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When EPPO meets customs:

A clash of enforcement strategies and procedural safeguards?

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Abstract: With the European Prosecutor's Office (EPPO), a new player has entered into the field of cross-border investigations of customs offences, thereby translating the EU legislator's will to better protect the Union's financial interests through criminal law. Pursuant to the EPPO Regulation, the EPPO has the power to initiate criminal proceedings and to give instructions to national authorities, including customs authorities. Nevertheless, the Regulation refers to national law for several matters. Consequently, despite being an EU body, the EPPO's functioning is, in part, governed by national criminal procedure.

In many Member States, customs authorities only have administrative enforcement powers. Yet in at least two Member States – Belgium and Luxembourg – customs law is characterised by a hybrid enforcement system: Customs officials do not only have administrative investigative and sanctioning powers, they also have the power to bring criminal charges, thereby side-lining the public prosecutor's office. In addition, the pivotal point where administrative proceedings become criminal is in practice hard to determine because customs authorities have the same set of investigative powers in either situation. These powers are broad and highly repressive, offering less high procedural safeguards to suspects. With the creation of the EPPO, the question arises whether this particular enforcement system can be maintained.

Interestingly, the Belgian legislator opted in February 2021 for a minimal intervention instead of fundamentally reforming the powers of the customs administration. As a result, the customs administration retains its own investigative *and* prosecution powers in EPPO cases, but will exercise them under the authority of the EPPO. Whether this approach is fully compliant with EU law is questionable. Moreover, the EPPO's prosecution strategy is likely to clash with the enforcement strategy of the customs authorities, which is primarily aimed at recovering unpaid duties to meet the Member State's financial obligations toward the EU. And most importantly, in 'mixed' EPPO cases, involving both customs and other PFI offences, different procedural safeguards will apply – the ones provided by customs law and those applicable in 'regular' criminal investigations.

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This contribution critically analyses the relation between the EPPO and national customs authorities, from a legal and practical perspective, taking Belgium as a case study. In doing so, it will pay special attention to the essential conditions for effective enforcement of the Union's financial interests and the need to adequately safeguard suspects' fundamental rights.

I. Introduction[3]

On 1 June 2021, the European Public Prosecutor's Office (hereafter EPPO) officially started its operations. The EPPO was created to enhance the protection of the EU's financial interests through criminal enforcement. The rules governing the functioning of the EPPO are laid down in the Regulation of 12 October 2017 establishing the European Public Prosecutor's Office[4] (hereafter EPPO Regulation).

An important part of the fraud affecting the financial interests of the Union concerns customs offences, since customs duties form one of the three main sources of revenue of the EU, alongside contributions based on Value Added Tax (VAT) and direct contributions by the EU member states.[5] Therefore, logically, the EPPO's material competence encompasses several customs offences as defined by the Directive (EU) 2017/1371 on the fight against fraud to the EU's financial interests (hereafter PFI Directive).[6] According to the EPPO's annual report of 2021, the level of detection of customs fraud by Member States is (still) surprisingly low.[7] The EPPO is thus determined to 'up its game' in the field of cross-border investigations of customs fraud. For example, on 29 April 2022, the EPPO reported to have seized 470,000 euros in financial assets from a company in Vicenza (Italy), which had allegedly evaded the payment of anti-dumping and customs duties by falsely declaring that the origin of the imported goods was Thailand instead of China.[8]

In order to improve the fight against the fraud of the Union's financial interests, the EPPO is the first Union body endowed with the power to conduct criminal investigations and to formally initiate criminal proceedings before national criminal courts. Nevertheless, the EPPO Regulation refers to national law for several matters, instead of regulating them at EU level,[9] and therefore can be regarded as a 'directive in disguise'. Consequently, despite being an EU body, the EPPO's investigations and prosecutions are, in part, also governed by national criminal procedure.

[3] This contribution is, in part, based on earlier research. See in particular Vanessa Franssen and Ana Laura Claes, 'Enforcement of policies against illicit trade in tobacco products in Belgium' in John Vervaele and Stanislaw Tosza (eds), *Illicit Trade in Tobacco Products. In Search of Optimal Enforcement* (Springer 2022) 117-224; Ana Laura Claes and Marie Horseele, 'Protection of procedural rights in administrative and criminal proceedings: the case of the privilege against self-incrimination in Belgian customs law' in Vanessa Franssen and Chris Harding (eds), *Criminal and quasi-criminal enforcement mechanisms in Europe. Origins, concepts, future* (Hart 2022) 301-340; Ana Laura Claes, Anne Werding and Vanessa Franssen, 'The Belgian Juge d'Instruction and the EPPO Regulation: (Ir)reconcilable?' [2021] 6(1) European Papers, 357-389; Vanessa Franssen, Anne Werding, Ana Laura Claes and Frank Verbruggen, 'La mise en œuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution' in Constance Chevallier-Govers and Anne Weyembergh (eds), *La création du Parquet européen: simple évolution ou révolution au sein de l'espace judiciaire européen?* (Larcier/Bruylant 2021) 135-173.

[4] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1 (EPPO Regulation).

[5] 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 [2020] OJ L 424/1, Art 2.

[6] 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 [2017] OJ L 198/29 (hereafter PFI Directive)

[7] EPPO, 'EPPO Annual Report 2021' (24 March 2022) <https://www.eppo.europa.eu/en/documents> accessed 25 May 2022.

[8] EPPO, 'Evasion of customs duties and VAT: € 470 000 seized in Italy' (29 April 2022) https://www.eppo.europa.eu/en/news/evasion-customs-duties-and-vat-eu470-000-seized-italy accessed 25 May 2022.

[9] Louise Seiler, 'Le parquet européen: une révolution sans bouleversements' [2019] REV DR PÉN CRIM 1188.

