Between national procedural law and Union oversight: Article 42 of the EPPO Regulation and the emerging jurisprudence of national and EU courts

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1 Introduction

After more than 20 years of sustained advocacy for and support by the European Commission for the criminal law protection of the European Union's (EU) financial interests,[1] the European Public Prosecutor's Office (EPPO) began operations on 1 June 2021.[2] The EPPO brings a seminal change to EU criminal justice: instead of working through cooperation across national judicial authorities, the EPPO exercises genuine European powers of investigation and prosecution in the Area of Freedom, Security and Justice (AFSJ) to fight offences affecting the financial interests of the EU.

The lengthy and difficult negotiations leading to the EPPO's establishment resulted, however, in the EPPO being a hybrid instead of a truly supranational agency, as reflected in the complex legal regime that governs the EPPO's investigations and prosecutions. First, the EPPO is in charge only of investigation and prosecution; adjudication is left to national courts.[3] The European prosecution system is therefore not completed by a European criminal court.[4] Second, in the EPPO's structure the central

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1 M Delmas-Marty and J Vervaele (eds), *The Implementation of the Corpus Juris in the Member States, Vol. 1* (Intersentia 2000).

2 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation). The EPPO started its operations with 22 EU Member States participating in the enhanced cooperation. This increased to 24 Member States with the participation of Poland and Sweden. Denmark and Ireland have an opt-out from the AFSJ.

3 Art 86(2) of the Treaty on the Functioning of the European Union (TFEU).

4 See on this point V Mitsilegas and F Giuffrida, 'Judicial Review of EPPO Acts and Decisions' in K Ligeti, MJ Antunes and F Giuffrida (eds), *The European Public Prose-*

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level[5] is completed by a decentralised structure of European Delegated Prosecutors (EDPs) operating in the Member States.[6] Whereas the decision to prosecute is taken at the central level, the decentralised level is in charge of investigation. The EDP handling a case leads the investigation on behalf of the EPPO on their own and either undertakes the appropriate investigative measures directly or instructs the national authorities to do so.[7] Third, the EPPO's activities are governed by a hybrid legislative framework comprising a set of European rules which are completed by national law and various European and national soft-law provisions.[8] The EPPO therefore applies both national law and European law during its activities and – as expressed in Article 5(1) of the EPPO Regulation – it ensures respect for the rights enshrined in the Charter of Fundamental Rights of the European Union (the Charter).

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cutor's Office at Launch. Adapting National Systems, Transforming EU Criminal Law (CEDAM 2020) 115, 128–29.

5 The central office is based in Luxembourg, and comprises the European Chief Prosecutor and two Deputies, the College (composed of one European Prosecutor from each participating Member State), 15 Permanent Chambers (PCs), and the Administrative Director.

6 K Ligeti, 'The European Public Prosecutor's Office' in V Mitsilegas, M Bergström and T Quintel (eds), *Research Handbook on EU Criminal Law* (2nd edn, Edward Elgar 2024) 462.

7 While in the initial Commission Proposal to establish the EPPO, the EPPO was invested with autonomous European powers (European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM (2013) 534 final (Commission Proposal)), according to Article 28(1) EPPO Regulation, the EPPO's activities heavily rely on national law. Article 28(4) of the EPPO Regulation allows the supervising European Prosecutor, in exceptional cases and with the approval of the competent PC, to conduct the investigations under the conditions mentioned in the provision. For a detailed analysis of the Commission Proposal, see K Ligeti, 'The European Public Prosecutor's Office' in V Mitsilegas, M Bergström and T Konstadinides (eds), *Research Handbook on EU Criminal Law* (1st edn, Edward Elgar 2016) 480, 486–500.

8 For a critical analysis of the EPPO's legal framework see L De Matteis, 'The EPPO's Legislative Framework: Navigating through EU Law, National Law and Soft Law' (2023) 14 *New Journal of European Criminal Law* 6, 6. The EPPO Regulation itself provides for several layers of interaction between EU law and national law in EPPO operations. Article 5(3) of the EPPO Regulation states that national law will apply to the extent that a matter is not regulated by the Regulation, while a number of provisions in the EPPO Regulation refer expressly to the application of national law, in particular regarding EPPO investigations; these include provisions on the conduct of investigations (Article 28(1)), rules on investigative measures (Article 30(2) and (3)), rules on cross-border investigations (Article 31), enforcement (Article 32), and pre-trial arrest (Article 33).

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Ensuring judicial oversight of the EPPO's investigative and prosecutorial decisions in this hybrid structure was a point of debate from the outset. Because it was established as a 'body of the Union',[9] one would expect that the EPPO's procedural acts and failures to act would be subject to judicial review before the Court of Justice of the European Union (CJEU) in accordance with EU law.[10] Instead, the rules on judicial review formulated in Article 42(1) of the EPPO Regulation provide for a derogatory system that largely exempts the EPPO's acts from CJEU scrutiny. Save for a limited number of scenarios, Article 42(1) of the EPPO Regulation confers on national courts the competence to exercise judicial review of those EPPO procedural acts that are intended to produce legal effects vis-à-vis third parties and failures to adopt such acts.

In practice, preliminary references in EPPO matters have so far been rare. This limited jurisprudence is not solely due to the EPPO's recent establishment. Rather, practice shows that national courts treat most EPPO acts as grounded in national procedural law and therefore see no necessity to refer questions to the CJEU. Limiting the CJEU's direct role, however, creates space for divergent national practices.

This contribution explores the evolving jurisprudence of national and EU courts. It begins in Section 2 by outlining the relevant rules on judicial review as set out in the EPPO Regulation. Section 3 then analyses the rulings issued by the CJEU related to EPPO procedural acts and the interpretation of Union law relevant for EPPO investigations and prosecutions. Although there is very little EU jurisprudence so far, one can already distill some tendencies in the CJEU's interpretation of EU law concepts relevant to EPPO procedural acts and in how it guides national courts when applying Article 42 of the EPPO Regulation.

Since it is primarily the role of national courts to review the legality of the EPPO's actions during the investigation and prosecution phases, Section 4 focuses on national decisions that are not limited to interpreting national law but also engage with provisions of Union law relevant to the EPPO's functioning. Accordingly, Section 4 studies national decisions concerning the EPPO's procedural acts adopted at the decentralised level (such as access to case files within the EPPO's case-management system and

9 Art 3(1) EPPO Regulation.

10 H-H Herrnfeld, 'Article 42' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 1–2.

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allocation of competence between the EPPO and national authorities), as well as national decisions regarding procedural acts adopted at the central level (such as decisions based on Article 36 of the EPPO Regulation). The selection of cases is based on an analysis by the author with the help of the EPPO Legal Service. The aim of this chapter is to identify whether there is any gap in (effective) judicial protection in the EPPO's activities, and thus compliance with Article 47 of the Charter, and Articles 6 and 13 of the European Convention on Human Rights (ECHR). The contribution concludes with recommendations to enhance legal clarity and strengthen procedural safeguards.

2 Rules on judicial review in the EPPO Regulation

Limiting the CJEU's jurisdiction to review EPPO acts goes back to the initial Commission Proposal to establish the EPPO,[11] which declared in its Article 36 that, in the performance of its functions, the EPPO shall be considered a national authority. By excluding legal redress before EU courts, the Commission Proposal departed from the principle of EU law according to which EU courts control the legality of the actions of EU bodies and national courts exert control over the actions of national authorities.[12] Assimilating the EPPO to a national authority for the purposes of judicial review received criticism from the outset. It was difficult to see how a national court could control the legality of the EPPO's central-level decisions in a coherent fashion.

These concerns notwithstanding, in the adopted text of the EPPO Regulation the participating Member States decided to follow the Commission's initial reasoning and agreed to only minor changes to the CJEU's jurisdiction to hold the EPPO judicially accountable. Article 42(1) of the EPPO Regulation confers on national courts the competence to exercise judicial review of procedural acts by the EPPO which are intended to produce legal effects vis-à-vis third parties and failures to adopt such acts. Pursuant to

11 Commission Proposal (n 7). See on this point K Ligeti and A Weyembergh, 'The European Public Prosecutor's Office: Certain Constitutional Issues' in LH Erkelens, AWH Meij and M Pawlik (eds), *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?* (Asser 2015) 53, 68 ff.

12 See ECJ, Case C-314/85 *Foto Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452; and ECJ, Case C-294/83 *Les Verts v European Parliament*, ECLI:EU:C:1986:166, especially para 23.

