EUROPEAN LAW BLOG
NEWS AND COMMENTS ON EU LAW

ELB Blogpost 1/2024, 15 January 2024
Tags: Case 281/22 G.K. e.a. (parquet européen)
Topics: EPPO, cross-border cooperation, investigative measures, judicial review

The judgment in *G.K. e.a.* (*parquet européen*) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?

By Nicholas Franssen

Disclaimer: The views in this blog are strictly personal and do not in any way represent an official position of the Dutch government.

Judging by the image of a visibly delighted EPPO employee posted on LinkedIn, the mood at 11 Avenue John F. Kennedy (i.e. the EPPO's headquarters in Luxembourg) following the ECJ's judgment in Case C-281/22 *G.K.* appears to have been celebratory, bordering on self-congratulatory. The tone of the EPPO's official statement on the judgment, titled 'EU Court of Justice confirms EPPO's approach to faster and more efficient cross-border investigations', is equally upbeat and echoes the appreciation of a welcome gift befitting the festive season. All joking apart, the statement undoubtedly reflects a sense of relief following a nagging concern that the mechanism in place for cross-border cooperation within the EPPO's ambit would have become much more cumbersome had the Court come to a different appreciation of the relevant articles in Regulation 2017/1939 (the EPPO Regulation) on the occasion. Even so, the question arises as to whether the initial euphoria regarding the outcome of the proceedings might somehow become slightly mitigated if we were to have a closer look at some of the legal and practical consequences of the Court's judgment, particularly given the likelihood that the judgment may well turn out not to be the final episode in the saga.

Background

But, first things first. What was this milestone case – the very first of its kind in a no doubt long row of EPPO cases that the Court looks set to pronounce itself on – actually all about? Well, the EPPO Regulation contains a specific – in EU terminology, *sui generis* – mechanism

for cross-border cooperation between European Delegated Prosecutors (EDPs) in its Articles 31 and 32. The mechanism is designed to enable EDPs in different Member States to cooperate in an effective manner and collect evidence in a Member State other than theirs, without having to resort to EU instruments adopted in line with the principle of mutual recognition, such as Directive 2014/41 on the European Investigation Order (EIO), let alone through traditional mutual legal assistance. The idea at the outset was to limit judicial authorisation for investigation measures undertaken in a certain Member State at the request of an EDP in a different Member State to one instance only.

So far, so good. After all, one of the most prominent examples of the added value that the EPPO Regulation has brought to the fight against fraud in the EU is precisely making it easier to investigate and prosecute this form of crime, often of a transnational nature anyway, when more than one participating Member State is involved. However, the wording of Articles 31 and 32, being the result of a hard-fought compromise during the negotiations, is – putting it mildly – not crystal clear and has led to problems in practice ever since the EPPO became operational on 1 June 2021. Indeed, so much so in fact that the EPPO College had to step in and adopt a Decision on 26 January 2022 containing guidelines on the application of Article 31 of Regulation 2017/1939. In its Decision, quite remarkably, the College left the original notion of a single judicial authorisation aside and accepted some form of judicial review in all Member States involved, in so doing, testing the boundaries of the EPPO Regulation and perhaps its own leverage to improve the practical application of that Regulation.

As a consequence of the complexities inherent to the wording of Articles 31 and 32, it was not so much a question whether a court might at some point be tempted or even forced to refer preliminary questions to the ECJ in order to clarify the legal situation but rather when one would actually do so. Credit where credit is due, the *Oberlandesgericht Wien* (Higher Regional Court in Vienna) eventually took up the challenge and formulated several questions regarding the interpretation of these two Articles in an originally German case of fraud with biodiesel that had links to Austria. The questions of the *Oberlandesgericht* essentially concern the exact role of a court in the Member State of an EDP (the assisting EDP) where certain investigation measures have to be undertaken after the EDP who is primarily in charge of the investigation in another Member State (the handling EDP) has assigned these to the assisting EDP, in accordance with Article 31(2) of the EPPO Regulation.

Opinion of Advocate General Ćapeta

In her Opinion of 22 June 2023, Advocate General Ćapeta referred to two schools of thought on the subject (discussed previously on this blog): the first one advocated a full judicial review in the Member State of the assisting EDP, a view supported by Germany

and Austria. The second one entails a more limited review in that same situation, i.e., a review of the formal and procedural aspects relating to the execution of the assigned investigation measure, a view supported by the European Commission, the EPPO, Romania, and the Netherlands. After weighing the various arguments, the Advocate General concluded that the Court should choose the second approach, i.e., that the court approving a measure to be carried out in the Member State of the assisting EDP may assess only the aspects relating to the execution of an investigative measure and must accept the assessment by the handling EDP that the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the Member State of the handling EDP. In her view the second approach responds better to the objective of the EPPO Regulation to create an efficient system in the fight against crime affecting the EU's financial interests.

