

THE EPPO and EU law: a step forward in integration



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TOPIC 2: THE EPPO

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WHO AUTHORIZES THE COERCIVE MEASURES REQUIRED BY THE EDP?

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THE PRINCIPLE OF “SINGLE AUTHORIZATION”

Art. 31 par. 3 REGULATION (EU) 2017/1939:

Cross-border investigations:

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

Recital 72 REGULATION (EU) 2017/1939:

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

CASE C-281/22, GK AND OTHERS, LODGED AT 25 APRIL 2022

In this reference for a preliminary ruling
(Case C-281/22, GK and Others, lodged at 25 April 2022),
the Oberlandesgericht Wien, Austria seeks clarification

as to

the extent of judicial review in cross-border investigations within the
EPPO regime when were applied “coercive measures”

CASE C-281/22, GK AND OTHERS, LODGED AT 25 APRIL 2022

In this case, the defendant's counselor argued
in front of the Austrian courts
that "coercive measures" targeted at them by an authorization of the
German judge were inadmissible
because
the lack of suspicion and proportionality and the infringement of
fundamental rights.

GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017/1939

The doubt about the right the procedure to be applied in these cases have prompted the EPPO College to adopt guidelines on the application of article 31 of the EPPO Regulation:

Art. 14, section B of the

Decision of the College of the European Public Prosecutor's Office of 26 January 2022 establishes that

14. The assignment of the measure pursuant to Article 31 is the essential procedural act that the handling EDP should send to the assisting EDP (within the CMS) and which, when judicial authorisation is required in the Member State of the assisting EDP, should be provided to the competent court/judge of the latter.

GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017/1939

So it means that the courts in the assisting European Delegated Prosecutor's Member State are not allowed

to perform a review of the substantive reasons to adopt the investigative measure.

This constitutes a clear violation of the right of defence.

THE REGIME ESTABLISHED BY THE EPPO REGULATION

The EPPO College argues that the assisting European Delegated Prosecutor should not need to provide the competent national court of the assisting Member State “with more or different supporting evidence and documents than what the national prosecutor currently does when,

i.e. executing an European Investigation Order (EIO)

in line with the principle that the justification and adoption of the measures is governed by the law of the Member State of the handling European Delegated Prosecutor” since the court in the assisting Member State should not “assess the ‘justification’ and the ‘substantive reasons’ [which the EPPO defines as ‘necessity and proportionality’] for undertaking the measure”.

EUROPEAN INVESTIGATION ORDER (EIO)

A European Investigation Order (EIO) is

a judicial decision which has been issued or validated by a judicial authority of a Member State ('the issuing State') to have one or several specific investigative measure(s) carried out in another Member State ('the executing State') to obtain evidence in accordance to DIRECTIVE 2014/41/EU.

EUROPEAN INVESTIGATION ORDER (EIO)

Who required by art.10 DIRECTIVE 2014/41/EU:

Recourse to a different type of investigative measure

- I. The executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where:
 - (a) the investigative measure indicated in the EIO does not exist under the law of the executing State; or
 - (b) the investigative measure indicated in the EIO would not be available in a similar domestic case

EUROPEAN INVESTIGATION ORDER (EIO)

In the case Criminal proceedings against Ivan Gavanozov, C-852/19, Judgment of 11 November 2021, the CJEU noted that executing authorities may refuse to execute an EIO “exceptionally, following an assessment on a case-by-case basis, where there are substantial grounds to believe that the execution of an EIO would be incompatible with the fundamental rights guaranteed”.

EUROPEAN INVESTIGATION ORDER (EIO)

So, also according to art. 14 par. 2 DIRECTIVE 2014/41/EU:

The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.

FROM THE FUNDAMENTAL RIGHTS' PERSPECTIVE

So, while the EPPO College argues that the provisions of the Regulation, if interpreted as requiring the courts of assisting European Delegated Prosecutors' Member States to perform a substantive review under their laws,

would represent

a more cumbersome process and thus a regression by comparison to the EIO regime, jeopardising the effectiveness of the EPPO;

FROM THE FUNDAMENTAL RIGHTS' PERSPECTIVE

however, viewed from a fundamental rights' perspective, such an interpretation would mean that the EPPO regime would not constitute a regression in respect of the protection of rights of those targeted by the investigative measures, but, in certain respects, would even constitute **a progress in that regard.**

ONE SINGLE PROSECUTION OFFICE

On the other hand, The EPPO is a “single prosecution office” (see Recitals 21, 28, 47, and Articles 8(1) and 45(2) EPPO Regulation) acting across the EU Member States (even though it has a hybrid decentralized structure).

So, the EPPO does not operate under the “mutual recognition principle” and does not have to issue an EIO to obtain evidence in another Member State.

ONE SINGLE COMMON STANDARD OF FUNDAMENTAL RIGHTS' PROTECTION

Also looking by the art. 47 CFRUE (Charter of Nice)'s prospective
who establishes

The Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

ONE SINGLE COMMON STANDARD OF FUNDAMENTAL RIGHTS' PROTECTION

Or by that nucleus of fundamental rights provided:

- in the European Convention for the Protection of Human Rights,
 - in the Charter of Fundamental Rights of the Union and
- in the constitutional traditions common to the Member States,
to which the art. 6 EU Treaty
recognizes
the rank of **general principles** of the European Union.

ONE SINGLE COMMON STANDARD OF FUNDAMENTAL RIGHTS' PROTECTION

We can state that Courts in the assisting Member State must have the power to perform a full review of the measures adopted in the handling Member State in the scope of EPPO proceeding.

Absent any harmonization in this field (for example, on the requirements to order a search, or interception of communications), Member States laws (including fundamental rights and immunities and privileges, such as legal privilege) apply in the context of EPPO investigations and may lead to the impossibility of executing a measure in another Member State.