

# Procedural Safeguards in the EU and under the EPPO Regulation *A Focus on Cross-Border Investigation*



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# Procedural Safeguards available in cross-border investigations

## Within the EPPO Regulation

- ▶ Art.41 (1): compliance with Charter
- ▶ Art 41 (2) : minimum level of protection (Directives adopted after the Stockholm Program)
- ▶ Art. 41 (3) all procedural rights available under national law
- ▶ Art 45 : Access to case file
- ▶ Art 37 and recital 80: rule of evidence
- ▶ Recital 67: suspect should only face one EPPO investigation

## Within the EU Legislation

- ▶ Directive 2014/41/EU on European Investigation Order
- ▶ Framework Decision 2002/584/JHA on European Arrest Warrant
- ▶ Framework Decision 2009/829/JHA on Supervision Measures
- ▶ European Convention on Mutual Legal Assistance

# Procedural Safeguards provided by the EPPO Regulation

- ▶ Art.41.1: compliance with Charter
- ▶ Art 41.2 : minimum level of protection (Directives adopted after the Stockholm Program)
- ▶ Art. 41.3 all procedural rights available under national law
- ▶ Art 45. : Access to case file
- ▶ Art 37 and recital 80: rule of evidence
- ▶ Recital 67: suspect should only face one EPPO investigation
  
- ▶ Other safeguards to bear in mind : judicial review (*see Fabio Giuffrida's presentation*) and independence of the EPPO

# Rights enshrined by the Charter

## Art 41 (1)

- ▶ A standard clause : **The activities of the EPPO ought to comply with the rights of suspects/accused person as protected by the Charter - Art.41 (1)**
- ▶ Right to presumption of innocence (art 48)
- ▶ Right to effective remedy and fair trial (art 47)
- ▶ *Non bis in idem* (art 50)
- ▶ Principle of legality and proportionality of criminal offence and sentence (art 49)
- ▶ Right to life (art 2), right to human dignity (art 1), prohibition of torture and degrading treatment (art 4), right to body integrity (art 3), right to privacy and family (art 7)
- ▶ ECtHR standards apply for corresponding rights (art. 57(3) of the Charter)

# Art. 41 (2) EPPO Regulation

“ Any suspected or accused person in the criminal proceedings of the EPPO shall, **at a minimum**, have procedural rights provided for in the Union Law, including directives concerning the rights of suspects and accused persons in criminal procedures, as implemented by national law, such as:

(a) the right to **interpretation and translation**, as provided for in Directive 2010/64/EU

(b) the right to **information and access to the case materials**, as provided by Directive 2012/13/EU

(c) the right to **access to a lawyer** and the right to communicate with and have third persons informed in the event of detention, as provided for in Directive 2013/48/EU

(d) the right to **remain silent and the right to be presumed innocent** as provided for in Directive (EU) 2016/343

(e) the right to **legal aid** as provided for in Directive (EU) 2016/1919”

# The Minimum Standards of Protection in Criminal Proceedings

- ▶ Art. 41 (2) refers directly to the Directives
- ▶ Directives = Only a **minimum** standards of protection
- ▶ Possibility to use the Directives directly in case of incomplete/unsatisfactory transposition?
- ▶ Articulation of the “specific” safeguards provided by the EPPO Regulation and rights enshrined by the Directive or its transposition (e.g. access to the file in art 45).
- ▶ No specific references to the EPPO proceedings in the various Directives

# Main Issues in EPPO cross-border investigations

- ▶ Interpretation/translation of the case file :
  - ▶ Difficulty and delay in getting the file translated (language, volume...)
  - ▶ Costs for MS
- ▶ Delay for access to case file for various reasons (translation, “essential documents”, practical reasons – art 49 electronic file/hard copy file) → in “due time” to exercise defence rights?
- ▶ Right to lawyer : No specific provision for EPPO cross-border investigation
  - ▶ EAW: Authorities in executing MS must inform the arrested person of right to a lawyer in issuing MS. (See C-265/19 PPU XD (para. 55))
- ▶ Protection of the presumption of innocence more efficient in some MS than in others.
  - ▶ See LM C-216/18 PPU
- ▶ The EPPO Regulation or the Legal Aid Directive do not provide for legal aid in each jurisdiction. See EAW procedure