ECJ judgment of 21 December 2023

In an eagerly awaited judgment, the Court followed the conclusion of Advocate General Ćapeta to the extent that 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). However, on top of that, the Court has added an interesting new element by ostensibly obliging the Member State of the handling EDP 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).

The combination of these two elements would seem to imply that the Court was not willing to accept the full implication of the conclusion of the Advocate General that it is was up to the criminal procedural law of the Member State of the handling EDP to determine whether judicial control is to take place *ex ante* – i.e., before the investigation measure is carried out in another Member State – or *ex post*, e.g. during the trial stage of the case. It thus bears the hallmark of a delicate compromise between the two schools of thought mentioned before, a Solomon's verdict in other words. It is this second element of the judgment in particular that may lead to some unforeseen legal and practical consequences. The following section contains some observations, not necessarily critical ones, as to why.

The legal and practical consequences of the judgment

Firstly, the effect of the ECJ's judgment indirectly boils down to a closer step towards the need to harmonise certain aspects of criminal procedural law in the 22 participating Member States for the purpose of EPPO investigations. Even though one could certainly conceptually defend the inevitability of such a development with the aim of making the EPPO's life a little easier in the longer term, quite apart from the question if harmonisation for EPPO cases only makes much sense from a legislator's point of view. It is not evident, however, that this idea is entirely consistent with the philosophy behind the current EPPO Regulation. Like it or not, national criminal procedural law clearly plays a dominant role in that Regulation. This situation is the consequence of the fact that Member States were strongly opposed to harmonisation of criminal procedural law during the negotiations. By means of illustration perhaps, the wording of Article 30 on investigation measures and Article 41 on procedural safeguards in the Regulation may seem to contradict that contention, but a closer look reveals that they constitute either a minimal form of harmonisation or refer to EU legislation that Member States would have had to implement anyway, leaving all else to national law in accordance with Article 5(3) of the Regulation. It will be interesting to see whether the ECJ will go further down the road of (indirect) harmonisation once it will be called upon to assess new cases in the future, no doubt to the delight of all those Member States that are not overly keen to see the EPPO project head in that direction.

Secondly, what will happen to the notion of single judicial authorisation, as expressed in recital 72 of the EPPO Regulation? Are we now, in essence, to draw the conclusion from the judgment that this central element of the *sui generis* mechanism for cross-border cooperation has, to quote the immortal Monty Python dead parrot sketch, 'ceased to be', in the sense that there will always be at least two forms of judicial control in a cross-border EPPO investigation: one *ex ante* on the merits in the Member State of the handling EDP and one marginal or formal in the Member State of the assisting EDP, unless the national legislation of that latter Member State does not actually require such a judicial review, which may well be the exception in cases of house searches and other intrusive measures? If so, does this effectively increase the efficiency of the EPPO's functioning in such cases? Time will tell.

Thirdly, is the obligatory *ex ante* judicial review always to be carried out by a court? This seems to follow from the Court's references to the Member State of the handling EDP rather than to the EDP himself or herself. Or could an EDP, bearing in mind the independent nature of the EPPO, also be competent to do so in certain cases, in theory at least? If the answer to the question were to be affirmative, would this not mean that the mechanism, as interpreted by the Court, in fact becomes more burdensome than in the case of the EDP, say, issuing an EIO or a freezing order on the basis of Regulation 2018/1805? This point is particularly interesting, bearing in mind that the ECJ in Case C-

584/19 on 8 December 2020 *A and others* on Article 1(1) and 2(c) of Directive 2014/41 ruled that the concepts of 'judicial authority' and 'issuing authority' […] include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State'? The same reasoning may very well apply, *mutatis mutandis* but still, to the EPPO if that would make it more effective.

On a sidenote, in its judgment in Case C-852/19 on 11 November 2021 *Gavanozov II*, the ECJ ruled that in certain situations issuing an EIO requires the availability of a legal remedy against that decision. However, the Court did not specify at which stage of the process the legal remedy would actually have to be available. Most, if not all, Member States probably take the view that it makes no sense whatsoever to create a legal remedy prior to issuing an EIO as this would undo the whole purpose of issuing an EIO and risk harming the investigation. Similarly, it goes without saying that any *ex ante* judicial review should ideally avoid negatively affecting the outcome of the assigned measure once approved beforehand or even render it useless if the suspect has already become aware of the ongoing investigation as a result of it.

At the same time, it is important to also bear in mind that the CJE has pronounced itself on occasion in favour of a role of a judicial authority other than the prosecutor's office in matters relating to data retention and access to traffic and location data. For instance, in its landmark judgment in Case C-746/18 of 2 March 2021 *Prokuratuur*, the Court specifically ruled that Article 15(1) of Directive 2002/58 precludes national legislation that confers upon the public prosecutor's office the power to authorise access of a public authority to traffic and location data for the purposes of a criminal investigation. As a consequence, we may well have to assume that this principle applies by analogy to EPPO cases where a handling EDP assigns such an investigative measure to a colleague in another Member State, even though the Court did not specifically refer to this kind of investigation measure in paragraph 73 of its *G.K.* judgment.