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Article 42(2) of the EPPO Regulation the CJEU is competent only to give preliminary rulings in accordance with Article 267 TFEU. The preliminary rulings shall concern: (a) the validity of procedural acts of the EPPO, insofar as such a question of validity is raised directly on the basis of Union law;[13] (b) the interpretation or validity of Union law;[14] and (c) the interpretation of Articles 22 and 25 of the EPPO Regulation 'in relation to any conflict of competence between the EPPO and the competent national authorities'.[15] Article 42(2) reflects the reasoning in *Foto-Frost* that 'national courts have no jurisdiction themselves to declare that measures taken by community institutions are invalid'[16]. Adapted to the EPPO's hybrid structure, this means that while national courts are competent to review EPPO procedural acts, they lack the power to declare such acts invalid where the question of validity arises under Union law. In those circumstances, they are required to refer the matter to the CJEU for a preliminary ruling. In other words, Union courts are competent for judicial review on the basis of Union law, whereas review on the basis of national law falls within the exclusive competence of national courts.[17]

Article 42(3) of the EPPO Regulation stipulates that 'the decisions of the EPPO to dismiss a case' can be subject to an action of annulment insofar as 'they are contested directly on the basis of Union law'. In particular, the CJEU will be competent in matters falling under the scope of Article 42(8) of the EPPO Regulation; mainly, it shall review acts related to the protection of personal data, public access to documents, and the dismissal of EDPs.[18]

To justify the derogatory rules on judicial review of the EPPO and the resulting division of competence between national courts (Article 42(1)) and the CJEU (Article 42(2)–(8)), the EPPO Regulation refers to Article 86(3) TFEU. Article 86(3) TFEU allows the EPPO Regulation to determine

13 Art 42(2)(a) EPPO Regulation.
14 Art 42(2)(b) EPPO Regulation.
15 Art 42(2)(c) EPPO Regulation.
16 ECJ, Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.
17 M Böse, 'Judicial Control of the European Public Prosecutor's Office' in T Rafaraci and R Belfiore (eds), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer 2019) 191, 195.
18 Pursuant to Article 42(4)–(6) of the EPPO Regulation, the CJEU will also maintain its jurisdiction for compensation claims (Article 268 TFEU), staff-related matters (Article 270 TFEU), and arbitration clauses in contracts concluded by the EPPO (Article 272 TFEU), although this could also imply national law and rules of procedure that could grant jurisdiction to national courts.

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'the rules applicable to the judicial review of procedural measures' taken by the EPPO 'in the performance of its functions'.[19] As expressed in Recitals 86, 87, and 97, the EPPO Regulation justifies the limited EU-level review of the EPPO on five main grounds. The first is the EPPO's hybrid nature, 'the tasks and structure of the EPPO, which is different from that of all other bodies and agencies of the Union [... requiring] special rules regarding judicial review'.[20] The second relates to the strong link between the operations of the EPPO and the legal orders of the Member States: whilst being an EU body, the EPPO is *de facto* integrated in the national legal systems of the participating Member States. The EPPO exercises the functions of the prosecutor in the competent courts of the Member States and it applies both EU law and national law throughout its operations, with the latter, in principle, falling outside CJEU jurisdiction.[21] Recital 87 explicitly mentions the EPPO's strong link to national legal systems. The EPPO's 'acts will be carried out by national law enforcement authorities acting under the instructions of the EPPO'; it is therefore appropriate to subject those procedural acts to judicial review by the competent national court. The third and

19 It is, however, questionable whether the possibility allowed in Article 86(3) TFEU empowers EU lawmakers not only to develop the competence of the CJEU in relation to the judicial control of the EPPO, but to actually create an exemption from the general rule. Leading experts doubt the compatibility of this derogatory regime with primary EU law. *Mitsilegas* argues that the possibility allowed by Article 86(3) TFEU as well as other similar Treaty provisions does not mean that rules of secondary EU law can substantially limit judicial review by the CJEU: see V Mitsilegas, 'European Prosecution between Cooperation and Integration: The European Public Prosecutor's Office and the Rule of Law' (2021) 28 *Maastricht Journal of European and Comparative Law* 245, 260.

20 Recital 86 EPPO Regulation.

21 This follows from Article 19 of the Treaty on European Union (TEU). See ECJ, Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462, para 43; and ECJ, Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400, para 28. The Court has, however, jurisdiction in specific cases where the national law refers to the content of a provision of Union law (see, e.g., ECJ, Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, ECLI:EU:C:1997:369, paras 25 and 27) or where the Court must provide all points of interpretation necessary for the national court to assess the compatibility with fundamental rights of national law implementing Union law (see Article 51 of the Charter as interpreted by the CJEU in ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, para 19). See also the interpretation by the Court of 'implementing Union law' in ECJ, Case C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gebierno de España en Alicante) and Others*, ECLI:EU:C:2014:2055.

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the fourth grounds are much more practical and relate to reasons such as national courts' easier access to case files and a desire not to overburden the CJEU.[22] The fifth and last reason is the need to maintain consistency. Since national courts are competent for providing *ex-ante* judicial authorisation for EPPO investigative measures, it is coherent also to entrust national courts with the *ex-post* judicial review of those investigative measures.[23]

The derogatory regime stipulated in Art. 42 of the EPPO Regulation has been confirmed recently by the General Court in *Stan* and *Brancusi*, where the General Court stated that Article 42 of the EPPO Regulation prevails over Article 263 TFEU – action for annulment against procedural acts of Union institutions – and that national courts are exclusively responsible for reviewing EPPO procedural acts.[24] Furthermore, in Case T-509/24, the President of the General Court reaffirmed the *sui generis* nature of the mechanism laid down in Article 42 of the EPPO Regulation, which confers on national courts the exclusive jurisdiction to rule on actions against the EPPO's decisions producing legal effects vis-à-vis third parties.[25]

Conferring judicial review on national judges risks, however, creating disparities in the scope of legal protection across Member States. This is not necessarily problematic in itself, but rather reflects the hybrid structure of the EPPO's regime, where differing standards for evaluating EPPO procedural acts stem from diverging requirements under the applicable national law. For instance, the procedural requirements governing telecommunications surveillance measures differ significantly among Member States; the same evidence may be admissible in proceedings in one jurisdiction but inadmissible in another. The European legislature has deliberately refrained from harmonising the procedural law applicable to the EPPO and thus from establishing a uniform EU-wide criminal procedure for EPPO investigations. However, insofar as questions of EU law arise – such as the scope of the EPPO's material competence, the rules applicable to cross-border investigations, etc. – the ECJ's jurisdiction based on Article 42(2) of the

22 Herrnfeld (n 10) mn 9.

23 Herrnfeld (n 10) mn 9.

24 ECJ, Case T-103/23 *Victor-Constantin Stan v European Public Prosecutor's Office*, ECLI:EU:T:2023:871; ECJ, Case T-385/23 *Constantin Mincu Pătraşcu Brâncuşi v European Public Prosecutor's Office*, ECLI:EU:T:2024:143. The compatibility of this view with the requirements of primary law is highly controversial, see M Böse and S Lobinger, 'Gerichtlicher Rechtsschutz gegen die Europäische Staatsanwaltschaft' (2025) *Zeitschrift für Internationale Strafrechtswissenschaft* 54, 55.

25 Order of the President of the General Court, in Case T-509/24 R *Research Investments and Others v European Public Prosecutor's Office*, ECLI:EU:T:2025:601.

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EPPO Regulation shall prevail. This appears as a simple division of competences between national and European courts pursuant to Article 42 of the EPPO Regulation. In reality, however, the boundaries are far less clear, as the line between national and EU law often blurs. Differences in legal protection could in practice lead to a violation of Article 47 of the Charter that requires a degree of equivalent legal protection across the Member States, including comparable standards of legality for the judicial review of EPPO procedural acts. Therefore, the extent to which disparities in the scope of legal protection across Member States lead to divergent – and potentially contradictory – practices regarding the standards for assessing the legality of EPPO procedural acts is examined in Section 4, where we analyse national decisions concerning EPPO procedural acts.

3 Judicial review in the EPPO's criminal proceedings: preliminary references to the ECJ

The European Court of Justice (ECJ) has so far issued two preliminary rulings: one concerning the scope of judicial review in cross-border investigations (Articles 31–32 EPPO Regulation)[26] and another concerning the scope and form of judicial review of domestic procedural acts (Article 42 EPPO Regulation).[27] Belgium has also very recently referred a third preliminary question to the ECJ, relating to the exercise of the EPPO's competence (Articles 24, 25, 27, 35, and 120 EPPO Regulation).[28]

3.1 G.K. and Others

The first reference for a preliminary ruling concerned the extent of judicial review in the context of the EPPO's cross-border investigations. Since Article 31 of the EPPO Regulation does not explicitly regulate situations in which judicial authorisation is required both in the state of the handling and of the assisting EDPs, it was anticipated from the outset that national courts would reach out to the ECJ to resolve this ambiguity. The questions referred to the ECJ aimed to shed light on two crucial aspects of the legal framework related to cross-border EPPO investigations: first, they address

26 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.
27 ECJ, Case C-292/23 *EPPO v I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.
28 ECJ, Case C-407/25 *Tersten*.

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the forum before which the suspect or another person negatively affected by an investigative measure of the EPPO may challenge the substantive reasons for adopting the measure; second, they concern the scope of judicial scrutiny to be performed by the national court.

According to Article 31 of the EPPO Regulation, where no judicial authorisation is required under the law of either Member State, the handling EDP decides on the adoption of the measure in accordance with national law and 'assigns' it to the assisting EDP, located in the Member State where the measure must be executed. The assisting EDP is then expected to enforce the measure, which is no longer subject to recognition procedures or grounds of refusal.[29] If judicial authorisation is required, Article 31(3) provides the following: if judicial authorisation is required only under the law of the handling EDP, the judicial authorisation is to be obtained by the handling EDP before assigning the measure (Article 31(3)(3)). In the opposite case, if authorisation is required by the law of the assisting EDP, the handling EDP may still adopt the measure according to their national law and assign it to the assisting EDP; the latter, however, must obtain the necessary judicial authorisation before executing the measure in accordance with their national law (Article 31(3)(1)).

