Remarks on the CJEU's Preliminary Ruling in C-281/22 G.K. and Others (Parquet européen)

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ABSTRACT

On 21 December 2023, the CJEU delivered its first judgment in response to the preliminary reference concerning the extent of judicial review in the context of the EPPO's cross-border investigations. The questions referred to the CJEU aimed to shed light on two crucial aspects of the respective legal framework. They address both the forum before which the suspect, or another person negatively affected by an investigative measure of the EPPO, may challenge the substantive reasons for adopting the measure and the scope of judicial scrutiny to be performed by the national court. This article first calls to mind the facts of the case and the legal framework on cross-border investigations laid down in Arts. 31 and 32 of the EPPO Regulation. Next, it analyses the Advocate General's opinion and the findings of the Court and then provides an assessment of the judgment, taking into account the negotiation history of the EPPO Regulation. The author concludes that, even if the CJEU's judgment offers much-needed clarity and legal certainty for carrying out cross-border investigations by the EPPO, the more adequate solution would be if the Commission were to propose an amendment of the EPPO Regulation.

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I. Introduction

On 1 June 2021, the European Public Prosecutor's Office (EPPO) started its operational activities,[1] more than 20 years after it was first envisioned by the authors of the Corpus Juris[2] and thanks to the European Commission's sustained advocacy of and support for the criminal law protection of the financial interests of the European Union (EU). The EPPO brings a seminal change to EU criminal justice: instead of working by means of cooperation between national judicial authorities, the EPPO exercises genuine European powers of investigation and prosecution in the Area of Freedom, Security and Justice (AFSJ) to better fight offences affecting the EU's financial interests.

The divergent views of the Member States on vertical criminal-justice integration into the EU led to lengthy and difficult negotiations on the EPPO's establishment. This is mirrored in the compromises embedded in the provisions of Council Regulation (EU) 2017/1939 (the EPPO Regulation),[3] which already attracted criticism during the negotiation process: concerns were voiced over the norms not always providing the required clarity in ensuring both effective criminal enforcement in cases of offences against the EU budget and effective judicial protection of individuals subject to EPPO investigations.[4] It was expected from the outset that the Court of Justice of the European Union (CJEU) would play a pivotal role in resolving such ambiguities through dialogue with the national courts.

It did not take long before the CJEU delivered its first judgment:[5] On 21 December 2023, it responded to the preliminary reference by the Higher Regional Court of Vienna (Austria) that harboured doubts about the extent of judicial review in the context of the EPPO's cross-border investigations.[6] The legal regime on cross-border investigation in the EPPO Regulation aims at enabling European Delegated Prosecutors (EDPs) of different Member States to cooperate in EPPO investigations in an effective manner. It limits to one authorisation the judicial authorisation ("single judicial authorisation") for investigative measures to be carried out in a certain State at the request of the EDP of a different Member State. The questions referred to the CJEU aim to shed light on two crucial aspects of the legal framework related to the EPPO's cross-border investigations: First, they address the forum before which the suspect, or another person negatively affected by the investigative measure of the EPPO, may challenge the substantive reasons for adopting the measure; second, they concern the scope of judicial scrutiny to be performed by the national court.

This article first calls to mind the facts of the case and the legal framework on cross-border investigations laid down in Arts. 31 and 32 of the EPPO Regulation (II.-III.). Then, it analyses Advocate General (AG) *Ćapeta's* opinion on the questions referred and the findings of the Court (IV.-V.). The final part (VI.) assesses the judgment by taking into consideration the negotiation history of the EPPO Regulation.[7]

II. The Preliminary Reference by the Higher Regional Court of Vienna

The case concerned a large-scale tax fraud and organised crime investigation opened by a German EDP, acting on behalf of the EPPO. Since, during the investigations, it was deemed necessary to gather evidence in other Member States, the German handling EDP assigned the search and seizure of certain business and private premises located in Austria to an Austrian assisting EDP. As such investigative measures require prior judicial authorisation under Austrian law, the assisting EDP obtained authorisation from the competent Austrian courts.[8]

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The suspects challenged the judicial authorisation before the Austrian courts[9] and contested, among other objections, both the necessity and proportionality of the measures. In response, the assisting Austrian EDP evoked Art. 31(2) EPPO Regulation, according to which the justification of cross-border investigative measures is to be examined only in the Member State of the handling EDP, while the competent authorities of the Member State of the assisting EDP may only assess the formalities relating to the execution of such measures.

