



# EPPO

## Right out of the starting blocks

8 November 2021

On 1 June 2021, the European Public Prosecutor's Office (the **EPPO**), the new prosecution office at European Union level, officially started its operations. Since then, it already opened more than 300 investigations. This article, which is a first in a series addressing the EPPO, provides an introduction to the EPPO, an overview of its first months in action, and some key take-aways for the Belgian enforcement practice in relation to financial crime.

### Setting the scene

The EPPO is a newly operational prosecution office at European Union (**EU**) level, with the task of investigating and prosecuting crimes contravening the EU's financial interests. The EPPO is designed to fill the enforcement gap relating to financial crime committed at EU level, and its establishment demonstrates that the EU is drawing more and more criminal competences to the supranational level.

The magnitude of financial crime affecting the interests of the EU is difficult to measure, but the scale of the problem is considered to be significant, to say the least. The reported impact of detected fraud against the EU budget in 2020 was approximately EUR 371 million. This does not include transnational Value-Added-Tax (**VAT**) fraud, in relation to which in 2020 alone, the difference between expected VAT revenues and actual VAT collected (the so-called VAT gap) has been estimated at approximately EUR 164 billion.

The EPPO was established by EU Regulation 2017/1939 (the **EPPO Regulation**), which was adopted on 12 October 2017 and entered into force on 20 November 2017. On 1 June 2021, the EPPO officially started its operations. It is expected to handle around 3,000 cases per year<sup>1</sup>.

To give some idea of the types of cases handled by the EPPO, for example, in October 2021, it coordinated an international operation against an organised crime group, where law enforcement authorities carried out searches, arrests, and seizures of assets worth more than EUR 13 million, as a result of a suspected VAT carousel fraud involving luxury cars<sup>2</sup>. In November 2021, following the uncovering of another VAT carousel, assets worth EUR 23 million were seized in the Czech Republic, Romania, and Slovakia<sup>3</sup>. On 4 November 2021, the Italian authorities, led by the EPPO, seized EUR 900,000 in Italy, where large pleasure boats were purchased as part of a EU-funded touristic programme in Calabria, whilst the boats were allegedly only used in Sicily where more profits could be made<sup>4</sup>.

The EPPO aspires to improve cross-border cooperation within the EU, and introduces innovative mechanisms to realise this goal. As a result, financial crime will occupy an even higher place on the enforcement agenda, having possible far-reaching effects for any individuals and businesses active in the EU.

## What is the EPPO?

The EPPO is the first supranational body to investigate and prosecute crimes contravening the EU's financial interests.

Currently, 22 EU Member States participate in the functioning of the EPPO. Each participating Member State may appoint one European Prosecutor, and at least two European Delegated Prosecutors (**EDPs**). Working agreements are being established with the five non-participating Member States (Denmark, Ireland, Hungary, Poland, and Sweden<sup>5</sup>), who are free to join later.

The EPPO is a centralised and a decentralised body. It is centralised in Luxembourg, which hosts the European Chief Prosecutor, the European Prosecutors, the College of Prosecutors, and the Permanent Chambers.

The European Chief Prosecutor manages the EPPO, organises its work, and represents it. The College of Prosecutors, comprising the European Chief Prosecutor and all of the European Prosecutors (currently 22), defines the strategy and the internal rules of the EPPO, and ensures coherence in the handling of cases. They set out the prosecutorial policy and take strategic decisions on questions affecting the EPPO as a whole.

The EPPO's decentralised operations are carried out at the national level by the EDPs. The EDPs carry out the investigations and prosecutions independently from the national authorities, while being supervised from Luxembourg. Each case is monitored and directed by the Permanent Chambers, which in principle consist of the European Chief Prosecutor and two European Prosecutors. The Permanent Chambers take the important operational decisions in individual cases, such as whether to prosecute the case, bring the case before the competent court, dismiss the case, settle the case, or reopen an investigation.

