*Marie-Lena Marstaller, LL.M., München**

The Legality Principle: An Effective Way to Minimise the European Prosecutors' Influence on Substantive Criminalisation?

Comparing the German Staatsanwaltschaft and the Crown Prosecution Service in England and Wales

Abstract

This article discusses proposed models for a European Public Prosecutor's Office with regard to the potential for influence of such an institution on substantive criminalisation – i.e. the way in which a criminal offence is applied in practice. To respect Member States' sovereignty and to comply with the principle of subsidiarity, such influence of a European Prosecutor is to be avoided. Valuable insights regarding possible controls and limitations of such influence can be drawn from the situation in national legal systems. As contrasting models, the approach of the German system adhering to the legality principle and the English model of discretionary prosecution will be examined. The most important potentials for influence and options for limitation will be shown, especially focusing on the role of prosecutorial dismissals of cases and plea bargaining. It will be shown that the draft proposals for the European Public Prosecutor's Office have developed in a welcome direction regarding the control of prosecutorial influence on substantive criminalisation.

I. Introduction

Prosecutors can be described as "gatekeepers" to the Criminal Justice System.[1] The way they reach decisions and the powers confided in them constitute decisive factors in shaping such a system. This is especially true when regarding prosecutorial decision-making not only as individual decisions but as a general practice. As such, it influences the practical implementation of criminal law: Behaviour which is commonly prosecut-

* Marie-Lena Marstaller, LL.M. (Edinburgh) is research assistant at the chair for criminal law, criminal procedure, legal philosophy and legal sociology (Prof. Dr. Armin Engländer) at the Ludwig-Maximilians-Universität München, Germany.

1 House of Commons Justice Committee, The Crown Prosecution Service: Gatekeeper of the Criminal Justice System, 6 August 2009, HC 168 2008-09.

DOI: 10.5771/2193-5505-2016-2-161

ed will also be more commonly punished and thereby be viewed as criminal. This can be described as "*substantive criminalisation*".[2] By contrast, behaviour formally within the scope of criminal offences is described as "*formal criminalisation*". Of course, there will always be a gap between behaviour which formally falls under the scope of a criminal offence and behaviour which actually is awarded criminal sanction. Part of this gap consists of cases in which criminal acts are not discovered or in which there is not sufficient evidence to determine the offender. This part is not the focus of this essay. But a substantial part of it is created through the decisions taken by the prosecuting authorities. In the US, the prosecutor has even been described as the criminal justice system's "real lawmaker".[3]

The influence of the prosecution service as "gatekeepers" on the existence and scope of such a gap between the "law in the books" and the "law on the streets" is worthy of attention in a national setting but gains even more relevance within the European context. The discussion surrounding the proposed creation of a European Public Prosecutor's Office (EPPO)[4] needs to take into account the ways through which such an institution could and should influence substantive criminalisation.[5] After a long period of developing the idea,[6] the establishment of an EPPO doesn't seem unlikely at the moment.[7] The Commission introduced a Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office in 2013,[8] and an alternative Draft is being worked on in the Council.[9]

2 *N. Lacey*, Historicising Criminalisation, Modern Law Review (MLR) 2009, p. 946.

3 In relation to the situation in the USA: *W. J. Stuntz*, The Pathological Politics of Criminal Law, Michigan Law Review (Mich.L.R.) 2001, p. 505.

4 For an overview on the development of the discussion on a European Prosecutor, see *E. Schramm,* Auf dem Weg zur Europäischen Staatsanwaltschaft, Juristenzeitung (JZ) 2014, p. 749 *et seq*.

5 There are many other disputed topics related to the introduction of the EPPO, e.g. the question of appropriate procedural safeguards for suspects, see *B. Schünemann,* Bürgerrechte ernstnehmen bei der Europäisierung des Strafverfahrens, Strafverteidiger (StV) 2003, p. 116 *et seq*.

6 *A. Erbežnik*, European Public Prosecutor's Office (EPPO) – too much, too soon, and without legitimacy?, European Criminal Law Review (EuCLR) 2015, p. 212.

7 *S. Drew,* How will the EPPO be born?, in: P. Asp (ed.), The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives, 2015, p. 20 *et seq*.: The Council needs to act unanimously, excluding the votes from Denmark (Prot. 22 to the Treaty of Lisbon), the UK and Ireland (Prot. 21 to the TFEU – the option in Art. 3 to "opt in" has not been used) and the European Parliament needs to consent to the draft regulation. Lacking unanimity, the votes of only nine Member States would suffice for an enhanced cooperation, Art. 86 (19) TFEU. An enhanced cooperation would lead to conceptual problems regarding how an institution created by part of the Member States would represent the financial interests of the EU, *M. Coninsx,* The European Commission's Legislative Proposal: An Overview of Its Main Characteristics, in: H. Erkelens/A. Meij/M. Pawlik (eds.), The European Public Prosecutor's Office, 2015, p. 28.

8 COM(2013) 534 – this will be referred to as the **Commission Proposal**.

9 Most recently in Council Doc. 10830/16, 11.7.2016 – this will be referred to as the **Council Draft**.

The logically consequent question is then, which factors actually have an impact on substantive criminalisation? The scope of discretion afforded to the prosecutor when deciding whether to prosecute a case or not should be considered as one of the most important factors. The consequence of such a connection would be that prosecutors which are bound to the *legality principle*, and therefore the principle of mandatory prosecution, such as the German "Staatsanwaltschaft" (Public Prosecution Office), would have less influence. On the other hand, criminal justice systems adhering to the *opportunity principle* and thus granting more discretion to its prosecutors, such as England and Wales,[10] would have prosecutors with more influence on substantive criminalisation. Testing this assumption by way of comparing these two jurisdictions[11] as "tell-tale mirrors"[12] can give valuable insights to determine in which way a European Prosecutor should operate. Juvenile offenders and the criminally insane are in some ways approached differently in criminal justice systems and will be excluded from the analysis, since they are unlikely to play a big role for the EPPO.

II. Substantive Criminalisation and the Role of Prosecutors' Decisions

The first question that needs to be addressed is why the influence of the European Prosecutor on substantive criminalisation might be problematic. General concerns regarding the influence of prosecutors on this matter will be considered and then applied to the situation of the EPPO.

1. Problems of prosecutorial influence on substantive criminalisation

Power to greatly influence criminalisation is problematic regarding the rule of law and democratic considerations.[13] If behaviour which is formally within the scope of a criminal offence is not prosecuted, it will not be affected by criminal justice measures and could then be perceived as not being "criminal" at all. Since the behaviour has been deemed worthy of attaining criminal sanction by the legislative, such "substantive de-

10 Any reference to England in the following means the jurisdiction of England and Wales. The position of the prosecutor is different in the other countries of the United Kingdom, *C. Lewis,* The Evolving Role of the English Crown Prosecution Service, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 214 *et seq*. Scotland and Northern Ireland are therefore not included in the analysis. For an analysis of the Scottish system in this context, see *L. Harris*, Scotland, in: K. Ligeti (ed.), Toward a Prosecutor for the European Union, Vol. I, 2013, p. 627 *et seq*.

11 More generally on a comparison between the two prosecuting authorities: *S. Buss,* Staatsanwaltschaft und Crown Prosecution Service, 2010.

12 *E. Luna/M. L. Wade*, Overview and Outlook – Toward Comparative Prosecution Studies, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 366.

13 *J. Kleinig*, Ethics and Criminal Justice: An Introduction, 2008, p. 30.

criminalisation"[14] by a prosecutor can lead to problems of democratic legitimacy: The fact that the legislator has decided to criminalise a form of behaviour always argues for the punishment of those who transgress.[15] By refraining from prosecution, a prosecutor therefore assumes the legislative role of the parliament and also of those who elected it: the people.[16]

This argument is less applicable if questions regarding the scope of criminal offences are left to the discretion of the prosecutors by the legislator.[17] This is particularly the case if a criminal statute is overinclusive or "intentionally non-ideal", i.e. constructed in a way that some conduct formally within its scope is not the intended target of the legislator.[18] In these instances, full enforcement would actually contravene the will of the legislator.[19] By enacting such an overly broad offence, the legislator himself shifts the task of adjudication towards the prosecutor.[20] Consequently, it is not the supremacy of parliament which is in danger of infringement.[21] Correction of such statutes through prosecutorial discretion is as an *ad hoc* measure preferable to the full enforcement of an overinclusive statute, but the system is still inferior to a statute communicating precisely what is criminalised.[22] To enact such statutes, legislators are forced to consider in the appropriate forum and with support by expert opinions which behaviour they truly deem worthy of punishment – ultimately improving the quality of legislation.[23]

14 In German, the term "verfahrensrechtliche Entkriminalisierung" (procedural decriminalisation) has been used: *Buss* (fn. 11), p. 107; *W. Heinz,* Die Staatsanwaltschaft, in: Festschrift für Hans-Heiner Kühne, 2013, p. 231 *et seq*.