Since Art. 31 EPPO Regulation does not explicitly regulate the situation in which judicial authorisation is required both in the state of the handling and of the assisting EDPs, the Austrian court decided to refer the case to the CJEU. The referring court noted that the wording of Art. 31(3) and Art. 32 EPPO Regulation can be interpreted in such a way that if an investigative measure requires judicial authorisation in the State of the assisting EDP, that measure must be fully examined by a court of the assisting EDP's Member State.[10] The Viennese court stated that such interpretation would result in the measure being the subject of a full examination in two different Member States.[11] Such a double examination would, however, constitute a step backwards compared to the regime established by the Directive on the European Investigation Order (EIO Directive),[12] according to which the executing Member State needs to verify merely certain formal aspects.[13] The cumbersome decision-taking process would contradict the rationale of the newly established EPPO cross-border investigations framework that aims at creating an easier cooperation than that provided for in other mutual recognition instruments.

Against this background, the Higher Regional Court of Vienna decided to stay its proceedings and ask the CJEU about the extent of the judicial review to be carried out by the court of the assisting EDP in the context of EPPO cross-border investigations,[14] also asking whether such an examination should take into account whether the justification and adoption of the measure were already examined by a court in the Member State of the handling EDP.[15] While the reference focused on the substantive scope of review in the court of the assisting EDP's Member State, it is also closely entwined with the applicable national law in terms of procedure, specifically where both Member States require judicial authorisation.[16]

III. Single Judicial Authorisation of the EPPO's Cross-Border Investigations – A Compromise Without Clarity

The procedural rules governing the EPPO's cross-border investigations are the result of a hard-fought negotiation process within the Council Working Group.[17] The original Commission proposal introduced the concept of a "single legal area"[18] where the judicial authorisation of an investigative measure of the EPPO would be valid in the entire area. Accordingly, once a measure has been authorised in the Member State of the handling EDP, it should be possible to carry out that measure in the territory of all EPPO countries without further authorisation of the territorial state of the investigation, with the EDPs acting "in close consultation."[19]

During the negotiations, the Member States departed from the ambitious idea of a single legal area and retained instead the idea of the EPPO operating as a "single office" that would function "over the borders of participating Member States without having recourse to the traditional forms of mutual assistance or mutual recognition."[20] Similarly, the proposal to harmonise national laws of criminal procedure – even if limited to certain types of EPPO investigative measures – failed to pass the subsidiarity control mechanism triggered by some national parliaments.[21]

Modified in this way, the concept of the EPPO required establishing detailed procedural rules clarifying which law is applicable in cases of cross-border investigation and which court is competent to grant judicial author-

isation.[22] While all delegations agreed on the premise that the EPPO Regulation should be simpler than the EIO Directive, two different approaches emerged. Some national delegations envisaged a system that used the concept of mutual recognition as a "starting point" and proposed making adjustments where suitable to embrace the idea of the EPPO working as a "single office".[23] The German and the Austrian delegations, in particular, proposed introducing a number of procedural rules mirroring the mutual recognition solutions of the EIO Directive.[24] The majority of national delegations, however, saw the concept of mutual recognition as being incompatible with the *sui generis* nature of the EPPO operating as a "single office"[25] and emphasized the need to ensure a less cumbersome and more efficient system of cooperation with only one judicial authorisation being required – if judicial authorisation is necessary under the law of either Member State.[26]

