

Towards More Efficient Compensation for Damage Caused by PIF Offences

Explanatory Remarks on the Rules on Compensation and Confiscation in the EPPO Regulation



Article

Francis Desterbeck

ABSTRACT

How can the European Union be efficiently compensated for damage inflicted by criminal offences affecting its financial interests? The EU's legislative framework, in particular the EPPO Regulation, states that EU Member States must take the necessary steps to confiscate, for the benefit of the Union, the proceeds of such criminal offences and to compensate for the damage caused by them. Given the binding force of the Regulation, these are even positive legal obligations for the Member States. According to the author, a minor adjustment in supranational and Member State legislation would suffice to achieve these objectives in a more efficient manner. He proposes, *inter alia*, including the proceeds of confiscation in the traditional own resources of the Union's budget. He also examines how Belgian legislation could be adapted such that the Union is effectively compensated for the damage it suffers from criminal offences affecting its financial interests.

AUTHOR

Francis Desterbeck

emeritus First Advocate-General at the Ghent Court of Appeal (Belgium); former President of the Belgian Association for European Criminal Law

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I. Introduction

Art. 86(1) of the Treaty on the Functioning of the European Union (TFEU) stipulates that, in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. This mandate became reality by means of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation).¹ The European Public Prosecutor's Office (EPPO) has been operational since 1 June 2021 and has, in its short existence, amply proved its usefulness with several notable activities.² As a result, the EPPO has drawn attention to the paramount importance of the fight against criminal offences affecting the Union's financial interests and, related to this, the importance of compensation for damages to the EU caused by these offences.

Art. 38 of the EPPO Regulation underlines the importance of the disposition of proceeds gained by said criminal offences affecting the Union's financial interests as well as the compensation for losses that the Union suffers due to these offences. First data in the EPPO's Annual Report for 2022 indicate that these damages are quite substantial. 1117 EPPO active investigations (as of 31 December 2022) involved estimated damages of €14.1 billion.³

However, Art. 38 of the EPPO Regulation has a rather general scope and, in my view, requires further specification both in the supranational legislation of the EU and in the national legislation of the Member States in order to ensure efficient recovery of the damage caused by the above-mentioned offences. This article aims to examine how this specification can be implemented in concrete terms.

A regulation is a binding legislative act, which must be applied in its entirety, meaning it aims to regulate a situation completely. Furthermore, a regulation is automatically part of the legislation of the Member States. This means the 22 Member States, which are members of the EPPO, have a duty to concretely apply, in practice, the principles put forward in general terms by Art. 38 of the EPPO Regulation.

This article starts with an outline of the general framework before explaining in more detail the issues surrounding the confiscation and compensation of offences detrimental to the EU's financial interests and then making recommendations for legislative improvements. In the following section (II.), I will examine the scope of the EPPO Regulation and, relatedly, the powers of the EPPO. In this context, the question is addressed of whether the EPPO has the power to prosecute all offences affecting the Union's financial interests. In section III, I will explain seizure and confiscation in general and, next, in section IV, discuss how the obligation of forfeiture and compensation by Member States can be concretely improved by some legislative adjustments. The conclusions (V.) put the ideas in a nutshell.

II. The EPPO's Powers

1. Criminal offences affecting the Union's financial interests

According to Art. 4 of the EPPO Regulation, the EPPO is responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices to, serious criminal offences affecting the financial interests of the Union, as provided for in Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive).⁴ The offences for which the EPPO has jurisdiction are defined in Arts. 3 and 4 of the PIF Directive and concern both the Union's expenditure and revenue. As for its scope, however, the Directive includes several limitations. For instance, in respect of

revenue arising from VAT own resources, the PIF Directive applies only in cases of serious offences against the common VAT system. Offences against the common VAT system are considered to be serious where the intentional acts or omissions are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10 000 000 (Art. 2(2) of the PIF Directive). Furthermore, it establishes that the criminal offences must have been committed intentionally (Art. 3(1)).

