



DIPARTIMENTO DI  
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# THE EPPO and EU law: a step forward in integration



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## **EPPO AND EU LAW: A STEP FORWARD IN INTEGRATION**

TOPIC I: THE ROAD TO EPPO

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# EPPO REGULATION: rules on the law to be applied by European Delegated Prosecutors in SPAIN

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# OUTLINE OF THE INTERVENTION

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2. **SCOPE OF THE EUROPEAN PUBLIC PROSECUTORS' COMPETENCE IN SPAIN.**
3. **THE BIG PROBLEM WILL BE THE DISTRIBUTION OF COMPETENCES.**  
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# I. INTRODUCTION

\* Organised crime is a serious threat to European citizens, businesses and institutions, as well as to Europe's economy:

- Main criminal activities in Europe: drug trafficking, cybercrime, smuggling of migrants, trafficking in human beings.

- EU countries lost around €140 billion in value added tax (VAT) revenue in 2018 as a result of transnational fraud. Fraud involving European public money is also committed by beneficiaries of European grants for purposes other than those for which they were awarded (in 2018 it amounted to almost €700 million).

\* The control and prosecution of these criminal actions was entrusted to the Member States. Two obstacles have rendered it ineffective:

- States' overriding interest in prosecuting crimes against national interests,
- and the territorial and material limits to cross-border prosecution.

\* The lack of unanimity prevented the adoption of criminal regulations to combat these crimes. The solution: enhanced cooperation.

**ENHANCED COOPERATION (22 Member States):** Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Slovakia and the Czech Republic

## The first year of the EPPO: in numbers



31/05/2022



Crimes which are within the mandate of the EPPO:

**It became operational on 1 June 2021, and since then (until June 2022) the EPPO has registered more than 4,000 crime reports from participating EU Member States and individuals; more than 929 investigations have been opened**

**Citizens can report crimes via EPPO website:**

<https://www.eppo.europa.eu/en/reporting-crime-eppo>



## 2. SCOPE OF THE EUROPEAN PUBLIC PROSECUTORS' COMPETENCE IN SPAIN:

since the European Public Prosecutor's Office must prosecute before national courts, its jurisdiction must be defined by reference to national criminal law, in accordance with Articles 4, 22, 23 and 25 of the Regulation of the European Public Prosecutor's Office (REPPPO).

**EPPPO Regulation** reserves to the EDPs the power to conduct investigations, prosecute and indict when acting within the framework of the material, personal and territorial jurisdiction conferred on them.

The LOFE (Organic Law on the European Public Prosecutor's Office) has been approved in July 2021 to enable the application of the Regulation of the European Public Prosecutor's Office in Spanish criminal proceedings.

According to art. 4 LOFE, and also the EPPPO Regulation, the **EPPPO has competence** to lead the investigation and prosecution **in SPAIN** in:

- 1) *offences harming EU financial interests covered by the PIF Directive (of 5 July 2017) on combating fraud affecting the financial interests of the Union through criminal law) transposed into Spanish law (arts. 305, 305bis, 306, 308, all of the amended Criminal Code), but in the case of VAT fraud only when the facts have cross-border repercussions and involve a total damage of at least €10 million;*
- 2) *offences relating to participation in a criminal organisation committing the above offences.*
- 3) *related offences (offences inextricably linked: by the existence of a set of circumstances linked to each other in time and space).*

## 2. SCOPE OF THE EUROPEAN PUBLIC PROSECUTORS' COMPETENCE IN SPAIN

Since the European Public Prosecutor's Office must prosecute before national courts, its jurisdiction must be defined by reference to national criminal law, in accordance with articles 4, 22, 23 and 25 of the REGULATION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE.

- **Article 25.6. EPPO Regulation:** "In the case of disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Article 22(2), or (3) or Article 25(2) or (3), the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case. Member States shall specify the national authority which will decide on the attribution of competence".

In case of discrepancy on the material scope of competence, the authority designated as competent, according to Art. 22.6 EPPO Regulation, RESOLVES. In Spain that authority can be two different ones:

- **The Spanish Attorney General:** if the discrepancy arises between the EPPO and the National Prosecutor's Office.
- **The Second Chamber (Criminal Chamber) of the Supreme Court:** if the discrepancy arises between an Investigating Judge already hearing the case and the EPPO. It is presented as a "question of jurisdiction". For the resolution of this question, the Supreme Court may refer the matter to the CJEU, by asking for a preliminary ruling.



