

The EPPO's Field of Operations—Jurisdiction and Coordination

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The European Public Prosecutor's Office ("EPPO") is a new European Union body responsible for investigating and prosecuting criminal offences affecting the EU's financial interests in 22 of its 28 Member States.¹ It is expected to start active investigations in November 2020.

In this third article of our series on the EPPO,² we consider its jurisdiction and how it will coordinate internally and with national authorities.

Substantive jurisdiction—criminal offences affecting the EU's financial interests.

The EPPO will be competent to investigate and prosecute criminal offences affecting the EU's financial interests.

The 2017 PIF Directive³ defines the EU's financial interests as covering all revenues, expenditure and assets covered by or due to the EU's budget as well as the budgets of, or directly or indirectly managed by, the EU, its institutions, bodies, offices and agencies. EU Member States, with the exception of Denmark and the United Kingdom, had to transpose the PIF Directive's common definitions of criminal offences against the financial interests of the EU (the "PIF offences") and minimum rules for sanctions and limitation periods into national law by July 2019.

Activity covered by the PIF Directive and therefore potentially falling under the jurisdiction of the EPPO involves a significant portion of the EU economy. To provide

¹ See 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"). [<https://eurlex.europa.eu/eli/reg/2017/1939/oj>] Denmark, Hungary, Ireland, Poland, Sweden and the United Kingdom have opted not to participate.

² See also *The EPPO—A New Player in European White Collar Crime Enforcement* [<https://www.debevoise.com/insights/publications/2019/11/the-epo-a-new-player-in-european-white-collar>] and *The EPPO's Structure and Powers—1 European Head, 22 National Swords* [<https://www.debevoise.com/insights/publications/2019/11/the-eppos-structure-and-powers>]

³ See Directive (EU) 2017/1731 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 (the "PIF Directive"). [<https://eurlex.europa.eu/eli/dir/2017/1731/oj>]

some examples, on the expenditure side, the EU's Structural and Investment Funds support major infrastructure, research and development, and other investments across Europe, and its Common Agricultural Policy disburses billions of Euros in agricultural support. On the revenue side, the EU's external tariff and its cross-border VAT system are important sources of income.

The PIF offences are:

- **Fraud.** This covers the intentional or knowing presentation of false or incorrect information, or the withholding of information required, leading to the wrongful retention of EU funds or assets, or the diminution of EU resources.

In relation to **frauds against VAT**, the EPPO will be competent where the misconduct is connected with at least two participating Member States, and has caused a total loss of at least EUR 10 million.

- **Corruption.** The PIF Directive covers active and passive corruption of public officials in relation to decisions affecting the EU's financial interests. The broad definition of "public official" encompasses:
 - "Union officials", covering in essence all persons employed by or seconded to the EU;⁴
 - officials of Members States or non-EU countries, as defined in national law and including any person holding an executive, administrative or judicial office at the national, regional or local level; and
 - persons assigned and exercising "public service functions" involving the management of or decision-making concerning the EU's financial interests.
- **Misappropriation.** This covers the intentional commitment or disbursement of funds by a public official contrary to their intended purpose and thus damaging the EU's financial interests.
- **Money laundering.** The laundering of the proceeds of PIF offences by conversion, transfer, concealment, disguise, or acquisition (conduct described in the EU's Fourth Anti-Money Laundering Directive⁵) also fall under the remit of the EPPO.

⁴ See Council Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community. [<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31968R0259&from=FR>]

- **Incitement to, aiding and abetting, or attempting** the commission of a PIF offence further triggers criminal liability (with the exception of attempting to commit corruption or money laundering).

In addition to the PIF offences, the EPPO Regulation gives the EPPO competence over **participation in a criminal organisation** whose “focus” is to commit PIF offences, as well as “**any criminal offence inextricably linked with the commission of**” a PIF offence. If the EPPO and national authorities disagree on jurisdiction over facts potentially falling within these two categories of offences, the conflict of competences will be decided at the national level.

