

Judicial review in EPPO proceedings by national courts and the CJEU

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Introduction

- ⇒ Judicial review of EPPO's activities is essential to ensure respect of its normative framework, including the Regulation itself.
- ⇒ "(...) access to a competent court to obtain the judicial review of the acts of a public authority is, in a democratic society, a pillar of the Rule of Law. It is inconceivable that the activity of a European Body or Agency, especially in the field of criminal law, does not provide an efficient remedy before an independent and impartial tribunal, because this could cause a serious breach of both the Charter and the European Human Rights Convention (...) the issue is not *if* there should be a judicial review of investigation and prosecution acts adopted by the EPPO, but *what kind of review* and *before which judge*, European or national, the review must be provided"

(I. Patrone, Deputy Prosecutor General at the Italian Supreme Court, before the European Parliament: Public Hearing on "The European Public Prosecutor's Office (EPPO) and the European Union's Judicial cooperation Unit (EUROJUST)", Session 3. EPPO: judicial review, 24 May 2016).

Outline

- 1) Broader legal context
- 2) Evolution of the judicial control on the EPPO in the previous projects, negotiations and final text
 - 1997, 1999 Corpus Juris
 - 2001 Green paper
 - 2013 Commission's proposal
 - Final Regulation of 2017
- 3) Judicial Review before **national courts**
- 4) Judicial Review before **the CJEU**

1) Broader legal context – Judicial review in EU Law

- **Art. 19 §1 TEU** : (...) Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
- **Art. 47 Charter**: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.
- **Art. 263 TFEU**: The **CJEU** shall review...the legality of acts of **bodies, offices or agencies** of the Union intended to produce legal effects vis-à-vis third parties.
- **Art. 267 TFEU** : The CJEU shall have jurisdiction to give preliminary rulings concerning: (...) (b) the validity and interpretation of acts of the institutions, **bodies**, offices or agencies of the Union.
- The Treaties “established a complete system of legal remedies and procedures designed to permit the **Court of Justice to review the legality of measures adopted by the institutions**” (CJEU, *Les Verts*, 23 April 1986).
- “[**national**] courts do **not** have the power to declare **acts of the Community institutions invalid**” (CJEU, *Foto-Frost*, 22 October 1987).
- **Art. 86(3) TFEU** : « **The regulations** referred to in paragraph 1 **shall determine** the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, **and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions** » (see also recital 86 of the EPPO Regulation).

2) Evolution of the judicial control on the EPPO

- Corpus Juris 1997
 - Judicial control divided/shared between national jurisdictions and the CJEU.
 - As a general rule, control was to be mainly exercised by national courts for the preparatory stage (judges of freedoms competent both to control investigations and the decision to commit the case to trial), the trial stage and for appeal to national courts.
 - Appeal to the CJEU should be permitted in 3 cases only, similar to those covered by the PFI Protocol.
- Corpus juris 1999 => Proposal to complement the EPP with a Specialised European pre-trial chamber (either replacing completely the judges of freedoms or only competent for the decision to commit the case to trial).
- 2001 Green Paper => the importance of judicial control exercised by national courts (references to judge of freedoms). But opened questions related to the extent of control by the CJEU (see follow up report = a number of respondents insisted that the judicial review of the EPPO's decisions to send cases to trial should be bestowed upon a European pre-trial chamber)

- 2013 Commission's proposal => Very controversial in this respect.
See for instance:

- Art. 13(4) about ancillary competence, which stated that "The determination of competence pursuant to this Article shall not be subject to review."
=> What's the meaning of Art. 13(4)?
- Art. 36 (main provision on judicial review) : when adopting procedural measures in the performance of its functions, the EPPO is to be considered as a national authority for the purpose of judicial review (1) and that where provisions of national law were rendered applicable by the Regulation, such provisions could not be considered as provisions of Union law for the purpose of Art. 267 of the Treaty (2).
=> Art. 36 : legal fiction aimed at reducing control by the CJEU as much as possible
=> Compatibility with EU primary law? At least inconsistency between the insistence on the status of the EPPO as a European body, on the one hand, and the fact of considering its acts as acts of a national authority, on the other hand.

- Final Regulation (EU) 2017/1939 :

- Art. 42 = main legal basis for judicial review of EPPO's acts

- National courts will play a key role in reviewing EPPO acts and decisions (Art. 42 (1))
 - The CJEU will also intervene but in a limited number of cases
 - No Pre-trial Chamber

- Improvement in comparison with Commission's proposal because

- it avoids the previous legal fiction
 - and it grants (at least more clearly than before) the CJEU jurisdiction over certain EPPO-related matters.

- Reasons/rationale for the importance of judicial review by national Courts

- But general questions remain

- to know whether such importance of national Courts is adapted to a « EU body » (see in particular judicial review by national courts of the choice of forum)
 - whether the limits brought to the CJEU competences are acceptable.

Main reasons / rationale

- Art. 86 (3) : « **The regulations** referred to in paragraph 1 **shall determine** the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, **and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions** » (see also recital 86).
- EPPO's legal framework = combination of EU & national law : national courts apply both EU and national law. On the contrary, the CJEU is not competent to apply national law.
- Practical reasons:
 - it's easier to go before national courts than before the CJEU
 - National courts will have a better possibility to look at the case file
 - Absence of specialisation in criminal law of the CJEU
 - CJEU would be overwhelmed and proceedings would be very long
 - ...

3) Judicial Review **before national courts**

=> Art. 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.

