

SELECTED ISSUES ON THE ROLE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN CROSS-BORDER FREEZING OF ASSETS

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Summary: 1. An introductory overview. – 2. The cross-border freezing measure under the EPPO Regulation. – 3. Grounds for non-recognition and non-execution. – 3.1. A focus on the judicial review of cross-border acts. – 4. On the allocation of management costs of seized assets. – 5. Concluding remarks.

1. The institution of the European Public Prosecutor's Office ("EPPO")¹ represents a significant step forward for the relationship between the European Union and national

¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), 32017R1939, adopted on 12.10.2017 and entered into force on 20.11.2017 (EPPO Regulation).

For an overall and in-depth analysis, see L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The Challenges Ahead*, Cham 2018; T. Gut, *EPPO's material competence and its exercise: a critical appraisal of the EPPO Regulation after the first year of operations*, in *ERA Forum* 23, 283–300, 2023; K. Ligeti, M. J. Antunes, F. Giuffrida, *The European public prosecutor's office at launch. Adapting national systems, transforming EU criminal law*, Milano 2020; H.H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office : Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') : article-by-article commentary*, Baden-Baden 2021; N. Franssenn, *Every Euro Counts ... and So Does Every Second. The EPPO and Cross-Border Cooperation in Relation to Seizure and Freezing in the 22 Participating Member States*, in *Eucrim*, 3/2022; N. Franssenn, *Judicial cooperation between the EPPO and Third Countries: Chances and Challenges*, in *Eucrim*, 14/2019; B. Vettori, T. Kolarov, A. Rusev, *Disposal of confiscated assets in the EU Member States. Law and Practices*, Center for the Study of Democracy, 7 and 19; P. Caeiro, J. A. Rodrigues, *A European contraption: the relationship between the competence of the EPPO and the scope of member states' jurisdiction over criminal matters*, in K. Ligeti, M. J. Antunes, F. Giuffrida, (eds.) *The European Public Prosecutor's Office at Launch*, Milano 2020; Ligeti, K., *The structure of the EPPO: features and challenges*, in *CACSP*, 2020; C. Vilarinho, *European Prosecutor's Office: A Rather Unambitious Project?* 2023, *JGRP*, 2023 - 07; S. Quattrocchio, S. Oliveira e Silva, E. Sacchetto, *Assets confiscation and prevention of crime in Europe. An overview upon the EU and domestic legislations*, Milano 2022; B. Piattoli, *Le notizie annotate nel case management system della procura europea: indagini transfrontaliere e formazione della prova*, in *Pre-investigazioni*, A. Scalfati (ed.), Torino 2020, 163 ff.; M. Rošić, *External Relations of the EPPO: Cooperation Challenges with Croatia and Eruopol*, in *Hrvatski ljetopis za kaznene znanosti i praksu*, 2020, 1; A. Cabiale, *I limiti alla prova nella procedura penale europea*, Milano 2019, 276 ff.; L. Camaldo, *Il pubblico ministero europeo dal Corpus Juris al Trattato di Lisbona: un "fantasma" si aggira nell'Unione europea*, in *Studi in onore di Mario Pisani*, vol. II, *Diritto processuale penale e profili internazionali. Diritto straniero e diritto comparato*, 71-77; G. Barrocu, *La procura europea. Dalla legislazione sovranazionale al coordinamento interno*, Padova 2021; L. Salazar, *L'adeguamento interno da parte italiana al regolamento EPPO alla vigilia dell'avvio delle prime indagini*, in *www.sistemapenale.it*, 6.4.2021; B. Piattoli, *Procura europea e criminalità finanziaria nella UE. Principi e modelli processuali*, Pisa 2022; M.

systems². The need for coordination among them raises sensitive issues as to the procedural consequences from the pre-trial phase, in particular regarding the specific acts that the European Delegated Prosecutors (“EDPs”) could effectively carry out, in order to investigate and prosecute cross-border criminal offences affecting EU financial interests under the Directive 2017/1371/EU³.

The challenge of efficiently fighting EU fraud has increased significantly after the approval of the new Multiannual Financial Framework (MFF) 2021-2027 and the Recovery and Resilience Instrument by the European Council in July 2021⁴.

The stunning amounts at stake would make it senseless to do anything other than step up the efforts in this field. Europol, Eurojust⁵, and OLAF have all publicly drawn attention to the considerable fraud risks⁶.

Fernandez-Bartier, *La confisca e il recupero dei beni criminali: uno stato dell'arte europeo*, in *Forum ERA*, 17, 323–342, 2016.