The system of cross-border cooperation adopted in the final version of Art. 31 EPPO Regulation reflects the majority opinion. It goes beyond the principle of mutual recognition and abandons terminology characterising the mutual recognition instruments.[27] If no judicial authorisation is required under the law of either Member State, the handling EDP, namely the EDP in charge of the investigation, will decide on the adoption of the measure in accordance with his/her national law and simply "assign" it to the assisting EDP, i.e. the EDP located in the Member State where the measure needs to be carried out. The latter, in accordance with both his/her national law and the assignment, is then expected to enforce the measure, which is no longer subject to any type of recognition procedure or grounds of refusal.[28]

If judicial authorisation is required, Art. 31(3) EPPO Regulation provides the following: If judicial authorisation is required only under the law of the handling EDP, the judicial authorisation is to be obtained by the handling EDP before assigning the measure (subpara. 3). In the opposite case, if authorisation is required only by the law of the assisting EDP, the handling EDP may still adopt the measure according to his/her national law and assign it to the assisting EDP; the latter, however, must obtain the necessary judicial authorisation before executing the measure in accordance with his/her national law (subpara. 1). If such authorisation is denied, the handling EDP must withdraw the assigned measure (subpara. 2).

The EPPO Regulation is silent, however, on the application of the *lex loci* and the *lex fori* when judicial authorisation is required by the laws of both the Member State of the handling EDP and the assisting EDP. Recital 72 EPPO Regulation simply states that a single authorisation should apply in cross-border investigations.

The applicable national law is relevant not only for establishing whether judicial authorisation is required. It defines at the same time the forum before which the suspect, or another person negatively affected by the investigative measure of the EPPO may challenge the substantive reasons for adopting the measure. In addition, it regulates the scope of judicial scrutiny to be performed by the national court. Due to the lack of harmonisation of the investigative measures available to the EDPs, the breadth of judicial review depends on the applicable national law and may differ from Member State to Member State.[29] For instance, if national law mandates a detailed analysis of the case file before granting judicial authorisation, "the court of the assisting Member State [could] ask for the translation of the whole file to conduct its own analysis (rather than rubbing stamping the authorisation [of the court of handling EDP's Member State])".[30] This would result in a situation in which full judicial review could take place in the courts of either or both Member States, leading to potentially conflicting outcomes on the same legal question.

Due to the practical difficulties experienced in cross-border investigations, the EPPO issued guidelines on the interpretation of Art. 31 EPPO Regulation in January 2022.[31] The guidelines reiterate that Art. 31 EPPO Regulation creates a "self-standing, sui generis legal basis" for the EPPO's cross-border investigations.[32] Nevertheless, they proclaim that the principle – according to which the substantive aspects for adopting any intra-EU, cross-border measures are governed by the law of the issuing Member State – also applies to EPPO cross-border investigations, as part of the *acquis communautaire*.[33] Consequently, the courts in the assisting EDP's Member State are not allowed to conduct a review, neither *ex ante* nor *ex post*, of the substantive reas-

ons for adopting the investigative measure. In addition, the guidelines specify that, since the EPPO Regulation does not address the question of legal remedies in relation to Art. 31, this matter falls under "pure legal interpretation in accordance with the basic principles of the EU law."[34] In line with Art. 47 of the Charter of Fundamental Rights as interpreted by the CJEU in *Gavanozov II*,[35] Art. 31 EPPO Regulation must therefore be interpreted such that both the judicial authorisation and its substantive reasons must always be subject to legal remedies in the Member State of the handling EDP.

IV. The Advocate General's Opinion

In her Opinion, AG *Ćapeta* first outlined the two contrasting interpretative approaches presented by the intervening parties in the case. The Austrian and the German governments argued that, if the assisting EDP is required by its national law to obtain prior judicial authorisation to carry out the assigned investigative measure, the authorisation should entail a full review not only of the procedural but also of the substantive aspects justifying the measure in the first place (Option 1).[36] Although the Austrian and German governments acknowledged that this approach would undermine the efficiency of the EPPO, the German government agent emphasized, "the Court of Justice is not a repair shop for faulty products. Instead, the faulty product should be returned to the manufacturer for improvement, in our case, the legislature."[37] Otherwise, there would be a risk of interpretation *contra legem*.

