

Cross-border investigation measures within the EPPO

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Provisions/Principles

- Art. 5 para. 3 – application of national law
- Art. 31 – cross border investigations
- Art. 32 – enforcement of assigned measures
- Art. 33 – pre-trial arrest and cross-border surrender
- Recitals 72 – 76

- Single Office Concept ↔ Territoriality of MS
- Terminology:
 - Handling EDP
 - Assisting EDP

Application of national law

Article 5 para 3

The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation. Unless otherwise specified in this Regulation, the applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case in accordance with Article 13(1). Where a matter is governed by both national law and this Regulation, the latter shall prevail.



Cross border investigations

Article 31

1. The EDPs 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 MS other than the MS of the handling EDP, the latter EDP shall decide on the adoption of the necessary measure and assign it to a EDP located in the MS where the measure needs to be carried out.
2. The handling EDP 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 MS' of the handling EDP. Where the handling EDP assigns an investigation measure to one or several EDPS from another MS, he/she shall at the same time inform his supervising EP.
3. ...
4. The assisting EDP shall undertake the assigned measure, or instruct the competent national authority to do so.

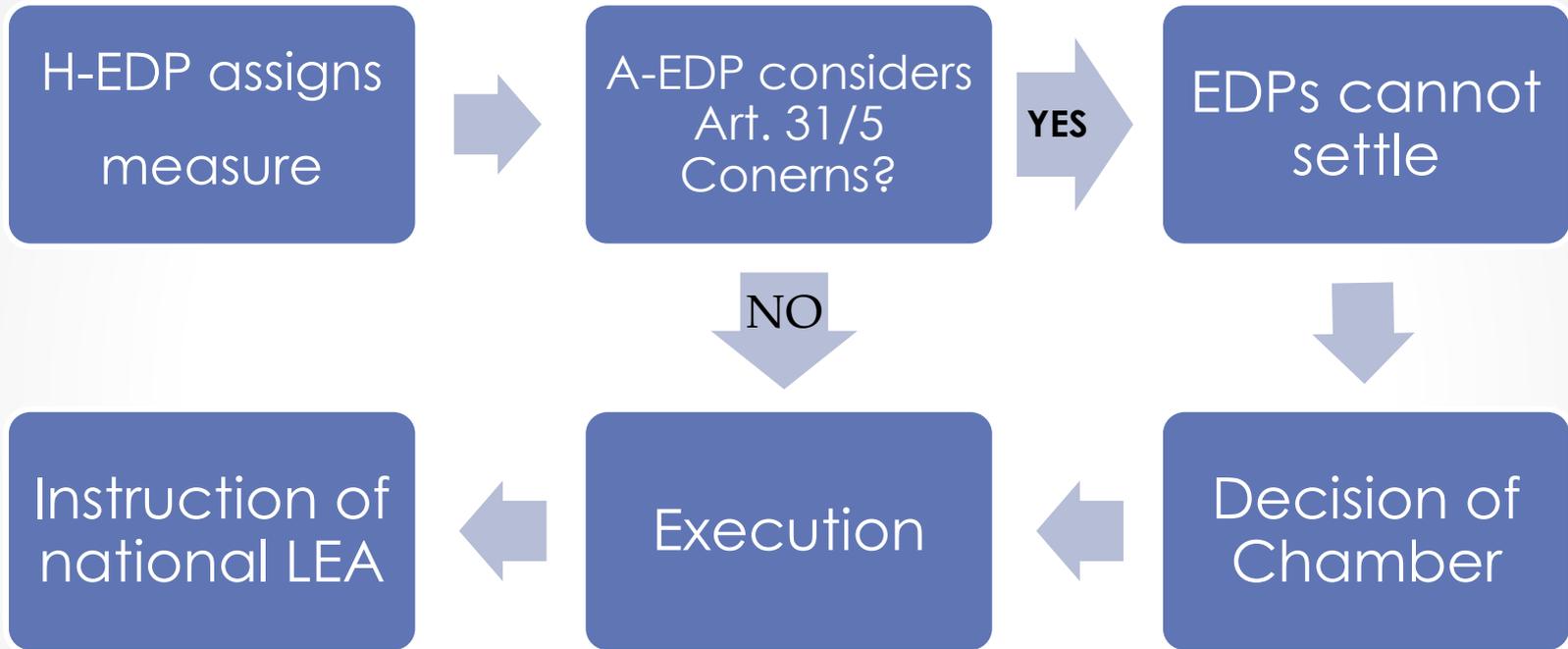


5. Where the assisting EDP considers that:
 - a) the assignment is incomplete or contains a manifest relevant error;
 - b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons;
 - c) an alternative but less intrusive measure would achieve 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 EP and consult with the handling EDP in order to resolve the matter bilaterally.

