Efficiency contra legem?

Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet européen)

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Article

ABSTRACT

The first preliminary ruling request concerning the EPPO Regulation raises several interesting questions regarding the interpretation of its Art. 31 on cross-border investigations. Advocate General Ćapeta presented her Opinion and proposals to the Court of Justice of the European Union on 22 June 2023. Her analysis shows the difficulties that the Court will presumably face when trying to find proper answers to the questions raised by the Higher Regional Court of Vienna (Austria), as it is difficult to reconcile the wording and context of its provisions and its legislative history with the Union legislator's presumed objectives, namely, to establish an efficient system for cross-border cooperation. The author concludes that a proper solution will in any case require an amendment of Art. 31 by the Union legislator. In particular, it should be up to the legislator to clarify the scope of review to be undertaken in the course of any ex ante judicial authorisation to be obtained in the Member State in which the ordered investigation measure is to be executed.

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I. Introduction

It came as no surprise that the provisions of Art. 31 of Regulation (EU) 2017/1939 (hereinafter: EPPO Reg.)[1] on cross-border investigations within the EPPO's territory would become subject to one of the first references for a preliminary ruling to the Court of Justice of the European Union (hereinafter "ECJ" or "Court"). The negotiations on this provision had been particularly controversial in the Council, and the resulting text of Art. 31 is not very convincing.[2] The main question heavily debated at the time was whether a required judicial authorisation of an investigation measure in a cross-border setting should be obtained from a court/judge in the Member State in which the investigation is being conducted or in the Member State in which the requested investigation measure is to be undertaken. While the EPPO has been conceived as a "single office" (Art. 8(1) EPPO Reg.), it nevertheless operates on the basis of national criminal procedural law (cf. Art. 5(3) EPPO Reg.) and thus not in a "single legal area".[3] The rules on cross-border investigation measures by the EPPO thus need to clarify which national legal regime is to apply and in which Member State judicial authorisation is to be obtained.

In January 2022, the College of the EPPO considered it appropriate to issue internal guidelines[4] on the interpretation of Art. 31 and the procedures to be kept when the European Delegated Prosecutors (hereinafter: EDPs) request the judicial authorisation of an investigation measure, essentially requiring the EDPs to obtain a required judicial authorisation in the Member State in which the so-called "handling EDP" conducts the investigations. While the interpretation given by the College may be debatable as such a rule is at least not specifically set out in Art. 31, the guidelines offer a pragmatic interpretation of the EPPO Regulation until the Council perhaps decides to amend and/or clarify the text of Art. 31.

Before the College adopted the guidelines, however, the question of interpretation of Art. 31 had already become an issue in proceedings before the Higher Regional Court of Vienna, Austria (*Oberlandesgericht Wien*). The Vienna court considered it necessary to request a preliminary ruling from the European Court of Justice (reference: Case C-281/22). A hearing in that case was held on 27 February 2023 and Advocate General (AG) *Tamara Ćapeta* presented her Opinion on 22 June 2023.[5]

This article provides a summary of the Advocate General's Opinion, analyses its findings, and offers possible conclusions prior to rendering of the ECJ judgment, which is expected to follow by the end of 2023.

II. Facts and Relevant Legal Framework

A German European Delegated Prosecutor ("handling EDP") investigated an alleged criminal offence, which required search and seizure measures *inter alia* in Austria. In accordance with Art. 31(3) subparagraph 1 EPPO Reg. as well as the German law implementing the EPPO Reg.,[6] the German EDP did not obtain judicial authorisation in Germany for the searches/seizures to be conducted in Austria (which would have been required in a domestic case in Germany). The reason was that, in accordance with Austrian law, a prior judicial authorisation for such measure is necessary and thus – in accordance with Section 3(2) of the German implementing law – no judicial authorisation in Germany was required. The German EDP assigned the measure to his Austrian colleague ("assisting EDP") who obtained search and seizure warrants from Austrian courts. Subsequently, the defendants filed an appeal against the search warrants before the Higher Regional Court of Vienna. In their view, the measures were neither necessary nor proportionate. In the course of the proceedings, the Austrian EDP claimed that, in accordance with the EPPO Regulation, the justification of the measure may be examined only in the Member State of the handling EDP. In his opinion, the court in the assisting EDP's Member State cannot assess the substantive validity of the measures but may control

only whether the measure complies with formal and procedural requirements. The Higher Regional Court of Vienna therefore presented three questions to the ECJ. While these questions focus on the scope of review to be undertaken by the court in the Member State of the assisting EDP, they are closely related to the underlying question of whether the substantive *ex ante* review to be undertaken in the course of a required judicial authorisation is a competence belonging to the court/judge in the Member State of the handling EDP (where the investigation proceedings are being conducted) or of the court/judge in the Member State of the assisting EDP (where the required measure is to be enforced).

