

The double hat of the Belgium customs authorities and their relation to the EPPO

*Conference Illicit Trade in Tobacco
Products: In Search of Optimal
Enforcement*

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Outline

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Introduction

▶ Where two roads cross...

- ▶ ITTP project
- ▶ EPP0 project

General presentation of the EPPO (1)

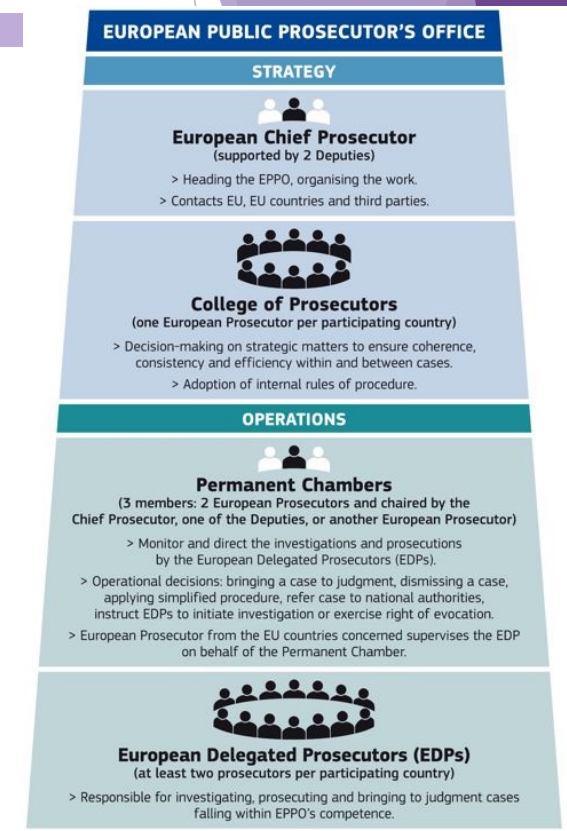
▶ European Public Prosecutor's Office (EPPO)

- ▶ EU body
- ▶ Set up by Regulation (EU) 2017/1939
- ▶ On the basis of **enhanced cooperation**
 - ▶ 22 participating Member States (soon 23?)
 - ▶ Relation with 5 non-participating Member States and third States
 - ▶ Cooperation with other EU institutions, bodies, offices and agencies
 - ▶ Eurojust
 - ▶ OLAF
- ▶ **Mandate**
 - ▶ Fraud against the financial interests of the EU
 - ▶ Scope of material competence: reference to 'PIF' Directive (EU) 2017/1371, includes **customs offences**
 - ▶ Criminal investigations and prosecutions = NEW
 - ▶ >< Eurojust



General presentation of the EPPO (2)

- ▶ **European Public Prosecutor's Office (cont'd)**
 - ▶ **Independent and impartial**
 - ▶ **Hybrid structure**
 - ▶ (>< more 'federal' approach of the Commission)
 - ▶ Central office
 - ▶ Decentralised level: **EDPs**
 - ▶ Implications on legal framework
 - ▶ Regulation but many references to national law
 - ▶ Criminal procedure
 - ▶ Data protection
 - ▶ No (or hardly any) approximation of criminal procedure
 - ▶ Delimitation of the scope of application EU/national law
 - ▶ Article 5(3) EPPO Regulation
 - ▶ But grey zones
 - ▶ Implications on functioning of the EPPO
 - ▶ Cooperation with national authorities (e.g. police, prosecutors, judges, customs)



General presentation of the EPPO (3)

▶ European Public Prosecutor's Office (cont'd)

▶ Prosecutor-led investigation

- ▶ >< some MSs with an investigating judge (i.e. judge leading the investigation): BE, LU, FR, ES, GR
- ▶ And in some MSs, like BE and LU, the customs authorities have (criminal) prosecution powers
- ▶ But Recital 15 EPPO Regulation:
 - ▶ *'This Regulation is without prejudice to Member States' national systems concerning the way in which criminal investigations are organised.'*

The double hat of the Belgian customs authorities ('GACE')

- ▶ The GACE has both
 - ▶ Administrative *and* criminal powers
 - ▶ Investigating *and* prosecution powers
- ▶ No clear-cut distinction between administrative and criminal proceedings
 - ▶ >< other sectors (VAT, health and safety)
 - ▶ Nearly any investigation can result in criminal prosecution
 - ▶ Far-reaching investigating powers applicable in both
 - ▶ 'Administrative' settlement (despite criminal prosecution)
 - ▶ *Quid* procedural rights applicable in criminal matters?



The incorporation of the EPPO in the Belgian legal order (1)

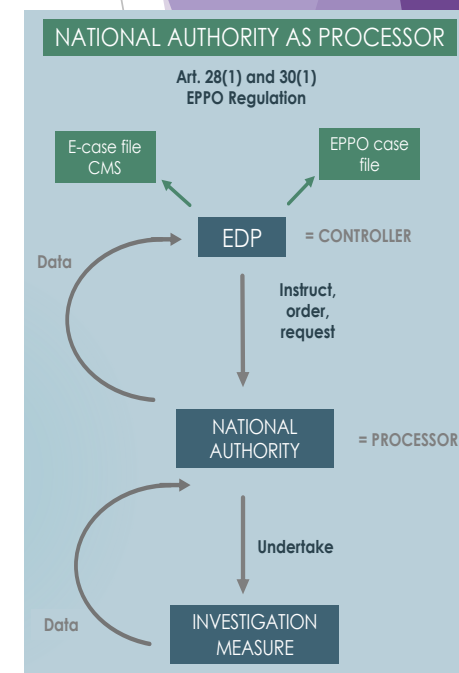
- ▶ EPPO Act (17 February 2021)
 - ▶ 2 EDPs (NL and FR) - full-time
 - ▶ **Specialised investigating judges**
 - ▶ Can still deal with other cases
 - ▶ But priority to EPPO cases
 - ▶ **Designated GACE official**
 - ▶ Independent from the GACE, while still belonging to it (!?)
 - ▶ Under the authority of the EDPs
 - ▶ Conducts the investigation according to the GLCE (not the CCP!)
 - ▶ Exercises the GACE monopoly to prosecute
 - ▶ Nothing changed here! (despite experts advising otherwise)
 - ▶ Why?
 - ▶ Internal coherence (customs & excises, EPPO and non-EPPO cases)
 - ▶ + strong lobbying of the GACE (even if they had favoured yet another approach, completely incompatible with the EPPO Regulation as pointed out by experts)