2. The EPPO's limited competence

The description of the scope of the PIF Directive under 1) reveals that obligations set up by Union law do not cover all offences against the Union's financial interests. However, confiscation and compensation are equally important for these offences outside the scope of Union law. This approach is also reflected in the division of responsibilities between the EPPO and national authorities. The EPPO Regulation provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union.⁵

If the terms of the EPPO Regulation are met, national authorities have a legal obligation to step down and let the EPPO do its work. The EPPO's work has enormous added value. The "helicopter view" that the EPPO takes of cases under its competence allows the office to make connections between facts that escape the attention of Member States' law enforcement powers. Some cases, however, escape even the EPPO's jurisdiction. Not all offences affecting the Union's financial interests exceed the damage threshold, at which point the EPPO becomes competent. Moreover, "only" 22 Member States are bound by the EPPO Regulation. Hungary, Poland, and Sweden, for instance, are not parties to the Regulation but are bound by the PIF Directive. These Member States also have a duty to prosecute crimes affecting the Union's financial interests, albeit through their national jurisdictions.

As mentioned above, the settlement of damages caused by offences for which the EPPO cannot take action, either because of the limited scope of the EPPO Regulation or because the EPPO has no jurisdiction over these countries, should still benefit the Union.

III. Seizure and Confiscation

1. Legal framework of the EU in general

Criminal offences affecting the Union's financial interests for the sake of financial gain often go beyond the national sphere and are often committed by organised criminal groups. It is obvious that the losses caused by these crimes must be recovered for the taxpayer's sake. As a result, both the PIF Directive and the EPPO Regulation pay attention to seizure and confiscation as means of recovery. Recital 29 of the PIF Directive calls on Member States to take the necessary measures to ensure the prompt recovery of sums and their transfer to the Union budget, without prejudice to the relevant Union sector-specific rules on financial corrections and recovery of amounts unduly spent. In addition, Art. 10 of the PIF Directive obliges Member States to take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Arts. 3, 4, and 5. Member States bound by Directive 2014/42/EU⁶ shall do so in accordance with that Directive. The 2014 Directive's recital 1 reads as follows:

The main motive for cross-border crime, including mafia-type criminal organisation, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. However, the effective prevention of and fight against crime should be achieved by the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature.

In addition, Art. 38 of the EPPO Regulation deals with confiscation of the proceeds of PIF offences as follows:

Where, in accordance with the requirements and procedures under national law including the national law transposing Directive 2014/42/EU of the European Parliament and of the Council, the competent national court has decided by a final ruling to confiscate any property related to, or proceeds derived from, an offence within the competence of the EPPO, such assets or proceeds shall be disposed of in accordance with applicable national law. This disposition shall not negatively affect the rights of the Union or other victims to be compensated for damage that they have incurred.

What is actually understood by the notions “seizure” and “confiscation”? Within this supranational legal framework, the notions “seizure” and “confiscation” are defined in a similar way by the EU Member States. Belgian case law and legislation is exemplary for this approach, as described in the following.

a) Seizure

The Belgian Court of Cassation defines seizure in criminal matters as a provisional coercive measure by which the competent authority, by virtue of the law and in response to a criminal offence, removes an object from the owner’s or possessor’s free right of disposal and, with a view to ascertaining the truth, confiscating it, restoring it, or securing civil interests, takes it, as a rule, into its custody.⁷

This is in line with the traditional view, which assumes that seizure in criminal matters has three functions. Initially, the *evidence function* prevailed: seizure secured goods that were the means or product of a crime. Later, seizure in criminal matters also acquired a *deprivation function*: the seizure guaranteed the execution of a possible later confiscation. More recently, the focus has been on civil interests and seizure has also acquired a *compensation function*: seizure should enable the return of property to its rightful owner and provide collateral for the compensation of victims.

b) Confiscation

Confiscation is a sanction, imposed by the court in response to a crime. Its purpose is either to deprive the asset of ownership over specific property or to oblige a person to pay a sum of money reflecting the equivalent value of such property.⁸

Art. 43 of the Belgian Criminal Code states that confiscation is applied (1) to the goods that are the object of the crime, and to those that served or were intended for the commission of the crime, when they are the property of the convicted person, (2) to the goods resulting from the crime, and (3) to the assets obtained directly from the crime, to the goods and values substituted for them, and to the income from the invested benefits.

