

# DECISION OF THE COLLEGE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE OF 26 JANUARY 2022

## ADOPTING GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017/1939

The College of the European Public Prosecutor's Office (EPPO),

Having regard to Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), hereinafter "the EPPO Regulation", and in particular Articles 9(2), 31 and 114 thereof,

Considering the outcome of the discussions within the Working Group established in order to clarify the different legal and practical aspects stemming from the application of the provisions related to the EPPO's cross-border investigations, as laid down by Article 31 of the EPPO Regulation ('Article 31'),

HAS DECIDED AS FOLLOWS:

### Article 1

Guidelines on the application of Article 31 of the EPPO Regulation are laid down in the Annex, which forms an integral part of this Decision.

### Article 2

This decision shall enter into force on the date of its adoption.

Done at Luxembourg on 26 January 2022.

On behalf of the College,

**Laura Codruța KÖVESI**

**European Chief Prosecutor**



## ANNEX

# GUIDELINES of the College of the EPPO on the application of Article 31 of the EPPO Regulation

## PRELIMINARY REMARKS AND DISCLAIMER

According to its mandate pursuant to Article 9(2) of the EPPO Regulation, the College adopts these Guidelines taking into account general issues arising from individual cases during the practical application of Article 31.

The main aim of these Guidelines is to ensure an internal uniform practice within the European Public Prosecutor's Office ('EPPO') in the framework of Article 31 of the EPPO Regulation, which created a new mechanism for the EPPO cross-border investigations.

These Guidelines express the position of the College on the interpretation of certain unclear provisions of Article 31 and are without prejudice to the judicial independence of the courts of the Member States, the rights of the parties as enshrined in the Charter of Fundamental Rights of the European Union or to any interpretation that will be given in the future by the Court of Justice of the European Union.

The investigative measures assigned in accordance with Article 31 of the EPPO Regulation are usually procedural acts of the EPPO, that produce legal effects vis-à-vis third parties. Recital 88 of the EPPO Regulation specifies that *"When national courts review the legality of such acts, they may do so on the basis of Union law, including this Regulation"*. Article 31 of the EPPO Regulation created an entirely new and autonomous EU legal concept, in line with the principle of the autonomy of the EU Law. Therefore, in case of doubts on the interpretation of Article 31, the EPPO should always request the competent court in the Member State concerned to take decisions in line with recital 88 of the EPPO Regulation which states that *"As underlined in the case-law of the Court of Justice, national courts should always refer preliminary questions to the Court of Justice when they entertain doubts about the validity of those acts vis-à-vis Union law"*.

## SECTION ONE

### General principles

1. Article 31 of the EPPO Regulation creates a self-standing, *sui generis*, legal basis for the EPPO cross-border investigations. Due to the fact that the EPPO is operating "as one single Office with a decentralised structure", this new "assignment mechanism" replaces, as a

rule<sup>1</sup>, only for this type of investigations, both the mutual legal assistance and mutual recognition instruments.

2. The practical application of Article 31 cannot be more cumbersome, bureaucratic and more time-consuming than the application of the Union acts giving effect to the principle of mutual recognition, such as the Directive 2014/41 regarding the European Investigation Order ("EIO Directive")<sup>2</sup> or the Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders ("Regulation 2018/1805")<sup>3</sup>.
3. The principle enshrined in Article 31(2) of the EPPO Regulation – the justification and adoption of the measures is governed by the law of the Member State of the handling European Delegated Prosecutor (EDP) – mirrors the principle that the substantive reasons and conditions for adopting any intra-EU cross-border measures are governed by the law of the issuing Member State<sup>4</sup>, and can be challenged only in that Member State. This should be considered part of the *acquis communautaire* and has to be interpreted as a principle that governs the application of the whole Article 31 of the EPPO Regulation.
4. As stated unequivocally in its paragraph 1, Article 31 establishes a framework for close cooperation and regular consultation between the EDPs in EPPO cross-border cases. Therefore, the EDPs (and the European Prosecutors) concerned shall always act in close cooperation and regularly consult each other with the aim to find the most effective and efficient ways of carrying out the respective cross-border investigation, avoiding unnecessary bureaucratic burden and ensuring a cost and time-effective mechanism.
5. Where, in accordance with Article 31 paragraph 3, first sub-paragraph, judicial authorisation is required under the law of the Member State of the assisting EDP, the assisting EDP shall obtain the authorisation in accordance with the law of his/her Member State and, if authorisation is refused, the handling EDP has to withdraw the assignment.
6. Where, in accordance with Article 31 paragraph 3, third sub-paragraph, the law of the Member State of the assisting EDP does not require a judicial authorisation, but the law of the handling EDP requires it, the handling EDP has to obtain the authorisation from the

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<sup>1</sup>As an exception, paragraph 6 of Article 31 allows the EDPs concerned to have recourse to mutual recognition/mutual legal assistance instruments, only if "the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation."