In contrast, the Commission, together with the EPPO as well as other Member States, argued that Arts. 31 and 32 EPPO Regulation establish a clear division of tasks between the handling and the assisting EDPs and their respective national courts, mirroring that between the issuing and the executing authorities in the context of other mutual recognition instruments (Option 2). If prior judicial authorisation is required by the national law of the assisting EDP, the court authorising the measure should review only its mode of execution. As a result, if the national laws of both EDPs' Member States require prior judicial authorisation, two authorisations would need to be issued: the court of the handling EDP would review the justification for issuing the measure; the review performed by the court of the assisting EDP would be limited to the procedural aspects relating to the execution of the measure. This logic would apply even in situations in which the national law of the handling Member State would not require judicial authorisation. The law of the handling Member State should be respected in its choice not to require judicial authorisation, and the judicial authorisation of the assigned Member State would be limited to procedural aspects even in those cases.

After comparing the two interpretations, the AG sided with Option 2, supporting the Commission, the EPPO, and other national governments. First, she reiterated that two interpretative rules of EU law must be respected: (1) the wording in legal rules must be always given some meaning and (2) if several interpretations are possible, the one that guarantees the effectiveness (*effet utile*) of the provision should be adopted.

The AG argued that both Option 1 and Option 2 were plausible interpretations of the EPPO Regulation. The strongest argument presented by the German and Austrian governments rested on the principle that the wording in legal rules must be always given some meaning. According to both governments, Option 2 would make Art. 31(3) EPPO Regulation redundant, since the rules establishing a division of tasks between the handling EDP and the assisting EDP are already contained in Arts. 31(1) and (2) and Art. 32 EPPO Regulation. Nevertheless, according to the AG, even if one adopts Option 2, Art. 31(3) still would not be redundant: restating that the rule relating to the applicable law also applies to judicial authorisation might have been perceived necessary, considering the difficulties related to agreeing on the issue of judicial authorisation during the negotiations. The AG went on to argue that the competence of the CJEU to interpret the EPPO Regulation allows it to restore legal certainty, and there is no need for intervention on the part of the legislator, contrary to the claim of the German and Austrian governments. The AG concluded that the CJEU

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should choose Option 2, which entails that Art. 31(3) of the Regulation should be construed as allowing the court of the Member State of the assisting EDP to review only aspects related to the execution of a measure while accepting prior assessment by the handling EDP that the measure is justified.[38]

V. The Judgment of the CJEU

In its judgment, the CJEU followed the AG's Opinion but added a new requirement to be implemented by the Member State of the handling EDP when serious interferences with fundamental rights occur.

Starting from a literal interpretation of the provisions, the CJEU reasoned that neither Art. 31 nor Art. 32 EPPO Regulation clarify the extent of the review that may be carried out for the purpose of judicial authorisation by the competent authorities of the respective Member State; a purely textual interpretation is not sufficient to fully address the questions referred. It went on to apply a contextual interpretation and endorsed the arguments presented by the EPPO[39] and confirmed by the AG, recalling that the cooperation established by the EPPO Regulation is "something more but not something different" than the cooperation based on the principle of mutual recognition and mutual trust.[40] Compared with the system laid down in the Framework Decision on the European Arrest Warrant [41] and the EIO Directive, the Court observed that, in the context of judicial cooperation in criminal matters between Member States, the executing authority is generally prevented from reviewing compliance with the substantive conditions necessary for the issuing of a cross-border measure.[42] The Court argued that allowing the competent authority of the assisting EDP to review not only the mode of execution of a measure but also the elements related to its justification and adoption would undermine the objective of the EPPO Regulation. The CJEU concluded that, for the cross-border investigation framework, the EPPO Regulation establishes "a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the enforcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor."[43] According to this division of tasks, "any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to elements connected with that enforcement."[44] However, it added an important qualification: when the assigned investigative measure seriously interferes with the right to private life and the right to property, as guaranteed by Arts. 7 and 17 of the Charter, respectively, it is up to the Member States of the handling EDP "to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures."[45]

