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Judicial review by national courts and the CJEU

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So close yet so far (from paradise)...



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- **Context**
- **Rules of the EPPO Regulation on judicial review and preliminary rulings**
- **Applicability of the Charter to the activities of the EPPO**

Context: Judicial review in EU law

- The Treaties “established a complete system of legal remedies and procedures designed to permit the **Court of Justice to review the legality of measures adopted by the institutions**” (*Les Verts*, 23 April 1986).
- “[national] courts do **not** have the power to declare **acts of the Community institutions invalid**” (*Foto-Frost*, 22 October 1987).
- **Article 263 TFEU**: The **CJEU** shall review...the legality of acts of **bodies, offices or agencies** of the Union intended to produce legal effects vis-à-vis third parties.
- **Article 47 Charter**: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article

Judicial review in the Regulation

Article 42 on judicial review (not internal review of EDP acts)

- **National courts** (in accordance with requirements and procedures laid down by national law) → **all EPPO procedural acts / failures to act**
- **CJEU** → EPPO decisions to **dismiss the case**
 - compensation for damage caused by the EPPO
 - dispute concerning arbitration clauses in contracts concluded by the EPPO
 - staff-related matters / data protection matters
 - **dismissal** of the ECP or EPs (not EDPs)

Judicial review by national courts

- **Rationale:** **specific** nature of the EPPO's tasks and structure is **different** from that of all other EU bodies and agencies (rec. 86)
 - **Combination** of EU & national law / **embedded** in national systems while being EU body / **practical reasons**
- **Rule:** EPPO procedural acts intended to produce **legal effects** vis-à-vis **third parties** – review by **national** courts (Art. 42(1))
 - MSs shall respect **principles of equivalence** and **effectiveness**
 - What if there are **no remedies** at the national level?
 - National courts competent on the **failures of the EPPO** to adopt procedural acts with legal effects vis-à-vis third parties and which it was **legally required to adopt** under the Regulation

Judicial review in cross-border cases

1. Choice of forum

- Procedural acts that relate to the choice of the MS whose courts will be competent to hear the prosecution ... subject to judicial review by national courts” (rec. 87)
- Decision of the Permanent Chamber + expedited procedures at the Court + **EU criteria** (Article 26(4) Regulation: territoriality; habitual residence; nationality; main financial damage + “if there are sufficiently grounds to do so” (Art. 36(3) Regulation)
- Risks of **negative conflicts of jurisdiction**: EPPO → MS A → declines → MS B → declines → ?

2. Judicial review of measures carried out abroad?

- Courts of the Member State of the handling or assisting EDP, or both?

Judicial review by the CJEU on decisions to dismiss a case

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- Article 42(3) Regulation: By way of derogation from para. 1..., **the decisions of the EPPO to dismiss a case**, in so far as they are contested directly on the basis of **Union law**, shall be subject to review before the CJEU in accordance with Article 263(4) TFEU
 - **Art. 263(4) TFEU**: Any **natural or legal person** may... institute proceedings against an act addressed to that person or which is of direct and individual concern to them...
- Who is this **natural or legal person (victim)**?
 - Rec. 89: “This Regulation is ... without prejudice to the possibility for a **Member State** ..., the **European Parliament**, the **Council** or the **Commission** to bring actions for annulment in accordance with the **second paragraph of Article 263 TFEU**”
 - **EU agencies / bodies – Other (natural or legal) persons**

Judicial review of dismissal decisions: some questions

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- **Grounds for judicial review:** lack of competence, infringement of an essential procedural requirement, infringement of the Treaties [including the Charter] [and] misuse of powers (Art. 263(2) TFEU)
- What role for **national law** providing for **further grounds to dismiss the case**? [Recital 81: The grounds for dismissal of a case are **exhaustively** laid down in this Regulation]
- What role for **national courts**?
 - Can they **review EPPO dismissal decisions**? (EPPO's dismissal decisions "in so far as they are contested directly on the basis of Union law, shall be subject to review before the CJEU")
 - Can they **take** the decision to dismiss the case?

Is the CJEU the right judge?

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- Is the CJEU in a position to review EPPO dismissal decisions?
 - ✓ **death or insanity of the suspect/
winding up of the legal person**
 - ✓ **amnesty/immunity (unless lifted)**
 - ✓ ***ne bis in idem***
 - ✓ **expiry of the national statutory
to prosecute**
 - ✓ **lack of relevant evidence**



- Need of specialisation within the CJEU? Specialised court?

Preliminary rulings of the CJEU

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Article 42(2) Regulation: CJEU shall have jurisdiction to give **preliminary rulings** concerning:

- a) the **validity of procedural acts** of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of Union law;
- b) the **interpretation or the validity of provisions of Union law**, including the Regulation;
- c) the interpretation of Articles 22 and 25 of the Regulation in relation to any **conflict of competence** between the EPPO and the competent national authorities.
✓ Note: conflicts of competence shall be decided by the **national authorities** competent to decide on the attribution of competences concerning prosecution at national level

Issues with the preliminary rulings

- Requests for preliminary rulings are, as with actions for annulment, “a **means for reviewing the legality of [EU] acts**” (*Foto-Frost*)
- The CJEU may develop **autonomous concepts** (*Poltorak; Kovalkovas*)
- **(Disadvantaged)** position of **individuals** (and of the **EPPO**)
- There is a “pressure” on national courts to dialogue with the CJEU:
 - Art. 267(3) – courts of last instance shall refer a request for preliminary ruling to the CJEU (if relevant and necessary)
 - ✓ CJEU case law on **State liability** (*Köbler*, 30 September 2003)
 - ✓ *Commission v. France* (2018): **infringement of the Treaties** since the *Conseil d’État* failed to make a reference to the CJEU
 - Principle of **sincere cooperation**
 - **ECtHR** case law on violation of Article 6 ECHR

EPPO and the Charter of Fundamental Rights

- Can suspects and accused persons **invoke the Charter?**
- “Article 50 [*ne bis in idem*] ... **confers on individuals a right which is directly applicable**” (*Garlsson*, 20 March 2018)
- However, provisions that may be relevant for the EPPO, are **worded in a way that requires the intervention of the MSs**
- Perhaps right to be tried within **reasonable time?**
 - **Consequence? Not** “an obligation on the part of national authorities to bring to an end criminal proceedings which have been under way for an unreasonably long period of time” (*Mabrouk*, GC, 5 October 2017)
- [What about the **European Convention on Human Rights?**]

Conclusion

- **National courts**, which are normally the “first judges” of EU law, will play a key role in reviewing EPPO acts and decisions
- The **Court of Justice** will only intervene in a **limited number of cases**, but it can ensure a certain level of consistency if national courts rely on the preliminary reference procedure whenever they have doubts about the interpretation of EU law/validity of EPPO acts
- In the future, it should be considered whether **specialised chambers at the CJEU** and/or procedures are necessary to deal with EPPO (criminal law) issues

Thank you very much for your attention!

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