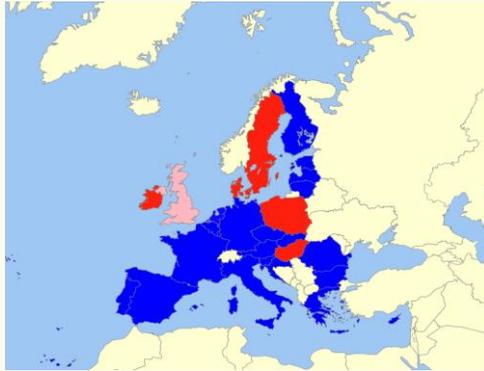




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Exercise of the competence of the EPPO – reporting and initiating an investigation



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Case example (part 1)

The police department in France is contacted by a private person („whistle blower“) who reveals to the police information about fraudulent activities carried out by an Austrian-German consortium of construction companies that is involved in a major infrastructure project at Charles de Gaulle Airport (new terminal 4). The whistle blower believes that the project is partially financed by the European Union (EU). According to the information given by him, the consortium has been cooperating with an Italian engineering firm that has been contracted by the consortium (the responsible manager working from the consortium's joint office in Hannover, Germany) to design the lay-out of the terminal's sprinkler system. The whistleblower also claims that the documentation he can provide to the police (several copies of manual files plus a USB stick) will prove the fact that the Italian engineering firm has been grossly overcharging the consortium for services they claim to have provided. The whistleblower further claims that part of the money received by the Italian company as payments for their services has been paid as “kick-back” to the consortium's manager (an Austrian citizen) on his personal account at a bank in Zurich.

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Case example (part 2)

A prosecutor in Hannover is conducting a (national) criminal investigation against that same manager of the consortium for the same criminal conduct in respect of the same infrastructure project in France, also involving the same Italian engineering company. These investigations had not yet revealed the fact that this infrastructure project has been co-financed by the EU and thus the German prosecutor had no reason yet to inform the EPPO.

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Concurrent competences

- **Article 25(1):** “The EPPO shall exercise its competence either by initiating an investigation under Article 26 or by deciding to use its right of evocation under Article 27. **If the EPPO decides to exercise its competence, the competent national authorities shall not exercise their own competence in respect of the same criminal conduct**”.
- Recital # 13: “This Regulation provides for a **system of shared competence between the EPPO and national authorities** in combating crimes affecting the financial interests of the Union, based on the right of evocation of the EPPO.”
- Recital # 58: “The **competence of the EPPO** regarding offences affecting the financial interests of the Union **should, as a general rule, take priority over national claims of competence** so that it can ensure consistency and provide steering of investigations and prosecutions at Union level. With regard to those offences the authorities of Member States should refrain from acting, unless urgent measures are required, until the EPPO has decided whether to conduct an investigation.”

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Article 22 – Material competence of the EPPO

- (1) criminal offences affecting the financial interests of the Union that are **provided for in Directive (EU) 2017/1371, as implemented by national law**.... As regards **offences referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371**, as implemented by national law, the EPPO shall only be competent when the intentional acts or omissions defined in that provision are **connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million**.
- (2) offences regarding participation in a **criminal organisation as defined in FD 2008/841/JHA**, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to in paragraph 1.
- (3) **any other criminal offence that is inextricably linked** to criminal conduct that falls within the scope of paragraph 1 of this Article. The competence with regard to such criminal offences may only be exercised in conformity with Article 25(3).

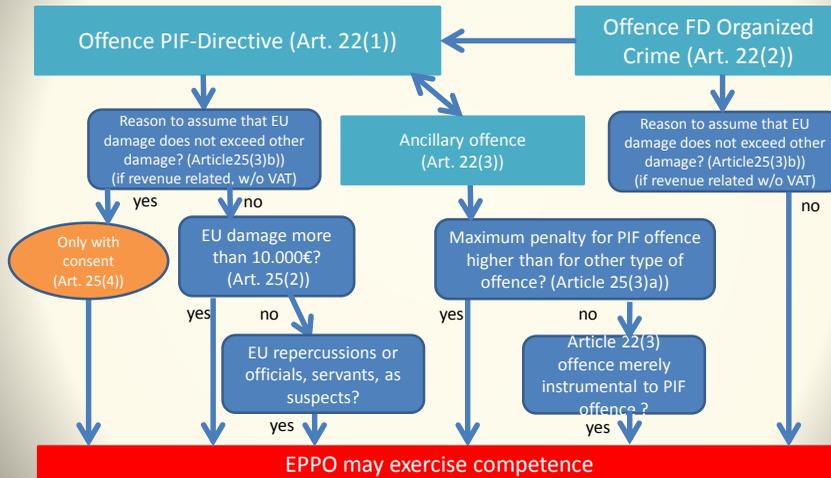
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PIF-offences (PIF-Directive (EU) 2017/1371

- **Fraud affecting the Union's financial interests**
 - in respect of (other) **expenditures** (Article 3(2)a) – expl.: ERFD
 - in respect of **procurement related expenditures** (Article 3(2)b))
 - in respect of (other) **revenues** (Article 3(2)c) – expl.: customs
 - in respect of **VAT revenues** (Article 3(2)d), Article 2(2)) – thus only where connected with the territory of two or more Member States and involving a total damage of at least 10 Million €
- **Money laundering** in respect of property derived from PIF offences (Article 4(1))
- **Active and passive corruption** (Article 4(2))
- **Misappropriation when committed by a public official** (Article 4(3))

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Article 25 Exercising of competence by the EPPO



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Article 24 Reporting, ...

