



Reports of Cases

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 22 June 2023¹

Case C-281/22

G.K.,

B.O.D. GmbH,

S.L.

joined party:

Österreichischer Delegierter Europäischer Staatsanwalt

(Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European Public Prosecutor’s Office – Regulation (EU) 2017/1939 – Cross-border investigations – Investigation measures delegated to an assisting delegated prosecutor – Prior judicial authorisation – Effective judicial review – Principle of mutual recognition – Fundamental Rights)

1. The European Public Prosecutor’s Office (‘EPPO’), with powers of investigation and prosecution of crimes affecting the financial interests of the European Union, began its operation on 1 June 2021. In the present 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.²

2. Crimes affecting the financial interests of the European Union often involve actors in several Member States. Therefore, in order to fulfil its task, the EPPO needs to be able to conduct cross-border investigations. Such investigations involve the handling European Delegated Prosecutor (‘handling EDP’),³ conducting the investigation in one Member State, and an assisting European Delegated Prosecutor (‘assisting EDP’)⁴ to whom the execution of the investigation measure in another Member State is assigned. The case at hand requires the Court to clarify certain aspects of the EPPO Regulation dealing with such cross-border investigations.

3. The three questions raised by the referring court may be assessed jointly. In essence, that court asks which national court (or courts) is to grant judicial authorisation for an investigation measure in a Member State other than the one in which the main EPPO investigation is taking place. If the

¹ Original language: English.

² Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office, (OJ 2017 L 283, p. 1) (‘the EPPO Regulation’).

³ See Article 2(5) of the EPPO Regulation.

⁴ See Article 2(6) of the EPPO Regulation.

court in the State of the assisting EDP is to give authorisation, what should the extent of that judicial review be, and does any prior judicial authorisation in another Member State play a role in that process?

4. That is by no means a simple question. The participants in the present case propose two mutually exclusive understandings of Articles 31 and 32 of the EPPO Regulation. As I will show, those two conflicting solutions rely on the standard interpretative methods used by the Court: through the interpretation of the text, context, objectives, and legislative history⁵ of the EPPO Regulation. None of the proposed outcomes are fully justified under all of these interpretive techniques. Nevertheless, the Court will have to choose one.

I. Facts, relevant law, and the questions referred

5. The EPPO is, through its European Delegated Prosecutor in the Federal Republic of Germany (Munich), conducting preliminary investigations into G.K., S.L. and B.O.D. GmbH ('the accused'). They are suspected of having made false declarations in order to circumvent customs provisions when importing biodiesel (of US origin) into the European Union, resulting in a loss of revenue of approximately EUR 1 295 000. That alleged loss constitutes a financial interest of the European Union and thus falls within the jurisdiction of the EPPO.⁶

6. Although the main investigation is taking place in Germany, the EPPO considered it necessary to gather evidence in other Member States. It was thus deemed necessary to undertake a cross-border investigation in other Member States, including in Austria. Specifically, the handling EDP assigned the search and seizure of the accused's property in Austria.

7. Under Austrian law, such an investigative measure requires prior judicial authorisation. The assisting EDP therefore applied for and obtained judicial warrants to search the residential and business premises of the accused persons for the seizure of potentially incriminating documents and hardware.

8. As explained at the hearing, no prior judicial review of the requested search and seizure measures had been sought nor granted by the German courts, even though this would be required in a comparable domestic situation. This is the result of the way in which Germany implemented Article 31(3) of the EPPO Regulation. According to that implementation, judicial authorisation does not need to be given for cross-border investigations if the investigative measure is to be conducted in a Member State whose law also requires prior judicial authorisation.⁷ In that case, the court of that other Member State is competent to authorise the investigative measure. Therefore, the handling EDP did not request a judicial authorisation in Germany.

⁵ See, for example, the following recent explanations about the interpretive method used by the Court. '...according to settled case-law of the Court, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part ...'. See, for example, judgment of 2 February 2023, *Towarzystwo Ubezpieczeń Ż (Misleading standard assurance contracts)* (C-208/21, EU:C:2023:64, paragraph 76 and the case-law cited). See also judgment of 13 October 2022, *Perfumesco.pl* (C-355/21, EU:C:2022:791, paragraph 39). 'The legislative history of a provision of EU law may also reveal elements relevant to its interpretation ...'

⁶ A certain level of harmonisation of the elements of financial crimes which affect EU interests is provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29) ('the PIF Directive').

⁷ Gesetz zur Ausführung der EU-Verordnung zur Errichtung der Europäischen Staatsanwaltschaft (Federal law on the implementation of the European Public Prosecutor's Office) of 10 July 2020 (BGBl. I S. p. 1648), Paragraph 3(2).

9. On 1 December 2021, the accused filed, before the referring court, the Oberlandesgericht Wien (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.

10. The referring court explains that, in the course of the main proceedings, the Austrian assisting EDP claimed that the EPPO Regulation had created a new type of legal framework for cross-border investigation measures, according to which their justification is to be examined only in the Member State of the handling EDP. The court of the State of the assisting EDP cannot assess the substantive validity of the investigation measure. It may only control whether the measure complies with formal and procedural requirements for its execution. The assisting EDP thus considered that the appeals should be dismissed.

11. Thus, the referring court is faced with the question whether the courts in the Member State of the assisting EDP are authorised to conduct a full review as they would do in a purely domestic situation or, when it comes to cross-border EPPO investigations, whether their review should be limited only to procedural questions concerning the exercise of such investigation measures. It considers that the answer to this question depends on the interpretation of Article 31 and Article 32 of the EPPO Regulation.

12. Article 31(1) to (3) of the EPPO Regulation, entitled 'Cross-border investigations', provides:

'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.

2. The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures shall be governed by the law of the Member States' of the handling European Delegated Prosecutor. Where the handling European Delegated Prosecutor assigns an investigation measure to one or several European Delegated Prosecutors from another Member State, he/she shall at the same time inform his supervising European Prosecutor.

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.

If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment.

However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.'

13. Article 32 of the EPPO Regulation, entitled 'Enforcement of assigned measures', provides:

The assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.

14. In those circumstances, the referring court, the Oberlandesgericht Wien (Higher Regional Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Must EU law, in particular the first subparagraph of Article 31(3) and Article 32 of [the EPPO Regulation], be interpreted as meaning that, in the case of cross-border investigations in the event that a court must approve a measure to be carried out in the Member State of the [assisting] European Delegated Prosecutor, all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality, must be examined?
- (2) Should the examination take into account whether the admissibility of the measure has already been examined by a court in the Member State of the European Delegated Prosecutor handling the case on the basis of the law of that Member State?
- (3) In the event that the first question is answered in the negative and/or the second question in the affirmative, to what extent must a judicial review take place in the Member State of the [assisting] European Delegated Prosecutor?'

15. Written observations were submitted by the parties to the main proceedings, the Austrian, German, French, Netherlands and Romanian Governments, the EPPO, as well as the European Commission. A hearing was held on 27 February 2023 where all those participants, with the exception of France, presented oral argument.

II. Analysis

16. To advise the Court on how to answer the questions of the referring court, I will proceed as follows. First, I will briefly describe the EPPO and the process behind its establishment that (arguably) influenced the choices in the final text of the EPPO Regulation (A). Next, I will present the two interpretative routes offered to the Court by the participants in the main proceedings and present their arguments (B). In the final section, I will propose to the Court which interpretative option to choose, taking into account the advantages and drawbacks of the two options. That will also include a reflection on the protection of fundamental rights in the work of the EPPO (C).