### 3. THE BIG PROBLEM WILL BE THE DISTRIBUTION OF COMPETENCES.

#### 2 CONFLICT SCENARIOS: POSITIVE AND NEGATIVE

Two types of conflict of competence can arise: positive and negative. And the most complicated ones arise between the Spanish and European prosecutors' offices.

**A) POSITIVE CONFLICT: The Spanish Public Prosecutor's Office decides that it is competent to investigate part of the offences. The SF disagrees and considers itself the only one with competence.**

In Spain, the investigation of crimes against the EU's financial interests is the responsibility of the Spanish Public Prosecutor, and specifically of the Prosecutor's Office against Corruption and Organised Crime, until such time as the EPPO decides to take up the case. But there may be borderline cases, such as in the case of related offences.

This discrepancy of competence between national and European Public Prosecutor's Offices is decided by the **Spanish Attorney General**, following the opinion of the Board of Public Prosecutors. And this decision cannot be appealed in court.

The European Public Prosecutor's Regulation does not provide for an appeal against the national decision. Nor does the Spanish legislation provide for an appeal against the resolution of possible conflicts of competence between the two prosecutor's offices.

And, what about the EUCJ?



# THE BIG PROBLEM WILL BE THE DISTRIBUTION OF COMPETENCES.

## 2 CONFLICT SCENARIOS: POSITIVE AND NEGATIVE

- **B) NEGATIVE:** The Spanish investigating judge considers that the EPPO has jurisdiction. The EPPO considers that it does not have jurisdiction and declines to exercise it.
- The Regulation does not provide for possible cases of negative conflict of competence.

In the case of a conflict between the courts and the FE, the body that has to solve it is the Second Chamber of the Supreme Court, and this must be the case whether it is a positive or negative conflict, unless the existence of negative conflicts is not admitted, given that the European rule does not provide for them.
- A negative conflict has been raised in Spain, presented by a Investigating Judge (Juzgado de instrucción, form Getafe- Madrid) with the EPPO and has been solved by the Second Chamber of the Supreme Court by order of 9 June 2022.
- The question raised involved a transitional point of law: **to determine whether the facts had been committed before or after 20 November 2017**. Art. 120.2 RFE grants competence to the EPPO in relation to offences committed after 20 November 2017, provided that the investigation was not completed with the filing of an indictment before the relevant court.
- The Investigating Judge considered that the matter should be taken over by the EPPO. The EPPO declined the transfer, with the Permanent Chamber's approval, because it considered that the fraud took place before 20 November and this closed their ability to take over the case.

# CONCLUSION

The procedural acts of the European Public Prosecutor's Office are subject to judicial review by the national courts. The Court of Justice of the European Union has residual powers to ensure consistent application of EU law by way of preliminary rulings or review of the legality of non-procedural acts of the European Public Prosecutor's Office (Article 42.-c).

According to this, it is possible to find the solution going to article 42 of the EPPO Regulation, and stopping at 3 clear statements it contains:

- 1) The acts of the EPPO with effects vis-à-vis third parties are susceptible to jurisdictional control.
- 2) Jurisdiction for the exercise of this control corresponds to national judges.
- 3) The decision of the EDP not to take over an investigation for an offence that falls within the competence of the EPPO is a procedural act, with effects vis-à-vis third parties, which has an impact on the determination of the legal judge.

Only a reform of the Regulation by reducing the decision-making possibilities of the national public authorities can solve these problems and enable the European Public Prosecutor's Office to be a true EU Public Prosecutor's Office

**Finally, one regret:** the Supreme Court should have taken the opportunity to **ask for a preliminary ruling** to highlight the situation of the Spanish regulation

#### 4. ONE WORD ON: "SECURING SOURCES OF EVIDENCE": ARTICLES 96 TO 106 LOFE). - L'INCIDENTE PROBATORIO (?)

By means of the "*incident for the securing of sources of evidence*", the EDP, ex officio or at the request of the prosecution and the person under investigation, may apply to the judge of guarantees, at any time before the summons to the trial body (it is therefore a request that extends beyond the investigation procedure), when it can foresee that they will not be available for use in the oral trial.

These are sources of personal (sic) evidence: witness or expert testimony, or of the person under investigation concerning the criminal liability of other persons.

In reality, it is a matter of *anticipating the evidence (anticipatory evidence)* in cases where there are reasonable grounds to fear that the source may disappear or the declaration *may be ineffective due to fear, coercion, degenerative illness, age, disability.*

iiGRAZIE MILLE!  
Per l'attenzione

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