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EPPO, Conflicts and the €100,000 Financial Threshold: *A Means to Circumvent Investigation?*

ARTICLE

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ABSTRACT

The European Public Prosecutor's Office (EPPO) is an independent public prosecution office of the EU responsible for PIF Offences. The EPPO has primacy over PIF Offences: if a criminal case is within its competence it has the power to handle the case over other authorities. The EPPO Regulation requires the EPPO to initiate investigations within its competence if no other authority is conducting a criminal investigation. This prevents impunity for suspects of PIF Offences, and prevents *in concreto* negative conflicts of competence. However, there is uncertainty whether a financial threshold of €100,000 may be applicable to initiation situations. This threshold, while applicable in special cases, is not a competence criterion, and there are safeguards to prevent *in concreto* negative conflicts from occurring or persisting when it is used outside of initiation situations. While this financial threshold is a useful tool for the EPPO in certain circumstances, it is inapplicable to initiation situations due to the EPPO Regulation's prevention of *in concreto* negative conflicts of competence.

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1. INTRODUCTION

The European Public Prosecutor's Office (EPPO) is an independent public prosecution office of the EU responsible for the investigation, prosecution and bringing to judgement of crimes against the financial interest of the EU (PIF Offences).[1] The EPPO has the right of primacy when it comes to handling PIF Offences, meaning that if the EPPO handles the case all other authorities are barred from acting.[2] This set up has the benefit of preventing potential *ne bis in idem* violations from arising after an investigation. Additionally, the EPPO has an obligation to initiate investigation if a law enforcement authority has not done so and the EPPO has competence.[3]

The EPPO requires competence in order to act: these competence criteria are found under Articles 22, 23 and 25 of the EPPO Regulation. Article 22 is EPPO's 'material competence'. The EPPO is only competent to handle criminal activity that involves PIF Offences.[4] Article 23 is EPPO's 'territorial and personal competence'. This limits EPPO to only handling cases that either take place on the territory of a member state (MS) or in exterritorial situations when the person is either an EU citizen or EU personnel and a MS has established jurisdiction over that person.[5] Article 23 is EPPO's 'exercise of the competence'. The basic element here is that the facts of the case are serious enough for the EPPO involvement.[6] If these competence criteria are fulfilled the EPPO has competence.

The EPPO has different obligations depending on whether competence criteria are fulfilled and the state of the investigation. If there is no criminal investigation and competence criteria are fulfilled, the EPPO has an obligation to initiate an investigation.[7] If there is a national criminal investigation and the competence criteria are fulfilled, the EPPO has the option whether to take over the investigation.[8] If the EPPO is investigating and it is determined that the EPPO does not have competence, then the EPPO must refer the case back to the national authorities.[9] Whether or not the EPPO has competence determines whether the EPPO is able to take over or must hand back investigations.

The EPPO Regulation provides a financial threshold of €100,000 that allows the EPPO to deviate from the standard procedure provided. It delegates final decision-making authority to the European Delegated Prosecutor (EDP) if certain other conditions are met under evocation.[10] It allows the EPPO to refer cases to national authorities in the interest of efficiency if national

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1 Council EPPO Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [2017] OJ L283/1 (EPPO Regulation), Art 4; Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29 (PIF Directive), Arts 3–4; M Zwiers, *The European Public Prosecutor's Office: Analysis of a Multilevel Criminal justice System* (Intersentia, 2011); LH Erkelens et al. (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?* (Springer, 2015); W Geelhoed et al. (eds.), *Shifting Perspectives on the European Public Prosecutor's Office* (Springer, 2018); L Winter (ed.), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer, 2018); W Geelhoed, 'Categorising the Offence of Fraud against the Financial Interests of the European Union: A Law and Cognition Perspective' in J Ouwerkerk et al. (eds.) *The Future of the EU Criminal Justice Policy and Practice: Legal and Criminological Perspective* (Brill, 2019), 143–160; K Ligeti et al. (eds.), *The European Public Prosecutor's Office at Launch: Adapting National Systems, Transforming EU Criminal Law* (Wolters Kluwer, 2020); HH Herrnfeld at al. (eds.), *European Public Prosecutor's Office: Article-by-Article Commentary* (Hart Publishing, 2021); V Mitsilegas & F Giuffrida, 'Bodies, Offices and Agencies' in V Mitsilegas (ed.), *EU Criminal Law* (Hart Publishing, 2022), 435–465; L Neumann 'The EPPO's Material Competence and the Misconception of "inextricably linked offences"' (2022) 12 *European Criminal Law Review*, no. 3, DOI: 10.5771/2193-5505-2022-3-235, 235–263; A Zuidema, 'To which prosecution service? Analyzing the way the Union Resolves Conflicts of Criminal Jurisdiction' (2023) 14 *New Journal of European Criminal Law*, no. 3, DOI: 10.1177/20322844231191373, 374–396.

2 This applies to EU authorities and Member State authorities as long as that Member State is participating within the EPPO, EPPO Regulation (n 1), Arts 25 & 101.

3 ibid, Art 26.

4 Also interrelated offences: participating in a criminal organization or inextricably linked offences; with some restrictions, ibid, Art 22(2)–(4).

5 In cases on territory of the MS, this is either in whole or in part; EU personnel are restricted to those covered by either the Staff Regulations or Conditions of Employment; ibid, Art 23.

6 This is reflected by the facts that the damage must be at least €10,000, the PIF Offence should be the preponderant offence, (in some cases) the damage to the EU should be greater than to other victims, or that the MS wishes the EPPO to act; ibid, Art 25(2)–(4).

7 This means that the EPPO has to follow the legality principle, ibid, Art 26(1); HH Herrnfeld, 'Art 26' in Herrnfeld et al. (eds.) (n 1), 218–219.

8 EPPO Regulation (n 1), Art 27.

9 ibid, Art 34(1)–(2).

10 ibid, Art 27 (8); EPPO, 'Adopting Operational Guidelines on Investigations, Evocation Policy and Referral of Cases' (2021) College Decision 029/2021 (EPPO Operational Guidelines).

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authorities are willing to handle the case.[11] Unlike financial thresholds provided for under the competence criteria, the €100,000 financial threshold does not affect the EPPO's competence or its obligation to initiate an investigation. Under the EPPO Regulation, only evocation and referrals contain provisions that allow the use of the €100,000 financial threshold.

