



Reports of Cases

Case C-281/22

G.K. and Others

(Request for a preliminary ruling from the Oberlandesgericht Wien)

Judgment of the Court (Grand Chamber) of 21 December 2023

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European Public Prosecutor’s Office – Regulation (EU) 2017/1939 – Article 31 – Cross-border investigations – Judicial authorisation – Scope of the review – Article 32 – Enforcement of assigned measures)

Judicial cooperation in criminal matters – European Public Prosecutor’s Office – Regulation 2017/1939 – Investigation measures and other measures – Cross-border investigations – Assigned investigation measure requiring judicial authorisation in accordance with the law of the Member State of the assisting European Delegated Prosecutor – Scope of judicial review – Matters concerning the enforcement of the measure – Review in the Member State of the assisting European Delegated Prosecutor – Matters concerning the justification and adoption of the measure – Serious interference with the fundamental rights of the person concerned – Review in the Member State of the handling European Delegated Prosecutor

(Charter of Fundamental Rights of the European Union; Council Regulation 2017/1939, recitals 12, 14, 20, 60 and Arts 31 and 32)

(see paragraphs 53-55, 64, 65, 67-73, 75, 78, operative part)

Résumé

The European Public Prosecutor’s Office (EPPO), through a European Delegated Prosecutor in Germany, is conducting preliminary investigations into G.K., S.L. and B.O.D. GmbH. They are suspected of making false customs declarations and thus of causing damage of approximately EUR 1 295 000 to the financial interests of the European Union.

In the context of the investigation taking place in Germany, the EPPO considered it necessary to gather evidence in other Member States, including Austria. To that end, the German handling European Delegated Prosecutor assigned¹ the search and seizure of property of the accused persons in Austria to an Austrian assisting European Delegated Prosecutor. On 9 November 2021, the latter prosecutor ordered searches and seizures, both at the business

¹ Pursuant to Article 31 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) (OJ 2017 L 283, p. 1).

premises of B O.D. and its parent company and at the homes of G. K. and S.L., all located in Austria. That prosecutor also requested the competent Austrian courts to authorise those measures.² Those authorisations having been obtained, the measures ordered were enforced.

On 1 December 2021, G.K., B.O.D. and S.L. brought actions before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), the referring court, against the decisions of the Austrian courts which authorised the measures at issue. In particular, they challenged the justification for the investigation measures ordered against them.

The referring court asks whether, where an assigned investigation measure requires judicial authorisation to be obtained in the Member State of the assisting European Delegated Public Prosecutor, that measure must be examined by a court of that Member State in the light of all the procedural and substantive rules laid down by that Member State.

In its judgment, the Court of Justice, sitting as the Grand Chamber, provides clarification on the scope of the review that may be carried out by courts hearing a request from an assisting European Delegated Prosecutor to authorise an assigned investigation measure.

Findings of the Court

First of all, the Court observes that, although the first subparagraph of Article 31(3) of Regulation 2017/1939 provides that judicial authorisation is to be obtained in accordance with the law of the Member State of the assisting European Delegated Prosecutor where an assigned investigation measure requires such authorisation under the law of that Member State, Articles 31 and 32 of that regulation do not specify the extent of the review to be carried out by the competent court. Nevertheless, it is apparent from the wording of those two articles³ that the adoption of an assigned investigation measure, as well as its justification, are to be governed by the law of the Member State of the handling European Delegated Prosecutor, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting European Delegated Prosecutor. The distinction thus drawn by those articles between the justification and adoption of an assigned investigation measure, on the one hand, and its enforcement, on the other, reflects the logic underlying the system of judicial cooperation in criminal matters between the Member States, which is based on the principles of mutual trust and mutual recognition. In the context of judicial cooperation based on those principles, the executing authority is not supposed to review compliance by the issuing authority with the conditions for issuing the judicial decision which it must execute.

The Court then observes that, by setting up an EPPO, the objective of Regulation 2017/1939 is to combat more effectively offences affecting the financial interests of the European Union.⁴ It follows that, by defining the procedures laid down by that regulation, the EU legislature intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition. However, although the grant

² The first subparagraph of Article 31(3) of Regulation 2017/1939 provides that, 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 is to obtain that authorisation in accordance with the law of that Member State.

³ More specifically, from the wording of Article 31(1) and (2) and Article 32 of Regulation 2017/1939.

⁴ See recitals 12, 14, 20 and 60 of Regulation 2017/1939.

of the judicial authorisation referred to in the first subparagraph of Article 31(3) of that regulation could be made subject to an examination, by the competent authority of the Member State of the assisting European Delegated Prosecutor, of the elements relating to the justification and adoption of the assigned investigation measure concerned, that would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation. First, the competent authority of the Member State of the assisting European Delegated Prosecutor would, in particular, have to examine in detail the entire case file, which would have to be forwarded to it and, where relevant, translated. Second, in order to carry out its examination, it would have to apply the law of the Member State of the handling European Delegated Prosecutor, although it cannot be considered to be the best placed to do so.

The Court concludes that Regulation 2017/1939 establishes, for the purposes of cooperation between European Delegated Prosecutors in the context of EPPO cross-border investigations, a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the enforcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor. In accordance with that sharing of responsibilities, any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure.

As regards matters relating to the justification and adoption of the assigned measure, the Court nevertheless points out that they must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the European Union. In accordance with Article 31(2) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide for a prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure, taking into account the requirements stemming from the Charter of Fundamental Rights. Where the measures concerned are investigation measures such as searches of private homes, conservatory measures relating to personal property or asset freezing, it is then for that Member State to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures.