



EPPO – A change in the Belgian settlement practice?

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The European Public Prosecutor's Office has been operating for one year now. Its track record is impressive: it has initiated almost 1000 investigations, and has already secured its first convictions. It is however still unclear which practice will be adopted with regard to criminal settlements in EPPO investigations. There are reasons to believe that less settlements will be concluded in such investigations, which may come at a cost, as this article explores.

A recap on the EPPO

As described in our **previous article**, the European Public Prosecutor's Office (the **EPPO**) has been operating for one year now. In this period, the EPPO has initiated almost 1000 investigations across the EU, and has already secured its first convictions¹. However, one of the remaining questions relates to the practice that the EPPO will adopt with regard to criminal settlements and other alternatives to criminal proceedings, which are referred to as **Simplified Prosecution Procedures** in the EPPO framework.

Based on the EPPO's first annual report, which covers its activities in the period between 1 June 2021 and 31 December 2021, only three EPPO investigations have been closed so far by applying a Simplified Prosecution Procedure (one in Italy and two in Slovakia)².

¹ EPPO, "1 year of EPPO operations: larger and faster EU fraud investigations", 1 June 2022

² EPPO, "2021 Annual Report", 24 March 2022.

Simplified Prosecution Procedures and the EPPO framework

Settlements, plea bargains, and other Simplified Prosecution Procedures are crucial and necessary tools that offer flexibility and promote efficiency in tackling criminal activity. Whilst some argue that these mechanisms may lead to the unequal application of criminal justice, empirical data supporting this argument is sparse in Belgium.

This tension between flexibility and efficiency, on the one hand, and equality and fairness, on the other, is also reflected in the text of EU Regulation 2017/1939 (the **EPPO Regulation**), which is the legal basis for the establishment of the EPPO. Article 40 of the EPPO Regulation, read together with the recitals of the EPPO Regulation³, sets out the ground rules for the Simplified Prosecution Procedures. In addition, the College of Prosecutors (consisting of the European Chief Prosecutor and all European Prosecutors) has issued additional guidelines on this topic, which should further guide the EPPO's practice in this respect.

Whilst Simplified Prosecution Procedures are in principle possible in EPPO investigations, certain limitations apply, including the following:

- First and foremost, the Simplified Prosecution Procedures may only be applied if they exist under the applicable national law, which is the law of the Member State of the European Delegated Prosecutor (**EDP**) handling the case, and under the conditions set by that national law.
- Second, only procedures that lead to the final disposal of the case, on the basis of an agreement with the suspect, are understood to be Simplified Prosecution Procedures under the EPPO Regulation. Other types of arrangements between the authorities and the suspect are therefore excluded.

The application of Simplified Prosecution Procedures in EPPO investigations

As set out in our **previous article**, EPPO investigations are in practice conducted by the EDPs, who undertake the necessary investigative measures either on their own or by instructing the competent national authorities to do so. The EDP handling the case is therefore also the person who may propose to apply a Simplified Prosecution Procedure. Nevertheless, the ultimate decision in this respect rests with the competent Permanent Chamber.

On the EDP's proposal to apply a Simplified Prosecution Procedure, the Permanent Chambers should check whether the relevant legal requirements are fulfilled and, if that is the case, whether the Simplified Prosecution Procedure should be applied in the case at hand. In taking its decision to use a Simplified Prosecution Procedure, the Permanent Chambers will take into account:

- the seriousness of the offence, which includes the amount of the financial damage caused by the offence⁴;
- the willingness of the suspect to compensate the damage caused by the illegal conduct; and
- whether the use of the Simplified Prosecution Procedure would be in accordance with the general objectives and basic principles of the EPPO.

³ In particular, Recital 82 of the EPPO Regulation states the following: "*National legal systems provide for various types of simplified prosecution procedures, which may or may not include involvement of a court, for example in the form of transactions with the suspect or accused person. If such procedures exist, the European Delegated Prosecutor should have the power to apply them under the conditions provided for in national law and in the situations provided for by this Regulation. Those situations should include cases where the final damage of the offence, after possible recovery of an amount corresponding to such damage, is not significant. Considering the interest of a coherent and effective prosecution policy of the EPPO, the competent Permanent Chamber should always be called upon to give its consent to the use of such procedures. When the simplified procedure has been successfully applied, the case should be finally disposed of.*"

⁴ Recital 82 of the EPPO Regulation indicates that Simplified Prosecution Procedures are permitted "*where the final damage of the offence, after possible recovery of an amount corresponding to such damage, is not significant.*"

