The Role of Mutual Trust and Mutual Recognition in the Functioning of the European Public Prosecutor’s Office*

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Abstract
This article aims to examine the situations in the European Public Prosecutor’s Office proceedings, in which the use of mutual trust and, consequently, mutual recognition is possible and deliberate on whether the role of these principles is significant or rather minor. By doing so, it sheds light on the nature of the principle of mutual trust and mutual recognition as well as the mutual recognition mechanisms which are applicable in criminal proceedings in general. It explains, with regard to the European Public Prosecutor’s Office, the possibility of their use in the European Public Prosecutor’s Office proceedings taking into account the limitations of the principle of mutual trust and mutual recognition.

Keywords
Mutual Trust; Mutual Recognition; European Public Prosecutor’s Office; Limits to Mutual Trust and Mutual Recognition.

Introduction
Once the borders within the European Union (hereinafter referred to as “EU” or “Union”) diminished, the transit of persons became easier than ever before, be it for work, studies, pleasure or else. Some side-effects, however, come hand in hand with such advantage, one of them being a rise of criminality with a cross-border dimension. This rise, hand in hand with the gradual evolution of the European Communities into a subject with an individual at its centre and with other than economic objectives as well, resulted into the need of extending the cooperation of the EU Member States also in the criminal matters. Trying to avoid absolute harmonisation, the EU legislator proceeded mostly in the area of procedural criminal law while establishing also the bodies responsible for promoting such cooperation in various areas. One of them was established quite recently and its creation was accompanied by rich and fruitful debate – the European Public Prosecutor’s Office (hereinafter referred to as “EPPO”) undoubtedly sparked the interests of the academics and wider

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public as well.¹ As for its practical functioning, many questions are yet to be posed and, hopefully, many answers are to come, one of them being the possible application of the principle of mutual trust and the principle of mutual recognition, the cornerstone of judicial cooperation in criminal matters.

This article aims to examine the situations in the EPPO proceedings, in which the use of mutual trust and, consequently, mutual recognition is possible and deliberate on whether the role of these principles is significant or rather minor. By doing so, it will be necessary to firstly shed light on the nature of the principle of mutual trust and mutual recognition as well as the mutual recognition mechanisms which are applicable in criminal proceedings in general and then, with regard to the EPPO, explain the possibility of their use in the EPPO proceedings. These considerations, however, might be presented only with regard to limitations of the principle of mutual trust and mutual recognition.

1 Member States’ cooperation in criminal matters within the European Union – historical background and a brief overview of current state

The Member States’ cooperation in criminal matters has started being emphasized after 1975, when an informal group “TREVI” (Terrorism, Radicalism, Extremism, Violence International) was established during a meeting of European Council. TREVI was the forum of the operational cooperation between ministries of justice and internal affairs of the Member States.² The next step in the development of the Union’s competence in the area of criminal law dates back to the Convention Implementing the 1985 Schengen Agreement³


and the Treaty of Maastricht. While the original TEU contained in its Title VI provisions on cooperation in the fields of justice and home affairs, competence to harmonise criminal law was not directly mentioned in these Treaty provisions. This did not, however, prevent the Union from adopting various conventions under international law, notably on the protection of the financial interests of the Union, whose clear purpose was to define the elements of certain criminal offences and relevant sanctions for them.

Moreover, it was the Maastricht Treaty that established Europol, The European Police Office, in 1999 with its mission to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

The obligation to protect Community’s financial interests was, however, formulated by the Court of Justice, which in its judgment C-68/88 stated that “… the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”

Three acts which could be adopted within the third pillar – common positions, common activities and conventions – were later supplemented by the framework decision, introduced by the Treaty of Amsterdam. Therefore, the Union’s competence to harmonise criminal law was, for the first time, unambiguously recognised through the inclusion of new provisions on the subject. The introduction of framework decision in the field of justice and home affairs represented a paradigm shift. Even though criminal law was still confined to intergovernmental cooperation under what was then the third pillar of the Union rather than the Community method, framework decisions were acts of Union law, not public international law.

Within the area of combating frauds against the financial interests of the European Union, a research report – Corpus Juris – was prepared in 1997 by several academic lawyers as a part of the European Legal Area project launched by the European Commission. Corpus Juris

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6 For current wording, see the Article 88 of the Treaty on the Functioning of the European Union, hereinafter referred to as “TFEU”.
8 Ibid.; See ROZMUS, TOPA, WALCZAK, op. cit., as well.
included several articles regarding substantive criminal law as well as articles on the criminal procedure and included the proposal for establishment of the European Public Prosecutor’s Office as well. Its purpose was not to create a single criminal code or criminal procedure for the EU but to come up with a set of legal principles that would be valid across all Member States when dealing with financial crime that related to the EU.\(^\text{10}\) Nevertheless, one of the authors of the Corpus Juris, professor Mireille Delmas-Marty, pointed out that although cooperation is necessary in this area, it is not sufficient. According to her, unification of definition for criminal offences and at least part of the rules of procedure within this area has become indispensable, in order to ensure the effectiveness of the system.\(^\text{11}\) Later on, the follow-up study was conducted with the aim to analyse the feasibility of the Corpus Juris in relation to the Member States’ legislation.\(^\text{12}\)

In 2001, Commission issued a Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor,\(^\text{13}\) with the objective to deepen a debate regarding protection of the EU financial interests by means of establishment of an independent European prosecution service.\(^\text{14}\) Similarly as professor Delmas-Marty, the Commission stated that organised crime harmful to EU financial interests has developed in such a way that the conventional tools of mutual judicial assistance are no longer suited to the task, and the progress so far made in judicial cooperation is limited. EPPO was seen as a possibility to overcome difficulties related to such limitation.\(^\text{15}\) Although it was not until the Lisbon Treaty that the legal basis for the establishment of the EPPO was laid down in the EU primary law, Corpus Juris and Green Paper contributed to the ongoing debate regarding creation and functioning of the EPPO as well as laying down the rules reaching beyond the traditional cooperation between Member States and providing for a certain degree of unification in the area of criminal law across the European Union.