In the EPPO Article-by-Article Commentary, the authors presented the following:

> [I]n accordance with Article 34(3), the EPPO may refrain from exercising competence and to refer the case to the competent national authorities. While Article 34(3) in principle applies only where the EPPO previously had decided to initiate an investigation, it could be considered to specify in general guidelines to be issued by the College in accordance with this provision, that the EPPO may resort to that possibility already in the course of the verification process (Article 24(6)) and thus before it has decided to initiate an investigation.[12]

This raises a question of whether the €100,000 financial threshold could also apply to initiation situations. The claim is not to change the EPPO's competence, but to simplify the procedure of initiating a case only to refer it back to the MSs. Instead, according to the claim, the EPPO should have the ability to refuse to initiate a case even if the competence criteria are fulfilled. However, the issue is that the EPPO Regulation implies that if the EPPO has competence it *must* initiate an investigation if no national authority is conducting a criminal investigation.[13]

The EPPO obligation to initiate an investigation resolves *in concreto* negative conflict of competence.[14] This type of conflict exists whenever there is a situation where no authority is conducting an investigation/prosecution, despite having the legal ability to do so. Whenever an authority does not investigate criminal activity, this can result in a person(s) having factual impunity from their criminal activity. The EPPO's obligation to initiate prevents *in concreto* negative conflicts from persisting.

This leads to the following research question: is the EPPO allowed to use the financial threshold of €100,000 to circumvent its obligation to initiate an investigation? In order to determine whether this is permissible, the nature of the financial threshold and initiation must be determined. The nature of the threshold will be determined by examining how it is used under evocation and referrals. As part of this determination, I will examine whether its use creates *in concreto* negative conflicts.[15] Afterwards, I will examine initiation and the way it prevents *in concreto* negative conflicts. Thereafter, it can be determined whether the use of the financial threshold is applicable to initiation.

2. EVOCATION

2.1 EVOCATION AND CONFLICTS

Evocation is the process by which a national criminal investigation is transferred to the EPPO. This process requires national authorities, which are conducting a criminal investigation, to report the case to the EPPO, which determines whether the case is transferred to it.[16] Only those authorities that can conduct criminal investigations are covered by the obligation to

11 EPPO Regulation (n 1), Art 34(3)–(5); EPPO Operational Guidelines (n 10).

12 Herrnfeld, 'Art 26' (n 7), 219 [mn 10, end of para].

13 EPPO Regulation (n 1), Art 26(1)–(3).

14 While conflicts of jurisdiction are primarily used in the context of different MS (or third States) jurisdictions, it can also be applied to the EPPO, along with the various forms of conflicts. However, in these situations they are termed 'conflict of competence' as the EPPO relies on 'competence' to act whereas MS use 'jurisdiction'. Despite the name difference, in this context they are interchangeable; Zuidema (n 1), 375; L Winter 'EPPO Versus National Prosecution Office: A Conflicting Case of Competence with Broader Dimensions' in M Luchtman (ed.), *Of swords and shields: due process and crime control in times of globalization* (Eleven Publishing, 2023), 516. See also on conflicts in general, P Caeiro, 'Jurisdiction in Criminal Matters in the EU: Negative and Positive Conflicts, and Beyond' (2010) 93 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, no. 4, DOI: 10.5771/2193–7869-2010-4-366, 366; F Zimmermann, 'Conflicts of Criminal Jurisdiction' (2015) 3 *Bergen Journal of Criminal Law and Criminal Justice*, no. 1, DOI: 10.15845/bjclcj.v3i1.832 2; J Birk & A Curcio 'Conflicts of Jurisdiction', *Eurojust News*, January 2016, 2; V Mitsilegas & F Giuffrida, 'Ne Bis in Idem and Conflicts of Jurisdiction' in in V Mitsilegas (ed.), *EU Criminal Law* (Hart Publishing, 2022), 171–172.

15 The EPPO Regulation has various effects on the various forms of conflicts of jurisdiction/competence (such as *in concreto* and *in abstracto* positive conflicts); however, this article will only focus on *in concreto* negative conflicts; for the other forms and its effects see Zuidema (n 1).

16 EPPO Regulation (n 1), Arts 24(2) and 27.

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report under evocation.[17] Authorities are required to report any case where they believe that the EPPO would have material competence.[18]

Whenever a case is reported to the EPPO, it is assigned to an EDP to verify the information and determine whether to evoke the case from the national authority.[19] The EDP verifies that there are reasonable grounds that the EPPO's competence is fulfilled.[20] If the competence requirements are fulfilled, the EDP has the option to evoke the case. The provision on evocation does not demand that an EDP evoke if EPPO competence is fulfilled. However, the College of the EPPO is empowered to establish guidelines that could require an EDP to evoke certain types of cases.[21]

In order to facilitate whether evocation should occur, the College of the EPPO has laid down Operational Guidelines on when an EDP should evoke cases: hereafter 'General Evocation Guidelines'.[22] EPPO's General Evocation Guidelines provide that the EDP 'shall exercise [EPPO] competence by evoking an investigation when the criteria laid down in 3.2 [competence] and at least one of the following additional criteria are met'.[23] The 'following additional criteria' given by the College are summarised as: when a case has repercussions or affects the reputation of the EU, involves public officials, or has a cross-border dimension; when there are doubts about the ability of a MS to handle the situation; or if the MS's national authority requests the EPPO to take over (see Annex 1 in this paper for the full list).[24] Whenever one of those additional criteria are present, along with the EPPO's competence being fulfilled, an EDP should evoke the case on behalf of the EPPO.

Whenever an EDP evokes a case, the case is transferred to the EPPO. Thereby, a national criminal investigation becomes an EPPO criminal investigation. However, if an EDP decides not to evoke a case, this decision is reviewed by one of the EPPO's Permanent Chambers.[25] The assigned Permanent Chamber will review the decision of the EDP not to evoke a case, and will

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17 ibid, Art 24(2).

18 ibid, Art 24(2)–(3).

19 ibid, Art 27(1) and (6); EPPO, Internal Rules of Procedure of the European Public Prosecutor's Office (2020) College Decision 003/2020 (EPPO Internal Rules of Procedure), Art 39(1); HH Herrnfeld, 'Art 27' in Herrnfeld et al. (eds.) (n 1), 239–240; EPPO's Internal Rules of Procedure, under Article 39, indicate that the decision on whether to evoke is taken by the EDP as assigned to that EDP by the European Prosecutor from the MS that has reported the criminal activity, or by consensus if more than one European Prosecutor has been notified; if the European Prosecutors cannot decide on the appropriate EDP, the European Chief Prosecutor must decide for them.

20 Reasonable grounds are to be understood in the national context, therefore is it reasonable under national law that the various competence requirements are met, see EPPO Regulation (n 1), Art 26(1). While it is not stated clearly in the provision that the competence requirements must be fulfilled within the EPPO Regulation under evocation, they are understood to apply regardless, see EPPO Regulation (n 1), recital 49 and Art 24(7); EPPO Internal Rules of Procedure (n 19), Art 40(2); EPPO Operational Guidelines (n 10), secs 2(b) [p 4] and 3.3 [p 7]; Herrnfeld, 'Art 27' (n 19), 237, 239, and 245; EPPO Regulation (n 1), Arts 22, 23, 25(2)–(4), 26(1), 27(7), 39(1), and 120(2); Additionally, the EPPO is prevented from evoking when an investigation has been finalized with an indictment sent to a court, EPPO Regulation (n 1), Art 27(7).

