Interinstitutional Relationship of European Bodies in the Fight against Crimes Affecting the EU's Financial Interests

Past Experience and Future Models

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I. Protecting the EU's Financial Interests: A Shared Responsibility in a Complex Enforcement Environment

The protection of the EU's financial interests (PIF) implies a shared responsibility on the part of both the Union and the Member States. In this respect, Art. 325 para. 1 TFEU recalls the multiple levels of cooperation required to counter and combat fraud and other illegal activities affecting the financial interests of the Union.

We can identify at least three levels or dimensions of cooperation in the PIF domain:

- The horizontal cooperation between the EU actors holding specific PIF responsibilities;
- The horizontal cooperation between the competent national authorities of the Member States;
- The vertical cooperation between the aforementioned EU actors and the competent national authorities of the Member States.

The intertwining of these three dimensions, coupled with the inherent cross-sectoral nature of the PIF domain[1] – in-between the administrative and the criminal law field – shapes a complex enforcement environment. In this environment, the realization of the ultimate objective – the effective protection of the EU's financial interests – may be constantly threatened by potential failures in the coordination of the actors at any of the three levels. Also, the efficiency of the enforcement process can be affected by unnecessary duplications of efforts.

While the vertical cooperation between the EU and national actors has been extensively analyzed (particularly, in respect of its failures), the horizontal cooperation between EU actors has received less academic and institutional consideration. This contribution will focus on the cooperation between the main existing EU actors holding enforcement responsibilities in the PIF sector. Therefore, the relationship between OLAF and Europol as well as between OLAF and Eurojust is further explored in the following.[2]

The analysis of this trilateral relationship will follow three strands of reflection: cooperation and synergies in information exchange and intelligence (infra 2.); cooperation and operational synergies (infra 3.); and the future scenario determined by the establishment of the European Public Prosecutor's Office (infra 4.).

At the outset, two preliminary remarks need to be made.

Firstly, the material competence of the three actors with regard to crimes affecting the financial interests of the Union may potentially overlap,[3] but their tasks and enforcement powers are still different: in this context, it must be recalled that Europol and Eurojust can intervene only when a case involves two or more Member States, while OLAF can also deal with purely internal cases.

Secondly, it cannot be overlooked that, as opposed to the two agencies in the field of Justice and Home Affairs, OLAF can conduct its own administrative investigations (both internal and external) into an alleged PIF case. Such a circumstance, to a certain extent, may have an influence and differentiate the "enforcement attitude" of the three EU actors.

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II. Information Exchange and Intelligence Synergies between OLAF, Europol, and Eurojust

An initial reflection should start with the synergies in information and intelligence exchange between the three existing enforcement actors: OLAF, Europol, and Eurojust.

The combination of analytical resources and expertise between OLAF and Europol, for instance through the sharing of criminal intelligence about the structures and techniques involved in committing PIF crimes, could contribute to improving the general detection and reaction capabilities of the enforcement system as a whole.

The current state of the art, however, presents certain limits, with regard both to the "patchwork nature" of provisions on the exchange of information between the EU actors as well as to the still fragmented data protection regimes that are applicable.[4]

The essential framework for the information exchange between OLAF and Europol is still provided by an administrative agreement concluded in 2004.[5] It allows for a bidirectional exchange of strategic[6] and technical[7] information but not of personal data.[8]

A future structural bilateral exchange of personal data between the two entities will be possible after the conclusion of a new agreement;[9] in particular, OLAF's access to and the subsequent exchange of information stored by Europol will be possible on the basis of a "hit/no hit" system: in case of a "hit" in the Europol Information System, Europol will have to initiate the procedure to share the related information with OLAF.

Two caveats, however, will apply in this context: any sharing, indeed, will be possible "only to the extent that the data generating the hit are necessary for the performance of [...] OLAF's tasks"[10] and, most importantly, in accordance with the restrictions indicated by the provider of the information.[11] This last condition could imply that the information and data provided to Europol by the Member States might present very different degrees of availability to OLAF, for instance when the providing Member State opposed a general limitation to the exchange of the information with non-judicial or non-police authorities.

A further issue that concerns informative synergies belongs to the possibility to associate OLAF's experts to specific Europol Focal Points[12] (in particular those on cigarette smuggling, intellectual property, and VAT fraud), previously foreseen under Art. 14 para. 8 of the 2009 Europol Decision[13] and not recasted in the new Europol Regulation. It cannot be ruled out, however, that such an opportunity to enhance analytical synergies might still be regulated in the new working agreement between OLAF and Europol.

