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# Legal News Alert

## European Network – EPPO Client Information

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## INTRODUCTION

In the future, the European Public Prosecutor's Office ("EPPO") will homogeneously prosecute criminal offenses against the EU's financial interests. The EPPO is an independent authority meant to prevent misuse and embezzlement of EU funds by investigating fraud, corruption, and money laundering. It is expected to play a decisive role in checking whether money provided by the EU in the context of the Covid-19 pandemic has been requested or used fraudulently by corporations.

The EPPO's administrative structure is currently being set up to make way for its operational phase, as it is supposed to be fully functioning soon. By implementing the EPPO, the EU aims to overcome existing obstacles to crossborder investigations and prosecute criminal offenses against the EU's financial interests more effectively. We expect more coordinated crossborder investigations in Europe as a whole, as the EPPO is an important step towards a more coherent criminal and white-collar crime prosecution system within the EU.

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## STRUCTURE

The EPPO will be organized in two levels. The first level will be headquartered in Luxembourg and consist of the European Chief Prosecutor, Laura Codruța Kövesi, who will be supported by two deputies, Danilo Ceccarelli and Andrés Ritter. This central office is authorized to instruct the European Delegated Prosecutors and supervise their investigations. Each participating Member States will delegate a European Prosecutor to Luxembourg.

The second, decentralized level will be located in the 22 participating Member States, where national public prosecutors, i.e., the European Delegated Prosecutors, will be entrusted with the tasks of the EPPO, in addition to their domestic activities. They will perform the actual investigations.

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## POWERS

The investigative powers of the EPPO in the individual Member States are generally governed by the respective applicable national laws.

Where a matter requires investigation in two or more Member States, as is frequently the case, the investigating European Delegated Prosecutor will be assisted by another European Delegated Prosecutor in the Member State concerned. Which European Prosecutor will perform the investigation in such cases will generally depend on the country where the focus of the criminal offense lies.

The complex, highly formalized regulations of international legal assistance have often stood in the way of smooth cooperation between national investigating authorities. But now, the new rules on European Prosecutors will prevail over these regulations and simplify and expedite cooperation of the European Public Prosecutor's Office in the countries involved.

The EPPO can also call upon the European Anti-Fraud Office ("**OLAF**") to provide information and carry out administrative investigations. OLAF itself cannot initiate any criminal proceedings, so it has to rely on the Member States and their national authorities for such proceedings, and it must report results and recommendations to them for further measures. While the EPPO will be responsible for criminal investigations, OLAF will continue to carry out administrative investigations into irregularities and fraud affecting the EU's financial interests in all EU countries, but it will consult and coordinate closely with the EPPO.

Furthermore, the European Union Agency for Criminal Justice Cooperation (Eurojust) and the EPPO have signed a Working Arrangement laying out the detailed practical ways they

will cooperate to fight crimes against the EU's financial interests, e.g., by regulating the exchange of information and establishing liaison teams.

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## JURISDICTIONS

The EPPO has subject-matter jurisdiction for the investigation and indictment of criminal offenses that affect the financial interests of the EU, in particular to prevent the misuse and embezzlement of EU funds by investigating fraud, corruption and money laundering. The question of whether an action is a criminal offense, however, will continue to be governed by the national criminal laws. The minimum criminal standards of these laws have been harmonized by a European directive.

To ensure the most bundled and efficient prosecution of criminal offenses against the interests of the EU, national authorities and EU bodies must convey relevant suspicions to the EPPO. Companies and private individuals may inform the EPPO of possibly relevant facts by way of a criminal complaint. Whether initial suspicion of a criminal offense exists, and an investigation is to be initiated will be ascertained solely by the EPPO based on the information provided. If an investigation of facts falling within the EPPO's scope of jurisdiction has already been initiated at the national level, the EPPO will be able to take over the proceedings. If the EPPO receives information over which it does not have jurisdiction, it will pass it on to the national prosecutors.