21 EPPO Regulation (n 1), Arts 9 and 27.

22 EPPO Operational Guidelines (n 10), sec 3.3. Additionally the College of the EPPO has laid down elements which it wishes the EDP to additionally assess: maturity of the investigation, the relevance of the investigation to ensuring coherence of the EPPO's investigation and prosecution policy, the cross-border aspects of the investigation, and the existence of any specific reason that would suggest that the EPPO is better placed to continue the investigation, see EPPO Internal Rules of Procedure (n 19), Art 40(2); These elements, however, do not inform the EDP whether they must evoke, rather that they should be assessed as well, as only the Operational Guidelines provide situations where an EDP should evoke, EPPO Operational Guidelines (n 10), sec 3.3.

23 EPPO Operational Guidelines (n 10), sec 3.3.

24 ibid, sec 3.3. The Operational Guidelines have special guidelines for what the EPPO has termed 'backlog cases' compared to the general conditions. Backlog cases are the cases where the criminal activity falls within the EPPO's temporal competence (generally 20 Novemeber 2017, EPPO Regulation (n 1), Art 120(2) [first para]) but the EPPO itself had not yet started operations then (EPPO start date was 1 June 2021, EPPO Regulation (n 1), Art 120(2) [second para] in conjunction with the Commission Implementing Decision (EU) 2021/856 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks [2021] OJ L 188/100). The backlog cases limit the various reasons for when an EDP should evoke to situations (1) where there may be repercussions at the EU level, (2) where public officials are involved, (3) MS national authority requests the EPPO to take over, or (4) the remaining time limit for conducting investigations does not interfere with the regular finalisation of the investigation and (4a) it is needed either to ensure coherence of the EPPO's investigation/prosecution policy, or (4b) there is a specific reason which suggests that the EPPO is better placed to take over. Interestingly, the Operational Guidelines further state that, without prejudice to those conditions, the EPPO should not evoke a case that was initiated two years before the EPPO started operations, meaning that if one of the conditions is not met, the EDP and Permanent Chamber should leave the investigation with the MS. This is a change from the General Evocation Guidelines, which would allow the EDP and Permanent Chamber to decide whether evocation should still take place, only mandating when they should so decide. Rather here, it is that unless one of these conditions are met the EDP should not evoke, see EPPO Operational Guidelines (n 10), annex 2.

25 EPPO Regulation (n 1), Art 27(6) [second para]; EPPO Internal Rules of Procedure (n 19), Art 42(6).

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make its own assessment.[26] If the Permanent Chamber agrees with the EDP, the case is not evoked and remains with the national authority.[27] However, if the Permanent Chamber believes that the case should be evoked, it has the power to order the EDP to evoke the case;[28] thereby, transferring the case to the EPPO. Only in cases where an EDP decides not to evoke a case does the Permanent Chamber review the EDP decision.[29]

Evocation allows the EPPO to take over national cases that fulfil its competence. Evocation, in general, does not affect *in concreto* negative conflicts. Evocations starting point is that the case is already under investigation by national authorities. Therefore, whether or not the EPPO evokes does not lead to situations where the case is no longer being investigated. Rather it changes which authority will conduct that investigation: the EPPO or the MS.

2.2 FINANCIAL THRESHOLD REQUIREMENTS

The EPPO Regulation provides:

> Where, with regard to offences which caused or are likely to cause damage to the Union's financial interests of less than EUR 100,000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute at Union level, it shall in accordance with Article 9(2), issue general guidelines allowing the European Delegated Prosecutors to decide, independently and without undue delay, not to evoke the case.[30]

This provision allows an EDP decision not to evoke a case to be made without review by the Permanent Chamber, under certain conditions. First, that the (likely) damage is under €100,000. Second, the College of the EPPO believes that, due to the seriousness of the offence or the complexity of the case, there is no need for the EPPO to investigate or prosecute the case. Third, the College must provide guidelines when it believes it to be the case to allow an EDP to take an independent decision.

The College has implemented this provision under its Operational Guidelines (hereafter €100,000 Evocation Guidelines).[31] The College has provided a list of situations where the EDP cannot take an independent decision not to evoke. Rather than an affirmative list (which would provide when a decision can be taken), the College has provided a negative list (if these situations are present the EDP may *not* act independently).

In order for the EDP to take an independent decision not to evoke, an EDP must ensure that the (likely) damage of the criminal activity is under €100,000. Additionally, the EPPO Regulation mandates that either the facts of the case are not sufficiently serious or are sufficiently complex to warrant the EPPO's involvement. As noted above, it is for the College to determine the latter. Through the €100,000 Evocation Guidelines, the College has provided the situations where a case is too complex or serious.[32] Therefore, an EDP must determine that the case is both below €100,000 and that the €100,000 Evocation Guidelines allow them to take an independent decision.

The €100,000 Evocation Guidelines' conditions are similar to those provided by the General Evocation Guidelines (see Annex 2 to this paper for a comparison).[33] The areas where the College has prevented an EDP from taking an independent decision are similar to the areas where the College wants the case to be evoked under the General Evocation Guidelines. However, there are some differences between the two.

26 EPPO Internal Rules of Procedure (n 19), Art 42(4).

27 Note, that MS have a general duty to re-inform EPPO if the facts of the case change which could cause the EPPO to evoke a case, EPPO Regulation (n 1), Art 27(7).

28 EPPO Internal Rules of Procedure (n 19), Art 42(5).

29 If a case is evoked, yet the Permanent Chamber believes that the case should be handled by the national authorities, this would be handled under referrals, as the Permanent Chamber has no power to reverse a decision to evoke from an EDP, EPPO Regulation (n 1), Art 27; Interview with a European Prosecutor, EPPO (Luxemburg, 21 September 2022).

30 EPPO Regulation (n 1), Art 27(8).

31 EPPO Operational Guidelines (n 10), Annex 3.

32 In fact, only if the College has determined what this means may the EDP use this provision, see EPPO Regulation (n 1), Art 27(8); EPPO Internal Rules of Procedure (n 19), Art 42(2).

33 EPPO Operational Guidelines (n 10), Annex 3.

First, the General Evocation Guidelines provide a wider understanding of the meaning of public officials than under the €100,000 Evocation Guidelines. Under the €100,000 Evocation Guidelines, the College has only defined public officials by reference to the PIF Directive, whereas the General Evocation Guidelines also references the UN Convention against Corruption (UNCAC).[34] The reason for the different reference point is unknown. After all, the EPPO itself would be limited to the understanding provided by the PIF Directive and not the UNCAC.[35]

The second difference concerns the obligation to evoke cases where there are doubts about the ability of MSs to handle the situation. While the €100,000 Evocation Guidelines provide similar provisions to the General Evocation Guidelines, the former has removed one element, namely if the MS has not taken significant acts of investigation. The reason that significant acts of investigation are not listed here but are under the General Evocation Guidelines is unknown. This creates a dilemma: the General Evocation Guidelines provide that these cases must be evoked, but the €100,000 Evocation Guidelines state that an EDP should decide not to evoke the case.