The information exchange between OLAF and Eurojust is currently based on a cooperation agreement signed by the two entities in 2008.[14] In contrast to the agreement with Europol, the Eurojust agreement expressly allows for the exchange of personal data.[15]

Under this framework, the OLAF and Eurojust are able to preliminarily exchange general information ("case summaries") in order to identify cases for collaboration[16] and, as a second step (once the cases have been identified and cooperation has begun), to exchange "case-related information" that may include personal data.

Strategic information – meaning intelligence on structures, links, *modus operandi,* and forms of financing of organizations involved in the commission of PIF offences – can be shared as well.

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Beyond the formal legal framework, however, it cannot be ignored that the institutional relationship between OLAF and Eurojust has actually been a troubled one, marked – especially at its beginning – by a latent antagonism between the two entities[17] and by a certain reluctance on the part of the Member States to share information on criminal investigations and prosecutions with a non-judicial entity.[18]

III. Operational Synergies and General Improvements of Enforcement in the Current Scenario

Beyond the informative level, operational synergies between the three main EU actors is marked by their involvement in Joint Investigation Teams (JITs),[19] by the possibility of achieving a better joint coordination of the national authorities, and by increasing the chances of a national judicial follow-up of coordinated cases.

Firstly, OLAF, Europol, and Eurojust can separately or jointly promote a JIT, by recommending its establishment to the national authorities when the information they possess indicates its usefulness. As to the participation of OLAF, Europol or Eurojust in JITs, all the different cooperation agreements concluded by the three actors provide that, whenever possible, each party should inform the other about its involvement in a JIT relating to fraud, corruption, or any criminal offence affecting the Union's financial interests.[20] In addition, in the case of the Eurojust-OLAF agreement, each party is also required to propose inviting the other party to join the JIT to the Member States.

Secondly, with regard to the possibility of achieving a better joint coordination of the national authorities involved in a case, several provisions already allow for the consultation[21] and association of the other relevant EU actors in the coordination activities. It should be noted, however, that, in the current Eurojust Decision, the possibility to involve OLAF in the coordination of investigations and prosecutions for PIF crimes is still conditional upon the non-opposition of the national authorities.[22]

Thirdly, the judicial follow-up of OLAF's recommendations has been defined the "Achilles heel"[23] of the PIF enforcement system: the most recent statistics provided by OLAF on the actions taken by national judicial authorities following an OLAF recommendation present an unchanged average indictment rate of 47%.[24] From this perspective, a closer operational synergy between OLAF and Eurojust might potentially positively impact the attitude of the national authorities. Eurojust, through its national members, might persuade the national judicial authorities to launch a criminal proceeding following OLAF's recommendation.[25] It must be born in mind, however, that, in the current scenario, Eurojust intervention against the national judicial authorities can only succeed through persuasion or consensus: Art. 85 para. 1 (a) TFEU,[26] indeed, only refers to the possibility for Eurojust to "propose" the initiation of prosecutions to the competent national authorities, yet without involving binding powers.[27]

The foregoing considerations on the judicial follow up of OLAF's administrative investigations leads me to the third part of my reflections: the future scenario and horizontal cooperation between the EU actors after the establishment of the European Public Prosecutor's Office.

IV. Future Scenario Following the Establishment of the EPPO

The establishment of the European Public Prosecutor's Office (EPPO) will represent a radical change in the PIF enforcement environment in all of its dimensions: in particular, it will inevitably reshape the cooperative relationship between the existing EU actors. For the purpose of the following reflections, I will focus on the

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relationship of the EPPO with Europol and with Eurojust and on the future role of OLAF. In doing so, I will refer to the latest available version of the draft text currently being negotiated in the Council.[28]

1. The relationship with Europol

The relationship between the EPPO and Europol is foreseen by Art. 86 para. 2 of the Treaty on the Functioning of the European Union (TFEU). [29]

According to the Treaty, the EPPO will carry its tasks (investigate, prosecute and bring to judgment perpetrators of PIF offences) "where appropriate, in liaison with Europol". At a first sight, this vague wording had also suggested the idea of Europol as a sort of *police judiciaire* of the EPPO. However, the express exclusion of direct and coercive powers of investigation upon Europol (Art. 88 para. 3 TFEU) put a significant limit to the viability of such an option.

In any case, Europol's informative and intelligence support might prove essential for the activities of the future EPPO: not an armed wing, but a well-connected brain.

