European Criminal Bar Association (ECBA)
EPPO Working Group

Proposal to the College of the European Public Prosecutor's Office (EPPO) for an exchange of views in respect of cross-border evidence gathering (Article 31 EPPO Regulation)

The ECBA

The European Criminal Bar Association ('ECBA') was founded in 1997 and is an association of independent specialist defence lawyers across Europe, representing the views of defence lawyers and promoting the administration of justice and human rights under the rule of law in Europe and among the peoples of the world. The ECBA is one of the main interlocutors of the European institutions on issues of criminal justice and the protection of the right of defence and fundamental rights, representing thousands of legal practitioners all around Europe through their direct affiliation to the Association as individual members, or through the Collective members that participate to the life of the Association.

The development of the legislation on the Protection of Financial Interests of the European Union and the European Public Prosecutor's Office ('EPPO') and its consistency with the principles of the rule of law and the rights recognised and guaranteed by the Charter of Fundamental Rights of the EU (the 'Charter') have been one of the main fields of action of the ECBA over the years.

When the EPPO became operational, as of June 2021, the ECBA continued its work in the field by forming a working group to reflect on defence issues and procedural rights in EPPO proceedings. Creating a new criminal procedure for a new institution is a complex matter, in which defence rights should be fully acknowledged and protected. The working group ('WG') has been focusing on the lack of specific regulations of defence and procedural rights, the impact on the rights of the suspects at the national level and problems relating to access to the case file. Since June 2022, the WG organises monthly online meetings to discuss practical issues and experiences regarding EPPO cases from different countries.

Using the knowledge from the ground gained through the activities of the WG, the ECBA furthermore interacts with the EPPO and other institutional stakeholders to convey the views of practitioners and help to build a practice that is in conformity with the highest standards of a fair trial and the rights of individuals. These exchanges take place in the context of the main institutional objectives of the ECBA: the dialogue with judicial institutions and the dissemination of a culture of strengthening the protection of fundamental rights and procedural safeguards.

With this aim, back in October 2023, the WG prepared a proposal to exchange views on cross-border gathering of evidence in EPPO proceedings. We now wish to bring it to the public and look forward to receiving any comments via our e-mail secretariat@ecba.org.

January 2024

The Topic

- The regime on gathering evidence across borders within EU Member States (MS) in the EPPO Regulation leaves room for uncertainty in respect of the applicable law in that context and may create gaps for the protection of fundamental rights in respect of both accused persons and third parties;

- Depending on the interpretation of the Regulation by the courts, namely the CJEU, it could also create significant burdens to the conduct of the EPPO criminal investigations, in the sense of making it burdensome to obtain evidence across borders;

- This has been recognized by the EPPO College (Decision of the College of the European Public Prosecutor's Office of 26 January 2022 adopting guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017 /1939) which adopted a system derogating from the Regulation, by which:

    - where both Member States laws require judicial authorisation, or only the assisting EdP MS law requires such authorisation, but the measure must be subject to legal remedies, judicial authorisation should be requested in the handling European EdP MS, otherwise there would be no legal remedy available to challenge the substantive reasons to adopt the measure (this is connected with the interpretation of the Regulation by the EPPO in the sense that the courts in the assisting EdP MS are not allowed to perform a review of the substantive reasons to adopt the investigative measure);

    - "[i]n line with the principle that the justification and adoption of the measures is governed by the law of the Member State of the handling European Delegated Prosecutor", the court in the assisting Member State should not "assess the 'justification' and the 'substantive reasons' [which the EPPO defines as 'necessity and proportionality'] for undertaking the measure".

    - The College argues allowing the courts of the assisting EdP MS to review a measure adopted by the handling EdP would amount to a regression in respect of the "effectiveness" of judicial cooperation in criminal matters that were in place before the EPPO was set up (ie the mutual recognition system).

- The ECBA has vouched its point of view about the current framework (Open Letter of the European Criminal Bar Association (ECBA) in respect of the preliminary ruling in Case C-281/22, *GK and Others*, lodged at 25 April 2022, by the *Oberlandesgericht Wien*, Austria) and has set out that it does not agree with a limitation of the powers of the courts of the MS when operating as "assisting MS courts":

- No limitation to the power of the courts of the Member States may be drawn from the EPPO regime, absent any clear wording of the Regulation to that end (to the contrary, there is explicit wording allocating the competence to the courts of the assisting EdP's MS in Article 31(3) EPPO Regulation).

- The argument that the law applicable to the adoption of the measures is the law of the handling MS is not persuasive, since the law of the assisting Member State is explicitly equally applicable (e.g., for certain measures, including intrusive measures – Articles 29, 30(2) and (3), 31(5)(d) and 32 EPPO Regulation).

