Acquisition and use of evidence in EPPO proceedings

# Cross-border acquisition of evidence

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The first preliminary ruling by the European Court of Justice on the interpretation of the EPPO Regulation concerned provisions of Article 31 on the question of judicial authorisation of cross-border investigation measures. The ECJ judgment may largely be welcomed as it may improve the efficiency of the procedures for undertaking cross-border investigations within the EPPO territory. Nevertheless, the Court's conclusions are difficult to reconcile with the intentions of the legislator as expressed in the wording of the provisions of Article 31, and the judgment leaves certain issues unresolved and raises new questions. The EU legislator may thus be called upon to reconsider and revise the wording of Article 31. This contribution makes some specific suggestions in this respect.

## *1 Introduction*

The negotiations on Article 31 of the EPPO Regulation[1] had been particularly controversial in the Council and the resulting text of Article 31 was not very convincing.[2] The major question heavily debated at the time was whether a required judicial authorisation of an investigation measure in a cross-border setting should be obtained from a court/judge in the Member State where the investigation is being conducted or in the Member State where the requested investigation measure is to be undertaken. While the EPPO has been conceived as a 'single office' (Article 8(1) EPPO Regulation), it nevertheless operates on the basis of national criminal procedural law (cf. Article 5(3) EPPO Regulation) and thus not in a 'single legal area'[3]. The rules on cross-border investigation measures by the EPPO thus

1 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

2 For more details see: H-H Herrnfeld, 'Article 31' in H-H Herrnfeld, D Brodowski and C Burchard (eds), *European Public Prosecutor's Office: Article-by-Article Commentary* (Nomos 2021) mn 4 ff., 38 ff.

3 Herrnfeld (n 2) mn 4.

need to clarify which national legal regime applies and in which Member State judicial authorisation is to be obtained. After lengthy negotiations in the Council Working Group COPEN a compromise solution for the provision of Article 31 was found, which, however, soon created difficulties for the EPPO in practice.[4] In the course of a preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the Grand Chamber of the European Court of Justice (ECJ), in December 2023, provided an interpretation of certain provisions of Article 31.[5] And while it is questionable whether the interpretation now given by the ECJ is truly reconcilable with the wording and contextual relationship of its provisions, the judgment by the ECJ may – in substance – be largely welcomed.[6] Nevertheless, the judgment leaves certain questions unanswered, which the ECJ may have to answer in future requests for preliminary rulings unless the Council decides to amend the provisions of Article 31 of the EPPO Regulation in order to better clarify its intentions and provide answers to the unresolved questions.

## *2 Current wording of Article 31 of the EPPO Regulation and its legislative history*

### 2.1 Adoption, assignment and enforcement of cross-border measures

Article 31 contains procedural rules for investigations which require an investigation measure or other measure, as referred to in Article 30 of the EPPO Regulation, to be undertaken in a different Member State than the Member State whose European Delegated Prosecutor (EDP) is undertaking the investigation ('handling EDP' as opposed to the 'assisting EDP' who is requested to undertake the measure in that other Member State).[7] The title of Article 31 as well as its substance are a recognition of the fact that the

4 See the first version of the Decision 006/2022 of the College of the European Public Prosecutor's Office of 26 January 2022 Adopting Guidelines of the College of the EPPO on the Application of Article 31 of Regulation (EU) 2017/1939, published at: https://epp o-lex.eu/cdn_01/.

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

6 For an analysis see: H-H Herrnfeld, 'Yes Indeed, Efficiency Prevails. A Commentary on the Remarkable Judgment of the European Court of Justice in Case C-281/22 G.K. and Others' (2023) *eucrim* 370.

