



WHEN EPPO MEETS CUSTOMS

A clash of enforcement strategies and procedural safeguards?



EPPO 1 YEAR IN ACTION (1)



- Goal = enhance protection of EU's financial interests
- How? Through criminal enforcement
 - Direct criminal enforcement by EU + better cross-border cooperation
 - More attention for offences affecting the EU budget
 - Fraud at the level of expenditure
 - Fraud at the level of revenue
 - VAT
 - EU MS Contributions
 - **Customs**
 - Consequently recovering more damages

EPPO 1 YEAR IN ACTION (2)



How to enhance the protection?

- EPPO = first EU body that can
 - conduct criminal investigations
 - formally initiate criminal proceedings before national court
- Main legal instrument for its functioning = EPPO Regulation
 - **BUT:** no « European Code of Criminal Procedure » or « European Criminal Court »
 - EPPO Regulation refers to national law for several matters

EPPO & Customs – Belgium as a case study



- 1) EPPO's competence regarding customs offences
- 2) Belgian customs criminal procedure
- 3) How does the EPPO conduct its prosecution?
- 4) How to fit these two together?
 - Solutions in theory
 - Solutions in practice: the Belgian solution
- 5) Evaluation

1. EPPO'S COMPETENCE (1)



- Art. 22 EPPO Reg → Art. 3 (c) PFI Directive

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

- (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*

1. EPPO'S COMPETENCE (2)

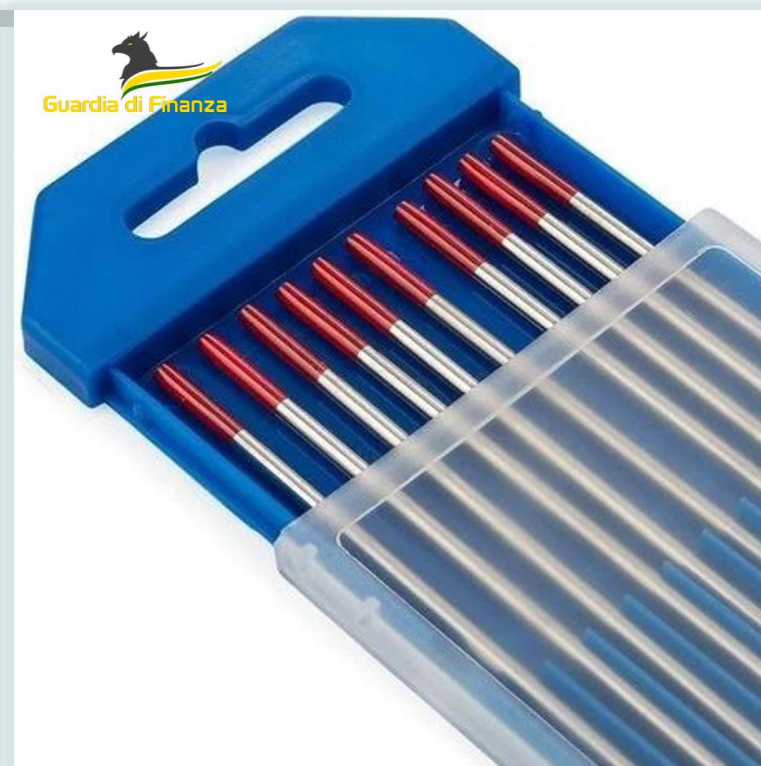


- PFI customs offences = 'fiscal offences' (give rise to a customs debt)
 - Import or export without declaration
 - Failure to declare or deliberate misdeclaration
 - Undervaluation
 - Misclassification of goods
 - Declaration of false origin
 - ...

1. EPPO'S COMPETENCE (3)



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1. EPPO'S COMPETENCE (4)



- ‘Non-fiscal offences’ ≠ PFI offences
 - Offences concerning licences or prohibitions, restrictions or control measures
 - Breach of seals
 - ...

1. EPPO'S COMPETENCE (5)



- EPPO is also competent to prosecute:
 - Money laundering involving profit from PFI customs offences
 - Criminal organisations involved in customs fraud
 - Inextricably linked offences
 - PFI offence is preponderant in terms of sanctions level
 - Or linked offence has been merely instrumental to PFI offence

1. EPPO'S COMPETENCE (6)



- Exceptions

- Art. 25 EPPO Reg, under conditions
 - Damage to another victim than EU is higher
 - Damage < 10.000
- Policy choices of EPPO
 - Damage < 100.000

1. EPPO'S COMPETENCE (7)



Excise offences?

