The EPPO Faces its First Important Test: A Brief Analysis of the Request for a Preliminary Ruling in G. K. and Others

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ABSTRACT

The article analyses the first question referred to the Court of Justice of the European Union for a preliminary ruling in a case concerning the European Public Prosecutor's Office (EPPO). It involves the interpretation of a key provision regarding the investigations of this new office, i.e. Art. 31 of Council Regulation EU 2017/1939. This provision governs investigative measures that need to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor. In the case at issue, the Oberlandesgericht Wien, Austria is seeking clarification as to the extent of judicial review if it comes to cross-border investigations within this regime. The author argues that the case raises a number of key issues for the functioning of the EPPO regarding its structure and operation, not to mention the EPPO's relevance in the creation of a common area of justice in the European Union.

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I. Facts of the Case and Reference for a Preliminary Ruling

A little more than a year after the start of operation of the European Public Prosecutor's Office (EPPO), a number of important elements of its operational activities and important legal issues that determine its operation are beginning to emerge.[1] One of the most interesting, but also most critical, issues of EPPO investigations, as was realised even before it started operating, is certainly that of transnational investigations, which are regulated by Art. 31 of Regulation 2017/1939 (the "EPPO Regulation"). Events are bearing this out, and now we have the first request for a preliminary ruling before the Court of Justice of the European Union (CJEU) precisely on the interpretation of this provision. The Court will have to interpret the validity of procedural acts of the EPPO in accordance with Art. 42(2)(a) of the EPPO Regulation – a fundamental provision in the European legislation for the functioning of the EPPO. What is the case about?[2]

A European Delegated Prosecutor (EDP) in Germany investigated a case on the circumvention of customs provisions and needed to undertake searches in Austria. According to the documents relating to the reference for a preliminary ruling, the search warrant was approved by the competent German judge at the request of the public prosecutor, as required under German law of criminal procedure. Having obtained the judge's approval for the search warrant in accordance with German law and as provided for in the EPPO Regulation, the German EDP activated the mechanism set out in Art. 31 of said Regulation.

For transnational investigations, the EPPO Regulation introduced a system that goes beyond the traditional mechanisms of judicial cooperation: the EPPO does not use the European Investigation Order to obtain evidence in the territory of another State; instead it is sufficient to involve the EDP of the State where the investigation is to be carried out (the assisting EDP) and to provide him/her with the electronic file for purposes of the execution of the investigations, once the measure has been ordered under the national law of the State in whose territory the EDP conducting the investigation operates (here: Germany). Therefore, in the case at issue, the EDP located in Austria was contacted by the German counterpart. According to Austrian law, a search ordered by the prosecutor must be approved by the competent judge. However, although the search warrant had already been authorised by the competent judge in the State of the EDP conducting the main investigation in Germany, the Austrian EDP also proceeded in accordance with the domestic law of his country and asked the Austrian judge to approve the search warrant, who did so. The persons under investigation appealed against the court approvals of the search warrants, putting forth above all a lack of serious evidence that the offence had been committed; this is a question of substance and not a question strictly related to the execution of the search warrant. The appeals court, the *Oberlandesgericht Wien*, Austria, had doubts as to which extent Austrian courts can verify the search measure under their national law and initiated a reference for a preliminary ruling to the CJEU (the case is registered as C-281/22).[3] The Austrian court in essence argued as follows:

> The EPPO is one single office and a measure to be executed in a State other than that of the EDP handling the case must normally be executed in accordance with the law of the State where the assisting EDP operates; if the latter law provides, then, for the measure to be examined by a judge, either for the purposes of prior authorisation or for subsequent approval, the judge of this State must be in a position to examine the entire file.

The referring court called to mind, however, that this would result in an even more complicated system than the one in use today in non-EPPO transnational investigations in which the European Investigation Order (EIO) comes to the fore: under the so-called EIO mechanism, the judge of the State of the execution does not

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have access to the entire file but examines only the certificate sent by the judicial authority requesting the measure, as the system is based on the principle of mutual recognition.

Must the consequence in transnational EPPO investigations therefore also be drawn that, like under the EIO mechanism, the examination of the judge of the State of the assisting EDP, who has been requested to carry out the measure, is limited to a formal control or that his/her control power does not extend to a complete examination of the previous criminal investigative proceedings? The referring court in Vienna questioned, however, whether this is in line with the EPPO Regulation, in which Art. 31(6) expressly stipulates that systems based on mutual recognition, such as the EIO mechanism, are merely subsidiary in EPPO investigations and would thus seem to be intended to mark a difference between the two systems of transnational assistance. As a result, the *Oberlandesgericht Wien* primarily posed the following question to the CJEU:[4]

> Must EU law, in particular the first subparagraph of Article 31(3) and Article 32 of Council Regulation (EU) 2017/1939 of 12 October 2017 concerning the implementation of enhanced cooperation with a view to the establishment of a European Public Prosecutor's Office (EPPO), be interpreted as meaning that, in the case of cross-border investigations in the event that a court must approve a measure to be carried out in the Member State of the supporting European Delegated Prosecutor, all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality, must be examined?