The third difference is that agreements made between the EPPO and MS authorities, with which the EPPO may be better placed to handle a case, are not excluded from the ability of an EDP to take an independent decision not to evoke. Whether an EDP would, in those cases, decide not to evoke a case when the MS authorities believe the EPPO is better placed is doubtful. However, of interest is that the College has determined that under the €100,000 financial threshold there is no prospect of ensuring that these cases are actually transferred to the EPPO.

Finally, if criminal organizations are involved, an EDP cannot take an independent decision. However, criminal organizations are not mentioned under the General Evocation Guidelines as a reason to evoke a case.[36] The reason for preventing an EDP from taking an independent decision not to evoke can be explained, namely that the involvement of criminal organizations implies that the case may be either serious or complex. Additionally, the EPPO has noted that it wishes to focus upon criminal organizations.[37] Therefore, it is of equal interest that criminal organizations were left out of the General Evocation Guidelines, rather than their inclusion under the €100,000 Evocation Guidelines as the EPPO wishes to focus on criminal organizations.

Nature of the independent decision

Under the EPPO Regulation and the EPPO's Internal Rules of Procedure, it is noted that after the passing of Operational Guidelines, an EDP can take an independent decision not to evoke.[38] The nature of the independent decision allows an EDP to take the final decision without having the Permanent Chamber reviewing that decision.[39] This raises a question as to why the €100,000 Evocation Guidelines state that decisions taken under the threshold are 'without prejudice to the powers of the Permanent Chamber'.[40] Additionally, it provides that if the case is outside the conditions set (those listed in the €100,000 Evocation Guidelines), the EDP 'shall decide [...] not to evoke a case'.[41] These conditions seem to imply a lack of independent decision-making, which will be examined here.

The EPPO Regulation provides that decisions that lead to the EPPO not investigating or prosecuting should be reviewed. This role of review is generally handled by the Permanent Chamber.[42] This review ensures that cases are properly assessed before the EPPO rejects them. Thereby, the provision on 'without prejudice to the powers of the Permanent Chamber' is not meant to limit an EDP independent decision, but to ensure that an EDP only takes such decision when the guidelines

34 EPPO Operational Guidelines (n 10), sec 3.3 in conjunction with Annex 3(a).

35 EPPO Regulation (n 1), Art 22(1).

36 EPPO Operational Guidelines (n 10), sec 3.3 & Annex 3.

37 EPPO One Year in Action (2022) <https://www.youtube.com/watch?v=efV5QVxGyVE&t=20386s> (last visited 14 October 2024), 4:45:45-onwards.

38 EPPO Regulation (n 1), Art 27(8); EPPO Internal Rules of Procedure (n 19), Art 42(2); Herrnfeld, 'Art 27' (n 19), 240–241.

39 Herrnfeld, 'Art 27' (n 19), 240–241.

40 EPPO Operational Guidelines (n 10), Annex 3 [second para].

41 ibid.

42 EPPO Regulation (n 1), Arts 10(2)–(5), 26(3), 27(6)[second para], 28(3), 35(1)–(2), and 36(1); EPPO Internal Rules of Procedure (n 19), Arts 42, 45, 46, 56(6) and 60(3); In limited cases the powers of the Permanent Chamber could be exercised by the European Prosecutor, see EPPO Regulation (n 1), Art 10(7) in conjunction with Art 10(3)(a) or (b). This includes the European Prosecutor if they are conducting an investigation, EPPO Regulation (n 1), Art 28(4).

allow them to. After all, it would undermine the EPPO if an EDP had the ability to claim the right of independent decision-making even in cases where they should not be taking such decisions.

The €100,000 Evocation Guidelines imply that if a situation allows an EDP to take an independent decision, the EDP should not evoke the case.[43] This creates an issue of what is meant by independent decision: is it the right of the EDP to decide on their own or just to prevent a review of that decision by the Permanent Chamber (as long as it falls within the €100,000 Evocation Guidelines)? Evocation under the EPPO Regulation provides that the EDP decides whether or not to evoke a case.[44] The €100,000 financial threshold under the EPPO Regulation only seems to imply that, when it is used (due to the College issuing Operational Guidelines), the review element is removed, not the ability of the EDP to decide whether to evoke.[45]

Despite the fact that the €100,000 Evocation Guidelines imply that an EDP should not evoke cases that fall within the financial threshold, an EDP from the EPPO said that there has never been an issue if they evoke cases that the €100,000 Evocation Guidelines provided that they should not evoke.[46] Additionally, a European Prosecutor at EPPO confirmed that regardless of whether the case falls within the €100,000 financial threshold, an EDP can always evoke a case:

> When the EDP decides to evoke a case, the Permanent Chamber can't do anything. Well, it can decide to refer the case back to the national authorities, if there is a huge mistake of the EDP. [Regardless] the case will have to be registered as an EPPO case, and then it will have to be referred back to the national authorities.[47]

Therefore, while the €100,000 Evocation Guidelines may imply that the EDP must not evoke if the €100,000 Evocation Guidelines are applicable, this is not the case. An EDP always has the right to evoke cases. This right of the EDP also resolves any issues in differences between the General Evocation Guidelines and €100,000 Evocation Guidelines, since an EDP can always evoke a case regardless of whether or not it falls within either Evocation Guidelines.

2.3 INTERMEDIATE CONCLUSION

Evocation is the process of determining whether the EPPO will take over a national criminal investigation. It is the method by which the EPPO, through the EDP, resolves potential issues of whether the EPPO or the MS should handle a criminal investigation. If the EPPO takes over the case, it has the added benefit of preventing potential future violations of *ne bis in idem* from arising. This benefit occurs as only the EPPO will be able to act.

The change brought by the €100,000 financial threshold under evocation is limited to decision-making only. It does not change the ability of EPPO to evoke cases, nor the way in which evocation resolves types of conflicts. Rather it allows the EDP to make decisions to not evoke cases without the Permanent Chamber having the ability to override the EDP. Thereby there is not a noticeable change between evocation in general and evocation under the €100,000 financial threshold.

3. REFERRAL

3.1 REFERRAL AND CONFLICT

Referrals are the inverse of evocation. It is the process by which an EPPO investigation is both reported to and potentially transferred to national authorities.[48] The EPPO refers cases either because it has lost the competence to investigate the case (mandatory referrals) or when the

43 EPPO Operational Guidelines (n 10), Annex 3 [second para].

44 EPPO Regulation (n 1), Art 27(6); EPPO Internal Rules of Procedure (n 19), Art 42; Herrnfeld, 'Art 27' (n 19), 239–240.

