Defence in future EPPO proceedings: cross-border investigations

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Defence in Cross-Border Cases (general)

- Issues of defence in cross-border cases
  - Dual defence
    - Legal and practical difficulties; funding.
  - Legal fragmentation
    - Requirements for gathering evidence; rules on the participation rights of defence; access to case files; coercive measures; alternatives to indictment; grounds for non-prosecution; etc.
    - Remedies (existence/non-existence; where to argue; gap due to cross-border dimension, lack of proper European law remedies, etc.).
  - Forum shopping / paralell proceedings/ conflicts of jurisdiction / ne bis in idem
    - Lack of criteria / lack of rights and remedies / lack of cross-dimension analysis of rights (lengthy PTD; proportionality of coercive measures, etc.) (except NBI after final decision)
Case Study (1)

- High level official of EU Agency (Mr F) suspected of having defrauded his institution (*European Aviation Safety Agency*, EASA, in Germany) of EUR 9 million.
- The prosecution case is that initially he places the money in Commerzbank in Cologne, Germany (PMS).
- Money moved to Sláinte Bank in Dublin (NPMS). Mr F subsequently receives a tip-off that inquiries have been made by police officers with Sláinte Bank. Therefore Mr F flies to Dublin and appears in person at Sláinte Bank. He gives instructions to move the money immediately to Cheers Bank in the British Virgin Islands (‘BVI’), which is done.
- Mr. F then settles all EUR 9 million into a BVI trust. The trustees of that trust are Cheers Bank Trust Company.
- Some of the moneys are used to buy a Villa in the Algarve, Portugal.
- The EPPO decides to prosecute the case in Germany.
- Mr F remains in Ireland.

(fictional case; inspired in case study by Mr. Drew – Seminar 14 March 2019, available at [https://www.era-comm.eu/EPPO/presentations.html](https://www.era-comm.eu/EPPO/presentations.html))
Case Study (competence)

Checking EPPO competence

- Art. 22 – material - definition of offence – PIF offence? Art. 3 – ML?
- Art. 23 territorial/personal jurisdiction (Mr. F and others for ML?)
- 10,000 threshold – art. 25(2)
- Art 26 (allocation) – DE territoriality?; PT for ML? / damages? Other?
- Challenges to allocation/competence? [which EDP / MS vs EPPO]
  - How?
  - Before which authority? (25, 6…)
  - When?

[see presentation by HH Herrnfeld, p. 4,5,6]
Case Study (NPMS)

- Evidence obtained from IE (NPMS)
  - Art. 327 TFEU – not sufficient
  - Agreement? (105,3)
  - Notification? (105,4) – not for EIO (IE no EIO), only for Conventions (1959 and additional protocols)
  - EUROJUST intervention / “double hat”? / Reciprocity?

- Extradition sought from IE (NPMS)
  - Art. 327 TFUE – not sufficient
  - Agreement? (105,3)
  - Notification? (105,3) – EAW
Case Study (TS)

- Evidence from BVI
  - Agreement? (104,3) [sector agreements? ]
  - Notification? (104,4)
  - “Double hat” / reciprocity ? / Report the offence... and then take profit of the evidence...
    
    [forum shopping for MLA... ?]

- Extradition sought from BVI
  - Request MS authorities (Art. 104,7)
    
    [forum shopping for extradition... ?]

Challenging legal basis...
Case Study (2) EPPO EAW and Evidence

**DE HDP orders**

- **Searches** of F’s **domicile** in Germany
- **Production** of documents by EASA
- **Searches** of the Algarve **Villa** in Portugal and seizure of any documents relevant for identifying the link with the dirty money, the identity of the owners or any persons possibly committing ML; **recording of conversations** in the domicile (to be installed during the search sub-reptitiously)
- **Production of Documents** from the commercial registry / real estate agent / banking transactions / tax documents related to the purchase of the villa
- **Freezing** of the Villa since liable to confiscation
- **Arrest and surrender** of F from Ireland
- Having discovered the identity of the owner of the Villa and the links to the “dirty money”, **arrest of surrender of this person from PT to DE**
Case Study (2) EPPO EAW and Evidence

Particular EPPO/EAW issues
- “judicial authority”; need for court order?
- EAW for interrogations / investigations? (proportionality…)
- Dual defence
- Access to case files of HEDP when arrested on an EPPO EAW
- Alternatives to PTD if cross-border situations?
- Refusal grounds (statute of limitation; ne bis in idem; lis pendens)
Case Study (2) EPPO EAW and Evidence

- Evidence obtained in DE, in principle EPPO same powers as in domestic cases? But, the “minimum available measures” (art. 30)
  - Judicial authorization pursuant to NL?
  - Art. 30(5) – threshold lower than NL?
  - Art. 30 vs 31

- Evidence obtained in PT (art. 31)
  - Art. 31 – how does this work?
  - Challenging measures in PT (e.g. unlawfully gathered evidence / privilege / lack of judicial authorization / formalities contrary to fundamental principles) - in which MS? To which authority? When? Effects? (for tomorrow)

- Challenges / requests to supervising EP / Chamber?
- Freezing and Confiscation in PT (national rules / MR instruments / Directive/ art. 30(1)(d), 38)
Other aspects in cross-border EPPO cases

- Applications in relation to competence?
- Applications in respect of allocation during the investigation?
- Applications in respect of closing the case?
- Applications in respect of “alternatives to the prosecution”?
- Applications in relation to bail measures / other precautionary measures?
Evidence gathering for the defence during EPPO cross-border investigations

[need of access to case files...]  
- Right to request  
- Right to attend  
- Right to participate  
- Right to dual defence  
- Right to financial legal aid?  
- Right for the accused to make statements before the indictment  
- Right for the accused to make statements in his MS  
- Right to (private) investigation by the defence
The Trial in EPPO cases – national law

- EDP ? EP?
- Victims?
  - E.g. MS in VAT Fraud
- The admissibility of the evidence
  - Applicable law
  - Competent forum for decision
  - Remedies
- Defence evidence (see above)
- The right to be present at trial (what about video-link if consent?)
- Dual defence
- Preliminary references to CJEU (and to other MS?)
  ....
Thank you!
Obrigada!
Danke!

Check out www.ecba.org
and http://handbook.ecba-eaw.org/ (update coming soon)