- **A good example: legal privilege.** If the EdP orders a search of a law firm in the assisting MS and this search is subject to prior judicial authorisation, such authorisation requires a decision on the proportionality *lato sensu* of the measure, which must obviously be made by the judge in the assisting Member State, as the assisting member state law regulates the privilege.

  From the perspective of the rights of those targeted by such a measure, an interpretation limiting judicial oversight would undoubtedly amount to a significant incursion, without clear wording in the Regulation upon which such a limitation could be based. Legal privilege being protected under EU law (see Judgment of 8 December 2022, *Orde van Vlaamse Balies v Vlaamse Regering*, Case C-694/20), albeit not being regulated in its details, namely the conditions for being breached or lifted, which are governed by Member States' national laws, it would mean that such an interpretation would jeopardise the *effectiveness* of EU law, namely the protection of rights.

  Even where this would not apply for a judicial authorisation *before* carrying out the search, it would apply to the remedies available *ex post*, e.g. immediately after the search. The same will apply in case of other privileges and special immunities.

- In the EIO system, there is an exception to the exclusivity of jurisdiction for review of substantive reasons on the basis of the legality and proportionality of the measure. This happens where fundamental rights may be at stake (Article 14(2): "The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, **without prejudice to the guarantees of fundamental rights in the executing State**.".

- In some MS there are no remedies available, therefore barring the actions of the assisting MS courts in those cases would jeopardise fundamental rights.

- In *Gavanozov II* (Judgment of 11 November 2021, *Criminal proceedings against Ivan Gavanozov*, C-852/19, ECLI:EU:C:2021:902) the CJEU noted that executing authorities may refuse to execute an EIO "**exceptionally, following an assessment on a case-by-case basis, where there are substantial grounds to believe that the execution of an EIO would be incompatible with the fundamental rights guaranteed, in particular, by the Charter"** (Article 11(1)(f) EIO Directive). However, in the case at hand, the Court was concerned that "in the absence of any legal remedy in the issuing State, the application of that provision would become automatic" which "would be contrary both to the general scheme of Directive 2014/41 and to the principle of mutual trust" (§59). It follows **that the CJEU has confirmed that if there is a risk of violation of fundamental rights, the executing authorities may refuse execution**. **This will demand that certain cases may require an assessment of the substantive reasons to adopt the measure**. This also flows from Article 14(2) EIO Directive.

- When viewed from a fundamental rights' perspective, such an interpretation would mean that the EPPO regime would not constitute a regression in respect of the protection of rights of those targeted by the investigative measures, and, in certain respects, would even constitute progress in that regard.

Discussion points on Article 31 EPPO Regulation

Both prosecution and defence identify critical points with the current regime.

⇒ The CJEU's ruling in G.K. will be important, but it will not solve all the issues.

⇒ The ECBA would be interested in:

- Sharing experiences regarding problems that have been raised in EPPO proceedings;
- Monitoring the overall functioning of the collection of evidence in cross border proceedings in different MS;
- Receiving information and statistics about the use of Article 31(5) (c) and (d) by assisting EdPs;
- Sharing information about court decisions from the MS courts based on the use of evidence obtained in a different MS;
- Collecting information about court decisions in the MS of the assisting EdP discussing whether certain evidence requested by a handling EdP via an assisting EdP could not be collected under assisting MS law or has been unlawfully collected under the assisting MS law;

⇒ The common sharing of the above information can foster the discussion on what could be a solution for the future of EPPO proceedings:

- More harmonization of procedural requirements of certain intrusive measures? (house searches, intercept evidence, e-evidence, legal privilege, other types of privilege?)
- Even in the absence of harmonization, clear distinction of different types of measures and where the law of the assisting MS continues to apply (privileges and immunities, requirements for intercept evidence, house searches, etc.) and require judicial oversight based on this MS law?
- What type of procedural jurisdiction to assess cases where there are intrusive multiple laws apply?
    - Maintaining the division: assisting MS will assess the relevant applicable assisting MS law (i.e. as it assesses the motives to refuse to recognize an EIO)?
    - Giving handling MS courts the power to assess the relevant applicable assisting MS law and establish an "horizontal preliminary reference procedure"?
    - Giving jurisdiction to the central level (CJEU / general court)? (especially given that in the current Regulation, there may be a decision taken by the Permanent Chamber where the assisting EdP has raised an obstacle based on the unavailability of a certain investigative measure under its law – see Article 31(8)

The ECBA is interested and available to explore the subject more in-depth together with the EPPO and relevant stakeholders in any working group that may be established on the issue. This would be an excellent opportunity bearing in mind the added value of experience from the ground the organizations are able to bring to the table.

October 2023

The ECBA EPPO Working Group

The ECBA thanks the Members of the CCBE Criminal Law Committee for their input into the preparation of this paper.