

Article 42 EPPO Reg - Judicial review

Article 42(1) „**Procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review** by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies to failures of the EPPO to adopt procedural acts which are intended to produce legal effects vis-à-vis third parties and which it was legally required to adopt under this Regulation.“

- deviation from rights under Article 263(4) TFEU and 265(3) TFEU
- “specific conditions and arrangements” (Article 263(5) TFEU; not so in Article 265 TFEU)
- Article 86(3) TFEU: “rules applicable to the judicial review of procedural measures”
- EPPO will largely apply national criminal procedural law (no competence of the CJEU)
- *ex-ante* and *ex-post* judicial control in the same hands; easier/quicker proceedings

2

Case study – facts

An EDP of Member State A received a report from a whistleblower claiming that Mr. X, a citizen of Member State B, who is director of consulting company based in Member State B, has been involved in a subsidy fraud scheme concerning a major infrastructure project in Member State A. The whistleblower produced a number of documents which offered sufficient grounds to believe that Mr. X has been redirecting EU funds, which he had received for the infrastructure project, to a personal bank account held in Member State C and used part of these funds for private purposes.

The EDP of Member State A (“handling EDP”) initiates an investigation. Based on further evidence, the handling EDP obtains a national arrest warrant against Mr. X and issues an EAW. The handling EDP furthermore orders the conducting of a house/office search in Member State B.

3

Access to case file

The suspect's lawyer in Member State B request the EPPO's Central Office to obtain access to the EPPO'S case file. The Central Office forwards the request to the handling EDP in Member State A, who considers this request for access to the case file to be premature and does not send a reply to the lawyer in Member State B.

Question: how can the lawyer proceed to obtain the case file from the handling EDP?

4

Rules on access to EPPO case files

Article 45(2) "Access to the case file by suspects and accused persons as well as other persons involved in the proceedings shall be granted by the handling European Delegated Prosecutor in accordance with the national law of that Prosecutor's Member State."

Article 41(2) "Any suspected or accused person in the criminal proceedings of the EPPO shall, at a minimum, have the procedural rights provided for in Union law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as:

.....

(b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU;

5

Challenging procedural acts of the EPPO

- Procedural act of the EPPO
- Intended to produce legal effects vis-à-vis third parties
- Failure - legally required to adopt such procedural act
- Shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law
- Mere reference to national law or obligation to provide judicial review?

Recital 87(3) “Where national law provides for judicial review concerning procedural acts which are not intended to produce legal effects vis-à-vis third parties or for legal actions concerning other failures to act, this Regulation should not be interpreted as affecting such legal provisions. In addition, Member States should not be required to provide for judicial review by the competent national courts of procedural acts which are not intended to produce legal effects vis-à-vis third parties, such as the appointment of experts or the reimbursement of witness costs.”

6

Internal review – judicial review

Article 12(4) “Where the national law of a Member State provides for the internal review of certain acts within the structure of a national prosecutor’s office, the review of such acts taken by the European Delegated Prosecutor shall fall under the supervisory powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO without prejudice to the supervisory and monitoring powers of the Permanent Chamber.” (cf also: Article 48 iRoP)

Recital 30 “... In such cases, Member States should not be obliged to provide for review by national courts, without prejudice to Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).”

7

Competence of national courts and the CJEU

Recital 88(2): “When national courts review the legality of such acts, they may do so on the basis of Union law, including this Regulation, and also on the basis of national law, which applies to the extent that a matter is not dealt with by this Regulation. As underlined in the case-law of the Court of Justice, national courts should always refer preliminary questions to the Court of Justice when they entertain **doubts about the validity of those acts vis-à-vis Union law.**”

➤ ECJ case 314/85 *Foto Frost*

Article 42(2) “The Court of Justice shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning:

- (a) the **validity of procedural acts of the EPPO**, in so far as such a question of validity is raised before any court or tribunal of a Member State **directly on the basis of Union law**;
- (b)

8

Opening an investigation – choice of forum

Article 26(4) “A case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.”