The College of Prosecutors adopted specific guidelines on 2 December 2020 that further clarify these three criteria. First of all, these guidelines reassert the principle of legality, in accordance with which a Simplified Prosecution Procedure may only be applied in conformity with applicable national law. Furthermore, the guidelines emphasise that the Simplified Prosecution Procedures should be applied in line with the principles of proportionality⁵ and opportunity⁶. In this respect, the guidelines notably confirm that "*the seriousness of the offence*" is not "*an ab initio impediment*" for the application of the Simplified Prosecution Procedures. As such, it appears that the Permanent Chambers will still be able to opt for the Simplified Prosecution Procedures, even if significant damage has been caused. In deciding whether to apply the Simplified Prosecution Procedures, all these constraints will have to be taken into account.

Impact on the Belgian settlement practice

Importance of the Simplified Prosecution Procedures in Belgium

In practice, criminal settlements⁷ are one of the most used and most efficient alternatives to criminal litigation in Belgium.

Over the years, the number of criminal cases in which a settlement has been reached with the public prosecutor's office has risen sharply⁸. Based on the settlement amounts paid under some of the largest settlements to date, it is apparent that they have contributed significantly to the Belgian state finances. Finally, it is also clear that it would be very difficult and burdensome to pursue all of these criminal cases in Belgium through the courts⁹. As such, the use of settlements appears to be key in avoiding overburdening the authorities, especially in large and complex investigations.

Other alternatives to criminal litigation available in Belgium include the guilty plea¹⁰, criminal mediation¹¹, and the regime applicable to persons who cooperate with public prosecutors¹². These alternatives are, for now at least, used significantly less by the Belgian Public Prosecutor's Office¹³. In addition, as only procedures that lead to the final disposal of the case are understood to qualify as Simplified Prosecution Procedures under the EPPO Regulation, it remains to be seen which of these other options the Belgian EDPs will propose in EPPO investigations.

Impact on the Belgian settlement practice

The Belgian Public Prosecutor's Office has the discretionary right to propose a settlement. However, pursuant to article 216*bis* of the Belgian Code of Criminal procedure, settlements are only possible if the following requirements are met:

- **Gravity of the offence:** only if the Belgian Public Prosecutor's Office considers that the maximum punishment that should be applied (in the case at hand) for the alleged offence is two years' imprisonment;
- **Additional conditions where an investigative judge is charged with the investigation:**

⁵ As regards the principle of proportionality, the guidelines refer to the seriousness of the offence, which is based in particular on "*the damage caused or likely to be caused to the interests, goods or values legally protected by the incriminating provisions, and the suitability of those procedures to restore the damage and prevent the commission of new criminal offences*".

⁶ For the principle of opportunity, the guidelines refer to, among other things, the "*public interest*", which "*is served by resolving the case and / or recovering damages in a swift and timely manner*", as well as to the "*effective protection of the financial interests of the European Union*".

⁷ Pursuant to article 216*bis* of the Belgian Code of Criminal Procedure.

⁸ Belgian Public Prosecutor's Office, *Het College van het Openbaar Ministerie stelt de jaarstatistiek 2020 van de correctionele parketten voor*, 1 April 2021; J. ROZIE and S. DEWULF, "Grenzen aan de buitengerechtelijke strafrechtelijke afhandeling van geschillen. Op zoek naar een evenwicht tussen een doeltreffende en rechtvaardige justitie" in A. VAN OEVELEN, J. ROZIE, S. RUTTEN, *Grenzen aan de buitengerechtelijke strafrechtelijke afhandeling van geschillen*, Antwerpen, Intersentia, 2019, p. 81.

⁹ J. ROZIE and S. DEWULF, *op. cit.*, p. 84.

¹⁰ Article 216 of the Belgian Code of Criminal Procedure.

¹¹ Article 216*ter* of the Belgian Code of Criminal Procedure.

¹² Articles 216/1-216/8 of the Belgian Code of Criminal Procedure.

¹³ J. ROZIE and S. DEWULF, *op. cit.*, pp. 97, 100 and 101.

- The Belgian Public Prosecutor's Office may only propose a settlement if the suspect indicates a willingness to compensate the victim for the damage caused to that victim;
- A judge must validate the proposed criminal settlement before it is entered into, applying a proportionality test;
- **Compensation for damage caused to victims:** the damage caused to a victim must in principle be fully compensated, before the criminal case can be settled.

