

Case C-281/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 April 2022

Referring court:

Oberlandesgericht Wien (Austria)

Date of the decision to refer:

8 April 2022

Accused and appellant:

G. K.

B. O. D. GmbH

S. L.

Subject matter of the main proceedings

Appeals against the court approvals of the warrants of the Austrian European Delegated Prosecutor to search the residential and business premises of the appellant and to seize items

Subject matter and legal basis of the reference

Interpretation of EU law, in particular the first subparagraph of Article 31(3) and Article 32 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'); Article 267 TFEU

Questions referred

1. Must EU law, in particular the first subparagraph of Article 31(3) and Article 32 of Council Regulation (EU) 2017/1939 of 12 October 2017 concerning the implementation of enhanced cooperation with a view to the establishment of a

European Public Prosecutor’s Office (EPPO), be interpreted as meaning that, in the case of cross-border investigations in the event that a court must approve a measure to be carried out in the Member State of the supporting European Delegated Prosecutor, all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality, must be examined?

2. Should the examination take into account whether the admissibility of the measure has already been examined by a court in the Member State of the European Delegated Prosecutor handling the case on the basis of the law of that Member State?

3. In 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 supporting European Delegated Prosecutor?

Provisions of EU law cited

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (EPPO) (‘the EPPO Regulation’); in particular, Articles 30, 31, 32, 42, recitals 72 and 73

National legislation cited

Bundesgesetz zur Durchführung der Europäischen Staatsanwaltschaft (Federal law on the implementation of the European Public Prosecutor's Office, ‘the EUStA-DG’); in particular Paragraph 11(2)

(Austrian) Strafprozessordnung (Austrian Code of Criminal Procedure, ‘the Austrian StPO’); in particular Paragraphs 117, 119, 120

Brief summary of the facts and procedure

- 1 The European Public Prosecutor’s Office, represented by the European Delegated Prosecutor in the Federal Republic of Germany (Munich) handling the case, is conducting preliminary investigations, inter alia, against G. K., S. L. and the B. O. D. GmbH on the grounds of Article 3(2)(a) and (c) of Directive 2017/1371; Paragraph 370(1) no. 1, (2) no. 3 and Paragraph 373(1) and (2) no. 3 of the Abgabenordnung (German General Tax Code, ‘the German AO’); Paragraph 129 of the Strafgesetzbuch (German Criminal Code, ‘the German StGB’). The accused are suspected of having circumvented customs provisions by making false declarations when importing biodiesel (of US origin) into the European Union and, in doing so, causing a loss totalling approximately EUR 1,295,000.
- 2 On 9 November 2021, in the context of supporting these investigations pursuant to Article 31 of the EPPO Regulation, the Austrian European Delegated Prosecutor

issued a warrant under point I./ to search the residential and business premises of the accused company B. O. D. GmbH and of the accused G. K. at the M. address (Landesgericht Korneuburg [Regional Court, Korneuburg, Austria]), the business premises of the accused company B. O. D. GmbH at the K. address (Landesgericht Krems an der Donau [Regional Court, Krems an der Donau, Austria]), the residential premises of the accused G. K. at the R. address and those of the accused S. L. at the S. address (Landesgericht Wiener Neustadt [Regional Court Wiener Neustadt, Vienna, Austria]) as well as the business premises of the accused company B. O. D. GmbH and/or its 'parent company' B. O. D. s.r.o & Co KS at the S. address (Landesgericht für Strafsachen Wien [Regional Court for Criminal Matters, Vienna, Austria), applied to the single judge responsible in each of the aforementioned regional courts for the court's approval and ordered, under point II./, the seizure of order and purchase order receipts, account records, correspondence and corresponding hardware and documents.