15 *J. Reimann*, Against Police Discretion: Reply to John Kleinig, Journal of Social Philosophy (J.Soc.Philos.) 1998, p. 133.

16 *Reimann*, J.Soc.Philos. 1998, p. 132.

17 *C. S. Steiker*, Criminalization and the Criminal Process, in: R. A. Duff/L. Farmer/S. E. Marshall/M. Renzo/V. Tadros (eds.), The Boundaries of the Criminal Law, 2010, p. 28.

18 *G. E. Lynch*, Our administrative system of justice, Fordham Law Review (Fordham L.Rev.) 1998, p. 2137. Such an offence is for example s. 58(2) Terrorism Act 2000 in the UK, *V. Tadros*, Crimes and Security, Modern Law Review (MLR) 2008, p. 965.

19 *Tadros*, MLR 2008, p. 956.

20 *Stuntz*, Mich.L.R. 2001, p. 571.

21 *J. Rogers*, Prosecutorial policies, prosecutorial systems, and the Purdy litigation, Criminal Law Review (Crim LR) 2010, p. 554.

22 *Stuntz*, Mich.L.R. 2001, p. 569. The German *Bundesverfassungsgericht* (BVerfG), requires the legislator to take all substantial decisions in fundamental normative areas himself ("der Gesetzgeber verpflichtet ist (...) in grundlegenden normativen Bereichen (...) alle wesentlichen Entscheidungen selbst zu treffen") BVerfGE 49, 89 (126) and needs to define it precisely enough that its scope can be determined from the law and its interpretation alone ("Tragweite und Anwendungsbereich der Straftatbestände für den Normadressaten schon aus dem Gesetz selbst zu erkennen sind und sich durch Auslegung ermitteln und konkretisieren lassen") BVerfGE 105, 135 (153).

23 *Reimann,* J.Soc.Philos. 1998, p. 136.

2. Influence of the EPPO on substantive criminalisation

While this argument is valid for "classic" prosecutors in domestic criminal justice systems, it also needs to be examined whether it remains true with regards to a more international prosecutor.[24]

When regarding the gap between formal and substantive criminalisation in a European context, the first question is, which criminal laws would even be in question here. According to the 2013 Commission proposal for a regulation to introduce the EPPO (*Commission Proposal*), the EPPO has an exclusive[25] competence for prosecuting criminal offences which are directed against the financial interests of the Union.[26] These offences will be determined by the so-called PIF-Directive,[27] which requires implementation by the Member States. The "law in the book" in question is therefore drafted within two democratic spheres: On the one hand, the offences applied by the EPPO are part of the domestic legal system of the Member State, adopted by its legislature. On the other hand, its content is partially pre-determined by the Directive as passed by the European legislator.

Apart from the offences regulated in the Directive, the EPPO as envisaged in the Commission proposal would also possess an ancillary competence according to Art. 13:[28] To avoid the effect of *ne bis in idem,* if the offences affecting the financial interests of the Union are inextricably linked with other offences, the latter are also included in the EPPO's competence – if this is in the interest of a good administration of justice.[29] Consequently, the EPPO would also apply national criminal law, albeit in limited circumstances.

24 The truly international prosecutor – the Office of the Prosecutor at the ICC – operates under the principle of the complementarity system, according to which the ICC only deals with a case if the national State is unable or unwilling to carry out an investigation, Art. 17 Rome Statute. The situation is therefore not comparable to the EPPO according to the current Drafts, although such an approach to the EPPO is supported by some, *H. Satzger,* The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could be Avoided, in: P. Asp (ed.), The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives, 2015, p. 81 *et seq*.

25 Another approach is taken by the Council Draft, see in more detail in section IV.3., but the competence, then in Art. 17, corresponds to that of the Commission Proposal.

26 Art. 11(4), 12 Commission Proposal; *K. Ligeti/A. Weyembergh,* The European Public Prosecutor's Office: Certain Constitutional Issues, in: H. Erkelens/A. Meij/M. Pawlik (eds.), The European Public Prosecutor's Office, 2015, p. 61.

27 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363. Some consider a regulation to be the more appropriate means by which to determine the criminal offences, *S. Rheinbay,* Zur Errichtung einer Europäischen Staatsanwaltschaft, 2014, p. 157; although the German version of Art. 86 TFEU can also be read as providing for the criminal offences to be determined in the Regulation which establishes the EPPO, other language versions prove that this Article does not grant the EU the competence to create supranational criminal law, *H. Satzger,* Internationales und Europäisches Strafrecht, 7th ed., 2016, p. 122.

28 In the Council Draft, this is regulated in Art. 17(2).

29 After consulting the authorities of the respective Member State: recital no. 22 Commission Proposal.

These offences constitute the "law in the book" for the EPPO and thus the scale upon which prosecutorial exercise needs to be measured. By influencing the scope of substantive criminalisation, a European Prosecutor would interfere with democratic decisions made by the Member State and the European legislator. The general problem of democratic legitimacy therefore also applies to the EPPO. In addition, problems of democratic legitimacy are more pronounced here, due to general reservations regarding democratic legitimacy of the EU's actions in the area of criminal law.[30]

Ensuring uniform implementation of the offences protecting the budget of the EU across the Member States is the pronounced aim of introducing the institution. The aim is therefore to *close* the current gap which is the result of a lack of enforcement of offences against the financial interests of the EU, due to slow, insufficient prosecution with large discrepancies of prosecution success between countries.[31] The EPPO should therefore only ensure the enforcement of the criminal offences which are put in place to protect the Union's budget. It is *only* to be given the powers necessary to attain that goal, no more, in order to avoid infringements of Member States' sovereignty in accordance with the principle of subsidiarity and proportionality.[32] Consequently, influence of the EPPO on the interpretation of criminal offences is to be avoided, and limiting that influence a politically desirable and even legally imperative component of the introduction of the EPPO.

III. The Importance of Information – the Role of the Police and the Member States

Investigation is mostly conducted by the police – either *de iure*[33] or *de facto*[34] – which leads to a dependency of the prosecution on the police.[35] There is the factual possibili-

30 Due to an incomplete legitimisation process on both the EU and the national level: *A. Meij,* Some Explorations into the EPPO's Administrative Structure and Judicial Review, in: H. Erkelens/A. Meij/M. Pawlik (eds.), The European Public Prosecutor's Office, 2015, p. 109 *et seq*.; see also *Erbežnik*, EuCLR 2015, p. 214.

31 *A. Weertz,* Der Schutz der finanziellen Interessen der Europäischen Gemeinschaften, 2006, p. 29 *et seq*.; *European Commission,* Explanatory Memorandum to the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534, p. 2.

32 The proportionality requirement is seen to be fulfilled in the current proposal by the *European Commission* (fn. 31), p. 4, see also Commission Proposal recital no. 6. However, the proposal triggered a "yellow card" procedure under Art. 7 (2) Protocol No. 2 on the application of the principles of subsidiarity and proportionality, *European Commission,* Annual Report 2013 on Subsidiarity and Proportionality, COM(2014) 506.

33 In England and Wales, the CPS has no power to direct the police in the investigative phase, *J. R. Spencer*, Introduction, in: M. Delmas-Marty/J. R. Spencer (eds.) European Criminal Procedures, 2002, p. 30; Code for Crown Prosecutors, 7th ed. (January 2013) 3.2.

34 Although the police in Germany are formally subordinate to the prosecutor, they in practice deliver in most cases fully investigated cases to the prosecution, *Buss* (fn. 11), p. 113.

35 *A. Sanders/R. Young*, From Suspect to Trial, in: M. Maguire/R. Morgan/R. Reiner (eds.), The Oxford Handbook of Criminology, 5th ed., 2012, p. 856; *Stuntz*, Mich.L.R. 2001, p. 539.

ty or even budgetary necessity of the police to turn a blind eye to some crimes.[36] Police stereotyping and focus on certain crimes – due to perceived seriousness or success assessment – can therefore influence the work of prosecutors and thereby affect substantive criminalisation.[37] The same is true for the reasons leading victims to refrain from reporting a crime, which keeps both police and prosecutors from responding to it properly.[38]

In the context of the EPPO, the latter problem appears in a different light, since in the cases within the proposed competence of the EPPO at least one of the victims is the EU. The problem of lack of information of the prosecution service does exist, furthermore, there is another complication: the EPPO might lack information from the prosecuting authorities of the Member States.[39] In the absence of its own investigative force, the EPPO depends on the information gathered by other EU or Member State institutions to initiate an investigation. Therefore, the Drafts oblige these institutions to inform the EPPO of possible infringements.[40] Practical deficiencies are to be expected and should be kept in mind as an additional factor influencing substantive criminalisation.

