



ELB Blogpost 19/2023, 26 April 2023

Tags: Case C-281/22 G.K. and Others, Art 31 of Council Regulation 2017/1939 on the European Public Prosecutors Office, EPPO

Topics: Criminal Law, Criminal Proceedings, Legal Remedies, Fundamental Rights, Mutual Recognition

**Judicial review of investigative measures under the EPPO Regulation.  
More to it than it seems? A recap of the Oral Hearing in *G.K & Others*.**

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*This post discusses the public oral hearing in Case C-281/22 held by the ECJ in Luxembourg on 27 February 2023, which the author attended in person/online. The summary of the oral hearing as presented here is based on the author's own observations and notes taken during the hearing.*

The European Public Prosecutors Office (EPPO) began operating on June 1<sup>st</sup>, 2021, and its 2022 [Annual Report](#) was recently published, on 7 March 2023. The Report provides an overview of the EPPO activities during its first full year of operation and indicates that by the end of 2022 it had over 1000 opened investigations, with 28.2% of its cases having a cross border dimension.

While the report gives the new and shiny EU prosecutorial body rave reviews for its achievements during its first full year in operation, [Regulation 2017/1939 on the European Public Prosecutors office](#) (the EPPO Regulation) is currently facing its first big test before the Court of Justice in the European Union (CJEU) with the case [C-281/22 G.K and Others](#). The central focus of the case pertains to the extent of judicial review of cross-border investigative measures within the EPPO framework, i.e. Article 31 EPPO Regulation. While this may seem like a merely technical issue, this case addresses a key question for the EPPO, namely whether the practical implementation of its legal framework allows for it to achieve its objective: conducting effective investigations of crimes against the financial interests of the EU. The outcome of the case will also affect the protection of individual

rights during EPPO proceedings and particularly the right to challenge investigative measures.

With the opinion of Advocate General (AG) Capeta due on 22 June 2023 we are (hopefully) close to getting some answers. This blog post will provide a short recap of the Oral Hearing, which took place before the Grand Chamber on 27 February 2023.

### **What is the case about?**

The case deals with Article 31 of the EPPO Regulation, which governs cross-border investigations. Before we get into the specifics of the case, there are a few things to keep in mind about the functioning of the EPPO. While the EPPO functions as a supranational prosecution body, it does not operate on the basis of an EU code of criminal procedure. In other words, the EPPO's daily activities, including ordering and executing investigative measures, are primarily governed by Member States' national law. The EPPO operates on the basis of a decentralized structure with European Delegated Prosecutors (EDPs) in each participating Member State, who act in accordance with EU and their own national law. Nonetheless, the underlying principle is that the EPPO operates as a single office (Article 8 of the EPPO Regulation). Therefore, during the [negotiations](#) it was decided it should be able to rely on its own specific cooperation mechanism for cross-border evidence gathering rather than on mutual recognition instruments such as the [European Investigation Order Directive](#) (EIO Directive).

This sui generis cross-border cooperation mechanism is set up by Article 31,. Under this system, the EDPs will work in close cooperation with each other, consulting and assisting each other when cross-border investigation measures are necessary. When the European Delegated Prosecutor (EDP) undertaking an investigation in one Member State (the handling EDP) needs to gather evidence located in another Member State, he or she will decide on the needed measure in accordance with the law of its own Member State, and will assign it to the EDP located in the relevant Member State (the assisting EDP) (Art 31(1) & (2)).

Article 31(3) – the key paragraph of the provision in this case – then deals with two possible scenarios. If the national law of the assisting EDP's Member State requires a judicial authorization to carry out the measure, he/she shall obtain it in accordance with its own national rules (Art 31 (3) subparagraph 1). If such an authorization is not required by the assisting EDP's national law, but is by the handling EDP's national law, then the handling EDP shall obtain it in its own Member State (Article 31(3) subparagraph 3).