Territorial and personal jurisdiction. The EPPO will be competent on the basis of:

- **Territorial jurisdiction** — relevant offences committed in whole or in part within the territory of one or several participating Member States.
- **Active personality** – relevant offences committed outside the territories of the participating Member States by a **national of a participating Member State** or an **EU official** if, in both cases, a Member State has extraterritorial jurisdiction for these offences.

Temporal jurisdiction. Subject to national limitation periods, the EPPO will be competent in relation to offences committed after 20 November 2017. The PIF Directive requires Member States to ensure that PIF offences punishable by a maximum of at least four years’ imprisonment have absolute limitation periods of at least five years counting from the commission of the offence, and a minimum of three years if the limitation period can be tolled.

Coordination between EDPs. European Delegated Prosecutors (“EDPs”) will investigate and prosecute cases on behalf of the EPPO in their respective Member States.⁵ As a rule, cases will be handled by EDPs from the Member State where “the focus of the criminal activity” is. If several connected offences within the competences of the EPPO have been committed, the competent EDP will be the one from the Member State where “the bulk of the offences has been committed.” Exceptions to this rule may apply, e.g. on the basis of the habitual residence or the nationality of the suspect, or where the main losses have been suffered.

⁵ See Article 1(3) of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>].

⁶ See *The EPPO’s Structure and Powers—1 European Head, 22 National Swords* [<https://www.debevoise.com/insights/publications/2019/11/the-eppos-structure-and-powers>]

If EDPs in several Member States are potentially competent to handle a particular investigation, the Permanent Chambers (a body tasked with the monitoring and directing of EDP investigations and prosecutions) will determine where to attribute the investigation.

In cross-border cases, a “handling” EDP has the power to require the execution of an investigative measure to an “assisting” EDP in another Member State. In this case only the rules of the Member State where the case is finally brought govern the admissibility of such evidence. The only limitation in the EPPO Regulation is that evidence cannot be ruled inadmissible on the sole basis that it was collected in another Member State.⁷

Coordination between the EPPO and national authorities. It is expected that the majority of EPPO investigations will be commenced by an EDP. If a national authority commences an investigation, the EPPO may exercise its “right of evocation” and take the investigation over, thus precluding national jurisdiction over the same conduct.

There are *de minimis* limits to the EPPO’s jurisdiction. In particular, the EPPO will not handle cases where the likely loss to the EU’s financial interests is less than EUR 10,000 unless they have repercussions at the EU level, or involve EU officials. Equally, the EPPO will refrain from handling cases where the maximum sentence of an “inextricably linked offence” exceeds that of the PIF offence (unless the former was instrumental to the commission of the latter), and in certain circumstances where the losses to the EU’s financial interests are likely inferior to those caused to another victim (notably a Member State).

In relation to these last circumstances, in case of disagreement between the EPPO and national authorities, the authorities responsible for the attribution of competences at the national level will decide. In any case, the European Court of Justice will have jurisdiction to give preliminary rulings in relation to conflicts of competence between the EPPO and the competent national authorities.

Outlook. Although the PIF Directive harmonises national laws, the EPPO’s substantive jurisdiction will still vary between the Member States in significant respects. Non-harmonised elements of offences (e.g. the concept of intention), and only minimally harmonised areas (e.g. sentencing), leave potentially material divergences between Member States. Also, it may well be that the EPPO will face a situation where the prosecution of the same conduct is time-barred in one Member State but not another.

⁷ The European Commission’s original proposal for the EPPO Regulation included the principle of “free movement of evidence”, i.e. that all evidence lawfully collected by an EDP in one Member State would be admissible in any other.

Given the risk of at least perceived forum shopping by the EPPO, it is hoped that its College will develop guidelines to address whether and how such divergences will affect the attribution of competences between EDPs.

The Treaty on the Functioning of the EU provides for the possibility of extending the substantive competence of the EPPO to other forms of “serious crime having a cross-border dimension”, including cross-border terrorism. This discussion has already started but the EPPO will most probably have to prove its effectiveness in handling PIF offences first before an extension to other crimes will be seriously entertained.

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