267.

exercise him/herself. The investigating judge then functions as a subsidiary body for the public prosecutor. His or her investigative actions constitute a form of administrative assistance referred to in article 35(1) of the German Constitution.⁵³ As the public prosecutor could in principle exercise these competences him/herself, he or she should only issue a request when this is considered necessary for special reasons, such as the preservation of evidence. For instance, when a material witness with the right not to testify is questioned by the investigating judge, the latter can him/herself testify as to what has been said during the main proceedings.⁵⁴

When receiving such requests for investigatory actions, the investigating judge only assesses the admissibility of the request and the investigative measure. This assessment covers the immunity of the suspect, the material and territorial competence of the judge, exemptions from German jurisdiction, the criteria for the investigatory act laid down by law and the proportionality principle.⁵⁵ The request is also inadmissible if it was issued after the indictment.⁵⁶

Secondly, the German Code of Criminal Procedure (*Strafprozeßordnung*, hereafter GCCP) subjects certain investigative measures, such as the physical examination of the accused or witnesses to a court order.⁵⁷ In this situation, the investigating judge makes the decision to conduct or order the measure ‘in his or her own capacity as an organ of the administration of justice’.⁵⁸ In case of coercive measures which interfere with constitutional rights, the investigating judge conducts a full review of the admissibility criteria mentioned before, and the necessity, expediency and proportionality of the requested measure. Furthermore, the investigating judge assesses whether the evidence sufficiently proves the existence of a suspicion of a criminal offense.⁵⁹

It follows from the above that the term *Ermittlungsrichter* (investigating judge) is misleading, since this judge is in fact not competent to conduct his or her own judicial inquiries like the investigating judge in Belgium. In principle, the German investigating judge only acts on request, mostly on requests from the public prosecutor.⁶⁰ In other words, the German Code of Criminal Procedure does not grant the *Ermittlungsrichter* the power to conduct and be in charge of his or her own investigation into the criminal acts. In fact, to avoid that the investigative task or the control over the investigative proceedings is transferred to the investigating judge, the public prosecutor needs to specify the desired judicial actions in a written request.⁶¹

3.4 Conclusion

It follows from the above that the concept of the investigating judge, meaning a judge who can act as an investigation magistrate and who can be in charge of his or her own criminal investigation, is not accepted in all national legal systems. The Belgian judicial inquiry, which is only used in a minority of criminal cases, constitutes the best example. The Dutch legislator has stated very clearly that the Dutch examining magistrate has a supervisory task and is not supposed to be an investigating judge who can be in charge of the criminal investigation. However the Dutch Code of Criminal Procedure does provide

⁵³ BeckOK StPO/von Häfen, 42. Ed. 1.1.2022, StPO § 162 Rn. 6, 7.

⁵⁴ Para. 10 Richtlinien für das Strafverfahren und das Bußgeldverfahren (RiStBV); MüKoStPO/Kölbl, 1. Aufl. 2016, StPO § 162 Rn. 7; KK-StPO/Griesbaum, 8. Aufl. 2019, StPO § 162 Rn. 1-3.

⁵⁵ BeckOK StPO/von Häfen, 42. Ed. 1.1.2022, StPO § 162 Rn. 23, 24; KK-StPO/Griesbaum, 8. Aufl. 2019, StPO § 162 Rn. 16-18.

⁵⁶ According to article 162 GCCP the handling court is competent to order the investigative actions after the indictment. KK-StPO/Griesbaum, 8. Aufl. 2019, StPO § 162 Rn. 1-3, 15.

⁵⁷ Art. 81a(2) jo 81c(5) GCCP. In some cases of urgency an *ex post* judicial order is also possible. MüKoStPO/Kölbl, 1. Aufl. 2016, StPO § 162 Rn. 3-6.

⁵⁸ KK-StPO/Griesbaum, 8. Aufl. 2019, StPO § 162 Rn. 1-3.

⁵⁹ BeckOK StPO/von Häfen, 42. Ed. 1.1.2022, StPO § 162 Rn. 22; OLG Düsseldorf NStZ 1990, [145](#).

