



BRUSSELS À JOUR

Scrutiny Ahead: Launching the European Public Prosecutor's Office

After years of debate, the European Public Prosecutor's Office (the "EPPO") has entered into its operational phase on 1 June 2021. It is the first independent supranational EU body competent to investigate and prosecute crimes under national law in national courts of the participating Member States. Considering the massive EU Recovery and Resilience Fund to rebuild the economy after the international health crises, the role of the EPPO should not be underestimated. The EPPO has jurisdiction over a very broad range of cases, given that a mere co-financing of projects in all kinds of sectors from the EU budget is sufficient and there is neither a requirement for an impact on trade between Member States nor a *de minimis*-threshold (except for a threshold of EUR 10 million in case of cross-border VAT fraud). At the same time, there is a reported backlog of about 3,000 cases the EPPO will have to investigate in its first year, which will be a challenge given the capacity restraints it will likely face.

The focus of this article will be on the EPPO in action. When does the EPPO have jurisdiction? What procedural rules apply? How are rights of individuals or companies under investigation protected? Last but not least: How to prevent prosecutorial forum shopping? The key takeaways are as follows:

- The EPPO will bring prosecutions before national courts under the substantive criminal law of the respective Member State. Likewise, national procedural law will be applicable unless the EPPO Regulation provides for specific rules.
- Generally, but subject to numerous exceptions, the EPPO will initiate and handle investigations in the Member State where the focus of the activity is. Cross-border investigations within the EU that are subject to the EPPO's competence will be possible without relying on requests for mutual legal assistance.



- The level of protection for the rights of the accused differ considerably between Member States, making certain jurisdictions more appealing from the point of view of a prosecutor than others. There is a risk of forum shopping by the prosecuting authorities.
- Different standards in the Member States regarding the defences' and victims' rights to inspect files during the investigative process can be particularly detrimental.

Material Jurisdiction: Financial Interests of the EU

The legal framework of the EPPO is set out in Regulation (EU) 2017/1939 (“**EPPO Regulation**”). Pursuant to Art. 2 of the EPPO Regulation, the EPPO is competent where financial interests of the EU, meaning all revenues, expenditures and assets covered by, acquired through, or due to the EU budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties, and budgets managed and monitored by them, are concerned.

The mandate covers crimes that fall under the Directive (EU) 2017/1371 (“**PIF Directive**”), which includes cross-border VAT fraud involving at least two Member States and total damages exceeding EUR 10 million, other types of fraud affecting the EU’s financial interests, corruption that damages the EU’s financial interests, misappropriation of EU funds or assets by a public official as well as money laundering and organised crime, and as other offences inextricably linked to one of the previous categories (see Art. 3 and 4 PIF Directive and Art. 22 of the EPPO-Regulation). The criminal offenses covered by this provision are determined by the national law of the Member States. The Member States notify the EPPO with the national substantive criminal law provisions that apply to the offences defined in the PIF Directive and any other relevant national law (Art. 117 EPPO Regulation). In addition, the EPPO is competent for any other criminal offence that is inextricably linked to criminal conduct that falls within criminal offenses covered by the PIF Directive. The concept of inextricability is based on the ECJ’s case law on the *ne bis in idem*-principle. Territorial and personal jurisdiction of the EPPO are generally limited to offences committed in the territory of one or several Member States or by a national of a Member State (Art. 3 EPPO Regulation).

EPPO Organisation and Operation

The EPPO is built on two levels, central and decentralised. The central office is located in Luxemburg and is composed of the European Chief Prosecutor and 22 European Prosecutors, one per participating Member State, as well as the Administrative Director. The decentralised level consists of European Delegated Prosecutors, who will be located in the respective participating Member States. There will be at least two European Delegated Prosecutors in each Member States. The European Public Prosecutors connect the central office in Luxemburg and the decentralized level in their respective Member States. The central level will supervise the investigations and prosecutions carried out at the national level. As a rule, it will be the European Delegated Prosecutors who bring cases before Member State courts, using local personnel and applying national procedures and legislation.



To carry out its investigations, the EPPO will work with other organisations, including Europol, Eurojust and OLAF as well as non-participating Member States (see Art. 99 PIF Directive et seq.). So far, the EPPO has entered into working agreements with Eurojust, Europol and the Office of the Prosecutor General of Hungary.

The EPPO in Action: Initiation of Investigations and Procedural Rules

If the EPPO initiates an investigation, it pre-empts any national action for the same criminal conduct. Besides its own investigations, national authorities and EU institutions will have to report any relevant criminal conduct that falls in the scope of the EPPO's competence. Originally, the Commission had considered exclusive jurisdiction of the EPPO but eventually decided on a right of evocation, which the EPPO shall exercise within 5 days after receiving the relevant information by national authorities (Art. 27 EPPO Regulation). This may particularly be relevant where evidence needs to be secured in a timely manner (e.g., through a seizure).

