Yes Indeed, Efficiency Prevails

A Commentary on the Remarkable Judgment of the European Court of Justice in Case C-281/22 G.K. and Others (Parquet européen)

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ABSTRACT

The first preliminary ruling request concerning the EPPO Regulation prompted the European Court of Justice to interpret the provisions of Article 31 regarding cross-border investigations. In its judgment of 21 December 2023, the Court largely, but not fully, followed the considerations and the proposed response offered by Advocate General Tamara Ćapeta. The judgment is remarkable in the sense that it is largely inspired by considerations concerning the objectives of the Regulation – in spite of the fact that the interpretation given by the Court is difficult to reconcile with the wording of the interpreted provisions and its legislative history. Article 31 certainly has its deficiencies and could have been worded more clearly. Indeed, the Court's judgment may help to ensure efficient cross-border investigations by the EPPO. Nevertheless, the EU legislator is now called upon to review and amend the provisions of the EPPO Regulation to clarify its intentions. Furthermore, the judgment contains a remarkable statement on the obligations of the Member States to provide for mechanisms of prior judicial review of investigation measures that involve serious interference with the rights of the person concerned.

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I. Introduction

Following the Opinion delivered by Advocate General *Tamara Ćapeta* in case C-281/22, G.K. and Others (*Parquet européen*) on 22 June 2023,[1] the judgment by the Grand Chamber of the European Court of Justice (ECJ) from 21 December 2023[2] came as no surprise: the Court's interpretation of Art. 31 of the EPPO Regulation,[3] which concerns cross-border investigations within the combined territories of the Member States participating in the establishment of the EPPO, is largely focused on the objectives of the legislation. It puts the aim of the legislator, to efficiently combat crimes against the financial interests of the Union (expressed *inter alia* in recitals 14 and 20 of the EPPO Regulation), at the forefront and concludes that, therefore, a literal interpretation of Art. 31(3), which had been advocated by the Austrian and the German governments in this case, could not be followed.[4]

Whether the interpretation now given to these provisions by the ECJ are truly reconcilable with their wording and contextual relationship is debatable (cf. IV.1 below). In substance, the decision by the Court may be welcomed to a large extent; however, the decision leaves certain questions unanswered and triggers new questions, which the ECJ may have to answer in future requests for preliminary rulings (cf. IV.2 below) – unless the Council steps in and amends the provisions of Art. 31 of the EPPO Regulation in order to better clarify its intentions and provide answers to the unresolved questions. Before providing a thorough analysis of the judgment and its implications in section IV. of this article, the following will first briefly recapitulate the questions put before the ECJ (II.) and, second, summarise the considerations of and replies given by the ECJ (III.).

II. The Questions before the Court of Justice

The author summarized the underlying facts and the relevant legal framework in a previous contribution to this journal[5] and refers the reader to that contribution for details. The present case essentially concerns the question of whether, in case of cross-border investigations, a judicial authorisation for the ordering of an investigation measure must, where so required by national law, be obtained by the European Delegated Prosecutor (EDP) handling the investigations in Member State A (the so-called "handling EDP"; in the present case an EDP in Germany) from a judge/court in his/her own Member State prior to "assigning" the measure to the so-called "assisting EDP" in Member State B, in which the investigation measure is to be carried out (in the present case an EDP in Austria). Or whether this authorisation is to be obtained by the assisting EDP from a judge/court in that Member State B. The first subparagraph of Art. 31(3) provides as follows:

> [I]f 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.

Therefore, the first question posed in this case by the Higher Regional Court of Vienna was whether this provision must be interpreted as meaning that the court in the assisting EDP's Member State must examine "all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality." The second question by the referring court was whether the examination to be undertaken by the court in the assisting EDP's Member States should take into account whether or not the admissibility of the measure had already been examined by a court in the Member State of the handling EDP (which had not been the case in the investigation proceedings in Germany underlying the preliminary ruling request). And, as a third question, the Higher Regional Court of Vienna queried the following: "[I]n the event that the first question is answered

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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 assisting European Delegated Prosecutor".

III. The Considerations and Replies by the Court of Justice

The ECJ recalls, that "according to settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part" (paragraph 46). In the course of analysing the wording of Art. 31 and the related Art. 32 of the EPPO Regulation (which concerns the enforcement of the measures assigned in accordance with Art. 31), the ECJ notes that, in view of the judicial authorisation to be obtained in the assisting EDP's Member State (first subparagraph of Art. 31(3)), these provisions do not "specify the extent of the review that may be carried out for the purposes of that judicial authorisation by the competent authorities of that Member State" (paragraph 53). The Court also observes that in accordance with Art. 31(1) and (2) and Art. 32

> "[„„] the handling European Delegated Prosecutor is to decide on the adoption of an assigned investigation measure and that that adoption, as well as the justification of that measure, are to be governed by the law of the Member State of the handling European Delegated Prosecutor, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting European Delegated Prosecutor" (paragraph 54).