What is more, European Councils held in Tampere and Hague aimed at strengthening the cooperation between the Member States and laid the foundation for the Council Decision 2002/187/JHA of 28 February 2002\(^\text{16}\) establishing the Eurojust with its aim to support and


\(^{14}\) Ibid., p. 9.

\(^{15}\) Ibid., p. 13.

strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol.\textsuperscript{17}

It was, however, the Treaty of Lisbon that expressly recognised, for the first time, the competence of the Union to ensure a high level of security through the approximation of criminal laws, if necessary. According to this Treaty, substantive criminal law can be harmonised according to three different legal bases: Art. 83(1) TFEU, to regulate “Euro-crimes”, Art. 83(2) TFEU, to ensure the effective implementation of EU policies, and Art. 325(4) TFEU, to protect the EU’s financial interests.\textsuperscript{18}

Moreover, according to the Article 86 TFEU, in order to combat crimes affecting the financial interests of the Union, the Council may establish a European Public Prosecutor’s Office which shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests as well as exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.\textsuperscript{19} Because of the unanimity of the Council, the EPPO was established in 2017 via the mechanism of enhanced cooperation and aimed to contribute to the cooperation of the EU Member States in criminal matters when starting being operational in 2021.

According to the current wording of the Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas such as mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime or any other specific aspects of criminal procedure which the Council has identified in advance by an unanimous decision with the consent of the European Parliament.\textsuperscript{20}

Minimum rules may be further established in relation to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, these areas being terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.\textsuperscript{21}

This cooperation – as may be seen above – depends broadly on the principle of mutual recognition, often mentioned hand in hand with the principle of mutual trust. What is then the relationship between these two?

\textsuperscript{17} See, in this regard, also the Article 85 TFEU.
\textsuperscript{18} See CSONKA, LANDWHR, op. cit.
\textsuperscript{19} See Article 86(1) and (2) TFEU.
\textsuperscript{20} Article 82(1) and (2) TFEU.
\textsuperscript{21} For further details see Article 83 TFEU.
As stated by the Court of Justice of the European Union, the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.\(^{22}\) Therefore, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.\(^{23}\)

In other words, EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU.\(^{24}\) That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected, and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, particularly Articles 1 and 4 thereof, which enshrine one of the fundamental values of the Union and its Member States.\(^{25}\) Being said that, it is clear that the mutual trust between EU Member States represents a rebuttable presumption, rather than a discretionary possibility or – taking into account the above-mentioned exceptions – absolute rule.

The principle of mutual trust is the prerequisite of the principle of mutual recognition\(^{26}\) and serves as its foundation.\(^{27}\) The principle of mutual recognition constitutes the cornerstone


\(^{23}\) Opinion 2/13, op. cit., para. 192. This statement was, however, slightly changed which will be elaborated on later.

\(^{24}\) Opinion 2/13, op. cit., para. 168.

\(^{25}\) See judgment of the Court of 19 March 2019, Abubacarr Jawo, C-163/17, ECLI:EU:C:2019:218, para. 80; Similarly, judgment of the Court of 15 October 2019, Dumitra-Tudor Dorobantu, C-128/18, ECLI:EU:C:2019:857, para. 45.

\(^{26}\) That is why the principle of mutual trust is also described as “the principle behind the principle”. See, in that regard, WILLEMS, A. Mutual trust as a term of art in EU criminal law: Revealing its hybrid character. In: European Journal of Legal Studies. Florence: European University Institute, 2016, Vol. 9, no. 1, p. 213. Available at: https://cadmus.eui.eu/bitstream/handle/1814/43289/EJLS_2016_Willems.pdf

of judicial cooperation in criminal matters\textsuperscript{28} and was initially selected as a governance rule to further EU cooperation in criminal justice matters without having to harmonise national legal systems, which was both unfeasible and undesirable. Building mutual trust is regarded as the key to enhancing or facilitating mutual recognition and the functioning of the Area of Freedom, Security and Justice more widely, and has as such become a core aspect of the EU’s criminal justice agenda.\textsuperscript{29}

Principles of mutual trust and mutual recognition play, however, a central role in the European Internal Market as well.\textsuperscript{30} Internal Market was, in fact, the area from which these principles emerged in the first place while assisting the evolution of the European Common Market to the Internal Market as we know it. It was the detailed harmonisation by the political institutions rather than a presumption of mutual trust that contributed to the actual achievement of the common market, nevertheless, in the 1970s, the approach changed both institutionally and substantively – the Court of Justice took the institutional lead through its case law from \textit{Dassonville}\textsuperscript{31} and \textit{van Binsbergen}\textsuperscript{32} onwards, while substantively, it based the law on the idea of mutual recognition founded on mutual trust in cases such as \textit{Cassis de Dijon}\textsuperscript{33} and \textit{van Wesemael},\textsuperscript{34} and later for example in \textit{Säger}.\textsuperscript{35,36}