² The EPPO is not only a supranational body that exclusively applies EU law, but also presents itself as a hybrid conjunction entity that relies heavily on national law to achieve its objectives. See W. M. Khün, *The European Public Prosecutor's Office: The Protection of the EU's Financial Interests as Supranational Integration Project*, 2022, *UJCL*, 3 and A.M. Santos, *The Status of Independence of the European Public Prosecutor's Office and Its Guarantees*, in *The European Public Prosecutor's Office. The Challenges Ahead*, cit., 1 ff.

³ Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29, currently interested by a proposal of amendment and extension with the Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM/2023/234 final. See the Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47. Actually, the article 86(4) TFEU makes it possible for the European Council, by unanimous decision and, further, only with the consent by the European Parliament, to extend the EPPO's competence to other fields of serious crime having a cross-border dimension (see recital 11 of the EPPO Regulation and the Commission's communication “A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes”, COM (2018) 641 final). For an in-depth analysis see W. M. Khün, *The European Public Prosecutor's Office: The Protection of the EU's Financial Interests as Supranational Integration Project*, *UJCL* 3, 2022 and D. V. Álvarez, *The Material Competence of the European Public Prosecutor's Office*, in *The European Public Prosecutor's Office. The Challenges Ahead*, cit., 25 ff.

⁴ See point 24 of the conclusions of the special meeting of the European Council on 17-21 July 2021 in Doc. EUCO 10/20: «The Commission is invited to present further measures to protect the EU budget and Next Generation EU against fraud and irregularities. This will include measures to ensure the collection and comparability of information on the final beneficiaries of EU funding for the purposes of control and audit to be included in the relevant basic acts. Combatting fraud requires a strong involvement of the European Court of Auditors, OLAF, Eurojust, Europol and, where relevant, EPPO, as well as of the Member States' competent authorities».

⁵ For an in-depth analysis see J. A. Espina Ramos, *The Relationship Between Eurojust and the European Public Prosecutor's Office*, in *The European Public Prosecutor's Office. The Challenges Ahead.*, cit., 87 ff.

⁶ N. Franssenn, *Every Euro Counts ... and So Does Every Second. The EPPO and Cross-Border Cooperation in Relation to Seizure and Freezing in the 22 Participating Member States*, in *Euclid*, 3/2022. The EPPO can count on a solid network (Eurojust, Europol, OLAF, EJM local authorities) from which it can obtain a wide range of information flow for its work and execute European investigation orders concerning budgetary crimes in its

According to the last annual report, EPPO granted «a total of 1117 active investigations for overall estimated damages of €14.1 billion (47% of which linked to VAT fraud) [ensuring] the freezing of €359 million»⁷. Among them, «cross-border value added tax (VAT) fraud involving damages above €10 million (...) [and] 28.2% of them had a cross-border dimension (acts either committed on the territory of several countries, or which caused damages to several countries)»⁸. In particular, «in 2022, 210 recovery actions took place in 18 of the participating Member States (Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, Slovakia, Spain). In total, the EPPO requested more than € 516 million to be seized, and the seizure of more than € 359 million was granted»⁹.

These amounts are truly impressive and, quoting from the annual report on 2022, «the EPPO's activity brought about a first positive evolution, with regard to the level of detection of fraud affecting the financial interests of the EU in some Member States»¹⁰. Even if a comparable dynamic could not be observed on the side of the institutions, bodies, offices and agencies of the European Union, there are now more investigations into EU fraud initiated in the 22 participating Member States than the historical average before the EPPO's establishment»¹¹.

In this scenario, the extraordinary importance of the acts exploited by the handling and assisting EDPs (and the European Prosecutors) in cross-border cases is already under the spotlight.

The Regulation doesn't harmonise the prerequisites for the acts to be performed by the EDPs; it only provides for an obligation on MSs to make certain instruments available «at least in cases where the offence subject to the investigation is punishable

competence.

⁷ This amount represents 7 times the budget of the EPPO for that year. EPPO *Annual Report 2022*, 4.

⁸ «[...]The single highest seizure was more than €49 million in monetary instruments. In 20 cases, a total of more than €14.9 million was recovered before trial. Extended confiscation was requested in 15 instances, in order to restrain assets towards which some protective measures had been taken by the criminals to avoid confiscation. The EPPO made extensive use of value-based confiscation to enable recovery. The EPPO also made several confiscation requests (20) with the intention to secure possible civil actions. The main assets seized were bank accounts, followed by real estate properties, vehicles, cash as well as shares, cryptocurrencies, motorboats and luxury items. Criminal merchandise such as clothing products, heavy machinery or e-bike components has been seized and removed from the market, effectively depriving the criminals of the benefit of their illicit activities». EPPO *Annual Report 2022*, 8.

⁹ EPPO *Annual Report 2022*, 64.

