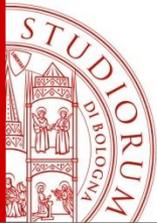


# The Challenges of Trans-national Investigation

## Adjudication of Pre-trial issues in Trans-national cases

### *After the EPPO*

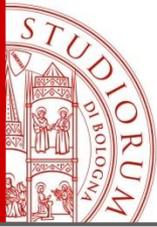
*Silvia Allegrezza*  
*Birmingham, 23 March 2013*



# The EPPO: Who ordered that?

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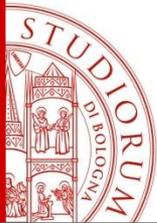
- The European Public Prosecutor Office
- Judicial review as a counterbalance to the EPPO power
- Judicial review “abroad” as weakness of the defence
  - Different legal rules
  - Language
  - Access to file
  - Limits to the scrutiny of the merits in the executing State
  - Why not to apply the mutual recognition principle to judicial review decisions?



# A common legal framework for the EPPO

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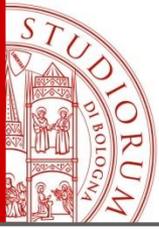
- Conditions:
- The establishment of the EPPO as a (partly or fully) centralised prosecutorial authority
- Material scope: common EU crimes
- A regulation providing for detailed and exhaustive rules governing the investigation phase
- The adoption of the European territoriality principle
- National courts are competent for the trial



# Legal basis: Article 86

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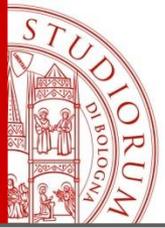
- According to article 86 in fine of the Treaty of Lisbon, one of the regulations envisaged in paragraph 1 for the creation of a EPPO will govern:
- “the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions”.
- French version of Article 86: “...les règles applicables au contrôle juridictionnel des actes de procédure qu'il arrête dans l'exercice de ses fonctions”.



# Terminology

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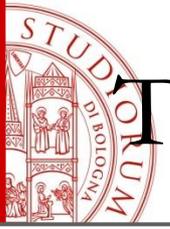
- Terminology:
  - Judicial authority
    - Judge or court
    - Prosecutor
    - Executive of the Ministry
    - Administrative agencies
  - Judicial control
  - Judicial review
  - Legal remedy



# Measures implying a judicial adjudication :

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- Investigative measures having a probative value and impinging on fundamental rights
- Arrest and remand on custody
- Decisions concerning prosecution
- Forum choice for the trial stage
- Admissibility of evidence



# Types of adjudication in pre-trial phase:

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- *A priori* review/*Ex ante* judicial authorization:
  - upon request of the EPPO, a judicial authority has to rule with an order or with a warrant allowing or confirming (in exigent cases) the investigative measures required by the EPPO. Usually *ex officio*.
- *A posteriori* review/*Ex post* judicial control:
  - upon request of the defendant or of third parties whose rights have been infringed by the investigative coercive or secret measures.
- A combination of the two.



# National and International dimension of the judicial control after the pre-trial stage

- Control by the trial court:
  - On custody on remand
  - On the admissibility of evidence
  - On the rights of the defendant
- Control by the court of appeal or other legal
- Constitutional judicial review
- Request for a Preliminary ruling to the Court of Justice
- European Court of Human Rights

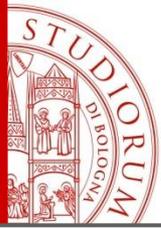


# Judicial Authorisation/Ex ante control

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## Projects and proposals on the European Public Prosecutor:

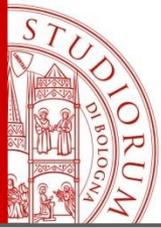
- 1) Corpus Juris (2000)
- 2) Green Paper of the EU Commission (2001)
- 3) Spanish Presidency Proposal (2009)
- 4) Model Rules for the European Investigation (2012)



# Corpus Juris (2000) - Article

## 25bis

- The judge of freedoms exercises judicial control on any measure which has the effect of restricting or depriving a person of the rights and fundamental freedoms of the ECHR
- designated by each Member State, independent and impartial
- He applies national law as well as the Corpus Juris.
- He controls:
  - the legality
  - the regularity
  - the necessity
  - the proportionality



# CJ: Judge of the Freedom

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On his statute:

- criteria for designation:
- Independent
- Impartial
- No overlap between the role of the judge of freedoms and that of the trial judge

On the appeal

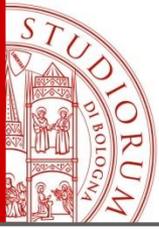
- Article 25bis(3) – Decisions of the judge of freedoms can be appealed against by the accused person and by the EPP.
- The Member States specify the arrangements for such appeals.



# Green Paper (2001)

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- Remind: the GP did not provide for a common system but for a lower-impact system applying national laws for investigative measures under the mutual recognition principle.
- Judge of freedoms:
- Authorization by National courts but with a European validity
- mutual recognition would mean that, in the event of execution in a Member State of an investigation measure authorised by a court in another Member State, the European Public Prosecutor would not have to seek a fresh authorisation.