The relevant legal framework is set out in Art. 31 EPPO Reg on "Cross-border investigations". Its paragraph 1 provides that the handling EDP "shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out." Art. 31(2) concerns the "justification and adoption" of the measure by the handling EDP, and it applies irrespective of whether the adoption, in accordance with national law, requires a judicial authorisation or not. The second sentence reads as follows: "The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor." This is followed by paragraph 3 of Art. 31 on "judicial authorisation", which differentiates between situations in which judicial authorisation is required under the law of the assisting EDP's Member States (subparagraphs 1 and 2) and situations in which judicial authorisation is only required under the law of the handling EDP's Member State (subparagraph 3). Art. 31 is followed by Art. 32 EPPO Reg. entitled "Enforcement of assigned measures".

III. Summary of the Opinion by Advocate General *Ćapeta* and Her Conclusions

In her Opinion, AG *Ćapeta* refers in detail to two very different understandings of Art. 31 EPPO Reg. The first one was put forward by the Austrian and German governments (referred to by the Advocate General as "Option One"), and the second one was submitted by the Commission and largely supported by the EPPO as well as the governments of Netherlands and Romania (referred to as "Option Two"). According to the views in favour of "**Option One**", it follows from the text of Art. 31(3) that, where a judicial authorisation is required under the law of the assisting EDP's Member State, this is to be obtained in that Member State. The judge/court of that Member State should undertake a full substantial review of the legality and proportionality of the requested measure. The Austrian and German governments consider that the wording of Art. 31 is quite clear in this respect and "the courts cannot depart from it" (mn. 35 f.).[7] By contrast, the Commission and other proponents of "**Option Two**" argued: "if the law of the assisting EDP's Member State requires a judicial authorisation of an investigative measure, such an authorisation may entail only a review of the formal and procedural aspects relating to the execution of the measure (…). If the laws of the Member States of both the handling and the assisting EDPs require judicial authorisation, two authorisations are to be issued. The court of the handling EDP's Member State would authorise the measure if it finds it justified, whereas the court of the assisting EDP's Member State would authorise the procedural modalities of its execution." (mn. 38 f.).

In the introductory part of her Opinion, AG *Ćapeta* concludes that "none of the proposed outcomes are fully justified" under applicable interpretive techniques; "nevertheless, the Court will have to choose one." (mn. 4).

Before entering into an interpretation of the relevant provisions of Arts. 31 and 32, AG *Ćapeta* initially refers to the Austrian/German alternative proposal for what is now Art. 31(3) (mn. 27), which had been presented in the Council Working Group (COPEN) in April 2015 and reads as follows:

> Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter shall order the measure in accordance

> with the law of the Member State of the handling European Delegated Prosecutor and, where necessary, shall apply for a judicial authorisation thereof, or shall request a court order for the measure.

The Advocate General then rightly points out, that this proposal had failed to make its way into the final text of the EPPO Regulation (mn. 28). In her view, the final text of Art. 31(3) "does not clearly specify which Member State law determines whether prior judicial authorisation for executing a measure is necessary, nor which court is responsible for granting such authorisation." (mn. 29).

Nevertheless, she essentially follows the views of the Commission (mn. 73) that the solution proposed by Austria and Germany during the negotiations, according to which the handling EDP must obtain the necessary judicial authorisation in his/her own Member State, is exactly what Art. 31 now regulates in its paragraph 2, albeit in an imperfect way.

Her further analysis then leads AG *Ćapeta* to conclude the following:

> Article 31(3) of the EPPO Regulation should be understood as allowing the court of the Member State of the assisting EDP to review only the aspects related to the execution of an investigative measure, while accepting the assessment by the handling EDP that the measure is justified, whether or not the latter is backed by prior judicial authorisation of the court of the Member State of the handling EDP. (mn. 73).