In respect of the context of Arts. 31 and 32, the Court notes that "the distinction drawn by those articles between the justification and adoption of an assigned investigation measure, on the one hand, and its enforcement, on the other, reflects the logic underlying the system of judicial cooperation in criminal matters between the Member States, which is based on the principles of mutual trust and mutual recognition" (paragraph 55). This is followed by a reflection on the principle of mutual recognition (paragraphs 57 to 63), concluding that, in accordance with that principle, "the executing authority is not supposed to review compliance by the issuing authority with the conditions for issuing the judicial decision which it must execute" (paragraph 64).

The Court then looks at the objectives of the EPPO Regulation, taking into account its recitals 12, 14, 20, and 60 and draws the conclusion that the legislator had "intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition" (paragraph 67). In this context, the ECJ excludes the possibility of interpreting Art. 31(3) allowing the judge/court in the assisting EDP's Member State to examine "elements relating to the justification and adoption of the assigned investigation measure concerned" as this "would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation" (paragraph 68).

Considering the distinction between the responsibilities of the handling EDP and those of the assisting EDP (paragraph 71), the Court concludes that Art. 31(2) must be interpreted as requiring that any prior judicial review of the conditions relating to justification and adoption must be obtained from a judge/court in the handling EDP's Member State when "adopting" the measure (paragraph 73), whereas "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" (paragraph 72).

The "efficiency" of the cross-border investigations by the EPPO was, however, not the only concern for the ECJ. Considering the proper division of responsibilities identified by the Court, it also stipulates the following:

> "[I]t is for the Member State of the handling European Delegated Prosecutor to provide for a prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure, taking into account the requirements stemming from the Charter, compliance with which is binding on the Member States in the implementation of that regulation pursuant to Article 51(1) of the Charter" (paragraph 73).

Furthermore, the Court notes that this applies to "measures which, like those at issue in the main proceedings, constitute interferences with the right of every person to respect for his or her private and family life, home and communications, guaranteed by Article 7 of the Charter, and with the right to property enshrined in Article 17 of the Charter" (paragraph 74). The Court then specifically refers to measures described in Art. 30(1)(a) and (d) of the EPPO Regulation and concludes that "it is for the Member State of the handling European Delegated Prosecutor 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." (paragraph 75).

The Court recalls that "the EPPO is to ensure that its activities respect the fundamental rights" (paragraph 76). And it points out that, while "the authorities, in particular the judicial authorities, of the Member State of the assisting European Delegated Prosecutor are not empowered to examine the justification and adoption of an assigned investigation measure", Art. 31(5) provides for a mechanism under which the assisting EDP shall, if he/she deems that an alternative but less intrusive measure would achieve the same results as the assigned investigation measure at issue, consult with the handling EDP and that, in accordance with Art. 31(6), if the matter cannot be resolved within the deadline of seven working days, it is to be referred to the Permanent Chamber at the EPPO (paragraph 77).

In conclusion, the Court then replies to the three questions of the preliminary ruling as follows:

> "[…] Articles 31 and 32 of Regulation 2017/1939 must be interpreted as meaning that the review conducted in the Member State of the assisting European Delegated Prosecutor, where an assigned investigation measure requires judicial authorisation in accordance with the law of that Member State, may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure; the latter matters must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter" (paragraph 78).

IV. Analysis

1. Observations on the Court's considerations and conclusions

Art. 31 of the EPPO Regulation clearly has its deficiencies, and it is certainly one of the weaker points of the Regulation.[6] Indeed, the Council may have failed to sufficiently clarify its intentions when finalizing the wording of its provisions. And perhaps, at that time, individual Member State delegations even had different views on what is intended by Art. 31 and how the final wording of the text is to be interpreted. However, the legislative history as well as the wording and context of Art. 31 do not give reason to assume that the interpretation now found by the ECJ is in line with what the Council intended to regulate in Art. 31 in respect of the judicial authorisation of investigation measures.

a) Why didn't the Council better clarify its intentions?

Had the EU legislator intended to stipulate in Art. 31 what the ECJ now concludes to be the correct interpretation of its provisions, one would expect the Council to have clarified this in the wording of paragraphs 2 and 3 of Art. 31, especially since one of its objectives was that "it should be clearly specified, in which Member State the authorisation should be obtained" (cf. recital 72 of the Regulation, second sentence). The legislator could easily have added a "clarification" to the second sentence of paragraph 2, namely that the "justification and adoption of the measure" shall, where required under the law of the handling EDP's Member State, also include a judicial authorisation (or "prior judicial review") by a judge/court in that Member State. And the Council could have easily worded subparagraph 1 of Art. 31(3) in such a way that it is clear from the text that the judge/court in the assisting EDP's Member State may only undertake any necessary judicial authorisation of the enforcement of the assigned measure. As a matter of fact, an earlier version of (then) Art. 26a in a Presidency document submitted to the JHA Council in March 2015,[7] had already included a provision stipulating that judicial authorisation required under the law of the handling EDP's Member State was to be obtained by the handling EDP in that Member State. That provision, however, was subsequently deleted from the text of what is now Art. 31. This deletion was not an oversight on the part of the Council but closely related to the final solution found in the Council Working Group for the wording of Art. 31(3).

