

ECJ Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations

Thomas Wahl

On 21 December 2023, the Grand Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment in [Case C-281/22 \(G.K. and Others \[parquet européen\]\)](#). It is the first ECJ judgment that interprets [Regulation 2017/1939](#) implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"). It relates to key provisions of the Regulation, i.e., EPPO investigations in cross-border situations for which Arts. 31 and 32 lay down the cooperation mechanism between the "handling European Delegated Prosecutor" (EDP), who conducts the principal investigation/prosecution, and the "assisting EDP" located in the Member State in which an investigative measure needs to be carried out (→ [article by Csonka/Juszczak/Sason, eu crim 3/2017, 125-135](#)).

Dispute in the main proceedings and question referred

Given that the provisions in question are silent, the reference for a preliminary ruling by the Higher Regional Court of Vienna (Austria) concerns the extent to which the national court in the assisting EDP's Member State can exercise judicial review (→ [eu crim 2/2022, 96](#)).

In the case at issue, several persons are being prosecuted for fraud in relation to the import of American biodiesel into the European Union. The EPPO has initiated an investigation through its Delegated European Public Prosecutor (EDP) in Germany, since the import allegedly infringed customs legislation and resulted in damage to the Union budget of nearly €1.3 million. Searches of residential and business premises and the seizure of assets in Austria, where suspects are located, have been ordered in this context. The German EDP transferred the execution of these measures to the assisting Austrian EDP.

The defendants challenged these investigative measures, which had been authorised by an Austrian court, before the referring court. They argued that the judicial authorities in Austria infringed several procedural provisions and defendants' rights. They claimed that suspicion against them was insufficient, no statement of reasons for the measures was given, the searches ordered were unnecessary and disproportionate, and that the relationship of trust with their lawyer was breached.

By contrast, the Austrian assisting EDP argued that the justifications for the assigned investigative measures are governed by the law of the handling EDP and, by analogy, with the regime established by [Directive 2014/41](#) regarding the European Investigation Order. Hence, they can only be examined by the authorities of that Member State.

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The referring Higher Regional Court of Vienna pointed out that, on the basis of Arts. 31(3) and 32 of Regulation 2017/1939, an interpretation is possible by which the assigned measure must be examined by a court in the assisting Member State in light of all procedural and substantive rules laid down by that Member State (full examination). However, this would entail practical challenges (e.g., transfer of the entire file, translations, etc.) and a retrograde step compared to the European Investigation Order.

Therefore, the Higher Regional Court of Vienna sought guidance as to whether the courts in the Member State of the assisting EDP must consider all material aspects of the case or whether they are limited to examining only certain formal aspects.

ECJ's findings: only limited judicial review in the assisting Member State

In its **judgment**, the ECJ first explains the subject matter of the EPPO Regulation and the functioning of the body. Second, the ECJ clarifies that the interpretation of judicial review for the adoption and cross-border enforcement of an investigative measure pursuant to Arts. 31 and 32 of Regulation 2017/1939 must consider the wording, context and objective of the provisions in accordance with settled case law.

With regard to wording, the judges in Luxembourg conclude that it is apparent from Arts. 31(2) and 32 that both the adoption and the justification of an assigned investigative measure are to be governed by the law of the Member State of the handling EDP, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting EDP.

Looking at the context, the judges in Luxembourg draw parallels between the cooperation mechanism in Arts. 31 and 32 EPPO Regulation and the scheme of judicial cooperation within the EU based on the principles of mutual trust and mutual recognition. According to the judges, these principles are of “fundamental importance” in EU law. Referring to the Framework Decision on the European Arrest Warrant and the Directive regarding the European Investigation Order in criminal matters, they state that the system of judicial cooperation in the EU is based on a division of competences between the issuing and executing judicial authorities. It is for the issuing authority to review compliance with substantive conditions and such assessment cannot be reviewed by the executing judicial authority. It follows that the executing authority is, in principle, bound to execute the issued judicial decision.

Considering the objective of the legislation, the ECJ points out that, by defining the procedures laid down in Regulation 2017/1939, the EU legislator intended to establish a mechanism that ensures at least the same degree of efficiency in cross-border investigations as the scheme based on the principle of mutual recognition. An interpretation making possible a full judicial examination in the assisting Member State, however, would lead to a less efficient system in practice.

Against this background, the ECJ states that the judicial review in the Member State of the assisting EDP (if judicial authorisation is necessary for the measure in question) must be limited to questions relating to the enforcement of the cross-border investigation measures, to the exclusion of matters concerning justification and adoption.

ECJ's addendum: ensuring procedural safeguards in the Member State of the handling EDP

The judges in Luxembourg add, however, that said sharing of responsibilities is without prejudice to the requirements relating to respect for fundamental rights in the adoption of the assigned measure. In the case at issue, the searches and seizures interfered with the persons' rights to private and family life, home, and communication (Art. 7 CFR) and with the right to property (Art. 17 CFR). The ECJ stresses:

“As regards investigation measures which seriously interfere with those fundamental rights, such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d) of Regulation 2017/1939, 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.”