45 EPPO Regulation (n 1), Art 27(8).

46 This was in relation to their own personal experience and does not indicate that this will always be the case. Interview with a European Delegated Prosecutor (26 July 2022).

47 Interview with a European Prosecutor (n 29).

48 EPPO Regulation (n 1), Art 34; HH Herrnfeld, 'Art 34' in Herrnfeld et al. (eds.) (n 1), 318–320. There is also an obligation to report and inform OLAF of cases where OLAF may be competent if the EPPO is no longer investigating, see EPPO Regulation (n 1), Arts 34(8) & 39(4); EPPO Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L248/1, Art 8(1) & (4); Working Arrangement between OLAF and EPPO (2021) <https://www.eppo.europa.eu/sites/default/files/2021-07/Working_arrangement_EPPO_OLAF.pdf> (last visited 14 October 2024), secs 5.2 & 5.3.

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Permanent Chamber finds that the case is better handled at the national level (optional referrals).[49] Optional referrals arise either because the €100,000 financial threshold is applicable or in cases of expenditure fraud where the (likely) damage is greater to a victim other than the EU.

3.2 MANDATORY REFERRALS

Mandatory referrals take place because the facts of the case mean that the EPPO no longer has competence.[50] The reason why this would be required is that when initiating or evoking cases the EPPO only has to have a reasonable belief that it has competence to act.[51] The leniency in allowing the EPPO to handle cases only when it has a reasonable belief is understandable as waiting for concrete proof that the conditions are fulfilled can delay investigations.[52] However, if it is determined that the EPPO lacks competence then the case should be removed as an EPPO investigation. This ensures that the EPPO will stay focused on its mandate, namely PIF Offences. There is a potential issues with mandatory referrals: a MS refuses to take the case.[53]

The EPPO Regulation does not force MS national authorities to conduct criminal investigations, nor does it mandate that those authorities must take over a case referred to them by the EPPO.[54] If no authority wishes to take over the case this will create an *in concreto* negative conflict of competence, leading to a person under investigation having factual impunity as no authority can or is willing to act.[55] The EPPO Regulation limits this effect by providing that the EPPO remains competent if the only competence criterion not fulfilled is the exercise of the competence criteria.[56] This requires that the EPPO's other two competence criteria, material competence and territorial and personal competence, are still fulfilled. In this way, the EPPO Regulation attempts to limits *in concreto* negative conflicts from persisting in limited cases.

3.3 OPTIONAL REFERRALS/FINANCIAL THRESHOLD REQUIREMENTS

Optional referrals are provided for under Article 34 of the EPPO Regulation:

> 3. Where, with regard to offences which caused or are likely to cause damage to the financial interests of the Union of less than EUR 100,000, the College considers that, with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, there is no need to investigate or to prosecute a case at Union level and that it would be in the interest of the efficiency of investigation or prosecution, it shall in accordance with Article 9(2), issue general guidelines allowing the Permanent Chambers to refer a case to the competent national authorities.
>
> [...]
>
> 5. Where the competent national authorities do not accept to take over the case in accordance with paragraph 2 and 3 within a timeframe of maximum 30 days, the

49 EPPO Regulation (n 1), Arts 34(1)–(3); Herrnfeld, 'Art 34' (n 48), 312–314. Referrals can, in some instances, occur where the EPPO wishes to dismiss a case; this is not under the referral Article of the EPPO Regulation but handled under the Article on Dismissals. This concerns dismissals involving inextricably linked offences or expenditure fraud where the (likely) damage is great to another victim; as this is a dismissal issue it will be excluded from this article. For more information see, EPPO Regulation (n 1), Art 34(6) in conjunction with Art 39(3)–(4); EPPO Internal Rules of Procedure (n 19), Art 58(1); D Brodowski, 'Art 39' in Herrnfeld et al. (eds.) (n 1), 369–370.

50 EPPO Regulation (n 1), Art 34(1)–(2).

51 ibid, Art 26(1).

52 Zuidema (n 1); Herrnfeld, 'Art 34' (n 48), 391–392.

53 Additionally, an issue can be that more than one MS wishes to take the case; creating an *in concreto* positive conflict of jurisdiction; see Herrnfeld, 'Art 34' (n 48), 317–320.

54 Additionally, the EPPO Regulation does not regulate situations where more than one MS wishes to take the case over; this is handled by other EU legislation; see Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42; EPPO Regulation (n 1), recitals 67 & 68, Art 26(4)–(6); Herrnfeld, 'Art 26' (n 7), 219–224; Herrnfeld, 'Art 34' (n 48), 319–320; Zuidema (n 1).

55 EPPO Regulation (n 1), Art 34(5). It should be stated that a European Prosecutor from the EPPO noted that this has never occurred in any cases that they have overseen. Whenever the EPPO has referred a case, the MS national authorities have taken over the investigation, Interview with a European Prosecutor (n 29).

56 EPPO Regulation (n 1), Art 34(2) in conjunction with (5).

> EPPO shall remain competent to prosecute or dismiss the case, in accordance with the rules laid down in this Regulation.[57]

From the above we can see that optional referrals are permissible for cases that (possibly) involve damage less than €100,000 which are either not complex enough or serious enough to warrant EPPO involvement and it would be in the interest of efficiency of the investigation or prosecution to transfer the case to national authorities.

Additionally, cases involving expenditure fraud, where there is a victim that has (possibly) suffered greater damage than the EU may also be transferred. Both types of optional referrals are based upon guidelines issued by the College.[58] As both types of referrals work in a similar manner (the difference is in the respective guidelines alone), this article will only go into depth here on the use of the application of the €100,000 financial threshold.[59]

The reason for optional referrals is to allow smaller cases that could be better handled at the national level to be transferred there. This would allow the EPPO to focus on cases that would benefit from the unique position which the EPPO has: a central prosecution office across the participating MSs. However, the EPPO Regulation does require that if the EPPO refers cases that fall under the €100,000 financial threshold, it must ensure that a MS is willing to take over the case (otherwise it must stay with the EPPO) and that referrals are made based upon guidelines issued by the College. The College has issued optional guidelines on this area (hereafter €100,000 Referral Guidelines) that allow the Permanent Chamber to refer cases under the €100,000 financial threshold.[60] These guidelines use a negative list structure rather than an affirmative list, similar to the €100,000 Evocation Guidelines.

Criteria

The €100,000 Referral Guidelines and the €100,000 Evocation Guidelines are nearly identical with each other, with only minor changes to the wording to reflect that the case is under EPPO investigation rather than national investigation or to merge some conditions together (see Annex 3 of this paper for comparison). This also means that the €100,000 Referral Guidelines shares many similarities with the General Evocation Guidelines on when the EPPO should evoke a case generally.[61] Thereby, the College has given the same advice to the Permanent Chamber as to the EDP when using the €100,000 financial threshold. This again strikes a balance between cases that would benefit from the EPPO's involvement and those that can be handled by national authorities.