<sup>2</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJEU L 130/1.5.2014.

<sup>3</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJEU L 303/28.11.2018.

<sup>4</sup> The following principles are established in the EIO Directive and in the Regulation 2018/1805, respectively:

- The conditions for issuing an EIO can be assessed only by the issuing authority (Article 6(1) and (2) of the Directive 2014/41);
- The substantive reasons may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State (Article 14(2) of the Directive 2014/41);
- The substantive reasons for issuing the freezing or confiscation order cannot be challenged before a court in the executing State, in accordance (Article 33(2) of the Regulation 2018/1805).



competent court<sup>5</sup> of his/her Member State. If the authorisation is granted, the handling EDP has to submit it to the assisting EDP together with the assignment. Then, the assisting EDP shall undertake the assigned measure in accordance with the assignment and the law of his/her Member State.

7. In principle, the assisting EDP should not have to provide the competent court of his/her Member State with more or different supporting evidence and documents than what the national prosecutor currently does when, i.e. executing a European Investigation Order (EIO), and the same legal practice should be applied. In line with the principle that the justification and adoption of the measures is governed by the law of the Member State of the handling EDP, the competent court of the Member State of the assisting EDP should not require more supporting evidence or documents, and not assess the "justification" and the "substantive reasons"<sup>6</sup> for undertaking the measure.
8. 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, the systematic interpretation of the EPPO Regulation would lead to the conclusion that "in any case there should be only one authorisation", as stated in recital 72. However, having only one judicial authorisation would create a serious legal gap because competent judicial authorities would not be in a position to assess the substantive reasons of the measure. 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.
9. The gap in respect of legal remedies would represent a serious concern. The EPPO Regulation does not contain specific provisions on legal remedies in the framework of Article 31. However, Article 42(1) of the Regulation fully applies in respect of procedural acts issued or decisions adopted in this context that produce legal effects vis-à-vis third parties. More importantly, Article 47 of the EU Charter of Fundamental Rights applies, and legal remedies must be granted in respect of the substantive reasons of the measure in the Member State of the handling EDP.
10. Therefore, recital 72 of the EPPO Regulation cannot be applied in all situations, because it would be in violation of Article 47 of the EU Charter of Fundamental Rights and of Article 42(1) of the EPPO Regulation.
11. Bearing in mind that Article 31 of the EPPO Regulation creates a new legal framework for EPPO cross-border investigations, different from the traditional judicial cooperation legal instruments, the corresponding costs, including for translation, where applicable, should, in principle, be borne by the EPPO, in light of recital 113, to the extent these are costs *"which are caused only due to the EPPO having assumed responsibilities for investigation and prosecution"*.

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<sup>5</sup> The term 'court' used in this document also encompasses the legal systems where a single judge, as for example an investigation judge or a judge of the guarantees, is competent to issue the order.

<sup>6</sup> Meaning the necessity and proportionality of the requested measure.



## SECTION TWO

### Guidelines regarding Specific investigation measures and other measures

#### ***A. Measures different from those listed in Article 30 of the EPPO Regulation, which do not require judicial authorisation***

12. In general, investigation measures that do not produce legal effects vis-à-vis third parties are not subject to judicial authorisation and legal remedies. These situations are very frequent and can be steered by the EDPs easily and swiftly.

The assignment of these measures should be done in the working language of the EPPO (English) and, in principle, does not need to be translated, without prejudice to the application of the provisions from the procedural rights directives.

As regards these measures, the execution goes from the handling EDP to the assisting EDP(s) just by assigning the measure in accordance with Article 31.

#### ***B. Measures listed in Article 30 - with the exception of letter d) – and other measures, which require judicial authorisation either in one or more Member States***

13. In most Member States, all the measures listed in Article 30 of the EPPO Regulation are subject to judicial authorisation. There is usually the possibility for the prosecutor to issue the order in urgent cases, and then obtain a confirmation from the judge. In a few Member States, some of those measures are subject to authorisation from the prosecutor only. These measures are subject to legal remedies and review by the competent national courts. Other investigation measures, which are not listed in Article 30 – such as covert investigations – may require judicial authorisation in most Member States.

In all these situations, the general principles stated above (paragraphs 5-8) as regards the application of Article 31 paragraph 3 apply.

