

Addressing Organised Crime in Fraud Cases – Developing a More Efficient Legal Framework

Deniz Genç



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AUTHOR

Deniz Genç

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The European Union has adopted and developed a comprehensive framework to combat offences affecting its financial interests over the years. It established a specific investigative service, the European Anti-Fraud Office (OLAF) in 1999, which is competent to conduct administrative investigations when there is suspicion of fraud or any illegal activity affecting the budget of the Union.¹ OLAF can fully independently conduct internal investigations (i.e., inside any European institution or body funded by the EU budget) and external investigations (i.e., at the national level if the EU's financial interests are affected); to this end, it cooperates closely with competent national authorities as well as with European agencies and institutions. The Court of Auditors audits the EU's finances and acts as their guardian. Also, Eurojust and Europol, as judicial and police agencies, play a role in the area of fraud connected to the EU budget and cooperate with OLAF for the purpose of its investigations.

OLAF is competent to conduct administrative investigations with regard to any offence affecting the financial interests of the European Union: typical offences involve, among others, VAT fraud, customs fraud, corruption of civil servants, fraud affecting structural funds, and cigarette smuggling. OLAF also provides assistance and coordinates in cases of euro counterfeiting and money laundering. These offences often have a transnational dimension but also links with criminal networks that are structured, organised, and whose activity is not limited to fraud but includes many serious crimes (human and drug trafficking, etc.). Indeed, offences affecting the Union's financial interests can be part of organised crime. To this end, the legal framework of OLAF specifies that cases presenting links to organised crime are a priority.² Also, and due to the nature of these offences, cooperation and coordination with Eurojust and Europol are essential to ensure an efficient response.

The existence of a link between fraud connected to the EU budget and organised crime has been acknowledged for a long time. Both Europol's Organised Crime Threat Assessments (OCTA) and Eurojust's Annual Reports, as well as the OLAF Reports, highlight the important links between certain criminal activities, e.g., fraud, corruption, cigarette smuggling, euro counterfeiting and money laundering, and organised crime. However, this link is not always made in practice. The main shortcomings result from the difficulties in agreeing on a single and common definition of organised crime and the difficulties in applying its criteria. As a direct consequence, many offences are not qualified as organised crime where they should have been. It is therefore difficult to fight these offences and these criminal networks properly but also to assess with precision how many investigations conducted at the EU level by OLAF implied organised criminal groups and how much of the EU budget has been defrauded by them. This should not, however, affect the imperative of improving the current legal framework and instruments in order to fight fraud offences with a link to organised crime even more efficiently.

I. A Wide Range of Definitions of “criminal organisation”

The Preamble of the Convention on the protection of the European Communities' financial interests of 26 July 1995³ already refers to organised crime: the Member States acknowledged the potential existence of a link between fraud affecting the Union's financial interests and activities conducted by criminal organisations.⁴ Furthermore, the Annual Reports on the fight against fraud presented by the Commission in the 1990s corroborated this by reporting fraud cases in which organised criminal networks were involved and had defrauded the Union's budget. The links between organised crime and fraud connected to the Union's budget were explicitly acknowledged and highlighted for some time, but after 9/11, the focus on organised crime started to decline in favour of terrorism. Terrorism cases do not present such obvious reasons for links with fraud as organised crime cases, with the exception of a few cases (e.g., cigarette smuggling cases in

Northern Ireland). Offences affecting the Union's budget still indicated links with organised crime, however, and organised crime was defined as one of the key threats in the European Security Strategy.⁵

In 2008, the Council adopted a Framework Decision on the fight against organised crime.⁶ A common definition at the Union's level is thus laid down. Under the Framework Decision, a criminal organisation is "a structural association, established over a period of time, or more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit."⁷ This definition focuses on a few specific elements:

1. A structured organisation of more than two people;
2. Existing for a certain period of time;
3. The commission of criminal offences punishable by imprisonment for a certain period;
4. A benefit that can be of financial nature.