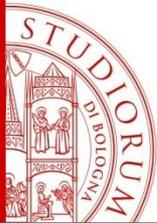


# GP 2001 Legal patchwork:

For the warrant: the applicable national law would be that of the Member State of the judge of freedom

For the execution stage: it would be that of the Member State of the place for execution.

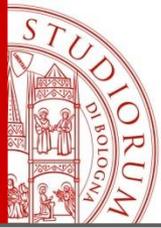
The warrant and the execution should be mutually recognised and evidence should be mutually admissible as between the Member States.



# GP 2001 Meaning of MR for JR:

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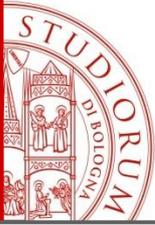
- The principle of mutual recognition would apply to the forms but not to the principle of review by the national judge of freedoms.
- Example: the warrant issued by the court in Member State A may have been issued by a summary procedure that does not exist in Member State B but is recognised there under the mutual recognition principle.
- But the EPPO could not simply do without a warrant in both Member States A and B on the sole ground that Member State C authorises searches of business premises without a warrant from the courts.



# Which forum the judge of

## freedom?

- Four criteria for the choice of the forum:
  - 1. the judge of freedoms in the Member State in which he wishes to undertake some act of investigation (lex loci).
  - 2. the EPPO could apply to only one judge of freedoms, who would issue or authorise all the acts needed for the investigation, executable on the basis of the mutual recognition principle.
  - 3. to leave the European Public Prosecutor free to combine these two possibilities.
  - 4. the court in the Member State to which the relevant Deputy European Public Prosecutor belongs
- Consequences: risk of forum shopping and fragmentation

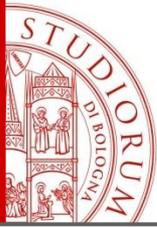


## GP 2001 On the structure:

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The Member States remain  
entirely free to determine

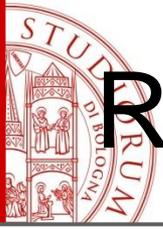
- the number of such courts
- the way they are organised.
- but its functions should be made incompatible with those of the trial court



# Spanish Presidency Proposal

2009

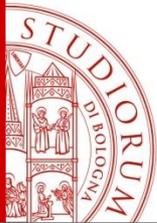
- following the opinion of the Green Paper:
- the role of the judge of freedoms should be played by a national judge:
  - of the state where the investigation is being conducted
  - or where the measure subject to review is to be implemented.
- Statute of the national court
  - specialised, and centralised court (best option)
  - ordinary courts
- specialised, and centralised court is the best option:
  - because of the complexity of EU frauds
  - It favours the uniform application of the EU law
  - it could open the way to the creation of a European judge in the framework of the Court of Justice of the EU



# Results from the Model rules study:

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- Comparative reports show that national legislations differ on:
  - Necessity of the authorisation
  - no general rule and no shared concept of actions requiring previous judicial consent
  - Substantive requirement
  - Thresholds (suspicion degree; seriousness of the offence)
  - Territorial limits of the authorisation
  - Time limits of the authorisation
  - Legal remedies

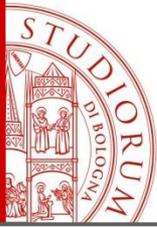


# Model rules (2012)

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## *Rule 7 (judicial control)*

- 1. To the extent indicated in these Rules, decisions of the EPPO affecting individual rights are subject to review by the European court.
- 2. Where these Rules provide for prior authorisation of a measure to be applied by the EPPO, a judge designated by each Member State shall be competent to decide upon this authorisation. Authorisation by the judge is effective within the single legal area as defined under Rule 2 (*European territoriality*).



# National judicial authorisation: where it comes from?

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- Competition law model: Regulation 1/2003 and ECJ case law (Hoechst, Roquette frères)
- When an authorization is required, the Commission has to address to the national judge according to national law. Article 20 (6 e 7)
- In the country where the measure has to be executed
  - 16 EU member States has a centralised agency
  - Others confer this power to courts all over their territory



# Competition law: A good example?

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- 1. The order is against:
  - a specific undertaking
  - for a specific inspection
  - no application of the territoriality principle
  
- 2. Fragmentation for the investigative authorities: multiple request, inconsistent decisions



# Competition law: A good example?

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## 3. Judicial Control is limited

The national judicial authority shall control only that the Commission decision is:

- Authentic
- that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular
  - to the seriousness of the suspected infringement,
  - to the importance of the evidence sought,
  - to the involvement of the undertaking concerned



# Competition law: A good example?

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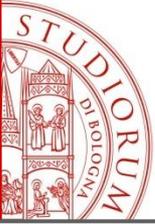
- 4. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice (articles 20(8) e 21(3)).
- As a consequence, the authorisation of the national court is not subject to judicial review by the Court of Justice
- 5. No access to file: the national judicial authority has no access to the materials of case and cannot ask to the Commission for further information



# *Ex post/a posteriori* Judicial review

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- In the Corpus Juris 2000:
- Article 25 quater § 5. Decisions of the judge of freedoms concerning coercive measures are appealable in so far as national law allows, in accordance with the provisions contained in Article 35.
- The procedure for judicial control is determined by national law, in accordance with the provisions contained in Article 35 (on complementarity of national law).