A. A brief introduction to the EPPO and the legislative history behind the rules on cross-border investigations

17. The establishment of the EPPO is a true novelty and an important achievement in the process of European integration. It is a single and, despite its decentralised organisation,⁸ indivisible body of the European Union,⁹ vested with the powers of investigation and prosecution of crimes affecting the financial interests of the European Union.¹⁰

18. The EPPO is established under Article 86 TFEU, which was introduced by the Lisbon Treaty. Actions which could be understood as harmful to the financial interests of the European Union and over which the EPPO has jurisdiction are set out in the PIF Directive. However, it is still for the Member States to classify those actions as crimes and define the elements of such crimes in their national law.

19. Furthermore, the EPPO Regulation only partially regulates EPPO procedures. For all situations where EU rules do not exist, that regulation determines only which Member State rules apply.¹¹

20. Therefore, the EPPO is indeed a single and indivisible body, but functions without a common substantive or procedural criminal law. Those issues depend largely on the laws of Member States, which might diverge in terms of the solutions they adopt. Both the unitary nature of the EPPO, on the one hand, and its dependence on national laws, on the other, are important factors in interpreting the EPPO Regulation.

21. The path to the establishment of the EPPO was neither easy nor quick. After years of preparation,¹² and the original proposal dating back to 2013¹³ which failed to reach unanimous agreement, the EPPO was eventually established as a mechanism of enhanced cooperation under Article 20(2) TEU and Article 329(1) TFEU. However, the new project was not acceptable to all Member States and, therefore, not all of them participate in it.¹⁴

22. The negotiations leading to the adoption of the EPPO Regulation were particularly difficult in relation to cross-border investigation measures.¹⁵

⁸ The EPPO works through a network of European prosecutors at the EU level (in Luxembourg) headed by the Chief European Prosecutor. The EPPO is composed of European Prosecutors, Permanent Chambers (which monitor and direct investigations and ensure the coherence of the activities of the EPPO), and the College of European Prosecutors (composed of one European Prosecutor from each Member State). The decentralised level consists of European Delegated Prosecutors (EDPs) from each participating Member State.

⁹ Article 8(1) of the EPPO Regulation.

¹⁰ See Article 86(2) TFEU and Article 4 of the EPPO Regulation.

¹¹ See Article 5(3) of the EPPO Regulation.

¹² See, in particular, Corpus Juris 2000, Green paper on criminal-law protection of the financial interests of the Community and establishment of a European Prosecutor, COM(2001) 715 final (the 'Florence proposal'). The Corpus Juris was a follow-up to the Corpus Juris 1997 ('Introducing penal provisions for the purpose of the financial interests of the European Union', Ed. Economica Paris, 1997) delivered by a group of experts appointed at the meeting of the Presidents of the European Criminal Law Associations at Urbino University (Italy) in 1995. The main proposal in the Corpus Juris was the creation of a single legal area, regulating both the substantive and procedural criminal law, the latter including a proposal for the creation of a European Public Prosecutor. For further information, see <<https://www.epppo.europa.eu/en/background>>.

¹³ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final ('the 2013 Proposal').

¹⁴ Non-participating Member States are Hungary, Poland, and Sweden. Denmark and Ireland have an opt-out from the area of freedom, security and justice (AFSJ).

¹⁵ Herrnfeld, H.H., 'Article 31', in Herrnfeld, H.H., Brodowski, D., and Burchard, C. (eds), *European Public Prosecutor's Office. Article-by-Article Commentary*, Bloomsbury Publishing, 2020, p. 300.

23. In the 2013 Proposal, Article 26 listed 21 different investigation measures. For ten of those, including the search of premises at issue in the present case, an authorisation by the competent judicial authority of the Member State where those investigation measures are to be carried out would have been required.¹⁶

24. In response to that proposal, 14 national parliaments submitted reasoned opinions to the Commission, thereby triggering the subsidiarity control mechanism under Article 7(2) of Protocol No 2.¹⁷ In their reasoned opinions, some national parliaments expressed the concern that listing investigative measures would lower procedural standards, and that since some investigative measures do not exist in the national law of some Member States, the necessary level of fundamental rights protection would not be ensured.¹⁸

25. In the end, that proposal was rejected¹⁹ and several counter-proposals were submitted. The proposal submitted jointly by the Austrian and German delegations is of particular interest for the current proceedings.²⁰

26. The German delegation submitted the following written comments:²¹ ‘The current concept of Article 26a is not convincing and needs further revision to be acceptable. We will need a workable and efficient system that will function at least as good as cross-border cooperation on the basis of MLA [mutual legal assistance] and mutual recognition procedures. As explained in the past: we believe we should establish a system that uses the concept of mutual recognition (the EIO) as a starting point and make adjustments where this is suitable to address the “single office” idea’.

27. The common Austrian and German proposal thus mirrored the mutual recognition solutions of the European Investigation Order Directive:²² ‘Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter shall order the measure in accordance with the law of the Member State of the handling European Delegated Prosecutor and, where necessary, shall apply for a judicial authorisation thereof, or shall request a court order for the measure’.²³

28. That joint proposal also failed to make its way into the final text of the EPPO Regulation.

¹⁶ See, in that respect, paragraphs 4 and 5 of Article 26 of the 2013 Proposal: ‘4. Member States shall ensure that the investigative measures referred to in points (a) to (j) of paragraph 1 are subject to authorisation by the competent judicial authority of the Member State where they are to be carried out’, and ‘5. The investigative measures referred to in points (k) to (u) of paragraph 1 shall be subject to judicial authorisation if required by the national law of the Member State where the investigation measure is to be carried out’.

¹⁷ Protocol No 2 on the application of the principles of subsidiarity and proportionality (OJ 2008 C 115, p. 206).

¹⁸ Communication from the Commission to the European Parliament, the Council and the national parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM (2013) 0851 final), p. 9.

¹⁹ Herrnfeld, n 15, p. 291.

²⁰ Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office – Written comments from the Austrian and German delegations, Interinstitutional File: 2013/0255 (APP), DS 1237/15, 21 April 2015.

²¹ Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office – Written comments from the German delegation, Interinstitutional File: 2013/0255 (APP), DS 1234/15, 21 April 2015.

²² Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1) (‘the EIO Directive’).

²³ The written comments from Austria and Germany further proposed: ‘Where the law of the Member State of the assisting European Delegated Prosecutor requires a judicial authorisation or a court order for recognition of the measure, he/she shall submit the order and, where applicable, the accompanying judicial authorisation to the competent judicial authority of his/her Member State for recognition’.

29. The chosen legislative outcome, reflected in what is the current Article 31(3) of the EPPO Regulation, created precisely the problems that the German delegation warned about in respect of earlier proposals.²⁴ It does not clearly specify which Member State law determines whether prior judicial authorisation for executing a measure is necessary, nor which court is responsible for granting such authorisation. The present case is thus a perfect illustration of those issues.

30. However, one issue was endorsed by all delegations during the legislative procedure: the EPPO Regulation should be simpler than what the EIO Directive, which at the time of its introduction was also a new instrument of cooperation in criminal matters, entails, given the unitary nature of the EPPO as a body.²⁵

B. The interpretative roads ahead

31. The EPPO Regulation is silent on the necessity of prior judicial authorisation for cross-border investigation measures, leaving it to the criminal laws of Member States. What is especially problematic is the situation in which the national laws of both handling and assisting EDP's Member States require prior judicial authorisation. Recital 72 of the EPPO Regulation explains that that instrument should clearly specify in which Member State the authorisation should be obtained, but that in any case there should only be one authorisation. Has that commitment been expressed in Article 31(3) of the EPPO Regulation and, if so, how?

