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Advocate General's Opinion in Case C-281/22 | G. K. e.a. (European Public Prosecutor's Office)

Cross-border investigations by the European Public Prosecutor's Office (EPPO): Advocate General Ćapeta advises the Court to rule that judicial review in the Member State of the assisting European Delegated Prosecutor should be limited to procedural questions

The EPPO is a highly developed system of mutual recognition with embedded safeguards guaranteeing the protection of fundamental rights

The European Public Prosecutor's Office (EPPO) has powers of investigation and prosecution of crimes affecting the financial interests of the European Union. In this case the Court is, for the first time, invited to interpret the legal instrument establishing that Office and setting out the rules on its functioning, namely, the EPPO Regulation.

In the present case, several natural and legal persons are accused of having set up a broad system for importing biodiesel from Bosnia and Herzegovina to the EU, which they claimed was produced from used cooking oil. This 'used cooking oil' was allegedly previously imported from the United States to Bosnia and Herzegovina. There is, however, a suspicion that this biodiesel had already been produced in the US without any intermediate processing or production steps in Bosnia and Herzegovina. The EPPO is, through its handling European Delegated Prosecutor (in Germany), conducting preliminary investigations concerning these alleged false declarations, resulting in a loss of revenue of approximately EUR 1,295,000. That alleged loss constitutes a financial interest of the Union and thus falls within the jurisdiction of the EPPO.

Although the main investigation is taking place in Germany, the EPPO deemed it necessary to undertake a cross-border investigation in Austria. Accordingly, the (German) handling European Delegated Prosecutor assigned the search and seizure of the accused's property to an assisting European Delegated Prosecutor (in Austria).

Under Austrian law, however, such an investigative measure requires prior judicial authorisation. The assisting European Delegated Prosecutor therefore obtained judicial warrants for search and seizure of potentially incriminating documents and hardware.

On 1 December 2021, the accused filed, before the Higher Regional Court Vienna (Austria), appeals against the search warrants approved by four Austrian courts. They submit that the search and seizure measures authorised were neither necessary nor proportionate.

The Higher Regional Court has decided to refer questions to the Court of Justice, to establish whether it is authorised to conduct a full review (as it would do in a purely domestic situation), or, whether its review should be limited to procedural questions concerning the execution of the cross-border investigation measures at issue.

In her Opinion of today, after assessing the interpretative options available to the Court, and taking into account the

efficiency of the EPPO as well as the protection of fundamental rights, Advocate General Tamara Čapeta proposes the Court to rule as follows: **the EPPO Regulation should be understood as allowing the court of the assisting European Delegated Prosecutor (in casu in Austria) to review only the aspects related to the execution of an investigative measure, and to accept the assessment by the handling European Delegated Prosecutor (in casu in Germany) that the measure is justified.**

First and foremost, the Advocate General notes that the EPPO Regulation only partially regulates EPPO procedures. Importantly, it is silent on the necessity of prior judicial authorisation for cross-border investigation measures, leaving it to the criminal laws of Member States.

She also stresses that the EPPO was intended to be an efficient mechanism in the fight against crimes damaging the EU's financial interests, including cross-border investigations.

Full judicial review in the Member State of the assisting European Delegated Prosecutor would result in the EPPO cross-border investigations being a less efficient system than intended. A division of tasks concerning judicial authorisation, whereby the court in the Member State of the assisting European Delegated Prosecutor may review only the aspects related to the execution of an investigative measure, is not contrary to the wording of the EPPO Regulation and responds better to its objective to create an efficient system in the fight against crimes affecting EU financial interests.

According to the Advocate General, such a solution, which results from the EPPO being a more advanced instrument of mutual recognition, also safeguards fundamental rights of suspects and accused persons in cross-border investigations, especially from the perspective of the broader system of the EPPO Regulation.

Specifically, the EPPO Regulation contains various safeguards guaranteeing the protection of fundamental rights. These are, for example, the communication mechanism between the handling and assisting European Delegated Prosecutors when a cross-border investigation measure is assigned; a concrete list of rights of suspects and accused persons in EPPO procedures; and the obligation of Member States to provide judicial remedies against EPPO's procedural acts.

Thus, allowing the court of the Member State of the assisting European Delegated Prosecutor to review only the aspects related to the execution of an investigative measure ensures that the EPPO efficiently performs its tasks, and does not endanger the protection of fundamental rights.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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