

# Judicial Control of the EPPO: the Role of the Court of Justice

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## Article

### ABSTRACT

This article examines the exercise by the Court of Justice of the European Union of its judicial review jurisdiction with respect to the European Public Prosecutor's Office. It describes the Court of Justice's activities in the framework of the Area of Freedom, Security and Justice, of which the European Public Prosecutor's Office is a key element, before examining the Court's jurisdiction to review the legality of measures taken by the European Public Prosecutor's Office and a number of cases in that context.

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## I. Introduction

Designed to safeguard the European Union's financial interests and to fight cross-border crime, the European Public Prosecutor's Office (EPPO) ushers in an era of vertical and horizontal cooperation between agencies charged with combatting crime. The idea of a European Public Prosecutor dates back to the Corpus Juris of 1997,<sup>1</sup> ultimately finding its way into EU primary law in Art. 86 of the Treaty on the Functioning of the European Union (TFEU). The European Commission submitted the first proposal for an EPPO Regulation some four years after the entry into force of the Treaty of Lisbon.<sup>2</sup> The proposal faced some resistance, as evidenced by the fact that 14 national parliaments submitted reasoned opinions to the Commission, triggering the so-called "yellow card" procedure under Art. 7(2) of the Treaty on European Union (TEU) and Protocol (No 2) to the TFEU on the application of the principles of subsidiarity and proportionality.<sup>3</sup>

The Commission's proposal having failed to win unanimous support, a group of 20 Member States, joined later by three others, adopted the EPPO Regulation by way of enhanced cooperation.<sup>4</sup> The EPPO Regulation is different from the "single legal area"<sup>5</sup> concept the Commission submitted in 2013. It nevertheless embodies a shift from horizontal judicial cooperation between national authorities to a vertical and more integrated form of cooperation. The EPPO operates as a single office with a two-layer structure, containing a central and a decentralised level. The central level consists of a college of 23 European Prosecutors – one from each participating Member State –, the Permanent Chambers, the European Chief Prosecutor (ECP), the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director.<sup>6</sup> The EPPO's decentralised level consists of European Delegated Prosecutors ('EDP') based in participating Member States.<sup>7</sup> The central level monitors and directs the conduct of investigations and prosecutions by the EDPs.<sup>8</sup>

In a society governed by the rule of law, the activities of a body that, in the exercise of its functions at a multi-national and national level, has a direct impact upon citizens' enjoyment of their fundamental rights, must be amenable to judicial control. This article examines the Court of Justice of the European Union's (CJEU) exercise of judicial control over the EPPO.<sup>9</sup> It commences with a description of the CJEU's activities in the framework of the Area of Freedom, Security and Justice (AFSJ), of which the EPPO is a key element. The second part examines the CJEU's judicial review jurisdiction over the EPPO and the third part looks at a number of cases that invoke that jurisdiction.

## II. The CJEU's Role in the Area of Freedom, Security and Justice

The Tampere European Council in 1999 heard calls for the establishment of Eurojust and discussed a proposal for a European Arrest Warrant (EAW), a ground-breaking legal instrument based upon the principles of mutual recognition and mutual trust designed to facilitate the cross-border surrender of persons suspected, or convicted, of having committed offences.<sup>10</sup> It was, nevertheless, not until a year after the attacks of September 11, 2001 that Eurojust was established,<sup>11</sup> whilst the Framework Decision on the European Arrest Warrant (FD EAW)<sup>12</sup> took effect in 2004.

Legislative progress on AFSJ measures outpaced a commensurate expansion of the CJEU's jurisdiction to interpret them. Member States could opt-out of the preliminary ruling procedure in this area, thereby leaving it to their courts to interpret these measures without any central guidance. An additional obstacle consisted in the reservation to courts of final instance of jurisdiction to make such references.<sup>13</sup>