Furthermore, she points out that "the EPPO Regulation is indeed the most advanced piece of legislation yet …. The EPPO is a single body and the assigned cross-border measures indeed need not be recognised, but only implemented." (mn. 101).

IV. Analysis

1. Interpretation of Art. 31 *contra legem*?

The Advocate General's Opinion correctly reflects that the Austrian and German governments substantiated their interpretation largely on the wording of the text as well as on the contextual relationship between paragraphs 2 and 3 of Art. 31, whereas the Commission and the EPPO placed a strong focus on the objectives of the Regulation to establish an efficient system for cross-border cooperation within the EPPO's territory. Much of the discussion at the hearing on 27 February 2023 did indeed circle around the question of whether the text of Art. 31 and the contextual position of its paragraph 3 are sufficiently clear and properly reflect the Union legislator's intention or whether the objectives aimed at by the legislator should primarily guide the interpretation of the text.

Referring to these different views, the Advocate General recalls an interpretative rule used by the ECJ according to which "where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness." (mn. 64).[8] But is that really the case that Art. 31 is "open to several interpretations"? In respect of wording and context AG *Ćapeta* simply reflects the fact, that the proponents of "Option One" and "Option Two" offer two different interpretations of the text but she addresses the question of whether these different interpretations are both possible only in respect of the arguments put forward by Austria and Germany, namely that "Option Two" would render paragraph 3 of Art. 31 superfluous – an argument she, in conclusion, does not share (c.f. IV.2.b) below). Other than that, she apparently considers the interpretation offered by the proponents of "Option Two" to be "equally plausible" and thus concludes that, if the Court were to follow this interpretation, it "cannot be treated as a *contra legem* interpretation." (mn. 67).

On other occasions, however, the ECJ has also ruled that the interpretation of EU law requires that account be taken of the origins of the provision and "in particular regard should be had to, inter alia, the recitals of the EU act concerned, since they constitute important elements for the purposes of interpretation, which may clarify the intentions of the author of that act."[9] As will be shown below, even if one considers both "Options" to be equally possible in terms of "text" and "context", the legislative history and recital 72 of the EPPO Regulation clearly indicate the legislator's intention and would allow an interpretation in accordance with "Option Two" only if one were to make the – presumed – objective of the provision, to establish an efficient system of cross-border investigation, the deciding factor for the interpretation.

2. Four interpretative methods applied

a) Textual interpretation

The Advocate General observes that both proponents of both "Options" agreed on one issue: paragraph 3 subparagraph 1 of Art. 31 applies in situations in which judicial authorisation is required under the law of both, the handling EDP's Member State and the assisting EDP's Member State; and it also applies where judicial authorisation is required only under the law of the assisting EDP's Member State. Subparagraph 3 of that provision – in turn – applies where only the law of the handling EDP's Member State requires judicial authorisation (mn. 42 to 44).

The Austrian and German governments interpret Art. 31(2) to clearly determine that the adoption and justification of the measure by the handling EDP is governed by the law of that Member State, whereas paragraph 3 specifies where a necessary judicial authorisation for ordering the measure would need to be obtained (mn. 43 f.), i.e. which court is expected to undertake a full *ex ante* review of the measure in terms of the necessary level of suspicion, proportionality, etc. as required under national law (mn. 35).

According to the Commission's view, the judicial authorisation to be obtained by the handling EDP (conditions set out in national law, sufficient grounds/justification of the measure) is covered by Art. 31(2) (mn. 50), whereas Art. 31(3) does not at all concern substantive issues relating to the legality of the investigation measure but only the judicial authorisation of the "mode of execution of the requested investigative measure and not its justification" (mn. 53), i.e. only "procedural modalities of its execution." (mn. 39).