Procedural

Compared to evocation cases, the decision-making process and its effect are different. The decision to refer cases under the €100,000 financial threshold is taken by the Permanent Chamber rather than by the EDP; however, the EDP or supervising EP (along with any member of the Permanent Chamber) may propose to refer the case.[62] Additionally, any decision to refer a case under the €100,000 financial threshold is reviewed by the European Chief Prosecutor. While the Chief Prosecutor cannot override the decision of the Permanent Chamber, the Chief Prosecutor can order the Chamber to review its decision.[63]

Optional referrals have a built in 'safeguard' to prevent *in concreto* negative conflicts of competence from occurring. Under the Regulation, if the EPPO attempts to refer a case, and no authority is willing to take over the case, then the case remains with the EPPO. This prevents *in concreto* negative conflicts, as the EPPO must continue its investigation if the national authority refuses to take over the case. This ensures that, regardless of the financial amount at stake, at least one authority that can conduct criminal investigations will do so. This prevents factual impunity from investigation based purely on the financial amount.

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57 ibid, Art 34(3)–(5).

58 ibid, Art 34(3).

59 ibid, Art 34(3); EPPO Operational Guidelines (n 10), Annex 4; Herrnfeld, 'Art 34' (n 48), 314–315.

60 EPPO Operational Guidelines (n 10), Annex 4(1).

61 ibid.

62 EPPO Regulation (n 1), Art 34(3); EPPO Internal Rules of Procedure (n 19), Art 57(1).

63 If the European Chief Prosecutor is a member of the Permanent Chamber taking the decision, the role of review is exercised by one of the Deputy European Chief Prosecutors, EPPO Regulation (n 1), Art 34(4); Herrnfeld, 'Art 34' (n 48), 316.

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3.4 INTERMEDIATE CONCLUSION

Referrals are an important element of the EPPO Regulation. They allow the EPPO to initiate or evoke cases as long as it believes it has competence, since it is possible for the EPPO to refer the cases back if this turned out to be incorrect. At the same time, it allows the EPPO to offload cases that would be better handled at the national level, and free the EPPO to handle cases that benefit from its unique position as a single office at the EU level.

However, referrals can raise *in concreto* negative conflict issues: there is no authority to handle the investigation or prosecution. This situation will result in a person's ability to have factual impunity. The EPPO Regulation limits this effect by allowing the EPPO to keep cases where only the exercise of competence criterion is missing and prevents the EPPO from dropping cases that were optionally referred.[64] In these latter cases, if a MS national authority does not take over the case, the EPPO remains competent. Preventing the EPPO from dropping cases that it referred under the €100,000 financial threshold where no authority is willing to take over creates a safeguard. This safeguard ensures that the use of the threshold does not create *in concreto* negative conflicts of jurisdiction.

4. INITIATING

4.1 INITIATION AND CONFLICTS

Initiation is the process whereby the EPPO opens a criminal investigation. Unlike with evocation, initiation handles situation where there is no current ongoing *criminal* investigation by a MS national authority.[65] The initiation process begins whenever any authority (MS or EU) believes that criminal activity, over which the EPPO has competency, has been committed; this activity is then meant to be reported to the EPPO.[66] Initiation allows the EPPO to open an investigation without the need for a national criminal case. This ensures that, in situations where national authorities have not opened a criminal investigation, the EPPO has the ability to open its own case.

EPPO's obligation to initiate is to be found under Article 26(1), which provides:

> 1. Where, in accordance with the applicable national law, there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed, a European Delegated Prosecutor in a Member State which according to its national law has jurisdiction over the offence shall, without prejudice to the rules set out in Article 25(2) and (3), initiate an investigation and note this in the case management system.
>
> [...]
>
> 3. Where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall, under the conditions set out in paragraph 1, instruct a European Delegated Prosecutor to initiate an investigation.[67]

The use of 'shall [...] initiate an investigation' demonstrates that the EPPO has an obligation to initiate an investigation. This obligation is triggered whenever there are reasonable grounds that the EPPO's substantive competence, exercise of competence and temporal competence conditions are fulfilled,[68] and there is not a current active criminal investigation by either the EPPO or a participating MS authority.[69] The obligation is for an EDP to initiate the investigation

64 The EPPO would be permitted to dismiss a case if that would be the correct action, EPPO Regulation (n 1), Arts 34(5) & 39.

65 ibid, Arts 24(1) & 26(1)–(3).

66 ibid, Art 24(1).

67 ibid, Art 26(1) & (3).

68 ibid, Arts 26(1) & 120(2)[first para]; Herrnfeld, 'Art 26' (n 7), 216–218.

69 The reason why this would apply to the EPPO not conducting an investigation is that the EPPO would not be able to initiate a new case, as it would already be actively investigating the matter; EPPO Regulation (n 1), recital 67, Arts 24(1)–(2), 26(1), & 27(1); Herrnfeld, 'Art 26' (n 7), 215 & 218–219.

if the conditions are met, and for the Permanent Chamber to ensure that the EDP fulfills their obligation.[70]

Initiation, due to the obligation to initiate an investigations, is tailored to prevent *in concreto* negative conflicts of competence. It does this by ensuring that when a situation is reported to the EPPO that is not currently under investigation, the EPPO has an obligation to initiate its own investigation. This ensures that a person does not have factual impunity from investigation due to a lack of a national investigation. However, there is a suggestion that this obligation could be limited by the use of the €100,000 financial threshold. I will, therefore, examine how the threshold could be used under initiation, whether it is applicable under initiation and finally whether initiation and the threshold are compatible with each other.

4.2 APPLICABILITY OF THE THRESHOLD

As provided in Section 1, a suggestion was raised in the EPPO Article-by-Article Commentary that the EPPO might be able to use the €100,000 financial threshold as a reason to not initiate a case:

> [I]n accordance with Article 34(3), the EPPO may refrain from exercising competence and to refer the case to the competent national authorities. While Article 34(3) in principle applies only where the EPPO previously had decided to initiate an investigation, it could be considered to specify in general guidelines to be issued by the College in accordance with this provision, that the EPPO may resort to that possibility already in the course of the verification process (Article 24(6)) and thus before it has decided to initiate an investigation.[71]

The EPPO Article-by-Article Commentary argument is that it would be beneficial for the EPPO to not initiate a case based on the €100,000 financial threshold, rather than initiate and refer the case back to national authorities.

Based upon the EPPO Article-by-Article Commentary and what we know of initiation and the use of the €100,000 financial threshold, I can provide a general idea of how this could be implemented for the EPPO: namely, the criteria and the procedure that would be used. As shown, the €100,000 financial threshold criteria for evocation and referrals are very similar.[72] Therefore, I can conclude that the EPPO, if it is able to apply this threshold, would also apply the same standards to initiation.