Judicial review before national Courts of the choice of forum

- In cross-border cases, the choice of forum will be essential.
 - Art. 36(3): the trial will take place in the **MS of the handling EDP** but the Permanent Chamber may decide to bring the case in **another MS**:
 - if there are “**sufficiently justified grounds to do so**”;
 - taking into account the **criteria** set out in Art. 26(4) and (5) (territoriality; habitual residence; nationality; main financial damage).
 - Recital 87: decisions on the choice of forum should be subject to judicial review by **national courts**.
 - They should assess whether: i) they have jurisdiction according to **national law**; ii) the EPPO applied the rules of the **Regulation** correctly.
 - => Right level of judicial control ???
 1. Risks of **negative conflicts of jurisdiction**: EPPO → MS X → declines → MS Z → declines → ?
 2. **National** courts will have to decide on a (partially) discretionary choice of an **EU body that is based on EU criteria**.

Specificity of Art. 31 (Cross-border investigations)

§ 1 => The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the *handling European Delegated Prosecutor*, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out => « assisting EDP ».

§ 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 => No second judicial authorisation will be necessary in the handling EDP's MS. If it is refused, the handling European Delegated Prosecutor shall withdraw the assignment.

If no such judicial authorisation is needed in the law of the assisting EDP, whereas it is in the law of the handling EDP, then it will have to be obtained by the handling EDP.

4) Judicial Review before **the CJEU**

a) What CJEU's jurisdiction to control the legality of the EPPO's acts (Art. 263 TFEU) ?

- As a consequence of Art. 42(1), the legality control by the CJEU has been strongly reduced. This seems admissible considering Art. 263 (5).
- However :
 - How to interpret 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 » ?
 - => Means that actions for annulment against EPPO's acts may not be introduced by natural and legal persons (to be introduced before national Courts) but may be introduced by a MS, the EP, the Council or the Commission.
 - => On what grounds? Lack of competence, infringement of an essential procedural requirement, infringement of the Treaties [including the Charter] [and] misuse of powers (Art. 263(2) TFEU).
 - => Why nothing in the Regulation itself ? (> preliminary ruling competence)
 - Exception to Art. 42(1): EPPO's decisions to dismiss a case !!

Art. 263 TFEU - reminder

- The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. **It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.**
- It shall for this purpose have jurisdiction in actions brought by a **Member State, the European Parliament, the Council or the Commission** on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.
- The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.
- Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.
- **Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.**
- The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

CJEU's jurisdiction to review decisions to dismiss a case

- Art. 42(3) Regulation: by way of derogation from para. 1..., **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 CJEU** in accordance with Art. 263(4) TFEU.
- Reasons to dismiss a case are listed in Art. 39 => (a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person; (d) immunity granted to the suspect or accused person, unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect's or accused person's case has already been finally disposed of in relation to the same acts; (g) the lack of relevant evidence.
- 4 questions:
 - Decision to be contested on what grounds? Lack of competence, infringement of an essential procedural requirement, infringement of the Treaties [including the Charter] [and] misuse of powers => How will these grounds apply to the EPPO's decision to dismiss the case?
 - What role for **national law** : **can national law provide for further grounds to dismiss the case?** (See Recital 81: the grounds for dismissal of a case are **exhaustively** laid down in this Regulation) => NO role?
 - What role for **national courts**? Can they **review EPPO dismissal decisions**? (EPPO's dismissal decisions "in so far as they are contested directly on the basis of Union law, shall be subject to review before the CJEU")
 - Is the CJEU well equipped to exercise such control? (see e.g. lack of specialisation)

CJEU's jurisdiction to give preliminary ruling

Art. 42(2) – CJEU shall have jurisdiction 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 (=> Not the interpretation of such acts...)
- b) the **interpretation or the validity of provisions of Union law**, including the Regulation;
- c) the interpretation of Art. 22 and 25 of the Regulation in relation to any **conflict of competence** between the EPPO and the competent national authorities => Needed?

Importance of such CJEU's jurisdiction to give preliminary ruling

- Requests for preliminary rulings are, as actions for annulment, “a **means for reviewing the legality of [EU] acts**” (*Foto-Frost*)
- The CJEU may develop **autonomous concepts** (many examples, including in EU criminal law : see for instance *Poltorak; Kovalkovas*)
- There is a “pressure” on national courts to establish the dialogue with the CJEU:
 - Art. 267(3) – courts of last instance shall refer a request for preliminary ruling to the CJEU (if relevant and necessary)
 - Principle of **sincere cooperation**
 - **ECtHR** case law on violation of Article 6 ECHR

Other references to basic CJEU's titles of competence

- Art. 42 (4) The CJ shall have jurisdiction in accordance with Art. 268 TFEU in any dispute relating to compensation for damage caused by the EPPO.
- Art. 42 (5) The CJ shall have jurisdiction in accordance with Art. 272 TFEU in any dispute concerning arbitration clauses contained in contracts concluded by the EPPO.
- Art. 42 (6) The CJ shall have jurisdiction in accordance with Art. 270 TFEU in any dispute concerning staff- related matters.
- Art. 42 (7) The CJ shall have jurisdiction on the dismissal of the European Chief Prosecutor or European Prosecutors, in accordance, respectively, with Art. 14(5) and Art. 16(5) => But not of EDPs

Conclusions

- **Despite the difficult reading/understanding of the EPPO Regulation, it is clear that:**

- **National courts**, which are normally the “first judges” of EU law, will play a key role in reviewing EPPO acts and decisions
- The **Court of Justice** will only intervene in a **limited number of cases**, but will play a crucial role as well. It can especially ensure a certain level of consistency if national courts rely on the preliminary reference procedure whenever they have doubts about the interpretation of EU law/validity of EPPO acts

- What about the future? In spite of previous discussions (1999 version of the corpus juris and 2001 Green paper), **no** European pre-trial Chamber established...

=> Future will tell if such Chamber is needed.

=> At least very likely that the need will be felt to establish **specialised chambers at the CJEU** and/or **specialised procedures** to deal with EPPO (criminal law) issues.

Thank you!!