¹⁰ Hereinafter MSs.

¹¹ EPPO *Annual Report 2022*, 10.

by a maximum penalty of at least 4 years of imprisonment» (art. 30, par. 1, EPPO Regulation)¹². The norm presents a list of measures, available to the EDPs, similar for all national legislations: the activities are not exhaustive since the article provides for a general reference to «any other measures» that national law makes available to the prosecutors in similar cases (art. 30, par. 4, EPPO Regulation).

Among the several measures provided by the Regulation and, in light of the amounts and percentages above mentioned, the possibility for EDPs to request freezing measures seems even more essential. According to paragraph 1, lett. d), in certain urgent cases, «where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation», the EDPs take on a central role of decision-maker. For this reason, the EPPO College recently established the Asset Recovery and Money Laundering Advisory Committee to emphasise that «an effective and harmonized asset recovery approach, which is in full alignment with the EPPO's mandate and mission, is of critical importance to the EPPO»¹³.

This article analyses the role of EDPs in ordering (or requesting, depending on the national rules on functional jurisdiction) cross-border freezing measures under Regulation (EU) 2017/1939. The first practical issue concerns the controversial nature of the seizure mentioned in Article 30 among the several acts granted to EDPs. Then, the article will focus on an extensive interpretation of the grounds for non-recognition of the orders in light of Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders (FCO Regulation)¹⁴. The analysis will conclude

¹² For an in-depth overview see *ex multis* E. Traversa, *I tre principali aspetti istituzionali dell'attività della Procura europea (EPPO): legge applicabile, rimedi giurisdizionali e conflitti di competenza*, in *AP* 3/2019, 17.

¹³ See College Decision 042/2022 of 28 September 2022, “*Establishing the Asset Recovery and Money Laundering Advisory Board of the European Public Prosecutor’s Office*”.

¹⁴ Regulation (EU) 2018/1805 of the European Parliament and of the Council on the mutual recognition of freezing orders and confiscation orders PE/38/2018/REV/1. For an in-depth overview see S. Mirandola, *Borderless enforcement of freezing and confiscation orders in the EU: the first regulation on mutual recognition in criminal matters*, 2020, 20 *ERA Forum* 405; S. Oliveira e Silva, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: a headlong rush into Europe-wide harmonization?*, in *NJECL* 2022, 13; C. Grandi, *Mutuo riconoscimento in materia penale e diritti fondamentali. Il nodo delle confische*, Torino 2023; A.M. Maugeri, *Il Regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e confisca: una pietra angolare per la cooperazione e l'efficienza*, in *DPC – RivTrim.* 2019; T. Wahl, *Regulation of freezing and confiscation orders*. <https://eucrim.eu/news/regulation-freezing-and-confiscation-orders/>, 2019; O. Calavita, *Mutual Recognition of Freezing and Confiscation Orders: what Issues are at Stake?*, in *ECLR* 2022; A. M. Maugeri, *Prime osservazioni sulla nuova “proposta di Regolamento del Parlamento europeo e del Consiglio relative al riconoscimento reciproco dei provvedimenti di congelamento e di confisca”*, 2017, *DPC* 231. For a comparative analysis on the implementation of the Regulation (EU) 2018/1805 see FORCE Project, *Comparative Report on the Implementation of Regulation (EU) 2018/1805*, 2023, available at <https://forceproject.eu>. For an in-depth analysis

by considering the costs of managing seized assets between the EU and the national level.

Even if the EPPO Regulation states that «the investigations and prosecutions on behalf of the EPPO shall be governed by the EPPO Regulation» and the national criminal procedural law with the other EU mutual recognition instruments are just supplementary¹⁵, the eventual flaws between the different levels of regulations could create practical issues and could perhaps be better overcome by strengthening the coordination with other existing EU instruments on cross-border freezing.

2. As anticipated briefly before, the EPPO Regulation doesn't contain a specific provision about the cross-border freezing measure within the realm of the 22 MSs participating in the EPPO¹⁶.

On the one hand, article 30, characterized by a «hybrid outreach»¹⁷, establishes several obligations directed at the MSs on what investigatory and other measures must be available to EDPs and which restrictions are allowed, under the Union law, invoking the applicable national law for the procedures and modalities. On the other hand, article 31 contains procedural rules to be taken in a different MS than the MS whose EDP is undertaking the investigation.

Among the above mentioned acts of paragraph 1, lett. d) states that an EDP can «freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation».

The following paragraph 5 completes the provision establishing that «the European Delegated Prosecutors may only order the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective».

