



E-CAPSULE N.5 TRAINING ON EU LAW



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DATA PROTECTION

Provisions of Regulation (EU) 2016/679 and Directive (EU) 2016/680: Similar and complementary, but also hierarchically – superiority and inferiority are not always clearly defined, thus situational and subject to discretionary powers.

EUROPEAN ARREST WARRANT

The CJEU's restrictive interpretation of the concept of judicial authority based on fundamental rights raises questions on the concept of public authority found in EU instruments on cross-border cooperation in criminal matters in the Area of Freedom, Security and Justice. This is clearly the case in relation to the Council Regulation 2018/1805 (mutual recognition of freezing orders and confiscation order); Council Framework Decision 2002/584/JHA (European Arrest Warrant); Directive 2014/41/EU (European Investigation Order); Council Regulation 2017/1939 (European Public Prosecutor's Office); Regulation 2016/679 (GDPR); Directive (EU) 2016/680 (criminal justice data protection); and the Framework Decisions 829, 909, and 947.

However, there are additional doubts when other – indirectly related – public authorities are acting in potentially relevant fields, e.g. tax authorities.

RESTORATIVE JUSTICE

Opportunities deriving from alternative measure to detention (FDs 829, 947 and 909) and their potential for cross-sectoral multi-agency cooperation mechanisms involving restorative justice instruments are not yet commonly conceptualised and applied. The added value of technology to gather and transfer data and to modernise the interplay of authorities, CSOs, perpetrators and victims is not yet capitalised on.

REQUIREMENTS FOR THE COLLECTION OF EVIDENCE

Domestic criminal procedure law does not recognise any generally applicable principle according to which every violation of evidence collection regulations entails a prohibition of use in criminal proceedings. Whether such a prohibition applies is rather to be decided according to the circumstances of the individual case, considering the type of prohibition and the weight of the violation, weighing the conflicting interests.

It must be noted that the assumption of a prohibition of use of evidence restricts one of the essential principles of criminal procedural law, namely the principle that the court must investigate the truth and, to this end, must extend the taking of evidence ex officio to all facts and evidence that are of importance. Therefore, a prohibition of the use of evidence is an exception that is only to be recognised according to an explicit statutory provision or for overriding important reasons in an individual case.

A MORE EXHAUSTIVE EU REGULATORY FRAMEWORK

The work of the EU in the Area of Freedom, Security and Justice is by no means exhausted in the legislative activity, which is primarily placed in the foreground here in terms of legal doctrine. Its focus is on activities to promote practical cooperation between the authorities of the member states; from a political perspective and from the point of view of the administration of justice, the creation of new regulations in Union law often appears to be a mere accompanying measure.

For this reason, efforts to ensure effective criminal prosecution have so far repeatedly been given too much priority, to the detriment of the individual rights of the accused (but not only).

EUROPEAN PUBLIC PROSECUTOR'S OFFICE EPPO

Art. 6 | EPPO Regulation provides that external instructions are not to be sought or received; advice may, however, be sought. It also requires member states and EU bodies not to influence the EPPO in the performance of its tasks. In addition, helping to ensure independence are the EPPO's own budget, regulatory autonomy and authority to adopt internal guidelines, the process for appointing and dismissing the European Prosecutor General, the European Prosecutors (as well as their non-renewable terms), and the European Delegated Prosecutors, decision-making in panels rather than by individuals, the different levels of supervision, and member state notification of or requesting approval of a disciplinary measure or dismissal to the European Delegated Prosecutors, who must be active members of the national prosecution or judiciary during their term of office.

It is subject to criticism that the responsibility in the investigation and prosecution activities is distributed in such a way that an accountability of the European Chief Public Prosecutor, who as the head of the EPPO bears the overall institutional responsibility and is indirectly democratically legitimized by the participation of organs of the Union in the appointment, can hardly be considered.

Due to the lack of a hierarchically conceived EPPO as well as decision-making in bodies, the European Attorney General cannot significantly influence the activities; thus, he rather degenerates into a representative body to the outside. The EPPO Regulation also only provides for the dismissal of the European Public Prosecutor for serious misconduct; however, this is an ultima ratio and not an appropriate sanction for other misconduct.

INTERPLAY OF EPPO AND DOMESTIC PUBLIC PROSECUTORS

The internal order of EPPO has a direct impact on the judicial system of the member states: Although primarily police, customs and tax authorities are instructed by the EPPO to carry out (investigative) measures, there is in principle an obligation similar to administrative assistance, which is standardized for domestic public prosecutors. Still unresolved against the background of the CJEU rulings on the EAW are the limits of the authority of the European (Delegated) Prosecutors to issue instructions to domestic prosecutors or other authorities who are subject to a right to issue instructions externally – such instructions are in tension with the independence of the EPPO.

This may happen because there is at least the possibility of a potential abuse (contrary to EU law) of the power to issue instructions by the political bodies with the power to issue instructions vis-à-vis the national authorities commissioned by the EPPO. In which constellations the EPPO can commission national authorities that are externally dependent on instructions will probably have to be decided on a case-by-case basis.

Criteria to be considered are the intensity of the commissioned measure in terms of fundamental rights, the scope of design and discretion exercised in the process, and the extent of supervision of the measure carried out. Consequently, measures that are particularly invasive of fundamental rights and involve a great deal of discretion cannot be delegated to the domestic public prosecutor's offices or other authorities that are bound by external instructions.