6. ...

7. If the EDPs cannot resolve the matter within 7 working days and the assignment is maintained, the matter shall be referred to the competent Permanent Chamber. ...

8. The competent Permanent Chamber shall to the extent necessary hear the EDPs concerned by the case and then decide without undue delay, in accordance with applicable national law as well as this Regulation, whether and by when the assigned measure needed, or a substitute measure, shall be undertaken by the assisting EDP, and communicate this decision to the said EDPs through the competent EP.



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Where to seek judicial authorisation?

Article 31 para 3

→ If judicial authorisation for the measure is required under the law of the MS of the assisting EDP, the assisting EDP shall obtain that authorisation in accordance with the law of that Member State.

If judicial authorisation for the assigned measure is refused, the handling EDP shall withdraw the assignment.

→ However, where the law of the MS of the assisting EDP does not require such a judicial authorisation, but the law of the MS of the handling EDP requires it, the authorisation shall be obtained by the latter EDP and submitted together with the assignment.

Recital 72

[...] Where judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained, but in any case there should be only one authorisation.[...]



Judicial authorisation required in MS of assisting EDP	Judicial authorisation requires in MS of handling EDP	Judicial authorisation has to be sought in:
X	X	MS of assisting EDP
0	X	MS of handling EDP
X	0	MS of assisting EDP

Example - Assignment

Austrian EDP is handling the investigations and wants to conduct a house search of a private home in Germany

- Justification and adoption of the search warrant is governed by AT CPC (Art. 31 (2))
 - AT EDP issues the search warrant
 - AT EDP assigns the measure to DE EDP (Art. 31 (2))
- AT and DE procedural law foresee court authorisation
 - Art. 31 (3) + recital 72 require that the court authorisation is applied for in DE
- AT EDP submits the search warrant to DE EDP
- DE EDP undertakes assessment in accordance with Art. 31 (5):
 - 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 or her MS;

Procedure in the assisting MS

- What is the DE EDP supposed to do now?
 - Submit the AT EDP search warrant to DE court for authorisation?
 - Draft another search warrant and submit his/her “own” search warrant to DE court for authorisation?
 - Apply to DE court to issue a search warrant?
- Regulation is silent on how to apply for court authorisation/search warrant by the court
- Art. 31 (3): judicial authorisation shall be obtained in accordance with the law of the assisting MS

Authorisation by the court in the assisting MS

- What is the DE EDP supposed to submit to the court?
 - file OR parts of the file and if so, which parts? Translated?
 - may the court ask for more evidence?
- How and based on what is the court going to take a decision?
 - some MSs CPC will foresee that a court has to issue a search warrant – how is a court going to manage to render a search warrant without a file, without evidence, without reports etc.?
 - some MSs CPC will foresee a court authorisation for a search warrant issued by the EDP; how is the court going to authorise the measure – full assessment, grounds for refusal?

Findings

- Handling EDP will have to use the evidence collected under Article 31 in the main trial which is likely to take place in his/her MS
→ admissibility of evidence!!!
- Common understanding of Article 31 by all participating MS is needed
- Uniform implementation by all participating MS would be desirable

Using mutual recognition tools?

Article 31 para 6

- “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, the EDPs concerned may, in agreement with the supervising EPs concerned, have recourse to such instruments.”
- temporary transfer of a person held in custody (EIO), video/telephone conference (EIO), e-evidence Regulation (under negotiation)

Enforcement of measure

- **Principle:** enforcement in accordance with the law of the assisting EDP
- How/when is a house search conducted; who conducts a house search etc.
- **Exception Art. 32:** *„Formalities and procedures expressly indicated by the handling EDP shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting EDP.“* → Relevance of lex fori
- See also Art. 9(2) Directive EIO 2014/41/EU

Cross border surrender

Article 33 para 2

- „Where it is necessary to arrest and surrender a person who is not present in the MS in which the handling EDP is located, the latter shall issue or request the competent authority of the MS to issue a EAW in accordance with Council FD 2002/584/JHA”

Questions?

Thank you for your attention!

