

Case scenario Module 2 – competences of the EPPO

X, CEO of a Hungarian Ltd. and representative of a consortium which was participating in a specific bidding/tendering process, contacted two officials of the European Commission in Brussels. In order to optimize the consortium's bids, the EU officials were asked if they would grant access to other bidder's confidential pricing information and other commercially sensitive information.

The officials, citizens of the Member States A and B, situated in Brussels, were willing to provide the requested information for EUR 20 000 each. The conversations with the agents were held in London. During the meetings, A and B provided the requested information by giving X tips that allowed the consortium to marginally underbid the competitor's offer. In the bidding process, X presented incorrect statements and documents.

The case attracted enormous media and public attention across the European Union. The national prosecution services of A and B were informed of the bribery case by national media services. Each of the Member States of A and B launched national investigations against their citizen.

Note to trainer:

- *This basic scenario involves different Member States and leaves it open if the actions of A, B and X indeed caused damage to the EU's financial interests.*
- *The case scenario leaves open if A and B were willingly aiding in the bidding actions of X.*
- *The case scenario does not specify if the expenditures are procurement-related or not (relevant for question 1).*
- *The mentioned Member States A and B can be changed to any existing participating Member State (but must be participating Member States).*
- *The country of X's actions may be changed to any other non-participating Member State as Denmark, Ireland, Poland or Sweden (but must be a non-participating Member State).*
- *The bribery sum is not relevant for the case. It can be changed to any other sum.*

Questions:

Q1. Assuming a damage to the EU's financial interests has occurred: what is your legal assessment concerning the actions of X? Can the EPPO initiate investigations against him? Would it make a difference, if there were no damage to EU's financial interests?

Note to trainer:

The objective of this part is to initiate discussions concerning the investigations against citizens of non-participating countries. Besides, the difference between procurement-related expenditures and such which are non-procurement-related should be explored.

Additional remarks:

- X has obviously actively bribed A and B. But Article 4 § 2 (b) PIF-Directive (active corruption) does not seem to be applicable as no damage to the EU's financial interests is caused by this particular action. The offence was obviously committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union (ancillary offence). Though the bribery offence could be considered an inextricably linked offence (Article 22 § 3 EPPO Regulation), it is yet not a ne-bis-in-idem action (identity of material facts or facts which are substantially the same) and it was committed outside the territories of the European Union. Furthermore, Hungary is not a participating Member State. Since the offence does not fall within the territorial and personal competences of the EPPO (Article 23 EPPO-Regulation), it has no possibility to investigate the bribery offence.
- As X has submitted incorrect statements and documents and also damage to the EU's financial interests has occurred, X has probably committed a fraud affecting the European Union's financial interests under Article 3 § 2 PIF-Directive. It is most likely that the personal scope of EPPO's competences also applies (Article 23 (b) EPPO Regulation): The criminal act was partly conducted inside the territories of the participating Member States (Brussels).
- If X's actions had not caused financial damage to the European financial interests, EPPO could only exercise its competences if the expenditure was non-procurement-related (Article 3 § 2 (a) PIF Directive). The definition of public contracts is given in Article 101 of the Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002.

Q2. What is your legal assessment concerning the competences of EPPO seen from the perspective as handling national prosecutor of the Member States A or B, who has to deal with the charges against the EU agents?

Note to trainer:

The objective of this part is to discuss the case from the perspective of a national

prosecutor with a view to the relevant provisions of the PIF Directive and the EPPO Regulation. The participants should take into account both relevant substantive and procedural law. The attendees should also take into account that the actions took place in London.

Additional remarks:

- Though it is quite obvious that A and B are involved in “passive corruption”, it is not sure that they have committed a PIF offence. Article 4 § 2 (a) PIF-Directive requires a damage or a “likely damage” to the Union’s financial interests.
- But it can be taken into account that the consortium has submitted incorrect statements and documents and has just marginally underbid the competitor. This circumstance causes at least an initial suspicion that A and B aided in X’s actions, which could be seen as fraud according to Article 3 § 2 PIF Directive.
- Even if the corruptive actions of A and B may itself not have damaged the Union’s financial interests, they can be seen as “inextricably linked offences” under Article 22 § 3 EPPO-Regulation. In this case the question arises, if A and B’s aid in X’s fraudulent actions and the simultaneous commission of corruption should be considered as a ne-bis-in-idem (identity of material facts or facts which are substantially the same). If yes, EPPO may only exercise its competence, if the maximum penalty for the PIF offence (fraud) is higher than that for the inextricably linked offence (bribery).
- It is most likely that the personal scope of EPPO’s competences applies (Article 23 (b) or (c) EPPO-Regulation): Though the criminal acts were conducted outside the territories of the participating Member States (London), they were committed by nationals of Member States respectively by persons who are subject to the Staff Regulations. There are reasons to assume that the Member States A and B have jurisdiction for such corruption acts even when committed outside their territory (doublecheck of the national jurisdictions though required).