As far as customs fraud is concerned, it is important to stress that in many (if not most) Member States, customs authorities only have administrative enforcement powers. Yet, in at least two Member States – Belgium and Luxembourg –, customs law is characterised by a hybrid enforcement system. This means customs officials do not only have administrative investigative and sanctioning powers, they also have the power to bring criminal charges, thereby side-lining the public prosecutor's office. Customs officials thus can be said to wear two 'enforcement hats', an administrative one and a criminal one. In addition, the pivotal point where administrative proceedings become criminal is in practice hard to determine because customs authorities have the same set of investigative powers in either situation. These powers are broad and highly repressive, offering fewer procedural safeguards to suspects.[10] Consequently, when preparing the integration of the EPPO at national level, the question arose whether this particular enforcement system could be maintained.[11]

Interestingly, the Belgian legislator opted in February 2021, when implementing the EPPO, for a minimal intervention rather than a fundamental (and, in our view, indispensable) reform of the powers of the customs administration.[12] According to the new law, the customs administration retains its own investigative *and* prosecution powers in EPPO cases, but will exercise them under the authority of the EPPO, following the instructions of the handling European Delegated Prosecutor (hereafter EDP) and the competent Permanent Chamber.[13] Whether this approach is fully compliant with EU law is debatable. Moreover, the EPPO's prosecution strategy is likely to clash with the enforcement strategy of customs authorities, aimed primarily at the quick recovery of unpaid duties to meet the Member State's financial obligations toward the EU, rather than investigating and dismantling criminal networks and bringing to justice the main responsible persons. Most importantly, in so-called 'mixed' EPPO cases, involving both customs and other PFI-related offences, different procedural safeguards will apply – the less protective ones applicable in customs investigations, and the 'ordinary' ones applicable in most other criminal investigations – with a risk of 'cherry-picking' by the investigating authorities.

This contribution aims to analyse the relation between the EPPO and national customs authorities, from a legal and practical perspective, taking Belgium as a case study. In doing so, it will pay special attention to the essential conditions for effective enforcement of the Union's financial interests and the need to adequately safeguard suspects' fundamental rights. First, it will analyse the EPPO's material competence with respect to customs offences (II). Second, it will present the Belgian customs law, entailing criminal procedural rules that are highly derogatory (III). In a third step, it will explain the functioning of the EPPO and the way in which it is supposed to conduct its investigations and to prosecute. Fourth, the contribution will present several theoretical solutions to bring Belgian customs law in line with the EPPO Regulation (V), before critically examining the approach adopted by the Belgian legislator (VI) and evaluating whether it is compliant with the EPPO Regulation and the EU legislator's intention to enhance the fight against fraud affecting the Union's financial interests (VII).

II. The EPPO's competence regarding customs offences

In order to fully understand the peculiar relationship between the EPPO and the Belgian customs authorities, it is necessary to briefly recall the material competence of the EPPO relating to customs offences.

The material competence of the EPPO is defined by Article 22 of the EPPO Regulation, which refers to the PFI Directive. Following a combined reading of the EPPO Regulation and the PFI Directive, the EPPO is competent to investigate and prosecute, for example, fraud involving EU subsidies, VAT fraud, active and passive corruption, but also fraud related to customs and antidumping duties. Indeed, Article 3(c) of the PFI Directive obliges Member States to incriminate:

> *In respect of revenue other than revenue arising from VAT own resources referred to in point (d), any act or omission relating to*

[10] Claes and Horseele, (n 3) 302-312.

[11] For a full analysis, see Vanessa Franssen, Frank Verbruggen, Ana Laura Claes and Anne Werding, *Implementatie van het Europees Openbaar Ministerie in de Belgische Rechtsorde/Mise en oeuvre du Parquet européen en droit belge*, Bilingual study funded by the Belgian Ministry of Justice, June 2019, 89-112.

[12] Act of 17 February 2021 holding several provisions in criminal justice matters (Loi du 17 février 2021 portant des dispositions diverses en matière de justice), *Moniteur belge* 24 February 2021 (hereafter EPPO Act).

[13] General Law on Customs and Excise of 18 July 1977 (Loi générale sur les douanes et accises), as amended by the EPPO Act, *Moniteur belge* 21 September 1977 (hereafter GLCE), art 285/3.

(i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;

(ii) non-disclosure of information in violation of a specific obligation, with the same effect; or

(iii) misapplication of a legally obtained benefit, with the same effect.

Article 3(c) thus incriminates fraud related to EU revenue *other than VAT*, including customs and antidumping duties.

It is important to stress that the PFI offences always require that the act or omission causes an illegal reduction of the (sources of revenue for the) Union budget. Looking at Belgian customs criminal law, most offences that give rise to a customs debt thus fall within the material competence of the EPPO. Examples of such offences are import or export without declaration as well as failure to declare or deliberate misdeclaration (undervaluation, misclassification of goods, declaration of a false origin…).[14] In contrast, offences that do not give rise to a customs debt (the so-called 'non-fiscal' offences, e.g., offences concerning licences or prohibitions, restrictions or control measures, breach of seals[15]) cannot be considered PFI-related customs offences.[16]

On top of these PFI-related customs offences, the EPPO Regulation and the PFI Directive further determine that the EPPO is also competent to investigate and prosecute: (i) money laundering involving property derived from the these customs PFI offences;[17] (ii) the fact that these customs offences take place within a criminal organisation;[18] and (iii) any other (non-PFI) offence that is inextricably linked to the customs offences.[19] In all these cases, the EPPO is thus competent to investigate and prosecute offences that are, strictly speaking, not PFI offences.

[14] According to the Explanatory Memorandum to the EPPO Act, the following criminal offences defined by the GLCE belong to the EPPO's material competence: Art 115, § 1, Art 202, § 2, Art 220, § 2, Art 236, Art 237, Art 256, Art 257, § 3, and Art 259. Explanatory Memorandum to the EPPO Act, Doc. Parl., Ch. Repr., sess. ord. 2020-2021, No 55-1696/001, 20-21 (hereafter Explanatory Memorandum to the EPPO Act).
[15] GLCE, art 165.
[16] Explanatory Memorandum to the EPPO Act, 21.
[17] PFI Directive, art 4(1).
[18] EPPO Regulation, art 22(2).
[19] EPPO Regulation, art 22(3).

Nevertheless, Article 25 of the EPPO Regulation provides several mitigations and exceptions to this competence of the EPPO. First of all, the EPPO will generally not exercise its competence if the damage caused or likely to be caused to the EU budget is less than 10,000 euro.[20] Secondly, with regard to 'inextricably linked offences', it is required that the PFI offence is preponderant in terms of sanctions levels.[21] The EPPO will therefore not exercise its competence – neither for the PFI offence nor for the inextricably linked offence – when the maximum sanction for the linked offence, as provided by national law, is equal to or more severe than the penalty provided for the PFI offence, unless the inextricably linked offence has been merely instrumental to commit the PFI offence. Finally, the EPPO will also not exercise its competence if there is a reason to assume that the damage caused or likely to be caused to the EU's budget does not exceed the damage caused or likely to be caused to another victim.[22] On top of Article 25 EPPO Regulation, the EPPO will also generally not investigate and prosecute offences which cause or are likely to cause less than 100,000 euros of damage to the EU's budget.[23] These exceptions to the EPPO's competence have been further clarified in guidelines adopted by the EPPO College.[24] Yet, their concrete interpretation and application will depend on the EPPO's practice in the next few years. Therefore, they will not be discussed in detail in the remainder of this article.