It remains unclear, however, why the Commission considers the text to say so. In the course of the hearing, the Commission at least conceded that it would have been preferable had the legislator clarified the text by inserting in Art. 31 paragraph 3 the words "of the enforcement" after "judicial authorisation". But the legislator did not do so – perhaps because this was not what the legislator actually had in mind (c.f. IV.2.d) below); in addition: the enforcement of the assigned measure is specifically regulated in Art. 32. It also remains rather unclear what exactly the "judicial authorisation of the enforcement of the measure" is supposed to mean in practice. This is also not clarified in the Opinion given by AG *Ćapeta*. In her view, the EPPO is "a single body and the assigned cross-border measures indeed need not be recognised, but only implemented." (mn. 101). Thus the "judicial authorisation of the enforcement of the measure" apparently would have to be something different (less?) than the role of the courts described in Art. 9 of the EIO Directive[10]. Furthermore: What would – in the views of the Commission and the Advocate General be the purpose of the second subparagraph of Art. 31(3) according to which the handling EDP, if "judicial authorisation for the assigned measure is refused, … shall withdraw the assignment"? If this judicial authorisation only concerns certain "modalities" of the enforcement, why should the handling EDP then be obliged to withdraw the assignment?

The Advocate General reflects the Commission's view of the purpose of the third subparagraph of Art. 31(3), recalling that the Commission at the hearing acknowledged that the use of the word "however" in Art. 31(3),

subparagraph 3 "complicates matters for the interpretation of Article 31(3) of the EPPO Regulation." (fn. 32 referred to in mn. 42). In the view of the Commission, where no judicial authorisation is required in the Member State of the assisting EDP, the judicial authorisation by the court in the Member State of the handling EDP shall cover both, "its justification and the execution of the measure." (mn. 45). That is also hardly convincing: If the execution (enforcement) of the measure is to be carried out in accordance with the law of the assisting EDP's Member State (c.f. Art. 32) and if that law does not provide for a need to obtain judicial authorisation of the enforcement, why then should the court in the handling EDP's Member State have to give judicial authorisation to the enforcement? And what would be the applicable law for such an authorisation?

Finally: if – in the Commission's views, the term "enforcement" is "missing" in paragraph 3: does that apply to both instances where the term "authorisation" appears in the first sentence of paragraph 3? In other words, does the rule set out therein apply where Member State law specifically requires the prosecutor to obtain judicial authorisation of the enforcement of the measure (its modalities etc.)? Or is – in the Commission's views– the word "enforcement" only missing in the second part of the first sentence so that whenever national law of the assisting EDP's Member States provides for judicial authorisation to order the measure (substantial grounds), the court now has to authorise the enforcement of the measure (modalities) only?

b) Context of the provision

In terms of context, the Advocate General refers to the views expressed by the Austrian and German governments that the third subparagraph of Art. 31(3) would be obsolete, if one were to follow the interpretation offered by the Commission: there would be no reason to regulate here the exceptional role of the court in the handling EDP's Member State if – as the Commission suggests – the judicial authorisation by a court in that Member State is to be undertaken on the basis of Art. 31(2) and the enforcement is regulated in Art. 32. AG *Ćapeta* here also refers to the views expressed by the Austrian and German governments that recital 72 of the Regulation clearly expresses the intention of the legislator according to which "there should be only one authorisation." (mn 48).

Furthermore, AG *Ćapeta* refers to the view of the Commission that it is precisely the relationship between paragraphs 2 and 3 that actually confirms the interpretation according to which paragraph 2 also concerns the judicial authorisation by the court in the handling EDP's Member State (mn. 50). In respect of recital 72, she points out that the Commission "acknowledged that the desire for a single judicial authorisation was not ideally expressed in Article 31…." (mn. 54).

In her own interpretation, AG *Ćapeta* states that the "most convincing argument … offered by the Austrian and German governments, is that Article 31(3) of the EPPO Regulation becomes obsolete under Option Two." (mn. 68). Nevertheless, she considers that its provisions "can be given a meaning beyond that of Article 31(2) and Article 32" and concludes (mn. 70) as follows:

> Expressing the rule relating to the law applicable to judicial authorisations separately might have been perceived as necessary, due to the difficulties that that precise issue presented during the legislative negotiations. The redundancy of Article 31(3) cannot thus be used as an argument against adopting Option Two.

