

# The EPPO—A New Player in European White Collar Crime Enforcement

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Faced with widespread concern over impunity for fraudulent activities harming not only its finances but its image, the European Union has set up an independent European Public Prosecutor's Office (the "EPPO")<sup>1</sup>, which will be responsible for investigating and prosecuting criminal offences affecting its financial interests in 22 out of the EU's 27 Member States.<sup>2</sup> The first European Chief Prosecutor was appointed in October 2019, the full College of European Prosecutors in July 2020, and the EPPO is due to start active investigations in November 2020.

This is a significant development for all companies and individuals involved in any of the many projects, schemes or activities benefiting from EU funding or subject to the EU's cross-border VAT regime.

This update, in which we provide a high-level overview of the EPPO regime, is complemented by a series of updates in which we have focused on its main aspects one by one.

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## Context

Every year, cross-border VAT fraud alone causes losses estimated at EUR 60 billion to the budgets of the Member States and the EU. Particular industries, like the heavily subsidised agriculture sector, the subject of a significant exposé in *The New York Times*,<sup>3</sup> are prone to criminal activities, leading to significant financial loss to the EU's finances. Corruption in public procurement for projects benefiting from EU funding causes significant financial loss to the EU budget. And the list goes on.

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<sup>1</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the "[EPPO Regulation](#)").

<sup>2</sup> Denmark, Hungary, Ireland, Poland, Sweden and the United Kingdom have opted not to participate. In April 2019, the Swedish Prime Minister indicated that Sweden may [opt-in at a later stage](#).

<sup>3</sup> "[The Money Farmers: How Oligarchs and Populists Milk the E.U. for Millions](#)", article of November 3, 2019.

On [10 September 2020](#), the European Anti-Fraud Office (“OLAF”) published its annual report for 2019. During 2019, OLAF opened 223 investigations and concluded 181, which led to the issuing of 254 recommendations to competent authorities at the EU and national levels. Cases investigated ranged from cross-border collusion between contractors and beneficiaries, via schemes involving the fraudulent undervaluation of goods imported into the EU, to corruption in high-value EU tenders. As environmental protection rises up the EU’s political agenda, frauds linked to environmental harm, such as biodiesel dumping, are increasingly in focus. Following investigations concluded during 2019, OLAF recommended the recovery of EUR 485 millions to the EU budget.

Due to a combination of a lack of resources in law enforcement and Member States not prioritising it, enforcement of fraudulent and corrupt activities involving EU finances is often deficient or lacking. In addition, resource-intensive investigations into cross-border cases are often hampered by a lack of cooperation. The hope is that the EPPO will fill this lacuna in enforcement.

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## An Independent EU Prosecuting Corps, Working within the National Systems

The EPPO, based in Luxembourg, will be the first supranational prosecuting authority charged with the investigations and prosecution of white collar offences. At the central level, the European Chief Prosecutor chairs the College of 22 European Prosecutors (one per participating Member State)<sup>4</sup>, responsible for supervising, coordinating and directing investigations and prosecutions carried out at a decentralised level by European Delegated Prosecutors (“EDPs”) working within the national criminal justice systems of the participating Member States. EDPs – at least two per participating Member State – will bring cases before Member State courts, using local personnel and applying national procedures and legislation. The operating costs of the central level as well as the salaries of the EDPs will come out of the EU’s budget, whereas the operational costs of the EDPs’ investigative activities and prosecutions will be the responsibility of the participating Member States, with the possibility of assistance from the EPPO’s central budget.

The institutional and operational independence of the EPPO as a whole is assured by strong EU law protections against administrative or political influence at both the EU and Member State levels. At the same time, the EPPO is ultimately accountable to the Court of Justice of the EU (the “CJEU”) and bound by the principles of legality, proportionality, impartiality and fairness. The EPPO is therefore obliged to investigate objectively, pursuing both inculpatory and exculpatory lines of inquiry.

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<sup>4</sup> The College was appointed on 27 July 2020; see <https://www.debevoise.com/insights/publications/2020/07/epo-meet-the-college-of-european-prosecutors>

All EDPs will have a common minimum set of investigative powers set out in the EPPO Regulation, as well as all powers available to equivalent national prosecutors. The EPPO's acts will be subject to judicial review before the courts of the relevant participating Member States; the CJEU will have jurisdiction to issue preliminary rulings on the legality of procedural acts of the EPPO challenged before any national court. The activities of the EPPO will have to respect, in particular, the Charter of Fundamental Rights of the European Union, which enshrines the right to a fair trial, the right to an effective defence and the presumption of innocence as well as the principle against double jeopardy/*ne bis in idem*.