III. Belgian customs (and excise) criminal procedure

If the facts of a case fall within the competence of the EPPO, the EPPO can start investigating and prosecuting on the basis of the EPPO Regulation. Nevertheless, the EPPO Regulation does not entail a full set of criminal procedural rules and refers to national law for several matters. While the course of an EPPO investigation and procedure might seem quite straightforward on the basis of the EPPO Regulation, it will prove to be challenging to encompass these rules in national procedures where the customs (and excise) administration[25] has a strong legal and practical position, as is the case in Belgium.

The Belgian customs (and excise) enforcement system is mainly regulated by the GLCE. These rules substantially derogate from the ordinary rules of criminal procedure as laid down in the Code of Criminal Procedure[26] (hereafter CCP), which the legislator has always justified by the cross-border nature of the offences, the technical nature of the subject matter, the great mobility of the goods and the relatively large number of natural and legal persons involved.[27] Although these rules offer far fewer procedural guarantees, the Belgian Supreme Courts (i.e., the Constitutional Court and the Court of Cassation) generally consider that the derogation from ordinary criminal procedure does not infringe upon the rights of the defence and is not, in itself, discriminatory.[28]

[20] Unless the case has repercussions at the EU level which require an investigation to be conducted by the EPPO or officials or other servants of EU, or members of the EU institutions of the could be suspected of having committed the offence. The EPPO will consult the competent national authorities or EU bodies to determine whether these criteria have been met.

[21] EPPO Regulation, art 25(3) (a) and recitals 55-56.

[22] Article 25(4) of the EPPO Regulation, however, states that: 'The EPPO may, with the consent of the competent national authorities, exercise its competence for offences referred to in Article 22 in cases which would otherwise be excluded due to application of paragraph 3(b) of this Article if it appears that the EPPO is better placed to investigate or prosecute.' According to recital 60 of the EPPO Regulation, 'The EPPO could appear to be better placed, inter alia, where it would be more effective to let the EPPO investigate and prosecute the respective criminal offence due to its transnational nature and scale, where the offence involves a criminal organisation, or where a specific type of offence could be a serious threat to the Union's financial interests or the Union institutions' credit and Union citizens' confidence. In such a case the EPPO should be able to exercise its competence with the consent given by the competent national authorities of the Member State(s) where damage to such other victim(s) occurred.'

[23] EPPO Regulation, art 34(3).

[24] EPPO, 'Decision of the College of the European Public Prosecutor's Office adopting operational guidelines on investigation, evocation policy and referral of cases' (21 April 2021), <https://www.eppo.europa.eu/sites/default/files/2021-04/2021.029_Operational_guidelines_on_investigation_evocation_policy_and_referral_of_cases.pdf> accessed 24 May 2022.

[25] It should be pointed out that, under Belgian law, the customs administration (in full: the General Administration of Customs and Excises) is also competent to investigate and prosecute excise offences. Its powers in this regard are very similar to the ones regarding customs offences, which explains the concern of the administration and the legislator to maintain this national coherence, despite the fact that excise offences do not belong to the material competence of the EPPO.

[26] Code of Criminal Procedure of 17 November 1808 (Code d'instruction criminelle), *Moniteur belge* 27 November 1808, 0.

[27] Alain De Nauw, 'Overzicht van douanestrafprocesrecht', [2004-2005] RW, 928; Steven Van Dromme, 'Douanerecht versus algemene beginselen van het strafrecht' in Michel Cornette (ed), *Douane.be: actuele problemen* (Intersentia 2006) 132; Franssen, Werding, Claes and Verbruggen, (n 3) 163.

[28] While several provisions of the GLCE have been the object of proceedings before the Constitutional Court and the Court of Cassation, the customs criminal procedure remains relatively untouched. For a more detailed analysis, see Claes and Horseele, (n 3) 310-312.

Hereafter, we will only discuss the aspects of this special enforcement regime that are of particular importance in view of the proper functioning of the EPPO. While considering the overview of this regime, the reader should be aware that the Belgian legislator intends to thoroughly reform and modernise the GLCE.[29] Currently, this reform is planned for 2023.

1) The customs administration has the power to prosecute

As already mentioned in the introduction, the Belgian customs authorities have the power to investigate, establish and prosecute customs offences.[30] The Belgian customs authorities are therefore not mere administrative authorities with the power to conduct administrative checks and impose administrative sanctions. They have extensive administrative *and* criminal powers. In contrast to the ordinary criminal procedure, where the power to investigate and prosecute lies with the public prosecutor's office, the customs authorities have the monopoly to start both administrative and criminal proceedings.

In practice, if a breach of customs legislation is detected, the Belgian customs authorities will first decide if they want to propose a settlement to the offender. This settlement can be proposed at any stage of the proceedings, as long as no final court judgment has been rendered. According to Articles 263-264 of the GLCE, a settlement can only be offered if there are mitigating circumstances or if the infringement can be attributed to neglect or mistake rather than to the intent to deliberately commit fraud. Any settlement is prohibited if there is no doubt that the offender had the intention to commit fraud. In practice, though, this settlement procedure is widely applied.[31]

If the matter cannot be settled or the terms of the settlement are not complied with, the case can be brought before court. In principle, the customs authorities can go to a civil court to recover the evaded customs duties. Nevertheless, all violations of customs (and excise) laws are criminally sanctioned and even if no specific sanction is provided in customs (or excise) laws, a fine between 125 EUR and 1,250 EUR can be imposed.[32] This means that infringements of customs laws can always be subject to a criminal prosecution by the customs authorities. In practice, the customs authorities will generally initiate criminal proceedings instead of civil proceedings.[33] Before the criminal court, the criminal claim (to impose criminal sanctions) and the civil claim (recovery of the evaded duties) are to be considered as separate legal proceedings. The criminal judge is obliged to rule on the civil claim that is brought before him, even in case of an acquittal or if the criminal claim becomes time-barred during the criminal proceedings.[34]

There is one exception, however, to the prosecution monopoly of the customs authorities. The power to request the criminal judge to impose a prison sentence remains in the hands of the public prosecutor. The customs authorities can only request non-custodial sentences (fines, confiscations, closing of factories or workshops, professional disqualifications…).[35] Moreover, all offences that are not considered customs offences, but might accompany customs offences (e.g., money laundering, human trafficking, participation in a criminal organisation…) remain the full competence of the public prosecutor's office.[36]

[29] To this end, the European Commission ordered an academic study in May 2019, conducted by the University of Antwerp (https://www.uantwerpen.be/en/staff/eric-vandooren/research/ last accessed 24 May 2022). This study has been finalised, but as far as we know the results have not yet been published. Moreover, the federal government, which took office on 1 October 2020, has included the ambition to modernise the GLCE in its general policy plan (<https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf> last accessed 24 May 2022). Franssen and Claes, (n 3) 132.