The EPPO Regulation is, however, silent where judicial authorisation is required under the laws of both EDPs' Member States.[30] Recital 72 merely states that a single authorisation should apply. Against this background, the ECJ was asked to clarify the extent of judicial review in Case C-281/22 *G.K. and Others (Parquet européen)*.[31] The case concerned a large-scale tax-fraud investigation initiated by a German handling EDP who assigned search and seizure measures in Austria to an Austrian assisting EDP. Since Austrian

29 Under Article 31(5) of the EPPO Regulation, it is possible for the assisting EDP to raise 'reasons to consult' solely with the handling EDP. If a solution is not found within a period of seven days 'the matter will be referred to the competent Permanent Chamber' who will decide 'in accordance with applicable national law' and the EPPO Regulation.

30 College Decision 006/2022, *Adopting guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017/1939* (26 January 2022) para. 8 notes that 'Article 31(3) does not expressely address situations where both the law of the Member State of the handling EDP and the law of the Member State of the assisting EDP require judicial authorization'.

31 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018. For an analysis of the *G.K. and Others* ruling, see K Ligeti, 'Remarks on the CJEU's Preliminary Ruling in C-281/22 G.K. and Others (Parquet européen)' (2024) *eucrim* 69.

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law required prior judicial authorisation, the assisting EDP obtained authorisation from the competent Austrian courts.[32] The suspects challenged this authorisation, contesting, among other objections, both the necessity and proportionality of the measures. Due to the ambiguity of Article 31 of the EPPO Regulation, the Higher Regional Court of Vienna decided to stay its proceedings and ask the ECJ about the extent of the judicial review to be carried out by the court of the assisting EDP.[33]

The ECJ held that neither Article 31 nor Article 32 specify the scope of such a review. A purely textual interpretation was therefore insufficient; instead, a contextual approach was required. The Court recalled that the cooperation established by the EPPO Regulation is 'something more but not something different' than the cooperation based on the principle of mutual recognition and mutual trust. Compared with the system laid down in the Framework Decision on the European Arrest Warrant[34] and the European Investigation Order (EIO) Directive,[35] the Court observed that, in the context of judicial cooperation in criminal matters between Member States, the executing authority is generally prevented from reviewing compliance with the substantive conditions necessary for the issuing of a cross-border measure.[36] The ECJ argued that allowing the competent authority of the assisting EDP to review not only the mode of execution of a measure but also the elements related to its justification and adoption would undermine the objective of the EPPO Regulation. The ECJ concluded that, for the cross-border investigation framework, the EPPO Regulation establishes

> 'a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the en-

32 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, paras 28–29.

33 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 36, questions (1) and (3).

34 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

35 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

36 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, paras 58–64.

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> forcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor'.[37]

According to this division of tasks, 'any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to elements connected with that enforcement'.[38] However, it added an important qualification: when the assigned investigative measure seriously interferes with the right to private life and the right to property, as guaranteed by Articles 7 and 17 of the Charter, respectively, it is up to the Member State of the handling EDP 'to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures'.[39]

Therefore, the Court felt that *ex-post* judicial review of the legality and the necessity of investigative measures seriously interfering with fundamental rights provided for in Article 42(1) of the EPPO Regulation would give insufficient protection. In such cases, *ex-ante* scrutiny must be ensured by the national court of the handling EDP in allowing the substantive reasons for adopting the measure to be challenged. In requiring *ex-ante* judicial control of the EPPO's investigative measure, the Court applied and further specified its existing case law developed in the context of execution of the EIO, and, particularly, the requirement set out in *Gavanozov II*, according to which the right to judicial remedy

> 'necessarily means that the persons concerned by such investigative measures must have appropriate legal remedies enabling them, first, to contest the need for, and lawfulness of, those measures and, second, to request appropriate redress if those measures have been unlawfully ordered or carried out'.[40]

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37 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 71.

38 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 71. See also A Mosna, 'Effective judicial protection as a central issue in EPPO cross-border investigations: The ECJ's first ruling in G. K. and Others' (2024) 61 *Common Market Law Review* 1345; R Zerbst, 'Judicial Authorisation of Cross-border Investigation Measures Conducted by the European Public Prosecutor's Office: A Comment on the Grand Chamber of the Court of Justice of the European Union's Judgment in the Case C-281/22' (2024) 14 *European Criminal Law Review* 94.

39 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 75.

40 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 33.

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However, 'it is for the Member States to provide in their national legal orders the legal remedies necessary for those purposes'.[41] The right to an effective remedy for intrusive investigative measures in cross-border investigations now has to be provided for *ex-ante* in the Member State of the handling EDP. National law must provide for the details of such an *ex-ante* review of assigned investigative measures.

It is uncontested that the EPPO Regulation aims to enhance the effectiveness of fighting crimes affecting the EU budget. In this context, the EPPO Regulation cannot be interpreted in a way that would render EPPO cross-border investigations more burdensome than cooperation between national prosecutors using the EIO. Allowing the court of the assisting EDP to carry out a full judicial review would require that court to have access to the entire case file, which in turn would need to be sent and translated by the handling EDP. This would not only be more time-consuming and costly than using an EIO but would also present considerable logistical challenges for the handling EDP. Such an approach would undermine the objectives of the EPPO Regulation. What remains striking, however, is that the text of the EPPO Regulation does not unequivocally support the Court's interpretation on the division of tasks. The Court has therefore been criticised for possibly going beyond the scope of mere judicial interpretation.[42] Should the European legislature adopt this interpretation in the course of a future revision of the Regulation, such criticism would naturally lose much of its significance.

Furthermore, it may be argued that the ECJ's interpretation weakens the position of the person affected by the measures in question. First, the division of labour between Member States may disadvantage the position of such persons in the Member State of the assisting EDP, as they have to defend themselves in a foreign legal system (i.e., the Member State of the handling EDP), often unfamiliar both in terms of procedure and, in most cases, language. More importantly, this division of powers coupled with the idea of a single judicial authorisation stipulated in Recital 72 of the EPPO Regulation would culminate in a somewhat 'awkward compromise'.[43] It

41 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 33.

42 H-H Herrnfeld, 'Yes Indeed, Efficiency Prevails. A Commentary on the Remarkable Judgement of the European Court of Justice in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 370.

43 J Öberg, 'Judicial Cooperation between European Prosecutors and the Incomplete Federalisation of EU Criminal Procedure – CJEU ruling in G. K. e.a. (Parquet européen)' (2024) (189) *EU Law Live: Weekend Edition* 1, 2.

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would namely mean that, if judicial authorisation is required only in the Member State of the assisting EDP, prior judicial review in respect of the substantive reasons for the measure would not be available to the suspects or other persons negatively affected by the EPPO's investigative measure, since this would only be possible before the court in the Member State of the handling EDP.[44] This leads to a legal gap in judicial protection contrary to Article 42(1) of the EPPO Regulation and Article 47 of the Charter that protect the accused person's right to an effective remedy. In particular, Article 42(1) of the EPPO Regulation states that EPPO procedural acts intended to produce legal effects vis-à-vis third parties shall be subject to judicial review.[45]

The final part of the ECJ's reasoning in *G.K. and Others* may to some extent attenuate this gap. In cases involving searches and seizures or the hearing of a witness via videoconference, the Court requires Member States to provide for *ex-ante* judicial review in respect of the substantive reasons of the assigned measure. Therefore, one might argue that the gap would not arise – in theory, at least – in cases involving searches and seizures or the hearing of a witness via videoconference, since compliance with the Court's ruling obliges Member States to ensure such a review. However, this raises further questions. It remains unclear which measures fall within the scope of this case law. In other words, what level of intrusiveness triggers the requirements of prior judicial control? And what if Member States fail to comply with the ECJ's requirements? Could the assisting EDP refuse to execute the measure in such cases? In *Gavanozov II*, the ECJ held that the availability of effective legal remedies in the issuing Member State is a pre-condition for the principle of mutual recognition to operate,[46] such that the

44 However, this gap could be mitigated if the national law of the Member State of the handling EDP provides the suspects or other persons negatively affected by the EPPO's investigative measure with other legal remedies (e.g. *ex-post* judicial review) that allow for scrutiny of the substantive grounds of the measure.

45 K Ligeti, 'Judicial Review of Acts of the European Public Prosecutor's Office: The Limits of Effective Judicial Protection of European Prosecution' in K Lenaerts, E Regan, U Neergaard and KE Sørensen (eds), *Shaping a Genuine Area of Freedom, Security and Justice* (Bloomsbury 2024) 61.

46 A Weyembergh, 'About the Gavanozov II and HP judgments of the CJEU on the European Investigation Order Directive: strengthening the judicial protection in the issuing Member State' in Eurojust, *20 years of Eurojust: EU judicial cooperation in the making. A collection of anniversary essays* (Eurojust 2022) at https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-20-years-anniversary-essays.pdf 95, 98; AH Weiss, 'Effective Protection of Rights as a Precondition to Mutual Recognition: Some

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absence of such remedies precludes the competent authority of that state from issuing an EIO.[47] Transposed to the EPPO context, this reasoning could fill the identified gap: the availability of *ex-ante* judicial review in the Member State of the handling EDP could be considered a precondition for the use of the mechanism under Article 31 of the EPPO Regulation. Absent such review, the handling EDP would be precluded from relying on this procedure. Yet whether this case law can be extended to EPPO cross-border investigations remains debatable. The *Gavanozov II* line of reasoning rests on the premise that mutual recognition must be excluded where the right to an effective remedy is infringed.[48] By contrast, as Advocate General *Ćapeta* has observed, Article 31 of the EPPO Regulation constitutes an enhanced form of mutual recognition of judicial decisions. The Regulation itself does not provide for refusal grounds to be examined by the assisting EDP, but leaves this to internal supervision by the competent Permanent Chamber (PC). Consequently, an assignment based on Article 31 cannot be refused even where there are strong grounds to believe that its execution would conflict with the Member State's obligations under Article 6 TEU and the Charter (see, by contrast, Article 11(1)(f) EIO Directive). Finally, the gap nonetheless remains with respect to other measures that are not considered sufficiently intrusive to fall within the ECJ's case law in *G.K. and Others*.