The entry into force of the Lisbon Treaty lifted these barriers, thereby facilitating a significant expansion in the CJEU's role in the AFSJ. New treaty provisions, such as Art. 19(1) second paragraph TEU, which states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, solidified the judicial protection of individual rights in the national legal orders. Similarly, Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter) enshrined the right to an effective remedy against violations of rights and freedoms conferred by EU law. The CJEU subsequently recognised that both of these provisions had direct effect in the legal orders of the Member States, thus enabling individuals to rely upon provisions of EU law directly before their national courts, which are under a duty to give those provisions full effect.<sup>14</sup>

Art. 267 TFEU empowers all national courts or tribunals to put questions to the CJEU concerning the interpretation of EU law, and the interpretation and validity of measures adopted in the context of the AFSJ. Art. 267 TFEU establishes a division of labour between the Court of Justice and national courts whereby the former rules on the interpretation and the validity of Union acts and the latter decide the facts and any issues of national law that may arise for determination. The EPPO Regulation apportions jurisdiction between these courts accordingly. There is a presumption that national courts ask questions that are necessary in order to enable them to decide the case before them. Where it is clear from the material before the CJEU that the answer sought does not serve that purpose, it will decline jurisdiction to determine the request. The CJEU will sometimes reformulate the questions asked in order to give a referring court an answer that may assist in deciding the issues before it.

Preliminary rulings under Art. 267 TFEU account for around two-thirds of the Court of Justice's caseload. In 2023, preliminary rulings made up 520 of the 821 cases brought before the CJEU. Where a preliminary ruling seeks an interpretation and/or a ruling on the validity of provisions adopted under the AFSJ and an individual is in custody, a national court may seek, and the CJEU will afford, access to an urgent preliminary procedure.<sup>15</sup> That procedure enables the CJEU to reply to questions within an average of 4.3 months, as compared to 16.1 months for the standard preliminary ruling procedure.<sup>16</sup> Between 2019 and 2023, the CJEU received 95 requests for the urgent preliminary ruling procedure, 35 of which raised issues pertaining to judicial cooperation in criminal matters. In 40 cases the Court granted the request.<sup>17</sup>

The CJEU also has jurisdiction in direct actions. The principal relief usually sought in such actions is the annulment of an act, but other remedies, including an award of damages, may also be sought. Art. 263 TFEU sets out the grounds upon which the Court may annul a measure: lack of powers; infringement of an essential procedural requirement; infringement of the Treaties or a rule of law; misuse of powers. Only a person to whom a decision is addressed, or to whom a decision is of direct and individual concern, has standing to bring a challenge by way of a direct action. Direct actions are in the nature of adversarial proceedings. The General Court of the European Union has exclusive jurisdiction to hear direct actions by private individuals or undertakings.

Courts can resolve only those issues that parties decide to litigate before them. For the first half century of its existence, the CJEU addressed almost exclusively what one could broadly categorise as economic matters. The AFSJ is a relatively new – and after the Treaty of Lisbon an enlarged and reinforced – jurisdiction for the CJEU to exercise. It has become one of, if not the principal, subjects of requests for preliminary ruling, with no less than 118 out of the 1,149 cases pending as of December 31, 2023 raising issues touching upon the AFSJ.<sup>18</sup> That proportion is unlikely to diminish in the near future as legislative initiatives including, but not limited to, the EPPO, continue to generate litigation.<sup>19</sup>

As the EU's powers expand, the CJEU has adjusted to the demands of determining novel legal issues. The majority of CJEU members do not purport to specialise in discrete areas of law, even if some of their number have expertise in fields such as competition law. For example, whilst the CJEU has ruled on questions

pertaining to Value Added Tax since the enactment of the First VAT Directive in 1967, it is but rarely that Member States have nominated specialists in that field – or even in the area of taxation – as members of the CJEU. That situation is unlikely to change.

