

Asking the Right Questions: Interviewing in PIF Investigations

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Article

ABSTRACT

The current institutional set-up to fight EU fraud is considered unsatisfactory. With the creation of the EPPO, the definition of the offences it will investigate and prosecute, and the OLAF Regulation under revision, the EU has carved out a new institutional set-up. The objective, both from an administrative (OLAF) and criminal law perspective (EPPO), is to successfully investigate fraud and corruption affecting the EU's financial interests. In addition to institutional and legal implementing steps, it is also important to consider what needs to be put in place in order to ensure the future quality of investigations, especially from the training perspective. This article presents some observations from the operational field with regard to what is arguably one of the major tools for enhancing the quality of PIF investigations: interviewing suspects.

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I. Investigations Conducted by the EPPO

1. The EPPO's mission to investigate

The European Public Prosecutor's Office (EPPO) created in 2017¹ will be responsible for and conduct investigations regarding criminal offences affecting the financial interests of the Union.² The PIF Directive defined the offences this new EU body will investigate and prosecute.³ These criminal offences concern fraud, money laundering, corruption, and misappropriation affecting the Union's financial interests, inextricably linked criminal offences, and participation in a criminal organisation committing such criminal offences, as further defined by national law.⁴

The responsibility for investigations, prosecutions and bringing cases to judgment lies with the European Delegated Prosecutor (EDP) of the Member States where the focus of the criminal activity lies or in which the bulk of the offences has been committed.⁵

For serious offences, the EPPO should have access to a minimum set of investigation measures in every participating Member State, including the search of premises and computers, access to (computer) data and bank accounts, freezing of money, telephone taps, and tracking facilities.⁶ In addition, the EDP will also be entitled to order any other measure available under national law in similar national cases.⁷

The EPPO's investigations should be carried out in full compliance with the fundamental rights of the suspects. The latter have the right to be presumed innocent, to a fair trial, and to enjoy all the procedural rights of defence as provided for in the EPPO Regulation and national law.⁸

2. The national investigators

The EPPO Regulation puts the centre of gravity of investigations at the Member States level, with an EDP to work hand in hand with his/her national law enforcement authorities, in particular police, customs, and financial authorities.⁹ The EDP may instruct these authorities to undertake investigation and *other measures*, and, in accordance with national law, the latter shall ensure that all instructions are followed and carry out the measures assigned to them.¹⁰ The competent national authorities shall actively assist and support the investigations of the EPPO, guided by the principle of *sincere cooperation*.¹¹

3. OLAF's role

OLAF cannot open any parallel administrative investigation into facts investigated by the EPPO, but the latter can request OLAF to (actively¹²) *support or complement* an EPPO investigation as follows:¹³

- By providing information, analyses (including forensic analyses¹⁴), expertise, and operational support;
- By facilitating coordination of specific actions of the competent national *administrative* authorities and bodies of the Union;
- By conducting administrative investigations.

The Commission proposal for the amendment of Regulation 883/2013¹⁵ clarifies that OLAF can complement an EPPO investigation by facilitating the adoption of precautionary measures or of financial, disciplinary, or administrative action.¹⁶

The PIF Directive provides that the Commission (OLAF) shall provide such technical and *operational assistance* as the competent (not restricted to administrative) national authorities need to facilitate *coordination*¹⁷ of their investigations of PIF criminal offences.¹⁸ Such assistance should *not*, however, *entail the participation of the Commission (OLAF) in the investigation procedures* of individual criminal cases conducted by the national authorities.¹⁹

The Commission proposal confirms that OLAF may organise and facilitate cooperation, but also adds that it *may accompany competent authorities carrying out investigative activities* upon request of those authorities and may participate in Joint Investigation Teams.²⁰

II. Interviewing

1. Perceptions on interviewing

The importance of interviews in investigations, in general, and in financial investigations, in particular, is sometimes put in question. Recurring challenges are the idea that digital and forensic evidence are all-decisive and that active lawyers prevent the interviewee from giving – if any – a statement with added evidential value. Moreover, academic research over the past years has raised doubts as to the credibility of statements.²¹ While all legitimate, these claims beg for some nuance.

