

# EPPO Cases in Data

Examples from Czechia on the (Problematic) Measurement of the Effectiveness of EPPO Investigations

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## Article

### ABSTRACT

In June 2023, the European Chief Prosecutor described the level of effectiveness of criminal investigations falling within the scope of the European Public Prosecutor's Office (EPPO) in the Czech Republic as low. This article aims to determine whether any data can verify or refute this statement. Incorporating relevant data from the EPPO's annual reports and statistics from national law enforcement authorities, the author shows that the effectiveness of the investigations does not differ dramatically from that of other economic crimes in the Czech Republic. On the contrary, the majority of cases investigated by the EPPO generally record a higher clearance rate than the national average. The clearance rate of EPPO cases even further improved in 2023 as statistical data submit.

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### CITATION SUGGESTION

J. Petr, "EPPO Cases in Data", 2023, Vol. 18(4), eucrim, pp380–384. DOI: <https://doi.org/10.30709/eucrim-2023-039>

Published in

2023, Vol. 18(4) eucrim pp 380 – 384

ISSN: 1862-6947

<https://eucrim.eu>



## I. Introduction

During her visit to the Czech Republic in June 2023, European Chief Prosecutor *Laura Codruța Kövesi* declared:<sup>1</sup>

We are interested in the level of crime detection, the level of reporting to the EPPO and also in having the police officers specialised in our cases. The level of detection in the Czech Republic is, in my opinion, low, particularly in cases of the value added tax (VAT) fraud. During our investigations we have seen many links with the Czech Republic. These mainly involved the so-called missing trader companies, i.e. fake companies that are set up to commit the VAT fraud.

Indeed, Czech law enforcement authorities, which are now under the supervision of the European Delegated Prosecutors, also consider such criminal activity a significant threat. According to the Report on the Situation in the Area of Public Order and Internal Security in the Czech Republic in 2022:<sup>2</sup>

[I]nfluencing public procurement is linked to subsidy fraud and damage to the financial interests of the EU, as public procurement is often paid for by subsidies, both national and EU. [...] Public procurement is thus a constant source of unjust enrichment at the expense of public budgets.

Ms Kövesi's criticism towards Czech national law enforcement authorities seems harsh and also to assume that the Czech Republic does not fully comply with the requirement enshrined in primary Union law to effectively protect the financial interests of the European Union (Art. 325(2) TFEU). The question arises as to whether these conclusions can also be verified empirically? The following seeks to answer this question by first examining the legal framework of EPPO investigations in the Czech Republic and second by assessing statistical data in respect of the type of EPPO cases and the national clearance crime rate.

## II. Legal Framework of the EPPO's Investigations in the Czech Republic

### 1. Criminal Procedure

It is important to note that the Czech Republic follows a rather formalised approach to criminal procedure in comparison with other European legal systems. The following section explains typical criminal proceedings in an EPPO case. For the sake of brevity and context, this explanation has been simplified, as it would exceed the scope of this article to go into details of the complete procedure with all its variants.

The initial stage of criminal proceedings is the pre-trial stage (*přípravné řízení*), which is typically divided into two phases: the examination phase (*prověřování*) and the investigation phase (*vyšetřování*). In this context, it should be noted that the wording of the Czech version of the EPPO Regulation<sup>3</sup> is (counterintuitively) rather confusing for a Czech practitioner, as it uses the term for the investigation phase (*vyšetřování*) to refer to what is, in fact, the entire pre-trial proceeding.

The legality of the entire pre-trial stage is supervised by the public prosecutor (in EPPO cases: the European Delegated Prosecutor – EDP), who is the *dominus litis* of this stage of the proceeding and is therefore vested with a number of powers by the Criminal Procedure Code.<sup>4</sup> For example, the public prosecutor can give direct instructions to the police authority, replace the investigator, and even conduct the entire pre-trial proceeding by him-/herself.

The police authority involved in EPPO investigations is typically the Criminal Police and Investigation Service of the Police of the Czech Republic (*Služba kriminální policie a vyšetřování Policie České republiky*) or its specialised branch, the National Centre against Organised Crime (NCOZ). In cases concerning VAT, the Customs Administration of the Czech Republic may also assume the role of the police authority.

In the examination phase, the police authority is responsible for conducting all necessary steps to establish the circumstances indicating that a criminal offence has been committed by a certain offender. This must be done within a period of two to six months, which can be extended several times upon approval by the public prosecutor.