⁶⁰ However, in some situations the investigating judge may act without a request. For instance, article 165 GCCP states that in exigent circumstances, the judge may conduct necessary investigatory acts if a public prosecutor is unavailable. In addition, the investigating judge has some discretion with regard to the request. Under certain circumstances, the investigating judge can question another witness, for example, when the request mistakenly refers to the wrong witness. BeckOK StPO/von Häfen, 42. Ed. 1.1.2022, StPO § 162 Rn. 4; Thomas Weigend, ‘Germany’ in Katalin Ligeti (ed), *Towards a prosecutor for the European Union volume 1: A comparative analysis* (Bloomsbury Publishing 2012) 267; KK-StPO/Griesbaum, 8. Aufl. 2019, StPO § 162 Rn. 4-6.

⁶¹ BeckOK StPO/von Häfen, 42. Ed. 1.1.2022, StPO § 162 Rn. 8; SK-StPO/Wohlens Rn. 13.

the examining magistrate with some (limited) possibilities to take investigatory actions *ex officio*.⁶² Hence, the Dutch examining magistrate is somewhere in between an investigating judge and a judge of the investigation, who primarily grants (or refuses) judicial authorizations for specific (coercive) investigative actions ordered by the public prosecutor or conducts specific investigatory actions on request of the public prosecutor. The German *Ermittlungsrichter* is primarily a judge of the investigation (or judge of liberties).⁶³

IV. The implementation of the EPPO Regulation and the role of the investigating judge

4.1 Introduction

It follows from the previous section that the investigating judge has an important, but different role in national criminal legal systems. In some legal systems, it seems better to call the investigating judge, a judge of the investigation. The main question is what consequences the establishment of the EPPO has for the role of the investigating judge⁶⁴ in the different national legal systems? The EPPO Regulation does neither order nor explicitly prohibit Member from including an investigating judge in EPPO proceedings. In my view, the EPPO Regulation leaves, in principle, room for a role for the investigating judge in EPPO proceedings. This follows, for instance, from article 5(3) and recital 15 which state that when a matter is not regulated by the Regulation, national law applies and that the Regulation does not intend to change way in which criminal investigations are organised in the national legal systems.⁶⁵ Forcing Member States to exclude the investigating judge from criminal investigations initiated or claimed by the EPPO could, in my opinion, be viewed as a fundamental change to the organisation of criminal investigations. This is in particular the case for Member States like Belgium in which judicial inquiries are an important part of the criminal investigation.⁶⁶ In addition, article 30 of the EPPO Regulation states that EDPs may order national measures available to them under national law in national cases. The procedures and modalities for the measures taken by the EDPs will be governed by national law. This includes *ex ante* judicial authorizations.⁶⁷

However, at the same time, the rules imposed by the Regulation take precedence in case they clash with national criminal laws. This raises the question whether the Regulation sets some limits to the role which the investigating judge can have in EPPO proceedings. At first sight, it seems likely that the role of the Dutch examining magistrate and German investigating judge do not cause too much trouble. They may fit rather easily in the prosecutorial system set up by the EPPO, because in these national legal systems the public prosecutor is in charge of the criminal investigation and the investigating judge often acts upon the request of the public prosecutor. However, to what extent is the Belgian system, which allows for judicial inquiries by investigating judges, in conformity with the EPPO Regulation?⁶⁸

4.2 The implementation acts

4.2.1 Belgium

The Belgian legislator opted against the integration of the EPPO into the existing Belgian public prosecutor's office. Instead, the implementation act creates a separate and autonomous public prosecutor's office for the Belgian European Prosecutor (BEP) and Belgian Delegated Public Prosecutor (BDPP). Contrary to other Belgian public prosecutors (*procureur des Konings*), who are competent

⁶² In addition, the concept of an investigating judge does not exist in common law systems Chris van den Wyngaert and others, *Strafrecht en Strafprocesrecht: in hoofdlijnen* (Maklu 2011) 612.

⁶³ Katalin Ligeti, 'Prosecution in Common Law and Civil Law Jurisdictions' in Darryl Brown, Jenia Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 146; Thomas Weigend, 'Germany' in Katalin Ligeti (ed), *Towards a prosecutor for the European Union volume 1: A comparative analysis* (Bloomsbury Publishing 2012) 267.

⁶⁴ With this term, I also mean 'judge of the investigation' or judge of liberties.

⁶⁵ Recital 15 and article 5(3) EPPO Regulation.

⁶⁶ Ana Laura Claes, Anne Werding and Vanessa Franssen, 'The Belgian *Juge d'Instruction* and the EPPO Regulation: (Ir)reconcilable?' (2021) 6 European Papers, 368.

