

Explanatory note – dismissal of the case

The dismissal of the case is one of the possible conclusions of the investigation when it comes to an end.

Therefore, the preliminary analysis of article 35 on the termination of the investigation is necessary, as the procedure to terminate the investigation is the same, both in case of dismissal and in the case of indictment.

In particular, the EDP has to submit to the EP a report with a summary of the case and the outcome of the investigation, with a recommendation to dismiss or prosecute the case.

The EP must forward this report, possibly with their own personal assessment, to the Permanent Chamber.

The decision to dismiss the case is therefore taken by the Permanent Chamber at central level, that will instruct the EDP, and the EDP can only implement such instructions.

On the topic of the dismissal of the case, the regulation is pretty detailed.

In particular, it provides for the ground for dismissal that, therefore, prevail on the possible different grounds provided in national legislation.

Recital 81 is very clear in this sense where it states that “the grounds for dismissal of a case are exhaustively laid down in this Regulation” and apparently does not leave any further room for national legislations.

However, this seems to be in contradiction with the wording of article 39: “Where prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor”

Despite the wording of recital 81, article 39 seems to leave space for the applicability of national law.

The matter could be relevant, for instance, when it comes to the termination of an investigation that could not prove the full identity of the author of the offence. This is not one of the grounds mentioned in the regulation, but it is a grounds for dismissal in the national laws of some EPPO States.

Another particularity of the dismissal procedure of the EPPO cases is that it is decided by the EPPO itself, namely by the prosecutor. In some national systems of the EPPO States, the dismissal is decided by the judge upon request of the prosecutor. Therefore, an important issue of compatibility of the EPPO system with the national system will be at stake, in the implementation of the regulation in the national systems. The matter is not just a formality, but it involves the matter of the protection of fundamental rights, not only those of the suspect, but also those of the victim. In many systems, the victim can oppose the request of the prosecutor by addressing a motion to the judge in charge of deciding on the request of dismissal. Nothing similar is provided in the regulation, and the dismissal mechanism in this sense looks less protective towards the victim.

The general requirement for the dismissal in the regulation is that the prosecution of the case is impossible, pursuant to the national law of the EDP handling the case.

The reference to the national law fills up this general wording with several meanings. For instance, in some Member States the “impossibility” to prosecute the case may mean that evidence acquired during the investigation is not sufficiently strong to successfully bring the case to trial. In other

systems, the dismissal of the case takes place when the allegation on the offence is not grounded, which is clearly something different to the previous situation.

The specific grounds of dismissal due to “lack of relevant evidence” mentioned in the regulation does not clarify completely the issue and has to be completed under national law.

For the rest, article 39 of the regulation provides for 7 specific grounds for dismissal.

It is worth mentioning the grounds under lit f), which recalls the “ne bis in idem” principle.

The EPPO system and structure should prevent the situation of “bis in idem” referred to in the Schengen agreement (art. 54), namely the pending of proceedings for the same facts in two different countries.

However, the wording of the regulation “the accused person’s case has been already finally disposed” in relation to the same acts has to be interpreted in the light of the evolution of the internal “ne bis in idem” principle in the case law of the Court of Justice and of the ECHR on the basis of the art. 4 protocol 7 of the ECHR and art. 50 of the Charter of Fundamental Rights of the EU.

It is the problem of the relationship between the criminal proceedings and the administrative proceedings, when they are substantially criminal in essence.

Double proceedings can also occur in respect of the EPPO investigation, in particular in the tax law area (VAT violations) when administrative proceedings are conducted by the national authorities. Indeed there is no provision in regulation preventing the national administrative authorities from conducting administrative proceedings on facts that might also fall into the EPPO competence.

National criminal proceedings are barred and European administrative proceedings (OLAF investigations) are barred, but there is no provision stating that when the EPPO is conducting a case, national administrative authorities have to interrupt their inquiries at administrative stage.

So, the “ne bis in idem” issue is at stake.

The current view of the principle is not only procedural (Grande Stevens case) but it involves the substantive law. The current interpretation of the principle is that when the two proceedings are expression of the same sanctionatory reaction of the State, there is no violation of the ne bis in idem principle.

How is it possible to understand whether the two proceedings are an expression of the same sanctionatory power? The most recent developments of case law indicate different criteria such as the temporal criterium (the two sanctions have been adjudicated in a very close time frame) and the use of evidence.

After the dismissal, however, the case can be reopened, but only in specific cases, in particular on the basis of new facts which were not known to the EPPO at the time of the decision and which become known after the decision.

When the EPPO is also handling non-EPPO offences (art. 22), the dismissal needs to follow a special procedure that requires consultation with the national authorities.

The same procedure has to be followed when the EPPO investigation relates to fraud in procurement-related expenditures and fraud in non procurement-related expenditures and the damage caused or likely to be caused to the Union’s financial interests does not exceed the damage caused or likely to be caused to another victim.

Further commitments related to the dismissal are the notifications to the national authorities and EU bodies that reported the case and the optional information to OLAF for the recovery of the money or the follow-up.

The case study

The case study introduces a situation where different grounds to dismiss the case are at stake.

The death of the suspect is certainly a reason to close the case with respect to that specific accused person.

The case shall be dismissed through a report with the proposal of dismissal sent to the EP; the EP shall forward them to the Permanent Chamber that will instruct the EDP to dismiss the case.

Also the immunity of the suspect could be a reason to dismiss the case, unless it is lifted.

In the case study, the honorary consul does not enjoy any immunity as he is not a professional diplomat.

The lack of relevant evidence is one of the grounds of dismissal under the regulation, but its meaning is shaped according to national law. The regulation does not say when the evidence is lacking.

In some systems it requires the dismissal when the evidence is not strong enough to successfully support the prosecution. In other systems this degree of evidence could be sufficient to prosecute the case, as the dismissal is justified only when no evidence has been reached.

Regarding the customs officers, the case study presents a case of possible ne bis in idem.

However, the trend of the European case law is that disciplinary proceedings do not amount to proceedings that can give rise to ne bis in idem situations, as they are expression of a specific and separate sanctionary power that concern the labour relationship between the employer and the employee.

The quiz

Question 1:

right answer c); the procedure for the dismissal is governed under the regulation

Question 2:

right answer a). This is the wording of the regulation. Answer C) is not completely correct as it is true that the dismissal is ordered by the Permanent Chamber, but the substantive requirement is the impossibility to prosecute the case

Question 3:

right answer a) according to the wording of the regulation

Question 4:

right answer b). If the immunity is not lifted during the investigation, the case must be dismissed. Answer a) is misleading as the immunity prevents the prosecution, according to the most reasonable interpretation of the provision. The immunity in many systems is a benefit that exclude the punishment. It must be lifted before the prosecution.

Question 5:

right answer is c). The EPPO regulation does not provide for any time frame for the expiration of the statutory limitation. The PFI directive, in its final version, provides for a very light time frame, so that, in concrete, the time for the expiration of the statutory limitation is still set in the national systems of the EPPO States. This means that the same offence can be subject to different time frames for the expiration of the statutory limitation, depending on the State where the offence has been committed.

Question 6:

right answer is b). It allows reopening the case on the basis of new facts.

Question 7:

right answer is a). This is the provision of the regulation

Question 8:

right answer is c), according to the specific provision of the regulation

Question 9:

right answer is b) according to the specific provision of the regulation. Answer c) is incorrect, as the referral to OLAF is optional, depending on the specific circumstances of the case.