### III. Judicial Review of EPPO Acts

Art. 86(3) TFEU provides that the regulations establishing the EPPO shall, *inter alia*, determine the rules applicable to the judicial review of the procedural measures that it takes in the performance of its functions. Because national laws and EU law regulate the EPPO's activities,<sup>20</sup> it was not possible to treat the EPPO, which is a body of the European Union,<sup>21</sup> in the same way as other EU agencies and bodies in order to ensure that its activities are subject to judicial review. The Union legislator concluded that both the specific nature of the EPPO's task and its structure, which differed from all other bodies, required the introduction of a new legal regime designed for that specific purpose.<sup>22</sup>

The EPPO Regulation does not disturb the monopoly that Member State courts exercise in criminal matters. Art. 86(2) TFEU recognises that the EPPO carries out its prosecutorial functions before the Member State courts, which requires a high level of engagement with them and with national law enforcement authorities. The principal rule is that EPPO procedural acts intended to produce legal effects vis-à-vis third parties are subject to review by national courts under national law. The same applies where the EPPO, in breach of a legal duty, fails to adopt procedural acts intended to produce legal effects vis-à-vis third parties.<sup>23</sup> Procedural acts include those adopted before the delivery of an indictment, including the decision on the choice of the Member State where an offence is prosecuted.

There is one exception to the principal rule. Where an EPPO decision to dismiss a case is challenged directly on grounds based upon EU law, a person to whom that decision is addressed or to whom that decision is of direct and individual concern may challenge it before the General Court of the European Union.<sup>24</sup>

The EPPO Regulation also grants the CJEU jurisdiction to review the acts or omissions of the EPPO in five specific circumstances: under Art. 268 TFEU in any dispute relating to compensation for damage that the EPPO may cause;<sup>25</sup> Art. 272 TFEU in any dispute concerning arbitration clauses in contracts the EPPO concludes;<sup>26</sup> Art. 270 TFEU in any dispute concerning staff matters;<sup>27</sup> and in any challenge to the dismissal of European Prosecutors, including the European Chief Prosecutor.<sup>28</sup>

The fifth and most important jurisdictions arises in the context of preliminary rulings under Art. 267 TFEU. That procedure may be available where the legality of an EPPO act is challenged before a national court on the grounds of its incompatibility with EU law or where issues arise as to the validity or interpretation of EPPO acts under EU law. This can occur in three circumstances. First, where a point is taken as to the validity of an EPPO procedural act before a national court or tribunal by reference to EU law. The CJEU has no jurisdiction to answer questions concerning the validity of such an act by reference to national law, which situation is consonant with the aforementioned division of jurisdiction between national courts and the CJEU under Art. 267 TFEU. Second, where questions of the interpretation or of the validity of provisions of EU law must be determined.

Third, where the interpretation of Arts. 22 and 25 of the EPPO Regulation arises in the context of a dispute as to the competence of the EPPO vis-à-vis national authorities. This jurisdiction is additional to that which the CJEU exercises under Art. 267 TFEU to give preliminary rulings interpreting the Treaties and provisions of secondary law at the request of a national court. A national court may refer questions on the interpretation of the Treaties under Art. 267 TFEU and questions on the interpretation of Arts. 22 and 25 of the EPPO Regulation to the CJEU in the same request for a preliminary ruling. In that context national courts must

ensure that national procedural rules governing actions for the protection of individual rights granted by EU law are no less favourable than those applicable to similar domestic actions (principle of equivalence) and do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

The EPPO Regulation does not alter the CJEU's jurisdiction to review EPPO administrative decisions, which consist of those that the EPPO does not take in carrying out its functions as an investigator or as a prosecutor but are nevertheless intended to have legal effects vis-à-vis third parties. It is in that context that Art. 42(8) of the EPPO Regulation sets forth a category of EPPO acts that the CJEU may review in the exercise of its jurisdiction under the fourth paragraph of Art. 263 TFEU.<sup>29</sup>

Finally, and in addition to the foregoing, any EU Member State, the European Parliament, the Council or the Commission may bring actions before the CJEU for the annulment of an EPPO measure in accordance with the second paragraph of Art. 263 TFEU and the first paragraph of Art. 265 TFEU.<sup>30</sup>

## IV. Cases before the CJEU

(1) In a request for a preliminary ruling from the Oberlandesgericht Wien, Austria, in Case C-281/22, G.K. et al., the Court of Justice was asked to interpret provisions of the EPPO Regulation for the first time. Two individuals and a limited company are suspected of having made false declarations on the importation of biodiesel into the EU, resulting in a loss of revenue of approximately €1,295,000. Since the EU had a financial interest in that revenue, the alleged offences fell within the competence of the EPPO, which commenced an investigation in Germany. At a certain point, the EDP in Germany considered that certain measures had to be carried out in other Member States, including Austria. The German ('handling') EDP entrusted the search and seizure of the accused persons' properties in Austria to an Austrian ('assisting') EDP. Under Austrian law, judicial authorisation is required in order to conduct searches; the assisting EDP sought and obtained that authorisation.