Why does Art. 31 paragraphs 2 and 3 now read as it does? Because the Council did not have the intention to provide for a distinction of responsibilities between a court/judge in the handling EDP's Member State and another court/judge in the assisting EDP's Member State as now underlying the interpretation given by the ECJ. Instead, at least a majority of Member States strongly advocated the idea that "in any case there should be only one authorisation" (cf. recital 72 sentence 2). For the Council majority, that was the primary consideration to ensure that cross-border investigation measures requiring judicial authorisation will be more efficient than in the case of the procedures under the Directive regarding the European Investigation Order (EIO).[8] The interpretation by the ECJ now means that, in the situations described in the first subparagraph of Art. 31(3), thus if judicial authorisation is required under the law of the assisting EDP's Member State, the EDPs will have to obtain two judicial authorisations: first from a judge/court in the handling EDP's Member State on justification of the measure and, second, from a judge/court in the assisting EDP's Member State on "matters concerning the enforcement" of the measure.

b) Adopting the investigation measure and obtaining judicial authorisation

In this context, it should be noted that the phrase "judicial authorisation" used in Art. 31(3) had already been used by the Commission in its proposal for a regulation on the establishment of the EPPO.[9] In particular, Art. 26(4) and (5) of the Commission proposal stipulated that any judicial authorisation shall be undertaken by the competent judicial authorities of the Member State in which they are to be carried out. It is interesting to note that Art. 31(3) – introduced only in the course of negotiations as part of the new Art. 26a – now uses the same terminology ("judicial authorisation"). And it is even more interesting to note that the first subparagraph of Art. 31(3), indeed, does provide for the same rule as in Art. 26(4) and (5) of the Commission proposal: the "judicial authorisation" shall be obtained by the assisting EDP "in accordance with the law of that Member State."

In its judgment, the ECJ instead uses the term "prior judicial review", which – according to the ECJ – is to be obtained from a judge/court in the handling EDP's Member State when adopting the measure in accordance with Art. 31(2).[10] While the judgment is not quite clear in this respect, presumably the terminology used by the ECJ is also intended to apply to different legal concepts used in criminal procedure law of the Member States, thus including not only procedures where a judge/court is requested to give prior approval of an investigation measure ordered by a prosecutor but also applying to procedures where the judge or court takes a decision to order an investigation measures based on a request received from the prosecutor. The

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wording used by the Council in Art. 31(3) was indeed chosen to cover all of these possible national procedures of obtaining judicial authorisation.[11]

In this context, it is worth noting that Art. 31 does not use the terminology of the EIO Directive, which provides that when the authorities of one Member State issue an "order", the authorities of the other Member State are expected to "recognize" and enforce the order. By contrast, Art. 31(2) deliberately refers to the "adoption" and "assignment" of measures. In view of the "single office" concept, the Council (or at least a majority of Member State delegations) did not wish to merely set up a system of "more efficient mutual recognition" but rather something "more advanced" than mutual recognition. The "adoption" of the measure by the handling EDP was to be undertaken in accordance with the law of his/her own Member State. The handling EDP was to observe the law of his/her own country when deciding on whether or not to assign a measure to the assisting EDP. And, depending on the applicable national law for obtaining any necessary judicial authorisation (Art. 31(3)), the adoption by the handling EDP may mean that the EDP decides on a measure that needs judicial approval issued by a judge/court. Or, if national law so provides, the handling EDP may merely take the decision to request that the competent judge/court order the required measure.[12]

c) The extent of review by the judge/court in the assisting EDP's Member State

As pointed out above, the Court of Justice observes that, in view of the judicial authorisation to be obtained in the assisting EDP's Member State, the EPPO Regulation does not "specify the extent of the review that may be carried out for the purposes of that judicial authorisation by the competent authorities of that Member State".[13] Well, the first subparagraph of Art. 31(3) does state that the assisting EDP "shall obtain that authorisation in accordance with the law of that Member State." Since the Council wanted to introduce a system that is more advanced than mutual recognition, Art. 31 does not contain any "grounds for refusal" for the assisting EDP such as those in the EIO Directive. Instead, Art. 31(5) provides that the assisting EDP may have to voice concerns and consult with the handling EDP in order to reach consensus; and if they cannot resolve the matter, a final decision will be taken by the competent Permanent Chamber at the EPPO in accordance with Art. 31(7). This mechanism, however, applies only to concerns raised by the assisting EDP. Where judicial authorisation is required under the law of the assisting EDP's Member State, Art. 31(3) subparagraph 1 provides that the court applies its national law when deciding whether judicial authorisation is to be granted or not. And since the Council did not consider it appropriate to let the EPPO's Permanent Chamber have the final word, subparagraph 2 of Art. 31(3) simply provides that "[I]f judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment". Here again, the Council wished to avoid the impression that the judge/court in the assisting EDP's Member State was expected to "recognize" the assigned measure or refuse recognition where so required in line with Art. 11 EIO Directive. Instead, the handling EDP himself/herself – once all legal remedies have been exhausted[14] – is to draw the necessary conclusions based on the lack of a possibility to obtain the required judicial authorisation from a judge/court in the assisting EDP's Member State.[15] In combination with the handling EDP's application of the national law of his/her own Member State when adopting the measure in accordance with Art. 31(2), this system essentially would mean that the measure needs to be in compliance with the laws of both Member States, thereby potentially ensuring that the higher level of protection prevails.[16]

