

Criminal and Administrative Procedures in Protecting the Financial Interests of the EU

EPPO and OLAF – Cooperation by Design



European Law Forum: Prevention • Investigation • Prosecution

I. Introduction

Art. 86 of the Treaty on the Functioning of the European Union (TFEU)¹ introduced the possibility to establish a European Public Prosecutor's Office (EPPO), with the task of investigating, prosecuting, and bringing to judgement "the perpetrators of, and accomplices in, offences against the Union's financial interests". Leveraging on this article, 22 Member States notified the European Parliament, the European Council, and the European Commission of their decision to establish the EPPO via enhanced cooperation. As a result, Council Regulation (EU) 2017/1939 on the establishment of the European Public Prosecutor's Office ("the EPPO") was adopted and entered into force on 20 November 2017.²

Until that moment, the protection of the EU's financial interests had been ensured by the vigilance of the judiciary of the EU Member States and on the basis of the investigations of the European Anti-Fraud Office (OLAF). OLAF had the competence to conduct administrative investigations against fraud and any other illegal activity affecting the EU's financial interests.

The establishment of the EPPO as a single, independent, and transnational prosecution office drastically and effectively changed the jurisdictional landscape with regard to protecting the EU budget. The EPPO gained the material competence³ for investigating criminal offences listed in the so-called PIF Directive,⁴ namely:

- Fraud, including cross-border value added tax (VAT) fraud involving a total damage of at least €10 million;
- Active and passive corruption;
- Money laundering;
- Misappropriation of funds and assets.

II. Mandates and Powers

The introduction of a newly designated transnational judicial body in addition to the administrative body of OLAF resulted in the creation of a twofold system of protection: By applying both criminal law and administrative mechanisms, an even more effective system has been achieved that enables the fight against fraud and against the misappropriation of EU funds.

Despite having a common goal, however, the EPPO and OLAF have separate jurisdictions, with clear boundaries and limitations. Nonetheless, their operations are significantly intertwined, as criminal investigations are often opened by the EPPO on the basis of information obtained during an administrative investigation conducted by OLAF. Moreover, in several instances, the EPPO has sought assistance from OLAF during the course of its criminal investigations in order to execute administrative measures or complimentary administrative investigations. Before taking a closer inspection of the concrete cooperation between the EPPO and OLAF on the basis of their Working Arrangement, the main aspects differentiating the criminal and administrative procedures for handling investigations aimed at protecting the EU's financial interests will be defined.

1. OLAF's competence

OLAF has the mandate to investigate fraud and corruption involving EU funds, to investigate serious misconduct within the European institutions, and to develop a sound anti-fraud policy for the European Commission. According to Art. 8(1) of the OLAF Regulation,⁵ the institutions, bodies, offices, and agencies of the Union

must “transmit to the Office without delay any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union”.

OLAF exercises its powers by conducting both internal administrative investigations involving staff of EU institutions and external administrative investigations involving beneficiaries of EU grants, subsidies, and other forms of EU financing. At the conclusion of its investigations, OLAF can issue “recommendations” to competent administrative authorities (either to EU institutions or to authorities in the Member State(s) concerned) for the adoption of disciplinary/administrative/financial measures and/or the opening of judicial proceedings against perpetrators who have violated the rules protecting the EU’s financial interests.⁶ This approach is characterised by the fact that OLAF has no mandate to directly prosecute or impose any sanctions on the investigated persons or legal entities. Therefore, the Office must rely on EU institutions or the national authorities of the Member States to agree with the recommendations and subsequently proceed with the imposition of sanctions or the opening of criminal proceedings.

The recommendations issued by OLAF may include:

- Disciplinary measures, such as a reprimand, demotion, or dismissal;
- Administrative measures, such as amendments to contracts, changes in rules, and improvements to recruitment procedures;
- Financial measures, such as the recovery of disbursed funds, the imposition of financial penalties, and exclusion from procurement procedures;
- Judicial measures, such as a report to administrative judges or the competent national public prosecutor’s office.

