

Explanatory note – opening of the investigation

The regulation has made clear that the opening of the investigation is a formal, official act of the EPPO, that consists of two stages.

It is linked to other mechanisms aimed at bringing the EPPO in possession of information, so that it is in a position to decide whether or not to open the case. They concern, in particular, the obligation of information to the EPPO from any body, national or European, that comes in possession of such information.

The issue is also connected to the general matter of the competence of the EPPO. Indeed, despite the principle that the EPPO is competent for the investigation and prosecution of PIF offences, the regulation has not designated an exclusive and automatic competence, but the exercise of competence has to be decided on a case by case basis.

The regulation foresees that, in some particular cases, the EPPO may decide not to handle a case, even when it involves PIF offences. It is the case of article 25 para 2 and 3 (offences with damage lower than 10 000 euros; offences connected to non-PIF offences, whose punishment is higher than that of the PIF offence).

Regarding the mechanisms that can let the EPPO exercise its competence, they are the initiation of investigation, when no other case is pending on the same facts with the national authorities, and the right of evocation, in the opposite situation.

It is essential, also for the protection of fundamental rights, that when the EPPO receives information that could result in a case, it is treated in a transparent and formal way.

Therefore the regulation provides that the information must be immediately registered in the Case Management System (CMS) irrespective of if it will give rise to an EPPO investigation or not.

The registration is an essential step because it marks the moment when the EPPO has officially received the information.

The registration aims at the verification of the information.

The verification has the goal to assess whether there are grounds to initiate the investigation or to exercise the right of evocation.

The mechanism to process the information was clarified in the internal rules of procedure that the college adopted after its establishment.

The verification can result in a double option: there is no reason to initiate the investigation, as the offence falls outside of the EPPO competence or there are reasonable grounds to initiate the investigation.

In principle, “reasonable” grounds means something more than “grounds” and something less than “serious” grounds, but the definition is left to the national law that in this respect complements the regulation.

The body entitled to open the investigation is the single European Delegated Prosecutor that, according to the national law, is competent to prosecute the offence.

Theoretically, it may happen that more than one EDP is in a position to open the investigation on the same case; in this case the internal information flow, the role of the European Prosecutors and of the Permanent Chamber will be essential.

The initiation of the investigation consists of a formal ruling that must be noted in the CMS.

According to article 26 para 3, where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall, under the conditions set out in paragraph 1, instruct a European Delegated Prosecutor to initiate an investigation.

The initiation of the investigation is also very important because in several national laws it is the formal moment that determines a number of consequences in the investigation. For instance, it is the starting moment of the time to complete the investigation.

The case study

The case study describes the mechanisms of opening the investigation in a complex cross border case, where potentially more than one EPPO EDP can start the case and where there are different sources that can give rise to the EPPO case.

Indeed, in the proposed scenario both a European body and the national authorities are aware, through different channels, of the potential fraud.

The case wants to show that the first information can come from different sources and the EPPO has to manage such situation to avoid duplications of investigations.

Another question arising from the case study is what does the EPPO do after receiving the two reports mentioned in the example. Does it first verify the information or does it first register it? Which EDP should register the information?

The answer is that the EPPO has to register the information immediately. In this case, more than one EDP may be entitled to register the case. The EDP in Spain, as company B is based there and the money has been received in that country. The EDP in Belgium, because in Belgium the damage occurred (the money was transferred from a Belgian account of the victim) and the documents with the alleged false information were presented in Belgium.

In this case, we assume that the EDP in Belgium registers the information under article 26 para 4. The registration takes place in the CMS and from that point the EDP is in charge of the case.

At this point, the EDP in Belgium verifies the information under article 24 para 6.

Q. What can the EDP do at this stage, after the registration and before deciding on the opening of the investigation, in order to verify the reliability of the information?

The regulation doesn't say anything about that, except that "the information shall be verified in accordance with the internal rules of procedure".

At this stage, therefore, there is no clear answer to this question, until the rules of procedure are approved.

However, it is reasonable to believe that in this phase the EDP won't be able to undertake intrusive measures, such as searches or interceptions, but he might interview people or request further information.

In the present case, we assume that after receiving the tender documents from the Commission, the EDP realises that the offer for the tender was submitted upon instructions of the holding company A, based in Italy.

After reading the documents, the EDP believes that there are reasonable grounds to open an investigation. The assessment is also carried out under the national law on opening a criminal case, as the regulation does not contain any definition of “reasonable grounds”.

The compliant by B, at this stage, appears like a different version of the facts from the suspect, but it is not enough to vanify the suspicions of fraud committed by B, maybe in cooperation with the mother company A.

Therefore the EDP in Spain opens the investigation, after exercising the right of evocation on the file sent by the Spanish national authorities.

He shall note the ruling of opening the investigation in the CMS and shall inform the Spanish authorities and the Commission (that reported the first information).

We assume that the development of the investigation shows that the mother company A was fully involved in the fraudulent scheme against the Commission.

At the end of the investigation, the issue on which EDP should file the indictment will emerge, under article 26 para 4 and 5.

The quiz

IN the light of the abovementioned explanations, the answers to the quiz are the following:

Question 1:

right answer is b), the EPPO has to register the information immediately and then to verify whether it is grounded or not

Question 2:

right answer is a). Basically the registration is an EPPO act and therefore it is governed under the internal rules of procedure. Some effects of the registration depend on the national laws, but the registration itself depends on the EPPO internal rules. The answer “is governed under the EPPO regulation” is not fully correct because the EPPO regulation does not govern specifically the registration; it mentions it, but it makes reference to the internal rules of procedure

Question 3:

right answer is b). In a way, there is also something correct in the other two answers, as when an investigation is opened it also aimed at establishing the damage and to identify the authors of the offence, but these are not specific goals of the registration of the first informatio. Its specific goal is the one in b)

Question 4:

right answer is b) according to the wording of the regulation (art 24 para 7)

Question 5:

the right answer is c), according to the wording of the regulation

Question 6:

the right answer is c). The answer a) is incorrect because the Permanent Chamber intervenes in the opening of th einvestigation only in the case mentioned in art. 26 para 3, but ordinarily the EDP begins the investigation.

Question 7:

the right answer is b) under the wording of the regulation (art. 26 para 2).