32. Participants in this case offered two opposing options for interpreting that provision.

33. Before I introduce and assess their positions, I feel the need to repeat a point of view that I have already expressed elsewhere.²⁶ In my view, literal interpretation as such does not exist inasmuch as words are always embedded in a context. Words in legal rules are of course relevant for judges as the law is mostly expressed in words. They both guide and constrain judges.²⁷ However, their meaning, including in legal acts, depends on the context in which they are used. It is thus difficult, if not impossible, to separate literal and contextual interpretation.

34. When it comes to contextual interpretation, the Court understands it in different ways. Most commonly, the Court refers to the provisions surrounding that for which interpretation is sought, or the document as a whole.²⁸ However, the Court has also considered legislative history as being

²⁴ The written comments from Germany added: 'To point out just a few main issues: The text of Article 26a will need to be clear about who takes the decision to order a measure or to request a measure to be ordered by a court and what is the applicable law for ordering/requesting such measures. The current text seems to leave that question open or, perhaps even give the handling EDP a choice: the term "assign" in para 1 does not clarify who is the one who takes the decision to order a measure'. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Written comments from the German delegation, Interinstitutional File: 2013/0255 (APP), DS 1234/15, 21 April 2015. See also Adopting Guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017/1939, College Decision 006/2022, p. 4, point 8 ('Moreover, Article 31(3) does not expressly address situations where both the law of the Member State of the handling EDP and the law of the Member State of the assisting EDP require judicial authorisation').

²⁵ See Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Other issues. Presidency of the Council 12344/16, 20 September 2016, p. 5.

²⁶ Opinion of Advocate General Čápeta in *Rigall Arteria Management* (C-64/21, EU:C:2022:453, point 43).

²⁷ Even the most ardent scholars of critical legal studies would admit that legal rules, as they are drafted, constrain judicial interpretation. See, for instance, Kennedy, D., *A Critique of Adjudication (fin de siècle)*, Harvard University Press, Cambridge, Massachusetts, 1997, p. 13.

²⁸ For example, in judgment of 28 January 2020, *Commission v Italy (Directive combating late payment)* (C-122/18, EU:C:2020:41, paragraph 43) (interpreting one article in the context of the succeeding one); of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraphs 56 to 69) (interpreting a provision in the context of the opening articles of a directive and its recitals); and of 24 February 2022, *Namur-Est Environnement v Région wallonne* (C-463/20, EU:C:2022:121, paragraph 46) (interpreting a provision in relation to the directive at issue as a whole).

relevant to the context when interpreting provisions of primary²⁹ and secondary EU law.³⁰ Finally, social reality is sometimes also taken into consideration as pertinent for understanding legal rules.³¹ The choice of the relevant context, and how that context is interpreted, influences the understanding of the wording of a particular provision. That is evident in the arguments of the participants in the main proceedings.

1. Option One: Full review in the Member State of the assisting EDP

35. The Austrian and German Governments argue that if the assisting EDP's national law requires prior judicial authorisation for the purposes of carrying out an investigative measure, such authorisation should entail a full review. That includes not only the procedural (the execution of the measure), but also substantive aspects justifying the measure in the first place. It is, thus, for the court of the assisting EDP's Member State to assess whether the necessary level of suspicion that a crime has been committed has been met; whether the investigative measure sought would yield the evidence necessary for prosecution; and whether the same evidence could not be acquired through a less intrusive measure.

36. The Austrian and German Governments relied largely on the text of Article 31 of the EPPO Regulation, which is in their view clear. Both governments insisted that the wording of a legal provision is the most important interpretative tool. If the wording is clear, the courts cannot depart from it.

37. In their view, there are limits to creative interpretation by the Court. An interpretation different from the one that clearly follows from the literal wording of the current text of Article 31 of the EPPO Regulation would cross the limits of acceptable judicial interpretation. It would also be contrary to the requirement of legal certainty. In the words of the representative of the German Government, the Court of Justice is not a repair shop for faulty products. Instead, the faulty product should be returned to the manufacturer for improvement, in our case, the legislature.

2. Option Two: a clear division of tasks within the judicial authorisation

38. The EPPO, the Commission, and the French, Romanian and Netherlands Governments argue that, contrary to Option One, if the law of the assisting EDP's Member State requires a judicial authorisation of an investigative measure, such an authorisation may entail only a review of the formal and procedural aspects relating to the execution of the measure. Accordingly, the EPPO Regulation contains a clear division of tasks between the courts of the handling and assisting EDP's respective Member State. This is obvious if Article 31(3) is read in the context of Article 31 taken as a whole.

²⁹ For example, in judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47) and of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 135).

³⁰ For example, in judgment of 10 March 2021, *Ordine Nazionale dei Biologi and Others* (C-96/20, EU:C:2021:191, paragraphs 26 and 27) and of 13 October 2022, *Rigall Arteria Management* (C-64/21, EU:C:2022:783, paragraph 31).

³¹ On this point, see judgment of 17 April 1986, *Reed* (59/85, EU:C:1986:157, paragraph 15) (where the Court found that in the absence of any indication of a general social development, the term 'spouse' does not include an unmarried partner). The same term was seen differently 32 years later, in the Opinion of Advocate General Wathelet in *Coman and Others* (C-673/16, EU:C:2018:2, points 56 to 58) (where he analyses the developments related to the understanding of the concept of 'spouse', to demonstrate that an increasing number of Member States understand it as including same-sex marriage).

39. If the laws of the Member States of both the handling and the assisting EDPs require judicial authorisation, two authorisations are to be issued. The court of the handling EDP's Member State would authorise the measure if it finds it justified, whereas the court of the assisting EDP's Member State would authorise the procedural modalities of its execution.

40. The review powers of the court of the assisting EDP's Member State are limited only to procedural aspects of the execution of the measure even in a scenario in which the law of the handling EDP's Member State does not require prior judicial authorisation in a comparable domestic situation. In that way, the law of the handling EDP's Member State, governing the justification of the measure according to Article 31(2), would be respected in its choice not to require prior judicial authorisation of the justification of the measure.

C. Answering the questions of the referring court

1. Comparing the two interpretative options

41. The two options offer different and mutually exclusive interpretative outcomes. I consider that following the lines of argument put forward in support of each of those options, when placed within their chosen interpretative frameworks, result in two equally acceptable interpretations of the EPPO Regulation. At the same time, they both involve certain drawbacks and inconsistencies. Next, I will contrast them within each of the methods of interpretation they used.

(a) Text

42. According to the Austrian Government, whose arguments are echoed by the German Government, Article 31 of the EPPO Regulation is clear. Paragraph 2 thereof determines that the justification and the adoption of an investigative measure is to be regulated by the national law of the handling EDP's Member State. However, paragraph 3 then changes the applicable law if the law of the assisting EDP's Member State requires judicial authorisation. In such a scenario, the first sentence of Article 31(3) of the EPPO Regulation clearly states that the law of the assisting EDP's Member State governs the powers and obligations of the judge issuing the authorisation.