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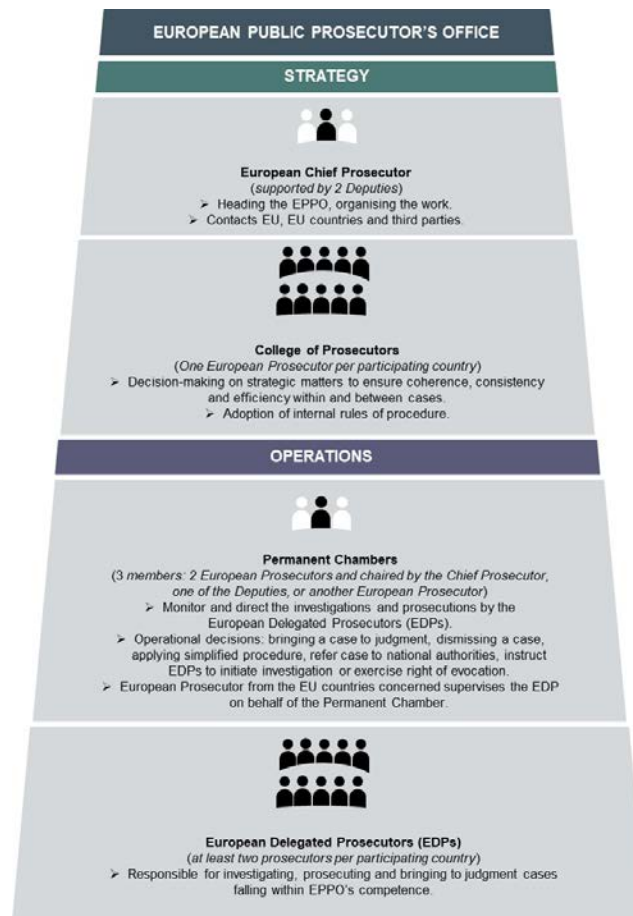
<sup>1</sup> Some of the statistics referred to in this article are based on a presentation on the EPPO given by the Belgian European Prosecutor on 15 October 2021.

<sup>2</sup> See <https://www.eppo.europa.eu/en/news/international-strike-against-organised-crime-group-10-arrests-and-seizures-worth-least-eu13>.

<sup>3</sup> See <https://www.eppo.europa.eu/en/news/four-arrests-and-seizures-worth-eu23-million-czechia-romania-slovakia>.

<sup>4</sup> See <https://www.eppo.europa.eu/en/news/pleasure-boats-bought-eu-funds-assets-worth-eu900-000-seized-italy>.

<sup>5</sup> Sweden has already announced that it intends to participate in the EPPO, and preparations to join the EPPO framework in 2022 are ongoing at the national level.



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## What to expect from the EPPO?

### Operationalisation

As stated above, the EPPO started operating on 1 June 2021. This is the culmination of a process that was set in motion in 1995, when a group of experts was tasked with developing guiding principles for protecting the EU's financial interests through criminal law. In 2007, the legal basis for the creation of the EPPO was finally established by the Lisbon Treaty. Ten years later, on 12 October 2017, the EPPO Regulation was adopted and became directly applicable in the national systems of the participating Member States.

On 14 October 2019, Ms Laura Kösevi was appointed as the first European Chief Prosecutor, for a non-renewable term of seven years. On 27 July 2020, 22 European Prosecutors were appointed, with Mr Yves Van Den Berge being appointed by Belgium, for a non-renewable term of six years. Finally, two EDPs, Ms Jennifer Vanderputten and Ms Pascale Vandeweyer, were appointed for Belgium in the first half of 2021, for a renewable term of five years.

### Mission

The EPPO aims to fill the enforcement gap relating to financial crime committed at the EU level. Other EU bodies pre-dating the EPPO, such as the European Anti-Fraud Office (OLAF), the European Union Agency of Law Enforcement Cooperation (Europol), and the European Union Agency for Criminal Justice (Eurojust), do not have the competence to launch criminal investigations or to carry out prosecutions themselves, and are dependent on the relevant national authorities. The EPPO aims to be fully independent in its protection of EU interests.

<sup>6</sup> See <https://www.eppo.europa.eu/en/structure-and-characteristics>.

Once up and running, the EPPO's workload is expected to be around 3,000 cases per year. Since the EPPO commenced its operations, it already opened more than 300 investigations into criminal activities that have reportedly caused EUR 4.5 billion<sup>7</sup> damage to the EU budget.