Nonetheless, the current provisions on cooperation with Europol as foreseen in the draft Regulation on the EPPO appear rather minimal. They mainly refer the modalities of collaboration to the conclusion of a future working agreement and require – in a general way – Europol to provide information and analytical support upon request of the EPPO.[30]

2. The relationship with Eurojust

The relationship between the EPPO and Eurojust is also established by the TFEU.[31] The EPPO, according to a much debated provision[32], should be established "from Eurojust". After the Commission's Proposal it is clear that the two entities will coexist and shall develop a "special relationship".

The relationship between these two actors will be characterized by several specific aspects and dependent on several circumstances. A first peculiarity would derive from the fact that the EPPO may be established by way of enhanced cooperation. In this scenario, the EPPO will need to resort to Eurojust in order to ensure coordination of its activities with the authorities of the non–participating Member States.

Furthermore, the need for cooperation will also depend on the scope of the competence of the EPPO with regard to the so-called "ancillary offences."[33] The stricter the competence assigned to the EPPO regarding these offences, the more it will need the support and assistance of Eurojust to coordinate related national investigations and prosecutions and to avoid inconsistent – or even detrimental – outcomes.

The current Art. 57 of the draft text of the EPPO Regulation shapes the general terms of this "special" relationship: Eurojust, in particular, should be associated to the EPPO activities in order to facilitate the transmission and execution of MLA requests towards non-participating Member States and third countries and to share information on investigations, including personal data. In regard to this latter need for information and intelligence synergies, the draft text provides the EPPO with indirect access to the Eurojust Case Management System on a "hit/no hit" basis.[34]

3. The future role of OLAF

While the original Commission proposal on the EPPO foresaw a strong limitation of OLAF's role, the new negotiating text reshapes the relationship between the criminal law and the administrative actors in terms of complementarity.[35]

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Complementarity mainly implies that OLAF should not, in principle, conduct administrative investigations into the same facts being investigated by the EPPO, unless the EPPO either decides to dismiss the case or expressly requires OLAF's support.[36]

To this end, Art. 57a of the draft text specifies the possible contents of such OLAF on-call support by referring to the following issues:

- the provision of information, analyses, expertise, and operational support;
- the coordination of specific actions of the competent national administrative authorities;
- the performance of administrative investigations.[37]

Ultimately, OLAF might potentially play a consultative role in the context of certain decisions of the EPPO, such as the exceptional exercise of its competence with regard to PIF offences causing damage under 10,000 euros, according to the current Art. 20 para. 2 of the draft text on the EPPO Regulation.[38]

V. Conclusions

The current architecture of PIF enforcement at the EU level presents several complexities: this contribution tried to briefly highlight the possible synergies between the EU Actors holding responsibilities in this peculiar field. Notwithstanding certain positive elements pertaining to information exchange and operational cooperation can be already retraced in the current scenario, fragmentation yet appears as the main feature of the existing legal framework.

In this perspective, the future establishment of the EPPO could in principle bring more coherence and reduce the risks deriving from the work of "too many hands" on the same issue: nonetheless, the actual success of such scenario and the persisting need and degree of involvement of different EU Actors in the enforcement process will ultimately depend by the concrete design of the EPPO, by the definition of its material competence and by the geographical scope of its jurisdiction[39].

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1. See in this regard the Commission Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money, COM (2011) 293 final, p. 8.↩
2. Potentially, several relevant other actors in conjunction with the protection of the EU's financial interests can be identified at the EU level. Just to provide some examples, a relevant role could be played by the European Court of Auditors and the DG DEVCO of the European Commission with regard to the detection of fraud involving development aid. Furthermore, at the level of EU agencies, the role of Frontex – and of the future European Coast and Border Guard – in providing operational information and intelligence on incidents occurring at the external borders and involving smuggling of cigarettes or other goods subject to custom duties should not be underestimated; Frontex has already cooperated with OLAF and Europol in a number of Joint Custom Operations (JCO) involving neighbouring third countries, such as the 2015 JCO Romoluk II; see OLAF Report 2015, p. 19.↩
3. According to its establishing decision (Decision 1999/352/EC), OLAF is competent: (a) to combat fraud, corruption, and any other illegal activity adversely affecting the Community's financial interests; (b) to investigate serious facts linked to the performance of professional activities that may constitute a breach of obligations by officials and servants of the Communities, likely to lead to disciplinary and, in appropriate cases, criminal proceedings. Europol today is expressly competent on crimes against the financial interests of the Union, according to Annex I to Regulation 2016/794/EU. The competence of Eurojust follows that of Europol: according to Art. 4 para. 1 lit. a) of the current Eurojust decision (2009/426/JHA), the material competence of the Agency is automatically and dynamically ("at all time") adapted to Europol's material competence.↩
4. OLAF's data protection regime is governed by Regulation 45/2001/EC. Europol's data protection regime and supervision have been strengthened by the recent reform, while Eurojust is still subject to specific data protection rules provided in its establishing decision and subsequent amendments. With regard to proposed Eurojust reform and to the proposal for the establishment of the EPPO, see the EDPS Opinion of 5 March 2014. In general, on this issue, see F. Boehm, Information Sharing and Data Protection in the Area of Freedom, Security and Justice. Towards Harmonised Data Protection Principles for Information Exchange at EU-level, Berlin 2012, p. 256.↩
5. The Administrative Agreement between Europol and OLAF was initially based on a previous Cooperation Agreement concluded between the European Commission and Europol in 2003. Nowadays, Art. 13 of the new Regulation 883/2013 on OLAF's investigations expressly enables the Office to conclude administrative arrangements with Europol and Eurojust in order to exchange operational, strategic, and technical information, including personal data. The new agreement with Europol is still under discussion in the context of a Joint Europol/OLAF Working Group, see the OLAF Report 2015, p. 22.↩