7 Cf. the definition in Art 2 No 5 and 6 EPPO Regulation.

EPPO still needs to observe the borders between Member States. Thus, an investigation undertaken by an EDP in one of the participating Member States may require cross-border investigation (or other)[8] measures to be undertaken in one or more of the other participating Member States. In accordance with Article 13(1) of the EPPO Regulation, the EDPs can only act on behalf of the EPPO 'in their respective Member State', and thus it is only in 'their' Member State where EDPs can conduct an investigation and undertake investigation measures themselves (cf. Article 28(1) EPPO Regulation). Where the handling EDP considers that an investigation measure needs to be taken in another (participating) Member State, he/she will have to revert to Article 31 and 'assign' the ordered measure to an EDP of the Member State where the investigation measure is to take place – see Article 31(1). In accordance with Article 31(2), the handling EDP may assign any measures which are available to him/her in accordance with Article 30 of the EPPO Regulation. The justification and adoption of such measures shall be governed by the law of the handling EDP's Member State.

Following the assignment of an investigation measure by the handling EDP it is the responsibility of the assisting EDP to undertake the assigned measure or instruct the competent national authorities of that Member State to do so (cf. Article 31(4)), and the enforcement of the measure shall then take place in accordance with the law of that Member State (cf. Article 32 EPPO Regulation). The assisting EDP has no need or competence to decide on the recognition of the assigned measure. In principle, he/she is expected to undertake (enforce) the measure (on his/her own) as assigned by the handling EDP or instruct the competent national authority to do so (cf. Article 31(4), Article 32). The assisting EDP cannot invoke any grounds for non-recognition such as those set out in Article 11 of the EIO Directive[9] and merely may, if he/she has certain concerns about the possibility to undertake the measure, 'consult' the handling EDP 'in order to resolve the matter bilaterally' (cf. Article 31(5)). Where they cannot agree, the competent Permanent Chamber shall decide (cf. Article 31(7) and (8)).

8 Such as e.g. the freezing of proceeds of crime (see Art 30(1)(d) EPPO Regulation).

9 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1.

## 2.2 Measures which require prior judicial authorisation

### 2.2.1 In any case, there shall be only a 'single judicial authorisation'

The original Commission proposal for the EPPO Regulation[10] provided in its Article 26 for a list of particularly intrusive investigation measures in respect of which the Member States were to ensure that these measures 'are subject to authorisation by the competent judicial authority of the Member State where they are to be carried out' (Article 26(4) of the original Commission proposal). During the negotiations a majority of Member States did not agree to establish any such harmonising obligation requiring prior judicial authorisation of certain investigation measures. Consequently, Article 30(5) in conjunction with Article 5(3) of the EPPO Regulation now merely refers to 'applicable national law'.

In the case of cross-borders measures this, of course, required specification in which Member State the judicial authorisation should be obtained, and thus which Member State's law determines whether a judicial authorisation is required as well as the applicable procedures. Such a prior judicial authorisation may take the form of a decision by a judge/court to express prior approval of the EDP's decision to order a certain measure; in other cases, depending on Member States' legislation, a judicial authorisation may mean a decision by a judge/court to order an investigation measure as requested by the EPPO. During the negotiations on the EPPO Regulation, Member States did, however, agree, that 'in any case there should be only one authorisation' (cf. Recital 72 EPPO Regulation). In other words: there should be no need for the handling EDP to first obtain a judicial authorisation in his/her own Member States to be followed by an additional judicial authorisation of the recognition/enforcement of the measures to be obtained from a judge/court in the Member States where the measure is to be carried out. Article 31(3) was intended to clarify in which of the Member States the 'single judicial authorisation' is to be obtained.

### 2.2.2 Judicial authorisation required in both Member States or only in the Member State of the assisting EDP

Where, in accordance with applicable national law, a judicial authorisation is required under the law of the assisting EDP's Member State, the solution

10 European Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office', COM(2013) 534 final.

found in Article 31(3) was to be quite different from a concept of mutual recognition: In such a case, the handling EDP is still empowered to 'adopt' the measure in accordance with the law of his/her Member State and assign it to the assisting EDP (paragraph 2). It was then, however, supposed to be the task of the assisting EDP to obtain the necessary judicial authorisation in accordance with the law of that Member State (paragraph 3, subparagraph 1). In line with the concept of a 'single judicial authorisation', the same was to apply in cases where a judicial authorisation is required under the law of both Member States. Here, too, judicial authorisation should thus be obtained only by the assisting EDP in his/her Member State. In both situations, if the judge/court – for whatever reason – refuses to give judicial authorisation, the handling EDP must withdraw the assigned measure (paragraph 3 subparagraph 2). The judge/court in the assisting EDP's Member State thus was to have full responsibility to decide on the authorisation on the basis of the national law of the assisting EDP's Member State, and that decision was not in any way supposed to be limited by a list of possible 'grounds for non-recognition' as in Article 11 of the EIO Directive.