2. EPPO’s competence

By contrast, the EPPO has the mandate to undertake investigations independently and carry out prosecutions before the competent national courts of the participating Member States until the case is finally adjudicated. Although the EPPO’s competence is regulated by Council Regulation 2017/1939, which effectively establishes the Office as a transnational judicial body, EPPO’s powers are regulated by the criminal law of the “participating” Member States, because it brings prosecutions before national courts and follows the national criminal procedures.

The internal criminal procedural architecture designed by the EPPO Regulation is centred around its three “organs”: the monitoring Permanent Chambers, the supervising European Prosecutors, and the European Delegated Prosecutors (EDPs). The EPPO Regulation sets out their interactions and introduces a mechanism of checks and balances within this system. While the Permanent Chambers guarantee a consistent application of the law across the 22 participating EU Member States, the supervising European Prosecutors coordinate and oversee the work of the EDPs during their investigations on the ground. Both the Permanent Chambers and the supervising European Prosecutors are based and operate out of the EPPO’s central office in Luxembourg.

EDPs are based in EPPO’s local (i.e. national) offices and have the same powers as national prosecutors with respect to the handling of criminal investigations. In compliance with Art. 13(1) of Regulation 2017/1939, and with exceptions limited to specific national procedural principles related to specific investigative measures (e.g. interception of communications and controlled deliveries of goods), all the investigative measures enumerated in Art. 30(1) of Regulation 2017/1939 should be made available to the EDPs in all the 22 participating Member States via national criminal procedural legislation.

3. The “end-to-end prosecution cycle” and the new “joint investigation mechanism”

The goal pursued by the EU legislator was to create an “end-to-end” prosecution cycle by means of procedural integration of the powers vested with the EPPO and OLAF. This enables both criminal penalties, such as imprisonment, and administrative and financial sanctions, such as asset forfeiture and the restoration of damages caused by the violations. Thus, this newly established holistic approach to the prosecution of crimes against and to administrative violations of the financial interests of the EU increases the ability of EU bodies to effectively tackle crime, to secure punishment of the criminal perpetrators and, lastly yet importantly, to provide an effective mechanism for recovery of misused funds.

However, for the sake of a proper investigation, administrative and criminal investigative work may overlap. We must also bear in mind that the territorial competence of the EPPO limits the collection of evidence to the 22 participating Member States, while OLAF’s territorial competence covers the territory of all EU Member States. The EPPO’s limited territorial competence creates an additional gap that is only partially solved through the implementation of measures deriving from the general principle of sincere cooperation in respect to non-participating Member States and the mechanisms of mutual legal assistance in respect to third countries, respectively.

The apparent overlapping of mandates requires sound cooperation between the two institutions, which is highlighted by Art. 101 of Regulation 2017/1939, according to which the “EPPO shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange”. This article led to the conclusion of a Working Agreement between the two institutions in order to facilitate their investigative and prosecutorial mandates, with a special focus on coordination, information exchange, and mutual support.⁷

Coordination is vital in view of respecting the principle of non-duplication in investigations. The discontinuity of OLAF’s investigations must be guaranteed if the EPPO is conducting an investigation into the same facts, especially against the background of the *ne bis in idem* principle (as enshrined in Art. 50 CFR, Art. 54 CISA, and Art. 4 Prot. No. 7 ECHR). The *ne bis in idem* principle also applies to “administrative sanctions” if the so-called “Engel criteria” as established by ECtHR case law are met for an act. This requires an examination of “the legal classification of the offence under national law, the [...] very nature of the offence, and [...] the degree of severity of the penalty that the person concerned risks incurring”.⁸ If the criminal nature of the sanction is confirmed accordingly, administrative sanctions, which might be applied on the basis of OLAF’s recommendations, can preclude the possibility of conducting a criminal investigation at a later stage and exclude the opportunity of issuing and enforcing genuine criminal sanctions. In order to limit the risks of incurring in such violations of the *ne bis in idem* principle, Art. 101(2) of the EPPO Regulation stipulates that, if the EPPO is conducting a criminal investigation, “OLAF shall not open any parallel administrative investigation into the same facts”.