It remains to be seen how this framework will operate in practice. National courts have begun to address the issue, largely following the ECJ's reasoning in *G.K. and Others*. For instance, the Court of Rotterdam[49] was called upon to rule on an appeal against the freezing of assets in the context of enforcing a measure under Article 31 of the EPPO Regulation. The Court dismissed the appeal on the grounds that it had jurisdiction to review only the manner in which the measure was enforced, not its justification. Similarly, in proceedings before the Court of Amsterdam,[50] the court had to rule on appeals against freezing orders under Regulation (EU) 2018/1805,[51]

Thoughts on the CJEU's Gavanozov II Decision' (2022) 13 *New Journal of European Criminal Law* 180.

47 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 62.

48 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 56.

49 Rechtbank Rotterdam of 23 January 2024, Parketno 23–000586, ECLI:NL:RBROT:2024:533.

50 Rechtbank Amsterdam of 14 September 2023, Parketno 23/014471, ECLI:NL:RBAMS:2023:5807.

51 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

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which froze the bank accounts of a company that had not been involved in the offences. The court examined the requirements for recognising the freezing order, but without addressing the question of whether the order should have been issued. In the same vein, recently the Higher Court in Munich held that the requirements for issuing a freezing order – specifically its legality and whether it is permitted under the applicable law – may be reviewed only by the courts of the Member State of the handling EDP.[52] The decision went even further. The court observed that the ECJ did not define the concept of 'enforcement' in its ruling. However, according to the Munich court, issues such as the amount to be frozen, whether the freezing measure should depend on a suspicion of unlawfully obtained financial advantage, or the proportionality of the amount, relate to the justification of the freezing order rather than to its enforcement. Consequently, these matters fall outside the competence of the court of the Member State of the assisting EDP.

Moreover, the Higher Court of Munich went on to address the ECJ's requirement of 'prior judicial review of the justification and adoption of the measure in cases of serious interference with the rights of the person concerned'. In the case at hand, the handling EDP in the Netherlands had obtained judicial authorisation to conduct a financial investigation as a whole (which under the Dutch Code of Criminal Procedure also include the freezing and confiscation of proceeds) aimed at determining the proceeds of crime unlawfully obtained by the suspect, with a view to confiscating them – rather than for the specific freezing order to be executed in Germany. The Munich court considered that the ECJ did not require an explicit judicial review of each individual measure; rather, such a general judicial authorisation was deemed sufficient. Finally, it is noteworthy that the court of the Member State of the assisting EDP examined whether prior judicial review of the substantive grounds of the freezing order had been conducted. Returning to the questions raised above and to the uncertainty regarding the scope of this requirement, the Munich court's reasoning seems to suggest that it regarded prior judicial review as a mandatory condition for the use of the mechanism of Article 31. However, since the Dutch EDP had, in fact, obtained judicial authorisation, the case did not provide an opportunity to see how a court in the Member State of the assisting EDP would have proceeded had such prior review been absent, nor whether it would have declined to execute the measure in that scenario.

52 OLG München of 29 April 2025, 2 Ws 224/25.

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The Munich court also considered the freezing order to be a measure that seriously interferes with the fundamental rights of the person concerned, and therefore one that falls within the scope of the ECJ's case law.

There are, however, decisions in which the national court of the assisting EDP does not limit its review to the confines set by *G.K. and Others*. For instance, in the context of an EPPO investigation, the Dutch assisting EDP, acting upon a request from the handling EDP, seized several assets belonging to a third party. In this context, the court of first instance, Rechtsbank Rotterdam,[53] held that it was entitled to examine whether the third party possessed legal rights over the assets in question. Similarly, in its decision of 9 October 2024,[54] the Court of Appeal of Lisbon overturned a decision of the competent court of first instance, which had rejected the assisting EDP's request to issue a court order for the execution of search and seizure measures. The Court of Appeal of Lisbon argued that the application did not meet the requirements of national law and, in particular, had not sufficiently described the circumstances of the offence; the court emphasised the cross-border nature of the order and the fact that it was based on a judicial decision from the Member State of the handling EDP. By basing its decision on the fact that the statement of facts was insufficient, the Court of Appeal of Lisbon did not follow ECJ jurisprudence and went beyond examining only the manner of enforcement.

3.2 EPPO v I.R.O. and F.J.L.R.

Article 42(1) of the EPPO Regulation leaves it to national law to define the nature and the modalities of judicial review (time limits, relevant procedures). Accordingly, national rules determine, for example, whether courts may declare only that an EPPO act violated domestic standards, or whether they may also remedy the violation, such as by granting access to the case file. National law also decides whether review is limited to legality or extends to the expediency of investigative measures taken by the EDP.

The EPPO Regulation thus gives a very broad margin to national courts in ensuring adequate judicial control over the activities of the decentralised level of the EPPO. Based on Recital 88(1) of the EPPO Regulation, Member States are responsible for ensuring effective remedies against the EPPO's

53 Rechtsbank Rotterdam of 20 November 2024, raadkamerno 24/017352.
54 Tribunal da Relação de Lisboa of 09 October 2024, Referência 22175859.

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procedural acts. The exact scope of this obligation is, however, not further defined and leaves open whether it extends to requiring Member States to ensure judicial review of the activities of the EPPO if such review is not given under the relevant provisions of national law. It follows from established ECJ case law that judicial review must always be provided for if persons' fundamental rights are impacted.[55] If, however, the EPPO's decision does not directly impact the suspect's or other persons' fundamental rights and national law does not provide for the possibility of seeking review against such decisions, national differences will persist.[56] For instance, an EPPO decision to appoint an expert or to reimburse witness costs are decisions that are not intended to produce legal effects vis-à-vis third persons and if seeking judicial remedy against such acts is not possible under national law, EU law currently does not create an obligation to allow remedy to be sought. The only aspect where harmonisation of divergent national rules on judicial review seems possible under the current provision of Article 42(1) relates to the definition of the EPPO's 'procedural acts' subject to judicial review. Article 42(1) of the EPPO Regulation does not specify what is meant by 'procedural acts'.[57]

Given this lack of clarity related to Article 42(1), it was anticipated that national courts would seek guidance from the ECJ on the obligation concerning the judicial review of EPPO acts deriving from the EPPO Regulation. Indeed, the ruling in Case C-292/23 *EPPO v I.R.O. and F.J.L.R.* addressed questions regarding the scope and form of judicial review of domestic procedural acts, and particularly whether Article 42(1) requires

55 ECJ, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, paras 282 ff.

56 *Herrnfeld* argues that the EPPO's decision to initiate an investigation (Article 26 EPPO Regulation) or to exercise its right of evocation (Article 27 EPPO Regulation) would not qualify as procedural acts against which EU law would require Member States to provide for possibilities to seek judicial review: Herrnfeld (n 10) mn 35.

57 The competence for the judicial review of the administrative decisions of the EPPO lies with the ECJ (Article 42(8) EPPO Regulation). Based on established CJEU case law one might expect that this term should receive uniform interpretation as an autonomous concept of EU law. See ECJ, Case C-108/16 PPU *Openbaar Ministerie v Paweł Dworzecki*, ECLI:EU:C:2016:346, para 28; ECJ, Case C-494/14 *European Union v Axa Belgium SA*, ECLI:EU:C:2015:692, para 21; ECJ, Case C-66/08 *Szymon Kozłowski*, ECLI:EU:C:2008:437, para 42. On the role of the ECJ in developing autonomous concepts see V Mitsilegas, 'Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice' (2020) 57 *Common Market Law Review* 45.

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Member States to ensure judicial review of an EDP decision to summon witnesses where national law does not provide such a remedy.[58] The case arose from an EPPO investigation conducted by Spanish EDPs into subsidy fraud and forgery. The handling EDP summoned two witnesses, and the suspects' lawyers challenged the decision before *Juzgado Central de Instrucción no 6 de Madrid*, arguing that this measure was unnecessary and infringed procedural rights. Spanish law (Organic Law 9/2021) precludes judicial review of witness summonses issued by the EPPO, though such review is possible when witness summonses are issued by an investigating judge. The Spanish court referred the matter to the ECJ, asking whether the lack of judicial review is compatible with Article 42(1) of the EPPO Regulation.