However, different definitions of organised crime can be found. The United Nations Convention against Transnational Organised Crime of 15 November 2000 gives a similar definition of "organised criminal group" that also focuses on the same above-mentioned four elements with more or less emphasis.⁸ But organised crime is an evolving and adapting phenomenon whose definition can differ from time to time but also depending on the particular perspective from which it is viewed. Therefore, its legal definition has to be sufficiently broad in order to allow for various forms of criminality to qualify as such, but not so broad so as not to cover any differences in categories of criminal activity or offence. Also, the definition should be drawn up in such a way that different categories of legal entities, not only natural persons but also legal persons, are covered as well as different levels of hierarchy.

Furthermore, when analysing the practice of EU agencies and institutions involved in the fight against organised crime, it has been found that not one common definition of organised crime is shared by them. Eurojust uses the definition set up in the Framework Decision. In contrast, Europol, OLAF, and the Court of Auditors do not use this particular definition or any definition at all. Indeed, Europol uses a body of characteristics to qualify an offence as an organised crime, some of them being mandatory, but neither OLAF nor the Court of Auditors has a working definition of organised crime. Moreover, use of the qualification of an offence as a "serious crime" by certain bodies can be seen as duplication and lead to confusion. This heterogeneous legal environment of course contributes to the difficulty of assessing the percentage of fraud cases where a link with organised crime exists as well as the amount of EU money that has been defrauded by organised criminal networks.

It should still be noted that, ultimately, the definition used by Europol shares the main elements of the definition in the Framework Decision. Indeed, among the body of criteria, four characteristics are mandatory and they correspond exactly to the four above-mentioned elements of the definition in the Framework Decision.⁹ However, the difference is that Europol requires additional criteria to qualify an offence as organised crime.

Therefore, the definition laid down in the Framework Decision on organised crime can be used as the common basis for analysis of the activities of the European agencies and institutions in fighting fraud to the EU budget committed by criminal organisations.

II. The Links between Organised Crime and Fraud Cases in Practice

In 2011, the European Parliament presented a study entitled “How does organised crime misuse EU funds,”¹⁰ which was based on publicly available information from OLAF, Eurojust, Europol, and the Court of Auditors. OLAF then conducted an internal analysis of its role as regards organised crime. The study underlined the difficulty of ascertaining to which extent organised crime defrauds the EU budget. This is due to both the lack of reliable information on the extent of misuse of EU funds by organised criminal groups and the lack of reliable information on how organised criminal groups misuse EU funds. The study, however, still highlighted the strong involvement of organised criminal groups in offences affecting the Union’s financial interests and pointed out the need for the EU agencies and institutions to focus more on organised crime in a cooperative manner.

The internal analysis conducted by OLAF analysed a sample of cases closed in 2009 and 2010: it consisted of 375 final case reports having a final impact of approximately €1750 million. The cases were analysed in order to detect the possible existence of an organised crime dimension, using the definition laid down in the Council Framework Decision. In the end, links with organised crime were found in 35 cases, the total impact on the EU budget being just over €750 million. In terms of percentages, cases having connections with organised crime amounted to somewhat less than 10% of all cases and the financial impact to above 40% of the EU budget. Already, only these numbers show to which extent organised criminal groups damage the Union’s financial interests: the impact of the cases concerned on the EU’s budget is four times greater than the impact of other cases.

Two things should be noted. First, this internal analysis is based only on cases where a link with organised crime has been established, and they only represent a small percentage of the real activity of criminal organisations in relation to fraud offences. Indeed, sometimes the connection to organised crime is not made and these cases escape the qualification. A significant number of fraud cases in general are also not reported or investigated. Secondly, however, the EU agencies and institutions do not have, *in fine*, the competence to qualify an offence as organised crime: only criminal courts have the power to legally qualify criminals as constituting a criminal organisation. Therefore, these numbers do not depict the reality of the final convictions for organised crime in fraud-related cases.