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6. Strategic information is defined by the agreement as information on trends in criminality, on the operational structures of the organizations implicated in the relevant criminal activities, and on the links existing between them as well as information on the strategies, the modus operandi, and the financing of these organizations.↩
7. Technical information is defined as information on technical investigation tools, on methods in treatment and analysis of data, and on IT equipment or knowledge.↩
8. A temporary arrangement for the exchange of personal data had been provided by the (now repealed) Art. 22 para. 3 of the 2009 Europol Decision (Council Decision 2009/371/JHA).↩
9. See Art. 13 of Regulation 883/2013/EU (new OLAF Regulation) and Art. 21 of Regulation 2016/794/EU (new Europol Regulation).↩
10. See Art. 21 para. 2 Regulation 2016/794/EU.↩
11. According to Art. 19 para. 2 of Regulation 2016/794/EU Member States, Union bodies, third countries, and international organizations can determine any restriction on the access or the use of such information at the moment of providing the information to Europol.↩
12. According to the Europol New AWF Concept – Guide for MS and Third Parties, 2012, p. 5, a Focal Point is: "an area within an Analysis Work File (AWF) which focuses on a certain phenomenon from a commodity based, thematic or regional angle. It allows Europol to provide analysis, prioritise resources, ensure purpose limitation and maintain focus on expertise."↩
13. See A. Weyembergh, I. Armada, C. Brière, The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area, Study for the LIBE Committee of the European Parliament, 2014, p. 37.↩
14. Practical Agreement on arrangements of cooperation between Eurojust and OLAF, 2008. For an analysis of the contents of the agreement, see V. Covolo, L'émergence d'un droit penal en réseau. Analyse critique du système européen de lutte antifraude, Baden-Baden 2015, p. 408 ff. A previous and unsuccessful Memorandum of Understanding was signed in 2003.↩
15. The agreement distinguishes between the exchange of "case summaries" (point 5 of the Agreement) and the exchange of "case-related information" (point 6 of the Agreement). While "case summaries" expressly exclude personal data, "case-related information" may also involve personal data.↩
16. Factors indicating the need for collaboration – and triggering the exchange of "case summaries" – are indicated under point 5 of the Eurojust-OLAF Agreement.↩
17. On this point, see A. Weyembergh, I. Armada, C. Brière, op. cit. (n. 13), p. 39 and V. Covolo, From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?, eucrim, 2/2012, p. 85.↩
18. Such reluctance surfaced in the original Recital 5 of Council Decision 2002/187/JHA establishing Eurojust: "[The College] should take full account of the sensitive work carried out by Eurojust in the context of investigations and prosecutions. In this connection, OLAF should be denied access to documents, evidence, reports, notes or information, in whatever form, which are held or created in the course of these activities, whether under way or already concluded, and the transmission of such documents, evidence, reports, notes and information to OLAF should be prohibited." This recital was removed by the 2008 amendment of the Eurojust Decision.↩
19. For the Joint Investigation Teams, see Council Framework Decision 2002/465/JHA. Recital 9 of the FD expressly refers to the possibility of involving representatives from Europol, OLAF (and Eurojust) in a JIT.↩
20. See point 5 of the 2004 Administrative Arrangement between Europol and OLAF; point 9 of the 2008 Practical Agreement between Eurojust and OLAF; and, more generally, Art. 6 of the 2009 Agreement between Eurojust and Europol.↩
21. See, for instance, Art. 21 para. 5 of the new Europol Regulation (2016/794/EU).↩
22. See Art. 26 para. 4 of the consolidated Council Decision 2009/426/JHA (Council doc. 5347/3/09 REV 3). Art. 42 para 2 of the latest draft negotiating a text for the new Regulation on Eurojust (Council Doc. 6643/15) generally states that OLAF shall contribute to Eurojust's coordination work regarding the protection of the Union's financial interests.↩
23. See A. Weyembergh, I. Armada, C. Brière, op. cit. (n. 13), p. 32 and K. Ligeti, M. Simonato, The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?, New Journal of European Criminal Law, Vol. 4 (2013), p. 8.↩
24. See OLAF Report 2015, p. 29, Figure 22. The data relate to the OLAF recommendations issued between 1 January 2008 and 31 December 2015.↩
25. See A. Weyembergh, I. Armada, C. Brière, op. cit. (n. 13), p. 42.↩
26. Art. 85 para 1 (a) TFEU includes, between the tasks of Eurojust, the initiation of criminal investigations and proposes the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union.↩
27. In this regard, see A. Weyembergh, The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU, New Journal of European Criminal Law, Vol. 2 (2011), p. 75 et seq..↩
28. The most recent consolidation of the draft text is contained in the Council Doc. 11350/1/16 REV 1 of 28 July 2016.↩
29. "In a rather mysterious way," according to A. Weyembergh, I. Armada, C. Brière, op. cit. (n. 13), p. 56.↩
30. See Art. 58 of the consolidated draft text.↩
31. Art. 86 para. 1 TFEU states that the European Public Prosecutor's Office may be established "from Eurojust."↩
32. For the debate and the possible interpretations on establishing the EPPO "from Eurojust", see J. Monar, Eurojust and the European Public Prosecutor Perspective: From Cooperation to Integration in EU Criminal Justice?, in: Perspectives on European Politics and Society, Vol. 14 (2013), p. 350 and K. Ligeti, A. Weyemberg, The European Public Prosecutor's Office: Certain Constitutional Issues, in: L.H. Erkelens / A.W.H. Meij / M. Pawlik (eds.), The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon, The Hague 2015, p. 69.↩
33. The current Art. 17 para. 2 of the draft negotiating text defines ancillary offence as "any other criminal offence which is inextricably linked to a criminal conduct falling within the scope" of the ordinary material competence of the EPPO. The exercise of competence for ancillary offences, however, is an exception and is authorized only under the conditions provided by Art. 20 para. 3. On this aspect, see also C. Deboyser, The European Public Prosecutor's Office and Eurojust: 'Love Match or Arranged Marriage?', in: L.H. Erkelens, A.W.H. Meij, M. Pawlik, op. cit., p. 85.↩
34. The system of indirect access on a "hit/no hit" basis replaced the original and more ambitious proposal of a "mechanism for automatic cross-checking of data" between the two case management systems; see Art. 57 para. 3 of the Commission's Proposal on the establishment of the EPPO, COM (2013) 534 final and Art. 41 para. 5 of the not yet coordinated General Approach on the Eurojust Reform Regulation, Council doc. 6643/15 of 27 February 2015.↩