The ECJ addressed two issues: first, whether an EPPO summons falls within the notion of 'procedural acts intended to have legal effects vis-à-vis third parties'; second, whether judicial review must take the form of a direct appeal. The Court held that 'procedural acts intended to produce legal effects vis-à-vis third parties' is an autonomous concept of EU law, equivalent to 'challengeable acts' under Article 263 TFEU.[59] Based on its settled case law, the ECJ held that procedural acts within the scope of Article 42(1) should include any

> 'acts of a procedural nature intended to produce binding legal effects capable of affecting the interests of third parties by bringing about a distinct change in their legal position, including those adopted in the course of a criminal investigation procedure'.[60]

In determining whether an act produces binding legal effects, the following criteria must be considered: the substance and content of the act, the context in which it was adopted, the powers of the issuing body, the third-party status of the person challenging the act, and – more importantly – *the impact of the act on the procedural rights of persons under investigation.*[61] The Court refrained, however, from deciding whether a witness summons meets these criteria, leaving the assessment to national courts.[62]

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58 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255.

59 Article 263 TFEU regulates the action for annulment against any provision or act adopted by the EU institutions, bodies, offices, and agencies.

60 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 63.

61 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, paras 67 and 69.

62 Article 41(3) of the EPPO Regulation states that: 'Without prejudice to the rights referred to in this Chapter, suspects and accused persons as well as other persons

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The ECJ therefore did not provide a definitive answer; instead it offered significant guidance for national courts to evaluate whether an act falls under the scope of Article 42(1), emphasising the need to consider *the impact of the act on the procedural rights of the person challenging it* (in the present case, the person under investigation). This consideration reminds us of the case law of the ECJ on the right to an effective legal remedy in the context of cross-border investigations, wherein the ECJ considers whether the act in question is liable to infringe rights and freedoms guaranteed by EU law as a basis for establishing whether the person concerned is entitled to a legal remedy. For example, in cases *État luxembourgeois*[63] and *Berlioz Investment Fund*[64] (both cited by the Court in this ruling), the ECJ held that requests for information exchange in tax cooperation could interfere with fundamental rights,[65] thereby necessitating the availability of effective remedies. Similarly, in *Gavanozov II*,[66] the Court found that an EIO for searches, seizures, or testimony via videoconference could affect fundamental rights,[67] requiring Member States to ensure remedies against the issuing of such an order. Finally, in *G.K. and Others*,[68] the Court clarified that in the context of cross-border EPPO investigations, intrusive investigative measures (such as house searches, conservatory measures relating to personal property, asset-freezing) must be subject to *ex-ante* judicial review in the Member State of the handling EDP.

Nevertheless, in the present case, the Court refrained from undertaking a concrete evaluation of whether a witness summons interferes with suspects' rights. The Court justified its restrained approach on the ground that this evaluation depends heavily on national procedural rules and the

involved in the proceedings of the EPPO shall have all the procedural rights available to them under the applicable national law'.

63 ECJ, Joined Cases C-245/19 and C-246/19 *État luxembourgeois v B and Others*, ECLI:EU:C:2020:795.

64 ECJ, Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373.

65 Such as the right to respect for private life guaranteed by Article 7 of the Charter and the right to the protection of personal data guaranteed by Article 8(1) of the Charter.

66 ECJ, Case C-852/19 *Ivan Gavanozov II*, ECLI:EU:C:2021:902, para 32.

67 Regarding searches and seizures, the pertinent right at stake is the right to respect for private and family life, home, and communications, as guaranteed by Article 7 of the Charter. Concerning the hearing of a witness via videoconferencing, this might interfere with the general EU principle on the protection against arbitrary or disproportionate interference by public authorities in the realm of private activities, because the order may compel witnesses to appear and testify under threat of penalty.

68 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018.

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specific investigative context given that the procedural rights of persons under investigation are stipulated not only by EU law, and particularly Article 41(1) of the EPPO Regulation, but also by domestic law. One could, however, counterargue that the same rationale could equally apply to investigative measures taken within the framework of the EIO or the *sui generis* mechanism for cross-border investigations under Article 31 of the EPPO Regulation.

While it is true that the previous mechanisms have approximated the rules of cooperation[69] between the issuing and the executing Member State (in the case of the EIO), and between the Member State of the handling EDP and that of the assisting EDP (in the context of the EPPO), neither the EIO Directive nor Article 31 of the EPPO Regulation has fully harmonised the procedural requirements, modalities, or applicable safeguards for cross-border investigations. Therefore, as in the present case, the procedural safeguards governing investigative measures remain subject to both EU and national legal frameworks. This did not, however, prevent the ECJ from explicitly recognising that the measures at hand (searches and seizures and hearing of witnesses via videoconference) interfere with fundamental rights guaranteed under EU law, thereby requiring Member States either to provide legal remedies against the issuing of such an EIO (*Gavanozov II*) or to provide for *ex-ante* judicial review in cases involving intrusive investigative measures in EPPO cross-border investigations (*G.K. and Others*).

The stronger procedural autonomy in *I.R.O. and F.J.L.R.* in comparison to the above-cited rulings might be linked to the different contexts of these cases. Whereas the earlier cases involved judicial review mechanisms within the framework of administrative cooperation in taxation and judicial cooperation in criminal matters respectively, *I.R.O. and F.J.L.R.* addresses the judicial review of a purely domestic measure – a witness summons – issued within the scope of an investigation conducted by the EPPO, governed primarily by national procedural law.[70] Indeed, the ECJ highlighted in its ruling that the EU legislature intended to limit the extent to which judicial review of EPPO procedural acts was harmonised to what is strictly necessary to ensure a uniform level of effective judicial protection which

69 P Asp, *The Procedural Criminal Law Cooperation of the EU* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2016) 22.

70 According to Article 30(5) of the EPPO Regulation, '[t]he procedures and the modalities for taking the measures shall be governed by the applicable national law'.

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complies with EU primary law.[71] Therefore, the conclusion in *I.R.O. and F.J.L.R.* could be seen as the Court's effort to strike a balance between the uniform interpretation of autonomous concepts and the preservation of Member States' procedural autonomy. The second notable difference concerns the nature of the measure itself, i.e., the decision to summon witnesses, challenged by those under investigation. Unlike searches, seizures, or videoconference witness hearings, which unequivocally interfere with fundamental rights under EU law and are generally recognised as coercive measures necessitating *ex-ante* judicial authorisation in many Member States, a witness summons does not clearly infringe upon the procedural rights of the suspect. Therefore, evaluating the exact implications of such a summons on the suspects' procedural rights and on the fairness of the process[72] necessitates a comprehensive understanding of national procedural frameworks, thereby posing greater interpretative challenges for the ECJ. It is, therefore, reasonable to question whether the outcome of the ruling might have differed had it concerned a different procedural measure.

Although the Court did not decide whether a witness summons falls within Article 42(1), it clarified the consequences if national courts were to find that it does. In that case, that decision *must* be subject to judicial review under national law; however, the *form* of such judicial review is left to national systems, subject to two limits: remedies must ensure effective protection under Article 19(1) of the TEU and must not be less favourable than those available in comparable domestic cases (principle of equivalence). The Court clarified that Article 19(1) TEU does not necessarily require a direct legal remedy; rather, it is sufficient in some cases if national law allows the person concerned to obtain incidental judicial review of the act.[73] Nevertheless, if domestic law provides a direct appeal for analogous measures, the principle of equivalence requires that the same apply to EPPO acts.[74]

Therefore, the ECJ followed its settled case law on the interpretation of the right to an 'effective legal remedy' as elaborated *inter alia* in *État*

71 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, para 74.
72 The issuance of a witness summons may affect the principle of equality of arms and, consequently, the fairness of the proceedings as a whole.
73 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, paras 79–80.
74 ECJ, Case C-292/23 *I.R.O. and F.J.L.R.*, ECLI:EU:C:2025:255, paras 84–87, 92.

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luxembourgeois[75] and *Berlioz Investment Fund*.[76] According to the ECJ's case law, Article 47 of the Charter does not require a direct legal remedy, as long as effective legal protection is available indirectly. Nevertheless, it is important to recall that in *État luxembourgeois*, when assessing whether the absence of direct judicial review infringed upon Article 47 of the Charter, the ECJ placed significant emphasis on whether the contested decision imposed a legal obligation or risk of penalties on the individuals challenging it. Specifically, the Court distinguished between two scenarios concerning the right to an effective remedy: first, the person holding information who is *compelled* to provide it under threat of penalty, and therefore must have a direct legal remedy against the information order itself; and second, the taxpayer concerned by the investigation giving rise to the decision ordering that information be provided, whose right to an effective remedy may instead be indirectly exercised through subsequent decisions. This thus gives rise to the question of whether the ECJ's conclusion regarding the *direct form* of judicial review might differ in a scenario where the decision of the Spanish EDP is contested by witnesses rather than suspects, given that witnesses are legally obliged to appear and provide evidence.

From a broader perspective, it remains uncertain whether this ruling will foster a more uniform framework for judicial review of the EPPO's acts. While the Court has offered useful interpretative criteria for defining 'procedural acts', it has also left considerable discretion to national courts. Member States are not obliged to establish direct remedies against EPPO acts – even where domestic courts consider an act to fall within the scope of Article 42(1) – unless national law provides a comparable remedy for equivalent domestic measures, in line with the principle of equivalence. This aspect of the Court's reasoning may prompt adjustments in Member States where discrepancies exist between the level of protection afforded in domestic proceedings and in EPPO cases. The overall impact is nevertheless likely to remain limited. The principle of equivalence is relevant only in situations where Member States apply a lower standard of judicial review to EPPO acts than to domestic acts. Even in such cases, its effect would merely be to raise the level of protection for EPPO acts to the level provided

75 ECJ, Joined Cases C-245/19 and C-246/19 *État luxembourgeois v B and Others*, ECLI:EU:C:2020:795.

76 ECJ, Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373.

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for domestic cases – assuming such discrepancies exist – rather than to establish a truly uniform level of protection across the Member States.