After more in-depth analysis of the 35 above-mentioned cases of the internal analysis conducted by OLAF in 2011, one can notice that almost all the major sectors of fraud are concerned:¹¹ agriculture, cigarettes, customs, direct expenditure, EU institutions, structural funds, trade, and VAT.¹² However, not all sectors attract criminal organisations in the same measure. Indeed, the only VAT case closed in 2009 showed links with organised crime as did a significant number of cigarette smuggling cases and trade cases closed in 2009 and 2010.

Also, it appears that the involvement of a criminal organisation is more important in certain sectors than in others, such as in cigarette smuggling cases. Moreover, and as stated in the OLAF Report for 2011, “cigarette smuggling is almost exclusively the domain of organised crime groups;”¹³ the OCTA 2011 (Organised Crime Threat Assessment) make the same remark on cigarette smuggling.¹⁴ Organised criminal groups are also very active in VAT fraud and in counterfeiting, which can impact customs duties. Moreover, counterfeiting of the euro is a major sector of activity of organised criminal groups, as is money laundering.¹⁵

Besides, a distinction can be pinpointed between different organised criminal groups and their structures: indeed, different types of organised criminal groups operate in different sectors, which makes their countering even more difficult. For example, those groups involved in euro counterfeiting are usually

organised in a specialised structure where cells operate under a clear and strict mandate and independently of one another in order to minimise risk. In the area of VAT fraud, it is proven that criminal groups work with each other, sharing knowledge, information, and intelligence, and even invest in one another's activities. Intelligence on criminal organisation and their structure is mainly collected and analysed by Europol at the European level, but a better exchange of information and intelligence on this matter would help the other bodies and improve their work as well as the fight against organised crime in general.¹⁶

However, as far as information given to OLAF by the national criminal courts, no conviction for criminal association was pronounced in the majority of the 35 cases: as stated previously, only criminal courts can legally decide if an offence qualifies as an organised crime, and they are not bound by the suggestions made by OLAF. It should be mentioned, however, that the Framework Decision on the fight against organised crime has not been properly implemented throughout the Union. Moreover, in some Member States, committing a crime within a criminal organisation is penalised as an aggravated circumstance whereas in others it is a specific conduct penalised as a separate offence; this difference in the legal systems of the Member States heightens the difficulty in assessing the number of convictions for criminal association on cases transferred by OLAF. Both the lack of a working definition within OLAF and the insufficient implementation of the Framework Decision in the Member States contribute to the limited number of convictions for criminal organisations in fraud-related cases transferred to competent national authorities by OLAF. The European Parliament, in a resolution on organised crime in the European Union,¹⁷ pointed out this issue and suggested that the Commission table a proposal for a Directive "which contains a less general definition of organised crime and manages better to identify the key features of the phenomenon" as well as the identification of "habitual offences committed by organised crime."

III. Recommendations: How to Better Fight Criminal Organisations in Fraud Cases

Of course, the fight against organised crime is and will remain a priority for OLAF investigations and for other European agencies' and institutions' activities; there is no questioning the importance of the fight against organised crime in the light of the risk it presents to the security of European citizens and the significant impact it has on the Union's financial interests. However, and as illustrated in the previous section and the internal analysis conducted by OLAF in 2011, the means currently available at the EU level are neither efficient enough yet, nor is the emphasis put on organised crime.

In 2011, the European Commission therefore adopted a communication on its Anti-Fraud Strategy (CAFS) with the objective "to improve prevention, detection and the conditions for investigations of fraud and to achieve adequate reparation and deterrence."¹⁸ The role of OLAF is highlighted, as it plays a central role by conducting administrative investigations and by supporting other Commission Services in the prevention and detection of fraud, including organised crime. The CAFS sets among its guiding principles fraud prevention, an effective investigation capacity, and good cooperation between internal and external actors. It pinpoints the need to develop specific sectorial anti-fraud strategies at the Commission Service level, with OLAF playing a proactive role in helping the concerned Services in the development and implementation of such strategies.