Nevertheless, as stated by Petra Bárd, “unlike in the context of the internal market, however, mutual trust and mutual recognition in the [Area of Freedom, Security and Justice] have different, considerably graver consequences for the individual. Whereas in the market setting they consummate freedoms, in the criminal law field they lead to an extension of state powers to curtail individual rights for the sake of legitimate state interests, such as prosecuting crimes. Should the presumption underlying trust not hold, it will also have very different consequences. In the market setting, a faulty product will freely circulate within the EU – which may or may not have severe impacts on the customer. Yet, in the criminal justice sector rebuttal of the presumption automatically and necessarily leads to the spread of rule of law violations and human rights abuses. Of course a substandard product may also cause severe harms – think of a toy produced for small


\textsuperscript{29} WILLEMS, 2016, op. cit., p. 213.


\textsuperscript{33} Judgment of the Court of 20 February 1979, \textit{Rewe-Zentral AG vs. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)}, 120/78, ECLI:EU:C:1979:42.

\textsuperscript{34} Judgment of the Court of 18 January 1979, \textit{Wesemael}, joined cases 110 and 111/78, ECLI:EU:C:1979:8.


children with poisonous paint on it, eggs contaminated with insecticide or cars emitting more than twice the legal limit of polluting substances (all real life examples). But more often than not, violations of consumers’ interests do not limit fundamental rights. In contrast, in the criminal context, a faulty judgment – due to the very nature of criminal law – will always result in individual rights’ infringements.”

Such considerations led to growing necessity for formulating certain limitations to the principle of mutual trust and, consequently, to principle of mutual recognition as well.

2 Mechanisms of mutual recognition in EU law applicable in criminal proceedings

Within the field of EU criminal law, significant number of legal instruments based on the principles of mutual trust and mutual recognition has been adopted. Probably the most discussed and most controversial instrument was the European Arrest Warrant, a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

The EAW Framework Decision provides for a list of offences which – if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State – shall under the terms of the EAW Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant. If another offence is concerned, surrender may be subject to the condition that


38 Article 1(1) of the EAW Framework Decision.

39 Article 2(1) of the EAW Framework Decision.

40 Article 2(2) of the EAW Framework Decision. This list contains offences such as participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities’ financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, extortiation, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft or ships and sabotage.
the acts for which the European Arrest Warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.\(^{41}\) The executing Member State may refuse execution of European Arrest Warrant on one of the optional non-execution grounds and is obliged to refuse its execution on one of the mandatory non-execution grounds.

A simplified procedure in the field of obtaining evidence within the area of EU criminal law was achieved by the European Investigation Order,\(^{42}\) a judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific investigative measures carried out in another Member State to obtain evidence in accordance with the EIO Directive.\(^{43}\) The EIO mechanism and the rules on the cross-border investigation established in the EIO Directive are based on the principle of mutual recognition, therefore the executing authority shall recognise an EIO, transmitted in accordance with the EIO Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in the EIO Directive.\(^{44}\)

In the investigation and evidence-gathering process, a freezing order and a confiscation order\(^{45}\) are of importance as well. A freezing order is a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof, while a confiscation order is a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person.\(^{46}\) Freezing orders or confiscation orders shall be executed without verification of the double criminality of the acts giving rise to such orders, where those acts are punishable in the issuing State by a custodial sentence of a maximum of at least three years and constitute one or more of the criminal offences enshrined in the list laid down in the FO and CO

\(^{41}\) Article 2(4) of the EAW Framework Decision.

\(^{42}\) European Investigation Order (hereinafter referred to as “EIO”) was established by the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1. 5. 2014, pp. 1–36, hereinafter referred to as “the EIO Directive”.

\(^{43}\) Article 1(1) of the EIO Directive.

\(^{44}\) Article 9(1) of the EIO Directive.


\(^{46}\) Article 2(1) and (2) of the FO and CO Regulation.
Regulation under the law of the issuing State.\textsuperscript{47} For other criminal offences, the executing State may make the recognition and execution of a freezing order or confiscation order subject to the condition that the acts giving rise to them constitute a criminal offence under the law of the executing State, whatever its constituent elements or however it is described under the law of the issuing State.\textsuperscript{48} The executing authority may decide not to recognise or execute a freezing order or a confiscation order only for the grounds laid down in the Article 8 or Article 19, respectively, of the FO and CO Regulation. The non-execution of a freezing order or confiscation order is further justified where it is impossible to execute it.\textsuperscript{49}

Another mutual recognition mechanism applicable in the field of criminal law is enshrined in the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.\textsuperscript{50} Apart from the situations involving deprivation of liberty, the rules on a non-custodial sentence involving the supervision of probation measures or alternative sanctions which has been imposed in respect of a person who does not have his lawful and ordinary residence in the state of conviction were enshrined in the Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.\textsuperscript{51} Furthermore, the rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures are laid

\textsuperscript{47} Article 3(1) of the FO and CO Regulation. Such list includes participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including fraud and other criminal offences affecting the Union's financial interests as defined in Directive (EU) 2017/1371 of the European Parliament and of the Council, laundering of the proceeds of crime, counterfeiting currency, including the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder or grievous bodily injury, illegal trade in human organs and tissue, kidnapping, illegal restraint or hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft or ships, sabotage.