It is mainly the third category of property that allows Belgian judges to forfeit the proceeds of crime that has harmed the Union’s financial interests. Given that confiscation is understood as a punishment under Belgian law, it is imposed by the judge at the request of the public prosecutor. Confiscation transfers ownership of the confiscated property to the Belgian State. The concrete implementation of forfeiture falls under the remit of the Ministry of Finance (in Belgium: Federal Public Service Finance).

The Belgian legislator has also been mindful of the compensation function of forfeiture. Art. 43bis of the Belgian Criminal Code states the following:

In case the confiscated items belong to the civil party, they will be returned to it. The confiscated items will also be returned to the civil party in case the court ordered the confiscation on the grounds that they constitute goods and values substituted by the convicted party for the items belonging to the civil party or because they constitute the equivalent of such items.

The wording of the law shows that awarding confiscated property depends on the capacity of the injured party as a civil party. The injured party acquires the capacity of civil party by acknowledging himself as a civil party during the criminal investigation or during the court proceedings. Recognition as a civil party thus requires active intervention by the injured party in the criminal proceedings and recognition by the judge.

2. In concreto

a) Seizure

As mentioned above, the EPPO's Annual Report 2022 revealed that, as of 31 December 2022, there were 1117 EPPO active investigations in the participating Member States. These investigations represented a total estimated loss of €14.1 billion. €6.7 billion of this amount is attributed to 185 VAT fraud investigations. In 2022, freezing orders were issued for €359.1 million. These figures illustrate the importance of seizure in criminal offences affecting the Union's financial interests, even assuming that only a fraction of these estimated damages will later be confiscated by Member States' sentencing courts.

b) Confiscation

To determine the total value of the goods to be confiscated, one should not only look at the value of the seized goods alone. Property not seized can also be confiscated. Art. 4 (1) of Directive 2014/42/EU incidentally requires Member States to establish a system of value confiscation:

Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

In Belgium, a system of value confiscation has been in place for some time. Art. 43bis of the Belgian Criminal Code stipulates that if the assets and property that served or were intended to serve the commission of a criminal offence cannot be found in the convicted person's assets, the court shall estimate their monetary value. The confiscation is then relative to a corresponding sum of money. The recovery of the amounts thus confiscated often involves significant difficulties and costs in practice.

IV. Suggestions for a More Efficient Supranational and Belgian Legislation

Notwithstanding the scenario of seizure and confiscation described *in abstracto* and *in concreto* above, confiscation especially in EPPO proceedings raises several issues. Indeed, Art. 38 of the EPPO Regulation (*supra* III.1) emphasises both the deprivation and the compensation function of seizure and confiscation (*supra* III.1a)). The deprivation function is emphasised by the reference to Directive 2014/42/EU, while the last sentence of the provision explicitly states that the Union must be compensated for the damage it has suffered due to the offences. For the implementation of these premises, the EPPO Regulation refers to the national legislation of the Member States. Overall, Art. 38 of the EPPO Regulation has been formulated in

rather vague terms and follows a rather principled approach. Hence, the question must be raised as to whether and to what extent additional legal measures should be put in place at both the Union and Member State levels for the sake of efficiency of execution of confiscation. This question is further explored in the following, which includes recommendations for the legislature.

1. At the supranational level

According to Art. 311 TFEU, “the Union shall provide itself with the means necessary to attain its objectives and carry through its policies”, i.e., the EU’s policies and activities are funded by the European budget, which is established by the Council and the European Parliament. Art. 311 TFEU further stipulates that, without prejudice to other revenues, the budget is financed wholly from own resources. Own resources account for about 99% of the budget’s resources. The composition of own resources is determined by Art. 2(1) of Council Decision 2020/2053.⁹ Accordingly, own resources include: “traditional own resources”, i.e., customs duties and agricultural and sugar levies; own resources derived from VAT; own resources based on the weight of non-recycled plastic packaging waste; and, last but not least, own resources based on the Gross National Income (GNI) of all EU Member States.