For reasons of procedural efficiency, the EPPO's priority over the national investigating authorities in its area of jurisdiction will be limited and not include minor cases of damages under EUR 10,000 or those in which primarily national objects of legal protection are damaged. In practice, the vast majority of cases are unlikely to fall under these exceptions. The EPPO has jurisdiction over VAT fraud when the offense is associated with the sovereign territory of (at least) two Member States, and the total damages are EUR 10 million or more.

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## COUNTRY-SPECIFIC IMPLEMENTATION

### 1. Germany

To incorporate the EPPO into its national law and secure the powers granted to the Office in Europe, Germany created new criminal procedure rules and adapted its existing laws. These material changes include the following:

- Along with the appropriate jurisdiction to prosecute individuals, the EPPO will also be responsible in Germany for investigating and fining companies within the scope of section 30 Administrative Offenses Act (OWiG). This is subject to the prerequisite that a company fine is linked to a predicate offense by an individual the EPPO is investigating.
- Germany has granted each of the German European Delegated Prosecutors nationwide jurisdiction. This is intended to contribute to bundling jurisdiction and to the most uniform prosecution.
- The possibility to refrain from prosecuting offenses committed abroad under the national Code of Criminal Procedure will be superseded to ensure effective prosecution. In the past, because of the difficulties associated with international investigation, national authorities had, in some cases, made extensive use of the possibilities of discontinuing prosecution.
- Once the EPPO has discontinued an investigation, a limited double-jeopardy rule applies, meaning that further national investigation is only allowed based on new facts.
- The European Delegated Prosecutors are subject solely to the instructions of the EPPO. National organizational rules and instructions do not apply.

### 2. Italy

Italy adopted the European Delegation Law 2018 (Law 117 of October 4, 2019), which entered into force on November 2, 2019.

Under article 4, the government enacted Legislative Decree 9 of February 2, 2021, which entered into force on February 6, 2021, to incorporate the EPPO into its statutory system.

The Legislative Decree:

1. identifies the Superior Council of Magistracy, in accordance with the Ministry of Justice, as the Competent Authority responsible for appointing three candidates to EPPO position. Within 30 days from its entrance into force, the Superior Council of

Magistracy will determine the selection criteria and procedures governing the appointment of the candidates;

2. identifies the Ministry of Justice as the competent authority to enter into the agreement with the EPPO to determine the number of Italian European Delegated Prosecutors and the functional and territorial distribution of powers among them;
3. provides that the European Delegated Prosecutors have the responsibilities and powers of the national Public Prosecutor Office in relation to the proceedings falling under the scope of the EU regulation;
4. establishes the rules governing the removal from office or the adoption of disciplinary measures with regard to the Italian European Delegated Prosecutors; and
5. provides that all complaints filed by Italian public authorities in relation to offenses that fall under the jurisdiction of the European Public Prosecutor must be conveyed to the national Public Prosecutor and to the European Delegated Prosecutor. The Legislative Decree also governs the registration in the notices of criminal offenses that fall under the jurisdiction of the European Public Prosecutor.

Furthermore, under article 3 of the European Delegation Law 2018, the Italian government adopted Legislative Decree 75 of July 14, 2020, which entered into force on July 30, 2020, to include “*offenses affecting the financial interests of the European Union and which are not already included in the Decree*” among those that can trigger corporate liability under Legislative Decree 231/2001, in addition to VAT fraud when connected to the territory of two or more Member States and involves damages for at least EUR 10 million.

### 3. France

Further to the appointment of Frédéric Baab as the French European Prosecutor; the French Parliament enacted Law 2020-1672 on the European Public Prosecutor's office, environmental justice and specialized criminal justice on December 24, 2020, whose goal was, among other matters, to adapt French criminal procedure to the EPPO.

This marks a severe departure from some of the founding principles of French criminal procedure:

- In France, public prosecutors are not independent from the government, which has the power to appoint them and issue general instructions regarding criminal policy.

By contrast, the European Delegated Prosecutors will be completely independent, except for the EPPO's central office.

The independence of public prosecutors is a highly debated topic in France, and accusations of government interference in criminal investigations are frequent, especially in high-profile cases. Complete independence of the European Delegated Prosecutors represents a major change in the organization of the French judiciary.