In the case at hand, the German EDP (the handling EDP) was conducting investigations in Germany concerning the circumvention of customs/tax evasion against G. K., S. L. and the B. O. D. GmbH (the accused/the appellants). As the German EDP needed to conduct

searches and seizures of various residential and business premises in Austria, the cooperation mechanism provided for in Article 31 of the EPPO Regulation. was put in motion. As under Austrian Law judicial authorization is required for conducting searches and seizures, the Austrian assisting EDP applied to the competent (Austrian) courts, which approved the measures. The accused however appealed the warrants before the Higher Regional Court of Vienna (*Oberlandesgerichtshof Wien*), Austria alleging a lack of sufficient suspicion to conduct the measures, a lack of proportionality and violations of their fundamental rights. However, the Austrian assisting EDP argued that these complaints could not be upheld, as courts in the assisting EDP Member State were limited to reviewing formal issues and could not engage in a full substantive review of the measure, particularly as the suspicion of the offences had already been reviewed by a German judge. Based on the statements made during the hearing it appears, though, that the investigative measures themselves had not been subject to prior judicial review in Germany. In turn the Austrian Court referred three questions to the CJEU.

### **What did the referring court ask?**

The referring Court asked the CJEU to clarify the extent of the judicial review to be undertaken by the judges in the assisting EDP's Member State as per Article 31(3) subparagraph 1 EPPO Regulation. The Court specifically inquired whether such judicial review should entail a full examination including substantive aspects – such as the suspicion of the relevant criminal offence, the necessity and proportionality of the measure – or whether it should be understood as referring only to matters concerning enforcement of the measure, as one may infer from Article 32 EPPO Regulation (Questions 1 & 3).

The referring court furthermore asked if it should consider whether the measure had already been subject to judicial review in the handling EDP's Member State. (Question 2). This question thus refers to a situation not expressly foreseen in Article 31(3), where, as in the present case, both Member States require judicial authorization

To put it simply, the core question in this case is how to interpret Article 31(3) in order to define the scope of the judicial review to be conducted by the judge in the Member State of the assisting EDP.

### **The issues discussed at the Oral Hearing**

The parties present at the hearing were the lawyer of the appellants, the representatives of the EPPO (especially the German and Austrian EDPs), the representatives of the European Commission, and the governments of the Netherlands, Romania, Germany and Austria.

The discussions revolved around two main issues. The first main point of discussion was how to reconcile the interpretation of Article 31(3) with Recital 72 of the EPPO Regulation. This recital establishes the principle of single judicial authorization in cross-border cases. Whenever judicial authorization is required, it should be clearly specified in which Member State the authorization should be obtained, but in any case, there should be only one authorization. The underlying idea is that, in EPPO proceedings, there is no need for cross-border recognition of judicial decisions, as cooperation takes place between members of the same body, with one judicial authorization sufficing where needed (as argued by [Herrnfeld](#)). In turn, this would ensure less time-consuming and more efficient investigations.

This brings us to the second point of discussion, revolving around Recital 12 of the EPPO Regulation, which addresses the overarching purpose of the EPPO: “to combat crime against the financial interests of the EU in a **more effective manner** than achieved by Member States” (emphasis added). The system designed in Article 31 of the EPPO Regulation should therefore allow for swifter and more efficient investigations than were possible through inter-state cooperation based on mutual recognition and regulated by the EIO Directive. The EIO framework provides that the authority of the issuing Member State will determine if an investigative measure is necessary, proportionate and lawfully available (Article 6 EIO Directive). The authority in the executing Member State (the Member State of the assisting EDP in the EPPO Model) must trust the issuing state’s assessment and is in principle obliged to execute the EIO i.e. perform the requested measure, unless it decides to invoke one of the grounds for refusal (Article 9 and 11 EIO Directive). In other words, in a similar case under the EIO Directive, if a judicial authorization is required in the executing Member State, the judge would undertake a limited assessment based on the EIO standardized form (Article 9 of the EIO Directive). For a comparison between the two systems, see [Allegrezza and Mosna](#).