The incorporation of the EPPO in the Belgian legal order (2)

▶ EPPO Act (cont'd)

▶ Course of the investigation

- ▶ Independent from the GACE, while still belonging to it (!)
- ▶ Under the authority of the EDPs
- ▶ The designated GACE official conducts the investigation
 - ▶ Investigation measures:
 - ▶ At the initiative of the designated GACE official
 - ▶ But duty to inform without undue delay the handling EDP
 - ▶ The handling EDP can oppose/suspend/order another investigation measure
 - ▶ Conformity with the EPPO Regulation?



The incorporation of the EPPO in the Belgian legal order (3)

▶ EPPO Act (cont'd)

▶ Closing the investigation

▶ The designated GACE official will

- ▶ draft a report and make a proposal to the EDP on how to proceed (initiate criminal proceedings or dismiss the case)

▶ But EPPO decides

- ▶ EDP > supervising EP > Permanent Chamber > EDP/EP (Art. 35 EPPO Regulation)

▶ Settlement:

- ▶ In EPPO cases not Art. 263-264 GLCE, but Art. 216bis CCP (broad! but criminal)
- ▶ = EPPO decision (Art. 40 EPPO Regulation)

The incorporation of the EPPO in the Belgian legal order (4)

▶ EPPO Act (cont'd)

▶ Prosecution

- ▶ Only the designated GACE official can formally initiate the prosecution, even if based on the EPPO's decision (Art. 36 EPPO Regulation)
 - ▶ Again, nothing has changed!
 - ▶ In conformity with the EPPO Regulation??
- ▶ At trial
 - ▶ GACE + EDP
 - ▶ GACE will request all criminal penalties, except the imprisonment + bring civil claim
 - ▶ EDP will only request a prison sentence
- ▶ Legal remedies: same division of powers

Conclusions: Future of ITTP investigations in(volving) Belgium? (1)

- ▶ What will be the **concrete role** of the EPPO in ITTP investigations with a customs component?
 - ▶ Current practice or new approach?
 - ▶ Minimal involvement or close follow-up?
 - ▶ Only 2 EDPS (and 1 EP), they cannot specialise in everything!
 - ▶ In conformity with the EPPO Regulation?
 - ▶ Formal or factual approach?
 - ▶ Which **enforcement logic** will prevail?
- ▶ *Quid* 'mixed' EPPO cases?
 - ▶ Customs and non-customs
 - ▶ Tensions due to divergence in applicable rules and safeguards
 - ▶ Risk of 'cherry picking' by the EPPO



Conclusions: Future of ITTP investigations in(volving) Belgium? (2)

- ▶ **Cross-border EPPO investigations**
 - ▶ Additional complexity if BE is involved -> Permanent Chamber to be aware of
 - ▶ Cooperation with non-participating MSs or third countries: international cooperation instruments
 - ▶ GACE prefers administrative cooperation tools, even if it can also resort to certain judicial cooperation instruments (due to its double hat), e.g. EIO -> sometimes causes friction with other MSs
 - ▶ But the EPPO is a judicial body!
 - ▶ Future practice?
- ▶ BE customs approach **sustainable** in the long run?
 - ▶ BE reform planned (2023?), but still in the pipeline...

Additional literature

- ▶ FRANSSEN, V. and CLAES, A.L., “Enforcement of policies against illicit trade in tobacco products in Belgium”, in TOSZA, S. and VERVAELE, J.A.E. (eds.), *Illicit Trade in Tobacco Products. In Search of Optimal Enforcement*, Springer, 2022, 117-224.
- ▶ CLAES, A.L. and FRANSSEN, V., “When EPPO meets customs: A clash of enforcement strategies and procedural safeguards”, EULEN Working Paper Series No. 9-22, May 2022, <https://jmn-eulen.nl/wp-content/uploads/sites/575/2022/05/WP-Series-No.-09-22-When-EPPO-meets-customs-A-clash-of-enforcement-strategies-and-procedural-safeguards-Claes-Franssen.pdf> .
- ▶ A.L. CLAES and M. HORSEELE, « Protection of Procedural Rights in Administrative and Criminal Proceedings: The Case of the Privilege Against Self-incrimination in Belgium Customs Law », in V. Franssen and C. Harding (eds), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future*, Oxford, Hart Publishing, 2022, 301-340.
- ▶ FRANSSEN, V., WERDING, A., CLAES, A.L. and VERBRUGGEN, F., “La mise en oeuvre du Parquet européen en Belgique: Quelques enjeux et propositions de solution”, in CHEVALLIER-GOVERS, C. and WEYEMBERGH, A. (eds.), *La création du Parquet européen: simple évolution ou révolution au sein de l’espace judiciaire européen?*, Brussels, Larcier, 2021, 135-173.
- ▶ FRANSSEN, V., VERBRUGGEN, F., CLAES, A.-L. and WERDING, A., *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 Minister of Justice, June 2019, 231p.

Thank you!

Questions?

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