[30] GLCE, art 281.

[31] Franssen and Claes, (n 3) 206 and the references mentioned there.

[32] Art. 261 GLCE.

[33] Eric Van Dooren, 'Iteratieve knelpunten van douane- en accijnsstrafrecht' in Michel Rozie (ed), *Actuele problemen van het fiscaal strafrecht* (Intersentia, 2011) 465, 465.

[34] Levi Goossens and Bert Gevers, 'Feasibility of harmonizing customs sanctioning systems in the European Union: some considerations from a Belgian point of view' [2018] GTCJ 329, 332; Patricio Diaz Gavier and Eric Van Dooren, 'Criminal customs law in Belgium and the consequences for customs debt recovery' [2013] GTCJ 70, 72.

[35] GLCE, art 281, para 2 , Royal Decree no 22 of 24 October 1934 on the judicial prohibition of certain convicted persons and bankrupt persons from exercising certain functions, professions or activities (Arrêté royal n° 22 relatif à l'interdiction judiciaire faite à certains condamnés et aux faillis d'exercer certaines fonctions, professions ou activités), *Moniteur belge*, 27 October 1934, 5 768.

[36] GLCE, art 282.

The result of this division of prosecution powers is a very special interaction between the customs authorities and the public prosecutor's office, which is of great relevance to the EPPO, since all the PFI offences are punishable with a prison sentence.[37] In particular, this interaction becomes very tangible in the following two scenarios:

(i) On the one hand, if the facts constitute a customs offence punishable with a prison sentence, only the public prosecutor can request this sentence. In this case, the customs authorities and the public prosecutor will exercise the criminal proceedings together and simultaneously.[38] Nevertheless, the initiative to engage the criminal proceedings lies exclusively with the customs authorities. The public prosecutor will thus depend on the initiative of the customs authorities.[39] He/she does not have the power to give orders regarding the criminal proceedings,[40] which is *in se* problematic for the EPPO (see *infra*).

(ii) On the other hand, if the facts constitute a concurrence of several offences, including both customs offences and offences that belong to the competence of the public prosecutor (e.g. a criminal organisation that illegally imports cigarettes), the public prosecutor can introduce his/her own case before the court, regardless of the intention of the customs authorities, and *vice versa*.[41] If both authorities go to court at the same time, the cases can be joined in light of the proper administration of justice. However, this requires a certain amount of coordination between both proceedings, which appears to be complicated and fairly rare in practice.[42]

2) The customs authorities' enforcement strategy differs from the public prosecutor's

The customs authorities do not only combine administrative and criminal powers, they also play a particularly ambivalent role in the criminal proceedings. Since the customs authorities are also responsible for the levying of the customs (and excise) duties, they also exercise a civil claim for the repayment of the duties.[43] The customs officials thus wear another double hat, one as prosecuting authority and another one as aggrieved party.

This double hat or role explains why the customs authorities have a different approach than the public prosecutor's office. In contrast with the public prosecutor, the focus of the customs authorities during the procedure is on the goods, more than on the persons involved and the underlying criminal activities that often accompany customs and excise infringements, such as participating in a criminal organisation, human trafficking or money laundering.[44] For the Belgian State, a fast and effective recovery of the customs duties is of course essential to comply with its financial responsibility toward the EU. If customs duties are evaded, the EU loses a part of its own resources. Long criminal proceedings expose the Belgian State to substantial interests for delayed payment of the duties to the European Commission.[45]

3) Customs officials enjoy broad investigative powers that derogate from ordinary criminal procedure

[37] PFI Directive, art 7(2).
[38] GLCE, art 281, para 3.
[39] *Ibid.*
[40] Alexander Baert, *Douane en accijnzen* (Kluwer, 2017) 275-276; Alexander Baert and Luc Gheysens, 'Douane- en accijnsstrafprocesrecht: een overzicht' in Luc Maes, Herman De Cnijf and Leo De Broeck (eds), *Fiscaal Praktijkboek 2013-2014 – Indirecte belastingen* (Kluwer, 2013) 322-323; Eric Van Dooren, 'De bijzondere plaats van het openbaar ministerie in het douanestrafprocesrecht' in Francis Desterbeck (ed), *Het douanestrafrecht vandaag/le droit pénal douanier aujourd'hui*, (Larcier, 2016) 68-69; Eric Van Dooren, 'Iteratieve knelpunten van douane- en accijnsstrafrecht', (n 33) 468.
[41] Eric Van Dooren, 'De bijzondere plaats van het openbaar ministerie in het douanestrafprocesrecht', (n 40) 52-54.
[42] Franssen and Claes, (n 3) 188-189.
[43] GLCE, art 283.
[44] A good example of this combination is the illicit trade in tobacco products. Franssen and Claes, (n 3) 174-175.
[45] Council Regulation (EU, Euratom) 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements [2014] OJ L168/39, art 12. See also articles 2, § 3, 9 and 10 on the date of establishment of the UE's traditional own resources (including customs duties) in disputed cases, the accounting arrangements and time limits for payment. This problem of increased financial responsibility in case of long-lasting criminal investigations was highlighted in interviews with several customs officials. Franssen, Verbruggen, Claes and Werding, *Implementatie van het Europees Openbaar Ministerie in de Belgische Rechtsorde/Mise en oeuvre du Parquet européen en droit belge*, (n11) 94 and 110. Franssen and Claes, (n 3) 186.

The GLCE invests the customs administration with very broad investigative powers with generally less procedural safeguards for the tax payer.[46] For example, within a specific customs zone called "*le rayon des douanes*",[47] the powers of the customs administration are broader and do not require judicial authorisation, not even for the search of private premises.[48] Another illustration is the very limited possibilities to lift a seizure.[49] A seizure cannot be lifted unless you pay a sum equal to the value of the seized goods, whether or not they are connected to the infringement. Moreover, any official report drawn up by the customs administration has a particular evidentiary value. They are considered as constituting evidence, unless proven otherwise,[50] while in general criminal procedure, this is the exception to the rule.[51] Similarly, rules relating to the arrest and pretrial detention[52] as well as the possibility of an out-of-court settlement[53] with the prosecuting authority differ greatly from the ordinary rules of criminal procedure.[54]

On top of the rules provided by the GLCE, the investigation conducted by the customs administration is particularly secret in practice, which makes it difficult for the persons concerned to exercise their rights. For example, the GLCE does not provide explicitly for the right to access the case file nor does it provide for a formal right to request additional investigation measures.