### 2.2.3 Judicial authorisation required only in the Member State of the handling EDP

Almost as an afterthought during the negotiations, delegations considered it necessary to also include a provision addressing the possibility that a judicial authorisation for ordering a specific measure is only required under the law of the handling EDP's Member State. The third subparagraph of Article 31(3) provides that in such a case, the judicial authorisation is to be obtained by the handling EDP before assigning the investigation measure to the assisting EDP. As in the situation where no judicial authorisation is required under the law of either Member State (see section 2.1 above), the decision to adopt the measure is taken in accordance with the law of the handling EDP's Member State and the assisting EDP is then expected to undertake (enforce) the assigned measures without any need for a formal act of recognition.

## 3 Interpretation of Article 31 of the EPPO Regulation following the judgment of the ECJ in Case C-281/22 G.K. and others (Parquet européen)

### 3.1 The interpretation of Article 31 of the EPPO Regulation by the ECJ

In a remarkable judgment of 21 December 2023, the ECJ, however, gave a different meaning to the provision of the first subparagraph of Article 31(3).

The case essentially concerned the question whether a judicial authorisation for an investigation measure must, where so required by national law, be obtained by the handling EDP from a judge/court in his/her own Member State prior to 'assigning' the measure to the assisting EDP; or whether this authorisation is to be obtained by the assisting EDP from a judge/court in his/her Member State. The first question posed in this case by the Higher Regional Court of Vienna was whether this provision must be interpreted as meaning that the court in the assisting EDP's Member State must examine 'all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality'. The second question by the referring court was whether the examination to be undertaken by the court in the assisting EDP's Member State should take into account whether or not the admissibility of the measure had already been examined by a court in the Member State of the handling EDP. And, as a third question, the Higher Regional Court of Vienna asked: '[I]n the event that the first question is answered in the negative and/or the second question in the affirmative, to what extent must a judicial review take place in the Member State of the assisting European Delegated Prosecutor'.

The ECJ ruled that the term 'judicial authorisation' used in paragraph 3 is to be understood as referring only to 'matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure'.[11] According to the ECJ, any 'prior judicial review' required under the law of the handling EDP's Member State has to be obtained by the handling EDP from a judge/court in his/her Member State in the course of adopting the measure in accordance with Article 31(2).[12] The Court put a strong emphasis on the objectives of the EPPO Regulation, taking into account its Recitals 12, 14, 20, and 60 and drew

11 ECJ, Case C-281/22 *G.K. and Others* (*Parquet européen*), ECLI:EU:C:2023:1018, para 78.

12 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 73.

the conclusion that the legislator had 'intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition'.[13] Consequently, the ECJ excluded the possibility of interpreting Article 31(3) in such a way as to allow the judge/court in the assisting EDP's Member State to examine 'elements relating to the justification and adoption of the assigned investigation measure concerned' as this 'would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation'.[14]

While this interpretation by the ECJ may be difficult to reconcile with the wording of Article 31 and its legislative history,[15] it may, indeed, help the efficiency of the procedures for cross-border investigations within the EPPO territory. Be that as it may, it needs to be taken into account now in the interpretation and application of Article 31.