As an alternative to the present text of Art. 31, the Council, on the basis of Presidency document 11045/15, also had looked at the possibility of specifying in what is now Art. 31(2) that prior judicial authorisation was to be obtained by the handling EDP from a judge/court of that Member State before assigning the measure and that the law of the handling EDP's Member State shall determine "the conditions and applicable procedures for ordering or requesting such cross-border measures and govern their adoption and justification".[17] This alternative proposal, discussed in the Council Working Group in September 2015, also provided that,

"where required under the law of his Member State", the assisting EDP "shall obtain the necessary judicial authorisation or court order"; however, "[T]he court in the Member State of the assisting European Delegated Prosecutor … shall not review the grounds, justifications, and substantive reasons for the ordered measure."[18] In essence, that solution closely resembles what the Court of Justice has now determined to be the proper interpretation of paragraphs 2 and 3 of Art. 31. At the time of negotiations, however, the Council delegations did not approve the concept set out as "Option 2" in that Presidency document. Instead, as a result of that discussion, Art. 31 was further developed along the lines of "Option 1" of that same document, which provided that the adoption of the measure by the handling EDP and its justification were to be governed by the law of the handling EDP (Art. 26(2) of that proposal), whereas the judicial authorisation "can only be requested in the Member State of the assisting European Delegated Prosecutor"; and if judicial authorisation is refused, the handling EDP "shall withdraw the assignment" (paragraph 4 of that proposal).

d) The efficiency considerations as arguments against a literal interpretation

In the oral hearing on 27 February 2023, the Austrian and German governments, considering also the legislative history of this provision, advocated a literal interpretation of the text of Art. 31(3), which would suggest that, if judicial authorisation is required under the law of the assisting EDP's Member State, the (only) judicial authorisation was to be obtained in that Member State and therefore the judge/court of that Member State would potentially be charged with a full review of the conditions (under the law of that Member State) for ordering the measure.

In respect of such an interpretation of the Regulation, the ECJ considers that this "would lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation".[19] In this context, the ECJ first observes that, if the judge/court in the assisting EDP's Member State were also to examine the elements relating to the justification and adoption of the assigned measure, the judge/court "would, in particular, have to examine in detail the entire case file, which would have to be forwarded to it by the authorities of the Member State of the handling European Delegated Prosecutor and, where relevant, translated."[20] It may be a correct assumption that this would render the procedure less efficient than the procedures provided for in the EIO Directive.[21] This was actually one reason why, in the course of negotiations, Austria and Germany provided a joint alternative proposal for the text of Art. 31 (Art. 26a at the time):[22] it stipulated that judicial authorisation of the adoption of the measure would have to be obtained from a judge/court in the handling EDP's Member State. The proposal also foresaw that an additional judicial authorisation for the recognition of the measure may have to be obtained in the assisting EDP's Member State; the judge/court here would, however, only have recourse to a limited list of grounds for refusal. This Austrian/German proposal had been modelled on the concept of the EIO Directive – albeit with fewer grounds for refusal. But that proposal did not meet with consensus in the Council Working Group. The majority of delegations did not favour a system requiring judicial authorisations to be obtained in both Member States. They did not want to have any requirements for formal recognition and grounds for refusal by the judicial authorities of the assisting EDP's Member State. And therefore Art. 31 was worded the way it is, which is why Austria and Germany in the oral hearing insisted on a literal interpretation of Art. 31 despite the fact that they would have preferred if the Council had indeed agreed on a model in which prior judicial authorisation would have to be obtained from a judge/court in the handling EDP's Member State.

The ECJ also notes that it would not be appropriate to expect the judge/court in the assisting EDP's Member State to give judicial authorisation to the assigned measures on the basis of the law of the handling EDP's Member State.[23] Indeed, that would prove difficult to do. But that was also not what the Council intended when formulating the text of Art. 31(3): in the situations referred to in subparagraph 1, the judge/court in the assisting EDP's Member State would rather be called upon to give judicial authorisation on the basis of the laws of and under the conditions provided for such an investigation measure in that Member State (see the

text of Art. 31(3), subparagraph 1: "obtain that authorization in accordance with the law of that Member State"). Only in the situation addressed in subparagraph 3 – i.e., where judicial authorisation is required only under the law of the handling EDP's Member State – is judicial authorisation to be obtained from a judge/court of and in accordance with/under the conditions provided for in the laws of that Member State.

e) Why did the original Commission proposal for the Regulation provide for such a less efficient system of cross-border investigation?