VI. Assessment of the Judgment of the Court

The CJEU largely followed the opinions of the AG and the EPPO/the Commission in deciding that any review conducted by the court of the assisting EDP's Member State may relate only to matters concerning the enforcement of the investigative measure. The Court did, however, feel that the *ex post* judicial review of the legality and the necessity of the investigative measure provided for in Art. 42(1) EPPO Regulation would give suspects and other persons negatively affected by the investigative measure of the EPPO insufficient protection. This would particularly be the case if the EPPO's investigative measure "seriously interferes with the right to private life and the right to property." In such cases, *ex ante* scrutiny must be ensured by the national court of the handling EDP in allowing the substantive reasons for adopting the measure to be challenged.

In requiring *ex ante* judicial control of the EPPO's investigative measure, the Court applied and further specified its existing case law developed in the context of execution of the EIO. In particular, the requirement pronounced in *Gavanozov II*, according to which the right to judicial remedy "necessarily means that the

persons concerned by such investigative measures must have appropriate legal remedies enabling them, first, to contest the need for, and lawfulness of, those measures and, second, to request appropriate redress if those measures have been unlawfully ordered or carried out. It is for the Member States to provide in their national legal orders the legal remedies necessary for those purposes."[46] The right to an effective remedy now has to be provided for *ex ante* in the Member State of the handling EPPO for intrusive investigative measures in cross-border investigations. National law must provide for the details of such *ex ante* review of assigned investigative measures, ensuring that the review does not jeopardise the outcome of the measure or even render it superfluous if the suspect is already aware of the ongoing investigation.

What remains striking, however, is that the text of the EPPO Regulation does not unequivocally support the Court's interpretation. Art. 32 read in conjunction with Art. 31(2) seems to underpin the approach taken by the Court. Art. 32 of the EPPO Regulation namely states:

> The assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.

Art. 31(2) reads:

> The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor.

Reading both provisions together, the courts of the Member State of the assisting EDP should not assess the justification, necessity, or proportionality of the measure. This, indeed, underscores the division of responsibilities between the courts of the handling EDP and the assisting EDP when authorising cross-border investigative measures.[47]

However, this division coupled with the idea of a single judicial authorisation stipulated in Recital 72 of the EPPO Regulation would culminate in a somewhat "awkward compromise".[48] It would namely mean that, if judicial authorisation is required only in the Member State of the assisting EDP, legal remedies in respect of the substantive reasons for the measure would not be available to the suspects or other persons negatively affected by the EPPO's investigative measure, since they would only be possible before the court in the Member State of the handling EDP. This leads to a legal gap in judicial protection contrary to Art. 42(1) EPPO Regulation and Art. 47 of the Charter that protect the right to an effective remedy for the accused person. In particular, Art. 42(1) EPPO Regulation states that procedural acts of the EPPO intended to produce legal effects vis-à-vis third parties shall be subject to judicial review.[49]

To support the daily operations of the EPPO, the guidance note on cross-border investigations *de facto* replaced the requirement of a single judicial authorization with a division between reviewing the substantive reasons for adopting the investigative measure, on the one hand, and reviewing the modalities of its enforcement, on the other.[50] In practice, the EDPs followed the internal guidelines of the College and, even when required only by the law of the assisting EDP, the handling EDPs also requested judicial authorisations in their Member State in order to facilitate the review of the investigative measures by the national courts of the assisting EDP.[51]