If the police authority cannot establish the concrete criminal offence and/or the offender, it dismisses the case. Such a decision may be overturned, however, by the public prosecutor. Conversely, the police authority should issue a formal decision without delay on the commencement of criminal prosecution against the concrete offender. This decision has procedural implications. It moves the proceedings from the examination phase to the investigation phase and confers procedural rights on the accused person. Therefore, a prosecution may not be initiated only to establish a case, i.e., against an unknown offender.<sup>5</sup>

Upon completion of the investigation, the police authority submits the file to the public prosecutor with a recommendation to draft an indictment or to take a different decision (e.g., to transfer the case or to dismiss the prosecution). It is then up to the public prosecutor to take the decision. He/She may, for instance, start negotiations on an agreement on guilt and punishment (i.e., an out-of-court settlement) or decide on different, alternative resolutions of the case.

If an indictment is filed, the public prosecutor represents the public prosecution in a trial. An indictment may only be brought for an offence for which a criminal prosecution was initiated, and the court may only try the offence specified in the indictment.

## 2. Material Competence of the EPPO

With regard to substantive criminal law, the Czech Republic notified the EPPO (in accordance with Art. 117 of the EPPO Regulation) a list of nineteen crimes that constitute the offences defined in the PIF Directive,<sup>6</sup> for which the EPPO exercises its competence. These criminal offences are specified in the Special Part of Act No. 40/2009 Coll., Criminal Code (CC), mainly as property or economic crimes.

## III. Analysis of Cases Investigated by the EPPO

The following section assesses available statistical data in respect of the type of EPPO cases and its national clearance crime rate in the Czech Republic.

The lack of publicly available data likely poses the biggest challenge when it comes to a proper assessment of the types of cases investigated by the EPPO in the Czech Republic, including data on the effectiveness of law enforcement authorities regarding their prosecution. At the Union level, recourse can be made only to data in the EPPO's annual reports (issued pursuant to Art. 7(1) of the EPPO Regulation). Given that the EPPO's annual report for 2021 only covers the second half of the year, only the data contained in the annual reports for 2022 and 2023 present a full picture of its activities.

Another problem is that the EPPO's annual reports (including the newly released EPPO Annual Report 2023<sup>7</sup>) do not provide any information on the methodology used to obtain their statistical data. Therefore, any relevant conclusions in the national context can only be drawn by consulting national data. For the Czech Republic, the data provided by the EPPO can be evaluated against the data presented in the "Annual Report

on the Activities of the Public Prosecutor's Office”<sup>8</sup> and the criminal statistics of the Police of the Czech Republic<sup>9</sup>.

## 1. Data Assessment

According to data from the Report on the Activities of the Public Prosecutor's Office for 2022,<sup>10</sup> the Czech EDPs have already supervised 80 files in total. Of these, 39 offences (49%) were classified as a criminal offence of damage to the financial interests of the European Union under Section 260 CC, and 29 offences were classified as subsidy fraud under Section 212 CC (36%). The third and fourth most frequent offences were evasion of taxes, fees, and similar compulsory payments pursuant to Section 240 CC and the offence of obtaining an advantage in the awarding of a public contract, in a public tender, or in a public auction pursuant to Section 256 CC.

As of 1 June 2021, when the EPPO started its operational activities, it had taken over the supervision of 25 ongoing criminal proceedings in the Czech Republic.<sup>11</sup> In 2022, it supervised 54 proceedings involving a total estimated damage of €275 million. It is interesting to note that only four cases were investigated as VAT fraud, but the total estimated damage made up almost 76% (€207.7 million) of the total estimated damage in all ongoing proceedings supervised by the total of ten Czech EDPs.<sup>12</sup> In 2023, the total estimated damage reached €318.7 million in all 77 supervised cases. VAT fraud cases had risen to seven cases in total,<sup>13</sup> while the share of the VAT fraud damages compared to the damage of all supervised cases remained almost unchanged at 75.9% (€ 241.9 million).

One possible explanation for the flagrant disparity between the amount of VAT fraud and other types of crime might be the restriction of the EPPO's material competence to VAT fraud cases with a total damage of at least €10 million (Art. 22(1) of the EPPO Regulation). Moreover, higher damages usually result from the complexity of the cases and the higher degree of organisation involved in this type of criminal activity, especially in cases of so-called carousel fraud.

## 2. Level of Reporting in Czechia

It should first be noted that the level of reporting should be distinguished from the level of detection of crimes. Currently, no official data exist with regard to the level of crime detection (i.e., latent criminality or dark figure of crime) or the pursued crime types in the Czech Republic. Indeed, for any criminality it is challenging to criminologists to objectively measure the level of crime detection. While law enforcement authorities might rely on official data only, a direct proportion between the level of detection and the level of reporting should logically exist. In my view, the hypothetic low level of crime detection of EPPO-relevant crimes by the national authorities would lead to the higher level of reporting from other entities, i.e. private parties and European Union authorities.