Mostly, the CAFS acknowledges the need to reinforce and intensify cooperation between the EU agencies and institutions by increasing the pooling and exchange of information. OLAF should share its operational experience and best practices with other EU institutions and agencies but also with the Member States authorities concerned with protecting the Union's financial interests, and specific cooperation with these authorities should be established as well. A Fraud Prevention and Detection Network will be developed and

organised by OLAF as a centre of expertise providing support and advice to other Commission's services, based on best practices and fraud risk assessments. Besides, the CAFS also foresees the development of improved fraud risk analyses and intelligence gathering and sharing, notably by the collection and analysis of cases in concrete sectors of EU funding and smuggling. The identification of fraud risk areas will thus be facilitated and formalised. The use of IT tools and fraud indicators is recommended as well as the development of secure platforms for the exchange of data. OLAF's operational experience can serve as the basis for the identification and definition of such indicators and best practices.

Other means are necessary in order to develop a comprehensive framework to fight organised crime more efficiently. First of all, one single definition of organised crime should be used at the EU level by the different agencies and institutions involved in combatting it, and it should be the one laid down in the Framework Decision on the fight against organised crime. As mentioned, Eurojust already uses this definition and Europol's definition is quite similar. OLAF does not formally use a specific definition of organised crime of its own. The internal analysis on cases presenting links with organised crime was based on the definition of the Framework Decision. Also, this definition is the only one enshrined in a legal instrument at the EU level.

This point is important for OLAF investigations but also to improve the cooperation between OLAF, Europol, and Eurojust. For OLAF investigations, it would help in further assessing the impact of organised crime on the Union's financial interests and the role of OLAF when it comes to countering it. The spectrum for analysis of the cases would then be larger and more efficient for future detection of the phenomenon and for its prevention. Also, a common definition would improve cooperation with Eurojust and Europol in so far as the communication and information exchange on cases between these bodies would be enhanced and lead to a more efficient system.

Secondly, and to complement the setting-up of a working definition for OLAF investigations, OLAF's cooperation with Europol should be increased by focusing more on organised crime; this is foreseen in the CAFS and in the legislation on reform of OLAF. Support and the exchange of information on how to identify and detect criminal organisations in fraud cases could only be an added value for OLAF investigations and for Europol's activities as well. As mentioned above, Europol has a specific mandate concerning the fight against organised crime and is quite active in collecting intelligence concerning these organisations. Its experience is an added value in the fight against organised crime in general. This should be combined with the experience and expertise developed by OLAF and Eurojust and the close and structured cooperation they have developed with national authorities.

The setting-up of a European Public Prosecutor's Office (EPPO) for the protection of financial interests would be a significant improvement in this area. The EPPO would be competent to investigate, prosecute, and bring to court cases of offences affecting the Union's financial interests.¹⁹ It would constitute the prosecution services corresponding to what OLAF is currently competent for (administrative investigations). It would be of great added value for the protection of the EU budget but also in the fight against organised crime considering the extent of the implication of criminal organisations in defrauding the Union's budget; as the internal analysis conducted by OLAF showed, the fight against offences affecting the Union's financial interests also includes the fight against organised crime – in so far as both are connected. The setting-up of the EPPO could help fight organised crime since investigations in anti-fraud cases would then be carried out from a European and potential cross-border perspective and would not be limited to a national context anymore.

In the end, the entire policy area of the protection of the Union's financial interests is relevant. Its reform will not only be of added value for the economy of the Union, but it will impact on many policy areas, notably on increasing police and judicial cooperation between and with the authorities of the Member States and on the fight against transnational crime. Several initiatives have been announced by the Commission.