In this judgment, the ECJ went a bit further, however, by answering a question that had not been posed by the Vienna Higher Regional Court: the ECJ not only ruled that any necessary 'prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure' is within the competence of the authorities of the handling EDP's Member State. It also pointed out that 'matters concerning the justification and adoption of that measure […] must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter'.[16] And the ECJ clarified that it considers investigations measures 'such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Ar-

13 ECJ, Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:1018, para 67.

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

15 For a detailed analysis see Herrnfeld (n 6).

16 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 78.

ticle 30(1)(a) and (d) of Regulation 2017/1939', qualifying as such measures seriously interfering with fundamental rights.[17]

### 3.2 Questions that are currently unresolved

The interpretation of Article 31(3) by the ECJ does raise several questions which are currently unresolved and may require attention by the Union legislator.

#### 3.2.1 What does the ECJ mean by 'matters concerning the enforcement'?

As mentioned above, the judgment draws a parallel to the EU instruments on mutual recognition. In respect of the EIO Directive, the ECJ specifically recalled its judgment in Case C-724/19, pointing out that the EIO Directive is based 'on a division of competences between the issuing judicial authority and the executing judicial authority, in the context of which it is for the issuing judicial authority to review compliance with the substantive conditions necessary for the issuing of an EIO, and that assessment cannot, in accordance with the principle of mutual recognition, subsequently be reviewed by the executing judicial authority'.[18]

The EIO Directive, however, does provide for numerous 'grounds for non-recognition' (Article 11 EIO Directive). Thus, the question may now arise whether these or similar grounds are to be taken into account when the judge/court in the assisting EDP's Member State is requested to give judicial authorisation in respect of 'matters concerning the enforcement'. The ECJ's judgment in Case C-281/22 does not lean in this direction, not even in respect of the limited list of conditions under which the assisting EDP, in accordance with Article 31(5), can raise concerns about the appropriateness of enforcing the assigned measure. And Advocate General *Ćapeta*, in her opinion delivered on 22 June 2023 in case C-281/22, was quite clear on this question: in her view, there is no room for (non) recognition, as '[T]he EPPO is a single body, .... the assigned measures indeed need not be

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

18 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 63, referring to ECJ, Case C-724/19 *HP (Spetsializirana prokuratura),* ECLI:EU:C:2021:1020, para 53.

recognized but only implemented.'[19] But would that be a proper solution? If that had been the intention of the Council when adopting the EPPO Regulation, why would the Council have refrained from clarifying this in the text of the Regulation? If such 'grounds for non-recognition' cannot be invoked by the judge/court in the assisting EDP's Member State, on what grounds can the judge/court in the assisting EDP's Member State then decide to refuse authorisation as specifically provided for in the second subparagraph of Article 31(3)? Only concerning the 'mode of execution', as has been suggested by the Commission in the present case?[20]

### 3.2.2 When is a judicial authorisation considered as being 'required'?

Considering the ECJ's interpretation of the first subparagraph of Art. 31(3), another question may be under which circumstances this provision is to apply. If the 'judicial authorisation' prescribed therein may only relate to 'matters concerning the enforcement of the measure', does that mean that this subparagraph also only applies if a judicial authorisation relating to matters concerning the enforcement is required under the law of the assisting EDP's Member State? And what kind of procedures under national law could that apply to? Or is the term 'judicial authorisation' used in the first part of the sentence to be interpreted differently than in the second part of the sentence of Art. 31(3), meaning that judicial authorisation by a judge/court in the assisting EDP's Member State, limited to 'matters of enforcement' is to be obtained whenever the criminal procedure law of that Member State, applicable in domestic cases, requires a full judicial authorisation also on the grounds and justification of the measure?

### 3.2.3 What is the purpose of the third subparagraph of Article 31(3)?

The third subparagraph of Article 31(3) applies if a judicial authorisation is required only in the Member State of the handling EDP. What could be the purpose of this provision if, according to the interpretation given by

19 Opinion of AG Ćapeta, in Case C-281/22 *G.K. and Others (Parquet européen),* ECLI:EU:C:2023:510, para 101; for an analysis see: H-H Herrnfeld, 'Efficiency contra legem? Remarks on the Advocate General's Opinion Delivered on 22 June 2023 in Case C-281/22 G.K. and Others (Parquet européen)' (2023) *eucrim* 229.

