

Explanatory note – investigative measures

The regime of the investigative measures in the EPPO regulation had to answer a preliminary question: which level of detail is necessary at European level in the matter.

Indeed, each EPPO State has its own criminal procedural system and there is almost no degree of harmonisation of the investigative measures.

Some of them are obviously common to many systems, but their execution can vary from State to State.

Therefore, the EPPO regulation had three choices on how to govern the matter: 1) to provide for a complete set of European investigative measures available for the EPPO, labeled by name and governed in a detailed way as for the execution, with no space for national laws; 2) to leave everything to the national laws, so that each measure will be adopted and executed according to the provisions of each national system; 3) to provide for a light degree of harmonisation, for instance by labelling the measures available to the EPPO, but leaving the specific discipline to the national laws.

The regulation had adopted the third solution. The first solution would have been very ambitious. Technically, it was not impossible, as it could have been based on specific studies on the matter (it is worth recalling the study of the University of Luxembourg on the “model rules for the EPPO” in 2010-2012), but politically it was complicated as it would have meant a deep innovation in the criminal procedural law of the States.

The second solution would leave a too fragmented scenario, with no added value from the EPPO establishment.

The third scenario is a sort of mediation between the first two options.

The solution adopted in the regulation is made clear in recital no. 70, where it states that “it is essential for the effective investigation and prosecution of offences affecting the Union’s financial interests that the EPPO be able to gather evidence by using at least a minimum set of investigation measures, while respecting the principle of proportionality”.

As for the general requirement, the measures provided in the regulation should be available with regard to the offences that are within the mandate of the EPPO, at least where they are punishable by a maximum penalty of at least 4 years of imprisonment, for the purpose of its investigations and prosecutions, but may be subject to limitations in accordance with national law.

In any case, the relationship between EPPO regulation and national law allows the EPPO to adopt any measure which is available for similar cases in the national system, even though it is not specifically mentioned in the regulation.

The measures are generally adopted during the investigations by the EDP handling the case, either personally or by instructing the national judicial police. No need for preventive authorisation by the EP or the Permanent Chamber is provided, although in practice it may be difficult to figure out that the EP supervising the case will be unaware of the initiatives adopted by the EDP.

On the contrary, the EP is entitled to carry out the investigation and to adopt investigative measures only in the exceptional case provided for in article 28 para 4 of the regulation.

The regulation provides for a list of six categories of measures available to the EPPO:

- a) Search
- b) Obtaining the production of any relevant object or document
- c) Obtaining the production of stored computer data
- d) Freezing instrumentalities or proceeds of crime
- e) Interception of electronic communications
- f) Tracking and tracing objects by technical means

Regarding the search, the regulation just specifies that it can concern premises, lands, means of transport, private homes, clothes and any other personal property or computer system. Its execution also includes any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence. However, the discipline of the measure for the rest is left to the national law of the EPPO State where it is carried out.

The production of relevant objects includes the documents in its original form or in any other specified form. Also for this measure, the role of national law to complete the discipline is essential.

As for the production of stored computer data, the Regulation specifies that they can be encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council. This is the directive dated 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

Freezing instrumentalities or proceeds of crime, includes assets, that are expected to be subject to confiscation by the trial court, 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 interception of electronic communications involves those to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using. In this very sensitive matter, the role of national law is essential, as the regulation does not provide for any other indication on it. For instance in some countries, such as Italy, a very interesting debate is currently ongoing on the possible use of a new tool of interception, generally called “Trojan horse”. It consists in making the mobile phone of the intercepted person a sort of permanent microphone, and this allows hearing any conversation of the person, not only those on the phone, but also those in presence. Further to some decisions of the Supreme Court, the matter has been recently governed by the national law.

The regulation specifies that track and trace an object has to be carried out by technical means, including controlled deliveries of goods.

On the relationship between EPPO regulation and national law on the topic, the regulation provides that when national law sets more restrictive requirements for the adoption of some measures, in particular production of stored computer data, interception of communications and track and tracing objects, they are applicable also in the EPPO investigations.

In particular, Member States may limit the application of the interception of communications and track and tracing objects to specific serious offences.

As for the definition of “serious offences” a reference can be made to article 7 of the PIF directive that provides for a specific severe punishment for the offenses that involve a “considerable” damage, namely a damage involving more than 100 000 euros.

However, such further conditions for adopting the measures may be notified by the Member States to the EPPO in accordance with Article 117.

As for the general requirements, in addition to the punishment level, the European Delegated Prosecutors may only order the measures under the regulation and the national law where there are:

a) reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation,

b) there is no less intrusive measure available which could achieve the same objective.

The concept of “reasonable” grounds is to be interpreted as something less than “serious” grounds, but something more than “grounds”.

The case study

The case study involves a case in the direct expenditures sector, in particular in scientific research.

The EDP has to verify whether there are reasonable suspicions of the offence: in this case the elements suggest there are certainly reasonable suspicions of fraud.

We figure out that the EDP in charge of the case needs to undertake some measures for the investigation’s benefit, such as:

interview the representatives of the universities involved in the project, as they seem unaware of the fraudulent scheme,

intercept the phone conversations of the representative of the company A, as they are deemed to be useful to reveal the full scheme of the fraud

obtain the company A bank record

check the company A computer, as there is likely to be evidence of the offence in them

search the premises of the company A.

We assume that the national system does not provide for the searching of a computer; in this case the EDP can use the provisions of the regulation to this regard.

Interviews are not mentioned in the regulation, but they are available under the law of the State where the EDP conducts the investigation.

We figure out that interceptions are available under the national law; the national law also provides for the possibility of using the so-called “Trojan horse”.

The quiz

Question 1:

right answer is a). This is the provision of the regulation under an ordinary scenario. Certainly the EP supervises the investigation and the EDP is likely obliged to inform him, under the internal rules of procedure, of any significant development, but technically the EDP is the responsible for the initiatives in the investigation. Therefore answer C) where it states “only on instructions of the EP” is not fully correct.

Question 2:

right answer is c): the regime of the investigative measure is a mix of the provisions of the regulation and those of the national law

Question 3:

right answer is a), as this is the specific provision of the regulation

Question 4:

right answer is b); the other two options contain requirements not provided for by the regulation

Question 5:

right answer is a). The application of the measure is subject in any case to the general requirement of the regulation (punishment by at least 4 years imprisonment); if the national law would theoretically allow the use of the Trojan horse also for offences that are punished by a lower sanction, for the EPPO offences the limit set in the regulation would remain.