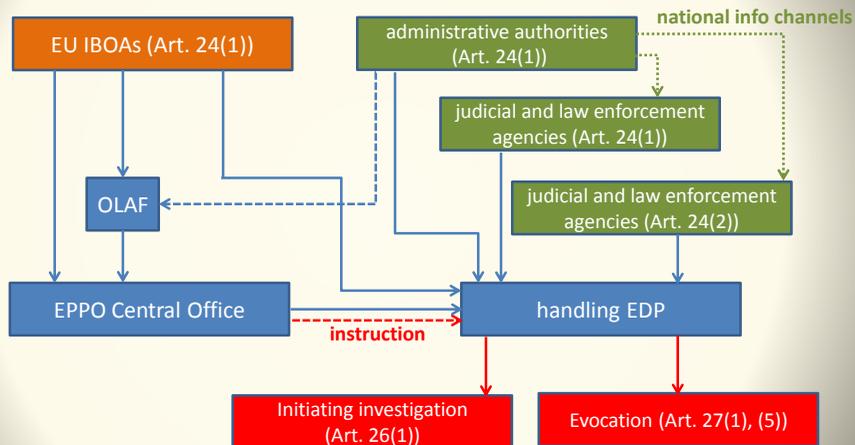
1. The **institutions, bodies, offices and agencies of the Union** and the **authorities of the Member States competent under applicable national law** shall **without undue delay report to the EPPO** any criminal conduct in respect of which it could exercise its competence in accordance with Article 22, Article 25(2) and (3).

2. When a **judicial or law enforcement authority of a Member State** initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence in accordance with Article 22, Article 25(2) and (3), or (...) that authority shall **without undue delay inform the EPPO** so that the latter can decide **whether to exercise its right of evocation** in accordance with Article 27.

Recital # 52: Member States' authorities should set up a system that ensures that information is reported to the EPPO as soon as possible. It is up to the Member States to decide whether to set up a direct or centralised system.

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Information channels (Article 24)



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Article 24 – preliminary evaluation

Article 24(1): “... shall **without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence**”.

Recital # 51: “... the national authorities of the Member States as well as institutions, bodies, offices and agencies of the Union should have in place **efficient mechanisms for a preliminary evaluation of allegations** reported to them....”.

Recital # 53: “Compliance ... should be interpreted broadly to ensure that **national authorities report cases where the assessment of some criteria is not immediately possible**”.

Who should undertake such preliminary evaluation? The police/customs office that has received a report by a national administrative authority? Or a national prosecutor to whose attention the case was brought by the police/customs office?

- Where „an assessment of whether the criteria in Article 25(2) are met is not possible”, the EPPO shall be informed in accordance with paragraphs (1) or (2) (Article 24(5)).
- Where a judicial or law enforcement authority considers the offence to be outside of the EPPO’s possibility to exercise competence (Article 25(3)), it may initiate an own investigation, but has to report to the EPPO in accordance with Article 24(3).

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Article 24(6) – Verification (criteria)

Article 24(6): “Information provided to the EPPO shall be verified in accordance with its internal rules of procedure. The verification shall assess whether, **on the basis of the information provided in accordance with paragraphs 1 and 2, there are grounds to initiate an investigation or to exercise the right of evocation**”.

- Verify what?
 - ✓ Are the **conditions for material, territorial and personal competence of the EPPO** met – c.f. recital number 49?
 - ✓ Are the conditions for exercising EPPO competence met (Article 25)?
 - ✓ Has a **case already been initiated** by the EPPO or by a national authority?
 - ✓ Are there any **legal impediments** for conducting investigations/prosecutions (Article 39; applicable national law)?
- In case of Article 24(1) and 26(1): are there **reasonable grounds to initiate an investigation** (in accordance with applicable national law)? – legality principle
- In case for Article 24(2) and 27(1): Are there **grounds to exercise (an existing) right of evocation?** – legality principle does not apply (“whether to”; recital # 66)

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Article 26 – grounds to initiate an investigation/case allocation

Principle condition for initiating an investigation (Art. 26(1)):

- “Where, **in accordance with applicable national law**, there are **reasonable grounds to believe** that an **offence within the competence of the EPPO** is being or has been committed...”
- an EDP “**in a Member State which according to its national law has jurisdiction** over the offence **shall**, without prejudice to the rules set out in Article 25(2) and (3) **initiate** an investigation....”

Principle for a possible choice of EDP / allocation of cases (Art. 26(4)):

Competence of the EDP from the Member State where the focus of the criminal activity is (**territory**)

Deviation from the principle where duly justified, taking into account the following criteria, **in order of priority**:

- (a) the place of the suspect's or accused person's **habitual residence**;
- (b) the **nationality** of the suspect or accused person;
- (c) the place where the main financial **damage has occurred**.

Possible subsequent **reallocation of case or merging/splitting** (Art. 26(5))

Article 27(1) – exercising the right of evocation

“Upon receiving all relevant information in accordance with Article 24(2), the EPPO shall take its **decision on whether to exercise its right of evocation...**”.

- Decision on right of evocation **to be taken by an EDP “from any Member State whose competent authorities have initiated an investigation...”** (Article 27(6)) and have informed the EPPO thereof in accordance with Article 24(2)
- EDP to inform the **competent authority that had reported the case** in accordance with Articles 24(2) and request **transfer of the file** (Article 27(5)) to the EDP
- This notion includes a **“transfer of proceedings”** as well as the actual **transmission of the case file**, which will become the EPPO case file
- Decisions under Article 27(1) have ***erga omnes* effect** also in respect of other national authorities (c.f. Article 25(1)); however, perhaps not in respect of Article 27(5); thus **EPPO may have to request a national authority to (also) provide a report** in accordance with Article 24(2) – c.f. Article 27(3)