\textsuperscript{48} Article 3(2) of the FO and CO Regulation.

\textsuperscript{49} Such reasons are laid down in the Article 13 of the FO and CO Regulation as regards freezing orders and in the Article 22 as regards confiscation orders.


down in the Framework Decision on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.\textsuperscript{52}

In this regard, the European Protection Order\textsuperscript{53} and the Framework Decision on the application of the principle of mutual recognition to financial penalties\textsuperscript{54} should be mentioned as well.

3 Mutual trust and mutual recognition and their possible application in the EPPO functioning

European Public Prosecutor's Office was established through the mechanism of an enhanced cooperation\textsuperscript{55} by the Council Regulation\textsuperscript{56} in 2017 and has become operational in 2021. With its purpose to investigate, prosecute and bring to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in the so called PIF Directive\textsuperscript{57} and determined by the EPPO Regulation,\textsuperscript{58} it is apparent that activities of the EPPO – as a Union body – shall be governed by a precise set of rules provided for in the EPPO Regulation. Application of a concrete legal norm, however, reflects a special character of the EPPO and depends on the fact whether the EPPO regulation provides for legal rules applicable to the corresponding matter and if that is not the case, the national law applicable in a Member State in which the European Delegated Prosecutor handling the case operates shall apply.\textsuperscript{59} Although the EPPO is competent


\textsuperscript{53} Aiming at allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue the protection of the person in the territory of that other Member State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State. See the Article 1 of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338, 21. 12. 2011, pp. 2–18.


\textsuperscript{55} Rules of which are laid down in the Article 20 TEU and Articles 326–334 TFEU, according to which EU Member States may establish such cooperation between themselves within the framework of the Union’s non-exclusive competences by making use of its institutions and exercising those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in the above-mentioned Articles.

\textsuperscript{56} 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 L 283, 31. 10. 2017, pp. 1–71, herein-after referred to as “the EPPO Regulation”.


\textsuperscript{58} In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of. See the Article 4 of the EPPO Regulation.

\textsuperscript{59} See, in that regard, Article 5 of the EPPO Regulation.
in respect of the criminal offences committed in one of the Member States as well, the character of the offences provided for by the PIF Directive often relates to two or more Member States thus including the cross-border dimension. And that’s where the dilemma begins.

Be it the case that the EPPO is competent with regard to a certain offence, a European Delegated Prosecutor in a Member State which according to its national law has jurisdiction over the offence shall initiate an investigation and note this in the case management system. Once the investigation begins, it shall be governed by the rules provided for by the EPPO Regulation or, where applicable, by national law. Besides general rules on investigation and investigation measures, the EPPO Regulation lays down the rules on cross-border investigation as well. Despite a number of mechanisms relying on the principle of mutual trust and mutual recognition within the European Union, the EPPO Regulation provides for a new set of rules, putting the former apart. Nevertheless, it may still be possible to make use of them, provided that certain prerequisites are met.

3.1 Mutual recognition and the investigative measures – brief historical overview: Article 31 of the EPPO Regulation as “the sensitive compromise”?

In the process of adoption of the EPPO regulation, the possibility of enshrining the rules on cross-border investigation laid down in the EIO Directive was discussed as well. With regard to the judicial authorisation which shall be obtained in the assisting Member State according to the Article 31(3) of the EPPO Regulation, the issue of no regulation of the details of the judicial authorisation – leaving them to the national applicable law – was put forward. According to the Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office, in cases where such applicable law requires a thorough analysis of the criminal file before granting the judicial authorisation for the assigned measure, this could lead to situations where the court of the assisting Member State would ask for the translation of the whole file to conduct its own analysis rather than rubber stamping the authorisation. Consequently, such translation could last months and, what is more, by diverting from the EIO rules, the courts would be exposed to different standards or procedures, which could be applicable to the same kind of cases, only based on whether the EPPO decided to exercise its competence or not. Although it was the translation example upon which such argumentation was based, this issue reflected the cross-border investigation dilemma in general.

60 As for the exercise of the EPPO’s competence, see Articles 24 and 25 of the EPPO Regulation.
61 See Article 26(1) of the EPPO Regulation. In some cases, the European Delegated Prosecutor may be instructed to do so or the investigation may be initiated by the European Delegated Prosecutor from another Member State. See, in this regard, Article 26(3) and (4) of the EPPO Regulation.
63 Ibid., p. 5.
64 Ibid.
To that matter, two possible solutions were suggested. First, that the EPPO provisions would be aligned with the EIO rules either by reference or by including specific provisions. However, this option did not seem very realistic since it would completely deviate from the idea that EPPO should function as a single European body across EU Member States and not on the basis of mutual recognition. It was pointed out in this regard that the majority of Member States rejected this option in the past and agreed on a *sui generis* regime for EPPO, also at Council level.\(^{65}\) The other suggestion put forward was the partial limitation of the judicial authorisation in the assisting Member State, to avoid situations, where under the EIO Directive the national prosecutor will receive evidence much faster than the EPPO under the EPPO provisions due to application of national rules on judicial authorisation leading to the translations and study of the whole criminal file by the court in the assisting Member State. Such partial limitation could be achieved by including a recital in the EPPO Regulation which would clarify that the decision of the assisting court should be made, as a rule, based only on the translated summary of the case and that the court may only refuse granting authorisation in limited cases, for example because of the lack of proportionality. The assisting court would be able to require further information from the assisting European Delegated Prosecutor where the summary of the case would not be sufficient for the assessment of the request.\(^{66}\) At that time, provisions of the draft regulation were already called “the sensitive compromise” and – as is apparent from the above-mentioned proposals – it was suggested to be taken even further. It, in fact, was; the means to do so, however, were distinct from those proposed.