⁶⁷ Ana Laura Claes, Anne Werding and Vanessa Franssen, 'The Belgian *Juge d'Instruction* and the EPPO Regulation: (Ir)reconcilable?' (2021) 6 European Papers, 369-370.

⁶⁸ The same question can be posed in relation to the French legal system.

within their own judicial district,⁶⁹ the Belgian EP and DPP are competent to investigate and prosecute crimes harming the financial interests of the EU that are committed anywhere in Belgium.⁷⁰ They have the same powers as other national public prosecutors and, in principle, need to comply with the same conditions for the exercise of certain investigatory actions, including the need for an *ex ante* judicial authorization from the investigating judge.⁷¹ In addition, the judicial inquiry has been preserved, but needs to be conducted by a specialized investigating judge with relevant experience with regard to the criminal offenses that fall within EPPO's competence. These investigating judges do not exclusively deal with EPPO cases, but they need to prioritize them over national cases.⁷²

The decision to maintain the judicial inquiry in EPPO cases raises a lot of questions, especially in light of the fact that other Member States, such as France decided to exclude the judicial inquiry in EPPO cases.⁷³ For example, the EPPO Regulation allows the Permanent Chamber to reallocate a case during the criminal investigation.⁷⁴ In principle, this would mean that the Permanent Chamber can also remove a case from an investigating judge conducting a judicial inquiry. However, is it possible to remove a case from a judge, who is independent and not obliged to comply with orders from public prosecutors, when the judge does not agree with the removal?⁷⁵

4.2.2 The Netherlands

In the Netherlands, the EPPO Regulation is implemented in a very short EPPO Implementation Act (*EOM Invoeringswet*).⁷⁶ The public prosecutors at the National Office for Serious Fraud, Environmental Crime and Asset Confiscation (NOSFECAC) act as delegated public prosecutors.⁷⁷ They have the same competences as Dutch public prosecutors have in national criminal proceedings.⁷⁸ In addition, the EPPO Implementation Act does not clearly elaborate on the position of the examining magistrate in EPPO proceedings. The silence on this matter may suggest that the Dutch legislator is of the opinion that the powers and tasks of the examining magistrate, as described in section 3, fit with the prosecutorial system set up by the EPPO Regulation. Hence, the general assumption seems to be that the supervisory tasks and powers of the examining magistrate will not clash with the proper functioning of the EPPO.⁷⁹

⁶⁹ Art. 137 jo 150 Gerechtelijk Wetboek (Judicial Code). However, the Belgian Federal public prosecutor (*Federale procureur*) is competent on the entire Belgian territory. He or she is, for instance, responsible for the prosecution of cases with an international dimension. Arts 143 jo 144ter Judicial Code.

⁷⁰ Art. 3 Wet houdende diverse bepalingen inzake justitie (17 februari 2021), Belgisch Staatsblad n. 55, ed. 2 (24 februari 2021) (Act of 17 February 2021 holding several provisions in criminal justice matters, hereafter Belgian EPPO Act); Art. 156(1) Judicial Code.

⁷¹ Art. 47quaterdecies Wetboek van strafvordering (Belgian Code of Criminal Procedure, BCCP); Art. 156(2) Judicial Code.

⁷² Art. 79 Judicial Code.

⁷³ Law No. 2020-1672 of December 24, 2020 relating to the European Public Prosecutor's Office, environmental justice and specialized criminal justice (*Loi n. 2020-1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée*), Journal officiel de la République française 26 December 2020.

⁷⁴ Art. 26(5) EPPO Regulation.

⁷⁵ This and other questions raised by the decision to maintain the Belgian judicial inquiry are being discussed in the legal literature. Ana Laura Claes, Anne Werding and Vanessa Franssen, 'The Belgian *Juge d'Instruction* and the EPPO Regulation: (Ir)reconcilable?' (2021) 6 European Papers.

⁷⁶ Wet van 17 maart 2021 tot aanpassing van enkele wetten ter uitvoering van de Verordening (EU) 2017/1939 van de Raad van 12 oktober 2017 betreffende nauwere samenwerking bij de instelling van het Europees Openbaar Ministerie («EOM») (*PbEU* 2017, L 283) (Invoeringswet EOM, EPPO Implementation Act), *Stb.* 2021, 155.

⁷⁷ Art. 144c Wet op de Rechterlijke Organisatie (Judiciary (Organization) Act). Competent courts to hear cases in first instance are the District Court of Amsterdam, District Court Oost-Brabant, District Court Overijssel, District Court Rotterdam. These are the courts which are competent in cases brought by NOSFECAC. See article 2(3) DCCP.