2. Belgian customs criminal procedure (1)



- General Law on Customs and Excise of 18 July 1977
- Very different from ordinary criminal procedure
- Justification =
 - Cross-border
 - Technical
 - Great mobility of goods
 - Large number of persons involved
- Far fewer procedural guarantees

2. Belgian customs criminal procedure (2)



- 1) Customs administration = prosecuting authority
- 2) Focus on the goods (\Leftrightarrow public prosecutor)
- 3) Broad investigative powers \rightarrow procedural safeguards?



2. Belgian customs criminal procedure (3)



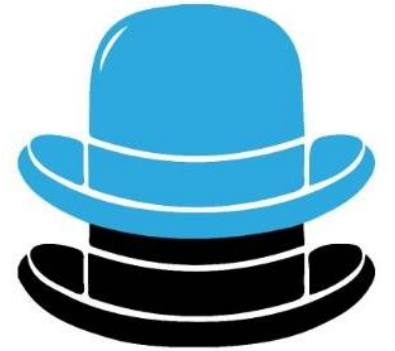
1) Customs administration = prosecuting authority

- Administrative checks & sanctions

AND

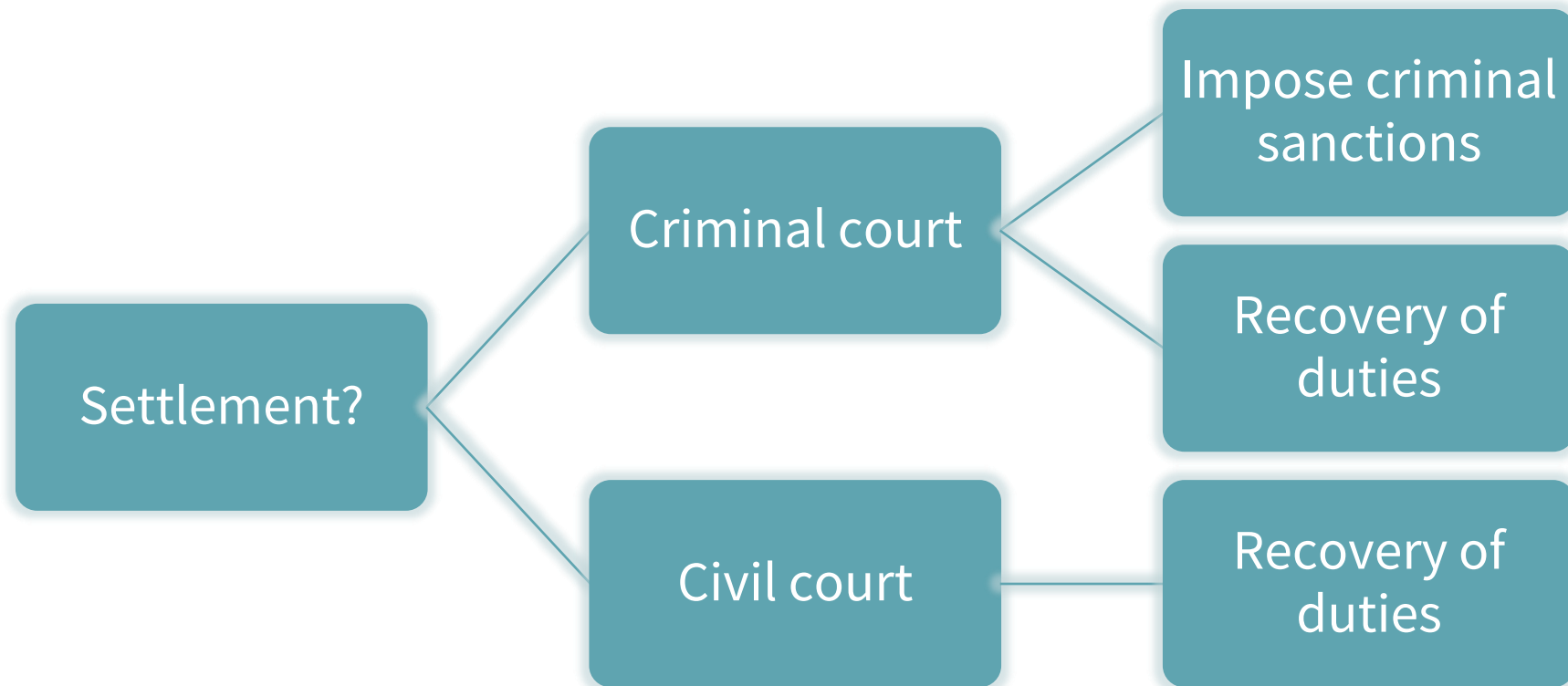
- Power to investigate, establish and prosecute customs offences