This explanation, however, is hardly convincing: Why should the legislator have decided to include such a "redundant" provision only for purposes of clarification and then use such – apparently – unclear wording in paragraph 3 that it allows for "different and mutually exclusive interpretative outcomes" (mn. 41), which – according to the Advocate General – are "equally plausible" (mn. 67)? And why would the provision of

paragraph 3 – if it really addresses only the judicial authorisation of the modalities of enforcement – be set out in Art. 31 rather than in Art. 32, which regulates the enforcement?

c) Objectives pursued by the legislator

In terms of objectives, AG *Ćapeta* points out that Austria and Germany admitted that their interpretation of the Regulation may indeed lead to practical difficulties for the EPPO but that, unfortunately, their alternative proposal had not been accepted during the negotiation process (mn. 56). She then gives a detailed account of the view of the Commission and the other proponents of "Option Two", according to which "[e]fficiency should therefore guide the interpretation of Article 31 of the EPPO Regulation." (mn. 57).

The crux of the matter here is that the Council, or at least the majority of its members, of course intended to set up an efficient system of cross-border investigations. However, a large group of Member States wanted to base cross-border cooperation within the EPPO territory on the principles of mutual recognition (in particular the concepts of the EIO Directive), while others wanted a system that is "more advanced" than mere mutual recognition.[11] The solution for situations in which no judicial authorisation is required (Art. 31 paragraphs 5, 7, and 8) found consensus fairly quickly; this system clearly is designed to make cooperation easier than that provided for in the EIO Directive, as it neither foresees any need for the assisting EDP to "recognise" the assigned measure nor a possibility to "refuse" its enforcement. Instead, the EDPs are expected to consult each other; if they cannot reach an agreement, the Permanent Chamber decides.

By contrast, it was much more difficult to find consensus in the Council on the proper procedure when a judicial authorisation is required. This was not a question of whether the provisions in Art. 31 should establish an efficient system but how to achieve that. During the negotiations in the Council, some delegations – including Austria and Germany – raised concerns over the proposed solution that (full) judicial authorisation should always be obtained in the Member State of the assisting EDP; this was seen too cumbersome and overly time-consuming, because it may require presentation of the full case file, normally including a translation thereof.[12] The majority of delegations at the time, however, considered this risk neglectable and favoured the solution that had been drafted along the lines of the current text of Art. 31 EPPO Reg. A major concern for them was that there should always be only one judicial authorisation (cf. recital 72), as the involvement of courts in two Member States would make the system overly cumbersome and time-consuming. In respect of the solution whereby judicial authorisation would have to be obtained from the court in the assisting EDP's Member State, the suggestion was made in the Council Working Group discussions that there should actually be no need to present the full case file to the court – including a translation thereof – but that a summary provided by the prosecutor should be sufficient for the court to undertake the substantial review.

d) Legislative history

It is interesting to note what AG *Ćapeta* reveals in terms of the different views on the relevance of the regulation's legislative history. She recalls the position of the Austrian and German governments, which pointed out that the legislative history – as also reflected by a sequence of alternative draft texts discussed in the Council working parties – clearly confirms their interpretation of the text. By contrast, in respect of the Commission's standpoint, all that AG *Ćapeta* does – and presumably could – refer to is that the Commission claims to have changed its view in the course of history. At the hearing on 27 February 2023, the Commission had been confronted with the fact that the Commission's own legislative proposal of 2013[13] had already provided a solution, according to which *the only* judicial authorisation would have to be obtained in the Member State in which the investigation measure is to be enforced. AG *Ćapeta* reflects in the Opinion that the Commission gave as explanation the fact that in 2013 the EIO Directive had not yet entered into force. The Commission claimed that it had subsequently discovered that the EIO system works quite well and

therefore "found it fortunate that the legislative institutions did not accept its original proposal that judicial authorisation ought to depend on the law of the Member State of the assisting EDP only, and instead have amended that proposal into what is today Article 31 of the EPPO Regulation…." (mn. 62).

In her own interpretation, AG *Ćapeta* mainly refers to said interpretative rule used by the ECJ, according to which "where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness." That interpretative rule, in her view, favours Option Two (mn. 64). She then essentially advocates her interpretation of Art. 31 by stating that, if the ECJ were to follow the interpretation offered by Austria and Germany, this would "be seen as an invitation to the EU legislature to react", as it would "require an amendment of the EPPO Regulation to enable efficient cross-border investigations." (mn. 71).