14. The assignment of the measure pursuant to Article 31 is the essential procedural act that the handling EDP should send to the assisting EDP (within the CMS) and which, when judicial authorisation is required in the Member State of the assisting EDP, should be provided to the competent court/judge of the latter.  
Since Article 31 does not foresee the content of the assignment, the latter should contain as a minimum the following elements:

- the object of and reasons for the assignment;

- the necessary information available on the person(s) concerned;
  - a summary of the facts, that are the object of the investigation or proceedings, the legal qualification of the facts as well as the applicable provisions of the EPPO Regulation and the criminal law of the handling EDP;
  - a description of the investigation measures(s) assigned and the evidence to be obtained;
  - information on the existence of reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, while there is no less intrusive measure available which could achieve the same objective as per Article 31(5) of the EPPO Regulation;
  - where applicable, the formalities and procedures of the handling EDPs national law according to which the assigned measure needs to be carried out<sup>7</sup>.
15. Pursuant to the last sub-paragraph of Article 31(3), only in case the law of the Member State of the assisting EDP does not require judicial authorisation, but the law of the Member State of the handling EDP so requires, the latter will obtain the authorisation and submit it to the assisting EDP(s) together with the assignment. As previously mentioned, in these situations usually the national legislation allows the assisting EDP to execute himself/herself the measure. The execution should be based only on the factual and legal allegations covered by the assignment and by the judicial authorisation obtained by the handling EDP, transmitted with the assignment, without any other supporting documents.
- For these measures, the assignment from the handling EDP to the assisting EDP(s) should be translated by the handling EDP and submitted in the language of the latter. The purpose of the translation is to guarantee full access to the document and to its content to all the involved actors: the assisting EDP, the Court competent for legal remedies, the suspect and the other private parties possibly involved. For the same reasons, when the handling EDP submits the authorisation of the Court of his/her Member State together with the Assignment, the judicial authorisation should also be translated.
16. In the Member State of the assisting EDP, the legal remedies should not lead to an assessment of the merits of the case or on the EPPO's competence, but only in respect of aspects such as:
- the violation of fundamental rights<sup>8</sup>;
  - in case the authorisation is issued for a measure that does not exist or would not be available in a similar domestic case under the law of his/her Member State<sup>9</sup>;
  - or (ex post) errors in the execution of the measure.

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<sup>7</sup> Unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting EDP.

<sup>8</sup> This is a general principle of the EU Law, always applicable.

<sup>9</sup> In these situations, the assisting EDP should not execute the Assignment in accordance with Article 31(5).



17. Similarly to the system foreseen for the EIO, the justification and adoption of the measure - i.e., its substantive reasons, necessity and proportionality of the measure - should be subject to legal remedies only in the Member State of the handling EDP, in light of Article 31(2) of the EPPO Regulation. In situations where there is only one judicial authorisation issued in the Member State of the handling EDP, the justification and adoption of the measure - i.e., its substantive reasons - would be obviously subject to legal remedies in the same Member State. However, errors or excess in the execution of the measure by the assisting EDP could be challenged in the Member State of the assisting EDP.
18. Conversely, pursuant to Article 31(3), first sub-paragraph, if judicial authorisation is required only under the law of the Member State of the assisting EDP, the assisting EDP shall obtain that authorisation. Thus, pursuant to recital 72 of the EPPO Regulation, the EPPO should obtain only one authorisation. This means that, in this situation, neither in the Member State of the handling EDP nor in the Member State of the assisting EDP, a court would have the opportunity to assess the substantive reasons of the measure. Furthermore, in the Member State of the handling EDP the parties do not have any decisions issued by a judge of that Member State that could be subject to legal remedies.
19. However, the right to an effective remedy in respect to decisions that produce legal effects vis-à-vis third parties is a fundamental right, which is enshrined in Article 47 of the EU Charter of Fundamental Rights and clearly referred to in Article 42(1) of the EPPO Regulation. This principle has been upheld very recently by the Court of Justice of the European Union (CJEU)<sup>10</sup> in respect of the EIO Directive. In particular, the Court clarified that the persons concerned by an EIO that involves search and seizure measures are fully entitled to legal remedies against the investigative measure in the Member State that issued the EIO. The Court specified that the legal remedies that must be available should allow the interested person to challenge the necessity and the legality of the EIO in respect of its substantive reasons. In fact, this principle was already outlined by Article 14(2) of the EIO Directive, which foresees that "the substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State".
20. As the EPPO Regulation does not contain any provisions in respect of recourse to legal remedies in application of Article 31, this is a matter subject to pure legal interpretation in accordance with the basic principles of the EU Law. The only possible interpretation in line with the EU Charter of Fundamental Rights and Article 31 paragraphs 2 and 3 of the EPPO Regulation is that the judicial authorisation and its substantive reasons can always be subject to legal remedies in the Member State of the handling EDP.
21. Therefore, in all the cases an investigation measure in the Member State of the handling EDP is subject to legal remedies, the measure must be authorised in the same Member

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<sup>10</sup> CJEU judgment of 11.11.2021 in Case C-852/19 'Gavanozov II', para 41.



State. Depending on the applicable national law, it will be a judge, a prosecutor, or even a Law Enforcement Agency to authorise, which will be subject to legal remedies in the same Member State in accordance with Article 47 of the EU Charter of Fundamental Rights.