Digital and forensic evidence is definitely on the rise and crucial in many investigations, including PIF investigations (e.g., a confidential e-mail in a corruption case or a bank transfer in a fraud case). This does not, however, affect the fact that the statements of witnesses and suspects are still the most used pieces of evidence, which make these findings highly relevant and have great convincing power on the prosecutor and other decision-makers.²² If forensic evidence delivers the building blocks for evidence, statements are its cement.²³ The suspect interview, in particular, remains a very important part of the evidence presented in the prosecution of criminal cases.²⁴

This is particularly the case for PIF offences, where demonstrating criminal intent is crucial. Many offenders in PIF cases deny having a criminal intent rather than denying that a criminal event has occurred²⁵ and are particularly prone to presenting exonerations in regard to the seriousness of the facts or their culpability²⁶. The intentional nature of an act or omission in relation to PIF offences may be inferred from objective, factual circumstances,²⁷ but direct evidence obtained in a professional and strategic interview is likely to be more convincing. When a “lack of conclusive evidence” is invoked in the debate on the follow-up to OLAF’s judicial recommendations,²⁸ this would seem to refer to the absence of *mens rea* in many cases and needs to be probed during interview.

The expectation that the presence of (more active²⁹) lawyers during the interview would lead to an increase in not declaring or obstructing suspects has not been confirmed by several scientific studies.³⁰ On the contrary, they found that the presence of lawyers led to more professionalism on both sides of the table and, hence, more relevant interviews.

Interestingly, the same studies paint a scenario in complex investigations where the interview increasingly becomes part of the conclusive proceedings at the end of the investigation, which are focussed on the

confirmation or presentation of evidence gathered and characterised by an increase in influencing, persuasive, and negotiation tactics from the side of the defence.³¹

Finally, academia has rightly identified and highlighted the dangers of suggestive and manipulative interviewing techniques, in particular when they lead to false confessions by vulnerable persons. Referring mainly to several miscarriages of justice in murder cases involving a number of vulnerable suspects, this doctrine and jurisprudence does not immediately seem to affect PIF investigations. The EPPO's future suspects are not likely to readily make coerced false confessions.

2. Interview models

Investigative interviewing is the term used for a modern approach to interviewing, based on respect for every interviewee and the search for accurate and complete information. Key elements are establishing a "rapport" with the interviewee, gathering information by listening carefully to his/her account, and asking open questions.

Its main model is PEACE,³² developed in the UK in 1992 and recently put forward as a model of efficient and ethical interviewing by the UN.

Stemming from a different framework (common crime interviews for PEACE and the interrogation of detainees in the UN Protocol) and marked by strong opposition to accusing and manipulative methods,³³ neither the PEACE model nor the UN Protocol seem to have fully taken into account the specifics of interviewing in financial investigations (PIF offences).

Whereas the PEACE model already did not contain a separate chapter ("step") dedicated to how to obtain accurate and reliable admissions, the UN Protocol explicitly provides that "The aim of interviews must not be to elicit confessions or other information reinforcing presumptions of guilt or other assumptions held by the officers".³⁴

Moreover, and in line with some scholars,³⁵ an approach seems to be advocated where interviewers provide early and complete disclosure of evidence at the start of the interview. They hardly – if at all – challenge his/her account³⁶ and abstain from using any influencing or persuasion tactics.

Such restrictions on strategic and tactical interviewing can be seen as preventing the interviewer in PIF investigations from conducting an effective and fair investigation and making him fall short of the task of safeguarding the financial interests of the EU.

Scientific research commissioned in the aftermath of reports on interview practices in Guantanamo has identified and validated strategic and tactical interviewing techniques that are focussed on eliciting information in an intelligence setting.³⁷

Arguably more directly relevant for PIF interviews are the strong findings in the behavioural sciences on how people judge and take decisions (when uncertain). Researchers today agree that two structurally divided cognitive systems converge in regard to decision-making: an intuitive system (1) provides quick and often subconsciously influenced answers, based on rules of thumb, whereas another system (2) is capable of abstract, sequential, more rational thinking³⁸.

Whereas these ground-breaking insights are applied with growing success across different fields, they seem to be underused in interviews, even though their relevance cannot be denied. Interviewees are required to make a continuous series of choices and decisions (e.g., what to tell during the free account, how to react to

evidence presented, etc.); these are all likely to impact on or to be affected by these dual decision processes. Understanding how intuition and ratio during the interview intervene in, for instance, how the strength of evidence is perceived, how the framing of a question can result in better responses, or how an early commitment will have continued effects, allows for an interview approach that is both effective and respectful for the freedom of statement.

3. Training

If the EPPO was designed to achieve a higher level of professional skills and know-how, tailored to the specific needs of transnational financial crime,³⁹ the same should hold true for the professionals conducting its investigations. Further to earlier claims regarding the crucial need to set up the training of all legal practitioners involved in criminal investigations dealing with PIF offences,⁴⁰ this requires PIF interviewers to receive specific training in accordance with the highest professional standards.