The ECJ further points out that the EDPs involved in a case also have the responsibility to safeguard the suspects’ rights, as is, *inter alia*, accentuated by Art. 31(5) lit. c) of Regulation 2017/1939.

In conclusion, adoption and justification of an investigative measure must be subject to prior judicial review in the Member State of the handling EDP in the event of serious interferences with the rights of the person concerned, as guaranteed by the Charter of Fundamental Rights of the European Union (CFR).

Put in focus

The ECJ’s Grand Chamber only partly follows the [opinion](#) of Advocate General (AG) *Tamara Čapeta* in the case (→ [eucrim 2/2023, 123](#)). In the case of cross-border investigations, it agrees with the AG in that 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 AG proposed that the ECJ must decide between two options: Option One: full review in the Member State of the assisting EDP – as advocated by the Austrian and German governments (→ [article by Hans-Holger Herrnfeld, eucrim 2/2023, 229-236](#)). Or Option Two: division of tasks for the judicial authorisation, with only a review of the formal and procedural aspects relating to the execution of the measure in the Member State of the assisting EDP – as argued by the EPPO, the Commission, and the French, Romanian, and Netherlands governments. AG *Čapeta* decided on the second option (critically, [Herrnfeld, idem](#), also making recourse to the legislative history).

The ECJ approves the AG’s view, in particular by stressing that it is the rationale of Union law to avoid discrepancies with the European Investigation Order (EIO). The cross-border cooperation system within the EPPO cannot be more cumbersome as the EIO system, which similarly holds that substantive reasons for issuing an EIO can be only challenged by an action brought in the issuing State.

The judges on the Kirchberg bench, however, differ from the proponents of “option two” when they stress that there must be an opportunity for a prior judicial review of the adoption and justification of a cross-border investigative measure in the Member State of the handling EDP. This seems to be a new argument in the discussion.

It follows, however, the line of argument that the Court has been using for the instruments of judicial cooperation based on mutual trust and mutual recognition, such as the European Arrest Warrant. Correspondingly, the ECJ requests that certain procedural standards securing the rights of defendants must be in place in the issuing Member State (e.g., independence of the issuing judicial authority) as a precondition for taking part in regimes of mutual trust – the underlying principle of judicial cooperation within the bloc.

In his [post of 15 January 2024](#) at European Law Blog, [Nicholas Franssen](#) rightly put it that the Court delivered a “Solomonic verdict”, reconciling the two schools of thought mentioned above. *Franssen* also rightly comments that this second element of the judgment could have “some unforeseen legal and practical consequences”. These include, for example, the following:

- Are the legal orders of the Member States participating in the EPPO scheme in line with the newly established Court’s prerequisite?
- Must these systems be revised now?

- At what stage in the procedure should the “prior” judicial review of justification and adoption be carried out and by whom?
- Has the maxim “only one single judicial authorisation”, as postulated in Recital 72 of Regulation 2017/1939, become obsolete now, since it seems that the ECJ established a two-tier procedure of judicial authorisation when it comes to cross-border investigations by EDPs?
- Is the Union legislator called on to amend the EPPO Regulation?

The requirement for a prior judicial review in the ECJ’s decision may also open the door for defence lawyers to contest the use of evidence that may have been collected without the necessary procedural safeguards pointed out by the judges in Luxembourg. Irrespective of whether national courts follow such an argumentation, another problem emerges for the defence: The ECJ seems to limit the requirement of prior judicial review to only serious interferences with fundamental rights. The ECJ itself cites as examples searches of private homes, conservatory measures relating to personal property, and asset freezing. The question arises as to which other investigative measures fall under the notion of “serious interferences”? Can one conclude from the ECJ’s listing that searches of business offices are exempt from this categorization? If so, this would trigger a discussion on whether and why business premises are less protected than private homes under the CFR?

From the perspective of the person concerned, the ECJ judgment ultimately confirms the problem of the fragmentation of legal protection in EU cooperation. The person concerned must seek relief in two (or more) different legal orders: If he/she wishes to tackle the justification of the measure, he/she must do it in the Member State issuing an order (here: Germany as the Member State of the handling EDP). If he/she wishes to complain about the enforcement of the measure (e.g., lack of proportionality during the execution), he/she must do so in the executing State (here: Austria as the Member State of the assisting EDP). Acting in another and foreign legal order regularly entails problems, such as the need for a double defence as well as the need to deal with an unknown legal system with different legal traditions and a foreign court language. These challenges for the individual also cannot be ignored in the present case: Even though Austria and Germany share a common language, the codes of criminal procedure in the two countries differ considerably in a number of respects.

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