

# The EPPO and Corporate Enforcement— Known Unknowns

4 December 2019 – Updated September 2020

The European Public Prosecutor’s Office (“EPPO”) is a new European Union body responsible for investigating and prosecuting criminal offences affecting the Union’s financial interests in 22 of its 27 Member States.<sup>1</sup> The EPPO is expected to begin investigations in November 2020.

In this fourth article of our series on the EPPO,<sup>2</sup> we consider the implications of the EPPO regime specifically for companies operating in the EU.

---

## Corporate Liability—Harmonised but of Unclear Scope

The 2017 PIF Directive<sup>3</sup> requires EU Member States to institute liability of legal persons for the main offences to be investigated and prosecuted by the EPPO, i.e., fraud, corruption and VAT fraud affecting the EU’s financial interests (the “PIF offences”).<sup>4</sup> The PIF Directive does not require this liability to be criminal, and regimes such as the ones in Germany and Italy imposing administrative corporate liability for criminal offences<sup>5</sup> would seem compatible with the requirements of the PIF Directive.

The PIF Directive establishes two bases for corporate liability, based on the direct or indirect responsibility of senior representatives for the substantive offence.

---

<sup>1</sup> 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](#)”).

<sup>2</sup> See our [EPPO practice page](#).

<sup>3</sup> 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](#)”).

<sup>4</sup> For a [discussion](#) of the EPPO’s substantive jurisdiction.

<sup>5</sup> The German Administrative Offences Act (*Ordnungswidrigkeitengesetz*) provides for companies to be fined for offences committed on their behalf. The Italian administrative corporate liability regime for criminal offences pursuant to D.Lgs. 231/2001 is enforced by the criminal enforcement authorities and determined before criminal courts.

### Liability for Offending by a Senior Company Representative

A company is to be held liable for a PIF offence if it is committed for its benefit by a “person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person”.<sup>6</sup>

### Liability for Lack of Oversight by a Senior Company Representative

A companies is also to be held liable where the commission of a PIF offence by a “person under its authority” and for its benefit was made possible by a “lack of supervision or control” by a person in a leading position.<sup>7</sup>

Under the PIF Directive, the assessment of whether a person is in a “leading position” will be based on her/his power to represent, authority to take decisions on behalf of, and authority to exercise control within the company. Although it seems clear that the notion of a person “in a leading position” extends beyond senior management and the board of directors to lower-level executives, the extent and nature of functions able to engage a company’s liability for criminal offences under the PIF Directive remains to be determined. Although these bases for liability of legal persons are relatively standard in EU legislation seeking to harmonise the liability of legal persons for criminal offences,<sup>8</sup> the EU Court of Justice has not had the opportunity to clarify their scope.

The notion of a “person under [the] authority” of a legal person is also not entirely clear. It can be assumed to extend wider than employees, but doubts remain for more remote actors such as independent affiliates and de facto agents.

Finally, in the absence of a defence based on the sufficiency of a company’s compliance programme, questions arise as to whether the existence and implementation of such a programme will be enough to avoid corporate liability on the basis of “lack of supervision or control”.

---

<sup>6</sup> Article 6 (1) of the PIF Directive.

<sup>7</sup> Article 6 (2) of the PIF Directive; We note that France has so far not expressly implemented this passive liability regime, see [Decree n° 2019-963](#) of 18 September 2019.

<sup>8</sup> See, e.g., article 8 (1) of Directive 2014/57/EU of The European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse ([market abuse directive](#)) and article 10 (1) of [Directive \(EU\) 2019/713](#) of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA.

---

## Corporate Penalties—Minimum Harmonisation

The PIF Directives requires Member States to implement “effective, proportionate and dissuasive sanctions”,<sup>9</sup> which shall include criminal or non criminal fines and “may” include ancillary orders such as:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent exclusion from public tender procedures;
- temporary or permanent disqualification from the practice of commercial activities;
- placement under judicial supervision;
- judicial winding up; and
- temporary or permanent closure of establishments which have been used for the commission of the criminal offence.<sup>10</sup>

Beyond the cross-EU requirement that companies be subject to financial penalties if held liable for PIF offences, corporate sentencing remains a matter for national law.