# Rights under the National Law

## Art 41 (3)

- ▶ Shall enjoy *“all procedural rights available to them under the applicable national law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses, and to request the EPPO to obtain such measure on behalf of the defence”* Art.41 (3)
- ▶ Who : suspect, accused person and “other person involved in the proceedings (e.g. victim)
- ▶ Potential difference of treatment of accused person depending on where the proceedings are carried out
  - ▶ Discrimination as prohibited by art. 18 TFEU (non discrimination), breach of art. 21 TFEU (freedom of movement) and fair trial rights as enshrined by the Charter?

# Admissibility of Evidence

- ▶ **Art 37 (2):** the trial court has power to assess the weight of evidence presented by the prosecution and the defendant
- ▶ Evidence cannot be excluded on the only ground that gathered in another jurisdiction or according to another MS national law.
- ▶ Article that needs to be read in conjunction with Recital 80
  - ▶ Admissibility of evidence has to respect fundamental rights and principle recognised in art 6 TEU i.e. rights enshrined by the Charter -> fair trial rights in particular
  - ▶ **ECtHR case law on fair trial rights applicable** (art 57 (3) of the Charter) : e.g. entrapment, rule on gathering of evidence, confession...

# One investigation to catch them all

- ▶ **Recital 67 :** “ *In order to best safeguard the rights of the defendant, in principle, a suspect or accused person should only face one investigation or prosecution by the EPPO.*

*Where an offence has been committed by several persons, the EPPO should in principle initiate only one case and conduct investigations in respect of all suspect or accused person jointly.”*

- ▶ Useful safeguard in cross-border investigation: wants to avoid multiple ongoing investigations where the suspect/accused person has different degree of involvement.
- ▶ Secure prosecution – Help to avoid gaps between different investigations
- ▶ Only a recital but guidance tool for EDP?

# Procedural Safeguards provided by the EU Legislation potentially applicable in EPPO cross-border proceedings

- ▶ Directive 2014/41/EU on **European Investigation Order**
- ▶ Framework Decision 2002/584/JHA on **European Arrest Warrant**
- ▶ Framework Decision 2009/829/JHA on **Supervision Measures**
- ▶ European Convention on **Mutual Legal Assistance**

# European Arrest Warrant

- ▶ Framework Decision 2002/584/JHA as amended by Framework Decision 2009/299/JHA
- ▶ Transposition date : 31 December 2003 (and 28 March 2011)
- ▶ Will apply to cross-border investigation, in particular with Non Participating MS
- ▶ Streamlined system including its own safeguards and legal remedies

# EAW safeguards

- ▶ Proportionality of the measure
- ▶ Art 11 : rights of the arrested person: access to lawyer, access to the EAW and its content
- ▶ Mandatory grounds for non execution of the EAW:
  - ▶ *Non bis in idem*
  - ▶ Double criminality if not a “tick box” offence
  - ▶ Amnesty
- ▶ Statute of limitation/ *litis pendens*
- ▶ EAW FD shall respect the Charter
  - ▶ Prison detention condition
  - ▶ Art 7 (private and family life)

# Main Issues with EAW in EPPO cross-border investigation

## ▶ **Independence of the EPPO: EDP an IJA ?**

- ▶ See ECJ decisions of 27 May 2019 on the Lithuanian prosecutor (C-509/18 PPU, *PF*) and German prosecutor (joint cases C-508/18 PPU *OG* and C-82/19 PPU *PI*)
- ▶ Recently strengthened by 4 decisions of 12 December 2019: joint cases C-566/19 PPU *JR* and C-626/19 PPU *YC*; case C-627/19 PPU *ZB*; and case C-625/19 PPU *XD* on the role of the judicial control when EAW issued by prosecutor