IV. The Role of Discretion in Prosecutorial Decision-Making

If the influence of the prosecutor on substantive criminalisation should be limited, as seen above, the question arises as to how this can be achieved. The first approach would be to avoid prosecutorial discretion when deciding whether to prosecute a case and commit prosecutors to only examining whether the evidential standard for investigating and prosecuting a case is fulfilled. If the standard is fulfilled, prosecution is mandatory. Such would be the approach of a pure legality system.

Additional advantages of eliminating prosecutorial discretion is that mandatory prosecution is supposed to ensure consistent administration of penal justice.[41] Al-

36 *M. L. Wade*, The Januses of Justice: How Prosecutors Define the Kind of Justice Done Across Europe, European Journal of Crime, Criminal Law and Criminal Justice (Eur.J.Crime Cr.L.Cr.J.) 2008, p. 449.

37 *U. Eisenberg/S. Conen*, § 152 II StPO: Legalitätsprinzip im gerichtsfreien Raum?, Neue Juristische Wochenschrift (NJW) 1998, p. 2246. Such influence could also happen in the opposite direction: if cases are not prosecuted on a regular basis, this can lead to a decline of police investigation in such offences, *P. Tak,* The Dutch Prosecutor: A Prosecuting and Sentencing Officer, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 139.

38 *A. Ashworth/J. Holder*, Principles of Criminal Law, 7th ed., 2013, p. 13.

39 This is particularly problematic, because crimes against the financial interests of the EU might lead to allocation of funds to local businesses, thereby giving the respective Member State or region an advantage. These authorities therefore might lack incentive to investigate: Stellungnahme DRiB (Statement of the German Association of Judges) 2014/1, p. 2.

40 Art. 15 (1) Commission Proposal; Art. 19 Council Draft; *R. Esser,* Die Europäische Staatsanwaltschaft – eine Herausforderung für die Strafverteidigung, Strafverteidiger (StV) 2014, p. 497.

41 *G. Pfeiffer*, Strafprozessordnung: StPO, Kommentar, 5th ed., 2005, § 152, margin no 2.

though objective evaluation is not incompatible with discretion and public interest can be determined by regarding only appropriate criteria, discretion can nonetheless open the door to discriminatory and arbitrary decisions by providing a cloak for decisions based on inappropriate factors.[42] Another danger of discretion and the connected selective enforcement is a loss of legal certainty and thereby of the value of criminal offences as guidance to the behaviour of citizens.[43]

Despite these advantages, a pure legality principle prosecution system is practically impossible. Full enforcement would require a budget for prosecution authorities widely exceeding the financial means available. Accepting the resulting delays is no practicable solution either.[44] Denying the law enforcement authorities any discretion, means to force the prosecution authorities to nonetheless exercise it by turning a blind eye to some cases or by claiming evidential insufficiency.[45] This is a greater danger to individual liberty and the rule of law than admitting the failure of full enforcement and the necessity of discretion – especially because it grants the possibility to control its exercise.[46] Additionally, the value of diversion from trial has been increasingly recognized, mostly in juvenile justice, but also regarding criminal law in general.[47]

Most systems therefore include certain discretionary elements.[48] In deciding upon the structure and procedure of the EPPO, a balance needs to be found. The state of debate regarding the introduction of the EPPO will be described in the following. In order to enable a better evaluation of that debate, two examples of such balancing will be illustrated beforehand: the basic approach to discretion in England and Germany, as two current EU Member States employing opposite systems.

42 *R. Daw/A. Solomon*, Assisted suicide and identifying the public interest in the decision to prosecute, Criminal Law Review (Crim LR) 2010, p. 741.

43 *Tadros*, MLR 2008, p. 955.

44 Both with regard to Art. 6(1) ECtHR and the potential damage to the reputation of the legal system, see *M. Zwiers,* The European Public Prosecutor's Office, 2011, p. 44.

45 *J. Kleinig*, Selective Enforcement and the Rule of Law, Journal of Social Philosophy (J.Soc.Philos.) 1998, p. 124.

46 *E. Luna/M. L. Wade*, The Prosecutor as Policy Maker, Case Manager, and Investigator, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 2.

47 Arguments in favour of diversion in a US-context, see *A. van den Woldenberg,* Diversion im Spannungsfeld zwischen "Betreuungsjustiz" und Rechtsstaatlichkeit, 1993, p. 4 *et seq*.; for Germany, *M. Walter,* Wandlungen in der Reaktion auf Kriminalität, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 95 (1983), p. 32 *et seq*.;. G. Albrecht/W. Ludwig-Mayerhofer (eds.), Diversion and Informal Social Control, 1995; *I. Goeckenjan,* Neuere Tendenzen in der Diversion, 2005, p. 15 *et seq*.

48 *Buss* (fn. 11), p. 106; *J.-M. Jehle,* The Function of Public Prosecution within the Criminal Justice System, in: J.-M. Jehle/M. Wade (eds.), Coping with Overloaded Criminal Justice Systems, 2006, p. 24. The prosecutorial systems of most EU member states can be found in: K. Ligeti (ed.), Toward a Prosecutor for the European Union, Vol. I, 2013, p. 7 *et seq*.; Alternative avenues to avoid prosecutorial overburdening also exist: e.g. the simplification of judicial procedures and resorting to summary procedures more often, see *Zwiers* (fn. 44), p. 45.

1. Opportunity Principle in England and Wales

Although participation of the United Kingdom in the EPPO is unlikely,[49] as a traditional opportunity principle system it nonetheless offers a valuable position to juxtapose the prosecution systems within the EU.[50] The Crown Prosecution Service (CPS) has been responsible for prosecuting crimes in England since the late 1980s.[51] The framework of the activities of Crown Prosecutors is the Code for Crown Prosecutors. The Director of Public Prosecution (DPP) as the head of the CPS is obliged by s. 10 of the Prosecution of Offences Act 1985 to publish such a Code.[52] An English prosecutor bases the decision whether to prosecute on the result of a two-stage test called the Full Code Test.[53] The first "Evidential Stage" of the test requires the prosecutor to attain a certain level of evidence against the suspect before commencing a prosecution.[54] This stage is not of interest here. Secondly, the case needs to pass the "Public Interest Stage".[55] The prosecutor has to consider whether prosecution is required in the public interest.[56] If the factors against prosecution outweigh the factors for prosecution, the prosecutor will not proceed.[57] The factors which prosecutors have to take into account when considering the public interest are non-exhaustively set out in the Code and correspond to those factors which aggravate or mitigate sentences, such as the harm caused to the victim or the impact on the community.[58]

2. Mandatory Prosecution in Germany

The German system applies the legality principle.[59] If there are sufficient factual indications for the existence of a criminal offence, prosecutors are obliged to raise public charges according to § 170(1) StPO ("Strafprozessordnung"– German Code of Crimi-

49 *Drew* (fn. 7), p. 18; this is true irrespective of a possible "Brexit".
50 The famous quote of *Lord Shawcross* (House of Commons Debate, 29 January 1951) shows the deep roots of the principle: "It has never been the rule in this country – I hope it never will be – that suspected criminal offenders must automatically be the subject of prosecution."
51 S. 1 Prosecution of Offences Act 1985. For smaller offences, the responsibility for charging is assigned to the police, which then also decides based on the Code for Crown Prosecutors, *Sanders/Young* (fn. 35), p. 855. In this function, the police are included in this analysis.
52 DPP, *Guidance on Charging*, 5th ed. (May 2013) para. 15.
53 Code for Crown Prosecutors, 7th ed. (January 2013) 4.1.
54 Code for Crown Prosecutors, 7th ed. (January 2013) 4.5.
55 Code for Crown Prosecutors, 7th ed. (January 2013) 4.7 – 4.12.
56 Code for Crown Prosecutors, 7th ed. (January 2013) 4.7.
57 *J. Rogers*, Restructuring the Exercise of Prosecutorial Discretion in England, Oxford Journal of Legal Studies (O.J.L.S.) 2006, p. 778.
58 Code for Crown Prosecutors, 7th ed. (January 2013) 4.12.
59 § 152 II StPO; *B. Huber*, Criminal Procedure in Germany, in: R. Vogler/B. Huber (eds.), Criminal Procedure in Europe, 2008, p. 289.

nal Procedure).[60] There is no separate evaluation of the public interest in a prosecution and therefore no discretion in the sense employed here.[61]

However, this statement needs to be put into perspective. Firstly, German criminal law knows a distinction between criminal offences and administrative offences.[62] The prosecution of administrative offences *is* subject to the discretion of the enforcing authorities.[63] Secondly, § 152(2) StPO allows for exceptions to the legality principle. The legislator has increasingly created exceptions in which prosecutors may not prosecute despite there being enough evidence, most importantly those codified in §§ 153, 153a, 154 and 154a StPO. Mandatory prosecution has consequently become rarer, particularly in relation to the prosecution of minor offences, *de facto* limiting the legality principle in Germany to more severe offences.[64] Although the provisions in §§ 153 *et seq*. stipulate that in these cases prosecutors "may" ("kann") dispense, this does not actually constitute discretion in the sense in which it is employed in an opportunity principle system.[65] Instead, the prosecutor has a wider margin of appreciation ("Beurteilungsspielraum") when determining whether the requirements for dispensing with prosecution are fulfilled.[66] However, if a prosecutor does find the requirements to be fulfilled, which is justiciable, he is then bound to dispense with prosecution. Although the application of the section does give prosecutors more leeway,[67] the "exceptions" to the legality principle do not grant the German prosecutor as free a scope of decision as an opportunity principle system. Therefore, the legality principle still constitutes an important principle affecting the German Criminal Justice System and cannot be seen as replaced by the opportunity principle.[68]

60 *B. Schmitt,* in: L. Meyer-Goßner/B. Schmitt (eds.), Strafprozessordnung, 59th ed., 2016, § 170, margin no 1; *Bundesgerichtshof* (BGH) NJW 1989, 97.

