



Ministry of Justice and Security

The judge's role in cross-border investigations

A Dutch perspective

Nicholas Franssen

25 March 2024



Which role(s) are we actually talking about?

- › Broad title covers various roles for a judge/court in cross-border criminal proceedings (national or EPPO's), in particular:
- › Judicial review of investigative measures, both in issuing and executing Member State
- › Legal remedies in issuing Member State
- › Trial, including assessing and weighing evidence gathered abroad
- › Request preliminary ruling by the ECJ



Main relevant features of Dutch criminal procedural law in cross-border investigations

- > Requirements in national cases concerning investigative measures (e.g. house searches) equally apply in case of an EIO, MLA or EPPO cases
- > So, if the *rechter-commissaris* (investigating judge) has a role in a similar national investigation, the same rule applies, in principle, in a cross-border case, both in relation to an outgoing or incoming request
- > An *ex ante* review by the *rechter-commissaris* encompasses a check if the measure could be undertaken in a national case, is proportional etc.
- > Note: the suspect is not involved at this review stage
- > Evidence gathered abroad is, as a rule, admissible during the trial



Role of the Dutch judge/court under the EIO Directive

- › Judicial review of investigative measures: subject to national law
- › Legal remedy: Section 5.4.10 of the Dutch CCP reflects Art. 14, EIO, as interpreted in Case C-852/19 (Gavanozov II)
- › Trial and admissibility of evidence: subject to national law
- › Preliminary ruling request: none thus far



Legal remedies in case of an EIO issued in the Netherlands 1

- › Section 359a, CCP: a suspect who is being prosecuted has **the right during the proceedings to object to the legality of, and the need for the applied investigative measures**, including the issuing of an EIO. If it turns out that a preliminary inquiry has not met the procedural requirements which cannot be corrected, and the legal consequences do not emerge from the law, under this section the court can determine that:
 - › a. the **level of the sentence** in relation to the gravity of the omission will be decreased in case the disadvantage caused by the omission can be compensated this way;
 - › b. **the results of the inquiry** resulting from the omission **cannot contribute to proving** the criminal offence;
 - › c. **prosecution can be barred** in a case due to the omission; in accordance with the principle of due process of law, the case cannot be tried.
- › The possible consequence depends on the interest that is served by the violated rule, the severity of the omission and the disadvantage caused by it.



Legal remedies in case of an EIO issued in the Netherlands 2

- › Ex-suspects, witnesses, persons filing a report and other parties involved can **start a civil action** in the Netherlands if, in their opinion, the State committed an unlawful act against them by issuing an EIO and/or applying the measure.
- › In case of seizure of objects or certain investigative measures concerning data, the persons concerned can also file a **complaint on the basis of Art. 552a, CCP**.
- › Note: witnesses are obliged to make a statement if summoned before an investigating judge or court. However, if the witness finds that their summons to a hearing was unlawful in a specific case since it would violate their rights (among other things based on Section 7 of the Charter/Art. 8 of the ECHR) **preliminary relief proceedings (*kort geding*)** can be launched **before a civil court**. The judge can thus examine if the government's involvement in the case was lawful in order to detect the criminal offences.



Legal remedies in case of an EIO issued in the Netherlands 3 - implications Gavanozov II judgment

- › An obligation to have legal remedies available *ex ante* would **seriously affect the interests of ongoing investigations**, not just for investigative measures such as search and seizure, but also for many other investigative measures, which hold either an element of surprise or secrecy, like interception.
- › If a legal remedy should be available *ex ante* this would make the **issuing of an EIO useless**, since the person against whom the investigative measure will be applied will be able to anticipate.
- › Paras 41 and 49 of the Gavanozov II-judgment seem to imply mainly that the person concerned should have the **possibility to contest** the need, lawfulness and substantive grounds for the EIO, but **does not state anything as to at which point during the proceedings** this legal remedy must be available.
- › The ECJ-judgment should be **interpreted in line with Art. 11 of Framework Decision 2003/577/JHA**, the EIO Directive's predecessor
- › Therefore, legal remedies against (the substantive reasons for) issuing the EIO in the issuing state **once the EIO is executed** by the executing state.