Against the backdrop of this practice and the lack of conclusiveness of the EPPO Regulation, the judgment of the Court now supports the system of double authorisation and renders explicit that judicial review of intrusive investigative measures must be available *ex ante* in the Member State of the handling EDP. Even if the Court has been criticised for possibly going beyond the scope of mere judicial interpretation,[52] the judg-

ment is understandable and coherent with its previous case law as well as the objectives of the EPPO Regulation. It is uncontested that the EPPO Regulation aims at enhancing the effectiveness of fighting crimes affecting the EU budget.[53] In this context, the EPPO Regulation cannot be interpreted such that it would render the cross-border investigations of the EPPO more burdensome than cooperation between national prosecutors using the EIO. Allowing the court of the assisting EDP to carry out a full judicial review would require that court to have access to the entire case file, which in turn would need to be sent and translated by the handling EDP. This would be not only more time-consuming and costly than using an EIO but would also present considerable logistical challenges for the handling EDP. Such an approach would undermine the objectives of the EPPO Regulation.

Even if the judgment of the Court provides much-needed clarity and legal certainty for the EPPO when carrying out cross-border investigations, the more adequate solution would be if the Commission were to propose an amendment of the EPPO Regulation. The Commission asked for an impact assessment study in 2023 to identify those provisions in the text of the EPPO Regulation that would require revision – in the light of practice.[54] The impact assessment study markedly pointed to Art. 31 EPPO Regulation as being difficult in practice and lacking clarity and legal certainty; therefore, its future amendment should be considered.[55] Although, the impact assessment study identified a handful of provisions that would also benefit from a revision, it is unlikely that the Commission will soon table such a proposal. The number of successful prosecutions carried out so far by the EPPO as well as the amount of EU funds recovered[56] speak for the success of the EPPO regardless of the imperfections in the text of the EPPO Regulation. The CJEU's seminal judgment in G.K. and Others is therefore likely to remain the pivotal guidance on cross-border investigations of the EPPO. It also triggers the amendment of several national implementing legislations of the EPPO Regulation, namely in those Member States that did not foresee *ex ante* judicial review of EPPO investigative measures.[57]

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1. The EPPO started with 22 EU Member States participating in the enhanced cooperation. Only Denmark, Ireland, Hungary, Poland, and Sweden were outside the operations. After a few years of troublesome relations between the EPPO and Poland, Poland joined the EPPO in February 2024 (Commission Decision (EU) 2024/807 of 29 February 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office C/2024/1444, OJ L 2024/807, 29.02.2024). According to this Commission Decision, the EPPO will commence its operational activities in Poland once the European Prosecutor from Poland has been appointed. To ensure the efficiency of the EPPO's activities, the Commission decided that the EPPO Regulation will apply retrospectively in Poland to any offence within the competence of the EPPO committed after 1 June 2021, i.e., after the EPPO started its operations. Furthermore, on 16 July 2024, the Commission adopted the decision confirming Sweden's participation in the EPPO (Commission Decision (EU) 2024/1952 of 16 July 2024 confirming the participation of Sweden in the enhanced cooperation on the establishment of the European Public Prosecutor's Office C/2024/4894, OJ L 2024/1952, 18.07.2024). This means that Sweden officially joined as of 17 July 20204. According to the Commission's decision, the EPPO will be able to start its operations and investigations in Sweden 20 days after the appointment of the European Prosecutor from Sweden by the Council, which is expected to take place in autumn. Therefore, at the time of writing, 24 Member States of the EU are participating in the EPPO. Denmark and Ireland have an opt-out from the AFSJ, and Hungary has not announced any interest in joining the EPPO.↩
2. M. Delmas-Marty and J.A.E. Vervaele (eds.), The implementation of the Corpus Juris in the Member States, Vol. I, 2000.↩
3. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L 283, 12.10.2017, 1.↩
4. See K. Ligeti, "The European Public Prosecutor's Office", in: V. Mitsilegas, M. Bergström, and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, 2016, pp. 480-504, 480.↩
5. CJEU, 21 December 2023, Case C-281/22, *G.K. and Others (Parquet européen)*.↩
6. A summary of the request for the preliminary ruling was published in the following working document: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=261521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=265595> accessed 26 July 2024.↩
7. For the negotiation's history, see E. Duesberg, "Anmerkung zu EuGH (Große Kammer), Urteil vom 21.12.2023 – C-281/22, Europäische Staatsanwaltschaft – gerichtliche Kontrolle", (2024) *Neue Juristische Wochenschrift (NJW)*, 487, 491.↩
8. CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), paras. 28-29.↩
9. CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), paras. 30-32.↩
10. CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 33.↩
11. CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 34.↩
12. 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 (EIO Directive).↩
13. Under the EIO Directive, the executing authority shall recognise an EIO and ensure its execution in accordance with the Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State, if provided for in its