Nonetheless, even under the Court's cautious approach, recognising the EPPO's 'procedural acts' as an autonomous concept of EU law may contribute to a baseline convergence concerning which acts are subject to judicial review. The question remains, however, whether this is sufficient to ensure effective protection of the fundamental rights of persons involved in EPPO proceedings. This concern is particularly pressing given the specific features of the EPPO's investigations, notably their cross-border dimension, which may lead to a fragmented and uneven treatment of individual rights across different jurisdictions. In the following, we shall now turn to the jurisprudence of national courts to examine whether such fragmentation and inconsistency truly exist or whether it is merely a scholarly concern.

4 Scrutinising the EPPO's procedural acts before national courts

When analysing the national jurisprudence on the legality of the EPPO's procedural acts, it is essential to distinguish between procedural acts based solely on national procedural law and those affected by EU law obligations – although the boundaries between national and EU law are not always clearly defined. The first case refers to procedural acts carried out at the decentralised level, grounded exclusively in national procedural law. As explained above, under Article 42(1) of the EPPO Regulation, procedural acts carried out by EDPs can be challenged by affected persons in the same way as those of national public prosecutors, following the relevant national laws. Article 42(2) further clarifies that Union courts are involved in reviewing EPPO procedural acts through preliminary rulings only when the validity of such acts directly depends on Union law. Consequently, national courts cannot refer questions to the ECJ regarding the validity of EPPO acts based solely on national procedural law.[77] In such instances, national courts should effectively be able to assess these acts as they do

77 Unless these acts are somehow affected by EU law – such as obligations set by the defence rights directives, the Charter, or the EPPO Regulation itself. However, as the case *EPPO v I.R.O. and F.J.L.R.* illustrates, the distinction between procedural acts governed by national law and those governed by EU law is not always clear. Even ostensibly domestic procedural acts, such as the issuing of a witness summons, should comply with obligations stemming from EU law.

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with purely domestic cases. This does not appear to raise any significant difficulties.

Conversely, the second set of cases comprises procedural acts – whether at the decentralised or central level – that are affected by requirements of EU law. Such acts may be domestic in nature but nonetheless shaped by EU law (for example, decisions refusing access to the case file), or they may have an inherently transnational scope (such as decisions on cross-border investigative measures or on forum choice). The risk of divergent and contradictory practice may occur in particular in case of decisions adopted at central level that produce legal effects in several Member States, such as the decision of the PCs pursuant to Article 10(3) of the EPPO Regulation to conclude the proceedings, to decide on cross-border investigative measures, or to bring charges in different Member States.

While referral to the ECJ under Article 42(2) can help to prevent divergent national approaches, the evolving jurisprudence of national courts reveals that, despite the growing number of EPPO cases, such referrals are still rare. As shown in previous Section 3, national courts have referred questions to the ECJ especially where the text of the EPPO Regulation is ambiguous or silent; in most cases, however, national courts treat most EPPO acts as grounded in national procedural law that they can review without ECJ guidance. According to the EPPO Legal Service, national courts have addressed EU law questions in relation to the competence of the EPPO (Articles 22 and 23), access to the case file (Article 45(2)), the scope of judicial review for investigative measures in the context of cross-border investigations (Article 31), and prosecution decisions (Article 36). In these cases, courts were required to interpret both national and Union law. However, even when Union law was clearly relevant, courts so far have rarely referred the matter to the ECJ.

In the following we examine national court decisions concerning two categories of procedural acts undertaken by the EPPO. First, we consider national decisions concerning the EPPO's procedural acts adopted at the decentralised level (such as access to case files within the EPPO's case management system, allocation of competence between the EPPO and national authorities). Second, we analyse national decisions regarding procedural acts adopted at the central level (such as decisions based on Article 36 of the EPPO Regulation). While the impact of some of these decisions is confined to a single Member State, others have cross-border implications. Our objective is to identify practices and tendencies manifest in national jurisprudence that could reveal substantive gaps in judicial protections.

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4.1 National decisions on procedural acts at the decentralised level

The Frankfurt court of first instance[78] was required to rule on a complaint lodged by a company seeking access to the procedural file in the context of EPPO cross-border investigations. The assisting EDP refused to grant access to the case file, relying on Article 45(2) of the EPPO Regulation, which stipulates that case files are maintained in accordance with the national law of the handling EDP. Access to the case file shall, therefore, be granted exclusively in accordance with the applicable national law. At the same time, the assisting EDP also rejected access to the files available in the assisting Member State, arguing that disclosure could jeopardise ongoing investigations and that there was no overriding interest justifying access. The court in Frankfurt upheld this reasoning and confirmed the assisting EDP's view. It held that access to the file – including in proceedings conducted under Article 31 of the EPPO Regulation – may only be authorised in accordance with the law of the handling EDP and must be decided by the latter. To date, the EPPO Legal Service is not aware of any contradictory jurisprudence regarding access to case files held by an assisting EDP. Accordingly, the interpretation adopted by the Frankfurt court appears to pose no difficulties in practice.

The courts in Palermo[79] and Trapani[80] had to decide independently how the term 'inextricably linked offence' under Articles 22(3) and 25(3)(b) of the EPPO Regulation should be interpreted for the purpose of establishing and exercising the EPPO's jurisdiction. Both cases ultimately concerned the question of whether, in the case of subsidy fraud, the EPPO can also prosecute the damage caused by the violation of criminal laws for the protection of the national budget, even if these were independent partial acts but covered by a common offence plan. The Palermo court held that the EPPO had jurisdiction, considering the partial acts to be inextricably linked. It went further, stating that even if the EPPO lacked jurisdiction, this would not entail procedural consequences (such as invalidity or nullity), since the allocation of competence relates only to the internal distribution of authority between law enforcement authorities and does not affect the legality of measures ordered by a competent court. By contrast, the Trapani court adopted a narrower interpretation, reasoning that inextricably linked

78 Amtsgericht Frankfurt of 08 February 2024, 931 Gs 1371/23.
79 Tribunale di Palermo of 26 June 2023, N. 73/2023 R. G. G. I. P.
80 Tribunale di Trapani of 29 February 2024, N. 30/2024 R. G. G. I. P.

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offences exist only where there is an identity of material facts, which was not the case here.

Regarding the division of competence between Member States and EPPO, the Court of Appeal of Liège[81] was asked to determine whether prosecutions initiated by the national prosecution service were invalid on the grounds that the case had not been presented in accordance with Article 24(2) of the EPPO Regulation, although the EPPO could have exercised its competence. The Court concluded that failure to provide the EPPO with the opportunity to evoke the case does not render the prosecution invalid, provided there is no violation of the rights of the defence or of the principles of a fair trial. Nevertheless, such a violation of Article 24(2) unlawfully restricts the EPPO's jurisdiction, thus raising questions as to the persuasiveness of the Belgian court's reasoning. To date, there are no other national decisions on breaches of the right of evocation that might shed light on how other Member States approach this issue.

In a decision of 27 June 2024,[82] the Court of Appeal of Paris clarified that the EPPO's material jurisdiction does not depend on whether the relevant offence – here, the criminal offence of *tromperie* (deception) provided for in the French Code of Criminal Law – was expressly included in France's notification under Article 117 of the EPPO Regulation, but solely on whether the offence falls within the material scope of the PIF Directive.[83] The court further held that the EPPO still has jurisdiction even though EU funds had not yet been disbursed, since the decisive factor was whether the contract at issue could have existed without the commitment of European funds enabling long-term financing. A comparable case before the Spanish *Audiencia Nacional* reached the same conclusion.[84] In its view, the EPPO's competence is to be assumed where the recipient disregards the purposes of a subsidy supported by EU funds, irrespective of whether the EU funds were actually disbursed or the national expenditure subsequently reimbursed by the Commission.

The above cursory look at national jurisprudence shows that national courts have a tendency to interpret concepts of EU law relevant for EPPO procedural acts without necessarily making a reference to the ECJ. Based

81 Cour d'Appel de Liège of 20 March 2025, 2023/CO/869.
82 Cour d'Appel de Paris of 27 June 2024, No. 2023/06345.
83 Directive (EU) 2017/1371 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.
84 Audicenca Nacional S. 3 of 25 March 2025, No. 191/2025.

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on the sample of national decisions examined here, divergences in national interpretations of EU law remain relatively rare. Nonetheless, it remains questionable whether national courts have adequately addressed all the EU law issues identified. Certain questions – such as the interpretation of the term 'inextricably linked offence' and the legal consequences of a violation of Article 24(2) of the EPPO Regulation, which results in restrictions on the EPPO's jurisdiction – raise matters of general significance for the functioning of the EPPO. In this light, one may argue that guidance from the ECJ would be highly desirable.