IV. How the EPPO conducts its investigation and prosecution of customs cases (according to the EPPO Regulation)

How can we fit the EPPO into this peculiar enforcement system? Before exploring the different options and the practical compromise finally made by the Belgian legislator, it seems useful to briefly reiterate the general functioning of the EPPO according to the EPPO Regulation.

The EPPO is a hybrid, multi-level prosecution body. It has a central office in Luxembourg and decentralised offices in the Member States.[55] The central office hosts the European Chief Prosecutor (and his deputies), the College, the Permanent Chambers, the European Prosecutors (who form the College), and the Administrative Director.[56] The decentralised level consists of the EDPs in the participating Member States.[57] The central level takes up two main tasks. First, the College takes decisions on strategic matters, including determining priorities or deciding on general issues arising from individual cases.[58] Second, the Permanent Chamber and the European Prosecutor (of the Member State where the investigation is conducted) supervise and direct specific EPPO investigations.[59] The actual investigation and prosecution measures are taken by the EDPs at the decentralised level, who are part of the national prosecution service.[60]

1) *The opening of the EPPO investigation*

[46] For a more elaborate analysis, see Claes and Horseele, (n 3) 307-212.
[47] The customs zone is an area 'along the maritime coast that extends inland for five kilometres from the low tide line' and that comprises also 'the territory of customs seaports and customs airfields as well as an area outside this territory with a width of 250 m from the limits of this territory' (Act of 22 April 1999 concerning Belgium's exclusive economic zone in the North Sea (loi concernant la zone economique exclusive de la Belgique en mer du Nord), *Moniteur belge* 10 July 1999, art 167.
[48] GLCE, arts 173-174.
[49] GLCE, art 275, para 3; Alexander Baert, 'De bevoegdheid van de rechter in kortgeding bij de aanhaling van goederen door de administratie der douane en accijnzen', [2013] TFR 925; Eric Van Dooren, 'Douane en accijnzen' in Francis Desterbeck and Jan Van Droogbroeck (eds), *Beslag en verbeurdverklaring in strafzaken* (Larcierb2015) 265, 266-267.
[50] GLCE, art 272; Goossens and Gevers, (n34) 330.
[51] Alexander Baert, *Douane en accijnzen* (Kluwer, 2017) 272-273; Van Dromme, (n27) 132.
[52] GLCE, arts 247-252. For a more detailed analysis of the pre-trial detention regime in customs cases, see Eric Van Dooren, 'De bijzondere plaats van het openbaar ministerie in het douanestrafprocesrecht', (n 40) 61-65.
[53] GLCE, arts 263-265.
[54] Franssen, Werding, Claes and Verbruggen, (n 3) 167.
[55] Verbruggen, Franssen, Claes and Werding, 'Implementation of the EPPO in Belgium: Making the Best of a (Politically) Forced Marriage?' (*European Law Blog*, 18 November 2019) <https://europeanlawblog.eu/2019/11/18/implementation-of-the-eppo-in-belgium-making-the-best-of-a-politically-forced-marriage/> last accessed 24 May 2022.
[56] EPPO Regulation, art 8(3).
[57] *Ibid*, art 8(4) and recital 21; Antonio Martinez Santos, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees' in Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office: Challenges Ahead*, (Springer 2018) 8.
[58] EPPO Regulation, art 9 and recital 24.
[59] *Ibid*, arts 10 and 12; Martinez Santos, (n 57) 10-11 and 13-14.
[60] EPPO Regulation, art 4. Claes, Werding and Franssen, (n 3) 362.

The EPPO will be informed about any criminal conduct in respect of which it could exercise its competence. All EU institutions, bodies, offices and agencies as well as the authorities of the Member States have an obligation to report these facts to the EPPO via a model 'EPPO crime report' (hereafter ECR) which will be uploaded in the EPPO's case management system.[61] This is the main channel that enables the EPPO to exercise its competence.[62] It is, however, also possible the that the EPPO receives information or complaints from third or private parties.[63]

Based on this information, the EPPO can start an investigation in two ways. On the one hand, the EPPO can initiate an investigation when there are reasonable grounds to believe that an offence falling within the competence of the EPPO is being or has been committed and in respect of which no investigation has been initiated by a judicial or law enforcement authority of a Member State.[64] On the other hand, the EPPO may decide to use the right of evocation, i.e., take over an existing case from a judicial or law enforcement authority of a Member State that has already launched an investigation.[65] Although the EPPO and national authorities have shared competences (i.e., both can prosecute EPPO offences), the EPPO's competence has priority.[66] Nevertheless, the right of evocation only exists as long as the national investigation has not been finalised and provided that an indictment has not yet been submitted to a court.[67]

The EPPO has to exercise this right of evocation within five days after receiving all the relevant information from the national authorities.[68] During the five days period for the decision of evocation, the national authorities have to 'refrain from taking any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation'.[69] Nevertheless, they have to 'take any urgent measures necessary, under national law, to ensure effective investigation and prosecution'. If the EPPO decides to exercise its right of evocation, the national competent authorities will hand over the file to the EPPO and stop their own investigation.[70]

2) The conduct of the EPPO investigation

Once an investigation has been initiated or evocated, the EDP takes up the role of prosecutor and will have the same rights and powers as a national prosecutor in that situation.[71] As indicated, he will conduct the investigation under the supervision and direction of the Permanent Chamber and the European prosecutor. In accordance with the EPPO Regulation and with national law, he can either undertake investigative or other measures on his or her own or instruct the competent national authorities to carry them out.[72] Those authorities have to execute these measures *in accordance with national law*.

3) The closing of the EPPO investigation and bringing the case to judgment

[61] EPPO Regulation, art 24. For the model ECR, see: EPPO, 'EPPO Crime Report (ECR): Quick guide', <https://exchange.justice.government.bg/api/part/GetBlob?hash=B4954FD759068414A8ED1A33E494DBEB>, last accessed 24 May 2022.