II. Reflections on the Case

When analysing the arguments put forward by the Viennese court, my first and immediate reflection was on the effects that would descend if the Viennese court's question were to be answered in the affirmative. Indeed, the EPPO Regulation established a rule to mark a difference between the EPPO system and the mechanism of the EIO, but this may only be meant in the sense of facilitating transnational EPPO investigations. Another interpretation would end up creating a much more cumbersome framework within which the new office would need to operate.

Beyond this consideration, the case enables us to reflect on several issues underlying the EPPO system, which should be briefly recapitulated: The underlying principle is that the EPPO is defined as a "single office", but it does not operate within a "single legal system", that is to say, a unitary legal and judicial system.[5] The question of the law applicable to the EPPO has already been the subject of numerous legal studies, and the EPPO Regulation obviously does not provide for a single European "rulebook" that the EPPO can use in its investigations.[6] On the contrary, the EPPO Regulation does not even achieve a high level of harmonisation of legislation on the investigative rules, for instance on the definitions of the investigative measures available in the EPPO investigation. Instead, it establishes the principle that each EDP applies the national law of the State in which he or she operates. Indeed, not all EPPO investigations are cross-border cases. Many of them are purely national investigations in which no problem arises as to which law is applicable: the applicable law is that of the State where the EDP conducting the investigation operates.

However, the EPPO framework must specifically deal with organizing transnational investigations, the system provided for in Art. 31 of the EPPO Regulation. Art. 31 does not solve the classic and major problem of applicable law in cases of judicial cooperation, namely the relationship between the *lex fori* (in EPPO cases: that of the handling EDP) and the *lex loci* (in EPPO cases: that of the assisting EDP).

This issue has been debated for a long time, and the EPPO Regulation seeks to resolve the question by striking a balance between the two applicable laws: in essence, the *lex loci* applies, but the *lex fori* may apply where it does not conflict with fundamental principles of the law of the State where the handling EDP

operates. In addition, the rule has been established that the execution of a measure in accordance with the *lex loci*, even if it is different from the *lex fori*, cannot justify evidence being inadmissible in a trial that will take place in the State of the *lex fori* (Art. 37 of the EPPO Regulation).

On the other side of the coin, the EPPO Regulation provides that the standard for the protection of the rights of the defence should be at the highest level, which is underpinned by the rule requiring court authorisations for investigative acts.[7] According to this principle (rights of the defence), the highest standard of judicial protection with regard to the authorisation or approval of the judge should always apply, so that, whenever the law of the State of the handling EDP or the law of the State of the assisting EDP requires a judicial authorisation for carrying out a measure, that must be requested and obtained, even though it is not necessary in the State where the trial will take place.

In this context, we should recall the wording of Art. 31(3) of the EPPO Regulation:

> If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State. […]However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.

In sum, this regulation may lead to the following situations:

- If the law of the requesting (handling) EDP's State requires court authorisation, that EDP must obtain it. The reason for this, as will be seen below, is that the conditions for the measure and the manner in which it is to be adopted are governed by the law of the State where the prosecutor conducting the investigation operates. In this situation, this law applies to the measure (*lex fori*);
- If authorisation is required under the law of the State of the EDP requested to assist with the execution of the investigative measure (lex loci), that EDP will have to obtain such authorisation in his or her own State. The first "requesting" EDP will be unable to complain that the rights of the defence have been compromised, since the certainty is given that no such risk has been involved;
- If authorisation is required in both States (a situation that the EPPO Regulation does not expressly foresee), both EDPs (the handling and the assisting EDP) will have to obtain authorisation, because each proceeding is conducted in accordance with the law of the State in which the prosecutor operates. This will definitely not impair the rights of the defence but rather, if anything, enhance them, and the person under investigation will surely not complain about this approach.

III. Procedural Challenges

On closer inspection, however, the issue addressed by the Viennese court does not so much concern the problem of the judge's authorisation of the measure but an equally relevant and related issue, namely challenges to the measure.[8] The question arises: before which court can the alleged lack of proof or evidence of the offence in relation to the ongoing EPPO criminal investigations be invoked – only before the court of the State of the EDP conducting the investigation, where the measure was ordered (State of the handling EDP), or also before the court of the State of the EDP requested for assistance, where the measure had to be executed (State of the assisting EDP)?