43. The only exception is provided in the third sentence of Article 31(3) of the EPPO Regulation, which applies when the law of the Member State of the assisting EDP does not require an authorisation, but the law of the Member State of the handling EDP does. Only in such a scenario does judicial authorisation rely on the law of Member State of the handling EDP. It is also apparent from the use of the word 'however' at the start of that sentence that this situation is an exception to the clear rule that the law of the Member State of the assisting EDP is to be applied.³²

44. By contrast, according to the proponents of Option Two, the first sentence of Article 31(3) of the EPPO Regulation clearly resolves which courts need to grant judicial authorisation and in relation to what, in two possible scenarios: when the laws of both the handling and the assisting EDP's Member State require such an authorisation, and in the situation in which the law of the

³² At the hearing, the EPPO also acknowledged that the use of the word 'however' complicates matters for the interpretation of Article 31(3) of the EPPO Regulation.

handling EDP's Member State does not require prior judicial authorisation, but the law of the assisting EDP's Member State does. In both situations, the court of the assisting EDP's Member State can only review issues relating to the execution of the measure.

45. The third sentence of Article 31(3) of the EPPO Regulation regulates the remaining possible scenario, one in which the law of the Member State of the assisting EDP does not require judicial authorisation of a measure, but the law of the Member State of the handling EDP does. In that scenario, the court of the Member State of the handling EDP will have to issue an authorisation, which will cover both its justification and the execution of the measure.

46. The Commission also pointed out that the wording of Article 32 of the EPPO Regulation clarifies that the execution and procedural aspects related to the requested measure pertain to the law of the Member State of the assisting EDP.

(b) Context

47. To substantiate its assertion that the wording of Article 31(3) of the EPPO Regulation is clear, the German Government focused on its immediate context. It argued that the third sentence of Article 31(3) would be obsolete if, in accordance with the Commission's reading, the main rule for regulating the division of tasks when it comes to judicial authorisations were to be Article 31(2) thereof. If that were so, it would always be clear that it is the law of the handling EDP's Member State that regulates the need for judicial authorisation of a particular investigative measure. Repeating this in the third sentence of Article 31(3) would therefore make no sense. That provision only makes sense if it changes the rule expressed in Article 31(2) in a situation when the law of the Member State of the assisting EDP also requires judicial authorisation.

48. Both the Austrian and German Governments also relied on recital 72 of the EPPO Regulation as providing the relevant interpretative context. In their view, the insistence on a single judicial authorisation expressed in that recital, read together with Article 31(3), can only mean that it is the law of the Member State of the assisting EDP that determines the need for and the context of a judicial authorisation. The division of a judicial authorisation into different tasks and between the courts of the Member States of the handling and the assisting EDPs would not be in line with the decision that there be only one judicial authorisation.

49. According to the Commission, and the same position is in substance supported by all proponents of Option Two, Article 31 of the EPPO Regulation as a whole follows the chronology of an investigation. It sets out the different tasks for the handling and assisting EDPs and for the national courts of their Member States. Paragraph 1 generally sets out the division of tasks between the two EDPs.

50. Paragraph 2 of Article 31 is, in the Commission's view, central. It clearly states that the law of the Member State of the handling EDP regulates the justification and adoption of an investigation measure. That also means that if the law of the Member State of the handling EDP requires prior judicial authorisation, it is for the court of that State to assess whether the measure is justified and necessary in the context of the specific investigation.

51. The Commission also emphasised that paragraph 2 of Article 31 is silent on the execution of the measure. That is a matter for Article 32 of the EPPO regulation, which provides that the execution should be governed by the law of the Member State of the assisting EDP.

52. Paragraph 3 of Article 31, which is the only provision that deals expressly with judicial authorisation, does not, in the Commission's view, change the applicable law when it comes to such authorisation, which is contrary to the argument submitted by the Governments of Austria and Germany. Rather, it should be seen as subordinate to paragraph 2 of Article 31. Paragraph 3 of that same provision does not therefore regulate the review of the justification for the investigative measure, as those issues are a matter covered by paragraph 2.

53. The first sentence of paragraph 3 concerns, in the view of the Commission, a situation in which the law of the Member State of the assisting EDP requires judicial authorisation. If that is the case, the court of that Member State will have to issue the authorisation prior to the execution of the measure. However, in making that decision, that court must pay attention only to the mode of execution of the requested investigative measure and not to its justification.

54. When it comes to the role of recital 72 of the EPPO Regulation, the Commission acknowledged that the desire for a single judicial authorisation was not ideally expressed in Article 31 thereof. However, even if some scenarios will require two judicial authorisations, given the clear division of tasks, each issue would still have only one authorisation. Understood in that way, the proponents of Option Two avoided the contradiction between Article 31(3) as they interpret it and recital 72 of the EPPO Regulation.³³

(c) Objectives

55. Turning to the objectives of the EPPO, both Austria and Germany acknowledged that a full review in the Member State of the assisting EDP might lead to difficulties. To be able to decide whether the requested measure is justified, the court of the Member State of the assisting EDP would need to have access to the entire case file. As the main investigation is conducted in a different Member State and with a view to commencing a trial in the court of that State if sufficient evidence is obtained, the case file might be in a different language. Its translation, which might be necessary to enable the court of the assisting EDP to decide on the substantive issues relating to the legality of the investigation measure, will, if nothing else, take time.³⁴ That would indeed make EPPO cross-border investigations more cumbersome than those conducted under the EIO Directive.

56. Such an outcome, the two governments admitted, is not in line with the objective of the EPPO to create an even easier framework in the fight against crimes affecting the EU's financial interests than the one existing previously. They emphasised that, unfortunately, their proposal was not adopted in the legislative process.

57. The proponents of Option Two emphasised that the creation of the EPPO was necessary in order to make the investigation and prosecution of crimes affecting the EU's financial interests more efficient than if they had been prosecuted by a single Member State. The EPPO, as a single body, should thus have at its disposal the tools necessary for achieving the objective of efficiently fighting crimes affecting the EU budget. Efficiency should therefore guide the interpretation of Article 31 of the EPPO Regulation. In any case, cross-border investigations conducted by the EPPO could not be interpreted as being subject to conditions more cumbersome than that which is required under the EIO Directive.

³³ The EPPO added at the hearing that recital 72 does not have normative value and should therefore not be determinative of the interpretation of Article 31.

³⁴ The EPPO stated at the hearing that case files sometimes contain thousands of pages, which would require external translators, and would therefore add considerable costs to the operation of the EPPO and take months or even years to translate.

58. The EPPO and the Commission focused further on the efficiency aspect by emphasising the logistical difficulties of transferring and translating large amounts of documents that pertain to the file of the case.³⁵ That supports the argument in favour of the interpretation according to which the justification of the measure is to be assessed only in the Member State of the handling EDP. Moreover, entrusting the justification of the investigative measure to the law of the State of the handling EDP and the courts of that State is consistent with the fact that those courts would have all the material necessary for a full review. After all, the investigation is conducted from that State and the trial would most likely take place before its courts.³⁶

59. Finally, the EPPO also pointed to the difficulties that would arise should the courts of different Member States in which cross-border investigations are carried out reach conflicting decisions concerning the justification of the measure. The proposed interpretation, according to which the justification of the measure is always a matter for the law of the Member State of the handling EDP, prevents conflicting decisions even where a high number of Member States are involved in the gathering of evidence for a particular case.