61 There even exists a criminal offence securing adherence to the legality principle: § 258a StGB – assistance in avoiding prosecution given in official capacity.

62 *S. Gerhold*, in: J.-P. Graf (ed.), Beck'scher Online-Kommentar OWiG, 10th ed., 15.1.2016, Einleitung zum OWiG, margin no 1.

63 § 47 I OWiG; *H. Diemer*, in: R. Hannich (ed.), Karlsruher Kommentar zur Strafprozessordnung, 7th ed., 2013, § 152, margin no 12.

64 *J.-M. Jehle/M. Wade/B. Elsner*, Prosecution and Diversion within Criminal Justice Systems in Europe. Aims and Design of a Comparative Study, European Journal on Criminal Policy and Research (Eur.J.Crim.Pol.Res) 2008, p. 98.

65 *K. Volk/A. Engländer,* Grundkurs StPO, 8th ed., 2013, § 12, margin no 2; the prosecutor only has true discretion ("Ermessen") in § 153c(1)(1) Nr. 1, Nr. 2 relating to cases committed abroad, in juvenile proceedings (s. 45 (1) JGG) and in the above-mentioned § 47 OWiG relating to administrative offences, *Schmitt* (fn. 60), § 152, margin no 8. § 31a Narcotics Act (Betäubungsmittelgesetz – BtMG) also gives discretion to prosecutors whether to prosecute consumption-related offences in cases with only a small amount, *P. Kotz,* in: W. Joecks/K. Miebach (eds.), Münchener Kommentar zum Strafgesetzbuch, Band 6, 2nd ed., 2013, § 31a BtMG, margin no 55.

66 *Diemer* (fn. 63), § 152, margin no 5.

67 *Volk/Engländer* (fn. 65), § 12, margin no 13.

68 *Diemer* (fn. 63), § 152, margin no 3.

3. The Principle guiding the EPPO as envisaged in current debate

Art. 86 TFEU itself, while giving the Union the possibility to introduce a European Prosecutor through secondary law,[69] says little on how precisely the institution should work.[70] Nevertheless, the most recent drafts show which constructions constitute a probable approach to the system of prosecution used for the EPPO. The *Commission Proposal* obliges this institution to initiate investigations in all cases in which there are reasonable grounds to believe that an offence within its competence has been committed.[71] If none of the (non-discretionary) reasons for dismissal in Art. 28(1) exist, the competent European Delegated Prosecutor (EDP) is instructed to prosecute before the competent national court.[72] This therefore constitutes a prosecutorial system according to the legality principle.[73]

The more recent revised Draft discussed in the Council[74] (*Council Draft*) has abolished the principle of exclusive competence of the EPPO and shifted towards a shared competence, which results in a more complex structure. Some elements of the Commission Proposal remain: If there is reason to believe that an offence within the competence of the EPPO has been committed and the case is not yet investigated by national authorities, there is a non-discretionary duty for an EDP to initiate an investigation.[75] The decision to prosecute is taken according to Art. 29. This decision is, in general, also governed by the legality principle.

However, since the competence of the EPPO as envisaged by the Council Draft is shared with the Member States' prosecution services, the additional element of another level of prosecution exists. If a national investigation is already underway, the EPPO has the right of evocation in cases within its competence.[76] But even if the EPPO initiates an investigation, the option to refer the case to the national authorities exists, Art. 28a.[77] These decisions do include the highly relevant question, in which cases EDPs should take over cases from regular prosecutors. Although the EPPO has a degree of discretion here, its decision is not related to the question *whether* the case should be prosecuted but rather by *which system.* The system envisaged by the Council Draft therefore still constitutes a legality principle system.

69 *B.-R. Killmann/M. Hofmann,* in: U. Sieber/H. Satzger/B. v. Heintschel-Heinegg (eds.) Europäisches Strafrecht, 2nd ed., 2014, § 48 Perspektiven für eine Europäische Staatsanwaltschaft, margin no 15.
70 *Ligeti/Weyembergh,* (fn. 26), p. 56.
71 Art. 16 (1) Commission Proposal and recital no. 20: "prosecution activities (…) should be based on the principle of mandatory prosecution".
72 Art. 27(2) Commission Proposal, see Art. 86(2) TFEU.
73 *Rheinbay* (fn. 27), p. 193; *Erbežnik*, EuCLR 2015, p. 213.
74 Draft EPPO-Regulation, Council Doc. 10830/16, 11.7.2016.
75 Art. 22 (1) of the Council Draft.
76 Art. 22a Council Draft.
77 E.g. the exceptions to the competence of the EPPO in Art. 20(2) (e.g. "repercussions at a Union level which require an investigation") and 20(3).

Obliging the EPPO to the principle of mandatory prosecution was already favoured in the Corpus Juris 1998[78] and by the Commission in the Green Paper on the establishment of a European Prosecutor in 2001.[79] It was argued that mandatory prosecution would serve as a balance to the independence of the EPPO.[80] It would enable the institution to act independently of instructions whilst avoiding claims of arbitrariness.[81] Additionally, this would further the aim of the introduction of a European Prosecutor, which is to ensure a more consistent prosecution of offences against the EU's budget across the Member States.[82] In Recital 20, the Commission Proposal explicitly refers to legal certainty and zero tolerance as reasons for opting for the principle of mandatory prosecution.

As in the German system, there are both in the Commission proposal and in the Council Draft **exceptions to the legality principle**, in which the EPPO is given discretion.[83] Firstly, this relates to the dismissal of cases: whilst most reasons for dismissal[84] do not give the prosecutor any discretion, the Commission Proposal does offer this option if the offence is minor according to the implementation of the Directive.[85] Additionally, in both Drafts, a transaction is proposed.[86]

As seen, the current debate focuses on an EPPO which functions in general according to the legality principle. But this fact on its own does not say whether the influence of the prosecutor on substantive criminalisation is appropriately limited: both opportunity and legality systems need to be seen in the wider setting of their national legal system determining the role with intricate systems of checks and balances.[87]

V. The Wider Setting of Prosecutorial Decision-Making in England and Germany

In this section, the framework of prosecutorial decision-making in Germany and in England will be examined, regarding how both legal systems control and limit prosecutorial power. To enable a structured approach, first it is necessary to illustrate the

78 *M. Delmas-Marty* (ed.), Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union, 1998, Art. 19(4).
79 *European Commission,* Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11.12.2001, COM (2001) 715, p. 46; *Buss* (fn. 11), p. 157.
80 *European Commission* (fn. 79), p. 45. Interestingly, the German legality principle does *not* go hand in hand with prosecutorial independence, *M. Markwardt,* Brauchen wir eine "unabhängige" Staatsanwaltschaft?, in: Festschrift für Reinhard Böttcher, 2007, p. 96.
81 *Rheinbay* (fn. 27), p. 193 *et seq*.; *Buss* (fn. 11), p. 159.
82 *U. Nelles,* Die verfahrensrechtlichen Vorgaben des Corpus Juris, in: B. Huber (ed.), Das Corpus juris als Grundlage eines europäischen Strafrechts, 2000, p. 263; *Buss* (fn. 11), p. 157.
83 This is also attributed to pragmatic considerations, such as avoiding docket pressure: *Rheinbay* (fn. 27), p. 198.
84 Art. 28(1)(a-e) Commission Proposal; Art. 33(1)(a-f) Council Draft.
85 Art. 28(2)(a) Commission Proposal: "*may* dismiss".
86 Art. 29 Commission Proposal; Art. 34 Council Draft as a provision relating to consensual disposal of cases, previously referred to as "transaction" e.g. in Council Doc. 15100/15.
87 *Zwiers* (fn. 44), p. 378.

ways through which prosecutorial decisions influence substantive criminalisation. The insights gained from this analysis will be applied to the EPPO in the following section.