4.2 National decisions on procedural acts at the central level

The Italian Court of Cassation[85] clarified in a judgement of 3 April 2025 that the EPPO Regulation does not give a suspect the right to be heard before the PC. In the case at hand, defence lawyers argued, *inter alia*, that the defendant's rights had been infringed because they had not been heard before the PC. The Court of Cassation rejected this argument, holding that the internal consultation mechanism between the handling EDP and the PC provided for under the EPPO Regulation does not constitute an additional means of defence; rather, even in EPPO proceedings, the suspect is only entitled to the rights provided for under the applicable national criminal law. Whether the characterisation of the PC as a purely internal body that has no influence on the rights of the suspect is sufficiently convincing remains open to question. The Court of Cassation went further, stating that the PC, after examining the reports and the case file, merely expresses its opinion on the EDP's decision to request an indictment from the national judge. In this respect, the Court held that the term *decision*, as employed in the EPPO Regulation to describe the act of the PC, is misleading, since such an act constitutes no more than an internal step within the EPPO's administrative organisation. The case thus raises questions not only about the right to be heard under national procedural law, but also about the right to be heard before the PC at the central level, the institutional structure of the EPPO, and the nature of procedural acts subject to EU law requirements (such as the legal nature of the 'decision' adopted by the PC under Article 36 of the EPPO Regulation). Given that the matter touches upon

85 Corte Suprema di Cassazione of 03 April 2025, S. N.: 14835.

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fundamental aspects of the EPPO's institutional framework with potentially far-reaching implications – and considering that the defendant expressly requested it – one might have expected the Italian Court of Cassation to refer a preliminary question to the ECJ; it chose not to do so.[86]

In a judgement of 5 December 2023,[87] the Court of Milan addressed, among other things, the question of the effect of decisions by the PCs. This case concerned the decision of the PC in an EU-wide VAT carousel scenario to allocate the prosecution to an Italian EDP pursuant to Article 26(4) of the EPPO Regulation. Of course, this decision also had consequences concerning where to present the indictment (Article 36(3) EPPO Regulation) and which legal-review framework to apply (Article 42(1) EPPO Regulation). The defence argued that prosecution in Italy was precluded by national rules on extraterritorial jurisdiction, according to which the prosecution of crimes committed abroad by Italian nationals requires a request from the Ministry of Justice.[88] The court took the view that in the relationship between the national regulations on extraterritorial jurisdiction and those on EPPO competence, the EPPO Regulation prevails. The Court of Milan further clarified that the criteria for the territorial jurisdiction of the EPPO are autonomously defined by the EPPO Regulation and do not necessarily coincide with the strict criterion of the *locus commissi delicti* under national law. In particular, in cases of potentially competing jurisdiction among different Member States, Article 26(4) assigns territorial jurisdiction to the EPPO in the Member State where the focus of the criminal activity is located and/or where the main financial damage occurred, thereby ensuring the unified exercise of criminal proceedings before a 'prevailing jurisdiction'. Accordingly, the Court of Milan stated that the assignment of a case to an EDP of a Member State by the PC results in its competence and is therefore the basis for its jurisdiction.

86 The defence lawyers requested the Court of Cassation to refer the following question (among others) to the ECJ for a preliminary ruling: Whether the combined provisions of Articles 10, 35, 36 and 42 of the EPPO Regulation, read in the light of the fundamental rights guaranteed by European Union law and, in particular, in the light of the general principles of the right of defence and the right to be heard, Articles 41 and 47 of the Charter, and Article 6 ECHR, must be interpreted, in the present case, in the sense that, before taking a decision on the request for indictment and/or prosecution to be brought at national level by the competent EDP, the PC must grant the suspect the right to be heard and/or to submit observations.

87 Tribunale di Milano of 05 December 2023, Chamber of Judges for preliminary investigation, I.000199/2023.

88 Article 9 of the Italian Criminal Code.

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This judgement is particularly interesting as VAT fraud cases are by nature transnational and involve several legal orders. According to the EPPO Regulation, the EPPO only has jurisdiction for VAT fraud when the fraud scheme crosses borders – making such cases inherently transnational. The ECJ has ruled that a tax exemption under Article 138 of the VAT Directive[89] must be denied if the taxable person knew or should have known that they were participating in VAT evasion within a supply chain.[90] As a result, tax losses occur at each stage of the fraudulent chain, giving rise to criminal jurisdiction in multiple Member States.

Article 26(4) of the EPPO Regulation states that when several connected offences fall within the EPPO's competence, the case should be handled by an EDP from the Member State where the focus of the criminal activity lies. However, determining the 'focus' can be challenging when the damage is spread across many Member States and criminal networks operate in each, collectively enabling the VAT carousel. In practice, the EPPO uses different approaches to manage such complex cases. One approach is to concentrate the investigation in the hands of one handling EDP and transfer parts of the case subsequently. In such cases the handling EDP leads the investigation, and – either during or after the investigation – the PC may transfer parts of the case involving other Member States to their respective EDPs under Articles 26(4) and 36(3) of the EPPO Regulation. All evidence collected by the handling EDP is shared with the other EDPs following the transfer. Instead of concentrating VAT fraud investigations in the hands of one handling EDP, it is also possible for the EPPO to conduct parallel (mirror) investigations. This is the case if multiple EDPs in different Member States conduct coordinated investigations, each focusing on offences committed within their jurisdiction. Evidence is regularly exchanged in accordance with Article 31 of the EPPO Regulation.

In both scenarios, the transnational nature of the proceedings means suspects may face multiple sets of procedural rules within a single case. These rules can differ significantly in terms of legal safeguards and defence rights.

89 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

90 ECJ, Joined Cases C-439/04 and C-440/04 *Axel Kittel v Belgian State and Belgian State v Recolta Recycling SPRL*, ECLI:EU:C:2006:446; ECJ, Case C-285/09 *R*, ECLI:EU:C:2010:742; ECJ, Joined Cases C-131/13, C-163/13 and C-164/13 *Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone's BV v Staatssecretaris van Financiën*, ECLI:EU:C:2014:2455.

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Moreover, the choice of forum – and therefore the applicable sanctions, sentencing practices, enforcement, and rehabilitation options – can greatly influence the outcome of the case for the accused.[91]

The EPPO's forum choice may be reviewed by national courts under Article 42(1) of the EPPO Regulation before charges are brought, as per Article 36(1). However, doubts may arise regarding the ability of national courts to perform a proper oversight of the EPPO's decision on forum choice.[92] First, this raises the question of how national courts should interpret key concepts such as the 'focus of the criminal activity' or the 'general interest of justice'. Should these be understood through the lens of domestic law, or do they constitute autonomous concepts of EU law? If the latter, national courts would be required to refer preliminary questions to the ECJ to seek interpretative guidance. Nevertheless, even in such cases, the ECJ may provide only an interpretation of Article 26(4); it is ultimately for the national courts to apply this interpretation to the facts in question. Second and more importantly, a national court may simply establish whether the case can be prosecuted and tried in front of the courts of its state, but it would not be in a position to reassign a case to another Member State. Such a decision involves supranational considerations that transcend the competence of any single national authority. It implicates the interests and legal systems of multiple Member States.[93] This limitation raises the risk of a 'jurisdiction ping-pong', where responsibility for prosecution is passed back and forth between Member States.

One may argue, therefore, that there is a risk of national courts reviewing EPPO procedural acts through the lens of their own domestic legal frameworks. This, however, carries the risk of overlooking the unique characteristics of EPPO proceedings, namely that they are often transnational and involve several legal orders. The Milan judgment[94] illustrates this tendency. The court appeared to limit its review to issues of Italian criminal procedure (specifically the rules on extraterritorial jurisdiction) without adequately considering the broader transnational aspect of the case – namely, the choice of forum as Italy rather than other potentially competent

91 Mitsilegas (n 19) 256.
92 Mitsilegas (n 19) 262.
93 M Panzavolta, 'Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?' in L Bachmaier Winter (ed), *The European Public Prosecutor's Office. The Challenges Ahead* (Springer 2018) 59, 80.
94 Tribunale di Milano of 05 February 2023, I.000199/2023.

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Member States.[95] In this specific case it is difficult to determine, however, whether the court's limited approach was due to a domestically oriented perspective or to the fact that the defendant's challenge was confined to jurisdictional rules under Italian law and did not directly contest Italy's designation as forum. Indeed, the defence did not argue that the suspects should have been prosecuted elsewhere; rather, it sought the nullity of prosecution on the basis that the facts had occurred abroad and that, under Italian law, extraterritorial jurisdiction may be exercised only upon a prior request by the Ministry of Justice – a requirement not fulfilled in this case. Still, even without expressly addressing the forum choice, the court made important observations concerning judicial review of such decisions. It held that national judges cannot undertake an *ex-post* review of how the criteria laid down in the EPPO Regulation were applied to allocate jurisdiction among several Member States. The court further clarified that these criteria, set out in Articles 22 ff of the EPPO Regulation, govern the internal allocation of jurisdiction between public prosecutor's offices (i.e., between different EDPs' offices) and are to be resolved, where conflicts arise, by the PC. Such decisions of the PC, according to the Milan court, cannot be reviewed by national courts – just as the decision of the Prosecutor General of the Court of Cassation resolving conflicts between the EPPO and national prosecutors, or resolving conflicts of competence at national level, is not subject to national judicial review.