(d) Legislative history

60. Both the Austrian and German Governments emphasised the need to take the legislative history behind Article 31 of the EPPO Regulation into account. According to Austria, it is clear from that history that the majority of Member States were aware of the problems that would arise due to the conflicting relationship between the second and third paragraphs of Article 31 of the EPPO Regulation. However, the joint proposal of the Austrian and German Governments that the problem be resolved by recourse to the mutual recognition model was not accepted in the final text of the EPPO Regulation. It is, therefore, clear that Article 31(3) does not, as suggested by the proponents of Option Two, require the court of the Member State of the assisting EDP to recognise the decision of the handling EDP that an investigative measure in the Member State of the assisting EDP is necessary. Rather, that provision requires the court of the State in which the measure is to be executed to check the legality of the measure, including its justification.

61. At the hearing, the Commission addressed some of the perplexities related to the legislative history of the EPPO Regulation and clarified the Commission's current position. To recall, its 2013 Proposal provided that the court of the Member State of the assisting EDP is to undertake a full judicial review for measures such as a search and seizure. In the present case, the Commission now takes a different position.

62. To justify its current position, the Commission explained that the 2013 Proposal was drafted before the EIO Directive came into force. That directive provides that the justification for a cross-border investigation measure is a matter for the issuing Member State and may only be challenged in the courts of that Member State.³⁷ That solution proved to function well in that mutual recognition instrument. The Commission, therefore, found it fortunate that the legislative institutions did not accept its original proposal that judicial authorisation ought to depend on the law of the Member State of the assisting EDP only, and instead have amended that

³⁵ See footnote 34 above.

³⁶ The EPPO Regulation provides for the possibility to change the Member State in which the investigation is taking place up until the decision to prosecute is taken under Article 26(5) (in line with Article 36 of the EPPO Regulation).

³⁷ Recital 22 and Article 14(2) of the EIO Directive. This was also emphasised in judgment of 11 November 2021, *Gavanozov II* (C-852/19, EU:C:2021:902, paragraph 40).

proposal into what is today Article 31 of the EPPO Regulation. The legislative process, thus, made its original proposal much better and more appropriate for what is necessary for cooperation in cross-border investigations undertaken by the EPPO.

2. *My proposed interpretation*

63. In sum, the two options offer different outcomes. Yet, they both share one common understanding: the EPPO system was intended to be an efficient mechanism in the fight against crimes damaging the EU's financial interests. That includes the mechanism of cross-border investigations. The EPPO Regulation supports that legislative objective.³⁸

64. An interpretative rule used by the Court requires that 'where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness'.³⁹ That interpretative rule favours Option Two.

65. However, according to the Austrian and German Governments, even if normatively desirable, Option Two is not an available interpretative option, as the wording of Article 31(3) of the EPPO Regulation is clear.

66. Indeed, if the wording were clear, attributing it a different meaning could be seen as an illegitimate intervention by the Court, in other words, an interpretation *contra legem*. However, is the wording of Article 31(3) really all that clear?

67. It is unquestionable that the Austrian and German governments consider that the correct meaning of Article 31(3) is that the court of the Member State of the assisting EDP is the one to issue prior authorisation for a search and seizure to be executed in that State by undertaking a full review. It is no wonder that the Austrian and German governments defended such an interpretation before the Court, as both States amended their laws in order to reflect that interpretation of the EPPO Regulation.⁴⁰ However, when confronted with the concurrent, equally plausible interpretation offered by the proponents of Option Two, it becomes clear that Option One is but one of the possible interpretative choices. Under the Treaties, it is the Court's task to make that choice. If the Court adopts Option Two instead of Option One, that cannot be treated as a *contra legem* interpretation.

68. The most convincing argument, to my mind, offered by the Austrian and German governments, is that Article 31(3) of the EPPO Regulation becomes obsolete under Option Two. Indeed, if Article 31(2) states that the justification for the investigative measure is governed by the law of the State of the handling EDP, and Article 32 states that the execution of the measure is governed by the law of the State of the assisting EDP, what is the purpose of Article 31(3)? It only repeats the same delimitation between applicable laws when it comes to the question of prior judicial authorisation. In other words, if Article 31(3) were deleted, the remainder of Article 31 read in conjunction with Article 32 would lead us to the same conclusion which Option Two offers as the correct understanding of Article 31(3). Option One thus gives some meaning to Article 31(3), different from other provisions of the same and surrounding articles.

³⁸ See, for example, recitals 14, 20, and 54, and Articles 12(3) and 34(3) of the EPPO Regulation.

³⁹ For example, judgment of 24 February 2000, *Commission v France* (C-434/97, EU:C:2000:98, paragraph 21).

⁴⁰ See points 7 and 8 above.

69. Another interpretative rule used by the Court requires that the wording in legal rules cannot simply be ignored, but must be given some meaning.⁴¹ That interpretative rule would seem to favour Option One.

70. However, to my mind, Article 31(3) can be given a meaning beyond that of Article 31(2) and Article 32 of the EPPO Regulation. It is a provision that expresses the choice of the applicable legal order specifically for judicial authorisations of an assigned measure, even if the same result would be reached by applying those other two provisions. Expressing the rule relating to the law applicable to judicial authorisations separately might have been perceived as necessary, due to the difficulties that that precise issue presented during the legislative negotiations. The redundancy of Article 31(3) cannot thus be used as an argument against adopting Option Two.

71. If one looks to the consequences of the Court's choice of one or the other interpretative option, it is clear that choosing Option One would turn EPPO cross-border investigations into a less efficient system than the one established under the EIO Directive. Thus, if the legislature's will was indeed to create a more efficient system, adopting Option One would require an amendment of the EPPO Regulation to enable efficient cross-border investigations. The Court's choice of Option One could thus be seen as an invitation to the EU legislature to react. According to the German Government, only such a solution would be in line with the requirements of legal certainty.

72. However, legal uncertainty exists because there is more than one interpretative option available. Once the Court clarifies the meaning of Article 31(3) of the EPPO Regulation by choosing either Option One or Option Two, legal confusion will dissipate. The intervention of the legislature, therefore, does not seem to me to be necessary in order to restore legal certainty.⁴²

73. The foregoing leads me to the conclusion that the Court should choose Option Two. Accordingly, Article 31(3) of the EPPO Regulation should be understood as allowing the court of the Member State of the assisting EDP to review only the aspects related to the execution of an investigative measure, while accepting the assessment by the handling EDP that the measure is justified, whether or not the latter is backed by prior judicial authorisation of the court of the Member State of the handling EDP. That interpretation is not contrary to the wording of Article 31(3) and responds better to the objective of the EPPO Regulation to create an efficient system in the fight against crimes affecting the EU's financial interests.

3. *Protection of fundamental rights – 'more than' mutual recognition?*

74. Efficient cross border investigations are without a doubt an important objective of the EPPO Regulation. However, efficiency cannot be achieved to the detriment of fundamental rights protection. The Court may, thus, choose Option Two as the proper interpretation of Article 31(3) of the EPPO Regulation only if it guarantees fundamental rights protection as required under the Charter of Fundamental Rights of the European Union ('the Charter').

⁴¹ For example, judgment of 1 April 2004, *Commission v Jégo-Quéré* (C-263/02 P, EU:C:2004:210, paragraphs 36 to 38).

⁴² On the other hand, if the Court adopts Option Two, that would require an intervention of the Austrian and German legislatures, as it would render those laws, which were adjusted to Option One, contrary to the EPPO Regulation. The Austrian Government stated at the hearing that it is aware of this and that, of course, the law of that State would need to be aligned with EU law if the Court decided to interpret the EPPO Regulation differently. That government repeated, however, that the interpretation as reflected in their law is the correct one.