[62] EPPO, 'Decision of the College of the European Public Prosecutor's Office adopting operational guidelines on investigation, evocation policy and referral of cases, as amended by Decisions 007/2022 of 7 February 2022 of the College of the EPPO (21 April 2021), <https://www.eppo.europa.eu/en/documents?keywords=&category=All&page=2>, last accessed 24 May 2022.

[63] Anyone can report a crime via the 'report a crime web form' on the website of the EPPO: https://www.eppo.europa.eu/en/reporting-crime-eppo.

[64] EPPO Regulation, art 26.

[65] *Ibid*, art 27.

[66] *Ibid*, art 25(1) and recital 58.

[67] *Ibid*, art 27(7). For a further analysis of the meaning of the term 'indictment', see Claes, Werding and Franssen, (n 3) 375-377.

[68] *Ibid*, art 27(1).

[69] Recital 58 seems to be broader than article 27(2) as it states that 'the authorities of Member States should refrain from acting, unless urgent measures are required, until the EPPO has decided whether to conduct an investigation', whereas Article 27(2) only mentions 'any decision under national law that may have the effect of precluding the EPPO from exercising its right of evocation'. Claes, Werding and Franssen, (n 3) 374.

[70] EPPO Regulation, art 27(5).

[71] EPPO Regulation, art 13(1).

[72] *Ibid*, art 28(1).

Once the investigation is completed, the handling EDP has to send a report to the supervising European Prosecutor with a draft decision on the out-come of the case:[73] prosecution[74] (with possibility for a simplified prosecution procedure if national law provides for it),[75] referral to the national authorities,[76] or dismissal.[77] The supervising European Prosecutor subsequently transmits the draft decision to the Permanent Chamber,[78] which will take the final decision.[79] That said, the Permanent Chamber cannot dismiss a case if the EDP has proposed to bring the case to judgment.[80] In case the EPPO decides to prosecute and the Member State in which the prosecution shall be brought is determined, the competent national court of that Member State will be determined on the basis of national law.[81] Parallel to conducting the investigation, the EDP will exercise all tasks and competences of the public prosecutor during the trial phase.

Finally, it is important to note that the EPPO will put emphasis on the fact that all investigations and prosecutions have to be carried out in full compliance with the rights of the suspects and accused persons. Considering the EPPO is an EU body, the fundamental rights laid down in the Charter of Fundamental Rights of the EU are, of course, applicable. Furthermore, the minimum rules provided by the so-called 'Roadmap' EU Directives concerning the rights of the suspects and accused persons in criminal proceedings also need to be respected.[82] But these minimum rules will be supplemented by the national procedural safeguards of the Member State where the investigation is conducted and these rules remain quite diverse, even within one and the same Member State, as Belgian customs law strikingly illustrates.[83]

V. Solutions in theory

Looking at the way in which EPPO proceedings are conducted, a *status quo* of the Belgian customs criminal procedure was clearly no option; Belgium customs legislation had to be amended on several points.[84] Indeed, in case the EPPO exercises its competence to investigate and prosecute a customs PFI offence, the EDP or, potentially the European Prosecutor,[85] has to be in charge, giving instructions to the customs administration to carry out investigative or other measures, deciding on out-of-court settlements, and acting as the prosecuting authority before the criminal courts. Therefore, the Belgian customs administration inevitably had to lose (at least some of) its autonomy and powers in EPPO cases. In particular, the customs administration's monopoly to prosecute had to be revised and it seemed highly desirable to streamline its investigative powers and rules of procedure with the ordinary rules of criminal procedure to avoid tensions in mixed EPPO cases.

5.1. The power to prosecute

[73] *Ibid*, art 35.
[74] *Ibid*, art 36.
[75] *Ibid*, art 40.
[76] Because the EPPO is not competent, because the conditions of arts 25(2) and (3) are not fulfilled anymore, or on the basis of the principle of prosecutorial discretion. EPPO Regulation, art 34; Michele Caianiello, 'The Decision to Drop the Case in the New EPPO's Regulation: Res Iudicata or Transfer of Competence?' [2019] NJECL 186, 191.
[77] E.g., due to the statute of limitation, the application of the principle of *ne bis in idem*, or the lack of evidence. EPPO Regulation, art 39.
[78] *Ibid*, art 35.
[79] Unless the Permanent Chamber has delegated its decision-making power to conclude the case before. EPPO, 'Decision of the College of the European Public Prosecutor's Office 003/2020 adopting the Internal Rules of Procedure of the European Public Prosecutor's Office (12 October 2020), https://www.eppo.europa.eu/sites/default/files/2020-12/2020.003%20IRP%20-%20final.pdf, art 55(1).
[80] EPPO Regulation, art 36(1).
[81] *Ibid*, art 26(5).
[82] *Ibid*, art 41.
[83] *Ibid*, art 41.
[84] Franssen, Verbruggen, Claes and Werding, (n 11) 100.
[85] EPPO Regulation, art 28(4).

In theory, two major options could be considered to resolve the problem with the prosecution monopoly of the customs administration.[86] On the one hand, the Belgian legislator could appoint a customs official as EDP, who would be exclusively competent for customs cases related to the EPPO's competence. This option was preferred by the Belgian customs administration.[87] On the other hand, the Belgian legislator could put an end to the prosecution monopoly of the customs administration and attribute the power to prosecute customs infringements to the public prosecutor, at least in cases that belong to the EPPO's competence.

The first option would leave the rules of customs criminal procedure untouched. Nevertheless, it is difficult to imagine that the customs official who would be appointed as EDP could fulfil all requirements set forward by the EPPO Regulation. First of all, Article 6 of the EPPO Regulation emphasises the independence of the EPPO, which implies that the EDPs cannot accept any external instructions from people or authorities outside the EPPO, such as the executive. It is hard to see how a customs official, as a member of the Ministry of Finance and considering his/her 'double hat' as prosecuting and aggrieved party, could meet this requirement of independence. Secondly, the EPPO Regulation requires that the EDPs 'have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgement'[88] and provides that they can also function as national prosecutors in non-EPPO cases if their workload permits so (i.e., as long as it does not prevent them from fulfilling their obligations under the EPPO Regulation).[89] In consequence, if a customs official were appointed as EDP, he/she could also intervene in cases that generally fall within the competence of the public prosecutor's office. That outcome did not seem desirable, for several reasons. Thirdly, if one of the Belgian EDPs, because of his/her specialisation, could only work on customs cases, that would greatly limit the flexibility of the Belgian EDPs and hamper the distribution of the work among them. In this respect, it should also be pointed out that the Permanent Chamber has the possibility to reattribute the case to another EDP in certain situations or to request the European prosecutor of Belgium to conduct the investigation himself.[90] In sum, the option of a customs-EDP did not seem compatible with the EPPO Regulation.[91]

Consequently, the second option, where the EDPs themselves can initiate criminal proceedings for customs offences, seemed the only way to ensure that Belgian law was in conformity with the EPPO Regulation. This option nevertheless required the Belgian legislator to get rid of the prosecution monopoly of the customs administration, at least for all customs cases that the EPPO wants to prosecute. Conversely, the monopoly would remain in place for all other customs cases. A disadvantage of this choice is, however, that the prosecution of customs and excise offences would be subjected to different procedural rules, depending on whether or not the EPPO exercises its competence. Moreover, as explained above, the rules on the (investigation and) prosecution of excise offences are the same as for customs offences.[92] Yet, excise offences are not PFI offences and could only be prosecuted by the EPPO as inextricably linked offences.[93] If the prosecution power of the customs administration would be set aside in EPPO cases, this would definitely undermine the coherence of the national system.