A requirement for the EPPO to obtain a necessary prior judicial review of the grounds for ordering the measure from a judge/court in the assisting EDP's Member State would be more burdensome for the EPPO and thus make cross-border investigations less efficient than under the procedures of the EIO Directive. This was rightly observed by the ECJ, following the arguments put forward by the Commission and the EPPO in the oral hearing.[24]

So why did the Commission provide for such a less efficient system in its initial proposal for the EPPO Regulation,[25] according to which judicial authorisation of investigation measures shall be undertaken "by the competent judicial authority of the Member State where they are to be carried out" (cf. Art. 26(4) and (5) of the original Commission proposal)?

When discussing the legislative history during the oral hearing, the Commission explained that the proposal for the EPPO Regulation had been drafted *before* the EIO Directive came into force[26] and that this "solution proved to function well in that mutual recognition instrument. The Commission, therefore, found it fortunate that the legislative institutions did not accept its original proposal that judicial authorisation ought to depend on the law of the Member State of the assisting EDP only, and instead have amended that proposal into what is today Article 31 of the EPPO Regulation."[27] So, perhaps, the Commission had actually been a secret admirer of the alternative proposal for a new Art. 26a, presented by Austria and Germany in the course of negotiations in April 2015 (IV.1.d) above), which had been based on the principles of the EIO Directive but did not find consensus in the Council Working Group.

Be that as it may, if the Council had simply approved the wording of Art. 26 as originally proposed by the Commission, the judge/court in the assisting EDP's Member State would indeed potentially have had to examine the entire case file including, where necessary, a translation thereof. The reason why the Commission originally proposed such a system presumably lies in the fact that the proposal foresaw that the European Public Prosecutor (in the terminology of the Commission proposal this was to be the Head of the EPPO (Art. 6(2) of the proposal, now the European Chief Prosecutor) can undertake investigations directly (Art. 18(6)), which the Commission proposal considered to be a particularly efficient avenue in case of investigations involving several Member States.[28] The financial calculations accompanying the Commission proposal apparently assumed that almost half of all investigations would be undertaken by the European Public Prosecutor "directly" – presumably with the help of investigators and prosecutors working in the Central Office. While the Commission proposal left unclear which national law, in case the investigations are conducted by the Central Office, would apply to the investigation proceedings as such,[29] it is not surprising that the Commission proposal provided in Art. 26(5) that judicial authorisation of investigation measures shall be obtained from a judge/court "of the Member State where the investigation measure is to be carried out." In such cases, there would have been no "handling EDP" to assign a cross-border measure after having first obtained the necessary judicial authorisation in his/her own Member State. Hence, the only possible solution was to have judicial authorisation obtained from a judge/court in the Member State in which the investigation measure was to be carried out.

Nevertheless, in terms of efficiency and in view of the "single office" concept (Art. 8(1)), one could have been inclined to consider the Commission proposal providing for investigations to be conducted "directly" from

the EPPO's Central Office to be the preferable option – in spite of the fact that this would have meant that any necessary judicial authorisation would have to be obtained from a judge/court in the Member State in which the measure is to be carried out.

But the EPPO Regulation now does provide that investigations are to be conducted by an EDP of a specific Member State (aside from the exceptional possibilities provided for in Art. 28(4)) and that – as a matter of principle – it is the law of that Member State that may find subsidiary application (Art. 5(3)). Against this background, it would indeed have been preferable if the Council had clearly stipulated in Art. 31(2) that the handling EDP shall obtain any necessary judicial authorisation from a judge/court in his/her own Member State.

2. Questions still open

a) Scope of judicial review by the judge or court in the assisting EDP's Member State?

In its third question (see supra II.), the Higher Court of Vienna asked the Court of Justice to clarify "to what extent must a judicial review take place in the Member State of the assisting European Delegated Prosecutor."[30] This question has not been fully answered by the ECJ. In its judgment, the ECJ concluded as follows:[31]

> the review conducted in the Member State of the assisting European Delegated Prosecutor […] may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure.

But what does the ECJ mean by "matters concerning the enforcement"? As outlined above, the judgment draws a parallel to the EU instruments on mutual recognition. In respect of the EIO Directive, the ECJ specifically recalled its judgment in Case C-724/19, pointing out that the EIO Directive is based

> on a division of competences between the issuing judicial authority and the executing judicial authority, in the context of which it is for the issuing judicial authority to review compliance with the substantive conditions necessary for the issuing of an EIO, and that assessment cannot, in accordance with the principle of mutual recognition, subsequently be reviewed by the executing judicial authority[32].