The legal framework of OLAF is being reformed; the reform is to be adopted in early 2013 by the European Parliament, although the changes it brings about have already been implemented in OLAF. Finally, a package on strengthening the legal framework of the protection of the Union's financial interests is under preparation. The proposal for a Directive for protection by criminal law is currently being discussed at the Council; the Directive will define at the European level offences and levels of sanctions in the area of the protection of the Union's financial interests, including aggravated sanctions in case of offences committed in a criminal organisation.²⁰ A proposal to set up the EPPO is to be tabled in 2013, together with the reform of Eurojust according to Article 85 TFEU.

In the area under discussion, it is very important to address the link between organised crime and corruption. In June 2011, the Commission adopted the anti-corruption initiative: a periodic reporting mechanism assessing the Member States' efforts to tackle corruption. The idea is to pinpoint the difficulties and problems regarding corruption in the Member States but also to propose solutions. It is believed that this instrument will facilitate the exchange of best practices and reinforce mutual trust between Member States. The anti-corruption initiative is part of a wider anti-corruption package, the following instruments being based on the findings of these reports. Other proposals can be mentioned: the revision of the legal framework on the confiscation and recovery of assets; the revision of the public procurement directive, which was defined as a priority in the CAFS; the strengthening of the Commission's cooperation with Europol, Eurojust, and the European Police College (CEPOL).

Many improvements are needed and can realistically be provided to establish a more efficient framework for the concerned bodies in order for them to exercise their respective competences and mandates. They will lead to better transmission of information between European bodies but also with and between national authorities.

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1. OLAF was set up by the Commission Decision of 28 April 1999; its competences are defined by Regulation 1073/1999, O.J. L 136, 1999, p. 1.↩
 2. OLAF, Investigation Policy Priorities for 2012.↩
 3. O.J. C. 316, 1995, p. 49.↩
 4. *Ibid.*: "Nothing that fraud affecting Community revenue and expenditure in many cases is not confined to a single country and is often committed by organized criminal networks".↩
 5. European Council, *A Secure Europe in a Better World – European Security Strategy*, 12 December 2003 (Not published in the *Official Journal of the European Union*).↩
 6. Council Framework Decision 2008/841/JHA, O.J. L 300, 2008, p. 42.↩
 7. Article 1 of Council Framework Decision 2008/841/JHA.↩
 8. Article 2(a) of United Nations Convention against Transnational Organised Crime: "organised criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.↩
 9. „A structured organisation of more than two people; an existence enshrined in time; the commission of an offence punishable by imprisonment for a certain period; and a benefit that can be of financial nature."↩
 10. European Parliament, DG for Internal Policies, Policy Department D: Budgetary Affairs, "How does organised crime misuse EU funds", 2011.↩
 11. Sectors where no connection with organised crime was found in cases closed in 2009 and 2010: alcohol (but no case was closed in 2009 and 2010), EU bodies and agencies, external aid and precursors.↩
 12. It should be kept in mind that this analysis is based only on cases closed during the years 2009 and 2010. Therefore, general conclusions cannot be drawn on this sole basis.↩
 13. OLAF Report 2011, p. 27: http://ec.europa.eu/anti_fraud/documents/reports-olaf/2011/olaf_report_2011_en.pdf.↩
 14. OCTA 2011, p. 32: <https://www.europol.europa.eu/sites/default/files/publications/octa2011.pdf>.↩
 15. OLAF is not competent to investigate cases of euro counterfeiting or money laundering but still plays a major role by providing technical assistance and coordination.↩
 16. OCTA 2011, *op. cit.*↩
 17. European Parliament, Resolution of 25 October 2011 on organised crime in the European Union.↩
 18. European Commission, Communication on the Commission Anti-Fraud Strategy, 24.06.2011, COM(2011) 376 final.↩
 19. Article 86 of the Treaty on the Functioning of the European Union.↩
 20. This Directive aims at replacing and reinforcing the legal framework set up by the 1995 Convention and its Protocols.↩
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