## ▶ **Proportionality of the EAW**

- ▶ EIO, supervision order?
- ▶ Ireland do not surrender for investigation purpose

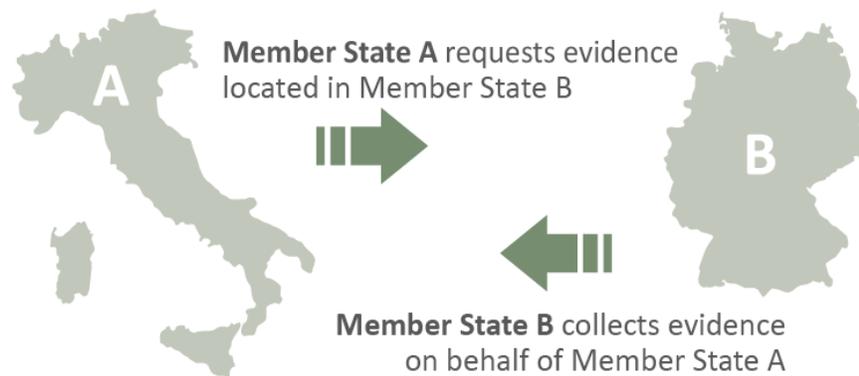
## ▶ **Alternative to pre-trial detention if cross-border investigation?**

- ▶ Flight risk, access to the suspect/accused person...

# European Investigation Order

- ▶ Directive 2014/41/EU Transposition date : 22 May 2017
- ▶ Globally implemented (exception: Ireland and Denmark)
- ▶ **Will apply to cross-border investigation, in particular with some Non Participating MS (Poland and Hungary)**
- ▶ Can be requested by suspect/accused person as well
- ▶ **The Directive includes its own safeguards and legal remedies**

## HOW IT WORKS



### Examples of investigative measures:

- ▶ Obtaining existing evidence
- ▶ Hearings of witnesses and suspects
- ▶ (House) searches
- ▶ Checks on bank accounts/financial operations
- ▶ Interception of telecommunications
- ▶ Temporary transfer of persons in custody
- ▶ Preservation of evidence

# EIO : safeguard and remedies

- ▶ Respect rights as enshrined by art 6 TEU and the Charter
  - ▶ Fair proceedings, right to effective remedy,
- ▶ Respect of legal principles
  - ▶ *Non bis in idem*
  - ▶ Immunities
  - ▶ No execution of EIO is not possible under the national law of the executing MS for this offence
  - ▶ Double criminality required if not an offence included in the list

# European Supervision Order – An overview

- ▶ Framework Decision 2009/829/JHA Transposition date : 1<sup>st</sup> December 2012
- ▶ Globally implemented (exception: Czechia, Slovenia, Ireland and Denmark) – Infringement proceedings opened against Ireland.
- ▶ Will apply to cross-border investigation for offence to the prejudice of financial interests of the EU, in particular with some Non Participating MS (Poland and Hungary)
- ▶ It lets EU citizens awaiting trial in another MS return home until their trial begins.
- ▶ Their home country supervises them using non-custodial (outside prison) measures.
  - ▶ E.g. to report to a police station, electronic tag...
- ▶ This avoids lengthy pre-trial detention abroad

# Potential Safeguards in Cross-border Investigation with Third countries

- ▶ Conventions on Mutual Legal Assistance
- ▶ UN Convention against Corruption (2003)
- ▶ UN Convention against Transnational Organised Crime (2000)
- ▶ Any agreement under Art 104 (3) EPPO Regulation to include safeguards?

Thank you !  
Merci !  
Danke !

- ▶ A question? Email me at [elise.martin-vignerte@macguill.ie](mailto:elise.martin-vignerte@macguill.ie)