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# Practical Problems of the Defence in EPPO Proceedings



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Defence in Future EPPO Proceedings – Trier, 17-18 October 2019

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## Procedural Safeguards in EPPO Procedure



EPPO, a modern Lernean Hydra?

© Svetlin Velinov

### Article 41 paragraph 2

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

- (a) the right to interpretation and translation, as provided for in Directive 2010/64/EU
- (b) the right to information and access to the case materials, as provided by Directive 2012/13/EU
- (c) the right to access to a lawyer and the right to communicate with and have third persons informed in the event of detention, as provided for in Directive 2013/48/EU
- (d) the right to remain silent and the right to be presumed innocent as provided for in Directive (EU) 2016/343
- (e) the right to legal aid as provided for in Directive (EU) 2016/1919”

## Interpretation and Translation

- ▶ **Article 41 paragraph 2 (a)** “the right to interpretation and translation, as provided for in Directive 2010/64/EU”
- ▶ Transposition date : 27 October 2013
- ▶ Globally implemented (exception: Belgium and Denmark)
- ▶ Apply to “person from the time they are made aware by the competent authorities of a MS by official notification (...) that they are suspected or accused of having committed a criminal offence” Art 1(2) Directive 2010/64/EU

## Main issues

- ▶ **Assessment of the need for an interpreter**
- ▶ **Independence and Confidentiality**
  - ▶ Right to interpretation of communication (letter/consultation) with lawyer is not guaranteed by law in all jurisdictions
  - ▶ Use of the same interpreter at police station, in court and for private consultation
- ▶ **Quality of the interpretation/translation**
  - ▶ Safeguards in the Directive (register/concrete means to ensure quality of service)
  - ▶ Knowledge of legal jargon
  - ▶ Rare language/dialect
- ▶ **Determining what to be interpreted**
  - ▶ Art 2 (2) Directive 2010/64/EU: “communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing”

## Main issues

- ▶ **Determining what to be translated**
  - ▶ Art 3 (1) Directive 2010/64/EU: **all documents which are essential** to ensure the suspect/accused is able to exercise their right to defence and to safeguard fairness of procedure (any decision depriving a person of his liberty, any charge or indictment, and any judgment)
  - ▶ Not all MS legislation lists the essential documents for which written translations have to be provided -> case by case basis
  - ▶ Common practice to provide oral translation instead of written translation
- ▶ **Access to remedies**
  - ▶ No requirement for a separate mechanism for challenge of refusals to provide interpretation and translation or the quality of provided services
- ▶ **Costs : supported by MS**

## Access to Documents

### ▶ EPPO Regulation

- ▶ **Article 45 paragraph 2** "Access to the file by suspects and accused persons as well as other persons involved in the proceedings shall be granted by the handling EDP in accordance with the national law of that Prosecutor's MS"
- ▶ **Article 41 paragraph 2 (b)** "the right to information and access to the case materials, as provided for in Directive 2012/13/EU"

### ▶ Directive 2012/13/EU

- ▶ Transposition date : 2 June 2014
- ▶ Globally implemented (exception: Belgium and Denmark)
- ▶ Applies to person from the moment they are made aware of their quality as a suspect or accused (article 2 (1) Directive 2012/13/EU).
- ▶ Two aspects: right to information about rights (art. 3, 4 and 5) and right to access documents of the accusation (art. 6 and 7)

## Main issues

### ▶ Disclosure of facts (art. 6 Directive 2012/13/EU) and access to the file (art. 7 Directive 2012/13/EU)

- ▶ An acute current issue : already difficult in some jurisdictions where minimum standards not met
  - > increased breach of fairness in the proceedings of future EPPO procedure to expected
- ▶ Impossibility to properly advise clients and exercise rights of defence

### ▶ Access granted in "due time" to allow exercise of rights of defence

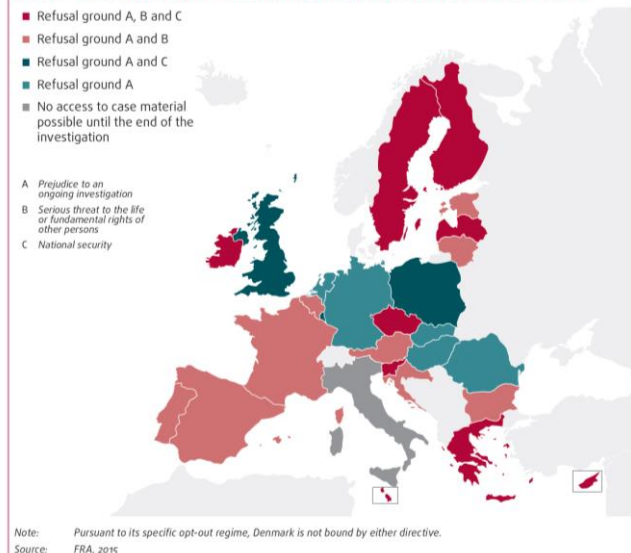
- ▶ Art 49 of the EPPO Regulation : electronic file and structural manual file : practical issues to obtain file in due time are likely to arise

### ▶ Tightly linked to right to silence

## Main issues

- ▶ **Restricted access to file in some circumstances (art. 7 (4) Directive 2012/13/EU)**
  - ▶ Decision by judicial authority subject to judicial review
  - ▶ Access to material at pre-trial stage, to challenge lawfulness of detentions or arrests, at the trial
  
- ▶ **Remedies ?**
  
- ▶ **Potential difference of treatment of accused person depending on where the proceedings are carried out**
  - ▶ Discrimination as prohibited by art. 18 TFEU, Breach of art. 21 TFEU and fair trial rights as enshrined by the Charter?