Nevertheless, the EIO Directive does provide for numerous "grounds for non-recognition" (Art. 11 EIO Directive).[33] Are these or similar grounds to be taken into account in case of the EPPO when the judge/court in the assisting EDP's Member States is requested to give judicial authorisation in respect of "matters concerning the enforcement"? The ECJ's judgment in case C-281/22 does not lean in this direction, not even in respect of the limited list of conditions under which the assisting EDP, in accordance with Art. 31(5), can raise concerns about the appropriateness of enforcing the assigned measure. Quite the contrary, even when it comes to the obligation on the part of the EPPO to observe fundamental rights, the ECJ (merely) refers to the internal consultation procedure set out in Art. 31(5) and the final decision to be taken by the EPPO's Permanent Chamber in accordance with Art. 31(7). The Court seems to consider this being a sufficient alternative to the "safeguards for the protection of the fundamental rights" provided for in the EU instruments on mutual recognition, which may exceptionally find application in accordance with Art. 31(6).[34]

In her Opinion, AG *Ćapeta*, was quite clear on this question: in her view, there is no room for (non) recognition, as "[T]he EPPO is a single body, …. the assigned measures indeed need not be recognized, but only implemented."[35]

But would that be a proper solution? Why did the Council not clarify this question in the text of the Regulation, in particular, since during the negotiations it had been proposed to allow the judge/court of the assisting EDP's Member State to refuse authorisation only under the conditions of Art. 31(5), i.e. where the assisting EDP would also be expected to raise concerns? As explained above, the Council did not intend to limit the scope of review by the judge/court in the assisting EDP's Member State. Instead, the first subparagraph of Art. 31(3) merely stipulates that the authorisation is to be obtained in accordance with national law. And the second subparagraph of Art. 31(3) clearly indicates that the judge/court in the assisting EDP's Member State may refuse to give the requested authorisation.

b) On what grounds could the judge or court then refuse to give authorisation?

Be that as it may, the ECJ has now determined that the first subparagraph of Art. 31(3) is to be interpreted differently. But on what grounds can the judge/court in the assisting EDP's Member State then decide to refuse authorisation in accordance with second subparagraph of Art. 31(3)? Only concerning the "mode of execution", as has been suggested by the Commission in the present case?[36] If one really wanted to suggest this interpretation, why then would the Council not have clarified it? And why would a provision on judicial authorisation of modalities of execution be placed in Art. 31(3); the proper place would be Art. 32 concerning the enforcement of assigned measures.

c) Under which circumstances does the first subparagraph of Art. 31(3) apply?

Considering the ECJ's interpretation of the first subparagraph of Art. 31(3), another question may be, under which circumstances this provision is to apply. If the "judicial authorisation" prescribed therein may only relate to "matters concerning the enforcement of the measure"[37], does that mean that this subparagraph also only applies if a judicial authorisation relating to matters concerning the enforcement is required under the law of the assisting EDP's Member State? And what kind of procedures under national law could that apply to? Or is the term "judicial authorisation" used in the first part of the sentence to be interpreted differently than in the second part of the sentence of Art. 31(3), so that judicial authorisation by a judge/court in the assisting EDP's Member State, limited to "matters of enforcement" is to be obtained whenever the criminal procedure law of that Member State, applicable in domestic cases, requires a full judicial authorisation also on the grounds and justification of the measure?

d) What could be the purpose of the third subparagraph of Art. 31(3)?

The ECJ's judgment also leaves open what the remaining purpose of the third subparagraph of Art. 31(3) could be. This subparagraph was added late in the negotiations on Art. 31 to ensure that, where the law of the assisting EDP's Member State does not require judicial authorisation but the law of the handling EDP's Member State does, the level of protection offered in this respect by the latter law is maintained.[38] So, what then would be the purpose of this provision if, according to the interpretation given by the ECJ, judicial authorisation as referred to in the first subparagraph of Art. 31(3) can only relate to "matters concerning the enforcement"? The suggestion, advocated during the oral hearing on 27 February 2023, according to which the authorisation given by the judge/court of the handling EDP's Member State in such situations shall extend to both the "justification and the execution of the measure",[39] is hardly convincing. Why should the judge/court in the handling EDP's Member State additionally give judicial authorisation to the investigation measure in accordance with the third subparagraph of Art. 31(3), in respect of which that same court had already exercised "prior judicial review" (supposedly) in accordance with Article 31(2)? And on what grounds could the judge/court express (additional) judicial authorisation of the enforcement of the measure? On the basis of the law of the handling EDP's Member State? Or the law of the assisting EDPs Member State – in spite of the fact that that law does not require judicial authorisation of the enforcement?

e) What are the consequences of the judgment regarding the question of whether an investigation to be assigned "must be subject to prior judicial review"?

The ECJ went somewhat further than merely deciding on the proper interpretation of the first subparagraph of Art. 31(3), taking into account considerations of efficiency. In paragraphs 73 to 75, the ECJ actually answered a question that the Higher Regional Court of Vienna had not asked. Presumably in order to mitigate fundamental rights concerns voiced in the course of the proceedings, the ECJ addressed in paragraph 73 not only the question of which judge/court (i.e. of which Member State) should undertake "a prior judicial review of the conditions relating to the justification and adoption of an assigned measure." It also pointed out that it is for the Member State of the handling EDP to provide for such a judicial review, "taking into account the requirements stemming from the Charter, compliance with which is binding on the Member States in the implementation of that regulation pursuant to Article 51(1) of the Charter."[40] The ECJ then indicated that the investigation measures in question in the present case, "constitute interferences with the right of every person to respect for his or her private and family life, home and communications, guaranteed by Article 7 of the Charter, and with the right to property enshrined in Article 17 of the Charter."[41] And while the Court, first, seems to consider a prior judicial review to be only one possible way of ensuring "adequate and sufficient safeguards … in order to ensure the legality and necessity of such measures,"[42] the final conclusions by the Court of Justice offer less flexibility in this respect. Here, the ECJ clearly puts forth: [43]

> The justification and adoption of the measure must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter.