The second option also implied changes at the trial stage. The EDP should have full competence before the trial judge (e.g., present his/her arguments at the court hearing, take part in the evaluation of the evidence that was obtained, launch an appeal against a judgment). The role of the EDP thus goes further than the public prosecutor's role under the GLCE (which is basically limited to requesting prison sentences and the organisation of the court hearing). Yet, technically speaking, if the prosecution monopoly of the customs administration, laid down in Article 281 of the GLCE, were abandoned, these problems would also have been solved.

5.2. Rules of procedure

[86] For an analysis of these two options prior to the adoption of the Belgian EPPO Act, see Franssen, Werding, Claes and Verbruggen, (n 3) 168-170.
[87] This view was expressed by the customs administration during an interview conducted in the framework of an academic study on the implementation of the EPPO in the Belgian legal order. Franssen, Verbruggen, Claes and Werding, (n 11) 99-100.
[88] EPPO Regulation, art 13(1).
[89] *Ibid*, art 13(3).
[90] *Ibid*, art 13(3). Article 16(7) of the EPPO Regulation provides that the EDP should also be able to substitute the European Prosecutor in certain situation, namely when he/she is unable to carry out his/her functions or left his/her position according to article 16(4) or 16(5) of the EPPO Regulation.
[91] For a further analysis, see Franssen, Verbruggen, Claes and Werding, (n 11) 101-103.
[92] See *supra*, (n 25).
[93] Excise duties are national taxes and thus do not qualify as the EU's 'own resources'.

Following the second option, the EDP would have to direct the investigation and, pursuant to Article 28(1) of the EPPO Regulation, conduct investigations measures him-/herself or instruct the customs official to do so. Consequently, this raised the delicate question of which rules of criminal procedure would apply. To the extent that the EPPO Regulation refers to national law, it had to be determined whether the derogatory regime of customs criminal procedure remained applicable or whether the ordinary rules of criminal procedure would apply. Here, two sub-options could be considered: Either the EDP could exercise all powers that the customs administration is vested with, or the EDP could *direct* the customs administration to conduct certain measures. Within this second sub-option, the customs administration could either apply the powers provided for by the GLCE or apply the ordinary rules of criminal procedure.

Following sub-option 1, the EDP himself could use all powers provided for by the GLCE with regard to the prosecution of customs infringements, but *only for these specific infringements.* The co-existence of two different regimes within one and the same investigation under the authority of the same authority does, however, seem difficult to justify in light of the principle of equality and entails the risk of cherry-picking, meaning that the prosecuting authority could choose which rules to apply with respect to, e.g., a house search.

Following sub-option 2, the EDP would have the power to give instructions to the customs administration. The EDP could thus request a customs official to carry out certain investigation measures that are provided in customs law. The latter would not have any discretion regarding the opportunity of the measure. This solution seems the most logical one in light of Article 28(1) of the EPPO Regulation and having regard to Recital 15. Under this sub-option, the Belgian legislator would have to decide whether the customs administration could use the investigative powers prescribed by the customs law or whether it should apply the ordinary rules of criminal procedure. Either decision has advantages and disadvantages. For instance, if the ordinary rules of criminal procedure would be applicable, the same rules, and thus the same procedural safeguards, would apply in all EPPO cases. Nevertheless, on the downside, the specific powers of the customs administration, which are tailored to customs fraud (*supra*), would be lost in EPPO cases. Moreover, this approach encompasses a new inequality because the customs administration would apply a different set of rules in its own criminal investigations and in EPPO investigations. Still, in our view, it would be the most coherent and simple option for EPPO cases (one investigation, one set of rules), while awaiting a more general revision of the customs criminal procedure.

VI. The Belgian solution

In February 2021, the Belgian legislator finally adopted new legislation to implement the EPPO into the national legal order. The EPPO Act amended both the ordinary criminal procedure and the customs criminal procedure. Interestingly, though, the legislator did not really alter the investigative and prosecution powers of the customs administration but opted for a minimal intervention. In EPPO cases, the customs administration will maintain its proper investigative and prosecution powers laid down in the GLCE but will exercise these powers under the authority of the EPPO. To this end, the Administrator General of the customs administration will appoint at least one official, after consultation with the Belgian European Prosecutor, who is responsible for the cooperation with the Belgian EDPs when the EPPO exercises its competence with regard to customs offences.[94]

The designated customs official will perform his/her tasks powers independently from his/her administration (even though he/she remains part of it) and will only follow instructions from the EPPO.[95] Therefore, the customs administration cannot oppose to an action of the designated customs official when he/she is implementing a decision taken by the EPPO.[96] The EPPO Act continues that this designated official shall exercise *his powers of investigation and prosecution* in accordance with the GLCE.[97] Moreover, the Act explicitly states that the power to initiate legal proceedings with regard to customs offences for which the EPPO exercises its competence, is awarded to this designated official, who has to use this power in accordance with the decision of the competent Permanent Chamber. This seems to indicate that the customs administration remains the competent authority to conduct investigation measures and to bring the case before a trial judge. Based on the EPPO Act, it looks like the EPPO has the final say, but then again, it can only take action in customs cases via this new designated customs official.

[94] GLCE, art 285/2.
[95] *Ibid*, art 285/3.
[96] *Ibid*, art 285/3 in fine.
[97] *Ibid*, art 285/3, para 2.