Q3. As a national prosecutor, dealing with the charges against A or B, would you inform EPPO of your case? If yes, how? What has to be done in respect of the national investigations in the meantime?

Note to trainer:

The objective of this part is to discuss the formal steps which national prosecutors have to take to address EPPO correctly. It should be also taken into consideration that the damage could not be assessed so far.

Recital 53 of the EPPO-Regulation (“broad interpretation of reporting obligations”) may be an issue. There also may be a discussion about what has to be

done if EPPO does not exercise its right of evocation within the periods under Article 27 § 1 EPPO Regulation.

Additional remarks:

- File a report to the respective EDP according to Article 24 § 2 and § 4 EPPO-Regulation: description of the damage caused or likely to be caused, possible legal qualification, any available information about potential victims, suspects and any other involved persons.
- The EPPO shall also be informed if an assessment of the damage is not possible (Article 24 § 5 EPPO Regulation).
- After being informed accordingly, the EPPO has to decide whether it evokes the case or not. The decision has to be rendered not later than 5 days (respectively 10 days by ECP in specific cases).
- National prosecutors have to refrain from any further investigations in the meantime which could compromise the decision of the EPPO (unless urgent measures). This does not apply, as far as the EPPO exceeds the time limits (see Article 27 § 2 EPPO Regulation: “during the periods referred to in paragraph 1 ...”).

Q4. If an argument arises that EPPO is not competent for the case concerning A and B because

- **no financial damage for the EU’s financial interests occurred or**
- **the financial damage is less than EUR 10 000.**

How can such disagreements be solved?

Note to trainer:

The objective of this part is to discuss the settlement of disagreements between the EPPO and national authorities. It is important to know for the attendees that Article 25 § 6 EPPO Regulation lays down that principally national authorities are competent to decide such matters. But this provision only applies for questions whether the criminal conduct falls within the scope of Article 22 §2 or § 3 or Article 25 § 2 or § 3 EPPO Regulation. Discussion may arise how disagreements can be solved, if the case falls within the scope of Article 22 § 1 EPPO Regulation.

Additional remarks:

- Case a: The disagreement is about the question if the criminal conduct falls within the scope of Article 22 § 1 EPPO Regulation. Article 25 § 6 of the Regulation therefore does not apply. It is up to the EPPO’s assessment if a financial damage has occurred or not. If yes, the EPPO may exercise its

competence by evocating the case; if no, it can refrain from such an action.

- Case b: the respective national authority may settle the disagreement because the scope of Article 25 § 2 EPPO Regulation is in question. As servants of the Union are suspected of having committed the offence, the decision should be made in favor of EPPO.

Q5. Can the EDP decide not to evocate the case against A and B if the damage (or likely damage) to the EU's financial interests is less than

a. EUR 100 000?

b. EUR 10 000?

Note to trainer

This is just an intermediate question, which can be brought up additionally if time allows.

Additional remarks:

- *The EDP can refrain from using its right of evocation in both cases according to Article 27 § 8 EPPO-Regulation, if the College has issued specific guidelines.*

Q6. Given, that EPPO has evoked the national investigations from the Member States A and B: In which Member State should EPPO initiate its own investigations?

Note to trainer:

The objective of this part is to discuss the multinational dimension of the case and the question if the investigations against A and B can be merged by the EPPO. The participants should take a closer look into the question, in which Member State the relevant forum could be. Article 26 § 4 und § 5 EPPO-Regulation should be taken into consideration.

Additional remarks:

- *Principally the jurisdictions of more than one Member State are concerned. Belgium (as the country of residence) as well as the Member States A and B are possible forums.*
- *The Permanent Chamber can decide to merge the investigations under Article 26 § 5 in accordance with § 4 EPPO-Regulation. If more than one Permanent Chamber can be considered, the internal rules of procedure should determine the competent Permanent Chamber.*

- *The focus of the criminal activity is most likely in London. There may be a discussion if Brussels is also a focus of the offences. Furthermore, there is no Member State, where the “bulk of offences” have been committed.*
- *The Permanent Member Chamber could decide that the investigations should take place in Belgium as “the place of the suspect’s or accused person’s habitual residence” (Article 26 § 4 (a) EPPO-Regulation). But the Chamber has to take into consideration that possibly Belgium may not have jurisdiction for the cases, since the criminal activity was performed outside Belgium’s territory (UK) and both A and B are not Belgium citizens (e.g. Austria would not have jurisdiction for such cases). Therefore, the Permanent Chamber could also decide not to merge the investigations and to instruct the EDP’s of the Member States A, and B to initiate separate investigations.*