20 See the reflection of the Commission's views in Opinion of AG Ćapeta in Case C-281/22 G.K. and Others *(Parquet européen),* ECLI:EU:C:2023:510, para 53.

the ECJ, judicial authorisation as referred to in the first subparagraph of Article 31(3) can only relate to 'matters concerning the enforcement'? The suggestion, advocated during the oral hearing on 27 February 2023, according to which the authorisation given by the judge/court of the handling EDP's Member State in such situations shall extend to both the 'justification and the execution of the measure',[21] is hardly convincing. Why should the judge/court in the handling EDP's Member State additionally give judicial authorisation relating to 'matters concerning the enforcement' in accordance with the third subparagraph of Article 31(3), in respect of which that same judge/court had already – in line with the interpretation given by the ECJ – exercised 'prior judicial review' in accordance with Article 31(2)? And on what grounds could the judge/court express (additional) judicial authorisation of the enforcement of the measure? On the basis of the law of the handling EDP's Member State? Or the law of the assisting EDP's Member State – in spite of the fact that that law does not require judicial authorisation of the measure?

#### 3.2.4 What are the consequences of the ECJ's judgment in respect of the need to exercise prior judicial review?

The conclusion of the ECJ concerning an obligation on the part of the Member States to provide for a prior judicial review of the conditions relating to the justification and adoption of an investigation measure[22] may have further consequences for the respective legislation of the Member States. The question arises here as to whether it would be appropriate for the EU legislator now – in light of the conclusions drawn by the ECJ in this case – to leave the text of the Regulation as is, thus triggering possible additional preliminary ruling requests to the ECJ asking which other types of investigation measures, aside from those specifically referred to by the ECJ in case C-281/22, require prior judicial authorisation. In particular, this may become an issue in respect of cross-border investigations by the EPPO if judicial authorisation of the assigned measure by a judge/court in the assisting EDP's Member State would be required in national investigations but where the law of the handling EDP's Member State does not require

21 See the views reflected in Opinion of AG Ćapeta in Case C-281/22 G.K. and Others *(Parquet européen)*, ECLI:EU:C:2023:510, para 45.

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

any prior judicial authorisation – such as could be the case e.g. in respect of searches in office buildings. It may also become a matter of concern if Article 31(3) were to be interpreted as not allowing the judge/court in the assisting EDP's Member State to refuse authorisation on grounds other than those concerning 'the mode of execution' as was proposed by the Commission in the present case (see 3.2.1 above).[23]

### *4 Proposals for a possible revision of Article 31 of the EPPO Regulation*

These questions arise because the ECJ gave an interpretation of Article 31 which does not follow the intention of the legislator when drafting these provisions. The Union legislator should thus consider reviewing and amending the provisions of Article 31, taking into account the considerations of the ECJ – and the EPPO – to ensure efficiency of the mechanism of cross-border investigations by clarifying that, indeed, any necessary (prior) judicial authorisation of an investigation shall be obtained by the handling EDP from a judge/court in his/her Member State in the course of adopting the measure and before assigning it to the assisting EDP.

This could easily be done by slightly amending the second paragraph of Article 31 to read as follows (new text in *italics*):

> (2) The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures, *including, if so required, a prior judicial authorisation*, shall be governed by the law of the Member State of the handling European Delegated Prosecutor. Where the handling European Delegated Prosecutor […].

Primarily, however, paragraph 3 of Article 31 should be amended to bring the text in line with the conclusions of the ECJ. If the legislator shares the view of the ECJ that the 'review conducted in the Member State of the assisting European Delegated Prosecutor, where an assigned investigation measure requires judicial authorisation in accordance with the law of that

23 Cf. on this, also with further questions: N Franssen, 'The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?' (European Law Blog, 15 January 2024), at https://www.europeanlawblog.eu/pub/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/release/1.