Fourthly, as the ink of the judgment is still wet, metaphorically speaking, it is highly unlikely that the implementing legislation in all participating Member States is fully in conformity with the ECJ's judgment. It is, therefore, safe to assume that all these Member States will have to urgently review their legislation; Member States, like Germany and Austria, that had foreseen a full judicial review by a court in the Member State of the assisting EDP, will probably have to face up to the new reality and limit that role to the enforcement of the investigation measure. In the same vein, these same Member States will somehow have to ensure that the *ex ante* judicial review undertaken in the Member State of the handling EDP is recognised as an adequate, trustworthy form of judicial control on the merits of the case at that stage of the investigation, thus allowing the assigned investigation measure to be carried out on their territory. Conversely, those Member States that had not foreseen *ex ante* judicial control in cross-border EPPO cases may well need to introduce this, leaving

aside the previous question as to which judicial authority is best placed to undertake it. Additionally, all Member States may have to try and offer clarity to courts as to which elements concerning the enforcement of the investigation measure they can take into consideration when they review the assigned measure. Whether this will actually be possible or even desirable without some degree of guidance at the EU level is doubtful.

Fifthly, the question arises as to whether the legislative implications of the judgment do not actually confront the EPPO with an acute legal limbo in relation to both its ongoing cross-border investigations and possibly appeals following previous convictions where evidence has been gathered elsewhere. For example, will handling EDPs be able to continue to initiate cross-border investigations in the absence of a clear legal framework corresponding to the ECJ's judgment? At first glance, it would also seem very tempting for defence lawyers to seek to exploit the present situation by claiming that evidence in cross-border EPPO cases has not been gathered in line with the procedure now foreseen by the ECJ. This prospect would appear to be a very realistic one, regardless of whether national courts are inclined to accept that argument as valid in the end or not, and, accordingly, accept the evidence gathered as admissible.

Sixthly, it is obviously entirely up to the EPPO College to decide to do so, but from an outsider's perspective it would seem useful to have a fresh look at its Decision of 26 January 2022 on the interpretation of Article 31 so as to bring it in line with the ECJ's judgment where needed and offer clear guidance on the way forward to European Prosecutors and EDPs on the ground, particularly as they are the ones who will be facing the reality of diverging legislation in the participating Member States that may not yet be in conformity with the ECJ's judgment, not to mention uneasy discussions with national courts as to what exactly is needed to enable them to carry out their limited review of assigned measures and equally predictable legality challenges by defence laywers.

Last but certainly not least, we will definitely need to have a serious conversation about the EPPO Regulation itself. I would personally not dare to go as far as to suggest that the emphasis on the efficiency of the mechanism for cross-border mechanism in EPPO cases, as interpreted by the Advocate General and partially followed by the ECJ, could be qualified as being *contra legem,* like a fellow-commentator has. Nonetheless, I will happily admit that the actual wording of Article 31 could do with a little bit of fine-tuning. One striking example of this, at least in light of the recent judgment, is the fact that the EPPO Regulation itself is notably silent on the necessity of prior judicial review in the Member State of the handling EDP. I would, therefore, strongly argue that urgent action on the part of the Commission and the EU legislator is required to ensure that practitioners can actually apply this provision in a manner that is consistent with the interpretation of the relevant provisions of the Regulation by the ECJ without, so to speak, having to consult the Curia website in the process. In view of the fact that this article is such a key provision

in the EPPO Regulation and so central to the EPPO's effectiveness in cross-border cases, I am anything but convinced that amending it should wait until the evaluation of the EPPO Regulation foreseen in 2026, in accordance with Article 119 of the EPPO Regulation.

Conclusion

In conclusion, the ECJ's judgment in this case is undoubtedly a milestone in the short history of the EPPO. This qualification is not just based on the mere achievement that it is the very first judgment of its kind. More importantly, its significance mainly sprouts from the fact that it deals with a centrepiece of the EPPO Regulation: the mechanism for cross-border cooperation that, building on the instruments based on the principle of mutual recognition, has been designed to enable the EPPO to operate effectively across borders in its fight against transnational crime at the detriment of the EU budget and all taxpayers. It is safe to assume that the judgment will not be the final step in the development of that mechanism. Instead, it encourages, if not actually forces all actors involved – be they the Commission, the EU legislator, national authorities in the Member States concerned, or the EPPO itself – to ensure a tangible follow-up to the judgment. Without such concrete next steps, the apparent clarity that the ECJ may have provided on this point of the Regulation runs the risk of being absorbed by a legal quagmire in which the European Prosecutors and EDPs are likely to get stuck sooner or later.