There is no provision on the limitation of the judicial authorisation in the current wording of the EPPO regulation, the avoidance of lengthy procedures was nevertheless achieved by several rules. After the handling European Delegated Prosecutor – convinced that a measure needs to be undertaken in another Member State – decides on the adoption of the necessary measure and assigns it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out, in cases where judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor,\(^{67}\) two situations may arise. First, the judicial authorisation for the assigned measure is refused, in which case the handling European Delegated Prosecutor shall withdraw the assignment.\(^{68}\) Second, the national authority would not refuse to authorise the measure *per se*, however, the measure would not be undertaken within the time limit set out in the assignment for justified and objective reasons or the assigned measure does not exist or would not be available in a similar domestic case under the law of the assisting Member State. In this case the assisting European Delegated Prosecutor shall inform his supervising European Prosecutor and consult with the handling European Delegated Prosecutor

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65 Ibid., p. 6.  
66 Ibid., p. 6.  
67 In this case, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.  
68 See Article 31(3) of the EPPO Regulation.
in order to resolve the matter bilaterally. If the European Delegated Prosecutors cannot resolve the matter within seven working days and the assignment is maintained, the matter shall be referred to the competent Permanent Chamber. The same applies where the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time. The competent Permanent Chamber shall to the extent necessary hear the European Delegated Prosecutors concerned by the case and then decide without undue delay, in accordance with applicable national law as well as the EPPO Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision to the said European Delegated Prosecutors through the competent European Prosecutor.

Except from the time-limit set out in the EPPO Regulation as well as the interference of the Permanent Chamber, another option to overcome the lengthiness of the cross-border cooperation in the investigation phase was laid down, namely the option to resort to legal instruments on mutual recognition or cross-border cooperation if the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by those instruments. In that case, the European Delegated Prosecutors concerned may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments.

It should be mentioned, however, that although the mechanism of legal assistance provided for by the EPPO legal framework does not significantly differ from the legal assistance mechanism according to the European Convention on Mutual Assistance in Criminal Matters and that of the European Arrest Warrant framework, as stated by Polák, its advantage consists in brief enumeration of reasons to not undertake a measure according to the Article 31(4) of the EPPO Regulation and a minimum time-limit to undertake such measure as well as involvement of the Permanent Chamber as a “superior” body.

3.2 Mutual recognition and surrender of persons – case of the European Arrest Warrant

As for the possibility to make use of the European Arrest Warrant, the EPPO Regulation states no other conditions or limitation of its use than the framework of the EPPO’s competence. The handling European Delegated Prosecutor may thus order or request

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69 See Article 31(4) of the EPPO Regulation.
70 See Article 31(7) of the EPPO Regulation.
71 See Article 31(6) of the EPPO Regulation.
74 See recital 76 of the Preamble of the EPPO Regulation.
the arrest or pre-trial detention of the suspect or accused person in accordance with the national law applicable in similar domestic cases and, where it is necessary to arrest and surrender a person who is not present in the Member State in which the handling European Delegated Prosecutor is located, he or she shall issue or request the competent authority of that Member State to issue a European Arrest Warrant.\textsuperscript{75}

Although the use of European Arrest Warrant in the EPPO proceedings might seem rather unlimited, it has to be stated that the limitations – or, in this case, almost no-limitations – provided for in the EPPO Regulation are not the only ones. Thus, the quite broad application of the European Arrest Warrant mechanism according to the EPPO Regulation does not necessarily need to mean its broad application in the EPPO proceedings.\textsuperscript{76}

\section*{4 Limits to the mutual trust and mutual recognition}

It was stated elsewhere that the principle of mutual trust does not impose unlimited trust, “\textit{in fact, in exceptional circumstances, a Member State is not obliged under EU law to place trust in the outcome of the legal system of another Member State. This is not surprising: conditionality is of the essence of trust, distinguishing it from pure loyalty. As Wischmeyer rightly points out, we only trust ‘except if’ and ‘as long as’. Put differently, mutual trust must not be confused with ‘blind trust’.}”\textsuperscript{77}

As for the possible limitations of the application of mutual trust in the EPPO proceedings, we may differentiate three reasons of such limitation – firstly, its use is limited by the EPPO Regulation itself, secondly, particular mechanisms of mutual trust and mutual recognition have to be limited in accordance with the very same rules that provide for them and thirdly, the application of mutual trust and mutual recognition might be limited in general on the grounds set out in the case-law of the Court of Justice of the European Union. While the second and third option exceptionally exclude the possibility of application of such principles in situations where their application is generally presupposed, the first one limits the possibility of applying those principles at all and in case where their application is not limited according to the first reason, the second and third may still be applied.