The EPPO Act provides some further specifications. It explicitly states that the designated customs official has to inform the EDP without undue delay when taking any investigation or other measure. The latter can oppose to the measure, suspend it or order another (investigation) measure.[98] The Belgian legislator also expressly added that the designated customs official cannot propose an out-of-court settlement as provided by the GLCE to the offender if the EPPO decides to exercise its competence or during the time period where it can decide to do so.[99] At the end of the investigation, the designated customs officials will draft a report for the EDP and propose how the case should continue (prosecution, dismissal…).[100] Following the EPPO Regulation, the EDP will then draft her own proposal for the Permanent Chamber, which will finally decide whether to initiate criminal proceedings, to propose an out-of-court settlement,[101] to close the investigation without further action, or to refer the case back to the national authorities. The designated customs official has to execute this decision.

It remains to be seen how this system will work in practice. Will the proposal of the designated customs official always be followed by the EDP and, subsequently, the Permanent Chamber, in which case the EPPO would only formally be deciding? Or will the EPPO be really in charge of the investigation and impose its own prosecution strategy, which would be more in line with the EU legislator's intention? The future will tell.

VII. Evaluation of the Belgian solution

Looking at the amendments made by the EPPO Act, it remains to be seen whether the relation between the customs administration and the public prosecutor will actually change a lot in EPPO cases. Formally speaking, the designated customs official will conduct the investigation, informing the handling EDP of the investigation measures he/she undertakes and giving her[102] the opportunity to oppose and suspend the measure or to order another measure, and he/she will also initiate the criminal proceedings before the court, thereby following the EPPO's instructions. In theory, the EPPO will thus have the power to intervene strongly in the investigation and to decide whether and when the customs administration exercises its right to prosecute. But considering the customs administration's pre-existing autonomy and the highly derogatory customs legal framework, which most public prosecutors are *not* familiar with, it remains to be seen whether the EDPs will truly be in charge and instruct the customs administration, or whether the designated customs official will *de facto* remain in charge of the investigation and the management of the proceedings (i.e., prosecution and recovery of duties). Put differently, if the EDP only takes a passive role, sticking to supervising a few key steps in the criminal proceedings, the situation will not change so much compared to the pre-EPPO era. In fact, this *status quo* even seemed to be the explicit intention of the Belgian legislator, as he strived to maintain a 'uniform and coherent prosecution policy' between PFI customs offences and customs offences that do not belong to the EPPO's competence, on the one hand, and between customs and excise offences which are both prosecuted by the customs administration,[103] on the other hand.[104] Whether this approach is fully in conformity with the EPPO Regulation, is questionable.

[98] *Ibid*, art 285/5, para 1.
[99] *Ibid*, art 285/4.
[100] *Ibid*, art 285/5, para 3.
[101] This will be the transaction provided by Articles 263-264 of the GLCE. The Explanatory Memorandum to the EPPO Act indicates that the ordinary out-of-court settlement of Article 216bis of the CCP will not apply to customs PFI offences. Explanatory Memorandum to the EPPO Act, 26.
[102] At present, both EPDs for Belgium are women.
[103] See *supra*, (n 25).
[104] Explanatory Memorandum to the EPPO Act, 25.

With regard to investigation measures, it seems possible that Belgian law requires the EPPO to act via the customs administration, since Article 28(1) of the EPPO Regulation provides that the EDP either undertakes the investigation measures himself or *instructs* the competent authorities to do so. However, with regard to bringing the case to court and the trial stage itself, the EDP should have full competence. The EPPO Act now requires the intervention of the designated customs official in order to bring the case to trial and to request the judge to impose all non-custodial sentences. Although the EDP would instruct this official, who cannot contest this decision, it does not seem fully in line with the EPPO Regulation, which is binding in its entirety and directly applicable in all (participating) Member States.[105] Any conflicting rule of Belgian law will thus be set aside. Nevertheless, it would be better to amend it in order to explicitly allow the customs administration to execute instructions with regard to investigation measures, but only allow the EDP to actually act as the prosecuting authority. The designated official could be awarded an advisory role but, in our view, cannot take any concrete action without violating the EPPO Regulation.

Furthermore, the approach of the Belgian legislator also seems to disregard that the EPPO, as an independent and impartial body of the EU, should be able to set out its own prosecution strategy. In our view, clashes between the enforcement strategy of the customs administration and the EPPO are quite likely in the future, even more so in 'mixed' EPPO cases, involving both customs offences and other offences, which will become more frequent due to the creation of the EPPO. Indeed, one should be aware of the fact that the EPPO Regulation did not alter the financial responsibility of the Belgian State for the collection and payment of customs duties, which explains the customs administration's focus on seizing goods and quickly recovering those duties, potentially at the expense of a deeper investigation into the underlying more serious criminal activities (such as human trafficking, participation in a criminal organisation and money laundering – which are all offences that do not fall within the competence of the customs administration and that would require a joint investigation with the public prosecutor's office[106]). Will this focus on recovery stay the core priority in the investigations conducted by the EPPO, or will this new hybrid judicial actor implement a more traditional prosecutor-approach, focusing on the investigation, the identification and the prosecution of the persons responsible for the fraud? In the latter hypothesis, it is quite likely that EPPO investigations will take a lot of time, given their complexity and their cross-border nature, and result in higher interests to be paid by the Member States to the EU, which would be contrary to the customs enforcement strategy.[107]

Last by not least, the current approach of the Belgian legislator means that in customs cases conducted by the EPPO, where the customs administration continues to apply its own derogatory rules, the procedural safeguards will prove to (far) less protective than in EPPO proceedings related to other PFI offences, such as VAT fraud. This, obviously, creates a high risk of cherry-picking. The EDP could instruct (or simply allow) the customs administration to conduct investigation measures under the less protective rules of the GLCE, even though the evidence collected will (also) be used to prove other PFI offences which are governed by the ordinary rules of criminal procedure. Although the Belgian Supreme Courts have generally accepted the difference in treatment between customs criminal procedure and the ordinary criminal procedure (*supra*), they have not yet ruled on the situation where one single prosecuting authority – the EPPO – applies two sets of procedural safeguards in the one and the same investigation. This questionable situation is all the more regrettable as it could have been easily avoided. Indeed, the implementation of the EPPO at the Belgian level could have been a welcome catalyst for a more fundamental reform of customs (and excise) law.[108] Unfortunately, the Belgian legislator failed to seize this opportunity, preferring to postpone, once more, this already long-awaited and dearly needed reform…

[105] TFEU, art 288.
[106] In practice, though, such joint or coordinated investigations are very rare. See Franssen and Claes, (n 3)174-176.
[107] Franssen, Werding, Claes and Verbruggen, (n 3) 166.
[108] Franssen and Claes, (n 3) 199.

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