The EPPO will bring prosecutions before the national courts under the criminal law of the Member State implementing the relevant EU legislation (including the PIF Directive). With respect to procedural law, European Delegated Prosecutors act within the EPPO Regulation and, as regards matters not covered by this, pursuant to applicable national law. If the alleged criminal activity was conducted in more than one Member State, (e.g. where a German national commits a PIF offense in France, currently the case would fall under both, German and French jurisdictions) the EPPO will initiate and handle investigations in the Member State where the focus of the activity is, or, if several connected offences within the competences of the EPPO have been committed, in the Member State where the bulk of the offences has allegedly been committed. An exception from this rule can, however, be made, e.g. on the ground of habitual residence or nationality of the accused. Cross-border investigations within the EU that are subject to the EPPO's competence will be possible without relying on requests for mutual legal assistance (see Art. 31 and Art. 26 (4) of the EPPO Regulation).

This decision is crucial for the further proceedings, as the competent Delegated Prosecutor investigates and instructs national authorities under the rules of both the EPPO Regulation and the applicable national law, if a matter is not regulated by the EPPO Regulation. In general, the applicable national law is the law of the Member State whose European Delegated Prosecutor is handling the case. Competent national authorities may take urgent measures in accordance with national law necessary to ensure effective investigations. In cross-border cases, the handling European Delegated Prosecutor may assign measures that need to be undertaken in a different Member State to a European Delegated Prosecutor located in that Member State as an assisting Delegated Prosecutor.

Pursuant to Art. 42(1) of the EPPO Regulation, procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. These must be interpreted in conformity with EU law and, in cases of doubt, national courts shall initiate preliminary ruling proceedings pursuant to Art. 267 TFEU.



The Delegated Prosecutor, after approval from the EPPO's Permanent Chamber, brings a case to judgment before a national court. Where more than one Member State has jurisdiction over the case, as a principle, the case will be prosecuted before a court in the Member State of the handling European Delegated Prosecutor. However, pursuant to Art. 36(3) of the EPPO Regulation, the suspect's or accused person's habitual residence or nationality as well as the place where the main financial damage has occurred (criteria in Art. 26(4) of the EPPO Regulation) is to be considered.

EPPO Proceedings – An Abridgement of Defendants' Rights? – How to Prevent Prosecutorial Forum Shopping

Art. 41 of the EPPO Regulation provides for the application of minimum standards in EPPO proceedings. However, requirements for the respective measures and the level of protection for the rights of the accused differ considerably between Member States, making certain jurisdictions more appealing from the point of view of a prosecutor than others, in case there should be a choice. The risk of forum shopping by the prosecuting authorities could result in the circumvention of essential rights of the accused. This is particularly true with respect to certain evidentiary measures and the requirement for pre-trial arrests.

The European Criminal Bar Association ("ECBA") has already pressed the need to set a clear common standard for all future EPPO proceedings that considers all Member State standards to prevent forum shopping (see ECBA, Notes on the Internal Rules of Procedure of the European Public Prosecutor's Office, College Decision 003/2020, 22 February 2021, p. 2). This need is apparent since under Art. 37(1) of the EPPO Regulation, evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State. In addition, many Member State jurisdictions lack legal remedies against investigative measures. As EU law itself does not provide any legal remedies, the situation is highly unsatisfactory.

Different standards in the Member States regarding rights to inspect the case file during the investigative process can also be particularly detrimental – especially to the rights of the accused, as an early access to the case files increases the chance to avoid superfluous indictments and consequently an unnecessary trial. The EPPO Regulation itself, however, does not provide any provision on access to the case file. The ECBA has therefore urged the EPPO to provide guidelines stating the discretion allowed by national law in this field should in EPPO proceedings be interpreted in a manner consistent with EU law (see ECBA, Notes on the Internal Rules of Procedure of the European Public Prosecutor's Office, College Decision 003/2020, 22 February 2021, p. 4). Consequently, in order to address the issue of potential prosecutorial forum shopping, it might be considered to even out the level playing field in cross-border cases.



Outlook

The introduction of the EPPO did not establish a minimum standard of uniform procedural rights at the EU level for the accused. Yet, proceedings by the EPPO pose new challenges for defence counsel. They require a new angle of international coordination, making sure that rights of the individuals or companies being investigated or accused are sufficiently safeguarded. There are at least potential loopholes and gaps that might otherwise allow for cherry picking by the EPPO, at the cost of essential rights. It also becomes increasingly important for defence counsel to have practical experience with cross-border scenarios and to be familiar with the basics of the legal frameworks and have a well working international network in other Member States, in order to be able to be prepared for the debates on uncharted grounds that will certainly follow.

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