In this sense, if a full judicial review needed to be undertaken in the assisting EDP’s Member State, could this mean that cross-border investigations under the EPPO Regulation would be in practice more complicated, cumbersome, and time-consuming than those conducted on the basis of mutual recognition instruments? It is worth mentioning that scholars had already pointed out that the ambiguity of the wording may lead to precisely this situation, even before the Regulation had been adopted (see [Weyembergh and Briere](#)).

### **Two models of interpretation**

With regard to the interpretation of Art 31(3), two different models were advocated for by the parties present at the hearing.

## 1. The literal model: Literally one single judicial authorization

The representatives of both the Austrian and German governments, along with the appellants' lawyer, interpreted Article 31(3) subparagraph 1 as meaning that, when judicial authorization is required under the national law of the assisting EDP's Member State, the judge needs to undertake a full judicial review of the measure. The Austrian government pointed out that Article 31(2), whereby the justification and adoption of the measure are governed by the national law of the handling EDP, must be interpreted as referring solely to the assignment of the measure, but not covering the judicial authorization. According to this position, in situations in which a judicial authorization is required either in both Member States, or in the Member State of the assisting EDP, a full judicial review shall be conducted within the Member State of the assisting EDP. In this case, Article 31(3) subparagraph 3 would constitute the exception to this rule. Only in situations in which the Member State of the assisting EDP did not require such a judicial authorization, but that of the handling EDP did, would the measure need to be reviewed in the latter.

The parties argued that their interpretation would be the only one that aligns with the principle of single judicial authorization. If the judge in the assisting Member State conducted a full judicial review, the EPPO would be a single prosecutorial body dealing with a single court. Such an interpretation is supported by some scholars (see [Herrnfeld](#) and [Mosna](#)) and the [European Criminal Bar Association](#) (ECBA).

## 2. The systematic model: the principle of single judicial authorization merely an ideal?

The parties on the other side of the Chamber (Romania, the Netherlands, European Commission, EPPO) argued for a systematic interpretation of the provision. Article 31(2) and Article 32 of the EPPO Regulation establish a division of labour, whereby issues relating to substantive aspects are to be governed by the law of the Member State of the handling EDP (here Germany). The assisting EDP's Member State (here Austria) would be responsible only for the formal issues relating to the enforcement of the measure. This attribution of competences would in turn determine the scope of judicial review in each Member State. According to this interpretation, if a judicial authorization is required in the Member State of the handling EDP, it will always have to be obtained there – at least with regard to the substantive reasons. If judicial authorization is required in both Member States, there would be two separate judicial authorizations, one sought by the handling EDP addressing the substantive issues and the other sought by the assisting EDP focusing only on the formal issues (Article 31(3) Subparagraph 1). If judicial authorization is only required in the Member State of the handling EDP, then in this case, this authorization would also cover the formal issues (Article 31(3) subparagraph 3). However, when only the Member State of the assisting EDP required a judicial authorization, it would seem that, in such a case, a judge in either State would not review the substantive measures. According

to the EPPO, this would not be problematic as full *ex-ante* judicial authorization is not always needed and can be counterbalanced with *ex-post* judicial review.

The European Commission, Romania, and the Netherlands considered that the proposed interpretation would still be in line with Recital 72, as every aspect of the investigative measure would be subject to one single judicial control. The EPPO referred to its College's [Guidelines on the application of Article 31](#). According to those guidelines, in situations in which the laws of both Member States require judicial authorization, an exception would have to be made with regard to the principle of single judicial authorization.

### **The tricky distinction between formal and substantive issues**

The division of tasks proposed by the supporters of the systematic model would seem to mirror the one found in the EIO Directive (see above), whereby the executing authority mainly deals with matters concerning the enforcement of the measure. This is what the referring court (para 11) and the EPPO seem to consider to be "formal matters". However, under the EIO system, these "formal matters", include compliance with (EU) fundamental rights, existence of immunities and privileges, and (to a certain extent) a proportionality assessment (See [Böse](#)).

