

The EPPO and Corporate Enforcement—Known Unknowns

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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 The EPPO is expected to begin investigations in November 2020.

In this fourth article of our series on the EPPO,² 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 Directive³ 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").⁴ The PIF Directive does not require this liability to be criminal, and regimes such as the German and Italian administrative corporate liability for criminal offences⁵ would seem compatible with the requirements of the PIF Directive.

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>].

² See also [<https://www.debevoise.com/insights/publications/2019/11/the-epo-a-new-player-in-european-white-collar>] [<https://www.debevoise.com/insights/publications/2019/11/the-epos-structure-and-powers>] [<https://www.debevoise.com/insights/publications/2019/11/the-epos-field-of-operations>].

³ 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>].

⁴ For a discussion of the EPPO's substantive jurisdiction see [<https://www.debevoise.com/insights/publications/2019/11/the-epos-field-of-operations>].

⁵ Although German law does not provide for corporate criminal liability, pursuant to the Administrative Offences Act (*Ordnungswidrigkeitengesetz*), companies can 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.

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

Liability for Offending by a Senior Company Representative

Companies are 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”.⁶

Liability for Lack of Oversight by a Senior Company Representative

Companies are also to be held liable where the commission of a PIF offence by a “person under its authority” and for its benefit has been made possible by a “lack of supervision or control” by a person in a leading position.⁷

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,⁸ 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”.

⁶ Article 6 of the PIF Directive.

⁷ We note that France has so far not expressly implemented this passive liability regime, see Decree n° 2019-963 of 18 September 2019 [<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039110172&categorieLien=id>].

⁸ See e.g. article 8 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) [<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1575028351531&uri=CELEX:32014L0057>], and article 10 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 [<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1575028351531&uri=CELEX:32019L0713>].

Corporate Penalties—Minimum Harmonisation

The PIF Directives requires Member States to implement “effective, proportionate and dissuasive sanctions”, 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;
- placing under judicial supervision;
- judicial winding up; and
- temporary or permanent closure of establishments which have been used for committing the criminal offence.

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 are 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—in particular, 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 cooperating with companies in criminal investigations vary widely among the prosecuting services from which the different EDPs will be drawn.

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 offence⁹ 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.¹⁰

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.¹¹ The EPPO Regulation specifies that the College will establish guidelines on Chambers’ approach to requests for approvals for non-conviction resolutions from EDPs in Member States where they are available¹² (hopefully including the EPPO’s approach to self-reporting and co-operation). 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

⁹ 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 [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>].

¹⁰ 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 [<https://globalinvestigationsreview.com/edition/1001290/the-practitioner%E2%80%99s-guide-to-global-investigations-third-edition>].

¹¹ See further [<https://www.debevoise.com/insights/publications/2019/11/the-eppos-field-of-operations>].

¹² See [<https://www.debevoise.com/insights/publications/2019/11/the-eppos-field-of-operations>].

unknown whether the Chamber will accept and have regard to a company's representations in this regard.

Outlook

For companies benefiting from the Single Market to conduct business across the EU, it may well be a relief to have a single body to which they can report suspected offences affecting the EU'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 economic growth is often high but where the fight against fraud and corruption often remains 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.

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