Figure 7: Grounds for refusing access to case materials during the pre-trial stage in EU Member States



Source: Rights of suspected and accused persons across the EU: translation, interpretation and information,

EU Agency for Fundamental Rights (FRA)

## Main issues

- ▶ **Access to file by third parties**
  - ▶ The Portuguese example
  - ▶ In some instance, in criminal cases where a public interest arises (for example corruption of subvention's fraud), any person (natural or legal) can be a party and enjoy same rights as the victim
  - ▶ Abuse of this mechanism by journalists
  - ▶ Threat to fairness of procedure and increased public pressure on judiciary

## Victim's rights

- ▶ **No definition of victim**
- ▶ **No specific article dedicated to the victim but enjoys rights under the Regulation**
  - ▶ Right to bring judicial review against procedural acts taken by EPPO at pre-trial stage,
  - ▶ Right to challenge act of EPPO electing the MS where trial will be held,
  - ▶ Right to take judicial review against EPPO for failure to act,
  - ▶ Right to be informed of the referral to national authorities where the EPPO investigation reveals that no criminal offences for which EPPO has jurisdiction have been committed.
- ▶ **Admission to access to the case file of the EPPO (art. 45 para. 2 3<sup>rd</sup> sentence) subject to the national law**
- ▶ **Rights granted to victim vary depending on national legislation**
  - ▶ Minimum standard established by Directive 2012/29/EU
  - ▶ In some jurisdictions legal persons (associations/NGOs) are not granted the status of victim and the various rights.
- ▶ **What if a person is granted the status of victim in the jurisdiction where investigation was done but the case will be tried in another jurisdiction where their status is denied?**

## Legal Aid

- ▶ **Article 41 paragraph 2 (e)** “the right to legal aid as provided for in Directive (EU) 2016/1919”
- ▶ Transposition date : 25 May 2019
- ▶ Globally implemented (exception: Denmark, Germany, Ireland, Greece, Malta and UK )
- ▶ No specific provision relating to EPPO proceedings.
- ▶ Article 4. 1 and 2 of Directive 2016/1919: “

## Main issues

- ▶ **No provision relating to EPPO procedure in Directive 2016/1919/EU**
  - ▶ Leave to the Member States’ authorities to base decision to grant legal aid on a “means” and “merits test” (Article 4.1 and 2)
    - ▶ Means: frozen assets
    - ▶ Merits: no guaranty that EPPO proceedings will meet this criteria
  - ▶ Potential refusal on the ground that “the interests of justice” do not require that legal aid is granted
  - ▶ Exception: detention hearings
- ▶ **Legal representation required in multiple jurisdictions**
  - ▶ EPPO procedure will inevitably involve multiple MS in each case
  - ▶ The EPPO Directive or the Legal Aid Directive do not provide for legal aid in each jurisdiction. See EAW procedure

## Main issues

- ▶ **Low level of payment of legal case**
  - ▶ A compensation rather than professional fees
  
- ▶ **A European funded prosecution but a national funded legal aid scheme**
  - ▶ Potential discrimination on the ground of art. 18 and 21 TFEU and breach of fair trial rights as protected by the Charter
  
- ▶ **The limits of lawyer nominated by Bar/Court**
  - ▶ Impossibility in many MS to choose own legal representation
  - ▶ Specific skills required for transborder investigations (EU law, EU criminal Law)
  - ▶ Linguistic skills

## Forum of Choice

- ▶ **Forum shopping for gathering of evidence and investigation measure**
  - ▶ EPPO Regulation and national law of the handling EDP
  - ▶ Art. 26 (4) of EPPO Regulation
    - Principle:** MS where "focus of the criminal activity" – no clear definition of what constitute the "focus of the criminal activity"
    - If **several connected offences:** MS where the bulk of the offences have been committed
    - Exception:** if duly justified jurisdiction can be granted to MS (in order of priority) of:
      - place of suspect/accused person habitual residence
      - nationality of the suspect/accused person
      - place where the financial damage has occurred
  - ▶ Criterion easily manipulated to elect a jurisdiction where evidence rules are more lenient and safeguards lowered to minimum standard.



## Forum of Choice

### ▶ Forum shopping for trial

- ▶ Article 36 (3) Possibility to prosecute a case in a different national court than the MS where the investigation was lead.
- ▶ Requirement: "*sufficiently justified grounds*"
- ▶ Criteria to elect national court for trial to be held : art. 26 (4) and (5); cf. Art 33.
- ▶ Forum shopping to elect jurisdiction where rules of evidence are less demanding

## Communication with the judiciary

- ▶ No provision in the EPPO regulation
- ▶ National law of the EDP ?
- ▶ Difference of culture amongst MS

# Thank you for your attention today !



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