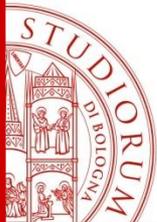


# Appeal to the ECJ: article 28

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## Article 28

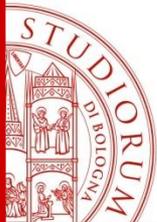
- a) preliminary questions on the interpretation of the Corpus Juris
- b) on the request of a Member State or the Commission on any dispute concerning the application of the Corpus Juris;
- c) on conflicts of jurisdiction
- on the request of the EPP on the exercise of judicial control by national courts (Articles 25 to 27);
- d) on the request of the accused on the choice of jurisdiction of judgment



# Other projects:

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- Green Paper 2001 and Spanish proposal
  - National judicial review
  - According to domestic law
  - Faint Openness to the pre-trial chamber
- Model Rules 2012
- European Court



# MLA Conventions

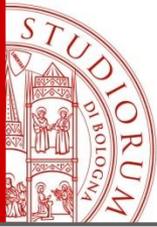
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1959: no specific provision

2000: no specific provision

Traditional issue:

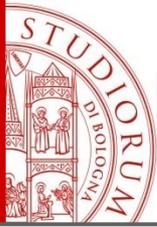
1. the judicial control in the requested State is limited to the execution of the investigative measure
2. the control on the merits is conferred to the requesting State



# Mutual Recognition Instruments:

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- FD on the EAW 2002/584/JHA is silent
- Article 11 FD 2003/577/JHA on freezing orders: legal remedies either in front of the issuing State or in front of the executing State
- Article 9 of the FD on confiscation 2006/783/JHA: substantive reasons may be brought only before the issuing State
- Article 18 of the EEW FD 2008/978/JHA: substantive reasons may be brought only before the issuing State
- Article 13 of the proposal for the European Investigation Order: “the substantive reasons...may be challenged only in an action brought in the issuing State”

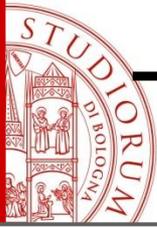


# National and EU case law on MR

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Two main trends:

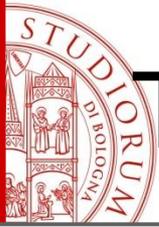
- National courts tend to extend their scrutiny including proportionality test (EAW)
- ECJ tends to:
  - Appraise national law when it helps the MR (Case *Mantello*) but it denies any relevance of (even Constitutional) limits (Case *Melloni*)



# The Judicial Review in the ECtHR

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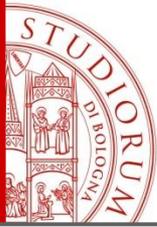
- Article 3, 5(4) and 8 ECHR:
- Accessibility and fairness of the remedy
- The Court has to be entitled to a review on the lawfulness bearing upon the procedural and substantive conditions;
- Capable to order the termination of the measure
- In a speedy judicial proceedings;



# The Judicial Review in the ECtHR

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- It must recognise some fair trial rights:
- Independent and impartial judge
- Access to file
- Equity of arms
- Effective and adversarial hearing
- the opportunity of effectively challenging the statements or views of the prosecutor
- Reasoned Decision in writing



# Four possible architecture:

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- European jud. authorization – European Jud. review
- National jud. authorization - European Jud. review
- National jud, authorization – National Jud. review
- European jud. authorization - National Jud. review

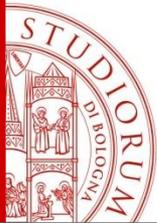


# Our proposal

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## European judicial authorisation (pre-trial chamber)

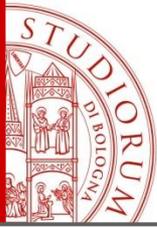
- Uniform and coherent application of the EU rules
- No inequalities
- No forum shopping for the EPPO
- Common rules on proceedings and exigent cases
- No obstacles with reluctant national authorities



# National judicial review

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- On request of the defendant (or a third person involved)
  - In his home country
  - In the member State where the measure has been executed
- The proceedings has to fulfill the ECtHR conditions
- The decision is valid throughout the EU according to the mutual recognition.

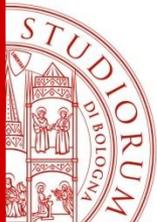


# National judicial review

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## Reasons:

- *ex post* Judicial review implies a scrutiny on both the measure and its execution (involving national police)
- Skepticism on the one-size-fits-all approach
- No EU proposal has never faced the problem of invalid warrants. Only national systems do provide for specific rules.
- No value of the defence forum shopping argument
- Preventive Exclusionary rules
- Maximum standard approach on fundamental rights can be better granted by national courts



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**Grazie!**