

Case C-292/23

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:

3 May 2023

Referring court:

Juzgado Central de Instrucción No 6 de Madrid (Spain)

Date of the decision to refer:

26 April 2023

Prosecuting authority:

European Public Prosecutor's Office

Defendants:

I.R.O.

F.J.L.R.

Subject matter of the main proceedings

European Public Prosecutor's Office – Effective remedy – Right to a fair trial – Judicial review – Giving evidence as a witness – Rights of defence

Subject matter and legal basis of the request for a preliminary ruling

Request for a preliminary ruling on interpretation – Article 267 TFEU – Compatibility of a national provision with Regulation (EU) 2017/1939 – Article 42(1) – Charter of Fundamental Rights of the European Union – Articles 6, 47 and 48 – Effective remedy – Right to a fair trial – Judicial review – Directive 2016/343 – Article 7 – Treaty on the Functioning of the European Union – Article 86(3) – Treaty on European Union – Article 2 and second subparagraph of Article 19(2) – Principle of equivalence

Questions referred for a preliminary ruling

1. Is Article 42(1) of Regulation 2017/1939 to be interpreted as precluding a national provision, like Article 90 of L[ey]O[rgánica] (Framework Law) 9/2021 of 1 July 2021, which excludes from judicial review a procedural act of the European Public Prosecutor's Office which produces legal effects vis-à-vis third parties (in the sense described), such as the decision of the European Delegated Prosecutor to summon witnesses in the Decree of 2 February 2023?

2. Are Articles 6 and 48 of the Charter of Fundamental Rights of the EU and Article 7 of Directive (EU) 2016/343 to be interpreted as precluding a national provision, like Article 90, in conjunction with Articles 42(1) and (3) and 43, of LO 9/2021 of 1 July 2021, which excludes from judicial review a procedural act of the European Public Prosecutor's Office such as the decision of the European Delegated Prosecutor to summon as a witness a third party in respect of whom a reasonable expectation of involvement in the offences under investigation has been identified?

3. Are the second subparagraph of Article 19(1) TEU and Article 86(3) TFEU to be interpreted as precluding a system of judicial review, of the kind laid down in Articles 90 and 91 of LO 9/2021 in relation to acts of European Delegated Prosecutors adopted under Articles 42(1) and 43 of LO 9/2021, which excludes from judicial review a measure adopted by the European Delegated Prosecutor in the exercise of his or her investigative powers and which has no equivalent in the national procedural provisions governing the right to contest decisions adopted by investigating judges in the exercise of their investigative powers?

4. Is Article 2 of the TEU, which enshrines the values inherent in the rule of law on which the Union is founded, in conjunction with the right to an effective remedy and the right to a fair trial laid down in Article 47 of the Charter of Fundamental Rights of the EU and the principle of effectiveness laid down in the second subparagraph of Article 19(1) of the TEU, to be interpreted as precluding a system of judicial review of acts of European Delegated Prosecutors which limits the situations in which there is a right to contest decisions to a closed number of situations such as that provided for in Spanish law in Articles 90 and 91 of LO 9/2021?

Provisions of European Union law relied on

Article 2, Article 4 and the second subparagraph of Article 19(1) of the Treaty on European Union.

Articles 6, 47, 48, 51 and 52 of the Charter of Fundamental Rights of the European Union.

Articles 86(3), 325(1) and 324(4) of the Treaty on the Functioning of the European Union.

Article 42(1) and (2) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('Regulation 2017/1939'). [note to reviser: I have corrected the regulation number from 2017/1936 to the correct number on several occasions which are highlighted in bold]

Article 7 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Judgment of 15 May 1986, *Johnston* (222/84, EU:C:1986:206).

Judgment of the Court of Justice of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360).

Judgment of the Court of Justice of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428).

Judgment of the Court of Justice of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449).

Judgment of the Court of Justice of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105).

Judgment of the Court of Justice of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107).

Judgment of the Court of Justice of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373).

Judgment of the Court of Justice of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117).

Provisions of national law relied on

Articles 42(1) and (3), 90 and 91 of Framework Law 9/2021 implementing Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (Ley Orgánica 9/2021 de aplicación del Reglamento (UE) 2017/1939 del Consejo, de 12 de octubre de 2017, por el que se establece una cooperación reforzada para la creación de la Fiscalía Europea) of 1 July 2021 ('LO 9/2021').

Articles 410, 420, 433, 311 and 766(1) of the Law on Criminal Procedure (Ley de Enjuiciamiento Criminal).