	June	July	August	Total
<b>Investigations opened</b>	119	97	66	282
<b>Cross-border investigations</b>	34 (28.57%)	30 (30.92%)	17 (25.75%)	81 (28.72%)
<b>VAT fraud investigations</b>	13 (10.92%)	17 (17.52%)	7 (10.60%)	37 (13.12%)
<b>Estimated damages for opened investigations</b>	1,608,989,052	2,094,702,216	627,487,182	4,331,178,450
<b>Estimated damages for VAT fraud investigations</b>	436,527,659	830,907,633	138,671,891	1,406,107,183

By way of another example, in August 2021, in Germany, the Netherlands, Slovakia, Bulgaria, and Hungary, premises were searched in the framework of an EPPO investigation into cross-border VAT fraud estimated at more than EUR 14 million. The German EDP stated that "[w]ithout the EPPO, setting up this operation would have taken months. Now, it was a matter of weeks"<sup>8</sup>.

## Competence

The EPPO is competent to investigate and prosecute the specific crimes listed in Directive 2017/1371 (the **PIF Directive**). These crimes include specific types of fraud affecting the EU's financial interests (notably VAT fraud, customs fraud, and fraud involving EU subsidies), money laundering, passive and active corruption, and the misappropriation of funds. In addition, the EPPO is also competent to handle offences involving participation in a criminal organisation, if the focus of the criminal activity of the organisation is to commit any of the crimes listed in the PIF Directive, as well as any other offences that are 'inextricably linked' to these crimes.

In terms of territorial and personal jurisdiction, the EPPO will handle crimes committed (i) in at least one participating state, (ii) by a national of a participating state, provided that a participating state has jurisdiction over the crime, or (iii) by EU-staff, provided that a participating state has jurisdiction over the crime. As to its temporal jurisdiction, the EPPO is competent for crimes committed since November 2017.

## Exercise of competence: the opening of investigations

The EPPO may exercise its competence by either initiating its own investigation, or by using its right of evocation. If the EPPO becomes aware that an investigation of a criminal offence that falls within its competence is already being undertaken by national authorities, it will consult with those authorities and decide whether to transfer the proceedings to the EPPO. As such, the EPPO may take priority over the national authorities.

<sup>7</sup> See for example <https://www.eppo.europa.eu/en/news/estimated-damages-eu-budget-ongoing-eppo-investigations-almost-eu45-billion>. However, please note that this amount is based on a preliminary estimate provided by the harmed parties themselves, and not a final calculation of the actual damage caused.

<sup>8</sup> See <https://www.eppo.europa.eu/en/news/premises-germany-netherlands-slovakia-bulgaria-and-hungary-searched-framework-eppo>.

Once a case is opened, it will be handled by the EDP from the Member State where the focus of the criminal activity is or, if several connected offences have been committed, the Member State where the bulk of the offences have been committed. In certain circumstances, for example if the suspect or the accused person have their habitual residence somewhere else but also if the main financial damage occurred elsewhere, the investigation may be handled in or reallocated to another Member State.

The EDP handling the case will conduct the investigation in accordance with national law. The EDPs may undertake investigative measures on their own, or instruct the competent authorities in the relevant Member State to do so. As such, national competent authorities, such as police authorities, are expected to support the EDPs in their day-to-day activities. The EPPO therefore remains, at least to some extent, dependent on the national authorities to do the ground work.

In cross-border cases, the EDPs of different Member States will cooperate in accordance with the rules set out in the EPPO Regulation. Contrary to the existing EU procedures of judicial cooperation, the EDP handling the case will directly assign certain investigative tasks to the assisting EDP, which may improve the efficiency of cross-border cooperation within the EU.

### Decisions following the investigation

After the investigation, the EDP handling the case may propose to the competent Permanent Chamber that the case be brought before the relevant court. As described above, the decision as to whether or not to do this rests ultimately with the Permanent Chambers.

If different Member States have jurisdiction, the case will in principle be brought before the courts of the Member State where the investigation has been handled. However, the case may also be brought before the courts of another Member State if, for example, the accused persons have their habitual residence or the main financial damage has occurred there. Once it has been decided in which Member State the case will be brought before the courts, the laws of that Member State govern the remainder of the proceedings.

The Permanent Chambers may also decide to dismiss the case, on the proposal of the EDP handling the case. The grounds for doing this are listed exhaustively in the EPPO Regulation. At a later stage, the Permanent Chambers may still decide to reopen the case, on the basis of new facts which were not known at the time of dismissal.