In terms of the level of reporting, the Czech EDPs received a total of 48 reports for 2022. Of these reports, 47 came from national authorities, and only one was from a European Union authority.<sup>14</sup> In 2023, the number of reports reached 63, consisting of 55 reports from national authorities, five from European Union authorities, and three from private individuals.<sup>15</sup>

## 3. Clearance Rate

The success of national law enforcement authorities in their criminal investigations can be measured by the clearance rate, presented in the criminal statistics of the Police of the Czech Republic.

In 2022, the Police registered a total of 53 acts that qualified as a criminal offence of damage to the financial interests of the European Union under Section 260 CC, with an overall clearance rate of 49%. 137 acts qualified as subsidy fraud under Section 212 CC, with an overall clearance rate of 60%. In addition, the Police registered 747 cases of tax evasion under Section 240 CC, for which the overall clearance rate was 41%. In comparison, the overall clearance rate for all types of economic crimes (registered by the Police of the Czech Republic in 2022) was 58%.<sup>16</sup>

In 2023, the Police registered a total of 43 acts of damage to the financial interests of the European Union (Section 260 CC), with an overall clearance rate of 84%. In addition, 130 acts qualified as subsidy fraud (Section 212 CC), with an overall clearance rate of 78%. The offence of tax evasion (Section 240 CC) was registered 916 times and cleared in 49% of cases. In comparison, the overall clearance rate for economic crimes in 2023 was 59%.<sup>17</sup>

Regarding the methodology used, it is important to stress that, in cases of multiple criminal offences, the statistics only cover the most serious offence in the sense of the most severely punishable offence. Furthermore, it is necessary to define the term “clearance rate” in order to correctly classify the data. In the context of Czech police statistics, this term represents the so-called relative clearance rate, i.e., the proportion of registered crimes with a known perpetrator in the total number of registered crimes. As a result, only these cases are considered “solved,” namely that a formal decision on prosecution (mentioned above in Section II.1) has been taken.

As the material competence of the EPPO is exercised in all offences of damage to the financial interests of the European Union (Section 260 CC) and of subsidy fraud (Section 212 CC), these data are the most representative of the EPPO’s activities. In contrast, VAT fraud cases falling within the scope of the EPPO represent only a small fraction of the total number of registered tax evasion offences in the Czech Republic. Nonetheless, given the absence of more specific data, this information gives us an idea of the average clearance rate for this type of criminal activity in the country.

## IV. Conclusion

As outlined in the introduction, European Chief Prosecutor Kövesi voiced criticism against the national law enforcement authorities in the Czech Republic, implying low effectiveness of investigation of the cases falling under the competence of the EPPO, in particular those concerning VAT fraud.

It was argued here that, whereas it seems impossible to objectively measure the level of crime detection, there must be a correlation between the level of detection and the level of reporting. Looking at the level of reporting, the EPPO’s annual reports are the only source of publicly available data. From them, we can conclude that the absolute majority of crime reports stem from the national authorities, while only a fraction of reports come from EU authorities and private parties. In my view, such data indicate the active approach of the national authorities to the detection of this kind of criminal activity.

Looking at the national clearance rate, we can conclude from the available data that the majority of criminal cases handled by Czech EDPs, i.e., cases of offences damaging the EU’s financial interests and subsidy fraud (Sections 260 and 212 CC), had a higher clearance rate than the national average for economic offences: Concretely, 49% and 60% respectively in 2022 as well as 84% and 78% in 2023, while the overall national clearance rate for economic crimes remained below 60%. This improvement could theoretically be due to the EPPO’s supervision of the cases; however, due to lack of long-term comparable data no firm statement can be made in respect of effectiveness.

With regard to tax evasion crimes, including VAT fraud, the overall clearance rate is slightly lower than the average for all economic crimes in the Czech Republic. Again, more precise conclusions cannot be made here, particularly since the EPPO's annual reports do not contain more specific data on its VAT fraud cases.

On the basis of the above data analyses, there is no indication that the approach taken by Czech law enforcement authorities to counter fraud affecting the financial interests of the EU is any different from their approach to countering fraud affecting the national budget.

In my view, one problem is that the EPPO's annual reports do not contain enough information to draw more accurate conclusions. They lack sufficient information regarding the methodology used, making any relevant international comparison impossible. In our case at issue, for instance, the section in the EPPO's annual report on "Typologies identified in active EPPO cases" (on the profile of each Member State's operational activity)<sup>18</sup> could include references to the concrete crime as per the Criminal Code. As a result, the current division in the EPPO's report is incomparable with the national statistics and does not entail an added value for the national authorities. In my opinion, the EPPO missed an opportunity to use its capacity to compare (and publicly disclose) more detailed information regarding its investigations. This would be a valuable asset in the European context. We should keep in mind that effective measures for the protection of the EU's financial interests at the Union level cannot be taken without data-based knowledge on the concrete situation in the Member States, particularly in cases involving such complex criminal activity as VAT fraud.

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The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



**Co-funded by  
the European Union**