Article 36(3) „Where more than one Member State has jurisdiction over the case, the Permanent Chamber shall in principle decide to bring the case to prosecution in the Member State of the handling European Delegated Prosecutor. However, the Permanent Chamber may, taking into account the report provided in accordance with Article 35(1), decide to bring the case to prosecution in a different Member State, if there are sufficiently justified grounds to do so, taking into account the criteria set out in Article 26(4) and (5), and instruct a European Delegated Prosecutor of that Member State accordingly.”

9

Challenging the EPPO's decision to initiate an investigation in MS A

The suspect's lawyer in Member State B considers that since his client has been handling the EU funds from his office located in Member State B, the investigation if any, should have been initiated and conducted by an EDP of Member State B.

- Procedural act of the EPPO
- Intended to produce legal effects vis-à-vis third parties (not mere preparatory acts)
- Shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law
- Mere reference to national law or obligation to provide judicial review?

Recital 87(2) "..... Procedural acts that relate to the choice of the Member State whose courts will be competent to hear the prosecution, which is to be determined on the basis of the criteria laid down in this Regulation, are intended to produce legal effects vis-à-vis third parties and should therefore be subject to judicial review by national courts, **at the latest at the trial stage.**"

10

Challenging the EAW

- In the issuing State: EAW as procedural act of the EPPO
 - subject to review by national courts – in line with CJEU jurisprudence on FD EAW
 - request for preliminary ruling in case of doubts about validity vis-à-vis Union law
- In the executing State
 - decision on EAW is competence of national authorities
 - indirect possibility to challenge the EPPO's decision on the competent EDP?

Article 4 FD EAW

"The executing judicial authority may refuse to execute the European arrest warrant:

.....

(7) where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;

or

11

Conducting investigations – house/office searches

Article 31(2) “The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures shall be governed by the law of the Member State of the handling European Delegated Prosecutor. ...”

Article 31(3) “If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.

....

However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.”

12

Challenging the investigation measure

Article 42(1) „Procedural acts **of the EPPO** that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law....“

- Court order or procedural act of the EPPO
- Execution of the court order by the EPPO and modalities of execution
- In either case national courts – but applicability of *Foto Frost*?
 - principle of proportionality – Article 30(5) and recital 88(3)
 - indirect possibility to challenge the EPPO’s decision on the competent EDP (?)
- “Single judicial authorization” – but judicial review in the courts of which (or both) Member State(s)

13

Further competences of the CJEU – Article 42

(2) “The Court of Justice shall have jurisdiction, in accordance with Article 267 TFEU, to give preliminary rulings concerning:

(a)

(b) the **interpretation or the validity of provisions of Union law**, including this Regulation;

(c) the **interpretation of Articles 22 and 25** of this Regulation in relation to any **conflict of competence between the EPPO and the competent national authorities**.

(3) “By way of derogation from paragraph 1 of this Article, the decisions of the EPPO to **dismiss a case**, in so far as they are **contested directly on the basis of Union law**, shall be subject to review before the Court of Justice in accordance with the **fourth paragraph of Article 263 TFEU**.”

Recital 89 “... This Regulation is also without prejudice to the possibility for a Member State of the European Union, the European Parliament, the Council or the Commission to bring actions for annulment in accordance with the second paragraph of Article 263 TFEU and to the first paragraph of Article 265 TFEU, and to infringement proceedings under Articles 258 and 259 TFEU.”

Article 42(4) to (8): non-procedural acts (compensation for damages, EPPO members/staff, data subjects' rights)

14

Key points

- Shift of competences from the CJEU to national courts
 - EPPO will largely apply national criminal procedural law
 - ex-ante and ex-post judicial control in the same hands; easier/quicker proceedings
- Judicial review in accordance with requirements and procedures of national law
 - Thus, in principle, the well-known standards/procedures apply
 - Obligation of Member States to ensure adequate level of judicial review
- National courts as “one-stop-shop” – review Union and national law
- Complex responsibilities in case of cross-border investigation measures
- CJEU competence preserved in respect of validity of procedural acts
 - of the EPPO where issue arises directly on the basis of Union law (not national law)
 - will cause delays as national court cannot take final decision when it entertains doubts about validity but will have to await CJEU ruling
 - national courts may, however, confirm the EPPO’s procedural act as valid
- National courts should make use of preliminary ruling procedure, where appropriate – but Art. 267 TFEU “does not constitute a means of redress available to the parties”

15