national law (Art. 2(d) EIO Directive). The EIO, however, does not allow for an extensive examination of the case file and, most importantly, specifies that the necessity and proportionality for issuing the EIO are to be assessed exclusively by the issuing authority (Art. 6(1)(2) EIO Directive). Accordingly, the substantive reasons to issue the EIO must be challenged solely before the competent national court of the issuing Member State.↩

14. CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 36, questions (1)(3).↩
15. CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 36, question (2).↩
16. For further analysis on the preliminary reference, see A. Venegoni, "The EPPO Faces its First Important Test: A Brief Analysis of the Request for a Preliminary Ruling in G. K. and Others", (2022) *eucrim*, 282-285.↩
17. H. H. Herrnfeld, in: H. H. Herrnfeld, D. Brodowksi, and C. Burchard, *European Public Prosecutor's Office: Article-by-Article Commentary*, 2021, Art. 31, p. 300.↩
18. Art. 25(2) Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final (original Commission proposal).↩
19. Art. 18(2) of the original Commission proposal (op. cit. n. 18).↩
20. Council Presidency, "Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – State of Play", Council doc. 13509/1/14, 2014, p. 3.↩
21. K. Ligeti, op. cit. (n. 4), pp. 480-504.↩
22. Policy Department for Citizens' Rights and Constitutional Affairs, *Towards a European Public Prosecutor's Office*, 2016, p. 31.↩
23. Opinion of Advocate General *Ćapeta*, 22 June 2023, Case C-281/22, para. 26.↩
24. Cited in the Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), para 27: "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." And footnote 23: "Where the law of the Member State of the assisting European Delegated Prosecutor requires a judicial authorisation or a court order for recognition of the measure, he/she shall submit the order and, where applicable, the accompanying judicial authorisation to the competent judicial authority of his/her Member State for recognition."↩
25. H. H. Herrnfeld, *op. cit.* (n. 17), p. 286.↩
26. H. H. Herrnfeld, *op. cit.* (n. 17), p. 286. See also N. Franssen, "The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?", *European Law Blog*, 15 January 2024, <https://europeanlawblog.eu/2024/01/15/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/> accessed 26 July 2024.↩
27. The only reference to mutual recognition can be found in Art. 31(6) EPPO Regulation, which, in agreement with the supervising European Prosecutors, grants the EDPs the possibility to take recourse to legal instruments on mutual recognition or cross-border cooperation if the assigned measure does not exist in a purely domestic situation but would be available in cross-border situations covered by such a legal instrument.↩
28. Under Art. 31(5) EPPO Regulation, it is possible for the assisting EDP to raise "reasons to consult" solely with the handling EDP. If a solution is not found within a period of seven days "the matter will be referred to the competent Permanent Chamber" who will decide "in accordance with applicable national law" and the EPPO Regulation.↩
29. S. Allegrezza and A. Mosna, "Cross-border Criminal Evidence and the Future European Public Prosecutor: One Step Back on Mutual Recognition?", in: L. Bachmaier Winter. (ed.), *The European Public Prosecutor's Office. The Challenges Ahead*, 2018, p. 154.↩
30. Council Presidency, "Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Other issues", Council doc. 12344/16, 2016, p. 5.↩
31. 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) 2017/193.↩
32. College Decision 006/2022, *op. cit*. (n. 31), p. 2.↩
33. College Decision 006/2022, *op. cit*. (n. 31), p. 2.↩
34. College Decision 006/2022, *op. cit.* (n. 31), p. 7.↩
35. CJEU, 11 November 2021, C-852/19, *Gavanozov II*, para. 41.↩
36. Opinion of Advocate General *Ćapeta*, *op. cit*. (n. 23), paras. 35-37.↩
37. Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), para. 37.↩
38. Opinion of Advocate General *Ćapeta*, *op. cit*. (n. 23), paras. 71-73. As to the possibility of *ex post* judicial review, see K. Ligeti, "Judicial Review of Acts of the European Public Prosecutor's Office: The Limits of Effective Judicial Protection of European Prosecution" in: *Liber Amicorum Bay Larsen*, 2024, (in press).↩
39. Opinion of Advocate General *Ćapeta*, *op. cit*. (n. 23), para. 80.↩
40. Opinion of Advocate General *Ćapeta*, *op. cit*. (n. 23), para. 99.↩
41. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, 1.↩
42. CJEU, *G.K. and Others (Parquet européen)*, *op. cit*. (n. 5), paras. 58-64.↩
43. CJEU, *G.K. and Others (Parquet européen)*, *op. cit*. (n. 5), para. 71.↩
44. CJEU, *G.K. and Others (Parquet européen)*, *op. cit*. (n. 5), para. 71.↩
45. CJEU, *G.K. and Others (Parquet européen)*, *op. cit*. (n. 5), para. 75.↩
46. See CJEU, *Gavanozov II*, *op. cit.* (n. 35) para. 33.↩
47. According to the European Commission, Romania, and the Netherlands, the proposed interpretation would still be in line with Recital 72 of the EPPO Regulation "as every aspect of the investigative measure would be subject to one single judicial control." See A. Hernandez Weiss, "Judicial review of investigative measures under the EPPO Regulation. More to it than it seems? A recap of the Oral Hearing in G.K & Others", *European Law*