Legal remedies in case of an EIO executed in the Netherlands

- > Section 552a, CCP: **complaint to the District Court** when a person, in the context of executing an EIO, has been the subject of:
 - i) items **seized** from him; or
 - ii) **data** demanded; or
 - iii) if **data** has been recorded during a search or during a search in an automated work; or
 - iv) a demand for the decryption of **data** has been made;
 - v) received a demand to store and keep available **data**; and
 - vi) **data** found in an automated work made inaccessible.



Role of the Dutch judge/court in cross-border cases under the EPPO Regulation

- › Judicial review of investigative measures: subject to national law, unless regulated by Regulation 2017/1939, cf. Art. 5(3), EPPO.
- › Legal remedy: Art. 31(2) and 32, EPPO as interpreted by ECJ (C-281/22, G.K and others, *parquet européen*)
- › Trial and admissibility of evidence: Art. 37, EPPO (evidence), otherwise subject to national law
- › Request preliminary ruling by the ECJ: none thus far



Art 31 (1) and (2), EPPO

> *Cross-border investigations*

- > 2. The handling EDP may assign any measures, which are available to him/her in accordance with Art. 30. **The justification and adoption of such measures shall be governed by the law of the Member States' of the handling EDP.** [...].
- > 3. If **judicial authorisation** for the measure is required under the law of the Member State of the assisting EDP, **the assisting EDP shall obtain that authorisation in accordance with the law of that Member State.**



ECJ decision of 21 December 2023 in Case C-281/22

- › Two key elements:
- › 1) the **review** conducted in the Member State of the assisting EDP, where an assigned investigation measure requires judicial authorisation in accordance with the law of that Member State, may relate only to **matters concerning the enforcement of that measure** (para. 72).
- › 2) the Member State of the handling EDP is to foresee **prior judicial review of the justification and adoption of the investigation measure** before it can be carried out in the Member State(s) of the assisting EDP(s) (para. 73).
- › According to the Court, this is necessary 'in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the EU' (paras 73 and 78). The Court mentions, as examples of such measures, **searches of private homes, conservatory measures relating to personal property, and asset freezing** (para. 75).



Implications of the judgment in Case C-281/22

- › Our initial assessment is that the judgment corresponds to our notion of judicial review in cross-border cases but it does raise several questions:
- › What is the fate of the “**single judicial authorisation**” (recital 72, EPPO)?
- › The exact scope of the term “**judicial review**” *ex ante* in the Member State of the handling EDP: e.g. full review or more or less marginal review, involving the suspect or not?
- › **Who** should undertake the “judicial review”: a national judge/court?
- › Which elements concerning the **enforcement of the assigned measure** can be taken into account by judge/court in Member State of assisting EDP?
- › Sidenote: does cross-border mechanism for the EPPO become more burdensome? Cf. role prosecutor issuing EIO (cf. judgment C-584/19 *A and others*) or freezing order ex Regulation 2018/1805?



Judgment of the District Court of Rotterdam of 23 January 2024

- > Case concerned complaint under Art. 552a, CCP against the seizure of goods by the EPPO in the Netherlands at the request of an Italian EDP.
- > The Court declared the complaint unfounded, stating that its **review in proceedings under Art. 31, EPPO is limited to aspects of the execution of the measure**. In the Court's view "there is no legal basis for a review as requested by the complainant with regard to the legality of the assigned investigation measure nor whether the requirements have met principles of proportionality and subsidiarity, unless special circumstances regarding the administration of justice in the Member State of the handling EDP make a judicial review in the Member State of the assisting EDP urgently necessary."
- > Note: no reference to CJE judgment of 21 December 2023



Art. 37, EPPO

> *Evidence*

- > 1. Evidence presented by the prosecutors of the EPPO or the defendant to a court **shall not be denied admission on the mere ground** that the evidence was gathered in another Member State or in accordance with the law of another Member State.
- > 2. The **power of the trial court to freely assess the evidence** presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation



Conclusion

- > Dutch criminal procedural law would appear to be fully in line with EIO Directive and EPPO Regulation as far as role judge/court in cross-border investigations is concerned
- > *Disclaimer*: obviously depending on correct interpretation of CJE judgments, past and future, as there may still be loose ends
- > As to *ex ante* review of investigative measures: beware of risk of harming effectiveness of investigative measure yet to be carried out
- > As to moment of legal remedy against order to undertake investigative measure: ideally *ex post* for the same reason and confined to substantial grounds underlying the order