- 3 The single judges responsible in each case approved the warrants issued by the supporting European Delegated Prosecutor with reference to the respective identical warrants under point I./ for the reasons stated there.
- 4 The actual conduct of the searches of the premises was ordered by the supporting European Delegated Prosecutor in each case and subsequently conducted by the competent tax authority.
- 5 According to the prosecutors' warrants – which are identical in content apart from the place of investigation and the persons involved – there is a suspicion that the following offences have been committed:

'The European Public Prosecutor's Office, through its European Delegated Prosecutor in Germany, is conducting criminal investigation proceedings into 1.000080/2021 on suspicion of continued tax evasion on a large scale and membership of a criminal organisation aimed at tax evasion pursuant to Paragraph 370(1) no. 1, (2) no. 3 and 373(1) and (2) no. 3 of the German AO as well as Paragraph 129 of the German StGB. According to the suspicious circumstances known to date, an organised criminal organisation has set up a broad system for importing biodiesel from Bosnia and Herzegovina to the EU, which was allegedly produced from used cooking oil of the local company S. E. D.O.O. This 'used cooking oil' was allegedly previously imported from the US to Bosnia and Herzegovina. In reality, this biodiesel had already been produced in the US without any intermediate processing or production steps in Bosnia and Herzegovina. In many cases (see below), companies of the B. O. Group entered into contractual relationships with S. E. D.O.O. for the purchase and import of biodiesel 'produced in Bosnia and Herzegovina', and that group boasted on its website of its European-wide business activities, including the collection and trade of used cooking oil throughout Europe and the production and trade of biodiesel. In at least 40 cases, a total of approximately 1,000 tonnes of this fuel, allegedly produced in Bosnia and Herzegovina, was then transported by land via Croatia and Austria to Germany using the T1 transit procedure and presented for

customs declaration in Dresden in order to be handed over to the local company **B. S. GmbH** (managing director R. R. M.) on behalf of the Austrian company **B. O. D. GmbH** (managing directors S. L. and G. K.), which was the contractual partner of the exporter **S. E. D.O.O.** In 62 further cases, a total of approximately 1,500 tonnes of the same biodiesel was transported by land via Croatia to Austria and presented for customs declaration in Spielfeld, Austria, in order to be delivered to the local company **B. O. D. GmbH**, established in M., Austria, under the direction of its managing director, S. L. The Incoterms selected for both deliveries and the underlying contracts were 'DAR (Delivered at Place)', which means that a delivery was to be made in Germany/Austria by **S. E.**, while the import procedure, including customs declarations, was the responsibility of **B. O. D. GmbH**, which is why this company was the responsible taxable person under Article 77 of the Union Customs Code despite using the services of a specialised transport company (Article 77(3)).

However, as the customs declaration in question incorrectly referred to a non-preferential origin in Bosnia and Herzegovina and a TARIC code, which would have exempted the biofuel from anti-dumping duties and countervailing duties even if its true place of production (USA) had been accurately declared, the competent customs authority levied solely VAT on the import. This resulted in a loss of at least EUR 1,295,151.11 (EUR 445,151.11 in uncollected duties in Germany and EUR 850,000 in Austria). A 25% share of the company **B. S. GmbH** is owned by the Slovakian company **B. O. D. s.r.o. & co KS** (managing director S. L., an Austrian national), which is also the parent company of the Austrian company **B. O. D. GmbH** (management director also S. L. as well as the Austrian national, G. K.). **B. O. D. s.r.o. & co KS** was sometimes represented by G. K. even though his official role was only with **B. O. D. GmbH**. **B. O. D. GmbH** itself was both the contractual partner of the alleged manufacturing company **S. E. D.O.O.** in Bosnia and Herzegovina and responsible for the customs declaration in Dresden as well as the recipient of some of the goods that were declared in Dresden, although they had to be transported back to Austria afterwards in order to reach the consignee. Furthermore, there are indications that the same type of arrangement was also in place with other recipient companies in Germany and **B. O. D. GmbH** was the ultimate recipient of these deliveries declared in Austria.

The managing director of **B. S. GmbH** (recipient in most cases where biodiesel was cleared for customs in Dresden/Germany), R. R. M., was the original founder and sole owner of the company in question, which was to produce biodiesel and was subsidised with EU funds. Ultimately, due to market developments, this had become commercially non-viable, which led M. to participate in a scheme that exploited differences between national tax laws to produce mineral diesel and sell it as 'lubricant' to Eastern European recipients, thus evading energy tax and VAT amounting to approximately EUR 73 million (indictment of the Public Prosecutor's Office in Frankfurt/Main, file number 7550 Js 216177/15 of 31 July 2018).