The literal meaning of the combined provisions suggests that the freezing measures are always admissible only if related to specific investigative or probatory ends. In

on the practical issues arising from the application of the Regulation (EU) 2018/1805 see FORCE Project, *Report on confiscation and freezing orders practical issues*, soon to be published (soon to be available at <https://forceproject.eu>).

¹⁵ Art. 5 and recital 73, Regulation (EU) 2017/1939.

¹⁶ See Z. Đurđević, *Legislative or regulatory modifications to be introduced in participant Member States to the enhanced cooperation*, International Conference on Enhanced Cooperation for the Establishment of the EPPO, 2018. Check the current participating EU MSs at <https://www.eppo.europa.eu/en/members>.

¹⁷ H. H. Herrfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 270 ff.

other words, a European Delegated Prosecutor must be able to issue or request a freezing measure just to satisfy an investigative/probatory aim. So, this innovative form of «EPPO freezing», as highlighted, «should be the sole measure to be used by EDPs if they need, for the purpose of the investigation that are carrying on, to seize an asset, which is also expected to be subject to confiscation»¹⁸.

Furthermore, the activities connected with a risk of dispersion for investigations or evidence may in reality be the most disparate; basically, it is the equivalent of prescribing that, in case of risk of dispersion, deterioration, corruption or even difficulty in finding elements useful for investigative purposes, the Regulation may justify any activity, even with a disproportionate coercive content¹⁹.

With regard to this crucial passage, the College of the European Public Prosecutor's Office, according to its function as an “interpretative guide” for the practical application of the Regulation²⁰, seems to give a definitive answer.

Indeed, as clarified with the Guidelines of the College of the EPPO on the application of article 31 of Regulation (EU) 2017/1939²¹, «although listed as such in Article 30 of the EPPO Regulation, freezing instrumentalities and proceeds of crime is not an investigation measure and is not aimed at gathering evidence». In particular, the College highlights that the freezing instrumentality «is in fact a tool to recover ill-gotten assets or their equivalent value, and has nothing to do with an “investigation measure”»²². As noted, «the word “investigation” should not be read as a limitation to the set of measures, but instead guide the interpretation of the measures»²³.

Consequently, the freezing measure would be part of the second category “other measures” from the title of article 30²⁴. This is coherent with the recital 107, which expressly provides that EPPO may always adopt «precautionary measures, in particular to prevent any continuous wrongdoing or to protect the Union from reputational

¹⁸ See L. Scomparin, O. Calavita, *Regulation 2018/1805/EU: a step forward with some criticalities*, in *EP forthcoming*.

¹⁹ See G. Barrocu, *La procura europea. Dalla legislazione sovranazionale al coordinamento interno*, cit., 111.

²⁰ Recital n. 24, Regulation 2017/1939/EU.

²¹ As clarified by the same College, the aim of the Guidelines is to ensure an internal uniform practice within the European Public Prosecutor's Office in the framework of Article 31 of the EPPO Regulation, which created a new mechanism for the EPPO cross-border investigations. *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939*, 8.

²² See *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939*, 8.

²³ H. H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 274.

²⁴ See *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939*, 8.

damage». According to the Guidelines²⁵, the recital seems to refer properly to orders for freezing proceeds of crime.

According to article 31, par. 1, where a measure needs to be undertaken in a Member State other than the Member State 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 Member State where the measure needs to be carried out. The assisting EDP should request the competent authority of his/her Member State to issue the order. On the one hand, a judicial authorisation is required under the law of the Member State of the assisting EDP: «the assisting EDP shall obtain the authorisation in accordance with the law of his/her Member State and, if authorisation is refused, the handling EDP has to withdraw the assignment»²⁶.

On the other hand, «where, in accordance with Article 31 paragraph 3, third subparagraph, the law of the Member State of the assisting EDP does not require a judicial authorisation, but the law of the handling EDP requires it, the handling EDP has to obtain the authorisation from the competent court of his/her Member State»²⁷.

Furthermore, 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 EDP may have recourse to such instruments (art. 31, par. 6).

Despite art. 32 of the EPPO Regulation stating «the assigned measures shall be carried out in accordance with this Regulation [EPPO] and the law of the Member State of the assisting European Delegated Prosecutor», would it not be convenient to provide for a direct coordination with the EU instrument regulating to this specific area of interest?²⁸ In line with article 7 of the FCO Regulation and starting from a comprehensive interpretation of the combined provisions 30 and 31 par. 6 of the EPPO Regulation, wouldn't it be more efficient for EDPs to be competent to directly order a

²⁵ GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939, 8.

²⁶ GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939, 3.

²⁷ GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939, 4.

