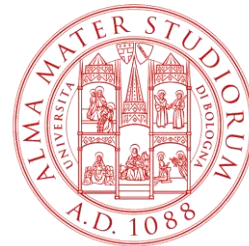


Cutting corners: borrowing the meaning of judicial authority from the EIO in EPPO transnational investigations

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Summary

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2. Two competing hypotheses
3. Answering the question through analogy
 - a) EAW
 - b) EIO
4. Suggestions from Strasbourg

Conclusions

1. Outcome of ECJ C-281/22 judgement

Before the judgement

| | ASSISTING EDP MS <u>requires</u> auth. | ASSISTING EDP MS <u>does NOT require</u> auth. |
|---|--|--|
| HANDLING EDP MS <u>requires</u> auth. | ? | HANDLING EDP to obtain authorisation and submit it with the assignment |
| HANDLING EDP MS <u>does NOT require</u> auth. | ASSISTING EDP to obtain authorisation (31(3) EPPO Regulation) | Mutual recognition 'de luxe' (Herrnfeld 2021) |

1. Outcome of ECJ C-281/22 judgement

Now, if the measure causes **serious interference with fundamental rights**

| | ASSISTING EDP MS <u>requires</u> auth. | ASSISTING EDP MS <u>does NOT require</u> auth. |
|---|--|--|
| HANDLING EDP MS <u>requires</u> auth. | <p><u>PRIOR JUDICIAL REVIEW of justification and adoption in hEDP MS</u></p> <p>Check of enforcement in aEDP State</p> | <p><u>PRIOR JUDICIAL REVIEW of justification and adoption in hEDP MS</u></p> |
| HANDLING EDP MS <u>does NOT require</u> auth. | <p><u>PRIOR JUDICIAL REVIEW of justification and adoption in hEDP MS</u></p> <p>Check of enforcement in aEDP State</p> | <p><u>PRIOR JUDICIAL REVIEW of justification and adoption in hEDP MS</u></p> |

2. Two competing hypotheses

What's the meaning of «prior judicial review»
which has to take place in the hEDP MS?

e.g.: house searches in Italian law



«*prior judicial review*»

subject

Focus on *judicial authority*

object

Focus on *judicial review*

2. Two competing hypotheses

Focus on *judicial authority*

A) EDPs can conduct prior judicial review

- Efficiency of investigations
- Worse for individual guarantees
- More likely (easy to implement)

- only some changes needed
- probably, the intention of the
Court

Focus on *judicial review*

B) An independent body must conduct prior judicial review

- Can hamper investigations
- Better for individual guarantees
- Less likely (tough to implement)

- massive change of MS laws...
- but no democratic input
- and no intention of the Court

3. Answering the question through analogy

Reasoning of the Court
«Efficiency by analogy»
with EAW, EIO

but...

**Does not specify the limits of the
analogy**

Where does analogy with the
instruments of judicial cooperation
brings us?

3. Answering the question through analogy

a) EAW

Issuing judicial authority does not include p.p.o. if subject to the executive
C-508/18 and C-82/19
(OG and PI)



But it's okay if subject to **endorsement by a court:**

- which **reviews independently and objectively** the conditions of issue and the proportionality;
- having access to the **entire criminal file** [...];
- adopting an **autonomous decision** [...].

(Case C-489/19 PPU, *Generalstaatsanwaltschaft Berlin*. In Italy see: Cass. sez. VI, 876/23)

3. Answering the question through analogy

b) EIO

C-584/19, *Staatsanwaltschaft Wien*

Question referred:

Do the EIO concepts of 'judicial authority' and 'issuing authority' include the p.p.o. regardless of any relationship with the executive?

Answer:

Unlike an EAW, yes.

3. Answering the question through analogy

b) EIO

C-584/19, *Staatsanwaltschaft Wien*

- Article 2(c)(i): **judges, courts, investigating judges or public prosecutors** as 'issuing authorities';



P.p.o. is included

- Article 2(c)(ii): **any other** competent authority
- ...But order **must be validated** by **Article 2(c)(i) 'judicial authorities'**



P.p.o. is one of the **'judicial authorities'** that can validate an EIO

+ "Impact on fundamental rights" argument.