The accused challenged those warrants before the Oberlandesgericht Wien, seeking a judicial review of their substantive legality on the grounds that no criminal offence had been committed in Austria, that there was insufficient reasonable suspicion against them and that the searches were disproportionate and unnecessary. In reliance upon the EPPO Regulation, the assisting EDP submitted that any examination of the substantive reasons for carrying out the investigative measures was to be conducted in the Member State where the investigation commenced, here Germany.

The Oberlandesgericht Wien asked the CJEU to interpret Art. 31(3) and Art. 32 of the EPPO Regulation to determine if the courts of the Member State of an assisting EDP have jurisdiction to conduct a comprehensive judicial review of the legality of the investigative measures they permitted, as in the case of domestic investigations, or whether that review is limited to procedural questions in a case where the EPPO investigation had commenced in a Member State other than that which the investigative measure was executed.

In her Opinion delivered on 22 June 2023, Advocate General Čapeta expressed the view that where the law of an assisting EDP's Member State requires a judicial authorisation to take investigative measures, judicial review before the courts of that state is limited to procedural aspects. It therefore cannot involve a full review of the justification for the adoption of those measures.<sup>31</sup> She justified her proposed approach by the need to ensure the effectiveness of Art. 31(3) of the EPPO Regulation.<sup>32</sup> In its judgment of 21 December 2023, the Court of Justice (Grand Chamber) interpreted Arts. 31 and 32 of the EPPO Regulation to the effect that any review of an assigned investigation measure that requires judicial authorisation by the courts of the assisting EDP's Member State is limited to the enforcement of that measure. Challenges to the justification

for, and adoption of, such a measure may, therefore, be the subject of prior judicial review only in the Member State of the handling EDP, here Germany.

(2) Case C-292/23 (European Public Prosecutor's Office v I.R.O., F.J.L.R) arises out of an appeal by accused persons against the legality of summonses that an EDP issued to two third parties to attend as witnesses at their criminal trial. According to the referring court, the Juzgado Central de Instrucción nº 6 de la Audiencia Nacional, Spain, where an EDP issues such summonses, Spanish law does not contemplate an appeal although such an appeal otherwise exists at Spanish law. The referring court asks the Court of Justice whether the situation that it describes, notably the unreviewable character of the EDP measure under national law, is compatible with, *inter alia*, Art. 42(1) of the EPPO Regulation, Arts. 6 and 48 of the Charter, Art. 7 of Directive (EU) 2016/343,<sup>33</sup> Art. 19(1), second paragraph TEU, Art. 86(3) TFEU, and Art. 2 TEU, read in the light of Art. 47 of the Charter. The resolution of the case may turn upon what precisely the phrase “[p]rocedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties” which appears in Art. 42(1) of the EPPO Regulation, entails. The hearing in the case is likely to take place before the end of 2024.

(3) Lastly, mention ought to be made of two orders of the General Court of the European Union ruling inadmissible two cases that sought, respectively, the annulment of a decision of the European Chief Prosecutor to request lifting the parliamentary immunity of the applicant based on Art. 29(2) of the EPPO Regulation,<sup>34</sup> and of the Permanent Chamber of the EPPO on the ground that its decision issued in breach of Art. 10 of the EPPO Regulation, which governs the composition of the Permanent Chamber.<sup>35</sup>

