

Role of the Belgian Investigative Judge in EPPO Cases

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Article

ABSTRACT

Is the Belgian legislative position of retaining the leading role of the investigative judge in certain EPPO criminal investigations in accordance with the EPPO Regulation? In view of the wording of the Regulation and the preparations leading up to it at the European level, the answer can only be in the affirmative.

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In the investigation phase, Belgian criminal procedure is characterized by a dual-level system: (i) the preliminary enquiry under total control of the public prosecutor's office and (ii) the judicial investigation, which is led by the investigative judge and monitored by the public prosecutor's office.¹ This puts Belgium in an exceptional position in the European Union. Only France, Luxembourg, Spain and Slovenia grant similar powers to the investigative judge, as a result of which this judge assumes the role of both judge and investigator in certain (usually more serious) criminal cases. The investigative judge is "both Maigret and Salomon," according to the famous quote by *Robert Badinter*, the former French Minister of Justice.

The four aforementioned countries, which are also participating members of the European Public Prosecutor's Office (EPPO), have adapted or will adapt their criminal investigation and prosecution procedures in light of the forthcoming operations being conducted by the EPPO.² For these criminal cases, the EPPO and, in particular, the European Delegated Prosecutors (EDPs) will take over the leading investigative tasks from the investigative judges. For certain intrusive measures restricting personal liberty and the right to private life, the investigative judges will still be able to intervene in the investigation – as *real* judges, who guarantee the protection of fundamental rights and freedoms by granting or refusing judicial authorisation. They will therefore become *judges of the investigation* (or *judges of the liberties*) rather than *investigative judges*.

By contrast, Belgium will not change its criminal procedure for EPPO cases.³ The two main reasons are the political will to preserve the decisive role of the judiciary in important criminal investigations⁴ and the prevention (and fear) of potential discrimination and unconstitutionality⁵ (due to a difference in treatment between EPPO cases and similar, purely national cases). The Belgian examining magistrates remain in charge of the EPPO cases. The Belgian investigative judges will remain in charge of the EPPO cases, when requested by the Belgian EDPs. This judicial request is mandatory under Belgian law if it is necessary, for instance, to carry out a home search without permission, an interception of telecommunication data, an insight operation into an IT system, or an arrest warrant. The EDPs will of course follow these judicial investigations closely and submit judicial claims to the investigative judges where necessary. In the event of contradictory decisions or poor or lengthy investigations, the EDPs may (like other prosecutors) appeal to, or turn to, the Court of Appeal. At the end of the investigation, it is also their task to take a final decision (after approval by the Permanent Chamber) and to ask another judge (the so-called "*chambre de conseil*") whether the case should be referred to the criminal court. It should be noted that the Belgian legislator provides for the appointment of investigative judges specialised in financial crime, who will deal with the files for which the EPPO is competent as a matter of priority.

The question now is whether the Belgian legislative position of retaining the leading role of the investigative judge in certain EPPO criminal investigations is in accordance with the EPPO Regulation. In view of the wording of the Regulation and the preparations leading up to it at the European level, the answer can only be in the affirmative.⁶ Some of the key provisions of the EPPO Regulation, whereby the EPPO continues to rely on national rules, are contained in Arts. 28, 30, and 41 and in Recital 15. Let us have a closer look at the wording of these provisions.

Art. 30(3) stipulates that certain investigation measures may be subject to further conditions, including limitations, provided for in the applicable national law. As investigative powers are and will remain national, so too will be the relationship be between actors in criminal investigations. Thus, the Regulation does not prohibit the intervention of a judge in a Member State, even if he/she is a leading investigative judge. This *ratio legis* can also be found in Recital 15: "This Regulation is without prejudice to Member States' national systems concerning the way in which criminal investigations *are organized*." The original European Commission proposal did not include such an explicit recital.⁷ Art. 28(1) also does not prohibit intervention or evocation by the investigative judge: "The European Delegated Prosecutor handling a case may, *in accordance with* this Regulation *and with national law*, either undertake the investigation measures and other measures on

his/her own or instruct the competent authorities in his/her Member State. Those authorities shall, *in accordance with national law*, ensure that all instructions are followed and undertake the measures assigned to them." This provision does not change the role of the national judge in the preliminary investigation of EPPO cases, either (the judge may always decide otherwise or refuse to accede to the request of the delegated prosecutor).

Since its genesis, the EPPO Regulation, all the more so with regard to Art. 28, did not intend to drastically change the national relationship between the prosecution and the judiciary – quite the opposite is the case. For example, the above-mentioned original Commission proposal did contain another, stricter position in Art. 18(1) on the powers of the EPPO: "The designated *European Delegated Prosecutor shall lead the investigation* on behalf of and under the instructions of the European Public Prosecutor. The designated European Delegated Prosecutor may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. These authorities shall comply with the instructions of the European Delegated Prosecutor and execute the investigation measures assigned to them." Hence, the Commission proposal did not include a reference to national law. The Member States subsequently intervened during the negotiations in the Council, and this led to the previously cited Art. 28(1) of the current EPPO Regulation, namely the deletion of "shall lead the investigation."⁸

As a consequence, in EPPO cases that will be conducted in Belgium, the EPPO may not be the day-to-day leader in the judicial investigation phase, but the Belgian delegated prosecutors will still be able to influence the work of the Belgian investigative judge and be able to give orders, often after the intervention and decisions of the supervising European Prosecutor and the Permanent Chamber. Moreover, every criminal investigation and prosecution begins and ends with actions by the EPPO.

1. In French: respectively "*l'information*" and "*l'instruction*".⁴

2. France: Loi n° 2020-1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée; Luxemburg: Projets de loi en cours d'examen à la Chambre des Députés (7759/7760).⁵

3. La loi du 17 février 2021 portant des dispositions diverses en matière de justice, *Doc.parl.*, Chambre, 2020-2021, n° 55-1696, *Moniteur belge* 24 février 2021.⁶

4. A Commission for the reform of criminal procedural law was appointed by the former Belgian Minister of Justice Koen Geens. The Commission submitted via the Minister a proposal for a new Code of Criminal Procedure. The redefinition of the role of the investigative judge in the Code was criticised both in practice and in Parliament. The proposal for a new Code is still pending in Parliament: Proposition de loi contenant le Code de procédure pénale, *Doc.parl.*, Chambre, 2020-2021, n° 55-1239/001.⁷

5. In its judgment of 21 December 2017 (no. 148/2017), the Belgian Constitutional Court annulled the law that allowed the public prosecutor to ask the investigative judge to authorise a home search without the latter being obliged to lead the investigation (the so-called "*mini-instruction*"/mini-investigation). The Constitutional Court argued that allowing a search by means of such a mini-investigation (judicial authorisation), without additional safeguards to protect the defense, constitutes an infringement of the right to private life and of the inviolability of the home. The Court ruled that a full-fledged judicial investigation under the leadership of the investigative judge is required.⁸

6. For this analysis, see also F. Verbruggen, V. Franssen, A.-L. Claes, A. Werding, *Implementatie van het Europees Openbaar Ministerie in de Belgische rechtsorde/Mise en oeuvre du Parquet européen en droit belge*, 2019-08, pp. 77-86.⁹

7. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17 July 2017, COM(2013) 534 final.¹⁰

8. Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Draft Regulation, 31 January 2017, Council doc. 5766/17, Art. 23(1), p. 67.¹¹

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