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As a general rule, Art. 42(1) of the EPPO Regulation (only) provides that procedural acts of the EPPO may be challenged before the national courts, naturally in accordance with applicable law. As a result, no court at the European level is competent to review procedural acts of the EPPO, except in the specific case of decisions of the EPPO dismissing a case, where the CJEU has jurisdiction to review the decision pursuant to Art. 42(3) of the EPPO Regulation.

If one again takes recourse to the EIO, Art. 14(2) of Directive 2014/41/EU expressly provides that "the substantive review for issuing an EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State." For its part, Art. 31(2) of the EPPO Regulation provides that "the justification and adoption of such measures shall be governed by the law of the Member State of the handling European Delegated Prosecutor." On the one hand, Art. 31(2) can be interpreted as not solely governing the division between the *lex loci* and the *lex fori* in the transnational execution of an investigative measure; the argument can be put forth that the provision precisely concerns the criminal investigative proceedings, as a consequence of which the measure must be challenged in the State where the proceedings are being conducted.

On the other hand, we should bear in mind that the EPPO is a single office, meaning that the handling EDP and the assisting EPD are not judicial officers of different States but belong to the same office. Moreover, each of them has easy access to the electronic file and, therefore, theoretically, it should not be difficult for the EDPs to make the file available to the respective judges. This would be an argument in favour of the possibility to also challenge the investigative measure in the Member State in which the measure is executed. However, if the judge of the executing State also has access to the entire file in order to assess the merits of the appeal on the grounds for the measure, the negative effect would of course be that two judges from different States would assess whether serious evidence existed for an offence; thus, risks of conflicting decisions could occur and certainly complicate the course of the investigation.

This brief analysis of the first reference for a preliminary ruling to the CJEU on a case involving the interpretation of the EPPO Regulation demonstrates that the decision of the CJEU is being expected with great interest. Considering the role that the Court has often played in the process of shaping European criminal law and a common area of justice, including criminal justice, the present case certainly affords a further fundamental opportunity in this regard.

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1. Cf. L. Salazar, "Habemus EPPO! La lunga marcia della Procura Europea," (2017) 3 *Arch. Pen.*; J.A.E Vervaele, "The European Public Prosecutor's Office (EPPO): Introductory Remarks", in W. Geelhoed, L. H. Erkelens & A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, Springer, 2018; G. De Amicis, "Competenza" e funzionamento della procura europea nella cognizione del Giudice*", La legislazione penale*, 31.1.2022; R. Sicurella, "Spazio europeo e giustizia penale," (2018) *DirPenProc*; G. Guagliardi, "Procura Europea. Siamo davvero pronti in assenza di un codice di procedura penale europeo? Una nuova sfida per l'avvocatura e la magistratura", *Giurisprudenza Penale Web*, 2021, 2.↩
2. A summary of the request for the preliminary ruling is 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 27 January 2023.↩
3. The questions referred to have been published here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=264514&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13684> accessed 27 January 2023.↩
4. The analysis of this question shall be in the focus of this article. In total, the *Oberlandesgericht Wien* formulated three questions. Question (2) is as follows: "Should the examination take into account whether the admissibility of the measure has already been examined by a court in the Member State of the European Delegated Prosecutor handling the case on the basis of the law of that Member State?" Question (3) is: "In the event that the first question is answered in the negative and/or the second question in the affirmative, to what extent must a judicial review take place in the Member State of the supporting European Delegated Prosecutor?"↩
5. H.H. Herrnfeld, in: Herrnfeld, Brodowski & Burchard (eds.), *European Public Prosecutor's Office*, *Article-by-Article Commentary*, London, Oxford, 2020 (comment on Art. 31 also highlights this aspect); see also: L. Bachmaier Winter, "Cross-Border Investigation under the EPPO Proceedings and the Quest for Balance", in L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The Challenges Ahead*, Springer, 2018.↩
6. For an overview, also with respect to the proposal for the EPPO regulation, see A. Venegoni, "Considerazioni sulla normativa applicabile alle misure investigative intraprese dal pubblico ministero europeo nella proposta di regolamento COM(2013)534", *Dir. Pen. cont.*, 20.11.2013.↩
7. In addition, the EPPO must also comply with the principle of proportionality: F.S. Cassibba, "Misure investigative del pubblico ministero europeo e principio di proporzionalità", *Sistema Penale*, 22.9.2022.↩
8. On this point, see Z. Durdevic, "Controllo giudiziario, ammissibilità delle prove e dei diritti procedurali nei procedimenti dinanzi all'EPPO", *European-rights eu* <http://www.europeanrights.eu/olaf/pdf_ita/4-Controllo%20giudiziario-zd.pdf> accessed 27 January 2023.↩

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Author statement

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