➔ Monopoly to start both administrative and criminal proceedings



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2. Belgian customs criminal procedure (4)



2. Belgian customs criminal procedure (5)



1) Customs administration = prosecuting authority

- 1 exception: prison sentence can only be requested by public prosecutor
- Customs authorities → only non-custodial sanctions
 - Fines
 - Confiscations
 - Closing of factories or workshops
 - Professional disqualifications

2. Belgian customs criminal procedure (6)



1) Customs administration = prosecuting authority

- Consequence: special interaction between customs and public prosecutor
- Interesting scenario's
 - Facts constitute a customs offence punishable with a prison sentence
 - Facts constitute a concurrence of several offences, including customs offences and offences belonging to the competence of the public prosecutor

2. Belgian customs criminal procedure (7)



2) Focus on the goods (↔ public prosecutor)

- Double hat = criminal enforcement AND recovery of evaded duties
- Focus on goods rather than persons involved or underlying criminal activities (criminal organisation, human trafficking, money laundering...)
- Why? Fast & effective recovery = essential to comply with financial responsibility towards EU

2. Belgian customs criminal procedure (8)



3) Broad investigative powers → procedural safeguards?

- Broad investigative powers
 - Within ‘customs zone’: search of private premises without judicial authorization
 - Limited possibility to lift seizure
 - Special evidentiary value of official report of customs administration
- Given double hat: not sure when administrative proceedings become criminal
 - Privilege against self-incrimination?
- Investigation is particularly secret
 - No formal right to access case file or request additional investigation measures

3. How does the EPPO conduct its prosecution? (1)



- 1) Opening of the EPPO investigation
- 2) Conduct of the EPPO investigation
- 3) Closing of the EPPO investigation and bringing the case to judgment



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3. How does the EPPO conduct its prosecution? (2)



1) Opening of the EPPO investigation

- EPPO will be informed
 - By IBOAS and MS through EPPO Crime Report (ECR)
 - By third or private parties
- EPPO can start investigation in 2 ways
 - No investigation on MS level yet? → EPPO can start
 - Investigation at MS level? → EPPO can evoke



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3. How does the EPPO conduct its prosecution? (3)



2) Conduct of the EPPO investigation

- EDP takes up role of prosecutor
 - Same rights and powers as national prosecutor in that situation
 - Under supervision and direction of the Permanent Chamber and European Prosecutor
- Acts in accordance with EPPO Regulation and with national law
 - EDP can either undertake investigative or other measures *himself*
 - OR *instruct* the competent national authorities to carry them out



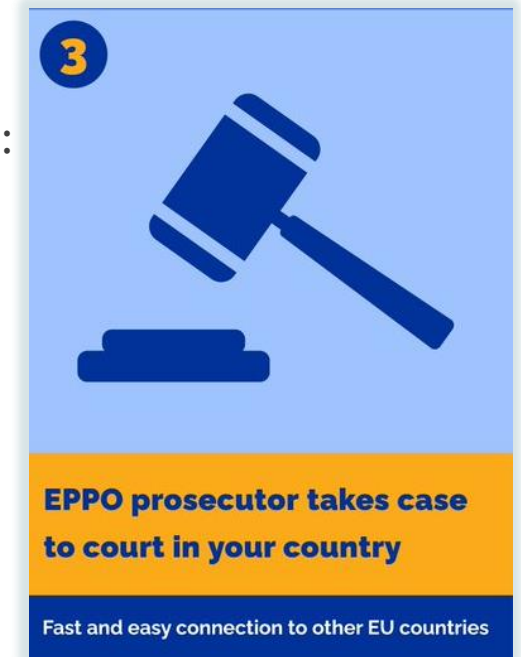
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3. How does the EPPO conduct its prosecution? (4)



3) Closing of the EPPO investigation and bringing case to judgment

- Handling EDP sends report + draft decision to supervising European prosecutor :
 - prosecution (including simplified procedure)
 - referral to national authorities
 - Dismissal
- Supervising European prosecutor will transmit draft decision to Permanent Chamber → final decision
- In case of prosecution, competent court determined by national law
- During the trial phase: EDP will exercise all tasks and competences of public prosecutor



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3. How does the EPPO conduct its prosecution? (5)