A complete portrayal of prosecutorial decision-making with its intricate system of exceptions and counter-exceptions would require a much more in-depth evaluation, which is beyond the scope of this analysis. In order to create a wider setting in which to evaluate the influence of the legality principle, such a cursory depiction suffices.

1. Decisions influencing Substantive Criminalisation

Problems of democratic legitimacy and the effective deterrent function of the criminal law are especially profound in the constellation in which substantive criminalisation is decreased through decisions of the prosecutor – that is, if behaviour formally within a criminal offence is not reached by measures of the criminal justice system. Several moments within a criminal proceeding might give opportunities to prosecutors to exercise discretion in this way.

a) Deciding whether to prosecute

One of the tasks at the core of a prosecutor's job is the decision whether to prosecute. If the prosecutor decides not to prosecute a specific behaviour or – if done in a more systematic practice – a type of behaviour in general, this can lead to a *de facto* decriminalisation of this behaviour, which is problematic with regards to democratic legitimacy. There are two stages to be considered: the decision to investigate a certain situation and then to take that case to court. In both instances, the decision not to investigate or not to prosecute are of importance here, since both lead to a case not being decided by a court.

As explained above, in England, the CPS has discretion not to prosecute according to the Full Code Test. But the German system also has exceptions to the legality principle and enables prosecutors in §§ 153 StPO *et seq*. to dispense with prosecution or terminate proceedings. In more detail: the exception granted in § 153 StPO constitutes an option for the prosecutor not to prosecute if there is minor guilt and no public interest in the prosecution. This provision only relates to misdemeanours, which are offences with less than a minimum sentence of one year's imprisonment, § 12 StGB. Unless there are merely minimal consequences from the offence, the prosecutor needs approval of the court to do this.[88] However, the court only undertakes a very cursory examination in practice.[89] Additionally, §§ 154 and 154a StPO give the German prosecutor the option not to prosecute offences which would only lead to an insignificant secondary penalty. These therefore constitute means by which prosecutors can effectively decriminalise certain behaviour. Once a German court has opened trial, a Ger-

88 *Schmitt* (fn. 60), § 153, margin no 14 *et seq*.
89 *Wade*, Eur.J.Crime Cr.L.Cr.J. 2008, p. 445.

man prosecutor cannot on its own decide to refrain from prosecuting further, whilst the Crown Prosecutor does possess such an option by not offering the judge any evidence.[90]

The effect of possibilities not to prosecute is more pronounced if there are prosecutorial guidelines regarding the treatment of certain behaviour. Through uniform application of such guidelines by prosecutors, this behaviour is *de facto* not caught by the Criminal Justice System anymore.

In the UK, the CPS issues the Code for Crown Prosecutors and large amounts of guidance related to specific issues on its website.[91] Crown prosecutors often rely on such prosecutorial guidelines which exist particularly in areas in which the determination of the public interest in the prosecution proves complex. One example for such guidelines is the CPS policy regarding assisted suicide.[92] The policy specifies the meaning to be given to the Full Code Test in cases of s. 2 Suicide Act 1961. Although the policy in para. 5 explicitly states that the policy does not change the law and the factors to be considered are subject to an overall evaluation, the guidance nonetheless shows a clear scenario regarding the preconditions under which prosecutors would not prosecute. Citizens can infer from the guidelines that their behaviour will not be prosecuted and will then consider it not criminal. The creation of prosecutorial guidance in those cases amounts to a power to define the law.[93]

In Germany, prosecutorial guidelines regarding non-prosecution exist as well, i.e. regarding what constitutes the possession of a "small amount" of drugs like cannabis, the prosecution of which is usually not in the public interest.[94] The Federal Minister of Justice and his correspondent colleagues at the "Länder"-level also enact Guidelines for Criminal Procedure as an interpretational framework to enhance equal treatment across the entire state.[95] In addition, internal guidelines of the prosecution services within the individual Länder exist, which define e.g. in what cases there is no "public

90 *Buss* (fn. 11), p. 52 *et seq*.

91 *A. Ashworth/M. Redmayne*, The Criminal Process, 4th ed., 2010, p. 207.

92 DPP, Policy for prosecutors in respect of cases of encouraging or assisting suicide (Oct 2014).

93 *Ashworth/Redmayne* (fn. 91), p. 219.

94 § 31a BtMG; The Länder are constitutionally obliged to see to an essentially consistent practice of non-prosecution ("Im Wesentlichen einheitliche Einstellungspraxis"): *Bundesverfassungsgericht* (BVerfG) BVerfGE 90, 145 (190) and avoid differences between the sanction traditions in the different Länder, which are especially pronounced in this area of "mass criminality", *K. Weber,* BtMG, 4th ed., 2013, § 31a, margin no 79.

95 E.g. RiStBV (Richtlinien für das Strafverfahren und das Bußgeldverfahren = Guidelines for the criminal procedure and the procedure relating to administrative offences). They are not binding for courts, but prosecutors need to follow such directions, § 146 GVG, *D. Magnus,* Das "öffentliche Interesse" in § 153 Abs. 1 StPO, Goltdammer's Archiv für Strafrecht (GA) 2012, p. 631; see more in section V.2.c). The RiStBV, however, only offers recommendations to prosecutors, which then have to decide based upon the individual case, *J.-P. Graf*, in: J.-P. Graf (ed.), Beck'scher Online-Kommentar StPO mit RiStBV und MiStra, 23rd ed., 16.11.2015, Einführung RiStBV, margin no 1; *U. Franke,* in: V. Erb/R. Esser/U. Franke/K. Graalmann-Scheerer/H. Hilger/A. Ignor (eds.), Löwe-Rosenberg, StPO, Band 5, 26th ed., 2010, § 146, margin no 25.

interest" in the prosecution.[96] German Guidelines only relate to the possibilities described above, and therefore only to cases of minor guilt. The definition of more severe criminal offences, such as assisting suicide[97], is in contrast done by the legislator.

b) Other Measures with punitive character

In addition to granting the choice *not* to prosecute, easing the caseload can also be achieved by granting prosecutors powers to refrain from prosecution whilst attaching conditions to the non-prosecution. Additionally, prosecutors could be granted the power to impose punitive measures, thereby circumventing trial. Such measures with punitive character also increase the influence of prosecutors on substantive criminalisation: the prosecutor decides which behaviour deserves punitive measures.[98]

In England, an out-of-court disposal is possible if the prosecutor determines that the public interest is best served this way.[99] Different forms with a punitive element exist: a Conditional Caution is a formal warning issued by the CPS in which the defendant admits guilt and which is supplemented by reparative or rehabilitative conditions.[100] If the cautioned person fails to meet the conditions, prosecution remains possible.[101] Other out-of-court disposals with punitive character are Fixed Penalty Notices and Penalty Notices for Disorder, both of which are mostly issued by the police.[102] However, the normal response of the English system to adult offenders remains prosecution.[103]

Comparable measures exist in Germany: one of the exceptions to the legality principle is the possibility of conditional dismissal. The prosecutor dismisses a case and sets conditions which are supposed to compensate the public interest in the prosecution of the suspect, § 153a StPO.[104] The suspect can choose not to accept the conditions and risk going to trial instead.[105] Several conditions exist, but most common is the payment of a fine.[106] This measure is used in more than 90% of dismissals by the prosecution

96 *W. Wohlers,* in: J. Wolter (ed.), Systematischer Kommentar zur StPO, Band 9, 4th ed., 2013, § 146 GVG, margin no 3; *T. Charchulla/M. Welzel,* Referendarausbildung in Strafsachen, 3rd ed., 2012, margin no 131.

97 Assisting suicide done in a business-like manner was recently criminalised in Germany, § 217 StGB.

98 *H.-J. Albrecht*, Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany, European Journal of Crime, Criminal Law and Criminal Justice (Eur.J.Crime Cr.L.Cr.J) 2000, p. 247.

99 Code for Crown Prosecutors, 7th ed. (January 2013) 7.1.

100 *Ashworth/Holder* (fn. 38), p. 12.

101 *M. Davies/H. Croall/J. Tyrer*, Criminal Justice, 4th ed., 2010, p. 211.

102 *Ashworth/Redmayne* (fn. 91), p. 168.

103 *Ashworth/Holder* (fn. 38), p. 12.

104 *Diemer* (fn. 63) § 153a, margin no 12.

105 *Volk/Engländer* (fn. 65), § 12, margin no 25.