Member State, may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure',[24] it should be considered to amend the wording of Article 31 paragraph 3 accordingly. The legislator could clarify that such (additional) judicial review in the assisting EDP's Member State may concern (only) the enforcement of the measure, independent on whether or not a judicial authorisation has been given in the Member State of the handling EDP.

It would seem appropriate, however, to also clarify the extent of the review which the judge/court in the assisting EDP's Member State may exercise before pronouncing an authorisation of the enforcement of the measure. In my view, it would be appropriate to specifically allow the judge/court in the assisting EDP's Member State to refuse such authorisation on the same grounds on which the assisting EDP can voice concerns against the assigned measure in accordance with the EPPO-internal procedure set out in Article 31(5), (7) and (8).

Furthermore, in a revision of Article 31(3), the content of its third subparagraph should be deleted as there is no reason why a judge/court in the handling EDP's Member State should – under the circumstances described in current subparagraph 3 – express additional judicial authorisation of the enforcement of the measure (cf. 3.2.3 above).

The text of Article 31(3) thus could be amended as follows (new text in *italics*):

> [1] If *prior* judicial authorisation for ~~the~~ *such* measure*s* is required under the law of the Member State of the assisting European Delegated Prosecutor, ~~the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.~~
> ~~[2] If judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment.~~
> ~~[3] However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the~~ *any necessary judicial* authorization *of the enforcement of the measure* shall be obtained by the latter European Delegated Prosecutor ~~and submitted together with the assignment~~ *in accordance with the law of that Member State. Such a judicial authorisation*

24 ECJ, Case C-281/22 *G.K. and Others (Parquet européen)*, ECLI:EU:C:2023:1018, para 78.

> *of the enforcement may only be refused on any of the grounds set out in paragraph 5.*

Obviously, such amendments would no longer be in line with the principle of a 'single judicial authorisation', which had been an important issue for the delegations in the negotiation process and which are reflected in Recital 72 EPPO Regulation. This is, however, already a consequence of the interpretation given by the ECJ to the present text of Article 31.

Finally, the Union legislator could consider addressing as well the findings of the ECJ concerning the obligation of Member States to ensure that matters concerning the justification and adoption of an investigation measure 'must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter'[25] (cf. section 3.2.4 above). Presumably this statement of the Court should, however, not only apply to the prior judicial review to be exercised in cross-border investigations in accordance with Art. 31(2) but should also apply to purely domestic investigation measures.

Thus, it could be considered to revise Article 30(5) of the EPPO Regulation as follows (new text in *italics*):

> The European Delegated Prosecutors may only order *or request* the measures referred to in paragraphs 1 and 4 where there are reasonable grounds to believe that the specific measure in question might provide information or evidence useful to the investigation, and where there is no less intrusive measure available which could achieve the same objective. The procedures and the modalities for *ordering, requesting and* taking the measures shall be governed by the applicable national law. *Measures referred to in paragraphs 1 and 4 must be subject to prior judicial authorisation in the event of serious interference with the rights of the person concerned enshrined in the Charter.*

The main point in question here is the additional last sentence, which would merely be a copy-and-paste exercise based on the findings of the ECJ in case C-281/22. Alternatively – and, I believe, preferably – the Council should reconsider its opposition to the original Commission proposal in respect of a list of investigation (and other) measures which do require a prior judicial authorisation.

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

## 5 Conclusion

As explained above, the interpretation of Article 31 of the EPPO Regulation given by the ECJ in Case C-281/22 may serve to enhance the efficiency of the applicable rules on cross-border investigations. The judgment, however, leaves several questions unresolved.

In order to bring the text of Article 31 more in line with the interpretation given to its current text by the ECJ, the Union legislator should – if the legislator agrees with the underlying considerations of the ECJ – amend the text of Article 31 accordingly. Furthermore, it could serve the interest of justice and the protection of fundamental rights if the Union legislator could, indeed, specify the obligations of the Member States to ensure proper procedures for a necessary prior judicial authorisation of particularly intrusive investigations measures potentially involving a serious interference with the rights of the person concerned guaranteed by the Charter.

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