⁷⁸ Art. 144a Judiciary (Organization) Act.

⁷⁹ The parliamentary documentation states that all safeguards and procedures in the Code of Criminal Procedure are applicable in EPPO proceedings in the Netherlands. This seems to include (at least) *ex ante* judicial authorizations. *Kamerstukken II* 2019/20, 35 429, nr. 6.

With regard to the supervision of the legality of the criminal investigation this seems to be true. As mentioned before, article 5(3) of the EPPO Regulation states that national law applies when a matter is not regulated by the Regulation. In addition, article 30 of the EPPO Regulation states that EDPs may *order or request* certain investigatory measures. The procedures and the modalities for taking these measures will be governed by the applicable national law. These provisions do not seem to clash with national laws, like the Dutch one, which state that certain investigative measures can only be conducted by an investigating judge (on request of the public prosecutor) or require an *ex ante* judicial authorization from the investigating judge. In case of EPPO proceedings, the Dutch delegated prosecutor will (simply) have to *request* the examining magistrate to conduct the investigative measure or to provide an authorization.⁸⁰

However, the supervisory tasks of the examining judge with regard to the efficiency, balance and completeness of the criminal investigation could raise questions. As explained in section 2, the Permanent Chambers monitor and direct the investigations and prosecutions conducted by the EDPs in the Member States. Article 10(5) of the EPPO Regulation states that the Permanent Chamber may give instructions to the handling EDP in specific cases, ‘where it is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO’. Hence, the tasks of the Permanent Chamber and the examining magistrate may overlap in specific cases.⁸¹

4.2.3 Germany

In Germany, suspicions of economic and financial crimes are mainly investigated on the basis of the general and traditional rules of criminal procedure. In other words, the German law does not provide a special regime for the investigation of these specific types of crimes.⁸² The same goes for the criminal offenses which affect the financial interests of the Union and fall within the competence of the EPPO. According to the *Europäische-Staatsanwaltschaft-Gesetz* (European Public Prosecutor’s Office Act, abbreviated as EPPO Act), which implements the EPPO Regulation, the general rules in the German Code of Criminal Procedure (GCCP) are primarily applicable.⁸³ These rules also define and limit the investigatory powers of the (currently) eleven public prosecutors situated in Munich, Cologne, Hamburg, Frankfurt and Berlin who act as delegated public prosecutors.⁸⁴ With regard to the role of the German investigating judge, it follows from section 3 that the *Ermittlungsrichter* in principle only acts on the request of the public prosecutor. Hence, at first sight, the task and competences of this judge do not seem to cause a lot of problems in EPPO cases.⁸⁵

4.2.4 Additional questions and challenges

⁸⁰ See also Michiel Luchtman, ‘Het Europees Openbaar Ministerie in Nederland. Over zijn ondeelbaarheid en de verhouding tot de Nederlandse strafrechter’ (2021) 63 DD 809.

⁸¹ Michiel Luchtman, ‘Het Europees Openbaar Ministerie in Nederland. Over zijn ondeelbaarheid en de verhouding tot de Nederlandse strafrechter’ (2021) 63 DD 810-811.

⁸² Martin Böse, ‘The Investigation and Prosecution of Economic and Financial Crimes – Role and Function of Administrative Authorities in Germany’ in Alessandro Bernardi and Daniele Negri (eds), *Investigating European Fraud in the EU Member States* (Hart 2019) 85.

⁸³ Gesetz zur Ausführung der EU-Verordnung zur Errichtung der Europäischen Staatsanwaltschaft, BGBl. I S. 1648 (hereafter EPPO Act). Article 2 of the EPPO Act states that in EPPO proceedings the German rules of criminal procedure, such as the GCCP and Courts Constitution Act (*Gerichtsverfassungsgesetz*, abbreviated as CCA) apply, unless the EPPO Regulation or the other provisions in the EPPO Act state otherwise. Hence, the German rules of criminal procedures have ‘subsidiary application’. See also art. 1(3) EPPO Act; BT Drucksache 19/17963, 16.

⁸⁴ According to article 142b CCA these public prosecutors have a double hat. In addition, in cases before the Federal Court of Justice, the investigation and prosecution will be conducted by a federal prosecutor acting as a European Delegated Prosecutor. Bundesministerium der Justiz, ‘Europäische Staatsanwaltschaft: Neues Kapitel im Kampf gegen Finanzbetrug und Korruption in der EU beginnt’ https://www.bmj.de/SharedDocs/Artikel/DE/2021/0528_Europaeische_Staatsanwaltschaft.html.

