

The EPPO and the Fight against VAT Fraud: a Legal Obstacle in the Regulation?

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ABSTRACT

The questionable decision to exclude the competence of the EPPO for criminal offences in respect of national direct taxes could adversely affect its capacity to fight VAT fraud.

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Fighting profit-driven crime is at the core of the mission of the European Public Prosecutor's Office (EPPO). The first ever EU prosecution body is invested with the mandate of protecting the Union's financial interests and its sphere of competence is naturally focused on fighting financial crime.

It is estimated that, on a world scale, drug trafficking is the most lucrative crime. At the EU level, the drug market is estimated to have a minimum retail value of €30 billion per year.¹ Other criminal activities seem more profitable, however, at least within the EU. In 2018, imports of counterfeit and pirated products into the EU amounted to as much as €121 billion (6.8% of EU imports).² Tobacco smuggling, a core offence within the competence of the EPPO, costs the EU budget more than €10 billion annually in lost public revenue³ – a significant amount, especially when compared to customs duties on all products imported to the EU, which amounted to €25 billion in 2018.⁴ Recently, OLAF reported that, based on detected cases, fraudulent irregularities affected the EU's expenditure slightly in excess of €1 billion in 2018.

However, multiple sources reveal that the most profitable crime in the EU is probably intra-EU VAT fraud. Missing trader intra-community (MTIC) fraud costs around €60 billion annually in tax losses⁵ – a figure strongly corroborated by independent indicators. The EU's VAT gap in 2018 was €137.5 billion⁶ and a significant part of it arises from VAT fraud, although the difference between expected and actual VAT revenue represents more than just fraud.⁷ Moreover, a recent study⁸ revealed that the EU has been running massive trade surpluses with itself for years – a logical impossibility and a strong indicator of fraud. The €307 billion self-surplus in 2018 (86% of the entire global self-surplus) for that year suggests possible VAT fraud amounting to up to €64 billion in that year. In respect of VAT fraud – regularly presented as one of the EPPO's "core offences" – the EPPO is competent if the offence is connected with the territory of two or more Member States and involves a total damage of at least €10 million.

VAT fraud often goes hand in hand with direct tax offences and is ultimately committed either by presenting false, incorrect, or incomplete statements or documents or by non-disclosing VAT-related information. Frequently, this conduct simultaneously involves both VAT and direct taxes. In case of simulated transactions in a "carousel fraud," an economic operator might not only illegally claim VAT reimbursement but also deduct from the taxable base the expenses related to the simulated purchase. Both the VAT and the direct tax offences would be committed via one and the same false or incorrect tax statement. In addition, in the context of a foreign company that avoids creating a permanent establishment⁹ in an EU Member State with the purpose of avoiding taxes, the charges might include both direct taxation and VAT as a consequence of non-disclosing information related to both taxes. Therefore, it can be well submitted that, in such cases, VAT and direct tax offences would be "inextricably interlinked."

Council Regulation (EU) 2017/1939 establishing the EPPO does not give a clear definition of the notion of "inextricably linked offences." Recital 54 makes reference to the "*ne bis in idem* principle" and to "concrete circumstances which are inextricably linked together in time and space." The "*ne bis in idem* principle" is a fundamental guarantee for the defendant, whereas in this case the Regulation has an entirely different purpose, i.e. setting out an operational and procedural rule in order to establish which prosecutor's office is competent. Common practice and criminal procedure law in Member States allow – and often oblige – national prosecutors to investigate and prosecute connected offences in the same proceedings, even if they are not "inextricably linked." This is done in the interest of justice and in order to ensure the consistency of the prosecutorial action.

It is expected that the interpretation of the notion of "inextricably linked offences" will become a very controversial legal issue, but there is no doubt that offences involving both VAT and direct taxes at the same time should fall under this legal definition, as outlined above. It is surprising, however, to read in Art. 22(4) of

Regulation 2017/1939 that the EPPO apparently will not be able to investigate and prosecute both the offences.

The rationale of this provision is obscure. Neither the recitals of the EPPO Regulation nor the PIF Directive¹⁰ provide any background on the reasons why, exclusively in respect of direct taxes, the rules on inextricably linked offences do not apply. Moreover, this is not consistent with the rules and operational practice followed by prosecution services in the Member States. Undoubtedly, there is the risk that this approach might substantially affect the capacity and the competence of the EPPO to investigate serious cross-border VAT fraud.

The operational activity of the EPPO will soon reveal the exact consequences that Art. 22(4) of the EPPO Regulation may create and whether a reasonable interpretation is possible. This could be the first and most important provision to undergo the “review clause” foreseen in Art. 119 of the EPPO Regulation, well before the five-year timeframe established therein for evaluation is up.

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