

Allocation of judicial review in cross-border investigations: EIO vs EPPO

Anna Mosna | MEIOR Conference — Leuven, 25-26 March 2024



**Universiteit
Leiden**
The Netherlands



MEIOR Project
Funded by the
Justice Programme (JUST) (2021-2027)
of the European Union
Project ID: 101046446

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Outline

Cross-border investigations under the EPPO Regulation



The case of G.K. and Others



Judicial protection between two interpretative options



The decision of the Court of Justice & reflection



Outlook

Cross-border investigations under the EPPO Regulation

Legal framework

Article 31 and Article 32 Regulation (EU) 2017/1939

- EDPs to act in close cooperation
- For cross-border investigations: handling EDP **assigns** measure to assisting EDP
- Justification and adoption of the assigned measure governed by the law of the MS of the handling EDP
- Measures to be carried out according to the law of the assisting EDP
- Judicial authorisation → if required:
 - under law of MS of assisting EDP → must be obtained by assisting EDP (if refused, handling EDP must withdraw assignment)
 - (only) under law of MS of handling EDP → must be obtained by handling EDP and submitted with assignment

Recital 72 Regulation (EU) 2017/1939

- If judicial authorisation is required, it should be clearly specified in which MS it should be obtained, *but in any case there should be only one authorisation*

The case of G.K. and Others, C-281/22

Background

- Case of customs fraud in Germany
 - false declarations in order to circumvent customs provisions when importing biodiesel into the EU (prejudice to the financial interest of the EU)
- German EDP assigns searches (and seizure) to be undertaken in Austria
- German implementation of EPPO Regulation foresees that even though in similar domestic proceedings prior judicial authorization must be sought, this is not necessary when law of MS of assisting EDP also requires such authorization
- Under Austrian law prior judicial authorization must be obtained by a court
 - assisting EDP requests and obtains it
- Defendant lodges an appeal against the search warrants before Higher Regional Court in Vienna because they were allegedly neither necessary nor proportionate
- Higher Regional Court in Vienna is unsure of the scope of the control it may exercise: substantive validity (justification) or only compliance with formal and procedural requirements?

The case of G.K. and Others, C-281/22 (2)

Questions referred

1. When a court in the MS of the assisting EDP must approve investigative measures, does its scrutiny extend to all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality?
2. Should the examination consider whether admissibility of the measure has already been controlled by court in MS of the handling EDP?
3. If 1) is answered in the negative and/or 2) in the affirmative, what is the scope of judicial review for courts in the MS of the assisting EDP?

Judicial protection between two interpretative options

Option 1 – Austrian and German Governments

(Opinion AG Ćapeta, points 35, 48)

Problematic from
teleological perspective:
transmission/translation
of case file

Less
efficient
than EIO
Directive!

- Textual interpretation of the EPPO Regulation indicates that if prior judicial authorisation is required under the law of the MS of the assisting EDP → then such authorisation should entail full review:
 - Procedural aspects (concerning the execution of the measures)
 - Substantive aspects (necessary level of suspicion, adequacy, proportionality)
- Contextual interpretation considering Recital 72 EPPO Regulation: only one authorisation!

Judicial protection between two interpretative options (2)

Option 2 – EPPO, Commission, French, Romanian and Netherlands Government

(Opinion AG Ćapeta, points 38-40)

- Contextual interpretation: distinction between the laws governing the activity identifies also competence and scope of control!
 - If law of the assisting EDP's MS requires prior judicial authorization → only review of formal and procedural aspects relating to the execution of the measure
 - If both law of the MS of the assisting EDP and of the handling EDP require prior judicial authorization, two authorisations must be obtained.

Clear division of tasks:

- Courts in the handling EDP's MS → on justification of the measure
- Courts in the assisting EDP's MS → on procedural modalities of execution (even if law of handling EDP's MS does not require prior judicial authorization)

The decision of the Court of Justice

- Like AG Ćapeta, CJEU considers Article 31(3) EPPO Regulation to be problematic because not clear
 - Unclear wording justifies passing onto contextual and teleological interpretation
- Option 2 is the most sensitive solution as it ensures efficiency → mirrors task division of EIO system
- Division of tasks implies that assisting EDP must accept determinations made on justification/adoption of the measure in the MS of the handling EDP (including when no authorisation is foreseen)
- **CJEU follows AG establishing that:**
 - **Scope of judicial review of the competent authority in the MS of the assisting EDP limited to elements connected with the enforcement of the assigned measure**

What are matters concerning the enforcement of the measure?

EIO

- Effectiveness of EIO instrument requires 'light' control by executing authority on substantive aspects, e.g. competence of issuing authority (→ recognition stage)
- Article 14(2) EIO Directive: judicial scrutiny in the issuing state on the substantive reasons for issuing an EIO must be **without prejudice to the guarantees of fundamental rights in the executing State**
- Possible ex post judicial control on matters concerning the execution

EPPO

- Assignment procedure → no decision on (non)recognition
- What is the object of an ex ante authorisation that cannot evaluate matters relating to justification/adoption of the measure
- Is authorisation a mere order to execute?
- *Ordre public* verification?

The decision of the Court of Justice

- CJEU goes a step further to avoid that division of responsibilities and task results in a prejudice for fundamental rights protection
- **CJEU establishes also that:**
 - **MS of the handling EDP must provide prior judicial review of conditions relating to justification/adoption of measures that seriously interfere with fundamental rights**

Contrôle juridictionnel préalable

- Court went beyond what was asked by the Vienna Higher Regional Court
- English version of the judgment refers to **prior judicial review**
- **French version: *contrôle juridictionnel préalable***
- Asymmetry between judicial and juridictionnel
 - Recalls the distinction between judicial authority and court or tribunal under Article 267 TFEU
 - Affected by asymmetry: public prosecutor
- CJEU seems propose case law harmonisation → imposition of prior review of a court or tribunal for measures implying serious interference with fundamental rights
- Clashes with prior case law providing for different degrees of judicial independence (and thus protection) depending on fundamental rights at stake (differentiation between EAW and EIO)
- *Staatsanwaltschaft Wien* (C-584/19) → German prosecutors can issue EIOs
- Possibly counterproductive outcome of imposing to certain EDPs additional step that is not necessary in domestic nor EIO proceedings → what about efficiency goal?

Outlook

- The judgment in *G.K. and others* confirms the importance of clarity regarding the allocation and scope of judicial control in cross-border evidence gathering
- CJEU decision clarifies Article 31(3) EPPO Regulation
 - Different implementations into national law → concerns of inefficiency, protection gaps or both
- After difficult negotiation process → compromise result → almost physiological that guidance on interpretation was needed
- Doubts about actual scope of control for judicial authority in MS of assisting EDP remain
- Addition of prior judicial review probably against the background of both Austria and Germany (following Option 1) have regulated cross-border investigations of EDPs with exception to the principle of equivalence → confirmation of Option 2 would require legislative modification
- Operative part of the judgment has, however, general value
- Starting point of a clarification process on which the CJEU has embarked

Thank you for your attention!

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