This statement may have – yet unknown – further consequences for the respective legislation of the Member States. The original Commission proposal[44] had included an extensive list of measures where a "judicial authorisation" was to be required.[45] Unfortunately, a majority of Member States' delegations did not agree to the attempt to harmonise such requirements for prior judicial review and hence Art. 30 of the EPPO Regulation now does not provide for that. The question arises here as to whether it would be appropriate for the EU legislator now – in light of the conclusions drawn by the ECJ in this case – to leave things as they are and leave it up to national legislation, thus triggering possible additional preliminary ruling requests to the ECJ asking which other types of investigation measures, aside from those specifically referred to by the ECJ, [46] require prior judicial authorisation. In particular, this may become an issue in respect of cross-border investigations by the EPPO if judicial authorisation of the assigned measure by a judge/court in the assisting EDP's Member State is not to address issues concerning the adoption and justification of the measure even in situations where the law of the handling EDP's Member State does not require any "prior judicial authorisation". It may also become a matter of concern if the judge/court in the assisting EDP's Member State should not be allowed to refuse authorisation on grounds other than those concerning "the mode of execution" as was proposed by the Commission in the present case (see IV.2. b) above).[47]

Presumably said statement of the Court not only applies to the prior judicial review to be exercised in cross-border investigations in accordance with Art. 31(2) but would also apply to pure domestic investigation measures, in respect of which Art. 30 does not contain any specific rules on the application of national law regarding the question of whether a prior judicial review is required or not.

In either case, the "prior judicial review", which the ECJ requires in its concluding statement in paragraph 78 would have to be exercised by a judge or court of the handling EDP's Member State and not merely by the EPPO itself – irrespective of the fact that a prosecution office may be considered being a judicial authority for the purpose of applying certain instruments on mutual recognition.[48] A different question may arise as to whether the requirements of prior judicial review would also be satisfied if, in accordance with national law,

for example, a house search may be ordered in urgent cases by a prosecutor, who would then be obliged to obtain subsequent judicial approval from a judge/court.

Member States will presumably now have to review and possibly amend their legislation in order to ensure that it meets the requirements expressed by the ECJ in respect of a prior judicial review in case of investigations measures ordered by the EPPO.[49] Moreover, additional questions may arise as to any conclusions to be drawn from this ECJ judgment, also in respect of the application of the EIO Directive in national criminal investigations.

V. Conclusion

The truly remarkable judgment of the ECJ may be welcomed to a large extent – leaving aside the fact that it is in part difficult to reconcile with text of Art. 31 of the EPPO Regulation and its legislative history. Presumably, it will indeed help to ensure that the EPPO can undertake cross-border investigations in a more efficient way than if judicial authorisation in respect of the grounds and justification of the measure would have to be obtained from a judge/court in the assisting EDP's Member State. Nevertheless, several questions remain open and could give rise to additional requests for a preliminary ruling. In the meantime, the difficulties that occurred in the interpretation of the provisions of Art. 31 may continue to be a source of uncertainty and confusion.

Member States may now need to amend their legislation to bring it in line with the interpretation of Art. 31 developed by the Court of Justice. But that may prove to be difficult to do in some respects. Should the national legislator specifically provide in its legislation on the implementation of the EPPO Regulation that judicial authorisation by the judge or court, when called upon by the assisting EDP, "may relate only to elements connected with that enforcement"? And would that help the judge/court to know what it may or may not examine before deciding on whether to pronounce judicial authorisation?

It would therefore be appropriate for the EU legislator to urgently reconsider the wording of Art. 31 and to clarify what Art. 31 really is intended to regulate,[50] taking into account not only concerns for the efficiency of investigations but also the milestones set by the Court of Justice in respect of the need to ensure proper prior judicial review by the competent judge or court.