\subsection*{4.1 Limitation of the application of the mutual trust and mutual recognition instruments in the EPPO proceedings laid down in the EPPO Regulation}

The EPPO Regulation itself lays down several conditions and prerequisites for application of mutual recognition mechanisms. As already stated, the possibility of their use “should not replace the specific rules on cross-border investigations under [the EPPO Regulation]. It should rather supplement them to ensure that, where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation, it can be used in accordance with national

\textsuperscript{75} See the Article 33 of the EPPO Regulation.

\textsuperscript{76} See, in this regard, the next chapter regarding the limitations of mutual recognition mechanisms, particularly according to the case law of the Court of Justice.

\textsuperscript{77} See CAMBIEN, 2017, op. cit., p. 103.
law implementing the relevant instrument, when conducting the investigation or prosecution.” This approach is specified further in the EPPO Regulation by the above-mentioned rule laid down in the Art. 31(6) on cross-border investigation, according to which if a measure that needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation, the Assisting European Delegated Prosecutors may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments.

As for the European Arrest Warrant, the EPPO Regulation limits its use in the EPPO proceedings – quite understandably – by the EPPO’s competence stating that the handling European Delegated Prosecutor should be entitled to issue or request European Arrest Warrants within the area of competence of the EPPO.

4.2 Limitation of the application of mutual trust and mutual recognition mechanisms in the EPPO proceedings laid down in the legal instruments providing for them

The second group of rules which may provide for limitation of the application of mutual trust and mutual recognition in the EPPO proceedings consists of rules laid down in the legal instruments providing for the mutual trust and mutual recognition mechanisms and their scope and content may differ according to the particular legal source. These may further divide to two categories – rules providing for limitation of its application per se and rules providing for limitation of its execution. As for the latter, these are summed up in particular Articles of specific EU legal acts and may be even divided as mandatory and optional reasons for such non-execution.

As for the rules providing for limitation of application of the principle of mutual trust and/or recognition per se, these may be considered as rules laying down the prerequisites and conditions which have to be met and fulfilled to allow for such application. An example may be put forward such as conditions for issuing of a European Investigation Order by an issuing authority.

4.3 Limitation of mutual trust and mutual recognition provided for in the CJEU case-law

In its famous opinion 2/13, the Court of Justice has stated that specific characteristics of the EU and EU law – which include those relating to the constitutional structure

See recital 73 of the Preamble of the EPPO Regulation.

See recital 76 of the Preamble of the EPPO Regulation.

See, for example, Article 11 of the EIO Directive.

See Articles 3 and 4 of the EAW Framework Decision. Article 5 may be considered as such example as well.

See Article 6 of the EIO Directive.
of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU as well as those arising from the very nature of EU law, in particular, the fact that EU law stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves — “have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’.”

Furthermore, such legal structure “is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.”

It further brought to attention its conclusion in the judgments NS and Melloni according to which “the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.” Therefore, “when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.”

Such logic of reasoning may be observed in the NS judgment, in which as the reason for rebutting the presumption of mutual trust and one of the “exceptional cases” were considered systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in a Member State that amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, providing for prohibition of torture and inhuman or degrading treatment or punishment.

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84 Ibid., para. 168.
86 Opinion 2/13, op. cit., para. 192.
87 Even though it must be stated that it was even sooner that the opinion 2/13 was issued.
88 See C-410/11, NS, op. cit., para. 94.
However, the reasoning in the opinion 2/13 has been – at least it seems to be – slightly changed if not fully abandoned in the judgment *Aranyosi and Căldăraru*. The Court of Justice stated that “where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.”

The executing judicial authority must rely on objective, reliable, specific and properly updated information on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies. These may be systemic or generalised, they may affect certain groups of people or certain places of detention.

However, according to the Court of Justice, “a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.”

The mere existence of evidence that there are deficiencies, either systemic or generalised, or affecting certain groups of people or places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State. The executing judicial authority must therefore examine particular circumstances of the case.

Being “the N.S. with a twist”, *Aranyosi and Căldăraru* may be considered as a slick solution to avoid a trappy general rule rather than a complication or unreasonable deviation from the previous case-law. As an example may serve the situation in Poland or Hungary which would – by leaving the “systemic deficiencies” rule untouched and considered as a no-exception rule in a narrow sense – result in constant refusal of mutual trust mechanisms’ execution solely on the ground that the issuing Member State is the subject of a reasoned proposal as referred to in Article 7(1) TEU. However, in line with the *Aranyosi and Căldăraru* reasoning, the Court of Justice has in this regard stated that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by the Member State which is subject of a reasoned proposal, without having to carry out any specific assessment of whether the individual concerned runs a real risk.


90 Ibid., para. 88.

91 Ibid., para. 89.

92 Ibid., paras. 91–92.

93 Ibid., paras. 93–94.
that the essence of his fundamental right to a fair trial will be affected only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State. If this is not the case, “the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal […] only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person […] will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.”

The executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State’s courts, are liable to have an impact at the level of that State’s courts with jurisdiction over the proceedings to which the requested person will be subject. Such authority “must also assess, in the light of the specific concerns expressed by the individual concerned […] whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.”