*In 2018, as a result of these developments, a 25% share in **B. S. GmbH** was acquired by the Slovakian company **B. O. D. s.r.o.** (managing director S. L.). This company is the sole owner of **B. O. D. GmbH** (managing director also S. L.).*

The US citizens B. V. and N. K. are owners of the company S. E. D.O.O., which in turn is also owned by the US suppliers of the prefabricated biodiesel (B. E. S. and W. O. Trade LLC), which supplied S. E. D.O.O. under the guise of 'used cooking oil' that was subsequently re-exported to the EU as 'biodiesel produced in Bosnia and Herzegovina'. S. E. D.O.O. itself is a subsidiary of B. E. S.

All this leads to the accused M., who attempted to deal with the economic difficulties of his company by participating in an illegal scheme to commit large-scale customs and tax fraud and by allying himself with the other accused in a criminal organisation dedicated to such activities to the detriment of the EU and its Member States, thereby bringing artificially 'discounted' fuel to the common market.

In the meantime, a confirmation of the 'authenticity' of the certificate of origin from Bosnia was obtained by the Austrian customs authorities by way of administrative assistance. However, since this had been issued by S. E. D.O.O. itself, which was obviously involved in the offences, this procedural result is not suitable to refute the other evidence.

On the basis of the facts described above, the accused natural and legal persons are suspected of having committed offences that fall within the jurisdiction of the European Public Prosecutor's Office pursuant to Article 22(1) of the EPPO Regulation in conjunction with Article 3(2)(a) (c) of Directive 2017/1371 ('the PIF Directive'). In Germany the offences are criminal pursuant to Paragraph 370(1) no. 1, (2) no. 3 and 373(1) and (2) no. 3 of the German AO, Paragraph 129 of the German StGB. In Austria [they are criminal] pursuant to Paragraphs 135(2), 39(1)(a) of the Finanzstrafgesetz (Austrian Financial Criminal Code), Paragraph 278 of the Austrian Criminal Code.'

The following explanations were provided regarding the necessity and legality of the measures ordered:

'The addresses affected by the warrant are either business addresses of the accused group and/or the accused natural persons. Based on the existing suspicion that a criminal offence has been committed, it must be assumed that the seizure of the items listed in point II. is necessary for reasons of collecting evidence (Paragraph 110(1) no. 1 of the Austrian StPO) because it allows for reliable conclusions to be drawn as to whether the invoices were in fact inaccurate or had been forged and whether they were used to mislead customs that the value of the goods was too low with a view to evading import duties.

The search warrant is necessary to deal with the offences because, with regard to the suspicion that an offence has been committed by the accused G. K., S. L., B. O. D. GmbH, the investigation requires that the documents sought are seized in their

entirety, without delay and without jeopardising the investigation. The measures are not disproportionate to the importance of the matter in view of the penalty provided for in relation to the offences in question.'