75. The Austrian and German Governments' insistence that the courts of the Member State of the assisting EDP should be empowered to conduct a full judicial review could be understood as a concern for fundamental rights protection. EU Member States have established coherent systems of criminal law. The protection of fundamental rights was carefully built into their legislation in the area of criminal prosecution and sanctioning of crimes, an area in which states exercise their coercive powers, affecting the private lives and liberties of individuals.

76. National criminal law systems therefore have inherent fundamental rights guarantees in their substantive and procedural rules of criminal law. Those rules are interdependent and protect fundamental rights when taken as a whole.⁴³ However, when a single rule is withdrawn from one system and placed into a different one, fundamental rights protection might diminish: although the rule functioned well in its original legal framework, it will not necessarily do so in another.⁴⁴

77. That is why reliance on mutual recognition, implying the transfer of only some legal rules of one legal system into the other, raises concerns about the potential weakening of fundamental rights protection.⁴⁵ However, given that EU law, as it stands today, does not have a coherent set of rules that govern either all the aspects of crimes for the prosecution of which the EPPO has jurisdiction, or the procedural rules governing the EPPO's prosecutions,⁴⁶ the mutual recognition principle is the next best option for removing obstacles to cross-border investigations.

78. I must therefore address the arguments of the proponents of Option Two that the EPPO is not a system of mutual recognition, but is *something more*. I would make a claim to the contrary: as long as there are no common EU criminal law rules, the EPPO cannot but operate based on mutual recognition. However, the levels of mutual recognition differ, and the EPPO may be seen as the most developed mutual recognition instrument in the area of cooperation in criminal matters yet (subsection a).

79. The resulting question is then whether the interpretation of Article 31(3) of the EPPO Regulation as proposed in point 73 of this Opinion, which is partly based on mutual recognition, safeguards the fundamental rights of suspects and accused persons in cross-border investigations. I will claim that this is indeed so, especially when viewed in the wider context of the EPPO Regulation (subsection b).

(a) The nature of mutual recognition in criminal matters

80. In the written observations and at the hearing, participants expressed their views about mutual recognition. The EIO Directive was used as an example of a mutual recognition mechanism, whereas it was argued that the EPPO Regulation is *something more*. When asked at

⁴³ Allegrezza, S., and Mosna, A., 'Cross-border Criminal Evidence and the Future European Public Prosecutor: One Step Back on Mutual Recognition?' in Bachmaier Winter, L. (ed.), *The European Public Prosecutor's Office. The Challenges Ahead*, Springer, 2018, p. 141, at pp. 146.

⁴⁴ For a compelling piece on legal transplants and legal irritants, see Teubner, G., 'Legal irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', vol. 61(1), *Modern Law Review*, 1998, p. 11.

⁴⁵ See, for example, Allegrezza and Mosna, above n 43, at pp. 145 and 158 (emphasising the dangers for fundamental rights arising from, for example, diverging levels of procedural guarantees and procedural rules on the execution of investigatory measures or collection of evidence, arguing that additional guarantees are needed in particular related to evidence). For an early warning concerning the same issue, see Kaiafa-Gbandi, M., 'The Establishment of an EPPO and the Rights of Suspects and Defendants: Reflections upon the Commission's 2013 Proposal and the Council's Amendments' in Asp, P. (ed.), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives*, Stifelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, 2015, p. 245-246.

⁴⁶ For an early proposal on the modalities of a future EU prosecutor, where its success depends on the harmonisation of substantive criminal law, see Peers, S., 'Mutual recognition and criminal law in the European Union: Has the Council got it wrong?', vol. 41, *Common Market Law Review*, 2004, p. 5, at p. 34.

the hearing what this *something more* means precisely, participants focused primarily on the nature of the EPPO: it is a single, indivisible body and its decisions should not be subject to a possibility of non-recognition (as is possible under the EIO Directive).⁴⁷

81. The term 'mutual recognition' was used to describe a situation whereby an individual decision (for example, a judgment, arrest warrant or investigation order) issued in one Member State is recognised in another Member State. The EPPO system does not require that the request for an investigation measure be *recognised* by the Member State of the assisting EDP in order to be implemented, which is the usual step to be taken in relation to instruments governing cross-border criminal procedures. Thus, the argument is that the EPPO mechanism is not a system of mutual recognition, but something more.

82. Indeed, given that the EPPO is a single body,⁴⁸ its decentralised prosecutors are part of that body. It would be strange if a single body were asked to recognise its own decisions. The assisting EDP is, therefore, *assigned a measure*, rather than required to recognise an investigation order.

83. However, the act of recognising a document (and its legal effects) originating in a different Member State is not the essence, but only the manifestation of the principle of mutual recognition. The core idea of the principle of mutual recognition is that legal rules of one Member State are recognised and given effect in another Member State, even if they differ from the solutions in that second State. Such an acceptance of the 'other' system requires a high level of trust in that other system.

84. Since there is currently no EU legislative solution to the issue which has arisen in the present case, the EPPO must instead rely, for each cross-border situation, on the laws of one of the Member States involved, which are then to be trusted by the other Member State.

85. Mutual recognition in criminal matters was inspired by the use of that principle in the internal market.⁴⁹ To recall, mutual recognition was developed as a central principle of the internal market as created by the Treaties, in the Court's *Cassis de Dijon* judgment.⁵⁰ That was possible as there was a certain basic level of comparability between the national laws in question.⁵¹

86. The effect of mutual recognition in the internal market was deregulatory, and it expanded the rights of individuals at the expense of the regulatory freedom of the state.⁵²

⁴⁷ For an argument that the EIO system is in effect simpler and more efficient than the regulatory solutions of the EPPO Regulation, see Allegrezza and Mosna, cited above in n 43, at pp. 155 to 156.

⁴⁸ As opposed to the idea from the *Corpus Juris* to create a single legal area, which failed to make it to the EPPO Regulation, the solution of a single body is a watered-down option that the participating Member States could agree on. See Mitsilegas, V., and Giuffrida F., 'The European Public Prosecutor's Office and Human Rights' in Geelhoed, W., Erkelens, L.H. and Meij, A.W.H. (eds.) *Shifting Perspectives on the European Public Prosecutor's Office*, TMC Asser Press, 2018, p. 89.

⁴⁹ '... borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition ...' Communication from the Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters. COM(2000) 495 final, Brussels, 26 July 2000, p. 2.

⁵⁰ Judgment of 20 February 1979, *Rewe-Zentral* (120/78, EU:C:1979:42).

⁵¹ Schmidt, S.K., 'Mutual Recognition as a New Mode of Governance', *Journal of European Public Policy*, vol. 14(5), 2007 p. 667, p. 669; Peers, S., 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?', *Common Market Law Review*, vol. 41(1), 2004, p. 5, p. 20.

⁵² Schmidt, above n 51, at p. 672. Perišin, T., *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO*, T.M.C. Asser Press, 2008, p. 23.