73. The EIO, unlike a EAW, **is not such as to interfere with the right to liberty (Art.6)**

So is for EPPO cross-border investigations

3. Answering the question through analogy

b) EIO

C-16/22 (*Staatsanwaltschaft Graz*)

Question referred:

Can the German tax office for criminal matters be regarded as judicial authority within 'group (i)'?

Answer:

No. But they may be regarded as 'issuing authority' **within the meaning of Article 2(c)(ii)**

3. Answering the question through analogy

b) EIO

C-16/22 (*Staatsanwaltschaft Graz*) (para. 28 onwards)

35. «Directive 2014/41 reflects the distinction, between the judiciary and the executive»:

- Article 2(c)(i): 4 categories that participate in the administration of justice

→ Judicial authorities are traditionally construed as the authorities that administer justice,

- Article (2)(c)(ii) - 'any other ... authority':

→ unlike, inter alia, administrative authorities, which are within the province of the executive

3. Answering the question through analogy

b) EIO

C-724/19, *Spetsializirana prokuratura*

Interrogates the principle of equivalence.

Bulgarian law on the EIO

Issuing authority:
public prosecutor

Bulgarian law on access to
data relating to electronic
communications

Competent authority:
judge

Question referred:

Can the public prosecutor issue an EIO for obtaining data, if in an identical domestic case the competent authority is a **judge**?

Answer:

35. **No.** [...] Same conditions in a similar domestic case to be respected

3. Answering the question through analogy

b) EIO

C-724/19, *Spetsializirana prokuratura*

42. In addition, recalls C-746/18 (Prokuratuur):

If p.p.o. both:

- leads pre-trial investigations
- brings public prosecution

It cannot have the power to authorise access to traffic and location data related to telecommunications



Possible analogy with
EPPO investigations
seriously interfering with
fundamental rights?

Requirements of prior judicial review as set by C-746/18 (*Prokuratuur*)

Background

Estonian p.p.o.:

Subject only to the law (no executive) / Gathers incriminatory and exculpatory evidence / It is a party at trial

POWERS

In general

The court or body:

- must have powers and
- provide guarantees to reconcile interests and rights

In the criminal field

Can balance:

- the needs of the investigation
- the **fundamental right to privacy**

51. It is essential that **access to data** be subject to a **prior review**

In general

Must

- Be a third party in relation to the authority requesting access;
- carry out the review objectively, impartially, free from external influence

In the criminal field

- not involved in the investigation
- neutral stance vis-à-vis the parties

INDEPENDENCE

55. That is **not** so in the case of:

- a p.p.o. which directs the investigation procedure and,
- where appropriate, brings the public prosecution

The p.p.o. has the task not of ruling on a case in complete independence [...]



Italy's response: inserted prior judicial review by a judge
(art. 132(3) d.lgs. 196/2003, amended by d.l. 132/2021)

EDPs: *judicial authorities* not independent
enough to carry out
prior judicial review within the meaning of
EU law in the criminal field?

4. Suggestions from Strasbourg

- Even non-judicial bodies, if independent, can issue authorisations for interceptions

- or there should be control by a judge or an independent body over the issuing body's activity.

≈ Art. 2(c)

Szabò and Vissy v. Hungary, p. 77, and case law cited (*Klass v. Romania*, etc.)

On art. 5(3) ECHR – ‘judge or other officer authorised by law to exercise judicial power’

28. "Magistrat" in French and, even more, "officer" in English manifestly have a wider meaning than "juge" and "judge". Again, the exercise of "judicial power" is not necessarily confined to adjudicating on legal disputes.

In many Contracting States, officers (magistrats) and even judges exercise such power without adjudicating, for example members of the prosecuting authorities and investigating judges.

A literal analysis thus suggests that Article 5 para. 3 includes officials in public prosecutors' departments as well as judges sitting in court.

(*Schiesser v. Switzerland*, p. 28)

Conclusions

Focus on *judicial authority*

Best argument in favour

Analogy with the EIO leads to this conclusion: see to C-584/19 (*Staatsanwaltschaft Wien*)

Focus on *judicial review*

Best argument in favour

Has a precedent in C-746/18 (*Prokuratuur*)

A new *Gavanozov*? (no reaction)

Will the Court apply the “traffic data” standard to investigative measures seriously interfering with fundamental rights in EPPO cross-border investigations?

Most likely answer: no

Unless also the analogy with *Prokuratuur* is respected (“double analogy”)

In other cases, EDPs review will suffice