106 This fine can be very high, e.g the proceedings against *Bernie Ecclestone* in 2014 were dispensed with conditional upon a payment of a fine of 100 Mio. USD, *H. Kudlich,* Ecclestone, Verständigungsgesetz und die Folgen – Reformbedarf für § 153a StPO?, Zeitschrift

according to this section.[107] Another way of enabling quicker proceedings is the penal order, §§ 407 StPO *et seq*. This procedure allows the prosecutor to fix a fine and continue in written proceedings, which the suspect can appeal against to have a regular trial.[108] Although the procedure requires agreement by the court, judicial review is more of a formality in this regard than an actual check on prosecutorial decisions.[109]

Although both German options grant the suspect the option to go to trial and thereby give him influence over his fate, they are – due to their vast use and the power of the prosecutor to in effect determine the sentence – very extensive powers and go further than English diversions.

c) Choice of Charge

Another task which can be assigned to the prosecutor is the choice of charges to be brought against a defendant, if the behaviour in question might constitute several criminal offences. Having the choice of charge, the prosecutors could in such a case determine to prosecute the behaviour only as the lesser crime and thereby partially decriminalise it or attach a lower consequence to it. In England and Wales, the selection of charges in almost all cases is done by the prosecutor and is supposed to reflect the seriousness of the crime and allow for appropriate sentencing by the court.[110] This is not problematic if the judge has the possibility to change the charge later on: If the CPS charges a more serious offence but the court can only prove the less serious offence, it is possible for the court to convict of the lesser offence.[111] However, no such option exists to convict of a non-charged more serious offence.[112]

In the German system, there are formal rules regarding sentencing for multiple offences. §§ 52-55 of the German Criminal Code (*Strafgesetzbuch – StGB*) determine which charges are brought. If a prosecutor nonetheless decides to charge a lower offence, the court does have the power to evaluate the legal situation differently and find the defendant guilty of a different offence, § 271 StPO. This typical inquisitorial feature subjugates the power of prosecutors to choose charges in the indictment to judicial review. The possibility, therefore, of decreasing substantive criminalisation by making it subject to only a lesser offence exists only in the adversarial system. However, this influence on substantive criminalisation is only a matter of how strictly a de-

für Rechtspolitik (ZRP) 2015, p. 10 – although in this case a court terminated proceedings after the case had already reached trial, the principle remains the same.

107 *W. Beulke,* in: V. Erb/R. Esser/U. Franke/K. Graalmann-Scheerer/H. Hilger/A. Ignor (eds.), Löwe-Rosenberg, StPO, Band 4, 26th ed., 2008, § 153a, margin no 29.

108 § 410 StPO, *L. Meyer-Goßner,* in: L. Meyer-Goßner/B. Schmitt (eds.), Strafprozessordnung, 59th ed., 2016, § 411, margin no 2.

109 *S. Boyne*, Prosecutorial discretion in Germany's Rechtsstaat: Varieties of practice and the pursuit of truth, 2007, p. 41; *Heinz* (fn. 14), p. 222.

110 Code for Crown Prosecutors, 7th ed. (January 2013) 6.1; *Lewis* (fn. 10), p. 227 *et seq*.

111 *Ashworth/Holder* (fn. 38), p. 14.

112 *J. I. Turner*, Prosecutors and bargaining in weak cases: a comparative view, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 109.

fendant is punished. Defining the choice of charge does not lead to full decriminalisation.

d) Application to the EPPO

In the current state of debate, the prosecutors of the EPPO would have powers comparable to the ones illustrated above. Some of the exceptions to the legality principle would give the prosecutor some discretion, most notably Art. 28(2) a) of the Commission Proposal, according to which the prosecutor *may* dismiss a case if it were to constitute a minor offence. In the newer Council Draft, this option has been replaced by the option to refer a case to the national authorities, Art. 28a, 20(2) and (3). The exercise of this option by the Permanent Chambers can be influenced through Guidelines, which the College can introduce, Art. 28a(2). But as explained above, this would only determine the question *by whom* a certain offence is prosecuted, not whether it is prosecuted *at all.* The Council Draft therefore grants less power to the prosecutor to influence substantive criminalisation by choosing not to prosecute. Nonetheless, the referral might influence substantive criminalisation, if proceedings are purposely assigned to a jurisdiction in which conviction is more likely.

However, another means of influence of the EPPO is the transaction proposed in s. 29 of the Commission Proposal. Similar to the measures with punitive character described above, this measure gives the EPPO the power to dismiss a case if the suspect, who has compensated all damages, agrees to pay a fine. A corresponding provision is also proposed by the Council, which would allow the EPPO to apply simplified prosecution procedures of the Member States to dispose a case based on a consensus with the suspect.[113] This is conditional upon the express agreement of the Permanent Chamber. The decision of the Permanent Chambers would also be influenced by Guidelines of the College, Art. 34(2) Council Draft.

The Proposals show a strong reliance on the national structures of the Member States,[114] which has the consequence that the proceedings do not take place before a European court but within the national jurisdictions.[115] The importance of choice of charges therefore depends on the national context. Due to the EPPO's attachment to the legality principle, this will have little consequence. Pre-trial decisions of the prosecutor are more influential.

2. Limitations to the Effect on Substantive Criminalisation

The described possibilities of prosecutors to decriminalise can be limited by the way Criminal Justice Systems are constructed. Next, some of those limiting factors will be

113 Art. 34 Council Draft.
114 *Satzger* (fn. 24), p. 73.
115 Art. 27 Commission Proposal; Art. 30(1) Council Draft.

examined to see in which way they act as safeguards against excessive prosecutorial power.

a) Judicial Review

The powers of the prosecutors can be limited by judicial review of prosecutorial *decisions not to prosecute.* Those who take a case of prosecutorial inactivity to court are mostly those with a personal interest in the proceedings, and therefore mostly victims or relatives of victims.[116]

Such an option for victims exists in the German system: the so-called Proceedings to Compel Public Charges consist of a departmental complaint and subsequent court decision which can ultimately order the prosecution service to prosecute, § 175 StPO.[117] However, decisions regarding the most important deviation from the legality principle – §§ 153 and 153a StPO – cannot formally be appealed by victims.[118]

Judicial review of the decision not to prosecute also exists in England and Wales.[119] Grounds for such a review can be that the decision was based on an unlawful policy.[120] Apart from this, the applicant has to prove that the decision taken was unreasonable.[121] Successful complaints are more likely if prosecutorial guidelines exist which facilitate proving wrongful behaviour by obliging prosecutors to take certain factors into account.[122] However, in addition to the fact that unreasonableness is a high standard to prove, especially with regard to the vague standards set by the Code, the prosecution does not give reasons for its decision, which constitutes an immense difficulty for applicants challenging it.[123] Consequently, there is reluctance of the courts to interfere with the discretional decisions of the prosecution.[124]

116 Although the use of the term "victim" prior to a procedural finding of guilt is contested, it will be used here for clarity's sake, see *C. Hoyle*, Victims, the criminal process, and restorative justice, in: M. Maguire/R. Morgan/R. Reiner (eds.), The Oxford Handbook of Criminology, 5th ed., 2012, p. 411.

117 *R. Kölbel*, in: C. Knauer/H. Kudlich/H. Schneider (eds.), Münchener Kommentar zur Strafprozessordnung, Band 2, 2016, § 175, margin no 4.

118 *K. Haller/K. Conzen*, Das Strafverfahren, 7th ed., 2014, margin no 172; *Albrecht*, Eur.J.Crime Cr.L.Cr.J 2000, p. 248.

119 *Ashworth/Redmayne* (fn. 91), p. 221.

120 *Ashworth/Redmayne* (fn. 91), p. 221; *Court of Appeal* (CA) *R v Metropolitan Police Commissioner, ex p Blackburn (No. 3)* [1973] QB 241.

121 *Court of Appeal* (CA) *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

122 *T. Weigend*, A Judge by another name? Comparative Perspectives on the role of the Public Prosecutor, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 386.

123 *R. Young/A. Sanders*, The Ethics of Prosecution Lawyers, Legal Ethics, 2004, p. 197.

124 *High Court, Queen's Bench Division* (QB) *R v DPP, ex parte Camelot Group Plc (No. 2)* (1998) 10 Admin.L.R. 93.

b) Private Prosecutions

Another limit to the prosecution's influence on decreasing substantive criminalisation is the citizens' rights to instigate criminal proceedings. With such an option, the refusal of the prosecutor to bring a case to court can be counterbalanced by allowing those with a legitimate interest to compel courts to decide over the matter. The powers to decrease substantive criminalisation are therefore limited by the possibilities of victims to enforce prosecution or bring cases to court themselves as private prosecutions. In England and Wales, a private prosecutor does not need to fulfil the criteria of the Code for Crown Prosecutors and thus need not take into account whether the prosecution is in the public interest according to paras 4.7 to 4.12.[125] In Germany, §§ 374-394 StPO offer the possibility that a number of crimes which typically cause little harm are prosecuted by the victim, if the Staatsanwaltschaft sees no public interest and therefore decides not to prosecute.[126]

This limitation is of no practical relevance for the EPPO: the EU itself will be the victim of the crimes within the competence of the EPPO.[127] There is therefore little separate interest of a victim which needs consideration, since the EPPO constitutes a Union institution. The EDP is also subject to supervision by the central level to ensure such adherence to the EU's interest.[128]

c) Hierarchical Responsibility

Another limitation is the internal organisation of the prosecution service.[129] If a prosecutor knows his decisions to be revisable and subject to scrutiny, this can improve the quality of prosecutorial decision-making and control the exercise of discretion.