87. Although mutual recognition in criminal matters also requires the acceptance of the other Member State's legislative choices, it does not follow the exact logic of that principle when applied in the internal market context. The object of recognition here is judicial and other sovereign individual decisions of Member States, where the monopoly of force of one Member State is put into service in another Member State.⁵³ The individual becomes the object, and no longer the subject, of free movement between Member States.⁵⁴ The deregulation that results from mutual recognition in the internal market turns in criminal matters into an obligation for a Member State actively to use its monopoly of force.⁵⁵

88. For mutual recognition to work in criminal matters, a high level of mutual trust is necessary. That trust relates to the other State's commitment to the protection of fundamental rights of the subject of the state's coercive force.⁵⁶

89. This is the starting point of all mutual recognition instruments, such as the EIO Directive. However, even if mutual trust is necessary, it cannot be imposed.⁵⁷ Thus, current mutual trust instruments also reflect a certain level of mistrust. This is reflected in the rules allowing non-recognition in certain circumstances,⁵⁸ in the harmonisation of aspects of criminal procedure at EU level,⁵⁹ and in the development of case-law in that respect.⁶⁰

90. In the present case, the parties have made reference to the EIO Directive to discuss the differences and similarities of that mutual recognition system in comparison to the EPPO Regulation. I would therefore like to briefly discuss the EIO Directive.

91. The EIO Directive was enacted under Article 82 TFEU in order to enhance cross-border investigations, and is based on mutual recognition. Under its system, an authority⁶¹ of a Member State may issue a European Investigation Order (EIO) when this is necessary in order to conduct an investigation as part of domestic criminal procedure. There is no condition that the crime must

⁵³ Nicolaïdis, K., 'Trusting the Poles? Constructing Europe through Mutual Recognition', *Journal of European Public Policy*, vol. 14(5), 2007, p. 685.

⁵⁴ Peers, above n 51, at p. 24.

⁵⁵ Peers, above n 51, at p. 25.

⁵⁶ That was recognised by the Court. See, for example, Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191), in which the Court stated that the principle of mutual recognition 'requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.

⁵⁷ Iglesias Sánchez, S., and González Pascual, M., 'Fundamental Rights at the Core of the EU AFSJ' in Iglesias Sánchez, S., and González Pascual, M. (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge University Press, 2021, pp. 8-9 (arguing that fundamental rights concerns triggered an incremental limiting of mutual trust, visible in the development of the Court's case-law and positive harmonisation in the AFSJ).

⁵⁸ See, for example, Articles 3, 4 and 4a of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24); and Article 11 of the EIO Directive.

⁵⁹ See, for example, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1). See also Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

⁶⁰ On the case-law allowing for additional ways not to execute a European Arrest Warrant, see judgments of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 93 and 94) and of 15 October 2019, *Dorobantu* (C-128/18, EU:C:2019:857, paragraphs 52 and 55).

⁶¹ Under Article 2(c) of the EIO Directive, an issuing authority may be 'a judge, a court, an investigating judge or a public prosecutor competent in the case concerned' as well as 'any other competent authority as defined by the issuing State' when the EIO is validated by a judge, court, investigating judge or a public prosecutor in the issuing State. This is a broader concept than the one of 'issuing judicial authority' for the purposes of the European Arrest Warrant, which excludes a public prosecutor. On this difference specifically, see judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraphs 74 and 75).

be one adversely affecting the financial interests of the European Union: all that matters is that an investigation measure needs to be carried out in the Member State outside the one in which the main investigation is taking place, including where a piece of evidence is already in the possession of the competent authorities of the executing Member State.⁶²

92. The authority of a Member State may issue an EIO under two conditions. First, an EIO must be necessary and proportionate for the purposes of criminal proceedings taking into account the rights of the suspected or accused person and, second, the measure indicated in the EIO could have been ordered under the same conditions in a similar domestic case.⁶³

93. Those substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State.⁶⁴ Intuitively, it thus appears that appraisals of substance pertain exclusively to the issuing State, a solution that significantly simplifies the use of the EIO and arguably demonstrates a high level of mutual trust. Is that really the case?

94. First, Article 14(2) of the EIO Directive indeed provides that reasons for issuing an EIO may be challenged only in the issuing State, but ‘without prejudice to the guarantees of fundamental rights in the executing State’.⁶⁵ That is further developed in Article 11(1)(f) of the EIO Directive, according to which an EIO may be refused in the executing State if ‘there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State’s obligations in accordance with Article 6 TEU and the Charter’.⁶⁶ Depending on the interpretation of the notion of ‘substantial grounds’, the aforementioned provision seems to allow the executing State to control the respect of fundamental rights in the issuing state. In addition, under Article 10(3) of the EIO Directive the executing authority is allowed to change the investigative measure requested by an EIO, if that other measure would achieve the same result by less intrusive means.

95. The short overview given above makes it difficult to argue that the EIO Directive sustains a high level of mutual trust. There remains a relatively broad space for manoeuvre for the executing authority to doubt the level of protection of fundamental rights or the application of the principle of proportionality in the issuing State.

96. When compared to, for example, the system of the European Arrest Warrant (EAW), with limited mandatory and optional grounds for refusal of its execution, the EIO Directive grants the executing authority a greater margin of manoeuvre. In comparison, we can refer to the EAW system as a somewhat stronger type of mutual recognition. Neither are complete, as they still focus on the recognition of individual decisions and there is still a possibility of a refusal in the executing Member State.⁶⁷

97. Mutual recognition is thus a matter of degree.

⁶² Article 1(1) of the EIO Directive.

⁶³ Article 6(1) of the EIO Directive.

⁶⁴ Judgment of 16 December 2021, *Spetsializirana prokuratura (Traffic and location data)* (C-724/19, EU:C:2021:1020, paragraph 53) (where the Court emphasised that the executing authority cannot review the compliance of an EIO with the conditions for its issuance under the Directive, as that would otherwise undermine the system of mutual trust underpinning that directive).

⁶⁵ See also recital 22 of the EIO Directive.

⁶⁶ See also, recital 19 of the EIO Directive.

⁶⁷ For an argument that mutual recognition under EU law is limited in the sense that there is no automatic acceptance in the executing Member State, see Möstl, M., ‘Preconditions and Limits of Mutual Recognition’, *Common Market Law Review*, vol. 47(2), Kluwer Law International, 2010 p. 405, at pp. 412, 418, 420.

98. In that light, the argument that the EPPO system is *something more* than mutual recognition could be accepted if understood as stating that the EPPO system establishes a different, higher degree of mutual recognition.

99. Yet, something *more* cannot mean something *else*. In other words, it cannot mean that the EPPO system does not rely on the principle of mutual recognition, which requires a trust in the legal systems of other Member States. It is precisely this principle, inbuilt within the system, which enables the acceptance of rules of other Member States, even if they are different. The possibility to apply that principle requires, as in all other instruments of mutual recognition, the trust that all Member States protect fundamental rights.

100. In sum, mutual recognition in criminal matters is not a unitary concept but has varying degrees across different mechanisms in the AFSJ.

101. If we accept that mutual recognition in criminal matters has varying degrees, the EPPO Regulation is indeed the most advanced piece of legislation yet – but even that is not complete mutual recognition.⁶⁸ The EPPO is a single body and the assigned cross-border measures indeed need not be *recognised*, but only implemented. However, in the absence of harmonisation, fundamental rights of suspects and accused persons must be guaranteed in a context in which the EPPO borrows a variety of national substantive and procedural criminal rules, such as in the case of cross-border investigations.

(b) Fundamental rights guarantees in the EPPO Regulation

102. Because the rules of one Member State apply to the judicial authorisation of investigation measures that will be carried out in another Member State, a decrease or even gaps in fundamental rights protection might occur.

103. Article 5(1) of the EPPO Regulation provides that the EPPO ‘shall ensure that its activities respect the rights enshrined in the Charter’.⁶⁹ Does the EPPO Regulation enable the fulfilment of that obligation when it comes to cross-border investigations? In my view, it does.