- Note on procedural safeguards

- EPPO will put emphasis on compliance with rights of suspects and accused persons
 - Charter of Fundamental Rights
 - Minimum rules of 'Roadmap' EU Directives concerning the rights of suspects and accused persons
 - Supplemented by national procedural safeguards of MS

4. How to fit EPPO in Belgian customs procedure? (1)



Status quo of customs criminal procedure was no option

When EPPO exercises its competence, it must be in charge

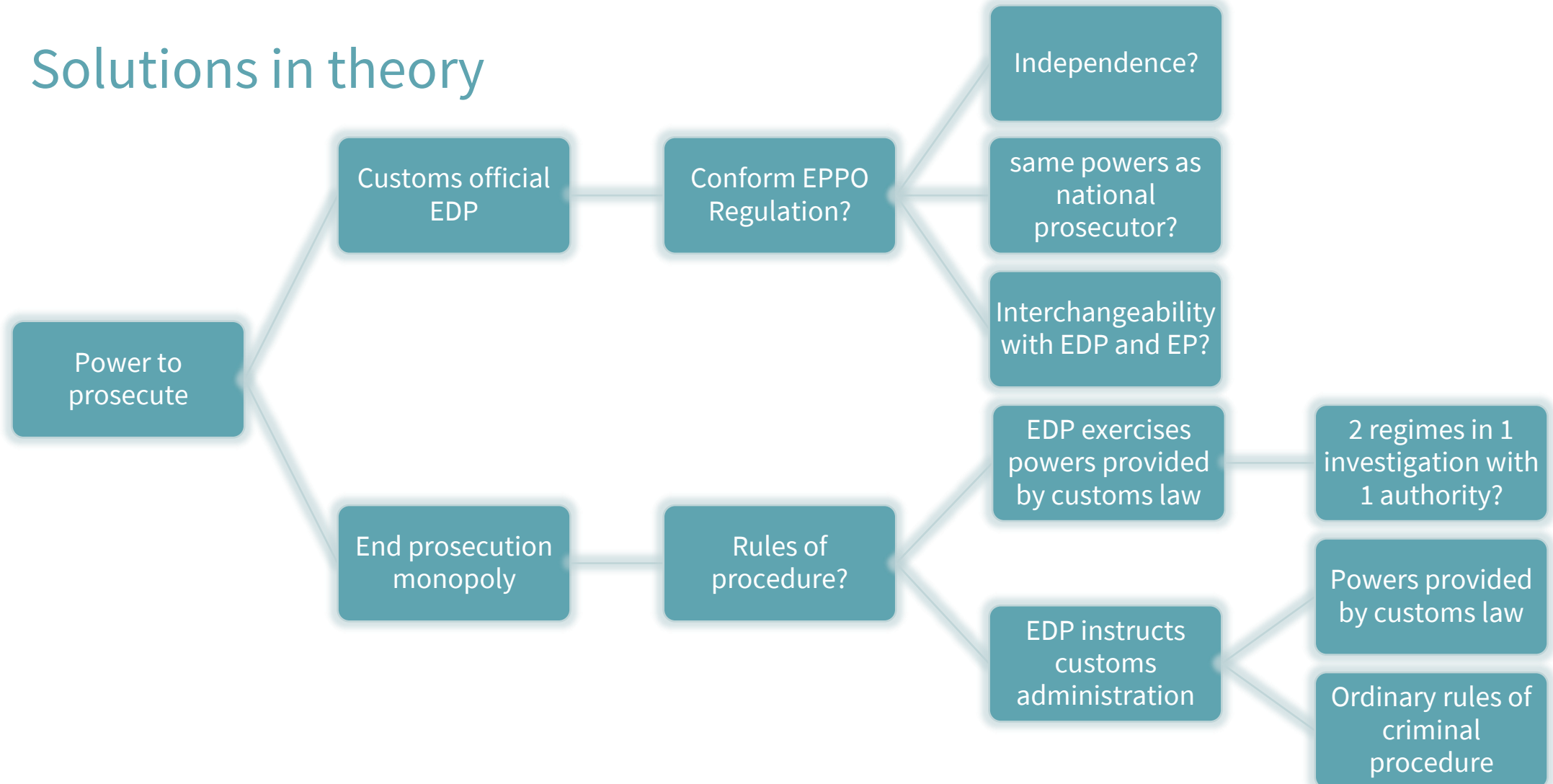
- Giving instructions to the customs administration (investigative or other measures)
- Deciding on out-of-court settlements
- Acting as the prosecuting authority before the criminal courts