5 Mutual trust and mutual recognition mechanisms which may be used in the EPPO proceedings

Sacha Prechal, Judge at the Court of Justice of the EU, has pointed out that “the principle of mutual trust is not a self-standing standard for review, at least not yet. As such, it does not produce legal effects on its own. This principle is applied ‘in tandem’ with provisions of secondary Union law in which concrete measures of the [Area of Freedom, Security and Justice] are enacted. Also in the internal market case law, mutual trust was closely linked with the provisions on the Treaty freedoms and in particular played a role in the context of the review of proportionality, or, alternatively, the principle of loyal cooperation or the principle of effectiveness.”

Therefore, one might say that the scope of application of principle of mutual trust in the EPPO proceedings corresponds with the scope of application of concrete measures provided for by the EU secondary law, namely the EIO Directive, EAW Framework Decision and other above-mentioned secondary EU law laying down the measures relating to cross-border investigation as well as the EPPO Regulation itself as it constitutes the framework of conditions for mutual recognition mechanisms’ application.

Taking into account the above-mentioned groups of rules providing for limitation of application of mutual trust and mutual recognition instruments, it may be concluded, in general, that for such mechanism to be applied in the EPPO proceedings, the EPPO Regulation itself has to presuppose its application, all of the conditions for its application per se laid down in the legal act providing for such mechanism have to be fulfilled, there shall not be any ground for mandatory non-execution of such mechanism and no specific situation as in the above-mentioned CJEU case-law shall arise. That being said, a question arises whether there is still any room for – and if so, whether such room is significant – application of the mutual trust and mutual recognition mechanisms.

The EPPO Regulation in its Article 30 provides for several investigation and other measures, most of them at least partially corresponding to measures provided for by the mutual recognition mechanisms, be it the European Investigation Order, Freezing Order or Confiscation Order. All of these measures may be assigned by the handling European Delegated Prosecutor to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out. Although being subject to specific set of rules under the EPPO Regulation, these measures may be carried out under the mutual recognition regime as well, provided that a particular scenario arises – first of all, as already stated, if the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation, the European Delegated Prosecutors concerned may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments. The application of the mutual recognition instrument therefore depends, in this case, on the range of measures available under the national law.

Another possible scenario which may arise is the case when judicial authorisation for the measure is required – either by the law of the Member State of the assisting European Delegated Prosecutor, or the handling European Delegated Prosecutor. In that case, the authorisation shall be obtained in accordance with the law of the Member State concerned. If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment. The question arises whether when the handling European Delegated Prosecutor is not authorised to assign the measure or the assisting European Delegated Prosecutor did not obtain the authorisation, they may have recourse to the mutual recognition mechanisms in order to achieve the aim pursued.

The same question poses itself in case where such measure is assigned and authorised and is about to be undertaken, the assisting European Delegated Prosecutor, however,

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96 And, if there is an optional ground for non-execution, the executing authority shall not opt for it.
97 The European Delegated Prosecutors are entitled to order or request these measures at least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment.
98 See Article 31(1) and (2) of the EPPO Regulation.
99 See Article 31(6) of the EPPO Regulation.
100 The EPPO Regulation says nothing about the situation where the authorisation is required and refused in the case where the law of the Member State of the handling European Delegated Prosecutor requires it, however, since the authorisation shall be obtained by the handling European Delegated Prosecutor and submitted together with the assignment, the measure should not be assigned without the authorisation at all.
considers that the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons. In this case, he or she shall inform his supervising European Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally.

Another situation which may appear relevant in this regard is the case where the European Delegated Prosecutors cannot resolve the matter within 7 working days and the assignment is maintained. In that case, the matter shall be referred to the competent Permanent Chamber which shall to the extent necessary hear the European Delegated Prosecutors concerned by the case and then decide without undue delay, in accordance with applicable national law as well as the EPPO Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting European Delegated Prosecutor, and communicate this decision to the said European Delegated Prosecutors through the competent European Prosecutor. However, the EPPO Regulation states that the same applies where the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time. Another question therefore arises, that is, what is the relationship and the solution of the situations set out in the Article 31 paras. 5(b) and 7. It seems that first of all, such matter should be attempted to be resolved bilaterally and, if that is not the case, referred to the competent Permanent Chamber.

As for the above-mentioned situations, it should be answered whether the recourse to the mutual recognition mechanisms may be possible after not obtaining authorisation for the assigned measure or while resolving the matter under the Article 31(5)(b) bilaterally or by the decision of the competent Permanent Chamber that a substitute measure shall be undertaken in situation where the matter cannot be resolved in the set out time limit, be it 7 days or the time limit set out in the assignment or within reasonable time should the matter be not resolved bilaterally.

Recourse to the mutual recognition mechanisms after not obtaining the authorisation for the assigned investigative measure might be considered as a useful way of achieving an objective of an investigation, nevertheless, it would be in clear contradiction with the aim of the legislators of the EPPO Regulation and with its overall purpose – to create a set of rules which are distinguished from the Member States’ cooperation up until the creation of the EPPO or outside its competence. Waiting for the authorisation according to the EPPO Regulation recalling the national law and then, after not obtaining it, make use of the very same rules which were rejected to be included in the wording of the EPPO Regulation, would mean only unnecessary delay of the proceedings without any logical explanation of why shall the European Delegated Prosecutor firstly wait for the national authorities’ authorisation and not directly make use of the European Investigation Order, for example. Higher level

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101 See Article 31(5)(b) of the EPPO Regulation. The scenarios laid down in the Article 31(5)(a) and (c), that is, if the assignment is incomplete or contains a manifest relevant error or an alternative but less intrusive measure would achieve the same results as the measure assigned, do not seem relevant in this case, since the assignment may be corrected or less intrusive measure might be assigned. Similarly, if, as stated in the Article 31(5)(d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his or her Member State, the Article 31(6) might be applied.