The procedure that the EPPO would follow would have to fit within the current framework of initiation. This means that in order to apply the €100,000 financial threshold to initiation both the EDP and the Permanent Chamber would have to agree. If an EDP decides to initiate a case, then the only recourse for the Permanent Chamber would be to refer the case back. The EDP, as with evocation, has the right to decide that the reported case should be an EPPO case.[73] If the EDP decides that the case should not be initiated, the Permanent Chamber has the obligation to review this decision and then decide whether to let the decision stand or order the EDP to initiate. There is no option under initiation for the EDP to take an independent decision as is the case with evocation. Therefore, only a joint decision by both would be possible.

4.3 ISSUES WITH ADDING THE €100,000 FINANCIAL THRESHOLD

Does the fact that the obligation to initiate an investigation under Article 26 of the EPPO Regulation has no reference to the €100,000 financial threshold mean that it automatically cannot apply? This is not necessarily the case: while the obligation to initiate is one of the most

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70 EPPO Regulation (n 1), Art 26(1) & (3), Herrnfeld, 'Art 26' (n 7), 224–225; The obligation to initiate an investigation must be understood separately from the question of whether the EPPO must apply the principle of mandatory prosecution; the latter point is a debatable issue, but is a separate issue from whether the EPPO has the obligation to initiate an investigation; see, W Geelhoed, 'Het Europees Openbaar Ministerie en het opportuniteitsbeginsel in Nederland' (2018) 16 *Strafblad: tijdschrift voor wetenschap en praktijk*, no. 6; A Novokmet, 'The European public prosecutor's office and the judicial review of criminal prosecution' (2017) 8 *New Journal of European Criminal Law*, no. 3, DOI: 10.1177/2032284417729934, 374; Herrnfeld, 'Art 26' (n 7), 218.

71 Herrnfeld, 'Art 26' (n 7), 219 [mn 10, end of para].

72 See Annex 3 below.

73 Interview with a European Prosecutor, EPPO (n 29).

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detailed provisions within the EPPO Regulation, it is not absolute.[74] An example is that temporal competence conditions are not mentioned within initiation (n or evocation and referrals), yet those conditions clearly apply.[75] Additionally, under evocation not all of the EPPO's competence requirements are provided, yet they are also applicable.[76] However, there is a difference between these examples and the threshold.

First, temporal competence clearly states that it applies regardless of the investigation status of a situation: 'EPPO shall exercise its competence with regard to any offence within its competence committed after the date on which this EPPO Regulation has entered force'.[77] Meanwhile, when the ability to use the €100,000 financial threshold is mentioned it is tied to the issue at hand: for evocation 'to decide […] not to evoke' or for referrals 'to refer a case'.[78] Secondly, evocation does not clearly provide that the various competence conditions must apply in order to evoke.[79] The various provisions of the EPPO competence (material, territorial/personal, exercise of) are general standalone provisions, with any exception being clearly defined within the Regulation.[80] This is also stated by the EPPO itself, that the College of the EPPO finds that as initiation does not provide for the use of the threshold under initiation, it cannot be used even in cases where the EPPO may decide to immediately refer the case back to the MSs.[81]

4.4 NATURE OF THE THRESHOLD AND INITIATION

When it comes to the €100,000 financial threshold's use in deciding conflicts of competence, we can notice a pattern from both evocation and referrals. In both cases there is a need for an investigation by an authority competent to conduct criminal investigations. In the case of evocation, this is a criminal investigation by a MS's national authority. In the case of referrals, the Permanent Chamber can attempt to return a case using the €100,000 financial threshold to a MS national authority competent to conduct criminal investigations; however, the EPPO must ensure that the MS will take over the case otherwise the case remains with the EPPO.[82]

Therefore, the use of the threshold is an additional tool that the EPPO has that allows it to more easily leave or return cases to national authorities. However, the EPPO Regulation has ensured that, when its use is permissible, additional safeguards are in place to prevent *in concreto* negative conflicts of jurisdiction. In the end, whenever the threshold is applied, there will be a competent authority investigating the criminal conduct.

In a similar vein, the obligation to initiate under the EPPO Regulation ensures that *in concreto* negative conflicts of jurisdiction do not persist. If no authority is conducting a criminal investigation, then the EPPO must, through the EDP and Permanent Chamber, initiate an investigation. This ensures that a situation does not occur where no authority is investigating due to a mistaken belief that another authority will. It can be argued that the reason the MS has not opened an investigation is not due to a lack of will to do so by the national authority, but rather that the national authority was fulfilling its obligation to report cases to the EPPO.[83] In other words, that the MS's national authority may have initiated a case, but did not do so in order to fulfil their obligation. This would mean that if the EPPO does not initiate (or for example could use the threshold to not initiate) the national authority would do so. Yet, the EPPO Regulation, particularly Article 26(1), does not provide the EPPO any leniency under its obligation to initiate; if there is no ongoing criminal investigation and the reported situation fulfills EPPO's competence, the EPPO must initiate an investigation.[84]

74 In contrast to evocation which does not provide all preconditions needed; see, Herrnfeld, 'Art 27' (n 19), 236–237; EPPO Regulation (n 1), Art 27.

75 EPPO Regulation (n 1), Art 120(2).

76 ibid, Arts 22, 23, 25(1), 27, 120(2); Herrnfeld, 'Art 27' (n 19), 236–237 & 240.

77 EPPO Regulation (n 1), Art 120(2).

78 See ibid, Arts 27(8) & 34(3).

79 ibid, recital 11 & Arts 4 & 25(1); Herrnfeld, 'Art 27' (n 19), 236–237.

80 EPPO Regulation (n 1), Arts 22, 23, 25, & 34(5).

81 Interview with a European Prosecutor (n 29); interview with a member of the Legal Service, EPPO (Luxemburg, 21 September 2022).

82 EPPO Regulation (n 1), Art 34(3) & (5).

83 ibid, Art 24(1).

84 Herrnfeld, 'Art 26' (n 7), 218–219.

The EPPO Regulation is attempting to find a balance for the EPPO by providing the €100,000 financial threshold. The EPPO has a duty to investigate PIF Offences within its competence area. This ensures that every case is investigated regardless of the ability of national authorities. However, not every case may require that the EPPO itself should handle the case. After all, under evocation the EPPO is given a choice as to whether or not to take over the national case; the threshold only changes who takes the final decision rather than the optional nature of whether to evoke. It still remains a choice as to whether the EPPO should take over or not. Regardless of this, under evocation the case is under a criminal investigation. The same is true of referrals: the case is under an EPPO investigation. The difference is that the EPPO, through the Permanent Chamber, believes that the case can be handled more effectively by MSs' national authorities. However, the referral can only occur if the MS authority agrees to take over, otherwise the case must remain with the EPPO. Thus, in both cases (evocation and referrals) the case will remain as a criminal investigation. The nature of the threshold along with its safeguard is that either the EPPO or the MS must (or be willing to) conduct a criminal investigation. It does not matter whether that authority is the EPPO or the MS: in other words, as long as the use of the threshold does not lead to *in concreto* negative conflicts then it may be used.