104. I have in mind several mechanisms across the EPPO Regulation that support that finding. First, the cooperation mechanism between the handling and assisting EDPs (Article 31(5) of the EPPO Regulation);⁷⁰ second, Article 41 of the EPPO Regulation dealing with the scope of fundamental rights protection; and, third, the requirement that all Member States provide for judicial review of the EPPO’s procedural acts (Article 42(1) of the EPPO Regulation). I will briefly address each of these in turn.

105. First, as stressed by the EPPO and the Commission, the EPPO Regulation does not contain grounds for non-recognition. Rather, in order to take into consideration the requirements of the assisting EDP’s Member State law and correct possible flaws in the request for an investigation

⁶⁸ For the same conclusion, see Mitsilegas and Giuffrida, above n 48, at p. 89.

⁶⁹ This provision is of course merely a more concrete expression of the obligation of all bodies of the European Union to respect the Charter, as expressed in Article 51(1) thereof.

⁷⁰ Article 31(5) of the EPPO Regulation provides: ‘Where the assisting European Delegated Prosecutor considers that: (a) the assignment is incomplete or contains a manifest relevant error; (b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons; (c) an alternative but less intrusive measure would achieve the same results as the measure assigned; or (d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State, he/she shall inform his supervising European Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally’.

measure, the EPPO system relies on an internal dialogue between the handling and assisting EDPs. Under Article 31(5) of the EPPO Regulation, the two EDPs work together on efficiently carrying out the investigation in line with the protection of fundamental rights.⁷¹ This internal cooperation system is one of the important elements for ensuring the protection of fundamental rights in the EPPO system.

106. In particular, the assisting EDP may inform the supervising European Prosecutor and consult with the handling EDP when issues arise with the assigned measure. Situations under Article 31(5)(c) and (d) of the EPPO Regulation are of particular interest: when a less intrusive measure would achieve the same results, and when the assigned measure does not exist or would not be available in a similar domestic case.

107. An assessment that a less intrusive measure would achieve the same result corresponds to Article 10(3) of the EIO Directive, under which the executing authority may change the measure requested by an EIO. More importantly, this means that the assisting EDP is invited to undertake a proportionality analysis of the assigned measure, providing for an additional check.

108. The non-availability of the same measure in a similar domestic case is a consideration also present in Article 10(1)(b) of the EIO Directive, and features as a reason for non-execution in certain cases under Article 11(1)(c) of the EIO Directive. In the event that the two EDPs cannot reach an agreement within seven days, the matter is, under Article 31(7) of the EPPO Regulation, referred to the Permanent Chamber for a final decision. Ultimately, then, the measure can survive regardless of the concerns raised by the assisting EDP. However, it is in the interest of the EPPO that the evidence resulting from the cross-border investigation may be used in the trial phase of the procedure.⁷² It is, therefore, unlikely that the Permanent Chamber would endorse a measure that is unacceptable in one of the participating legal systems.

109. While the internal cooperation system between the handling and the assisting EDP might alleviate the danger of a fundamental rights breach to certain degree,⁷³ the EPPO cannot be assumed to be flawless.

110. In that respect, the EPPO Regulation contains additional mechanisms that enable the control of EPPO actions in cross-border investigations.

111. First, Article 41 of the EPPO Regulation sets out the concrete rights of suspects and accused persons in EPPO procedures in further detail. It refers to the standards of protection in the Charter (paragraph 1); to the protection guaranteed in the various EU mechanisms harmonising aspects of criminal procedure in the Member States (paragraph 2);⁷⁴ and to all the procedural rights available under the applicable national law (paragraph 3).⁷⁵

⁷¹ See, in that respect, Herrnfeld, above n 15, at pp. 293 to 295. Interestingly, Allegrezza and Mosna find the cooperation mechanism of the two EDPs as a burden on the simplification and acceleration of cross-border investigations, especially because there is no time limit attached to the execution of the investigative measure. Allegrezza and Mosna, above n 43, at pp. 154 to 155.

⁷² In relation to the admissibility of evidence, Article 37(1) of the EPPO Regulation only provides that evidence shall not be denied before a national court for the mere fact that it was collected in another Member State or in accordance with the law of another Member State.

⁷³ Allegrezza and Mosna conclude that the procedure of cooperation between the two EDPs will in effect mean that the laws of both the respective Member States will be respected. Allegrezza and Mosna, above n 43, at p. 153.

⁷⁴ Including the right to interpretation and translation, the right to information and access to case materials, the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention, the right to remain silent and the right to be presumed innocent, and the right to legal aid.

⁷⁵ Including explicitly the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measures on behalf of the defence.

112. Second, Article 42(1) of the EPPO Regulation requires that judicial review of investigation measures is always available. Therefore, if there was no prior judicial review, or if the combined application of two legal systems (one for the justification of the measure and the other for its execution) led to some oversight in the protection of fundamental rights, an a posteriori judicial review of the measure would serve as a correction to any potential violation.⁷⁶

113. The EPPO Regulation guarantees the protection of fundamental rights to a high degree. It is true that in certain situations and from the perspective of some Member States it may lead to a decrease of the previously protected level of individual rights. Nevertheless, those rights are protected at least at the level of the Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Harmonisation, after all, inevitably leads to a weakening of the protection of fundamental rights in Member States with a higher prior level of protection,⁷⁷ unless the highest standard is adopted as a common rule.

114. That, however, is the price of building a future together.

115. In conclusion, when it comes to cross-border investigations, the EPPO Regulation establishes a highly developed system of mutual recognition. Even if it does not provide for the possibility of a refusal of the handling EDP's decision that it is necessary to undertake an investigation measure in a Member State other than the one in which the principal investigation is taking place, it contains various safeguards guaranteeing the protection of fundamental rights. Interpreting Article 31(3) of the EPPO Regulation as splitting the competences for review of a cross-border investigation measure between the legal orders of the handling and the assisting EDP's Member States' courts does not therefore endanger the protection of fundamental rights. In view of the above, I propose that the Court should adopt the interpretation of Articles 31 and 32 of the EPPO Regulation, which is set out in point 73 of this Opinion.

III. Conclusion

116. In light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) as follows:

- (1) Article 31(3) and Article 32 of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO Regulation')

must be interpreted as meaning that, in the case of cross-border investigations, the court approving a measure to be carried out in the Member State of the assisting European Delegated Prosecutor may assess only the aspects related to the execution of an investigative measure.

- (2) Article 31(3) and Article 32 of the EPPO Regulation

⁷⁶ See, by analogy, Opinion of Advocate General Richard de la Tour in *MM* (C-414/20 PPU, EU:C:2020:1009, point 133) (where he explained that effective judicial protection demands that the conditions under which a European arrest warrant was issued must be subject to review at the stage of the criminal proceedings subsequent to surrender, if no remedy was provided for at an earlier stage).

⁷⁷ Exemplified clearly in the harmonisation of standards for trials *in absentia*. The solution chosen in Article 4a of the EAW Framework Decision was at odds with the Spanish level of protection, as it became clear in *Melloni*. However, as is well-known, the Court concluded that where EU harmonisation takes place, higher national standards cannot stand in the way of the effectiveness of the system of mutual trust. Judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraphs 62 to 64).

must be interpreted as meaning that, in the case of cross-border investigations, the court in the Member State of the assisting European Delegated Prosecutor must accept the assessment by the handling European Delegated Prosecutor that the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the Member State of the handling European Delegated Prosecutor.