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1. M. Delmas-Marty, “Foreword”, in: M. Delmas-Marty and J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States, Volume I*, 2000, p. 7.<sup>36</sup>
2. European Commission, “Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office”, COM(2013) 534 final.<sup>37</sup>
3. H-H Herrnfeld in: H-H Herrnfeld, D. Brodowski, and C. Burchard., *European Public Prosecutor’s Office: Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’): Article-by-Article Commentary*, 2021, Introduction para 4.<sup>38</sup>
4. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ L 283, 31.10.2017, 1 (hereinafter “the EPPO Regulation”). Hungary and Sweden do not participate in the EPPO. Denmark and Ireland have exercised their rights to opt-out of AFSJ cooperation in this area.<sup>39</sup>
5. COM(2013) 534 final, *op. cit.* (n. 2), p. 26.<sup>40</sup>
6. Art. 8 EPPO Regulation.<sup>41</sup>
7. Arts. 8, 10 and 13 EPPO Regulation.<sup>42</sup>
8. Art. 10 EPPO Regulation.<sup>43</sup>
9. References to the CJEU in this article are to the CJEU as institution, which at present consists of the Court of Justice of the European Union and the General Court of the European Union: Art. 19(1) TEU.<sup>44</sup>
10. Presidency Conclusions, Tampere European Council, 15-16 October 1999, paras. 33 and 46.<sup>45</sup>
11. Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime; OJ L 63, 6.3.2002, 1.<sup>46</sup>
12. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, 1.<sup>47</sup>
13. Order of 22 March 2002, Case C-24/02, *Marseille Fret SA v Seatrano Shipping Company Ltd.*, EU:C:2002:220, para 14.<sup>48</sup>
14. Judgment of 2 March 2021, Case C-824/18, *A.B. and Others v. KRS* (Nomination of Supreme Court Judges), EU:C:2021:153, paras 145 - 146.<sup>49</sup>
15. The Court heard four such cases in 2023: CJEU Annual Report 2023 ‘The Year in Review’, p.27.<sup>50</sup>
16. CJEU Annual Report 2023 ‘The Year in Review’, p.27.<sup>51</sup>
17. CJEU Annual Report 2023, ‘Statistics concerning the judicial activity of the Court of Justice’, p.26.<sup>52</sup>
18. CJEU Annual Report 2023 ‘The Year in Review’, p.27.<sup>53</sup>
19. See, for example, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, 1) adopted to replace the fragmented and complicated framework for the gathering of evidence in criminal cases with a cross-border dimension by a simplified and more effective system of judicial cooperation based on a single instrument. See, for example, judgment of 30 April 2024, Case C-670/22, *M.N. (Encro Chat)* EU:C:2024:372.<sup>54</sup>
20. Art. 5 EPPO Regulation.<sup>55</sup>
21. Art. 3(1) EPPO Regulation.<sup>56</sup>
22. Recital 86 EPPO Regulation.<sup>57</sup>
23. Art. 42(1) EPPO Regulation.<sup>58</sup>
24. Art. 42(3) EPPO Regulation.<sup>59</sup>

25. Art. 42(4) EPPO Regulation. ↪
26. Art. 42(5) EPPO Regulation. ↪
27. Art. 42(6) EPPO Regulation. ↪
28. Art. 42(7) in accordance with Art. 14(5) and Art. 16(5) respectively EPPO Regulation, ↪
29. These include decisions that affect data subjects' rights under Chapter VIII of the EPPO Regulation; EPPO decisions that are not procedural acts, such as those concerning public access to documents and the dismissal of EDPs pursuant to Article Art. 17(3) of the EPPO Regulation, and what are described as "any other administrative decisions." See Recital 89 EPPO Regulation. ↪
30. Recital 89 EPPO Regulation. ↪
31. Opinion of Advocate General Čapeta, 22 June 2023, Case C-281/22, paras 38-40, EU:C:2023:510. ↪
32. Opinion of Advocate General Čapeta, *op. cit.* (n. 31) para 60. ↪
33. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, 1). See, for instance, Judgment of 8 December 2022, Case C-348/21, *HYA and Others*, EU:C:2022:965. ↪
34. Order of 16 January 2024, Case T-46/23, *Kaili v Parliament and EPPO*, EU:T:2024:14. ↪
35. Order of 15 December 2023, Case T-103/23, *Stan v EPPO*, EU:T:2023:871. ↪

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