

ECBA: Courts in the Assisting Member State Must Have Full Review Powers

News

Thomas Wahl

On 27 February 2023, the CJEU held a Grand Chamber hearing in the first reference for a preliminary ruling dealing with the interpretation of the EPPO Regulation (Case C-281/22, *GK and Others* → [eucrim 2/2022, 96](#)). On the eve of this hearing, the [European Criminal Bar Association \(ECBA\)](#) published an [open letter](#) in which the views of the defence lawyers on the case are presented. The reference for preliminary ruling by the Oberlandesgericht Wien concerns the question as to which extent the courts of the assisting European Delegated Prosecutor (EDP) can verify an investigative measure under their national law when it was authorised in the Member State of the EDP handling the case (→ analysis by A. Venegoni, [eucrim 4/2022, 282](#)).

First, the ECBA points out the existing structural inequality of arms in EPPO proceedings: while the EPPO as an institution is allowed to participate actively in the proceedings before the CJEU, defence lawyer organisations representing the bars cannot intervene.

Second, the ECBA strongly advocates that the courts in the assisting EDP's Member States must be allowed to review the substantive reasons for the investigative measure to be adopted. A substantive review by the courts in the assisting Member State is already required in order to assess fundamental rights, immunities and privileges (such as legal privilege) that exist in the laws of the assisting Member State. The ECBA further argues that legal reviews in the assisting Member State cannot be a mere rubber-stamping exercise when it comes to mutual legal assistance situations under the EPPO regime.

Third, the ECBA opposes the argument that legal reviews in cross-border cooperation situations under the EPPO regime cannot be more cumbersome than in the system established by the European Investigation Order (EIO). According to the ECBA, the courts in the Member States executing an EIO would also have the power to review the "substantive reasons" for issuing a measure if the fundamental rights of persons targeted by investigative measures are at stake.

In sum, the ECBA's open letter emphasises that an interpretation of the EPPO Regulation in Case C-281/22 should not lead to a preponderance of the effectiveness of EPPO investigations.

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