In order to mitigate the risks of violating the *ne bis in idem* principle, the Working Arrangement between OLAF and the EPPO has introduced a measure facilitating complementary investigation on the part of OLAF. The EPPO can request that OLAF conduct a “complementary” investigation in parallel to its own criminal investigation. At the same time, OLAF can itself propose the initiation of complementary action to the EPPO. Such complementary action grants OLAF the possibility to address fundamental elements of the administrative process in order to effectively ensure the protection of the EU’s financial interests, in particular in terms of speedy recovery, the adoption of administrative precautionary and conservative measures, and the drafting of structural recommendations to improve internal control and fraud detection processes. This strategy can

be applied to all cases in which weaknesses during OLAF's administrative investigations are identified, e.g. the disbursement of funds and procurement procedures.

The synchronization of activities between the two investigative EU bodies represents a fundamental added value for the comprehensive approach towards protecting the EU budget, introducing what could be described as a new EU "joint investigation mechanism" in the field of the protection of the European taxpayers' money. From a more practical perspective, the coordination between the two bodies is indispensable in order to plan investigative actions. This is necessary to ensure that the evidence gathered may be fully admissible in criminal proceedings before the national courts of the Member States. It entails the need to respect high standards of data protection, to respect the rights of the individual (in particular his/her right to legal assistance and representation), and to comply with the limitations imposed by the holders of information (e.g. the Member States) that is shared in the course of such investigations.

III. Conclusion

Art. 101(3) of the EPPO Regulation stipulates the following:

"The EPPO may request OLAF [...] to support or complement EPPO's activities, in particular by:
(a) providing information, analyses (including forensic analyses), expertise and operational support; (b) facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union; (c) conducting administrative investigations".

This provision is possibly the most remarkable example of the EU legislator's intention to create a combined system through which the two bodies of the EU responsible for investigating fraud and other offences damaging the EU budget (i.e. the EPPO and OLAF) are enabled to improve the effectiveness of prosecution and conviction of suspects. It also effectively enhances the concrete recovery of defrauded funds and damages caused by the criminal conduct.

The fact that the EPPO may request OLAF to conduct specific conservative actions and support the criminal investigation by making available its technical and analytical expertise as well as by carrying out activities, such as on-the-spot checks and inspections and applying further coercive measures (within the limits of its administrative mandate), illustrates the vast potential and interlinked nature of the architecture of this new criminal and administrative "EU joint investigation mechanism".

1. Consolidated version of the Treaty on the Functioning of the European, O.J. C 202, 7.6.2016, 82–83. ↪
2. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31.10.2017, 1. ↪
3. Art. 22 of Council Regulation (EU) 2017/1939. ↪
4. 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, 28.7.2017, 29. ↪
5. Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, O.J. L 248, 18.9.2013, 1. ↪
6. Art. 11 of Regulation (EU, Euratom) No 883/2013, *op cit.* (n. 5) as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013 as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, O.J. L 437, 28.12.2020, 49. A consolidated version of Regulation 883/2013 is available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0883-20210117>> accessed 6 February 2022. ↪
7. The Working Arrangement between OLAF and the EPPO was signed on 5 July 2021 and applied as of 6 July 2021. It is available at: <https://anti-fraud.ec.europa.eu/system/files/2021-09/working_arrangement_olaf_eppo_en_9cb679e4cb.pdf> accessed 6 February 2022. For the Arrangement, see also: N. Kolloczek and J. Echanove Gonzalez de Anleo, "The European Anti-Fraud Office and the European Public Prosecutor's Office: A Work in Progress", (2021) *eucrim*, 187-190. ↪
8. ECtHR (GC), 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03, paras. 52-53; see also H. Satzger, "Application Problems Relating to "Ne bis in idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR", (2020) *eucrim*, 213-217; G. Lasagni and S. Miran-

dola, "The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law", (2019) *eucrim*, 126-135. For the "Engel criteria", see also the article by L. Bachmaier, "Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court", in this issue. ↪

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