Blog, 26 April 2023, <https://europeanlawblog.eu/2023/04/26/judicial-review-of-investigative-measures-under-the-eppo-regulation-more-to-it-than-it-seems-a-recap-of-the-oral-hearing-in-g-k-others/> accessed 26 July 2024.↩

48. J. Öberg, "Judicial Cooperation between European Prosecutors and the Incomplete Federalisation of EU Criminal Procedure – CJEU ruling in G. K. e.a. (Parquet européen)", (2024) *EU Law Live Weekend Edition* no 189, p. 2.↩
49. See K. Ligeti, op. cit. (n. 38).↩
50. N. Franssen, op cit. (n. 26).↩
51. European Commission, "Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004)", September 2023; p. 53. The report is available on the European Parliament's website: <https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142> accessed 26 July 2024.↩
52. H. H. Herrnfeld, "Yes Indeed Efficiency Prevails, A Commentary on the Remarkable Judgement of the European Court of Justice in Case C-281/22 G.K. and Others (Parquet européen)", (2023) *eucrim*, 370-380.↩
53. A. Hernandez Weiss, op. cit. (n. 47).↩
54. See M. Engelhardt, "Compliance with the EPPO Regulation", in this issue.↩
55. European Commission, "Compliance assessment", op. cit. (n. 51).↩
56. See European Public Prosecutor's Office, *EPPO Annual Report 2023*, 2024, p. 10. In 2023, 139 indictments were filed (over 50% more than in 2022).↩
57. See, for instance, § 3(2) *Gesetz zur Ausführung der EU-Verordnung zur Errichtung der Europäischen Staatsanwaltschaft* (Law implementing the European Union regulation establishing the EPPO) in Germany and, in reaction to the CJEU's judgment, the proposed amendment of this article by Art. 2 *Referentenentwurf eines Gesetzes zur Modernisierung des Verpflichtungsgesetzes und zur Änderung des Europäische-Staatsanwaltschaft-Gesetzes* of 19 July 2024, available at: <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2024_Modernisierung_VerpflG_AEnd_EUStAG.html> accessed 26 July 2024.↩

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