Prosecutors in England and Wales are subordinate to the DPP.[130] Since they are in turn superintended by the Attorney-General who answers to Parliament on policy questions, there exists indirect political accountability of prosecutors to Parliament.[131]

125 *R. Buxton*, The private prosecutor as a minister of justice, Criminal Law Review (Crim LR) 2009 p. 428. These prosecution are, however, very rare, and subject to legal and practical constraints on the exercise of the right, Law Commission, *Consents to Prosecution (*Law Com No 255, 1998) para. 4.7; *T. Howe,* England, in: K. Ligeti (ed.), Toward a Prosecutor for the European Union, Vol. I, 2013, p. 136.

126 *L. Senge,* in: R. Hannich (ed.), Karlsruher Kommentar zur Strafprozessordnung, 7th ed. 2013, § 374, margin no 6. The option is used e.g. in cases of insult.

127 On the manifestations of damage to the EU budget, see *Weertz* (fn. 31), p. 114 *et seq*.; *Rheinbay* (fn. 27), p. 11 *et seq*.; in cases of fraud related to subventions with mixed financing from EU and Member State's funds, the Member State could be an additional victim, *Satzger* (fn. 27), p. 191.

128 See below in section V.2.e).

129 *D. J. Galligan*, Discretionary Powers: A Legal Study of Official Discretion, 1986, p. 133.

130 S. 1 Prosecution of Offences Act 1985.

131 *Rogers*, O.J.L.S. 2006, p. 798.

Additionally, the CPS is overseen by Her Majesty's Inspectors whose reports are published.[132]

German prosecutors are organised hierarchically according to § 146 GVG and have to follow instructions of their superiors both in general and related to individual cases.[133] The politically appointed ministers of justice of the respective Länder are at the top of the hierarchy and can also issue so-called *external* directions relating to the treatment of cases.[134] Prosecutors in Germany are therefore not considered independent, in contrast to the importance of this notion in the UK.[135] In practice, interference by the superiors in individual cases is rare.[136]

Apart from instructions influencing individual cases, general guidelines issued by superiors can also serve to limit the negative effects of influence on substantive criminalisation: they help to eliminate the danger of unequal treatment[137] and if they are published, they can also alleviate the limited guiding function of the law due to discretion.[138] They might also alleviate the lack of democratic legitimacy: The CPS Code is laid before Parliament as part of the annual report of the DPP to the Attorney General and thereby endorsed.[139] The influence of the ministers of justice on the prosecution service in Germany is also argued to ensure parliamentary control.[140]

Despite this, circumvention of guidelines remains possible: In Germany supervisors have little time to effectively review the decisions of their subordinates.[141] In England, the Code is very vague and offers little concrete guidance.[142] It is fairly easy for prosecutors to depict decisions made for a different reason as being based on guidance.[143] Nonetheless, guidelines are important measures ensuring equal, objective and fair application of prosecutorial discretion across the jurisdiction.

132 *Ashworth/Redmayne* (fn. 91), p. 80.
133 *Franke* (fn. 95), § 146, margin no 3.
134 *Boyne*, (fn. 109), p. 25; This possibility attracts criticisms, both nationally and internationally, see *E. Rautenberg,* Deutscher Widerstand gegen weisungsunabhängige Staatsanwaltschaft, Zeitschrift für Rechtspolitik (ZRP) 2016, p. 38. Additionally, the Federal Minister of Justice has the right to supervise and direct the "Generalbundesanwalt" (Federal Prosecutor General) and the federal prosecutors, who are competent e.g. in cases of treason or crimes against constitutional organs, §§ 147 Nr. 1, 142a, 120 GVG.
135 Or even more so in several former Soviet States, *Rautenberg,* ZRP 2016, p. 38.
136 *Albrecht*, Eur.J.Crime Cr.L.Cr.J 2000, p. 253; *Wohlers* (fn. 96), § 146 GVG, margin no 24.
137 *M. Osler*, This Changes Everything: A Call for a Directive, Goal-oriented Principle to Guide the Exercise of Discretion, Valparaiso University Law Review (Val.U.L.Rev.) 2005, p. 631 *et seq*.
138 *Weigend*, (fn. 122), p. 386.
139 S. 9(2) and 10 (3) Prosecution of Offences Act 1985.
140 *Markwardt* (fn. 80), p. 99.
141 *S. Boyne*, Is the Journey from the In-Box to the Out-Box a straight line? The drive for efficiency and the prosecution of low-level criminality in Germany, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 49.
142 *L. Zedner*, Criminal Justice, 2004, p. 148.
143 *Ashworth/Redmayne* (fn. 91), p. 180.

d) Other Limitations

Although prosecutors are not elected both in England and in Germany, public opinion and its expression through the media can constitute a "soft" constraint to the exercise of prosecutorial power. Public opinion tends to be in favour of prosecution, since defendants themselves are usually a "politically anaemic group" and their interests are not represented with significant political power.[144] Therefore, public scrutiny of prosecutorial action works more effectively to control decisions in which the prosecution might appear to be too lenient. But there is a larger problem of invisibility of prosecutorial decisions not to prosecute, especially in victimless crimes such as money laundering or corruption. This problem could also be applicable to the EPPO, which would also have the competence to prosecute cases of corruption and money laundering according to the proposed PIF-Directive.[145]

Education, legal culture and the perception of their role can influence prosecutorial decision-making as well.[146] Informal internal controls amongst colleagues can work as a constraint in practice by encouraging to maintain the mainstream response.[147] In Germany, prosecutors are educated as part of the judiciary and are legally obliged to examine evidence both in favour and against the defendants, which leads to an attitude in which convictions are not necessarily seen as victories of the prosecutor.[148] Internal controls amongst English prosecutors are less likely to restrain their exercise: in adversarial systems, the role of uncovering the truth and finding a just response is assigned to trial between equal parties.[149] But even if informal controls are executed amongst prosecutors, as *informal* controls they are not effective measures to limit prosecutorial influence on substantive criminalisation.

e) Application to the EPPO

Internal controls on the exercise of the options for the EPPO to dismiss a case are stipulated in the current Drafts for the EPPO Regulation. The Commission Proposal includes in Art. 18 (4) monitoring of the EDP by the European Public Prosecutor (EPP, the head of the EPPO, Art. 6). Additionally, the EPP can reallocate the case or lead the investigation himself.[150] A more intricate system of supervision is constructed in the Council Draft, which introduces the College, Permanent Chambers and European

144 *R. E. Barkow*, Separation of Powers and the Criminal Law, Stanford Law Review (Stan.L.Rev.) 2006, p. 995.
145 Art. 4(2) and (3) of the PIF-Directive proposal, COM (2012) 363.
146 *E. Luna/M. L. Wade,* Looking back and at the Challenges ahead, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 430.
147 *Luna/Wade* (fn. 146), p. 431.
148 *Boyne*, (fn. 109), p. 32.
149 *Boyne*, (fn. 109), p. 12.
150 Art. 18 (5) Commission Proposal.

Prosecutors in addition to the EDP.[151] The Permanent Chambers can give instructions in individual cases and take decisions, based on the proposal of the EDP, on (amongst other things) dismissing and referring cases.[152] This also applies to the transaction, which, as seen above, is one of the main methods of the EPPO to influence substantive criminalisation.