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1. Opinion of Advocate General *Tamara Ćapeta*, 22 June 2023, Case C-281/22, G.K. and Others (*Parquet européen*), ECLI EU:C:2023:510); for a detailed analysis of the Opinion, see: H-H Herrnfeld, "Efficiency contra legem?", (2023) *eucrim*, 229-236.↩
2. ECJ (Grand Chamber), 21 December 2023, Case C-281/22, G.K. and Others (*Parquet européen*), ECLI EU:C:2023:1018.↩
3. 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.↩
4. See, in particular, paragraphs 65 to 71 of the judgment, *op. cit.* (n. 2).↩
5. See n. (1); see also: 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.↩
6. See further on this: H-H. Herrnfeld, "The Draft Regulation on the EPPO", in: C. Brière/A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, 2018, pp. 383, 402 et. seq.↩
7. Council Document 6318/1/15 of 2 March 2015, informing the JHA Council on the "state of play", in which the Presidency had attempted to "reconcile as many as possible views expressed by delegations."↩
8. 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; See on this question also: L. Bachmaier Winter, "Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance", in L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office – The challenges ahead*, 2018, p. 117, 122.↩
9. COM (2013) 534 final, 17.7.2013.↩
10. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 73.↩
11. This also follows from recital 72, where the Council deems that the handling EDP should "withdraw the request or the order"; cf. further on this question: H.-H. Herrnfeld, in H.-H. Herrnfeld/D. Brodowski/C. Burchard, *European Public Prosecutor's Office, Article-by-Article Commentary*, 2021, Art. 31 mn. 15.↩
12. Herrnfeld, in Herrnfeld/Brodowski/Burchard, *op. cit.* n. (11), Art. 31 mn. 4 et seq., 14 et. seq., and 38 et. seq.↩
13. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 53.↩

14. See recital 72, sentence 2 of the EPPO Regulation.↩
15. Herrnfeld, in Herrnfeld/Brodowski/Burchard, *op. cit.* n. (11), Art. 31 mn. 8 and 23.↩
16. Herrnfeld in Brière/Weyembergh, *op. cit.* (n. 6), p. 406.↩
17. See the text of Art. 26(2) of the "Option 2" set out in the (public) Council Document 11045/15 of 31 July 2015, available at <https://db.eurocrim.org/db/en/doc/2363.pdf> accessed 18 March 2023.↩
18. See Art. 26(5) of the "Option 2" set out in Council Document 11045/15 (n.17).↩
19. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 68.↩
20. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 69.↩
21. Herrnfeld, in Herrnfeld/Brodowski/Burchard, *op. cit.* n. (11), Art. 31 mn. 40.↩
22. Council document DS 1237/15, 21 April 2015.↩
23. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 70.↩
24. See a reflection of the Commission's views in the Opinion delivered by AG *Ćapeta*, *op. cit.* (n. 1), para. 58.↩
25. COM(2013) 534 final, 17.7.2013 – see on this also section IV.1.b) above.↩
26. The transposition deadline for Directive 2014/41/EU (*op. cit.* (n. 8)) ended on 22 May 2017.↩
27. Cited from the Opinion delivered by AG *Ćapeta*, *op. cit.* (n. 1), para 62.↩
28. See recital 9 of the Commission proposal.↩
29. Art. 11(3) of the Commission proposal prescribed that "[T]he applicable national law shall be the law of the Member State where the investigation or prosecution is conducted." If the term "investigation" here was to refer to the investigation proceedings as such – and not only to individual investigation measures – what would have been considered the applicable national law if the investigation was conducted by the Central Office directly? The same question would essentially arise if the investigation were conducted by an EDP in accordance with Art. 18(1) of the Commission's proposal, requiring, however, investigation measures to be undertaken in one or several other Member States.↩
30. See Section 2 above and ECJ, Case C-281/22, *op. cit.* (n. 2), para. 37.↩
31. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 78.↩
32. ECJ, Case C-724/19, judgment of 16 December 2021, Spetsializirana prokuratura (Traffic and location data), EU:C:2021:1020, para. 53.↩
33. As also rightly observed by 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. & other", *European Law Blog* 19/2023, 26 April 2023.↩
34. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 76 and 77; on issues of concern for the defence in view of the "single-office principle" see V. Costa Ramos, "The EPPO and the equality of arms between the prosecutor and the defence", (2023) 14(1) *New Journal of European Criminal Law*, 43 et seq.↩
35. Opinion of AG *Ćapeta*, *op. cit.* (n. 1) para. 101.↩
36. See a reflection of the Commission's views in the Opinion of AG *Ćapeta*, *op. cit.* (n. 1), para. 53.↩
37. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 78.↩
38. Along the same lines: *Bachmaier Winter*, *op. cit.* (n. 8), p. 128.↩
39. See the views reflected in the Opinion of AG *Ćapeta*, *op. cit.* (n. 1), para 45.↩
40. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 73.↩
41. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 74.↩
42. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 75.↩
43. ECJ, Case C-281/22, *op. cit.* (n. 2), para. 78.↩
44. COM (2013) 534 final, 17.7.2013.↩
45. Art. 26(4) of the Commission proposal referring to parts of the list set out in its paragraph 1.↩
46. In paragraph 75 of the judgment, the ECJ specifically refers to "searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d)".↩
47. Cf. on this, also with further questions: *Nicholas 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* 1/2024, 15. January 2024, p. 4.↩
48. Cf. for considerations to the contrary: *Franssen*, *op. cit.* (n. 47), p. 5 et. seq.↩
49. Cf. also T. Wahl, "ECJ Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations", eucrim news of 27 February 2024.↩
50. In the same vein: *Franssen*, *op. cit.* (n. 47).↩

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