---

## The EPPO’s Approach to Companies and Corporate Prosecutions—The Great Unknown

With large aspects of the EPPO regime subject to widely divergent national laws, it will be potentially difficult to navigate for companies with EU-wide operations. In particular, there is a wide range of reasons why a company would want a European Delegated Prosecutor (“EDP”) in one Member State to handle a matter rather than another. We would highlight in particular the following:

### The Approach to Co-operating Companies

It is well established that clarity about co-operation—particularly on how companies that discover wrongdoing within their operations can report this and the availability of leniency if they do—incentivises companies to co-operate with law enforcement authorities. The practice and experience of interacting and co-operating with companies in criminal investigations vary widely among the prosecuting services from which the different EDPs will be drawn.

---

<sup>9</sup> Article 7(1) of the PIF Directive

<sup>10</sup> Article 9 of the PIF Directive.

## The Procedural Status of the Corporate Victim

The possibility for a legal person who claims to have suffered loss from an alleged offence to become a party to, and claim damages as part of, criminal proceedings is widespread in the EU. Nevertheless, the practical availability, speed and effectiveness of such a remedy are subject to significant variation among the Member States.

## The Availability of Non-Conviction Resolutions

Companies involved in projects and transactions that fall under the jurisdiction of the EPPO will almost by definition be to a greater or lesser extent dependent on public contracts. For these companies, the debarment from public procurement that would almost inevitably flow from a conviction for a PIF offence<sup>11</sup> may well be fatal to their operations. Companies under investigation by the EPPO will therefore prefer to have their cases handled by EDPs in Member States where non-conviction resolutions (such as deferred prosecution agreements or administrative settlements) are available for legal persons but also, potentially, for any directors and managers involved.<sup>12</sup>

Companies can seek to control events by self-reporting to a particular EDP, as long as there is some jurisdictional nexus with the Member State of that EDP. Responsibility for allocating cases between EDPs will, however, ultimately rest with a Permanent Chamber (“Chamber”) which will have regard to the factors set out in the EPPO Regulation.<sup>13</sup> The EPPO Regulation specifies that the College of European Prosecutors will establish guidelines on Chambers’ approach to requests for approvals for non-conviction resolutions from EDPs in Member States where they are available (hopefully including the EPPO’s approach to self-reporting and co-operation).<sup>14</sup> However, it remains to be seen whether the College will establish guidelines also on the prior question of how issues specific to corporate suspects should affect the allocation of cases among EDPs and whether it will seek to harmonise the EPPO’s approach to corporate suspects more generally. For instance, we do not know whether the EPPO will consider a company’s place of incorporation or the possibility of avoiding the collateral damages which would flow from a corporate conviction to engage the “the general interest of justice”, in which case such factors could potentially affect the Chambers’ decisions on case allocation. It is also unknown whether the Chamber will accept and have regard to a company’s representations in this regard.

---

<sup>11</sup> See Article 57 of the [Directive 2014/24/EU](#) of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

<sup>12</sup> According to the [IBA Report](#) on Structured Settlements for Corruption Offences, of the 22 participating Member States, only Croatia, the Czech Republic, France, Luxembourg, the Netherlands, Portugal, Romania, Slovakia and Slovenia make use of DPAs for such offences.

<sup>13</sup> [See further.](#)

<sup>14</sup> See Article 40(2) of the EPPO Regulation.

---

## Outlook

For companies benefiting from the Single Market to conduct business across the European Union, it may well be a relief to have a single body to which they can report suspected offences affecting the Union's financial interests. A more consistent and effective approach to the enforcement of these crimes will hopefully benefit legitimate enterprise, particularly in Central and Eastern Europe where the EU directs much of its funding and where economic growth is often high but the fight against fraud and corruption often deficient.

At the same time, however, the widely different legal contexts in which this single body will operate will make it a complex interlocutor for companies operating across the Single Market. It is already clear that College guidelines would be welcome on a number of aspects of importance to legal persons involved in EPPO investigations. Time will tell whether the implementation and operation of the EPPO will lead to calls for deeper harmonisation of the procedural approach to legal persons involved in criminal proceedings across the EU.

\* \* \*

Please do not hesitate to contact us with any questions.

### LONDON



Karolos Seeger  
kseeger@debevoise.com



Jane Shvets  
jshvets@debevoise.com



Robin Lööf  
rloof@debevoise.com



Martha Hirst  
mhirst@debevoise.com



Alma M. Mozetič  
amozetic@debevoise.com

**PARIS**



Antoine F. Kirry  
akirry@debevoise.com



Alexandre Bisch  
abisch@debevoise.com



Ariane Fleuriot  
afleuriot@debevoise.com

**FRANKFURT**



Dr. Thomas Schürle  
tschuerrle@debevoise.com



Dr. Oliver Krauß  
okrauss@debevoise.com



Dr. Friedrich Popp  
fpopp@debevoise.com