I propose that the proceeds of confiscations, pronounced in respect of criminal offences affecting the Union’s financial interests, be placed under a separate heading of own resources in the Union budget. Such an entry in own resources would place a positive obligation on Member States to collect confiscated amounts and contribute them to the Union budget.

As a second option, it would also be appropriate to insert confiscated amounts under the specific heading “traditional own resources”. At first glance, this might seem odd because, historically, they were the first source of revenue for the Union. However, traditional own resources are subject to their own rules of contribution, whereas uniform rates of contribution are applied to other own resources. If traditional own resources are collected, collection costs may be deducted from the amounts actually paid. These costs range from 10 to 25%, depending on when the amounts must be made available to the Union. Therefore, insertion of confiscations under traditional own resources would not only oblige Member States to pay the proceeds of all confiscations ordered for criminal offences affecting the Union’s financial interests to the Union, but also allow them to take into account the costs often associated with the recovery of confiscations in practice. In particular, when recovering amounts imposed by way of value confiscation, these costs can be quite considerable.

2. At the national level – Belgian legislation

a) Seizure

Belgian law already provides the proper means to handle seizure of the proceeds of crime. It does not restrict seizure to items that are related to a committed crime and can actually be found. If there are serious and concrete indications that the suspect has obtained a pecuniary advantage, and the items representing this pecuniary advantage cannot be found as such or can no longer be found on the suspect’s property located in Belgium or have been mixed up with legal goods, the public prosecutor can seize other items on the suspect’s property up to the presumed amount of this pecuniary advantage (Art. 35 of the Belgian Code of Criminal Procedure). This is referred to as seizure by equivalence of property benefits. It requires a special procedure to be followed in order to safeguard the rights of the accused. As far as seizure is concerned, in my view, the Belgian legal system is thus sufficient for its authorities to properly conduct the investigation of criminal offences affecting the Union’s financial interests and to secure the proceeds of these crimes until a final court decision is taken.

b) Confiscation

As mentioned above (III.1b)), under Belgian law, any injured party to a criminal offence can have confiscated property appropriated by the criminal court once he/she is formally recognised as a civil party and thus becomes a party to the criminal proceedings. This also applies to the European Union because there is no provision that prohibits it from becoming a civil party. Nevertheless, the European Union becoming a civil party is a cumbersome process and implies that the Union closely monitors every criminal investigation into cases in which its financial interests are affected. In EPPO cases, this process would also create additional workload for the European Delegated Prosecutors (EDPs). As public prosecutors, the EDP must also be mindful of confiscation, which, as already mentioned above, is considered a punishment under Belgian law.

I propose a slight adaptation of the already cited Art. 43bis of the Belgian Criminal Code. The article could be supplemented with the following paragraph:

Assets, related to or proceeds obtained by means of offences against the financial interests of the European Union shall be confiscated for the benefit of the Union.

This supplement could simplify criminal proceedings because the court would be required by law to impose confiscation of the proceeds of criminal offences affecting the Union's financial interests, without having to acknowledge the European Union as a civil party. Furthermore, such a provision would offer the advantage that it would also apply to offences that damage the financial interests of the Union but are not prosecuted by the EPPO because of its limited material or territorial competence (see supra II.).

c) Simplified prosecution procedure

Belgium has a well-functioning legal system in that it has a simplified prosecution procedure. Its scope has been repeatedly extended in the recent past so that it also applies today with regard to economic and financial delinquency. In this context, Art. 216bis of the Belgian Code of Criminal Procedure provides *inter alia*:

For the fiscal or social criminal offences by which taxes or social contributions have been evaded, a simplified prosecution procedure is possible only after the offender of the crime has paid the taxes or social contributions he owes, including interest, and the fiscal or social administration has agreed to it.