102 See Article 31(7) and (8) of the EPPO Regulation.
of legitimacy of such measure would hardly be a proper explanation, leaving the mutual recognition instruments as less legitimate options. The specific character of the EPPO and its proceedings, missing unanimity of the EU Member States as regards its creation and the law-making process relating to EPPO’s existence and functioning excludes, in our opinion, recourse to mutual recognition mechanisms in cases where national authority rejects the authorisation for the measure assigned by the handling European Delegated Prosecutor.

The same applies to the other situations concerning the time-limits for the assignments, in which the consideration of another measure or of its necessity or, if that would be possible and in line of the aims of the investigation, of extending the time-limit for its execution, would seem more appropriate and effective. It is hardly imaginable that the recourse to the measures within the framework of mutual recognition mechanisms would be of any help in such situation.

However, it should be stated that, as regards the European Arrest Warrant as one of the mutual recognition mechanisms, the scope of its application is quite wide. Provided that there are no grounds for its non-recognition and non-execution whilst taking into account that there are no limitations as regards its application in the EPPO proceedings laid down in the EPPO Regulation except from the EPPO’s competence, and, what is more, no specific regime for surrendering persons as is the case of investigation measures, it seems that the biggest obstacles to overcome would be the limits laid down in the case law of the Court of Justice, particularly those visibly emerging in the last few years relating to the detention conditions in the EU Member States. The conclusions in *Aranyosi and Căldăraru* may soften such limitation, yet the detention regime and reality differ from one Member State to another, making it almost necessary to examine detention conditions in every case raised by the person affected.

Nevertheless, the real scope of the mutual recognition mechanisms’ application will be shown by practice and, subsequently, corresponding case law of the Court of Justice of the European Union. However, should the recourse to the mutual recognition mechanism be possible in the above-mentioned cases related to the investigation measures, these scenarios and such recourse may, in certain cases, create the framework of complicated cooperation in the matters which were intended to being resolved as effectively as possible. The question is – is this what the EU legislator intended? Certainly not, nonetheless, possible lacunae as regards the cross-border cooperation between the EU Member States not only within the EPPO competence leads us to contemplate on how far are we able to stretch the EU legislation on cooperation in criminal matters without its harmonisation.

**Conclusion**

When deliberating on application of the mutual recognition mechanisms, one must clearly take into account what type of mechanism we have in mind. Having regard to the wording of the EPPO Regulation and the character of necessary cross-border cooperation when

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103 See as well POLÁK, 2019, op. cit.
surrendering suspects or accused persons, the room for the European Arrest Warrant’s application from the EPPO Regulation’s point of view is undoubtedly generous. Considering the limits of its application, we may conclude that the most challenging obstacles for its application would be the limits set out in the Court of Justice’s case-law.

The application of the European Investigation Order, however, depends notably on national legal orders, therefore being subject to several different regimes depending on whether a measure exists in a purely domestic situation. Even the situations in which it may at a first sight appear possible to apply the mutual recognition mechanisms related to the investigation measures are, in our opinion, excluded from such possibility. That is supported by the wording of the Preamble of the EPPO Regulation stating that they are intended to rather supplement the specific rules on cross-border cooperation under the EPPO Regulation, where a measure is not available under national law. Therefore, the examined scenarios in the Chapter 5, except from the one explicitly stated in the Article 31(6) of the EPPO Regulation, fall outside the scope of mutual recognition mechanisms’ application.

Jukka Snell argued that if we wish to move from internal market to economic union, we need to overcome a model based on mutual trust and “instead get back to the old fashioned business of harmonization.”\(^\text{104}\) The truth is, in EU criminal law, the EU motto “united in diversity” does not seem flattering and, above all, real. The mutual trust and mutual recognition do not seem very popular these days, and, as for the EPPO and its proceedings, we may observe that its use in relation to investigative measures is quite limited. As for the surrender measures, namely the European Arrest Warrant, last years show considerable number of cases related to the detention conditions which may question the desirability of making use of mutual recognition mechanisms.\(^\text{105}\) Moreover, with so many provisions in the EPPO Regulation referring to national law while abandoning the use of mutual recognition, one may wonder whether the EPPO and its regime does not even run counter to the European integration.

On the other hand, as it seems, right now this is the best we can get. Different regimes and rules of criminal law will not change overnight and, what is more important, the will to do so is still difficult to be found. The EPPO itself is a perfect example – its creation was achieved only by the means of the enhanced cooperation because of the lacking unanimity of EU Member States. Nonetheless, the establishment of the EPPO must be considered as a courageous step forward. The best way to persuade someone to join you is to show that what you do is working perfectly fine. It remains to be seen whether such scenario is realistic also for the EU Member States joined together in the enhanced cooperation establishing the EPPO and those which do not participate yet. And, who knows, maybe later without such visible recourse to the national legal orders.

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\(^{104}\) SNELL, 2016, op. cit., p. 11.