⁸⁵ A question which could arise concerns the intermediate procedure in Germany in which the court decides whether a case should be discussed at trial. Is this intermediate procedure affected by the rules on the closing of an EPPO investigation in the EPPO Regulation?

Other potential challenges and questions arise from the role of the investigating judge in cross-border cooperation, which is regulated in article 31 of the EPPO Regulation. Article 31(3) provides priority rules concerning judicial authorizations. This provision states that when a judicial authorization for an investigatory measure is required according to the law of the Member State of the handling EDP and the law of the Member State of the assisting EDP, only the latter EDP needs to request a judicial authorization from the national judge. In case the national law of the assisting EDP does not require a judicial authorization, but the law of the Member State of the handling EDP does, the handling EDP will request the judicial authorization.

Now, let's say that the handling EDP in a specific case requires the assistance of the German authorities in his or her investigation. As explained in section 3, the German Code of Criminal Procedure subjects investigative measures which violate constitutional rights, such as the physical examination of witnesses to a court order. In case the German *Ermittlungsrichter* is requested by the German assisting EDP to order the investigative measure, the *Ermittlungsrichter* should in principle conduct a full review of the measure, including its admissibility and necessity. To be able to conduct this assessment the German *Ermittlungsrichter* will probably need access to the case file. However, the national law of the handling EDP could prevent the EDP from sharing information in the case file (at certain stages of the proceedings). In addition, the German *Ermittlungsrichter* may have to make the assessment on the basis of a foreign case file that is not translated.⁸⁶ The question arises whether these potential consequences of the priority rule in article 31(3) of the EPPO Regulation clash with the constitutional structural principles of the EPPO, such as its operation as a single Office?

The constitutional structural principle of 'a single Office' is the result of a compromise. The 2013 Commission Proposal hinted at the establishment of a single legal area.⁸⁷ However, the idea of a single legal area opened the door to a strong supranationalisation of cross-border cooperation and was, therefore, perceived as a threat by the Member States.⁸⁸ The idea of a single legal area was replaced with the EPPO as a single Office. According to the (at the time) Italian Presidency of the Council this constitutional structural principle refers to the "general idea" that the EPPO "will function over the borders of participating Member States without having recourse to traditional forms of mutual assistance or mutual recognition."⁸⁹ Hence the question arises whether the obstacles which investigating judges in the assisting Member States may encounter when deciding on a judicial authorization or court order clash with the idea of the EPPO as a single Office, which should allow for cooperation, which is even better and faster than judicial cooperation on the basis of mutual recognition.⁹⁰

V. Preliminary observations

It follows from the above that the role of the investigating judge in national criminal proceedings differs. Some tasks of the national investigating judge, such as conducting judicial inquiries could be in conflict with the EPPO Regulation or at least raise questions in light of the EPPO Regulation. In addition, the rules in article 31(3) of the EPPO Regulation raise questions in light of the constitutional structural principles of the EPPO, which are laid down in Article 8 of the EPPO Regulation. These questions provide a fertile ground for further research.

⁸⁶ Hans-Holger Herrnfeld, Dominik Brodowski, Christoph Burchard, *European Public Prosecutor's Office. Article-by-Article Commentary* (Nomos 2021) 286.

⁸⁷ Article 25(1) Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

⁸⁸ Hans-Holger Herrnfeld, Dominik Brodowski, Christoph Burchard, *European Public Prosecutor's Office. Article-by-Article Commentary* (Nomos 2021) 286.

⁸⁹ Council document 13509/1/14, 3.10.2014, 3; Hans-Holger Herrnfeld, Dominik Brodowski, Christoph Burchard, *European Public Prosecutor's Office. Article-by-Article Commentary* (Nomos 2021) 286.

⁹⁰ Hans-Holger Herrnfeld, Dominik Brodowski, Christoph Burchard, *European Public Prosecutor's Office. Article-by-Article Commentary* (Nomos 2021) 286. Another point that has been raised is that the fact that EDPs can only act in their own Member State clashes with the constitutional structural principles of the EPPO. In addition, how does the Belgian judicial inquiry fit in the system of article 31(3) EPPO Regulation? BT Drucksache 19/17963, p. 28.

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