This means of concluding criminal cases is very well applicable in practice. According to Belgian press reports, over 1530 out-of-court settlements were proposed to defendants (excluding traffic offences) between May 2011 and December 2021.¹⁰ Together, these out-of-court settlements raised more than €1 billion, which is distributed as follows:¹¹

Out-of-Court Settlement	Amount in million EUR
Payment to the public prosecution service	518
Payment to the tax authorities	407
Recovery of proceeds of crime	138
Payment to civil parties	20
Payment to social security services	0,7
Legal costs	0,4
Total	1.085

I suggest that Art. 216bis of the Belgian Code of Criminal Procedure be supplemented by the following sentence:

In respect of criminal offences, affecting the Union's financial interests, a simplified prosecution procedure is possible only after the offender of the offence has compensated the prejudice to the European Union, and the Union has given its consent.

In the same way as the proposed amendment to Art. 43bis of the Belgian Criminal Code would formally establish the Union's claims for asset benefits to be confiscated, this proposed addition would strengthen the Union's claims if they are treated by a simplified prosecution procedure. As it appears from the aforementioned legal text, in Belgium, tax and/or social administrations must explicitly give their consent when a simplified prosecution procedure is proposed by the public prosecutor. This provision gives the concerned administrations a say in the matter in the form of a veto right. There can be no doubt that such a veto right would also be of interest for the Union where criminal offences affecting the Union's financial interests are concerned, and such a right should be clarified in favour of the EU in the law as proposed, when an offence against the Union's financial interests is committed.

V. Conclusion

The EPPO's annual Report 2022 confirms what all stakeholders involved in the fight against criminal offences affecting the Union's financial interests have intuitively felt for a long time: the damage caused to the Union by these crimes is, in practice, much higher than previously assumed. It is therefore correct that Union law, in particular the EPPO Regulation (and the PIF Directive), pay heed to the recovery of the damage caused by these crimes and stress the importance of seizure and confiscation of the proceeds of crime. *Stricto sensu*, the provisions of the EPPO Regulation may be regarded as sufficient in themselves to enable the recovery of these proceeds for the benefit of the European Union. Nevertheless, this recovery can be effected much more efficiently through a number of minor amendments to supranational and national laws, as proposed in this article.

Given that Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union is currently under review, a window has also been opened to effectively implement the proposed adjustments. As a consequence, the proceeds from the confiscation of proceeds and assets from criminal offences affecting the Union's financial interests can also formally be given a place in the Union's budgetary framework.

1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31.10.2017, 1. ↪
2. EPPO, "Annual Report 2022", available at: <https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf> accessed 4 October 2023. ↪
3. See Annual Report 2022, *op. cit.* (n. 2). ↪
4. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198, 28.7.2017, 29. ↪
5. The EPPO's competence is also characterised by the principle of subsidiarity. The idea is that the fight against offences affecting the financial interests of the Union cannot be sufficiently achieved by the Member States on their own, given the fragmentation of national prosecutions. Therefore, the fight against these offences can be better achieved at the Union level (cf. Recitals 12 and 13 of the EPPO Regulation). ↪
6. Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, O.J. L 127, 29.4.2014, 39. ↪
7. Cass, 25 February 2003, AR P.02.0674.N. ↪
8. E. Francis, "De uitvoering van de verbeurdverklaring : interne en internationale aspecten", in J. Baron, M. De Rue, E. Francis, P. Reynaert, V. Seron, Y. Van den Berge, F. Verbruggen and G. Vermeulen (eds.), *De strafuitvoering*, 2006, pp. 1-56. ↪
9. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J. L 424, 15.12.2020, 1. ↪

10. Newspaper Knack, 14 December 2022, <<https://www.knack.be/nieuws/belgie/justitie/afkoopwet-levert-belgie-ruim-een-miljard-euro-op/>> accessed 4 October 2023. The journalist's data are partly based on statistics from the College of Public Prosecutors.¹⁰
11. Ibid.¹¹

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