22. This principle applies also to cases where a judicial authorisation for the measure is required under the law of the Member State of the assisting EDP. In these situations recital 72 (one only judicial authorisation) cannot be applicable, because in clear violation of Article 47 of the EU Charter and of Article 42(1) of the EPPO Regulation.<sup>11</sup>
23. In line with the rationale of Article 31(3) second sub-paragraph of the EPPO Regulation, the handling EDP will submit the authorisation issued or obtained in his/her Member State to the assisting EDP together with the assignment, both translated in the language of the assisting EDP. However, the authorisation issued in the Member State of the handling EDP should not be translated if, following prior consultation between the EDPs concerned, it appears that this is not necessary in the Member State of the assisting EDP where a judicial authorisation is issued.

### ***C. Freezing instrumentalities and proceeds of crime referred to in Article 30 letter d)***

24. Although listed as such in Article 30 of the EPPO Regulation, it has to be noted that freezing instrumentalities and proceeds of crime is not an investigation measure and is not aimed at gathering evidence. This is in fact a tool to recover ill-gotten assets or their equivalent value, and has nothing to do with an “investigation measure”. Consequently, it falls under the notion of “other measures” from the title of Article 30.
25. In any case, *de lege lata*, the EPPO Regulation includes the order for freezing proceeds of crime in Article 31. Therefore, as a rule, the handling EDP should assign the measure of obtaining a freezing order to the assisting EDP in the participating Member State where the asset is located, and the latter should request the competent authority of his/her Member State to issue the order.
26. The considerations mentioned in section II. B. of this document apply to this procedure as well.

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<sup>11</sup> It is well known that recitals of EU legal acts do not have any independent legal value: in the EU legal order they are descriptive and not prescriptive in nature (Judgments of 19 November 1998, Nilsson and Others (C-162/97, EU:C:1998:554, paragraph 54), of 24 November 2005, Deutsches Milch-Kontor (C-136/04, EU:C:2005:716, paragraph 32), and Opinion of Advocate General Ruiz-Jarabo Colomer in TeliaSonera Finland (C-192/08, EU:C:2009:309, paragraphs 87 to 89).

## SECTION THREE

### Guidelines regarding expenditures related to the application of Article 31

27. While, in principle, the provisions of Article 91 paragraphs 5 and 6 of the EPPO Regulation also apply to EPPO cross-border investigations, there are solid reasons of legal and practical nature supporting the thesis stated in paragraph 11 of these Guidelines, namely that the expenditures related to the application of Article 31 should be borne by the EPPO to the extent that these are costs *"which are caused only due to the EPPO having assumed responsibilities for investigation and prosecution"*.
28. As the system established by Article 31 of the EPPO Regulation is entirely new<sup>12</sup>, those expenditures directly linked to the application of the assignment mechanism, although essentially of operational nature, should, in light of recital 113, be borne by the EPPO because they are caused only due to the EPPO having assumed responsibilities for investigation and prosecution.
29. Thus, the EPPO should, *inter alia*, bear the costs related to the following activities:
- organisation and carrying out of coordination meetings and operational activities at the EPPO's headquarters or on the territory of a participating Member State, including costs for interpreters and costs related to the participation in these activities of the EDP(s) concerned, as well as of EPPO staff and of representatives of the national authorities;
  - translation of the assignment and of all eventual related documents, including those resulting from the execution of the measure by the assisting EDP. It has to be noted that, in principle, the assignment should not be subject to sworn translation in any Member States because it is a new and autonomous EU legal instrument, which belongs to the autonomous EU legal order. Since the EU legislation does not foresee this requirement, it is arguable that the judicial authorities in the Member States should not request that the assignment may be subject to certified or sworn translation.
30. In accordance with Article 91(5) of the EPPO Regulation and without prejudice to Article 91(6), the Member States shall remain responsible for the costs they would have anyway incurred if the measure would have been executed under the mutual recognition or

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<sup>12</sup> Thus, the assignment of the investigation measure is a novelty in the EU legal framework, and it is an entirely new EU legal instrument applicable only and exclusively within the EPPO.

mutual legal assistance regime, such as costs incurred by any national authority during the execution of a measure on the territory of that Member State.

31. The interpretation provided for in paragraphs 11 and 27-29 of these Guidelines has significant practical advantages, because the EPPO is in a position to organise and streamline those expenditures in a much swifter and consistent way. In that context, the EPPO should allocate adequate financial and human resources, take all necessary measures (e.g. procurement procedures) and establish an internal flow for the coverage of the costs mentioned in paragraph 29.
32. From a policy point of view, it is in the interest of justice, and in the interest of the EPPO, that the European Public Prosecutor's Office maintain independence on its investigations and operations to the largest possible extension also from a resources point of view.