The question that comes to mind is, how does this division of tasks translate into the EPPO framework. As AG Capeta asked during the Q&A part of the hearing: 'What can the judge in the assisting EDP Member State check?'. The AG referred in this context to Article 31(5) of the EPPO Regulation. Article 31(5) sets up a problem solving mechanism, whereby the EDPs will consult with each other if certain issues arise, such as, the measure not being available in a similar domestic case, or another less intrusive measure possibly achieving the same results. AG Capeta asked if these issues would fall under the scope of judicial review.

The European Commission clearly stated that, in their opinion, the judge would not be able to refuse the authorization of an investigative measure on the grounds of Article 31(5), as these were not to be understood as grounds for refusal, but issues to be discussed internally between the handling and assisting EDPs before the assignment. The EPPO gave a slightly different answer, making a distinction between Article 31(5)(d) and Article 31(5)(c). The question if a measure was available in a similar domestic case (Article 31(5)(d)), was an objective (i.e. formal) issue, which would therefore not entail a substantive evaluation of the case. Rather, it would constitute merely a legal assessment on the basis of the authorization previously handed down in the handling EDP's Member State, such as for example checking that the criminal offence which the concerned person was suspected of, was an offence for which a certain measure could be authorized. Deciding on a different less intrusive measure (Art 31(5)(c)) would constitute a material issue, as it

would require a proportionality assessment. However, the AG seemed to be critical of this as she implied that one of the main reasons why Member States require a judicial authorization in the first place is to determine if a certain interference with a person's rights is proportional.

### **Effectiveness of EPPO proceedings vs Effectiveness of rights; is it either or?**

With regard to the need to ensure the effectiveness of EPPO cross-border investigations, all parties seemed to agree that requesting a full judicial review in the assisting EDP's Member State would entail practical difficulties, as, where multiple Member States are involved, this would entail multiple judges deciding on exactly the same facts, with possibly contradicting outcomes. However, in the view of the Austrian and German governments, it was the sole possible interpretation to be derived from the wording, context and drafting history of the Regulation. In this sense, they referred to a [counter-proposal](#) made during the negotiations, where they suggested an alternative wording for this specific provision (then Art. 26) in the sense of the systematic model, clearly stating the division of competences between the two EDPs. This however was not the approach adopted in the final text of the EPPO Regulation. The German government then went on to say, that the CJEU was not a repair shop for faulty legislation. In a case where there is a design flaw, the product must be sent back to the factory. It would seem as though the German and Austrian governments hoped that if the Court opted for the literal interpretation model, the Commission would then be nudged into amending the Regulation.

What seemed however unclear, is in what way the EPPOs cooperation mechanism would present a step forward in terms of effectiveness compared to the EIO Directive. During the Hearing, both the Netherlands and the European Commission highlighted the internal dialogue procedure in Article 31(5) and the lack of grounds for refusal as clear advancements in this respect. However, a complete lack of grounds for refusal could lead to limiting the judicial control in the assisting EDP's Member State to such an extent that it would become a mere formality. During her Q & A AG Capeta inquired whether, so far, there has been any instance where a judicial authorization has been refused in an assisting Member State. While the parties did not really answer this question, merely indicating that up until the present case there did not seem to have been any problems with cross-border cases, the AG seemed to be asking if the judicial authorization in the assisting Member State was merely a rubber-stamping procedure.

While the discussions mainly revolved around how to interpret the regulation in order to ensure the effectiveness of the EPPO prosecutions one must not forget that investigations under the EPPO must also ensure the effectiveness of (EU) fundamental rights, the protection of which are still largely defined by national law.

## **Final Remarks**

The added value of the EPPO as a centralized, specialized prosecutorial office for tackling complex financial crimes is clear. However, with regards to cross-border evidence gathering, one should not lose sight of the fact that while the EPPO is a single prosecutorial body it does not operate within a single legal area. The need to come up with effective cooperation mechanisms while still respecting the legal diversity of Member States and effectively guaranteeing individuals rights in criminal proceedings is the tension that underlies all judicial cooperation in criminal matters in the EU. So the question is, how is this tension to be resolved in EPPO proceedings? The upcoming opinion of the AG and CJEU decision will be important first steps in answering this question.