35. It is worth noting that between the Commission's Proposal and the current negotiations in Council also the nature of the material competence of the EPPO on PIF crimes has been modified from exclusive to shared with the Member States. A. Weyembergh, I. Armada, C. Brière, op. cit. (n. 13), p. 53, noted that the perspective of a shared competence changed the situation not just in regard to the role of Eurojust but also of OLAF.↩
36. See the Recitals 98 and 100 and the Artt. 33 para. 4 and 57a of the draft negotiating text.↩
37. According to Art. 57a para. 5 the EPPO should also obtain indirect access on a "hit/no hit" basis to OLAF's case management system (CMS). The reciprocal indirect access of OLAF to the EPPO's CMS is not foreseen in the current draft text, but the same provision specifies that the EPPO shall inform OLAF whenever a "hit" occurs.↩
38. Art. 20 para. 2 of the current draft negotiating text, requires that, where appropriate, the EPPO shall consult the competent national authorities or Union bodies, in order to establish whether the criteria allowing for the exceptional exercise of the competence under the 10.000 Euros damage threshold are met.↩
39. For some critical considerations on the current design of the EPPO, see K. Ligeti, A. Marletta, The European Public Prosecutors' Office: What Role for OLAF in the Future?, in: Z. Durdević / E. Ivičevic Karas (eds.), European Criminal Procedure Law in Service of the Protection of the European Union Financial Interests: State of Play and Challenges, Zagreb 2016, p. 53 ff.↩

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