²⁸ «The practical application of Article 31 cannot be more cumbersome, bureaucratic and more time consuming than the application of the Union acts giving effect to the principle of mutual recognition, such as the Directive 2014/41 regarding the European Investigation Order ("EIO Directive") or the Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders ("Regulation 2018/1805")». GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939, 3.

freezing measure? Of course, with respect to all requirements established in the FCO Regulation, especially for the MSs who have not decided to join the EPPO Regulation and present special issues with EU fraud and lack of efficient prosecution. It's still unclear to what extent the EU law on freezing orders (FCO Regulation) will subsequently come into play (if it will come into play) and how the two regulatory texts can talk to each other in practice²⁹. Focusing for a while on just the FCO Regulation, the EDP is a judicial authority who can be designated (and MSs have already been designated) according to the definition of Article 2, 8) and, as such, may directly issue the freezing of an asset³⁰.

A coherent approach also seems to guide the proposed amendment of the Directive on asset recovery and confiscation³¹. As is well known, the aim of the proposal is to update the existing legal framework and to facilitate and ensure effective asset recovery and confiscation efforts across the Union³². The proposed Directive intervenes in different ways, *inter alia* specifying the existing rules for several asset recovery stages, promoting the adoption for a comprehensive national strategy on asset recovery, accompanied by provisions on the cooperation of the Asset Recovery Offices (AROs)³³ with the European Public Prosecutor's Office (EPPO), Eurojust and Europol. In particular, according to artt. 28, 29 of the proposed Directive, the EPPO - together with AROs, Europol and Eurojust - plays a crucial role for better cross-border cooperation between all institutions involved in asset recovery to ensure that all types of freezing orders and confiscation orders are enforced to the maximum extent possible throughout the Union³⁴.

²⁹ On this aspect see N. Franssenn, *Every Euro Counts ...*, cit., 3/2022.

³⁰ See the notification of the MSs appointed EPPO as issuing authority on the website of the Judicial Library of the European Judicial Network (<https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/4/-1/o>).

³¹ Commission, 'Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation' COM (2022) 245 final.

³² For an in-depth analysis see A. Sakellarakis, *EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?* In *NJECL* 2022, 13/4, 478–501.

³³ The Asset Recovery Offices (AROs) are national central contact points with the powers and information needed to trace and identify assets, and facilitate cross-border cooperation (see Council Decision 2007/845/JHA and Framework Decision 2006/960/JHA).

³⁴ A. Sakellarakis, *EU Asset Recovery and Confiscation Regime – Quo Vadis? A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?* 501.

3. A further issue that might interfere with the eventual and most efficient coordination between the EPPO and FCO Regulation concerns the grounds for non-recognition and non-execution of freezing measures.

Art. 31 par. 5 of the EPPO Regulation provides a very limited and specific number of situations in which the assisting EDPs could refuse to execute the freezing informing his/her Supervising European Prosecutor and consulting with the handling EDP in order to solve the issue. The reason would be that the EPPO system relies on an internal dialogue between the handling and assisting EDPs. This internal cooperation system is one of the main elements for ensuring the protection of fundamental rights in the EPPO system.

The grounds for non-recognition, listed in paragraph 5 of the EPPO Regulation, are considerably fewer than in the FCO Regulation. They essentially concern situations where the allocation by the handling EDP is incomplete or contains a manifest and material error; the measure cannot be adopted within a specified time limit for justified reasons; a less intrusive measure would achieve the same results in the same way; finally, the allocated measure does not exist or would not be applicable in a similar domestic case under the law of its Member State.

On the other hand, art. 8 par. 1 of the FCO Regulation provides a much more detailed catalogue and considers additional situations that may occur with a certain frequency in practice. For example, point (a) covers the case in which the execution of the freezing order is contrary to *ne bis in idem*. In such cases, how should the assisting EDP proceed? Since there is a risk of a violation of a fundamental principle, could this hypothesis be brought under article 32 or 42 of the EPPO Regulation?

Considering both Regulations in comparison, while subparagraph (a) of the EPPO Regulation could reasonably be made to coincide with subparagraph (c) and article 32 or 42 could be a genus of the more specific subparagraph (f) of the FCO Regulation³⁵, the cases of subparagraphs (b), (d) and (e) of the FCO Regulation would remain outside the scope of the EPPO Regulation.

In these last hypotheses, which of the two EU Regulations should actually operate and with regard to which phases of the proceedings? Considering a transnational investigation case handled by an EDP, could the grounds for non-recognition listed in the FCO Regulation be invoked by the defendant? Or should every issue arising with

³⁵ This is also a general principle of the EU law, always applicable and valid. See *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939*, 6.

regard to the execution of the measure be solved in light of only the national rules?³⁶ The lack of coordination could potentially create a practical tension and it might not be so easy to avoid the grounds for refusal under the FCO Regulation being invoked before the Court, in particular by lawyers representing the persons concerned. As noted, «given the fact that the mechanism for cross-border cooperation in the EPPO Regulation seeks to further develop the EU instruments on mutual cooperation, it would be beneficial to the efficiency of the mechanism if only the situations mentioned in Art. 31(5) pose an obstacle in practice»³⁷.