As such, the extent of the damage caused is not a determining factor that limits the possibility to enter into a settlement under Belgian law. However, as noted above, in EPPO investigations, the (extent) of the damage caused by the offence relates to the seriousness of the offence, which is a criterion that is considered when deciding to pursue a Simplified Prosecution Procedure. It remains to be seen whether the Permanent Chambers will adopt a strict approach in assessing the "*seriousness*" criterion in practice, and whether it will avoid settling cases where the damage caused is significant. Statements made in the press by the European Prosecutor appointed by Belgium already indicate that this may be the case¹⁴. As such, it is probable that less cases will be settled in EPPO investigations.

Specific case study: customs investigations

The impact of the EPPO Regulation will be even greater on customs investigations.

In customs investigations, the initiative to propose a settlement must be taken by the Belgian customs authorities, and not by the Public Prosecutor's Office¹⁵. The Belgian General Act of 18 July 1977 on customs and excises (the **General Customs Act**) sets out the conditions that must be met to conclude settlements in customs investigations. However, the customs authorities have a broad discretion in assessing these conditions, and practice has shown that they are quite lenient in assessing these conditions¹⁶, so settlements are in practice proposed to the majority of suspects in customs investigations¹⁷.

The General Customs Act was amended in order to implement the EPPO Regulation. A new provision was introduced, declaring that settlements will no longer be permitted in cases where the EPPO is competent, or during the period in which the EPPO may make use of its right of evocation¹⁸.

As such, a suspect who is targeted by a '*common*' customs investigation will still have the option of reaching a settlement with the customs authorities, who are reportedly in favour of this as an alternative to criminal litigation. However, if the EPPO makes use of its evocation right or conducts the customs investigation from the outset, the suspect will not have this option. This poses a number of questions, not only in relation to the efficiency and practicability of prosecuting all customs-related criminal offences before the Belgian criminal courts, but also in relation to the justification of this difference in treatment between suspects in these two situations.

Conclusion: less settlements and more criminal litigation, at a cost?

So far, only three EPPO investigations have been closed by applying a Simplified Prosecution Procedure¹⁹. As such, it remains to be seen how the EPPO's practice will evolve in this respect, and whether more use will be made of this important alternative to criminal litigation once the investigations reach the next stage.

In addition, it will be interesting to see whether a different practice will be adopted in different member states (until now, Simplified Prosecution Procedures have only been applied in Italy and Slovakia). If certain member

¹⁴ De Tijd, *Europees parket gaat onze havens strenger controleren*, 1 June 2021.

¹⁵ J. ROZIE and S. DEWULF, *op. cit.*, p. 81; E. VAN DOOREN, "Douanerechtelijk transigeren" in F. DERUYCK, M. DE SWAEF, J. ROZIE, M. ROZIE, P. TRAEEST EN R. VERSTRAETEN (eds.), *De wet voorbij. Liber Amicorum Luc Huybrechts*, Antwerpen, Intersentia, 2010, p. 498.

¹⁶ E. VAN DOOREN, *op. cit.*, p. 503.

¹⁷ E. VAN DOOREN, *op. cit.*, p. 496.

¹⁸ Article 285/4 of the General Customs Act.

¹⁹ EPPO, "2021 Annual Report", 24 March 2022.

states have more favourable regimes allowing for Simplified Prosecution Procedures, it is not excluded that these will be favoured by the EPPO once its caseload increases.

Specifically for Belgium, if the statements made by the Belgian European Prosecutor in the press reflect the approach that will be followed by the Permanent Chambers, it is likely that less settlements will be concluded in EPPO investigations, most notably in cases where significant damage has been caused. In addition, suspects who are targeted by customs investigations conducted by the EPPO will no longer be able to enter into settlements with the customs authorities.

Taken together with the expected increase in investigations resulting from the establishment of the EPPO and the impact thereof on the capacity of the Belgian authorities in terms of resources, it remains to be seen whether these authorities will be overwhelmed if only a limited number of EPPO cases are settled. Unfortunately, it is well known that criminal investigations in Belgium are (too) long, especially in large and complex matters. Belgium has already breached the reasonable-time requirement several times²⁰, and due attention will need to be paid in this respect, also in EPPO investigations.

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²⁰ See for example European Court of Human Rights (**ECtHR**) 14 September 2021, *Brus/Belgique*, 18779/15; ECtHR 2 July 2019, *Abboud/Belgique*, 29119/13; ECtHR 28 October 2014, *Panju/Belgique*, 18393/09; ECtHR 25 September 2007, *De Clerck/Belgique*, 34316/02; ECtHR 24 April 2008, *Heremans c. Belgique*, 28171/04; ECtHR 15 July 2002, *Stratégies et communications en Dumoulin/Belgique*, 37370/97.

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