A look at the legislative history of Art. 31 EPPO Reg. indeed explains the dilemma. During consecutive Council Presidencies in 2014 and 2015, different proposals for what is now Art. 31 (at that time first Art. 26a, later Art. 26) were discussed and discarded. In particular, the Austrian and German governments had provided a counter-proposal in April 2015,[14] according to which paragraph 1 was to specify that the handling EDP obtains any necessary judicial authorisation and submits this together with the assignment to the assisting EDP. Furthermore, in accordance with paragraph 5 of that proposal, the assisting EDP shall, where required, submit the order and, where applicable, the accompanying judicial authorisation to the competent court of his/her Member State for recognition. As mentioned before, and also properly reflected in the Advocate General's Opinion, this proposal did not meet with sufficient support in the Council Working Group.

In June 2015, the Latvian Presidency presented a compromise proposal,[15] which was drafted along the lines of what eventually became the final text of Art. 31. After further discussion, the ensuing Luxembourgish Presidency presented to the Council a document[16] containing two new alternative drafts: An "Option 1" provided that the handling EDP was to decide on the adoption and justification of the investigation measure in accordance with the law of that Member State (paragraph 2 of the proposal). And paragraph 4 of the proposal then stated that, if judicial authorisation of the assigned measure is required, "it can only be requested in the Member State of the assisting European Delegated Prosecutor". The underlying concept thus was similar to the previous compromise proposal of the Latvian Presidency. The "Option 2" set out in that document, in principle, followed the former Austrian/German proposal, specifying that the handling EDP shall obtain the necessary judicial authorisation in accordance with the law of that Member State (paragraph 2 of that proposal). Avoiding the term "recognition", Option 2 then specified that the assisting EDP shall, where required, obtain the necessary judicial authorisation; the court/judge in that Member State shall not, however, review the grounds, justification, and substantive reasons for ordering the measure. Thus, Option 2 was similar to what the Commission now claims to be the correct interpretation of Art. 31 EPPO Reg. This option, however, also did not (!) find the Council's approval. Instead, the Council eventually agreed on a concept for Art. 31, which, in principle, follows the draft text presented by the Latvian Presidency in June 2015.

Considering this background, it is hardly possible to reconcile the views expressed by the Commission in the present case on the correct interpretation of Art. 31 with the apparent intentions of the Union legislator.

3. Protection of fundamental rights – "more than mutual recognition"

AG *Ćapeta* also considered it appropriate to address the views expressed by Austria and Germany that the court in the assisting EDP's Member State needs to be able to undertake a full judicial review, as this is necessary in order to ensure effective protection of fundamental rights. Furthermore, she refers to the fact that proponents of Option Two had argued that Art. 31 does not provide for a system of mutual recognition but "something more." She then explains why she does not agree with that view: "as long as there are no

common EU criminal law rules, the EPPO cannot but operate based on mutual recognition." In her view, "the levels of mutual recognition differ, and the EPPO may be seen as the most developed mutual recognition instrument in the area of cooperation in criminal matters yet." (mn. 78). This then leads her to detailed reflections on the nature of mutual recognition in criminal matters, in general, and in the EIO Directive, in particular. Comparing these solutions with the EPPO Regulation, she concludes that "[t]he EPPO is a single body and the assigned cross-border measures indeed need not be recognised, but only implemented." (mn. 101).

This reasoning is followed by her analysis of fundamental rights guarantees in the EPPO Regulation. She refers to the fact that the Commission had rightly pointed out that the EPPO Regulation does not contain grounds for non-recognition. She refers to Art. 31(5), which – instead – relies on an internal dialogue between the handling and the assisting EDPs. AG *Ćapeta* concludes that "[t]his internal cooperation system is one of the important elements for ensuring the protection of fundamental rights in the EPPO system." (mn. 105). She also admits, however, that "the EPPO cannot be assumed to be flawless." (mn. 108). But, in her view, the EPPO Regulation contains sufficient additional mechanisms. In this respect, she refers to the provisions in Art. 41 on procedural rights and in Art. 42 on (subsequent) judicial review.

Finally, AG *Ćapeta* recognizes that, for some Member States, this may lead to a decrease in the previously protected level of individual rights, and she concludes (mn. 113 f.):

> "[h]armonisation, after all, inevitably leads to a weakening of the protection of fundamental rights in Member States with a higher prior level of protection, unless the highest standard is adopted as a common rule. That, however, is the price of building a future together."