While the interpretation of the grounds for non-recognition/non-execution provided by the EPPO Regulation would deserve a clarification in light of FCO Regulation, the time limits to proceed in case of non-recognition or non-execution, provided by the two legal texts, do not seem to raise any particular practical issues. Indeed the two articles use different expressions but are quite aligned. Apart from paragraph 7 of art. 31 of the EPPO Regulation which states that if the EDP cannot solve the issue within 7 working days, the matter shall be referred to the competent Permanent Chamber, paragraph 8 recommends the Permanent Chamber to take a decision «without undue delay, in accordance with applicable national law». Similarly, article 9, par. 1 of the FCO Regulation states that the executing authority shall take a decision on recognition and execution «without delay and with the same speed and priority as for a similar domestic case».

3.1. A related exegetical issue concerns the judicial control and review of freezing measures assigned in cross-border cases according to article 31 EPPO Regulation³⁸.

While article 33 of the FCO Regulation provides that an appeal of a seizure may be brought before a Court of the executing State according with the law of that State³⁹, the EPPO Regulation does not contain any specific provisions on the legal remedies

³⁶ Actually the original approach of the EPPO Regulation moved by the assumption that «any problem arising with regard to the execution of the required (assigned) measure, shall be dealt with by both EDPs involved in order to try to find a solution by way of bilateral communication and together with the European Supervisory Prosecutor». L. Bachmaier Winter, *Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance*, cit., 123.

³⁷ N. Franssenn, *Every Euro Counts ...cit.*, 3/2022.

³⁸ A. Cabiale, *I limiti alla prova nella procedura penale europea*, 288.

³⁹ See S. Oliveira e Silva, *Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: a headlong rush into Europe-wide harmonization?*, in *New Journal of European Criminal Law*, 2022, 13, 12 ff.

with regard to the application of article 31⁴⁰. However, the right to an effective remedy is a fundamental right, which is enshrined in Article 47 of the EU Charter of Fundamental Rights. When a freezing of assets is requested by a handling EDP to an assisting EDP, in case of a non-recognition and non-execution hypothesis or some procedural issues, it is not easy to understand how legal remedies should work in practice. For this reason, this is a matter subject to pure legal interpretation in accordance with the basic principles of EU law⁴¹.

Article 42 par. 1 of the EPPO Regulation establishes that the Courts of the MSs are competent to review procedural acts which «are intended to produce legal effects vis-à-vis third parties». Recital 88 continues specifying further that «effective remedies should be ensured in accordance with the second subparagraph of Article 19(1) TEU [...]. When national courts review the legality of such acts, they may do so on the basis of Union law, including this Regulation, and also on the basis of national law, which applies to the extent that a matter is not dealt with by this Regulation». So, as noted, «the suspect, or another person negatively affected by the investigative measure, may be able to challenge the decision taken by the handling EDP to adopt the measure» and «the competent courts to challenge the decision taken by the handling EDP could be the courts of that Member State»⁴². However, if a judicial authorization has been obtained by the Court of the assisting EDP⁴³, the latter should also be subject to a subsequent judicial review in accordance with the law of this MS. Therefore «when it comes to a possible subsequent judicial review of the measure that has been taken, such judicial review may – in accordance with applicable national law – take place in the Courts of either or both Member States»⁴⁴.

The last possibility of article 42 is to award the competence to the national Courts for the judicial review of the legality of the acts carried out by the EPPO, in accordance with national law⁴⁵. However, the norm does not address all the issues of judicial review of the EPPO that may arise in the context of investigations conducted by the EPPO since the provision applies only to the control of the EPPO procedural acts.

⁴⁰ GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017/1939, 4.

⁴¹ H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 299.

⁴² H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 299.

⁴³ According to the article 31 EPPO Regulation.

⁴⁴ H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 299.

⁴⁵ H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 402.

This topic has been the main subject of the first case concerning the interpretation of the EPPO Regulation before the EU Court of Justice (CJEU)⁴⁶. More in detail, the investigations were conducted by the EDP in Germany (handling EDP) who sought assistance from colleagues in Austria (assisting EDP). The Austrian Court had to decide on appeals by natural and legal persons who were subject to search and seizure in Austria.

