

AG Argues for Limited Judicial Review in EPPO's Cross-Border Investigations

News

Thomas Wahl

On 22 June 2023, Advocate General (AG) *Tamara Čapeta* delivered her [opinion in Case C-281/22](#) (G.K. and Others) – the first case before the CJEU regarding the interpretation of the EPPO Regulation 2017/1939 (→ [eucrim 2/2022, 96](#)). The case deals with cross-border cooperation between the handling European Delegated Prosecutor (EDP) in Germany who conducts the principal investigation and the assisting EDP in Austria who is requested to carry out searches and seizures against suspects under investigation in accordance with Arts. 31 and 32 of the EPPO Regulation.

The questions for a preliminary ruling were put forward by the Higher Regional Court of Vienna, Austria (*Oberlandesgericht Wien*), which has to decide on appeals by the suspects; they argued that the search and seizure measure was unnecessary and disproportional as well as contrary to fundamental rights. Given that judicial authorisation for the investigative measures is needed under Austrian law but the EPPO Regulation is rather silent on the scope of review, the Vienna Court asked:

- Whether the Austrian judge must examine all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality;
- To which extent prior judicial authorisation in the Member State of the handling EDP plays a role;
- To which extent a judicial review must take place in the Member State of the assisting EDP.

AG *Čapeta* first states that the answer to the questions is not easy and that the ECJ will have different interpretative options. Accordingly, application of the standard interpretative methods (text, context, objective and legal history) does not lead to an unequivocal result. The AG points out that the judges in Luxembourg must finally choose between two options: Option one entails a full review in the Member State of the assisting EDP – this was advocated by the Austrian and German governments relying on the wording of Art. 31(3) EPPO Regulation. Option two would favour a division of tasks within the judicial authorisation, i.e., the court in the assisting EDP's Member State only makes a review of the formal and procedural aspects relating to the execution of the measure. This option was backed by the EPPO, the Commission, and the French, Romanian and Netherlands Governments.

AG *Čapeta* supports option two, emphasising above all the intention of the EPPO Regulation to provide an efficient mechanism in the fight against crimes damaging the EU's financial interests, including cross-border investigations. Full judicial review in the Member State of the assisting EDP would result in the EPPO cross-border investigations being less efficient than intended.

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In addition, the AG is of the opinion that the solution, which results in the judicial review in the assisting Member State being limited to procedural aspects related to the execution of the investigative measure also sufficiently safeguards fundamental rights of suspects and accused persons in cross-border investigations. In this context, the AG specifically points out the system of the EPPO Regulation that contains various safeguards guaranteeing the protection of fundamental rights, such as a concrete list of rights of suspects and accused persons in EPPO procedures, and the obligation of Member States to provide judicial remedies against EPPO's procedural acts.

In light of these considerations, the AG advises the ECJ to interpret Arts. 31(3) and 32 EPPO Regulation with regard to cross-border investigations as follows:

- The court approving a measure to be carried out in the Member State of the assisting EDP may assess only the aspects related to the execution of an investigative measure;
- The court in the Member State of the assisting EDP must accept the assessment by the handling EDP that the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the Member State of the handling EDP.

The AG's opinion differs from the European defence lawyers' view who argued for full review powers of the court in the assisting Member States (similar to the arguments put forward by the Austrian and German Governments in the proceedings before the ECJ) and expressly objected to a preponderance of effectiveness considerations (→ [eucrim 1/2023, 17](#)). For a critical analysis of the AG' Opinion → [eucrim article](#) "Efficiency contra legem?" by [H.H. Herrnfeld](#) (published online 25 July 2023). For the request for a preliminary ruling by the Higher Regional Court of Vienna → [A. Venegoni](#), "The EPPO Faces its First Important Test: A Brief Analysis of the Request for a Preliminary Ruling in G. K. and Others", [eucrim 4/2022, 282-285](#).

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