Principal arguments of the parties in the main proceedings

- 6 The appeals of B. O. D. GmbH, G. K. GmbH and G. K. K. GmbH of 1 December 2021, each of which were filed in due time and are identical in content, are directed against the court approvals of the search warrants (searches of premises), in which – put briefly – the lack of suspicion of a criminal offence or a grossly inadequate justification of the same, an inadmissibly wide time limit for the seizure and an infringement of Article 8(1) ECHR (breach of the relationship of trust between lawyer and client) are contested and an objection is raised against the order and execution of the seizure on the grounds of a legal infringement. Finally, an ‘objection’ was raised against the forwarding of the seized documents to the German authorities until a legally binding decision is made on the complaints and the objections.
- 7 The supporting European Delegated Prosecutor for Austria stated in his opinion of 15 February 2022 that the complaints should not be upheld because – in summary – the substantive objections would fail, in particular since the EPPO Regulation had created a new type of legal framework for cross-border investigative measures, which differed from the previous case of mutual assistance between two authorities of different Member States, while in substance constituting a further development of the principle of mutual recognition in criminal matters, which is why, following the Directive on the European Investigation Order, factual reasons for the investigative measures could only be reviewed in the issuing State. Accordingly, the conditions of admissibility, which were to be determined in accordance with the law of the European Delegated Prosecutor handling the case (Article 28(1) and (2) EPPO Regulation), could only be examined by the courts of the State in question. The same applied in relation to a clarification of the exercise of the jurisdiction of the European Public Prosecutor’s Office. In the Member State of the supporting European Delegated Prosecutor, only the formal law applicable there had to be examined when carrying out the investigative measures, but not any aspects of substantive law. With regard to the case in question, the European Delegated Prosecutor pointed out that the suspicion that an offence had been committed had already been examined in the Federal Republic of Germany by the competent investigating judge at the Amtsgericht Munich (Local Court, Munich, Germany). The appeal should therefore be dismissed.
- 8 The appellants countered this and essentially argued that, in their view, no criminal offence had been committed in Austria and/or that there was no sufficient reasonable suspicion against the named accused, which is why the Austrian customs authority had rightly pointed out a ‘problem in terms of criminal evidence

and traceability'. In any event, based on this, there was a lack of proportionality and necessity of the ordered searches (statement of 14 March 2022).

- 9 The Oberlandesgericht Wien (Vienna Higher Regional Court, Austria) has to decide on the appeals against the search warrants of premises approved by the aforementioned courts of first instance.

Brief summary of the basis for the reference

- 10 Based on Articles 31(3) and 32 of the EPPO Regulation in conjunction with the considerations stated in this regard, the view might be taken that in the case of a measure to be approved by a court in the Member State of the supporting European Delegated Prosecutor, the measure to be carried out must be examined on the bases of all formal and substantive provisions of this Member State. This would, however, mean that the court applied to by the supporting European Delegated Prosecutor would have to be provided with all the necessary documents or files from the Member State of the European Delegated Prosecutor handling the case by way of basis for assessment, which, particularly if several Member States are affected, would entail – apart from the necessary translation work – the examination of one and the same criminal investigation proceedings for the purpose of approving a measure in different Member States with different legal systems. This is the case, above all, if no court approval is required for the measure in the Member State of the European Delegated Prosecutor handling the case.
- 11 Although this would take into account the fact that the European Public Prosecutor's Office is one single Office (cf. Article 8(1) EPPO Regulation) and that, accordingly, legal instruments of mutual recognition should only be used in exceptional cases (Article 31(6) EPPO Regulation), in practice however this would constitute a massive step backwards. For, in contrast to a European Investigation Order (EIO), for example, which must be examined in the requested State according to only a few formal aspects, a complete examination of the previous criminal investigation proceedings would have to be carried out in each Member State concerned (depending on national law) for the purpose of approving the requested measure (this according to the national law of the State of the European Delegated Prosecutor handling the case; Article 31(2) EPPO Regulation). During the implementation of the measure, the law of the Member State of the European Delegated Prosecutor handling the case must also be observed to the greatest possible extent (Article 32 EPPO Regulation). This in turn requires that – as already described – not only a certificate in the sense of an EIO, but the entire file necessary for the respective assessment would have to be forwarded because otherwise the courts concerned would not have the necessary basis for a decision to carry out a formal and substantive examination of the facts.
- 12 When interpreting the present EPPO Regulation in the light of a quick, efficient and economic prosecution, the conclusion is therefore obvious that a judicial

approval of the measure in the country of the European Delegated Prosecutor handling the case should be limited to formal aspects only. This should be the case, at the very least, if a judicial review has already taken place in the Member State of the European Delegated Prosecutor handling the case.

- 13 However, such an interpretation is opposed by the merely subsidiary use of the instruments on mutual recognition of such decisions, which is expressly enshrined in the law (Article 31(6) EPPO Regulation).
- 14 Therefore, the European Court of Justice is requested to clarify the legal situation in this regard.

WORKING DOCUMENT