Since the EPPO is conceived as an independent institution, it will not be bound to external directions, either from national governments or EU institutions.[153] However, it has been understood since the proposal of the EPPO in the Corpus Juris that political accountability of the EPPO to the European Parliament is necessary for democratic control as a counterbalance to this independence.[154] This accountability is provided for in the current proposals in the form of an annual report to the European and national parliaments, to the Council and to the Commission.[155]

Some factors limiting the power of the prosecutor are also related to the organisation of the trial: e.g. the independent determination by the German judge. The EPPO will have little influence on these aspects: because prosecution by the EDP takes place in a national jurisdiction, the trial is subjected to the procedural rules of that Member State.[156] Therefore, prosecutions by EDPs might in some Member States be subjected to more intense restraints than in other. Although the legal culture of the EPPO remains to be determined, it can already be said that – in accordance with continental tradition – it is set up as an objective prosecutor, who collects evidence in favour as well as against the suspect's guilt.[157] Whether this role will be assumed by the EDPs, who remain prosecutors within their national setting, is a different question. In particular, the combination of such an impartial prosecutor with an adversarial system of trial might prove interesting, but the UK[158] and Ireland as two jurisdictions employing this trial mode, are not likely to participate in the EPPO.[159] Irrespectively, the different

151 Art. 7(3) and (4) Council Draft.
152 Art. 9(3), 29 Council Draft.
153 Art. 5 Commission Proposal; Art. 6(1) Council Draft; *Rautenberg,* ZRP 2016, p. 38.
154 *Zwiers* (fn. 44), p. 373; *Ligeti/Weyembergh* (fn. 26), p. 56; *Rheinbay* (fn. 27), p. 194, who argues in favour of assigning this task to a Pre-Trial Chamber, p. 164.
155 Art. 5(3), 70 Commission Proposal; Art. 6a Council Draft (which includes that this report must be public); there is an additional option for removal of the European Public Prosecutor by the CJEU in case of serious misconduct, Art. 8(4) Commission Proposal; in the Council Draft this is regulated regarding the European Chief Prosecutor and the European Prosecutors in Art. 13(4), 14(5) Council Draft respectively.
156 Art. 27 Commission Proposal; Art. 30(1) Council Draft.
157 Art. 11(5) Commission Proposal; Art. 5(4) Council Draft; *Esser,* StV 2014, p. 497; *K. Ligeti,* The European Public Prosecutor's Office: How Should the Rules Applicable to its Procedure be Determined?, European Criminal Law Review (EuCLR) 2011, p. 125 (regarding the Corpus Juris).
158 Although Scottish law is influenced by continental law, its criminal procedure is predominantly adversarial, *C. Gane,* Classifying Scottish Criminal Procedure, in: P. Duff/N. Hutton (eds.), Criminal Justice in Scotland, 1999, p. 61.
159 See Prot. 21 to the TFEU, *Drew* (fn. 7), p. 18. Other EU Member States with a common law tradition employing adversarial trial are Malta and Cyprus, *A. Neocleous,* Introduction to Cyprus Law, 2000, p. 479.

treatment in trial will not be very influential on substantive criminalisation, because pre-trial decisions are the most important powers of the prosecutor, as shown above.

One important restraint in both jurisdictions is underrepresented at the EPPO level: judicial review. Judicial review of the decision *not* to prosecute is usually initiated by a victim. This might not be as relevant regarding an institution forming part of the EU, which is the prime victim of the offences under the EPPO's jurisdiction.[160] Nonetheless, the legality principle lacks judicial control of possible misconduct of the EPPO.[161]

Decisions of the EPPO *in favour of* prosecution might be contested by the prosecuted person or by Member States which could see an infringement of national sovereignty due to the EPPO's decision not to refer. The Commission Proposal explicitly submits procedural measures of the EPPO to the judicial control of the Member State where the prosecution is conducted – for this purpose, they are considered a national authority.[162] It is unclear whether the decision to open an investigation itself is also subject to judicial control in the Member States.[163] This is especially poignant since judicial control of prosecutors forms an inherent part of the constitutional law of some of the Member States.[164]

Apart from the national judicial control, the Commission Proposal excludes EPPO acts from the jurisdiction of the CJEU.[165] The internal controls of the EPPO are mostly considered insufficient to provide appropriate control.[166] This lack of central judicial control in the Commission Proposal has attracted criticism, also in relation to Art. 19(2) TEU and Art. 267(1)b TFEU.[167] Relying on national judicial control alone could result in a deficit of harmonization in the EPPO's approach.[168] The dependence on the venues of judicial review offered by the Member States' criminal justice systems might also lead to greatly diverging legal protection levels depending on the forum. Additionally, the curious situation of the EPPO as an EU institution outside of the jurisdiction of the CJEU seems at odds with the general approach of the EU to judicial protection.[169] Corresponding to this criticism, limited jurisdiction of the CJEU is included in the most recent draft provision of the Council Draft.[170] In particular, the

160 *M. Wasmeier,* The Choice of Forum by the European Public Prosecutor, in: H. Erkelens/A. Meij/M. Pawlik (eds.), The European Public Prosecutor's Office, 2015, p. 114.
161 *Esser,* StV 2014, p. 497, 502. Especially the decision to dismiss a case could be subjected to judicial control, *Rheinbay* (fn. 27), p. 194, who argues in favour of assigning this task to a Pre-Trial Chamber, p. 254 *et seq*.; Similar: *Buss* (fn. 11), p. 159; *H. Satzger,* Die potentielle Errichtung einer Europäischen Staatsanwaltschaft, Neue Zeitschrift für Strafrecht (NStZ) 2013, p. 212.
162 Art. 36(1) Commission Proposal; *Meij* (fn. 30), p. 112.
163 *Erbežnik*, EuCLR 2015, p. 213.
164 *Erbežnik*, EuCLR 2015, p. 216.
165 Art. 36(1) and recitals 36-39 Commission Proposal; *Killmann/ Hofmann,* (fn. 69) § 48, margin no 40.
166 *Erbežnik*, EuCLR 2015, p. 215.
167 *Meij* (fn. 30), p. 112 *et seq*.; *Erbežnik*, EuCLR 2015, p. 215; *Schramm,* JZ 2014, p. 757.
168 *Erbežnik*, EuCLR 2015, p. 215.
169 *Ligeti/Weyembergh* (fn. 26), p. 69; *Meij* (fn. 30), p. 114 *et seq*.
170 Art. 36 Council Draft.

proposed draft Art. 36(3)(a) which would allow judicial control of decisions to dismiss a case is a step in the right direction.

The EPPO does have an additional means of influence non-existent in the national jurisdictions: the option to refer a case to national jurisdictions, but also to determine in which Member State a prosecution will take place.[171] The criteria in the proposals for determining which Member State has jurisdiction are relatively vague.[172] This could create the possibility for the EPPO to choose the more convenient jurisdiction by way of "forum shopping".[173] By choosing a jurisdiction with a more severe punishment tradition, the EPPO might through this option influence the application of the criminal offences in practice. Despite this influence, the choice of forum evades judicial control, which has also been criticized in relation to the proposed structure of the EPPO.[174]

VI. Conclusion

By investigating legality and opportunity principle jurisdictions more closely it becomes clear that decisions of the prosecutor influence substantive criminalisation in a multitude of ways, not all of them depending on the level of discretion afforded to him. Whether discretion of the prosecutor amounts to an interference with the task of the democratic legislator therefore depends on the reality of application of the principle in practice.

The complex interactions show that prosecutorial discretion is but one of many factors contributing to an influence on the application of the criminal law in practice. In itself, it is not problematic, but it can become so if there are no other institutions of the Criminal Justice System reducing its risks.[175] Especially with regard to the complex structures of democratic legitimacy and control within the EU, it is important to keep those options in mind when discussing the preferable structure of the EPPO.

Internal controls and especially the strengthening of possibilities of judicial review are important here, especially the control of the EPPO's actions by the CJEU, as suggested in the Council Draft. Another approach would be to enhance the democratic legitimacy of the prosecutors themselves, e.g. by determining the Chief European

171 Art. 27(4) Commission Proposal; Art. 30(2), 22(4) and (5) Council Draft.
172 *Esser,* StV 2014, p. 498; *Schramm,* JZ 2014, p. 757.
173 *Wasmeier* (fn. 160), p. 151; *Esser,* StV 2014, p. 502; *K. Lohse,* Errichtung einer Europäischen Staatsanwaltschaft, recht + politik 4/2014, p. 5.
174 *F. Zimmermann,* Choice of Forum and Choice of Law under the Future Regulation on the Establishment of a European Public Prosecutor's Office, in: P. Asp (ed.), The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives, 2015, p. 173; *Esser,* StV 2014, p. 502; *U. Sommer,* Die Europäische Staatsanwaltschaft, Strafverteidiger (StV) 2003, p. 126 *et seq*.
175 *D. K. Brown*, American Prosecutors' Powers and Obligations in the era of plea bargaining, in: E. Luna/M. L. Wade (eds.), The Prosecutor in Transnational Perspective, 2012, p. 211 *et seq*.

Prosecutor through election by the European Parliament,[176] rather than appointment by Council with consent of the European Parliament.[177] Currently, a joint appointment by Council and the European Parliament is discussed.[178] The Council Draft therefore already points in a better direction, which should be upheld in the final Proposal and the EPPO Regulation, whenever it might see the light of day.

176 This idea is supported by the *German Bundestag,* BT-Drs. 18/1658, 4.6.2014, p. 4. The European Parliament also stressed the importance of its involvement in the appointment, EP resolution T8-0173/2015, 29.4.2015.
177 Such as envisaged in Art. 8 (1) of the Commission Proposal.
178 Council Doc. 15100/15, 22.12.2015, Art. 13 (1)-(3).