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Defence in future EPPO proceedings: cross- border investigations

Trier, 17-18 October 2019

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Co funded by the Justice Programme 2014-2020 of the
European Union



Defence in Cross-Border Cases (general)

- ▶ Issues of defence in cross-border cases
 - ▶ Dual defence
 - ▶ Legal and practical difficulties; funding.
 - ▶ Legal fragmentation
 - ▶ Requirements for gathering evidence; rules on the participation rights of defence; access to case files; coercive measures; alternatives to indictment; grounds for non-prosecution; etc.
 - ▶ Remedies (existence/non-existence; where to argue; gap due to cross-border dimension, lack of proper European law remedies, etc.).
 - ▶ Forum shopping / parallél proceedings/ conflicts of jurisdiction / ne bis in idem
 - ▶ Lack of criteria / lack of rights and remedies / lack of cross-dimension analysis of rights (lengthy PTD; proportionality of coercive measures, etc.) (except NBI after final decision)

Case Study (1)

- High level official of EU Agency (Mr F) suspected of having defrauded his institution (*European Aviation Safety Agency, EASA, in Germany*) of EUR 9 million.
- The prosecution case is that initially he places the money in Commerzbank in Cologne, Germany (PMS).
- Money moved to Sláinte Bank in Dublin (NPMS). Mr F subsequently receives a tip-off that inquiries have been made by police officers with Sláinte Bank. Therefore Mr F flies to Dublin and appears in person at Sláinte Bank. He gives instructions to move the money immediately to Cheers Bank in the British Virgin Islands ('BVI'), which is done.
- Mr. F then settles all EUR 9 million into a BVI trust. The trustees of that trust are Cheers Bank Trust Company.
- Some of the moneys are used to buy a Villa in the Algarve, Portugal.
- The EPPO decides to prosecute the case in Germany.
- Mr F remains in Ireland.

(fictional case; inspired in case study by Mr. Drew – Seminar 14 March 2019, available at <https://www.era-comm.eu/EPPO/presentations.html>)

Case Study (competence)

Checking EPPO competence

- Art. 22 – material - definition of offence – PIF offence? Art. 3 – ML?
- Art. 23 territorial/personal jurisdiction (Mr. F and others for ML?)
- 10.000 threshold – art. 25(2)
- Art 26 (allocation) – DE territoriality?; PT for ML? / damages? Other?
- Challenges to allocation/competence? [which EDP / MS vs EPPO]
 - How?
 - Before which authority? (25, 6...)
 - When?

[see presentation by HH Herrnfeld, p. 4,5,6]

Case Study (NPMS)

- Evidence obtained from IE (NPMS)
 - Art. 327 TFEU –not sufficient
 - Agreement? (105,3)
 - Notification? (105,4) – not for EIO (IE no EIO), only for Conventions (1959 and additional protocols)
 - EUROJUST intervention / “double hat”? / Reciprocity?
- Extradition sought from IE (NPMS)
 - Art. 327 TFUE – not sufficient
 - Agreement? (105,3)
 - Notification? (105,3) – EAW

Case Study (TS)

- Evidence from BVI
 - Agreement? (104,3) [sector agreements?]
 - Notification? (104,4)
 - “Double hat” / reciprocity ? / Report the offence... and then take profit of the evidence...

[forum shopping for MLA... ?]

- Extradition sought from BVI
 - Request MS authorities (Art. 104,7)

[forum shopping for extradition... ?]

Challenging legal basis...

Case Study (2) EPPO EAW and Evidence

DE HDP orders

- Searches of F's domicile in Germany
- Production of documents by EASA
- Searches of the Algarve Villa in Portugal and seizure of any documents relevant for identifying the link with the dirty money, the identity of the owners or any persons possibly committing ML; recording of conversations in the domicile (to be installed during the search sub-reptitiously)
- Production of Documents from the commercial registry / real estate agent / banking transactions / tax documents related to the purchase of the villa
- Freezing of the Villa since liable to confiscation
- Arrest and surrender of F from Ireland
- Having discovered the identity of the owner of the Villa and the links to the “dirty money”, arrest of surrender of this person from PT to DE

Case Study (2) EPPO EAW and Evidence

Particular EPPO/EAW issues

- *“judicial authority”; need for court order?*
- *EAW for interrogations / investigations? (proportionality...)*
- *Dual defence*
- *Access to case files of HEDP when arrested on an EPPO EAW*
- *Alternatives to PTD if cross-border situations?*
- *Refusal grounds (statute of limitation; ne bis in idem; lis pendens)*

Case Study (2) EPPO EAW and Evidence

- Evidence obtained in DE, in principle EPPO same powers as in domestic cases? But, the “minimum available measures” (art. 30)
 - Judicial authorization pursuant to NL?
 - Art. 30(5) – threshold lower than NL?
 - Art. 30 vs 31
- Evidence obtained in PT (art. 31)
 - Art. 31 – how does this work?
 - Challenging measures in PT (e.g. unlawfully gathered evidence / privilege / lack of judicial authorization / formalities contrary to fundamental principles) - in which MS? To which authority ? When? Effects? (*for tomorrow*)
- Challenges / requests to supervising EP / Chamber?
- Freezing and Confiscation in PT (national rules / MR instruments / Directive/ art. 30(1)(d), 38)

Other aspects in cross-border EPPO cases

- Applications in relation to competence?
- Applications in respect of allocation during the investigation?
- Applications in respect of closing the case?
- Applications in respect of “alternatives to the prosecution”?
- Applications in relation to bail measures / other precautionary measures?

Evidence gathering for the defence during EPPO cross-border investigations

[need of access to case files...]

- Right to request
- Right to attend
- Right to participate
- Right to dual defence
- Right to financial legal aid?
- Right for the accused to make statements before the indictment
- Right for the accused to make statements in his MS
- Right to (private) investigation by the defence

The Trial in EPPO cases – national law

- ▶ EDP ? **EP?**
 - ▶ Victims?
 - ▶ E.g. MS in VAT Fraud
 - ▶ The admissibility of the evidence
 - ▶ Applicable law
 - ▶ Competent forum for decision
 - ▶ Remedies
 - ▶ Defence evidence (see above)
 - ▶ The right to be present at trial (what about video-link if consent?)
 - ▶ Dual defence
 - ▶ Preliminary references to CJEU (*and to other MS?*)
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Thank you !
Obrigada!
Danke!

Check out www.ecba.org
and <http://handbook.ecba-eaw.org/> (update coming soon)