



CROSS-BORDER GATHERING OF EVIDENCE UNDER THE EPPO REGULATION

*Jacob Öberg, Professor of European Union Law, University of Southernn
Denmark*

AIM OF PRESENTATION

- The paper intends to briefly illustrate how evidence is and should be **gathered and handled** under the EPPO Regulation

STRUCTURE OF PRESENTATION

- I. The investigation** by the European Public Prosecutor
- II. Investigative measures** under Article 30 of the EPPO Regulation
- III. Admissibility of evidence** under the EPPO Regulation

GATHERING OF EVIDENCE UNDER ARTICLE 30 OF THE EPPO REGULATION

The EPPO has significant powers to gather evidence pursuant to the Regulation including,

- I. Searching** any premises,
- II. Obtaining production** of any relevant object or document and stored computer data
- III. Freezing** instrumentalities or proceeds of crimes,
- IV. Intercepting** electronic communications
- V. Tracking and tracing** an object by technical means

PROBLEMS WITH GATHERING OF EVIDENCE UNDER THE EPPO REGULATION I

- I. Although the EPPO may order or require investigative measures to be taken throughout the EU, the possibility to enforce investigative measures depends,, on the conditions laid down by the **national laws** of the Member States
- II. It is unclear to what extent national courts generally holds **investigative measures admissible** if they are carried out on the basis of an EPPO order but are **not prescribed by their national law-** input from practice
- III. Whilst Member States should apply and interpret national law in accordance with the EPPO Regulation, the latter does not set any **common standards for national rules of criminal procedure**, however, which means that Member States are **free** in this respect

PROBLEMS WITH CROSS-BORDER GATHERING OF EVIDENCE II

- I. If investigative measures need to be taken in the territories of different Member States, the admissibility of the measures and their form of execution is determined by the law of the **Member State upon whose territory the investigative measure is taken**
- II. Not only prosecutorial activities, but also other activities, e.g., the indictment and conducting the criminal trial, will remain at the **national levels of the Member States**

CROSS-BORDER COOPERATION BETWEEN EUROPEAN DELEGATED PROSECUTORS

- I. As regards cross-border cooperation, the EPPO introduces a novel approach in Art 31 deviating from standard MLA instruments- The EDPs will operate on the basis of a regime for cross-border cooperation which foresees an **obligation for the EDPs to execute investigation measures** assigned to them
- II. The **judicial authorisation and adoption** of an investigation measure assigned by the handling EDP to the assisting EDP, shall be governed by the **national law** of the Member State of the **handling EDP**
- III. Still, however, reliance on **national law** in terms of authorisation for distinctive investigation measures

ADMISSIBILITY OF EVIDENCE AND RIGHTS OF DEFENCE

- I. Evidence shall **not be denied admission in the trial** ‘ on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State’, Art 37 of EPPO Regulation
- II. The trial court has power to assess the **weight of evidence** presented by the prosecution and the defendant pursuant to Art 37

REFLECTIONS

- All this leads to a situation in which the rules on the collection, use, and admissibility of evidence are left to the laws of **national criminal procedure only**- The negotiations on the EPPO Regulation unequivocally demonstrated how reluctant MS are in agreeing to rules for the **gathering and admissibility of evidence in EPPO investigation**
- The consequence is that the prosecution of offenders stays very much within the ambit of the Member States- Although this answers to the fears articulated by Member States regarding competence creep, it will also lead to **incoherence**, since there are clear discrepancies between the various judicial systems of the Member States.
- This incoherence is problematic for the **effective protection of citizens and their legal certainty** –solution is to expand the oversight of the ECJ or harmonising to a certain degree the role of national courts in protecting citizens