- Under French law, investigations can be performed in one of two procedural frameworks: (i) the preliminary or *flagrante delicto* investigation, under the authority of a public prosecutor and (ii) the judicial investigation, under the authority of an investigative magistrate. The latter is used when complex investigations are required or when it is necessary to place the suspect under judicial supervision or pre-trial custody during the investigation.

To reconcile judicial investigation with the EPPO rules in matters falling under its jurisdiction, the European Delegated Prosecutors will be allowed to exercise the powers of both the public prosecutor and the investigative magistrate.

This solution seems quite unorthodox, as the judicial investigation is construed as a contradictory procedure in which the investigating magistrate conducts the investigation impartially, with the participation of the suspect, the victim and the public prosecutor.

Besides, this solution echoes the fierce debate in France between the proponent of an adversarial procedure, with an emphasis on the role of the public prosecutor and the defendants of the inquisitorial procedure and the investigating magistrate.

- Contrary to the rule applicable under French law, according to which public prosecutors can discretionarily decide whether to press charges, European Delegated Prosecutors are required to do so, provided there is enough evidence and no reason bars prosecution (e.g., statute of limitation, death or insanity of the suspect).

From a practical point of view, the Paris courts have exclusive jurisdiction regarding the cases falling under the scope of the EPPO, in first instance as well as on appeal.

Therefore, it will be interesting to examine the operation of the European Delegated Prosecutors in France in the next few years, as these changes are likely to have a lasting effect on French criminal procedure as a whole.

## 4. Spain

Spain's efforts to incorporate the European Public Prosecutors Office into its national legislation can be summarized as follows:

- On February 2, 2019, the Kingdom of Spain approved Royal Decree 37/2019, which established the conditions for the appointment of candidates for European Prosecutors and European Delegated Prosecutors in Spain, including the candidates' requirements and qualifications. Under the Royal Decree, the Selection Committee, which is a multifaceted collegiate body attached to the Spanish Ministry of Justice, submits names for the shortlists for European Prosecutor and for Delegated European Prosecutor in Spain. This committee is chaired by the head of the Spanish Ministry of Justice.
- On July 27, 2020, the appointment of Concepción Sabadell as the Spanish European Prosecutor was published.
- On January 21, 2021, the internal regulations of the European Public Prosecutor's Office were published in the Spanish Official Gazette.

- Taking advantage of the fact that Spanish legislators are working on a new Criminal Procedure Code, a specific paragraph on the European Public Prosecutor's Office has been included in the first draft (approved by the Council of Ministers on November 24, 2020). The new code empowers the European Public Prosecutor's Office to "investigate and prosecute the perpetrators of crimes against the financial interests of the Union."

## 5. Portugal

Following Regulation (EU) 2017/1939 of October 12, 2017, implementing enhanced cooperation on the establishment of the EPPO, the Portuguese Parliament approved Law 112/2019 of September 10, 2019 ("Law 112/2019"), which is now in force and aims to adapt the legal system to the EPPO and its mission.

Under Law 112/2019:

- the EPPO, whenever exercising its investigative powers in Portuguese territory, is considered equivalent to the Portuguese Public Prosecutor's Office ("PPPO") in criminal proceedings;
- the PPPO is obliged to immediately communicate, to the EPPO, any crime reports that fall within the EPPO's jurisdiction (see above);
- the Portuguese Criminal Police Bodies (encompassing all police entities and agents who are responsible for carrying out any acts that a judge or the PPPO orders) are obliged to assist the EPPO with exercising its investigative powers in Portuguese territory (in these cases, the Criminal Police Bodies will operate under the direction of the EPPO, on which they are functionally dependent);
- Portuguese judges (*juízes de instrução criminal*) must carry out any judicial acts that have to be carried out in an investigation that falls within the EPPO's jurisdiction;
- the remaining Portuguese authorities must collaborate with the EPPO under the same terms that obliges them to collaborate with the PPPO; and
- European Delegated Prosecutors are granted access to criminal investigation databases.

On July 27, 2020, the appointment of José Eduardo Guerra as the Portuguese European Delegated Prosecutor was published.