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# Defence in future EPPO proceedings: remedies

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# Case Study

- 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

## *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 (Mr. S) and the links to the “dirty money”, arrest of surrender of this person from PT to DE*

# Case Study

- **Is Mr. F able challenge the search of the Villa in Portugal due to lack of judicial authorisation in Germany? (in the presence of judicial authorisation in Portugal)**
  - On what basis? (NLF, NLL, EUL)
  - Before which authorities? (EPPO? National Courts? CJEU?)
  - When? (during the search? After the search [where is the evidence?]?)
  - Consequences? (none? exclusion of evidence? Other?)

# Case Study

***DE HDP makes a proposal for an indictment for prosecution to be brought in DE***

- May Mr. S challenge this decision and asking for the case to be closed, or for “alternatives to indictment” to be used?
  - On what basis? (EUL? NLF? NLL? [→ connection to challenges of the forum – other MS NL])
  - Before which authority? (EPPO? National Courts? CJEU?)
  - When? (before the indictment proposal? after the proposal? after the indictment?)
  - Consequences? (“quashing” of indictment? Replaced by another order, closing the case? Effects?)

# Case Study

***DE HDP makes a proposal for an indictment for prosecution to be brought in DE***

- Is it possible for Mr. S to challenge the forum chosen and ask to have the investigation or his trial be conducted in Portugal?
  - On what basis? (EUL? NLF? NLL?)
  - Before which authorities? (EPPO? National Courts? CJEU?)
  - When? (before the indictment proposal? after the proposal? after the indictment?)
  - Consequences? (“quashing” of indictment? Replaced by another order, sending the case to PT EDP?)

# Remedies within EPPO structure?

## Powers of PC

- ▶ Article 10 (2) and (3)/(4)/(5) – powers of the PC to “monitor and direct” investigations
  - (3) / 35
    - ▶ Bring a case to judgment (Article 36(1)(2)(3))
    - ▶ Dismiss a case (Article 39(1)(a) to (g))
    - ▶ Simplified prosecution procedure / final disposal (Article 40)
    - ▶ Refer a case to national authorities (Article 34(1)(2)(3) or (6))
    - ▶ Reopen an investigation (Article 39(2))
  - (4)
    - ▶ Instruction for evocation (Article 10(4)(b) – Art. 27(6))
    - ▶ Allocation (Art. 36(3)) / reallocation (Art. 28(3)) / Allocation to the SEP (Art 28(4))
  - (5)
    - ▶ Instructions in compliance with applicable national law to HEDP, where it is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO
    - ▶ Joinder of cases (Art. 36(4))
- ▶ Hierarchical Review: Recital 30 / Article 12(4).
- ▶ ECP – referral MS / Article 34(4)

# Judicial remedies? Art. 42

- ▶ Recitals 86-89
- ▶ National Courts
  - ▶ General Rule – for all EPPO Acts / Failure to act – Art. 42(1)
  - ▶ Acts *vis-a-vis* third parties
  - ▶ Choice of Forum – 36(3) – recital 87  
[effectiveness / equivalence]
- ▶ CJEU
  - ▶ Decisions to dismiss the case (if contested solely on the basis EUL) – Art. 42(3); by whom (263,4 TFEU – victims?)
  - ▶ Compensation for damage caused by EPPO Art. 42(4)  
[*other: disputes contracts EPPO; staff matters; data protection; discipline of CEP ;EP - Art. 42(5)-(7)*]
  - ▶ Recital 89 / Art. 263(4) TFEU / Art. 42(8)
  - ▶ Preliminary references – Art- 42(2)
- ▶ ECtHR?

# Important Provisions

## CFREU

- ▶ Article 47

## TEU/TFEU

- ▶ Art. 19(1) TEU; Art. 86 TFEU; Art. 263 TFEU; Art. 267 TFEU

## General Principles

- ▶ Article 5 (1) (ref to CFREU)
- ▶ Article 5 (2) Rule of Law
- ▶ Article 5 (3) Applicable Law “principle” – NLF – EUL – explicit cases NLL
- ▶ Article 5 (4) investigation “*à charge et à décharge*”
- ▶ Article 5 (5) investigation without undue delay

# Important Provisions (2)

## Evidence

- ▶ Recital 72 - Art. 19 TEU; Art. 86(3) TFEU; Art. 263 TFEU; Art. 267 TFEU
- ▶ Article 29 – Privileges and Immunities
- ▶ Article 30 - Investigation measures and other measures
- ▶ Article 31 - Cross-border investigations
- ▶ Article 32 – enforcement - lex loci – but request formalities
- ▶ Article 37 – admissibility and assessment of evidence
- ▶ Article 41(1) – rights of suspect/accused, fair trial, rights of defence
- ▶ Article 41(2) – Directives – see provisions on remedies
- ▶ Article 41(3) – minimum rights (available under NL, including right 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)

# Important Cases

- ▶ *Les Verts*, 23.04.1986, CJEU
- ▶ *Foto Frost*, 22.10.1987, CJEU
- ▶ *Johnston*, 1.05.1986, CJEU, 222/84, §§18-19 (“The requirement of judicial control [...] reflects a general principle of law which underlies the constitutional traditions common to the Member States. [...] also laid down in Articles 6 and 13 [ECHR]”)
- ▶ Pending case: *Gavanozov*, C-324/17 - see *AG Bot Opinion*, 11.04.2019, ECLI:EU:C:2019:312
  - (1) Article 14 [DEIO] in criminal matters must be interpreted as precluding the legislation of a Member State, such as the Bulgarian legislation, which does not provide for a legal remedy against the substantive reasons for an investigative measure indicated in an EIO, and the issuance of an EIO by the authorities of that Member State.
  - (2) Article 14 [DEIO] cannot be relied on by an individual before a national court to challenge the substantive reasons for issuing an EIO if remedies are not available under national law in a similar domestic case.
  - (3) The concept of ‘party concerned’ within the meaning of [DEIO] includes a witness subject to the investigative measures requested in an EIO and the person against whom a criminal charge has been brought but who is not subject to the investigative measures indicated in an EIO.

# Right to the lawful Judge?

- ▶ The German Constitutional Court has found that the refusal to make a preliminary ruling, if the requisites for a reference are met, is a violation of the corresponding right in the German Federal Constitution

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/12/rs20171219\\_2bvr042417en.html;jsessionid=840578633B85518ADB1EEA18C0C27FC8.1\\_cid394](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/12/rs20171219_2bvr042417en.html;jsessionid=840578633B85518ADB1EEA18C0C27FC8.1_cid394)).



Thank you !  
Obrigada!  
Danke!

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