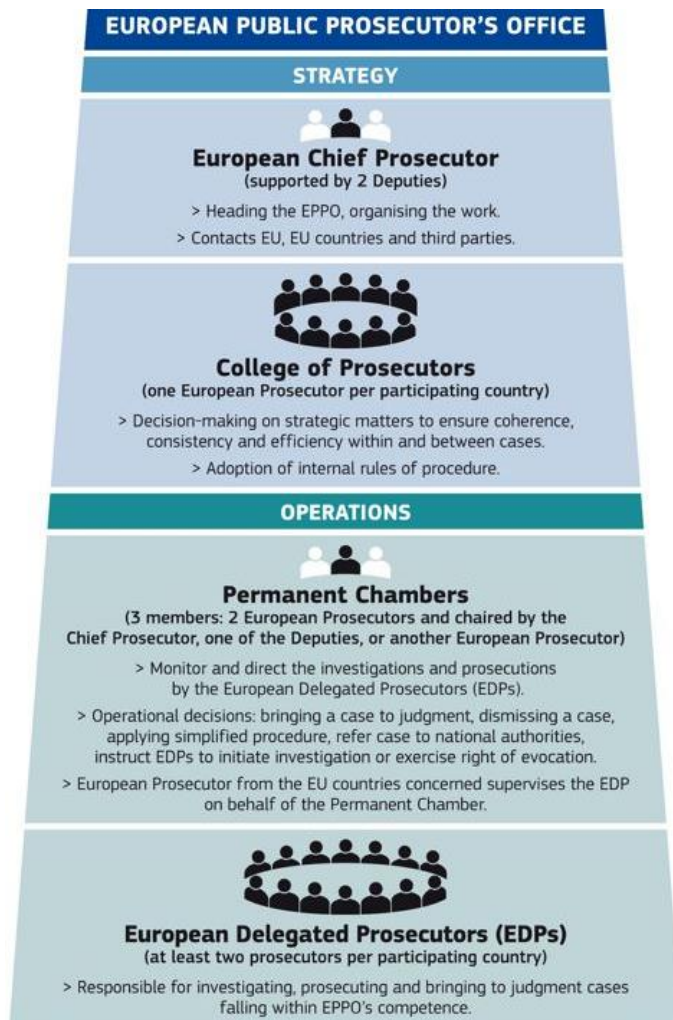
→ customs administration had to lose some autonomy and powers

4. How to fit EPPO in Belgian customs procedure? (2)



1) Solutions in theory





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4. How to fit EPPO in Belgian customs procedure?



2) The Belgian solution

- EPPO Act of 17 February 2021 = minimal intervention
- Customs maintains investigative *and* prosecutorial powers
- BUT will exercise them under the authority of the EPPO
 - Via a 'designated customs official'
 - Acts independently from his/her administration
 - Continues to exercise powers of investigation and prosecution
 - EPPO will have final say, but can only act via this customs official

4. How to fit EPPO in Belgian customs procedure? (3)



2) The Belgian solution

- Further specifications?
 - Obligation to inform EDP about investigative or other measure
 - Prohibition to propose out-of-court settlement when EPPO exercises its competence (or during 5-day period)
 - End of investigation: draft report for EDP with proposal: prosecution, dismissal...
 - EDP will then draft proposal for Permanent Chamber
 - Customs official has to execute decision of Permanent Chamber

5. Evaluation of the Belgian solution (1)



Who will *de facto* be in charge?



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- EPPO Act of 2021: designated official will
 - Conduct investigation → obligation to inform EDP who can oppose/suspend measures)
 - Initiate criminal proceedings before the court → following EPPO's instructions
- EPPO can intervene strongly, but
 - Pre-existing autonomy of customs administration
 - Prosecutors not familiar with customs legal framework

5. Evaluation of the Belgian solution (2)



- Conform EPPO Regulation?

- EPPO acts via designated customs official

- Investigative and other measures: allowed under art. 28.1 EPPO Regulation

- Bringing case to court and trial phase?

- EDP should have full competence

- EPPO Regulation directly applicable in its entirety

- Belgian law can be set aside

- Better to amend: advisory role for customs official?

5. Evaluation of the Belgian solution (3)



- Conform EPPO Regulation?

- Clash of enforcement strategies?

- EPPO Reg did not alter financial responsibility of Belgium to recover customs duties

- Will focus on the goods change to focus on the persons and underlying criminal activities?

- Derogatory procedural rules + fewer procedural safeguards than in other EPPO investigations?

- Risk of cherry-picking

- Implementation of EPPO was not used as an opportunity to reform customs criminal procedure



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Thank
you for
your
attention!



Ana Laura Claes