The interpretative issue is whether the Courts in the Member State of the assisting EDP are authorised to conduct a full review of the decision as they would do in a purely domestic situation or, when it comes to cross-border EPPO investigations, whether their review should be limited only to procedural issues concerning the exercise of such investigation measures.

According to the Austrian and German government, «it is, thus, for the Court of the assisting EDP's Member State to assess whether the necessary level of suspicion that a crime has been committed has been met; whether the investigative measure sought would yield the evidence necessary for prosecution; and whether the same evidence could not be acquired through a less intrusive measure»⁴⁷. This would mean that cross-border investigations under the established EPPO Regulation might be less efficient than approving a measure in accordance with the EU's instruments on mutual recognition⁴⁸.

On the contrary, the EPPO, the Commission, and the French, Romanian and Netherlands Governments stated that if the law of the assisting EDP's Member State requires a judicial authorisation of an investigative measure, such an authorisation may entail only a review of the formal and procedural aspects relating to the execution of the measure⁴⁹.

Waiting for a definitive response from the CGEU, on 22nd June 2023, the Advocate General drew his conclusions starting from the assumption that «the EPPO system was intended to be an efficient mechanism in the fight against crimes damaging the EU's

⁴⁶ C-281/22, *GK and Others*, lodged at 25 April 2022.

⁴⁷ C-281/22, *GK and Others*, *Opinion of the Advocate General*, par. 35.

⁴⁸ For example, «to be able to decide whether the requested measure is justified, the court of the Member State of the assisting EDP would need to have access to the entire case file. As the main investigation is conducted in a different Member State and with a view to commencing a trial in the court of that State if sufficient evidence is obtained, the case file might be in a different language. Its translation, which might be necessary to enable the court of the assisting EDP to decide on the substantive issues relating to the legality of the investigation measure, will, if nothing else, take time». C-281/22, *GK and Others*, cit., par. 55.

⁴⁹ C-281/22, *GK and Others*, cit., par. 38.

financial interests»⁵⁰. For this reason, the EPPO Regulation should be understood as allowing the Court of the Member State of the assisting EDP to review only the aspects related to the procedural execution of the measure⁵¹. This interpretation also recalls what was recently clarified by the College which stated that the «legal remedies must be granted in respect of the substantive reasons of the measure in the Member State of the handling EDP». In other words, in the MS of the assisting EDP, the legal remedies should not lead to an assessment of the merits of the case or on the EPPO's competence: the judicial authorisation and its substantive reasons can always be subject to legal remedies in the Member State of the handling EDP⁵². The judicial review in the assisting MS should concern only procedural aspects or exceptional grounds such as the violation of fundamental rights, in case the authorisation is issued for a measure that does not exist or would not be available in a similar domestic case under the law of his/her Member State or (ex post) errors in the execution of the measure⁵³.

4. It's necessary to keep in mind that in certain cases the costs of managing and maintaining frozen properties over a longer period of time can become very high⁵⁴.

No European text specifies the competent authorities for the decisions relating to the management of frozen properties⁵⁵. The FCO Regulation simply provides that decisions relating to the management of frozen property «shall be governed by the law of the executing State» (art. 28, par. 1). The main scope of this provision is to avoid or minimize the risk of economic devaluation of frozen assets (Directive 2014/42/EU, recital 32; Regulation (EU) 2018/1805, art. 28, par. 2).

According to article 31 of the FCO Regulation «each Member State shall bear its own costs resulting from the application of this Regulation». The provision continues stating that costs may be shared among MSs if they are particularly high or exceptional.

⁵⁰ C-281/22, *GK and Others*, cit., par. 63.

⁵¹ Assuming that «the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the Member State of the handling European Delegated Prosecutor». C-281/22, *GK and Others*, cit., par. 73.

⁵² *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017/1939*, 7.

⁵³ *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017/1939*, 6 ff.

⁵⁴ T. Slingeneyer, *Management of frozen assets*, in *Improving confiscation procedures in the European Union*, A. Bernardi (ed.), 2019, 556 ff.

⁵⁵ T. Slingeneyer, *Management of frozen assets*, in *Improving confiscation procedures in the European Union*, 558 ff.

In a cross-border case involving EDPs, who bears the management costs of frozen properties?