The court of Milan thus treated the PC's forum choice as a decision merely allocating competence among different prosecutor's offices – but are these decisions indeed comparable? Unlike a decision resolving a conflict of competence between, for example, the prosecutor's office in Rome and that in Milan, the decision of the PC, as discussed above, not only allocates competence to an EDP's office but also determines the applicable law – including procedural safeguards, applicable sanctions, sentencing practices, enforcement, and rehabilitation options – and thus can profoundly affect the outcome of the case for the accused. The consequences for the defendant are therefore far more severe. While Article 42(1) of the EPPO Regulation leaves judicial review to national courts in accordance with national law, such a law must nonetheless provide effective remedies against EPPO procedural acts that produce legal effects vis-à-vis third parties, in line with Article 19(1) TEU. One might argue, therefore, that Italian law creates a gap

95 As this was an EU-wide VAT carousel case with transnational dimensions.

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in judicial protection, contrary to Article 42(1) of the EPPO Regulation as well as Article 47 of the Charter and Article 19(1) TEU, insofar as it excludes judicial review of forum choice, despite the significant legal effects on third parties.[96] This interpretation is reinforced by Recital 87(2) of the EPPO Regulation, which expressly states that

> '[p]rocedural acts that relate to the choice of the Member State whose courts will be competent to hear the prosecution, which is to be determined on the basis of the criteria laid down in this Regulation, are intended to produce legal effects vis-à-vis third parties and should therefore be subject to judicial review by national courts, at the latest at the trial stage'.

In the end, this decision[97] was overturned by the Court of Appeal of Milan.[98] The appellate court held that the EPPO Regulation does confer on PC the power to determine the Member State in which a case should be prosecuted when multiple Member States have jurisdiction, but this choice is not binding on national courts, which may review it *ex officio*. Therefore, in line with our analysis above, the Italian courts may review whether they have jurisdiction over the specific case. On the merits, the court found that the offences had been committed on Italian territory rather than abroad according to the applicable national rules on jurisdiction. It therefore concluded that the Italian courts did indeed have jurisdiction, and that the Ministry's request – relevant only to situations of extraterritorial jurisdiction – was unnecessary. The decision of the Court of Appeal is more compelling because, unlike the first-instance ruling, it distinguishes the EPPO's 'competence' from the courts' 'jurisdiction' and emphasises that the EPPO cannot determine the jurisdiction of national courts without the possibility of judicial review. However, similarly to the first-instance court, the judicial review exercised by the Court of Appeal is limited to verifying whether Italian courts have jurisdiction. Nothing is said about the choice of forum and the application of the criteria under Article 26(4) of the EPPO

96 Amedeo Barletta, 'Questioni di competenza e giurisdizione nel sistema della Procura europea, a partire da una recente sentenza del GUP di Milano' (2024) 3 *Giurisprudenza Penale Web*, available at https://www.giurisprudenzapenale.com/2024/03/14/questioni-di-competenza-e-giurisdizione-nel-sistema-della-procura-europea-a-partire-da-una-recente-sentenza-del-gup-di-milano/.

97 Tribunale di Milano of 05 December 2023, Chamber of Judges for preliminary investigation, I.000199/2023.

98 The decision of the Court of Appeal of Milan is not publicly available at present.

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Regulation, namely whether one Member State is better placed than another to prosecute the case. It remains unclear whether this omission is due to the contextual circumstances of the challenge or due to the domestically oriented perspective of the court.

Finally, it is noteworthy that the Court of Milan characterised the PC's act – made in response to a proposal by the EDP – as a *decision* allocating jurisdiction to a specific Member State, rather than as a mere *opinion*, unlike the Italian Court of Cassation, which held that the PC merely issues an opinion on the EDP's decision. Thus, two national courts within the same Member State appear to diverge in their interpretation of Article 36 of the EPPO Regulation, particularly with regard to the legal nature of a 'decision' by the PC adopted under that provision.

Beyond the review of forum choice, another important issue arises in cases where proceedings are reallocated to a different EDP: the review of investigative material gathered in other Member States. Can the national courts of the Member State of the 'new' EDP in charge effectively assess the investigative material collected by the first EDP in charge in accordance with the law of their Member State? To date, no national decision has addressed this question.

5 Conclusions: substantive gaps in judicial protection by national courts?

The hybrid structure of judicial review concerning the legality of EPPO investigations and prosecutions requires both the CJEU and national courts to clarify their respective roles and competencies. Only through such clarification can they jointly ensure effective judicial protection for individuals affected by EPPO proceedings. This hybrid system of judicial protection rests on two key assumptions: first, it assumes that national courts are fully aware of the unique nature of EPPO investigations and, when reviewing the legality of the EPPO's procedural acts, take into account the often cross-border dimension of these cases. Second, it presumes that national courts, when interpreting both national and EU law in the context of EPPO procedural acts, will make use of the preliminary reference procedure to seek guidance from the ECJ on the interpretation of EU law concepts. However, as demonstrated in Sections 3 and 4, these assumptions are not yet fully realised in practice.

To support a clearer understanding of the respective roles of European and national courts, the CJEU has repeatedly reaffirmed the special regime

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of judicial protection established by the EPPO Regulation. This regime limits the CJEU's jurisdiction to reviewing the legality of EPPO investigations and prosecutions. In *G.K. and Others*, the ECJ went to considerable lengths to fill the legislative gap left by Article 31 of the EPPO Regulation. Following criticism of this approach, the judgment in *I.R.O. and F.J.L.R.* can be seen as the Court's first attempt to strike a balance between the uniform interpretation of autonomous EU law concepts and the preservation of Member States' procedural autonomy.

National courts, by contrast, tend to interpret their procedural autonomy broadly. To date, they have made limited use of the preliminary reference procedure. Often, they treat EPPO procedural acts as primarily grounded in national law or consider the legal questions – despite involving EU law concepts – as sufficiently clear under the *acte clair* doctrine. As a result, they feel confident deciding these matters without referring them to the ECJ. It should also be taken into consideration that the constraints of the daily work of national courts and the duration of proceedings do not favour readiness to present a preliminary question to the ECJ pursuant to Article 42(2) of the EPPO Regulation. The examples in Section 4 reveal a few clearly contradictory national decisions on identical legal questions. While this limited jurisprudence does not yet provide conclusive evidence of fragmented or uneven protection of individual rights across jurisdictions, it equally fails to confirm that the hybrid structure of judicial protection under Article 42 of the EPPO Regulation functions effectively. In fact, several examples show that national courts are deciding on critical aspects of the EPPO's institutional framework – such as the right to be heard before the PC – that have far-reaching implications. These matters require uniform treatment across all participating Member States to ensure consistent protection of individual rights.

The absence of preliminary references presents, in itself, significant concerns. The EU's 'complete system of judicial review' relies on the preliminary ruling procedure, whereby national courts refer questions on the interpretation of EU law to the ECJ. This mechanism is designed to ensure the uniform interpretation and application of EU law across all Member States. Such uniformity is particularly crucial for the EPPO, which operates as a single office but functions within a highly intricate framework shaped by national legal systems. Yet national courts often refrain from making preliminary references even in cases that clearly implicate EU law, assuming that the issues are sufficiently clear. However, this assumption is open to

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challenge. Is the concept of 'inextricably linked offences' unambiguous? The literature, as well as ongoing academic and political debates, strongly suggests otherwise. Likewise, can national courts unilaterally determine whether suspects have the right to be heard before the PC, given that this question concerns procedures at the central rather than the decentralised level? One could argue that ECJ clarification on such matters would be of considerable value. The most recent preliminary reference from the Court of Appeal in Brussels provides an excellent illustration of a case that merits a ruling by the ECJ.[99] It concerns the interpretation of Article 24(2) of the EPPO Regulation, and in particular the obligation imposed on national authorities that have initiated an investigation into a criminal offence falling within the EPPO's competence to inform the EPPO. Central to the reference is the question of how long such an investigation must be considered 'ongoing', thereby requiring the competent authority to notify the EPPO in accordance with that provision, so that the latter may decide whether to exercise its right of evocation. In essence, the Court is asked to clarify the meaning of the phrase 'at any time after the initiation of an investigation'. This is a crucial issue that cannot be decided by a national court; it requires interpretation by the ECJ, as failure to comply with the obligation set out in Article 24(2) may unlawfully restrict the EPPO's competence. It is noteworthy that, in a similar case, the Court of Appeal of Liège decided the matter without referring a preliminary question to the ECJ.[100] This contrast demonstrates how national courts – even within the same Member State – may differ significantly in their assessment of when interpretative guidance from the ECJ is required.

Furthermore, the lack of preliminary references to the ECJ is particularly problematic where the national court reviews EPPO decisions with a transnational dimension (for instance, forum choice), as national courts might tend to approach the case through the lens of domestic law only and ignore aspects of foreign law.

In sum, there is currently insufficient evidence either that national courts are incapable of reviewing the EPPO's procedural acts – thus necessitating revision of Article 42 – or that they interpret EU law adequately. More time and jurisprudence will likely be needed before the real problems fully materialise. In the meantime, however, a case can be made for strengthening the preliminary reference procedure, including by considering whether

99 ECJ, Case C-407/25, *Tersten*.

100 Cour d'Appel de Liège of 20 March 2025, 2023/CO/869.

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the EPPO itself should be granted the capacity to submit preliminary references. This would enable more consistent guidance from the ECJ. Yet this raises a further question: is ECJ guidance through preliminary rulings sufficient, or is more robust harmonisation within the EPPO Regulation (including the concept of EPPO 'procedural acts') required? At present, this question cannot be answered. More time is needed to observe how courts and legislators respond to recent ECJ judgments, and whether such guidance may contribute to the development of a more uniform framework for EPPO criminal proceedings.

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