This conclusion is rather surprising in the present context: The "procedural rights directives" referred to in Art. 41(2) EPPO Reg. guarantee only a minimum level of protection, and they have not been specifically attuned to the new challenges for the defence posed by the EPPO.[17] While the Commission's proposal for the EPPO Regulation contained some additional specific provisions on procedural rights[18] as well as a catalogue of investigation measures in respect of which Member States would have been required to provide for an *ex ante* judicial authorisation,[19] the majority of Member States in the Council did not agree to any such harmonisation attempts but simply wanted to have national law apply. It remains to be seen whether the assumption of the Advocate General is correct that Art. 42(1) EPPO Reg. actually "requires that judicial review of investigation measures is always available" (mn. 112).[20] Perhaps this will soon be for the ECJ to decide.

V. Consequences of the Solution Proposed by AG *Ćapeta* and Own Conclusion

Considering the numerous questions that arise in respect of the literal and contextual interpretation advocated by the Commission and the other proponents of "Option Two" as well as the difficulties to reconcile that solution with the legislative history of the EPPO Regulation, the question remains: Should one nevertheless follow the proposed conclusions by the Advocate General, as "preference must be given to that interpretation which ensures that the provision retains its effectiveness." (mn. 65)?

Obviously, the EPPO needs to be able to apply workable provisions on cross-border investigations. And it was to be expected that Art. 31 EPPO Reg. may lead to difficulties in this respect. Perhaps the ECJ will find a way to apply to its provisions an interpretation that at least solves the most immanent issues for the EPPO. In any case, however, the legislator would still be called upon to speedily amend the provisions of Art. 31: If the Court follows the Advocate General's proposal, the Union legislator should clarify the text and bring it in line with its presumed intention to establish an efficient system of cross-border investigations. Also, the

legislator would need to clarify a number of open questions (see IV.2. a) and b) above). In addition, national legislation in Austria and Germany and perhaps in other Member States whose national legislators had faithfully relied on the assumption that Art. 31 actually means what it says, may have to be amended. Alternatively, if the Court follows the interpretation given by the proponents of "Option One", the EU legislator should amend Art. 31 in order to ensure that it does indeed provide rules for an efficient system of cross-border investigations.

Would the Advocate General's solution regarding the correct interpretation of Art. 31 be a suitable system of rules on cross-border investigation? A solution whereby a required judicial authorisation in terms of legality and substantial grounds is to be obtained from a court/judge in the Member State of the handling EDP would certainly make life easier for the EPPO and the courts, as there would normally be no need to call upon a court in the assisting EDP's Member State to undertake a substantial *ex ante* review of the ordered measure. It should normally also make it easier for the defence to estimate its legality and appropriateness and, where necessary, to challenge such a judicial authorisation or court order/warrant in the Member State in which the investigation is being conducted. Moreover, a judicial authorisation in the Member State of the handling EDP may also better ensure that the evidence gathered on this basis can indeed be used as such in the main criminal proceedings.

If one wishes to achieve that solution by interpreting the present text of Art. 31(2), as proposed by the Commission and other proponents of "Option Two", to also address the judicial authorisation of the ordered measure, the decisive question is: What purpose/meaning then remains for paragraph 3 of Art. 31? Neither the wording and context nor the EPPO's legislative history offer a satisfactory answer. If the Court nevertheless follows the view, also shared by the Advocate General, that paragraph 3 concerns only the "judicial authorisation of the enforcement" of the ordered measure, the question remains as to what exactly the scope and frame of reference for such a judicial authorisation could be. The text of Art. 31 does not provide an answer to this. As may be seen by looking at the legislative history, the Council did not have any intention of limiting the scope of the *ex ante* judicial review by the courts in the Member State of the assisting EDP. This is why Art. 31 does not contain any rules in this respect and why subparagraph 2 of Art. 31(3) merely contains a rule on the consequences of a decision by the court/judge in the assisting EDP's Member State not to grant judicial authorisation of the "assigned" measure. The text of Art. 31 neither contains any indication that it was the legislator's intention to stipulate that "assigned cross-border measures indeed need not be recognised, but only implemented" nor would it be appropriate to insert such a clause by way of interpretation of its provisions, as suggested by the Advocate General (mn. 101). And in case of investigation measures that require judicial authorization, it would not be appropriate to replace the judicial authorisation in the assisting EDP's Member State simply by a system of "consultation" between the involved EDPs, as AG *Ćapeta* suggests (mn. 105).