A similar element is presented within the obligation to initiate. If no authority is conducting a criminal investigation, then the EPPO must do so if it is reasonable to believe that the criminal activity is within its competency area. Additionally, the EPPO Regulation does not provide an obligation for national authorities to open a criminal case; this obligation is only directed at the EPPO.[85] This obligation ensures that a case will be investigated by the EPPO, if no other national authority has opened a criminal investigation. In other words, the EPPO has an obligation to prevent *in concreto* negative conflicts from continuing once a situation has been reported.

As noted above, the ability to refer a case under the €100,000 financial threshold has a safeguard attached: another MS authority must be willing to take over the case. In the case of whether to initiate an investigation, there is no safeguard that requires a MS to inform the EPPO that it will not investigate nor is there an obligation for the EPPO to ensure that a MS would investigate.[86] This highlights that it was not foreseen that the threshold would be used under initiation. After all, the EPPO Regulation already provides for a procedure to allow cases under €100,000 to be sent to a MS. First, the EPPO initiates an investigation and then, through referrals, determines whether the MS is willing to take over. This procedure ensures that *in concreto* negative conflicts do not arise, while at the same time ensuring that cases which can be handled locally are so handled.

Therefore, while it might seem to simplify the procedural elements to allow the EPPO to use the threshold under initiation rather than initiating and then referring, this is not possible. The EPPO is meant to conduct criminal investigations within its competence area. It is only allowed to circumvent this duty to investigate whenever it is known that another MS national authority is conducting a criminal investigation or is willing to conduct the criminal investigation. The reality of the matter is that in cases that are reported that require the use of Article 26 (initiation), it is unknown whether a MS is willing to investigate. Therefore, the EPPO, through the EDP and Permanent Chamber, must initiate a case and only afterwards attempt to refer the situation to a MS national authority.

4.5 INTERMEDIATE CONCLUSION

Initiation ensures that any situation reported to the EPPO, which is within the EPPO's competence, will be investigated by the EPPO. In this way, initiation is preventing *in concreto* negative conflicts from persisting. At the same time, since the EPPO has primacy over PIF Offences within its competence it prevents other authorities from investigating as well. This mandate for the EPPO to initiate investigations ensures that persons who commit PIF Offences will not have factual impunity from investigation.

Applying the €100,000 financial threshold to initiate would undermine the fact that the EPPO obligation to initiate prevents *in concreto* negative conflicts. This is because there is no

85 Unlike with evocation where there is a general obligation to reinform the EPPO if the facts of the case change; this allows the EPPO to redecide whether to evoke based upon these changes, EPPO Regulation (n 1), Art 27 [first para].

86 ibid, Art 26.

obligation for MS authorities to open a criminal investigation if the EPPO does not open an investigation. This also goes against the idea of the €100,000 financial threshold. The threshold is meant to allow the EPPO to either simplify the evocation process or to refer the case to a MS that is willing to take over. This allows the EPPO to focus on more 'serious' criminal activity. It is not permissible to use the €100,000 financial threshold to allow *in concreto* negative conflicts from occurring. Therefore, it is incompatible with initiation and cannot be applied.

5. CONCLUSION

I sought to determine whether it would be permissible for the EPPO to use the financial threshold of €100,000 to circumvent its obligation to initiate cases and the effect this would have on how the EPPO resolves *in concreto* negative conflicts. This was accomplished by examining the effects that the financial threshold has on evocation and referrals; this was then compared with initiation to determine whether those two factors (initiation and the threshold) would be compatible with each other.

Evocation is the process that allows the EPPO to take over cases under national criminal investigation if the case is within the EPPO's competence. The EPPO has a level of discretion in determining whether to evoke cases from national authorities. The application of the threshold to evocation only affects who takes the final decision on evocation. It does not affect the way that the EPPO Regulation resolves conflicts under evocation. Regardless of whether the EPPO evokes, the case will be under a criminal investigation and thereby no *in concreto* negative conflict will arise.

Referrals is the process whereby the EPPO transfers its investigation to national authorities. The reason for the referral is because the EPPO has lost competence, is using the €100,000 financial threshold or in certain cases of expenditure fraud. When the EPPO refers cases under the €100,000 financial threshold there is a safeguard set in place. This safeguard requires that the EPPO confirms that a national authority capable of conducting criminal investigations will take over the case. This prevents *in concreto* negative conflicts from occurring when the EPPO attempts to refer under the threshold.

Initiation is the process whereby a situation is reported to the EPPO that is not under a criminal investigation. The EPPO has an obligation to initiate an investigation if the situation reported fulfills its competence criteria. This prevents *in concreto* negative conflicts from persisting as the EPPO will be investigating. Unlike the situation with referrals, there is no safeguard under initiation that would require the EPPO to ensure that a MS will open a criminal investigation. If the financial threshold were to be applied to initiation this would erode the Regulation's strong position on preventing *in concreto* negative conflicts in cases where the EPPO has competence. Additionally, the €100,000 financial threshold use is not to allow conflicts to occur, but is meant to ensure that the right authority handles the criminal investigation.

The €100,000 financial threshold is a useful tool for the EPPO. It streamlines decision making within evocation and allows the EPPO to offload cases to national authorities for the sake of efficiency. However, it is meant to be used when there is a guarantee that another authority is conducting a criminal investigation. This is the very reason why the threshold cannot be applied to initiation situations; this is because the EPPO only decides whether to initiate an investigation when no (known) authority is conducting a criminal investigation. The EPPO has a duty under the EPPO Regulation to ensure that those cases will be investigated, and therefore, prevent *in concreto* negative conflicts from persisting.

Instead of attempting to apply the current version of the €100,000 financial threshold to initiation situations, it might be prudent to change the financial threshold provided under the exercise of the competence of the EPPO (Article 25 of the EPPO Regulation). The lower financial threshold under Article 25 (€10,000 rather than €100,000) already provides for exceptions if a case is better placed with the EPPO. This is similar to the €100,000 financial threshold, certain cases should be with the EPPO while other case benefit from being handling at the national level. I believe that it would benefit the EPPO to revamp the EPPO Regulation to provide a higher financial threshold under Article 25 rather than attempting to apply the €100,000 financial threshold to initiation situations.

ADDITIONAL FILE

The additional file for this article can be found as follows:

- **Operational Guidelines on Evocation and Referrals.** Annex 1–3. DOI: https://doi.org/10.36633/ulr.1017.s1

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