During the negotiations of the EPPO Regulation, MSs were divided whether, according to article 28, the EPPO should also cover the costs of “acts incurred by national authorities when acting on behalf of the EPPO”. The provision of paragraph 5, article 91 establishes a difference between “expenditure incurred by the European Delegated Prosecutors” and “costs related to investigation measures carried out by competent national authorities”. As noted, «expenditures incurred by the EDPs are considered operational expenditure of the EPPO whenever they act in the framework of the EPPO»⁵⁶. Recital 113 further specifies the concept of “operational expenditure” stating that «these should include the cost of operational communication between the European Delegated Prosecutor and the central level of the EPPO, such as mail delivery costs, travel expenses, translations necessary for the internal functioning of the EPPO, and other costs not previously incurred by Member States during an investigation which are caused only due to the EPPO having assumed responsibilities for investigation and prosecution». As noted, «the recital here thus confirms the principle that the EPPO should be responsible only for “new” types of costs or additional costs – but not for those costs of the investigation measures which the Member States would have to cover even if the EPPO had not been established»⁵⁷.

The last category of recital 113 also includes the “costs related to investigation measures carried out by competent national authorities” which shall not be considered operational costs of the EPPO⁵⁸.

The College of the European Public Prosecutor's Office, with the Guidelines of 26 January 2022, states that those expenditures directly linked to the application of the assignment mechanism should be borne by the EPPO because they are caused only by the EPPO having assumed responsibilities for investigation and prosecution⁵⁹.

However, at the same time, paragraph 30 of the Guidelines states that «in accordance with Article 91 (5) of the EPPO Regulation and without prejudice to Article 91 (6), the Member States shall remain responsible for the costs they would have

⁵⁶ H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 556.

⁵⁷ H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 556.

⁵⁸ H.-H. Herrnfeld, D. Brodowski, C. Burchard, *European Public Prosecutor's Office*, cit., 556.

⁵⁹ *GUIDELINES OF THE COLLEGE OF THE EPPO ON THE APPLICATION OF ARTICLE 31 OF REGULATION (EU) 2017 /1939*, 9.

anyway incurred if the measure would have been executed under the mutual recognition or mutual legal assistance regime, such as costs incurred by any national authority during the execution of a measure on the territory of that Member State».

This approach would in principle be more coherent with recital 112 of the EPPO Regulation stating that the costs of measures undertaken by the EPPO should in principle be covered by the national authorities carrying them out⁶⁰. Just exceptionally high costs for some measures such as complex experts' opinions, extensive police operations or surveillance activities over a long period of time could partly be reimbursed by the EPPO, including, where possible, by reallocating resources from other budget lines of the EPPO, or by amending the budget in accordance with this Regulation and the applicable financial rules. However, it may therefore be more than necessary to further clarify how to reconcile paragraphs 28 and 30 of the Guidelines in practice.

5. The protection of EU financial interests has become fundamental. These interests are vulnerable to cross-border crimes, particularly regarding subsidy and VAT fraud, but also money laundering and corruption.

The European Prosecutor's Office was created not only to bring perpetrators of fraud in the EU to justice but also, just as importantly, to help recover the criminal profits thus acquired. Providing efficient instruments and guaranteeing the right coordination between the competent judicial authorities are key to achieving the Union's objectives and facilitating cross-border judicial cooperation, which would otherwise remain a simple rhetorical wish. Especially in cross-border investigations, an efficient coordination between the EDPs themselves and, between them and the national competent authorities, may be a key element for the effectiveness of the mutual recognition instruments⁶¹.

The terms of the Regulation itself and the College's Guidelines, however, still leave some weaknesses to the EPPO's activity, which can be overcome by taking into account the other existing EU cooperation instruments on seizure and confiscation and management of frozen assets and reducing the current fragmentation of the rules.

⁶⁰ N. Franssenn, *Every Euro Counts ...*, cit., 3/2022.

⁶¹ H. Satzger, *The European Public Prosecutor's Office and Its Coordination with the National Public Prosecutor's Office: The Model of Complementarity*, in *The European Public Prosecutor's Office. The Challenges Ahead*, cit., 2018, 43 ff, S. Allegrezza, A. Mosna, *Cross-Border Criminal Evidence and the Future European Public Prosecutor. One step back on Mutual Recognition?*, in *The European Public Prosecutor's Office. The Challenges Ahead*, cit., 154, L. Camaldo, *La nuova fisionomia della procura europea*, 814-816.

Perhaps, some of the above depicted issues will remain merely “theoretical”, without any particular practical consequences due to the fact that in any case the application of the EPPO Regulation must prevail.

In any case, despite some highlighted theoretical difficulties, the data on the amount of assets seized by the EPPO, also supporting the national authorities, gives a reason for optimism.

A proactive transnational approach should be adopted firstly considering the existent EU mutual recognition instruments⁶². This model could avoid the potential practical weaknesses in cross-border investigations, counteract systemic gaps in the criminal procedural law of the Member States, and lead to criminal prosecution in accordance with the rule of law.

⁶² L. Bachmaier Winter, *Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance*, cit., 136.