In the absence of any clarification that may be provided by the Union legislator, paragraph 3 of Art. 31, if interpreted by the Court to refer to the "judicial authorisation of the enforcement" of the assigned measure, should thus be seen as a provision on "recognition" of the assigned measure by a court/judge in the Member State of the assisting EDP – in analogy to the provision on "recognition and execution" in Art. 9(1) of the EIO Directive. This recognition may be refused (cf. subparagraph 2 of Art. 31(3)), and it will eventually be up to the legislator to clarify which "grounds for refusal" may be applied. The court in the assisting EDP's Member State should, however, take into account whether a court in the handling EDP's Member State already reviewed the admissibility of the measure and should refrain from undertaking its own substantial review in terms of grounds and appropriateness. Furthermore, the Union legislator could in this respect aim at a solution that it may consider to be an improvement over the EIO Directive: limiting the grounds for refusal, perhaps along the lines set out in Art. 31(5), which apply in case of investigation measures that do not require a judicial authorisation. Whether – in the current absence of any provision to that effect – such a

limitation of the "grounds", also in case of a required judicial authorisation, may be "read" into Art. 31 by way of interpretation of its provisions is – again – a difficult question. But the ECJ may find a viable solution in this regard, as well.

1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *O.J.* L 283, 31.10.2017, 1↩
2. H.-H. Herrnfeld, in H.-H. Herrnfeld/D. Brodowski/C. Burchard, *European Public Prosecutor's Office, Article-by-Article Commentary*, Baden-Baden 2021, Art. 31 mn. 4 et seq., 38 et seq.↩
3. *Herrnfeld*, ibid. Art. 31 mn. 4.↩
4. Cf. College Decision 006/2022 of 26 January 2022 adopting guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017/1939; also available at <https://eppo-lex.eu/cdn_01/> accessed 17 July 2023.↩
5. Opinion of Advocate General *Tamara Ćapeta* delivered on 22 June 2023 in Case C-281/22, *G.K., B.O.D. GmbH, S.L.*, ECLI:EU:C:2023:510.↩
6. Section 3(2) of the German EUStAG – Act of 10 July 2020 to implement the EU Regulation establishing the European Public Prosecutor's Office, BGBl. I, p. 1648.; an English translation has been published on <https://eppo-lex.eu/eppo-atlas-germany/>. In a similar vein: Art. 11(1) of the Austrian implementing law; an English translation has been published on <https://eppo-lex.eu/eppo-atlas-austria/> accessed 17 July 2023.↩
7. References to the margin numbers of the Advocate General's Opinion, *op. cit.* n. (5).↩
8. Here, AG *Ćapeta* refers, by way of example, to the judgment of the ECJ in case C-434/97, *Commission vs. France*, ECLI:EU:C:2000:98, mn. 21.↩
9. Cf. judgement of the ECJ of 8 June 2023 in Joined Cases C-430/22 and C-468/22, *VB and VB*, ECLI:EU:C:2023:458, mn. 24 with further references.↩
10. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J.,* L 130, 1.5.2014, 1.↩
11. *Herrnfeld,* in Herrnfeld/Brodowski/Burchard, *op. cit.* n. (2), Art. 31 mn. 5, 38.↩
12. Cf. in particular the formal declaration of the Austrian delegation of 8 October 2015, addressed to the Council, DS 1547/15.↩
13. See Art. 26(4) of the Commission's Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.↩
14. Council document DS 1237/15 of 21 April 2015.↩
15. Council document 9372/15 of 12 June 2015.↩
16. Council document 11045/15 of 31 July 2015.↩
17. *D. Brodowski*, in Herrnfeld/Brodowski/Burchard, *op. cit.* n. (2), Art. 41 mn. 63 with further references; for a detailed analysis see also: *V. Costa Ramos*, "The EPPO and the equality of arms between the prosecutor and the defence", (2023) 14(1) *New Journal of European Criminal Law*, 43 et seq.↩
18. Art. 33 to 35 of the Commission proposal, *op. cit.* n. (13)↩
19. Art. 26(4) of the Commission proposal, *op. cit.* n. (13)↩
20. See on this question: *Herrnfeld,* in Herrnfeld/Brodowski/Burchard, *op. cit.* n. (2), Art. 42 mn. 31 et seq.↩

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