

Explanatory note - The cross-border investigations

The slides

The relevant provisions are:

Art. 5 para. 3 – application of national law

Art. 28 conducting the investigation

Art. 31 – cross-border investigations

Art. 32 – enforcement of assigned measures

Art. 33 – pre-trial arrest and cross-border surrender

- Recitals 72 – 76
- Single Office Concept: Territoriality of MS

The idea of the regulation in the cross-border investigations is to shape them on the concept that the EPPO is a single office. However, the territorial area in which the single office carries out the investigation is not entirely a single legal area, because we know that, in addition to the Regulation, in each country the national law continues to apply. A high degree of fragmentation, therefore, is still existing.

In the cross-border investigation this issue is crucial.

On one side, the regulation would like to overcome the ordinary mutual legal assistance instruments for the EPPO cross-border investigations, as they are based on a different background that does not foresee any single European Office, but the authorities of different sovereign States; on the other side, at the same time it does not provide for common procedural rules applicable in all of the EPPO area.

So, the regulation tries to find an innovative solution between two extremes: the current situation in cross-border investigations and the situation of common procedural rules all over the EPPO area, implemented by a single European Office.

Even the terminology is important.

Just to mark the distance with the current situation, in the EPPO investigations there is no prosecutor requesting assistance from a prosecutor of another State, but cross-border cases are handled by two or more prosecutors belonging to the same office, only located in different Member States.

Therefore, the regulation does not use terminology such as “requesting” prosecutor or “requested” prosecutor, which is typical of the current MLA tools, but makes reference to the European Delegated Prosecutor (EDP) “handling” the case and to the EDP “assisting” the first one in carrying out the measure. Unlike the current scenario, in the EPPO cases the two prosecutors are colleagues from the same office.

The principle of the regulation is that when the handling prosecutor needs to undertake an investigative measure in the territory of an EPPO State other than that where the case is open, he will assign the implementation of the measure to the colleague EDP located in the EPPO State where the measure has to be executed.

In practical terms, this will happen by associating the other EDP to the electronic file of the investigation, by giving him access to the relevant documents.

An issue is, however, which is the applicable law to the cross-border measure, considering that the regulation does not provide for any common rules applicable all over the EPPO area.

In this regard, the applicable law is the result of a mixture between the EPPO regulation and the national laws of the interested EPPO States.

The EPPO regulation, as mentioned already, does not provide for any common procedural rule, instead it only mentions six investigative measures available to the EPPO, with the possibility to integrate them with other similar measures available under national law.

The problem that might occur is that the procedural rules for the same measure can vary from State to State.

Just as an example, a search in Italy can be ordered by the prosecutor with no need for judicial authorisation, while in other EPPO States the same measure can only be requested by the prosecutor, but ordered by a judge.

Therefore, if an Italian prosecutor needs to carry out a search in France, for example, can he do it only on the basis of the prosecutor's order? In that way, there is the risk that under French law the measure is regarded as illegal. On the other side, the Italian prosecutor cannot request the authorisation from an Italian judge, as it is not foreseen by Italian law.

The solution of the regulation is in the middle. The Italian prosecutor will order the search under Italian law, and will send the order to the other EDP for the execution, but if the law of the State of the assisting EDP requires the judicial authorisation, the latter will request it from the national judge.

In other words, the highest standard of protection of the defensive rights must be ensured when the relevant national laws are not fully consistent.

Also the execution of the measure shall be carried out under the law of the EPPO State where the measure is executed. However, if the EDP handling the case requires the use of modalities of his own national law that are not in coherence with the fundamental principles of the EPPO State where the measure is executed, the EDP in the State of execution will do his best to apply such modalities.

Just as an example, if under Spanish law, 3 witnesses have the right to assist a search, and the measure has to be executed in Italy where there is no similar provision in national law, the EDP located in Spain may request the EDP located in Italy to apply such modality. Although it is not provided in Italian law, still it is certainly not in coherent with the fundamental principle of the State, and therefore the Italian EDP will take care of adding such practicality in the execution of the measure in Italy.

This issue might have an impact on the admissibility of evidence in trial, as one measure could have been executed under rules and practical modalities other than those of the EPPO State where the trial takes place.

For this reason, article 37 of the regulation states that “evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State”.

Another relevant point is that the informal relationship among the EPPO prosecutors facilitates dialogue in case of problems. If the request to execute the measure is not fully clear, or fully consistent with the law of the State where the measure has to be executed, the two prosecutors may talk to each other, always in connection with the respective European prosecutors in the central office, and try to find a solution.

In conclusion, in the EPPO cross-border cases, no tool of judicial cooperation is needed, no mutual legal assistance request and not even the European Investigation Order.

Only the European Arrest Warrant remains applicable for surrendering the suspects, according to article 33

The case study

The proposed case study intends to approach some of the abovementioned issues.

In the example, to get the bank records in Cyprus, the Italian EDP shall request the judicial authorisation in Italy and shall forward it to the EDP in Cyprus, even though in that State the authorisation is not necessary.

In the execution, the EDP in Cyprus can follow Cypriot law and request some witnesses to be present, as this does not conflict with the fundamental principle of the Italian State.

As for the search in Bulgaria, the Italian EDP will send the search order to the EDP in Bulgaria, as in Italy no judicial authorisation is necessary. The EDP in Bulgaria will make sure to get the judicial authorisation from a Bulgarian judge, under Bulgarian law.

As for the interview of a witness in France, in principle the presence of a defence lawyer at the interview, according to French law, is not in contrast with the fundamental principle of Italian law, and the EDP in Italy may agree on that, unless he alleges that the presence of a third person (the defence lawyer) undermines the development of the investigation, as he would become aware of the witness' statement.

The request to make a copy of the computer hard disk during the search can be carried out in the other EPPO States, even though it is not labeled as “search of a computer system”, as it is not specifically regulated under Italian law, but the requested measure is equivalent.

The quiz

Question 1:

right answer is B). The EPPO does not use EIO or other MLA tools. Answer c) is incorrect as, in a normal situation, the handling EDP requests the assisting EDP to take evidence in the latter's State.

Question 2:

right answer is a). The evidence must be taken in the way that ensures the highest degree of admissibility in the trial in the State of the handling EDP and that ensures the highest degree of protection of the fundamental rights. If the conversations between the suspect and his defence lawyer are not admissible in the State of the handling prosecutor, they cannot be executed even though the law of the State of execution allows them.

Question 3:

right answer is c). The measure of article 30 para 1 lit c) is "track and trace of an object", not of a person. Obviously there is no case-law yet on the situations of the EPPO investigations, but literally it should not involve persons. Therefore, the only thing that the handling EDP can do is using the similar measure available under his national law and make sure with the EDP of the other EPPO State that it can be executed. Certainly he cannot send freely his judicial police in another EPPO State to undertake investigative measures, because, although the EPPO is a single office, still it is not fully a single legal area.

Question 4:

right answer is b). The handling EDP cannot request the authorisation in his State under his national law, as it does not provide it. Equally the regulation does not say that the national law of the handling EDP shall prevail in any case on the law of the State of the assisting EDP.