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## Significant but Strictly Delineated Jurisdiction

The material jurisdiction of the EPPO is set out in the so-called "PIF Directive",<sup>5</sup> which provides a non-exhaustive list of what shall be regarded as fraud affecting the EU's financial interests:

- fraud relating to expenditures and revenues affecting funds or assets from the EU budget or budgets managed by the EU, or on its behalf;
- fraud relating to VAT if (i) connected with the territory of two or more Member States, and (ii) worth at least EUR 10 millions;
- active and passive corruption or misappropriation that affect the EU's financial interests;
- taking part in a criminal organisation focused on committing crimes against the EU budget;
- the laundering of assets derived from such activities; and
- incidental offences closely related to the aforementioned activities such as tax offences, submission of false statements to public authorities, books-and-records violations, or breach of trust.

Member States were obliged to transpose the PIF Directive by 6 July 2019, including providing for these offences in their national criminal legislations. Those offences are the ones the EPPO will investigate and pursue before the courts of the Member States.

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<sup>5</sup> [Directive \(EU\) 2017/1371](#) of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

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## Impact on Corporates

Evidently, corporate actors are involved in projects, schemes and activities involving EU funding and with the EU's cross-border VAT regime. Corporates can therefore be expected to be an important source of reports, complaints and evidence for the EPPO. Where possible in national law, corporate victims of fraud affecting the EU's financial interests will be able to become formal parties to proceedings. In addition, and significantly, the PIF Directive requires Member States to provide for corporate liability for fraud affecting the EU's financial interests.

For the corporate target of an EPPO investigation, it is clear that deferred prosecution agreements and other non-conviction disposals will be available to corporates where they are provided for in the national law of the handling EDP. Convicted corporates will be sentenced according to national sentencing laws. However, it will be for the EPPO to establish policies and procedures on matters such as its approach to corporate suspects, victims, and witnesses, and which criteria should determine jurisdiction between potentially competent national EDPs. All of these questions, plus how the EPPO will interact with national corporate enforcement regimes, will be potentially very important for corporates operating within the EU.

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## Interaction with National, EU and International Authorities and Bodies

The EPPO will cooperate with the national law enforcement authorities of the participating Member States, particularly in relation to the sourcing of allegations and resolving potential jurisdictional conflicts. The EPPO will also cooperate closely with a number of EU agencies, in particular, Eurojust, OLAF and Europol.

In relation to law enforcement authorities in non-participating Member States, the EPPO will seek to establish working arrangements, and it will be able to benefit from EU and national cooperation and MLAT arrangements with third countries and international organisations.

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## The First European Chief Prosecutor

Laura Codruța Kövesi was formally appointed the first European Chief Prosecutor on 17 October 2019, for a non-renewable term of seven years. Kövesi is the former head of the Anti-Corruption Directorate of the Romanian Public Prosecutor's Office (the "DNA"). In a difficult political context, the DNA achieved significant successes, including notably

the conviction and imprisonment of a former prime minister. In fact, under Kövesi's stewardship, the DNA was seen as a rare bright spot in the context of a general deterioration of Romania's commitment to the rule of law and, in particular, the fight against corruption. Having sought to neuter the DNA by passing amnesties and decriminalising some forms of corruption, the Romanian government finally dismissed Kövesi from her office in 2018. It then actively opposed her appointment as European Chief Prosecutor and accusations of misrepresentation, abuse of office and bribery, widely seen as an attempt to derail her nomination, were made against her.<sup>5</sup> Kövesi's appointment was secured largely due to strong support from the European Parliament.<sup>6</sup> Kövesi's 2018 dismissal as head of the DNA was subsequently ruled a violation of Kövesi's human rights by the European Court of Human Rights.<sup>7</sup>

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## Outlook

The EPPO has the potential to be an effective enforcer against sophisticated white collar criminality affecting the EU's financial interests. The EPPO regime is complex and multifaceted and there will undoubtedly be legal complications for national and EU judiciaries to grapple with. In addition, the budgetary resources made available to the EPPO will be key. However, in light of the background and experience of its newly appointed head, it is reasonable to expect the nascent EU prosecutor to approach its mandate with ambition and vigour.

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Please do not hesitate to contact us with any questions.

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<sup>6</sup> [“European Parliament maintains its support to the Romanian candidate for European Chief Prosecutor”](#), press release of August 18, 2019.

<sup>7</sup> [“European Court of Human Rights Decision Upholds Prosecutorial Independence Across the Council of Europe”](#) article of May 5, 2020; case of Kövesi v. Romania (application no. 3594/19).



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