When the investigation of white-collar crime is already complex⁴¹ and requires specialist contextual knowledge (e.g., tendering procedures, cost models), the profile of its suspects calls for specific interview skills and expertise, in particular for matching counter-strategies involving influence and persuasion.

Training needs are thus important and should be set up to guarantee consolidation of the trained skills, as these degrade in practice when there is no follow-up to feedback⁴². Such training could profit from OLAF's expertise.

In connection with on-going EU-financed research⁴³ or by inspiring targeted research, such training could also benefit from scientific, evidence-based support.

III. Conclusion

The success of the EPPO will depend largely on the quality of the work of its investigation partners. An important factor is the quality of interviews. OLAF has knowledge and expertise that could be offered to national authorities working with the EPPO when interviewing PIF suspects.

Such interviews should comply with ethical standards and procedural safeguards, respecting and protecting the physical and psychological integrity of the interviewees and aimed at gathering reliable, accurate, and complete information. This should not exclude the use of strategic and tactical interviewing techniques. Behavioural sciences offer evidence-based venues for such techniques, which are particularly relevant for PIF interviews.

In any event, training is crucial to the success of the EPPO. Interview training should be inspired by OLAF's legacy and backed up by scientific research.

1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('EPPO-Regulation').⁴⁴
2. Art. 4 EPPO-Regulation.⁴⁵
3. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198/29 – 28.07.2017 ('PIF-Directive').⁴⁶
4. Art. 22 of the EPPO-Regulation and Arts. 3(2) and 4(1, 2 and 3) of the PIF-Directive.⁴⁷
5. Art. 13 and 26(4) EPPO-Regulation.⁴⁸
6. Art. 30(1) EPPO-Regulation.⁴⁹
7. Art. 30(4) EPPO-Regulation and recital 71.⁵⁰
8. Art. 41 and recital 83 of the EPPO-Regulation, the latter referring to Arts. 47 and 48 of the CFR.⁵¹

9. P. Csonka, A. Juszczak, and E. Sason, "The establishment of the European Public Prosecutor's Office. The road from vision to reality", (2017) *eucrim*, 125, 127. ↵
10. Art. 28(1) of the EPPO-Regulation. ↵
11. Art. 5(6) EPPO-Regulation. ↵
12. Recital 69 of the EPPO Regulation. ↵
13. Art. 101(3) of the EPPO-Regulation. ↵
14. Recital 100 of the EPPO-Regulation confirms the interests in OLAF's operational analysis when it states that cooperation with (Europol and) OLAF should be of particular importance for the EPPO to draw on their analysis in specific investigations. ↵
15. European Commission, "Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations", COM(2018) 338 final ('Commission Proposal'), supported by a European Commission Staff Working Document, SWD(2017) 332 final. ↵
16. Art. 12e, 12f(1) and (2) of the Commission Proposal. ↵
17. See Art. 1(2) of Regulation 883/2013 for OLAF's mission to assist in organising coordination between competent authorities in the fight against fraud. ↵
18. Art. 15 of the PIF-Directive. ↵
19. Recital 23 of the PIF-Directive. ↵
20. Art. 12b(1) and (4) of the Proposal. ↵
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24. See, e.g., W.J. Verhoeven and E. Duinhof, *Effectiviteit van het verdachtenverhoor*, Politie & Wetenschap, Rotterdam: Erasmus School of Law, 2017, p. 19. ↵
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27. Recital 11 of the PIF-Directive. ↵
28. See, e.g., OLAF report 2017, p. 42. ↵
29. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings adopted on 22 October 2013 by the European Parliament and the Council (O.J. L 294, 6.11.2013, p. 1). ↵
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31. See Vanderhallen et al., *op. cit.*, pp. 153. ↵
32. See: <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing> ↵
33. Mainly the REID model used in the USA (see Inbau, F.E., Reid, J.E., Buckley, J.P. & Jayne, B.C. *Criminal interrogation and confessions*, Burlington, Jones & Bartlett Learning, 2013. ↵
34. Interim report, *op. cit.*, point 49. ↵
35. See, e.g., Pérez-Sales, "Drawing the fine line between interrogation and torture: towards a Universal Protocol on investigative Interviewing", (2017) 27(2) *Torture*, 1–11. ↵
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43. See, e.g., <http://www.law-train.eu/> and <http://valcri.org/>. ↵

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