Succinct presentation of the facts and procedure in the main proceedings

- 1 In their capacity as directors of IMDEA Materiales, I.R.O. and F.J.L.R. are accused of subsidy fraud and falsification of documents in proceedings brought by the European Public Prosecutor's Office through European Delegated Prosecutors.
- 2 Y.C. and I.M.B. received from the company IMDEA Materiales, which is also a defendant, financial sums which allegedly came from European funding and which do not appear to be sufficiently substantiated.
- 3 The Juzgado Central de Instrucción No 6 de Madrid (Central Court of Preliminary Investigation No 6, Madrid, Spain) acts as the court responsible for guarantees. In those proceedings, the European Delegated Prosecutors summoned Y.C. and I.M.B. to give evidence as witnesses, by decree of 2 February 2023.
- 4 The representatives of I.R.O. and F.J.L.R. in the proceedings lodged a document with the court responsible for guarantees, contesting the decree of 2 February 2023 with regard to the summons concerning Y.C.
- 5 LO 9/2021 states that decrees of the European Delegated Prosecutors may be challenged before the court responsible for guarantees only in the situations expressly stipulated. A decree summoning a person to give evidence as a witness is not one of those situations. On that basis, the European Delegated Prosecutors question whether the challenge lodged by I.R.O. and F.J.L.R. should be allowed to proceed.
- 6 However, if those proceedings were not conducted by the European Public Prosecutor's Office, with the specific procedural features which that entails, but rather by an investigating judge, there is no doubt that, under national law, the summons for Y.C. and I.M.B. to give evidence as witnesses could be challenged by the defendants.
- 7 Against that background, the court responsible for guarantees, as the referring court, has stayed the proceedings in order to refer the questions set out above to the Court of Justice for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 8 The defence lawyer acting for the defendants is opposed to the giving of evidence by Y.C. as a witness.
- 9 The European Delegated Prosecutors submit that, in the light of the body of evidence available to them, Y.C. and I.M.B. should be called to give evidence as witnesses and not as suspects. Moreover, the European Delegated Prosecutors argue that the fundamental rights of the persons involved are guaranteed by the right to bring an exceptional appeal for a declaration that the proceedings are automatically null and void, as laid down in Article 29 of LO 9/2021.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 Under LO 9/2021, which implements Regulation 2017/1939, an appeal may lie only against those decrees of European Delegated Prosecutors in respect of which LO 9/2021 expressly provides for that right. The decree of European Delegated Prosecutors of 2 February 2023, summoning Y.C. and I.M.B. to give evidence as witnesses, is not one of those decrees. However, Article 42 of Regulation 2017/1939 provides that procedural acts of the European Public Prosecutor's Office that are intended to produce legal effects vis-à-vis third parties may be the subject of judicial review by the competent national courts.
- 11 The referring court points out that the decree of 2 February 2023 creates legal effects vis-à-vis third parties and, in this case, vis-à-vis the persons called to give evidence as witnesses and the defendants.
- 12 In relation to the former, Y.C. and I.M.B., the summons of 2 February 2023 has an impact on their rights to liberty and freedom of movement, since the summonses to give evidence as a witness come with an obligation to appear which, if it is breached, can lead to the arrest of the person summoned and even to their being charged with the offence of obstruction of justice.
- 13 Being called as witnesses also affects the rights of defence of Y.C. and I.M.B. for, under national law, witnesses do not have access to a lawyer, have a duty to declare what they know and to tell the truth. The referring court takes the view that, in the present case, there is a reasonable expectation that evidence of Y.C. and I.M.B.'s participation in the offences under investigation may be apparent from their witness statements, which is why it would be appropriate for them to be summoned in a capacity which would allow them access to the lawyer of their choosing. Giving evidence as a witness without the assistance of a lawyer and with the obligation to tell the truth would breach Y.C. and I.M.B.'s rights of defence in the unlikely event that they were subsequently made suspects in these proceedings as regards the events about which they have made statements.
- 14 Furthermore, the referring court observes that the right to bring an extraordinary appeal for a declaration that the proceedings are automatically null and void does not make it possible to safeguard sufficiently the fundamental rights of the persons involved as witnesses and as defendants, nor can it be used as an ordinary remedy for challenging procedural acts in proceedings conducted before the European Public Prosecutor's Office.
- 15 In relation to the defendants, the giving of witness evidence by Y.C. and I.M.B. affects their right to proceedings without undue delay because Y.C. has already given a witness statement in the same proceedings. Moreover, Y.C. and I.M.B.'s evidence may enable the European Delegated Prosecutors to obtain new incriminating evidence against the accused, which would also affect their procedural rights.

- 16 In the referring court's opinion, the restrictive requirement laid down in national law concerning the powers of the court responsible for guarantees to review acts of the European Delegated Prosecutor, as compared with the requirements laid down in Regulation 2017/1939, impedes the exercise of the rights of defence and the right to an effective remedy which constitute fundamental values of the rule of law on which the Union is founded.
- 17 Moreover, the fact that national law does not allow an action contesting an act, as provided for in Article 42(2) of Regulation 2017/1939, to be brought in proceedings to combat fraud and tax evasion in the Union, impedes the protection of European financial interests.
- 18 In the light of the foregoing considerations, the referring court asks whether the provisions of national law which govern the right to contest procedural acts of the European Public Prosecutor's Office may be stricter than those contained in Regulation 2017/1939 and those which govern the right to contest equivalent acts of national courts, that is, in the case of the Spanish judicial system, acts of the investigating judge.