Finally, if the applicable national law provides for a simplified prosecution procedure aimed at the final disposal of a case on the basis of terms agreed with the suspect, such as the possibility to terminate the investigation through a settlement, the EDP handling the case may propose that the competent Permanent Chamber apply that procedure.

### Procedural safeguards

The persons involved in the EPPO proceedings (suspects, accused persons, witnesses, and victims) are protected by different procedural safeguards. In particular, the EPPO must respect:

- the Charter of Fundamental Rights of the European Union, which specifically establishes the right to a fair trial, the rights of the defence, the presumption of innocence, and the *ne bis in idem*-principle<sup>9</sup>;

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<sup>9</sup> Articles 47, 48 and 50 of the Charter of Fundamental Rights of the European Union.

- the safeguards provided under existing EU Directives establishing specific procedural rights<sup>10</sup>; and
- any additional guarantee provided for every suspect or accused person by the national legislation of the Member State where the investigations occurs<sup>11</sup>.

In conducting its investigations and prosecutions, the EPPO must be guided by the principles of legality, proportionality, impartiality, and fairness towards the suspects or accused persons. This includes the obligation to seek all types of evidence, inculpatory as well as exculpatory, on its own initiative or at the request of the defence.

The procedural acts of the EPPO are subject to judicial review by the relevant national courts. In addition, the European Court of Justice (the **ECJ**) has residual powers to ensure the consistent application of EU law. This means that it is able to give preliminary rulings on (i) questions of validity of the EPPO's procedural acts based on EU law raised before any national court, (ii) the interpretation or the validity of provisions of EU law, including the EPPO Regulation, and (iii) the interpretation of the provisions of the EPPO Regulation concerning the material competence of the EPPO or the exercise of such competence in relation to any possible conflict that might occur with national authorities.

## Consequences for Belgian enforcement practice

The EPPO Regulation is directly applicable in the national legal systems of the Member States. That being said, the Member States are still responsible for ensuring practical operationalisation and must bring national legislation in line with the EPPO Regulation.

Belgium has already adopted several legal provisions to adapt its existing legislation to the EPPO Regulation. For example, a newly inserted provision in the Belgian Code of Criminal Procedure confirms that the EDPs have the same legal competencies as national prosecutors. This provision also requires the EDPs to only submit cases to specialised investigating magistrates. Indeed, at least in Belgium, the investigating magistrates will continue to lead judicial investigations. The EDPs will only be able to follow the judicial investigations closely, submit requests to the investigating magistrates, and turn to the competent appellate courts where necessary. At the same time, it will be interesting to see whether the investigating magistrates' work and caseload will be impacted, and whether this will affect the aspired increase in financial crime investigations.

In practice, another far-reaching consequence for the Belgian enforcement practice relates to the possibility to dismiss cases or to reach settlements. Belgian prosecutors may currently choose to dismiss a case for a variety of reasons. As stated above, the EPPO Regulation exhaustively sets out the possible reasons for dismissing a case in EPPO investigations. As such, it will no longer be possible for an EPPO case to be dismissed solely at the authorities' discretion. In addition, while it is still possible to settle cases, it yet has to be seen whether the Permanent Chambers will adopt a favourable approach or whether they will choose to submit more cases to the courts. Finally, it will be interesting to see whether divergences in national legislation (such as the existence of corporate criminal liability, which is not provided in all of the Member States' legal systems) or other considerations (such as backlogs) will lead to forum shopping under the EPPO Regulation, and whether this result in the Belgian courts being chosen, or avoided.

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<sup>10</sup> These procedural rights include (i) the right to interpretation and translation, as provided for in Directive 2010/64/EU; (ii) the right to information and access to the case materials, as provided for in Directive 2012/13/EU; (iii) the right of access to a lawyer and the right to communicate with and have third persons informed in the event of detention, as provided for in Directive 2013/48/EU; (iv) the right to remain silent and the right to be presumed innocent as provided for in Directive (EU) 2016/343; and (v) the right to legal aid as provided for in Directive (EU) 2016/1919.

<sup>11</sup> See [https://ec.europa.eu/info/sites/default/files/dg\\_justice\\_eppo\\_brochure\\_en.pdf](https://ec.europa.eu/info/sites/default/files/dg_justice_eppo_brochure_en.pdf), p.9.

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