

From Europol to Eurojust

Towards a European Public Prosecutor... Where does OLAF fit in?



Article

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CITATION SUGGESTION

V. Covolo, "From Europol to Eurojust",
2012, Vol. 7(2), eucrim, pp83–88. DOI:
<https://doi.org/10.30709/eucrim-2012-002>

Published in

2012, Vol. 7(2) eucrim pp 83 – 88

ISSN: 1862-6947

<https://eucrim.eu>



Arts. 85, 86, and 88 TFUE opened up a rich debate on the construction of the European criminal law area. What role will OLAF play in the future as regards the possibilities offered by these new legal bases? The question may surprise those who are not familiar with OLAF's activities. Indeed, OLAF carries out administrative, not criminal investigations.¹ Its competences do not cover only offences but, in a wider sense, irregularities adversely affecting the financial interests of the EU.² Above all, Regulation 1073/99 explicitly states that OLAF's investigations shall not affect the powers of Member States to initiate criminal proceedings.³ From this point of view, the question can be restated as a more provocative one: does OLAF fit in the landscape of the European criminal law area?

I. OLAF as a Link between Administrative Investigations and Prosecution

To answer this question, we first need to establish the relevance of OLAF's activities to the criminal law protection of the EU's financial interests. Regulation 1073/99 is careful to define the administrative character of its investigations. In particular, OLAF is competent to investigate illicit activities committed both by European civil servants and by economic operators when the EU budget is at stake. The first category of cases refers to internal investigations conducted within the EU institutions,⁴ while the second covers external investigations.⁵ As regards the latter, OLAF inherited from the Commission the power of carrying out on-the-spot checks and inspections on the premises of economic operators within Member States.⁶ To this end, OLAF can avail itself of the same inspection facilities as national administrative inspectors.⁷ However, it may only request the assistance of national authorities that are free to take precautionary measures in order to safeguard evidence or to take coercive measures in cases where an economic operator refuses to provide access to premises and documents. Similarly, when investigations indicate that a criminal offence has been committed, OLAF recommends that national prosecuting authorities follow-up the case on a judicial level without obliging them to start prosecution.

Despite the limits on its investigative powers, OLAF's operational activity is intrinsically linked to criminal legislation and law enforcement authorities involved in the fight against fraud. The link is inevitable with regard to the scope of its investigations: as soon as an irregularity⁸ constitutes an intentional infringement criminalised by domestic law, it leads OLAF to cooperate with national police and judicial authorities. Regulation 1073/99 also stresses the need to ensure that OLAF's findings could be used to prosecute the case when the circumstances call for it. For this purpose, OLAF forwards to the competent authority a final case report that contains precise allegations, findings, as well as recommendations about the appropriate follow-up.⁹ A unit composed of magistrates has been created within the Office with the task of transferring the case file to national disciplinary and judicial authorities. In complex transnational cases, OLAF also cooperates with Eurojust and Europol. In conclusion, OLAF participates even at the very early stage of criminal proceedings.

What does such relevance to criminal law represent in practice? As statistics show,¹⁰ OLAF recommends a judicial follow-up in around 40% of the cases opened. However, the effective prosecution of fraud, which national authorities are asked to ensure, is usually described as the Achille's heel of the fight against fraud. Between 2006 and 2008, less than 7% of OLAF's investigations led to a judicial decision, whether sentences or acquittals. However, this figure is not entirely reliable due to the lack of empirical data. First, there is currently no obligation for Member States to inform OLAF of the measures undertaken at the national level. Second, national statistics do not usually distinguish between general fraud cases and those detrimental to the EU's financial interests. Third, fraud itself is defined differently in the various European national systems.

Although it remains difficult to assess, the lack of judicial follow-up is the key issue that a European Public Prosecutor's Office (EPPO) may solve. What then is the added value of OLAF?

II. Added Value of OLAF

First of all, OLAF's know-how provides valuable input as to the design of anti-fraud instruments.¹¹ The information collected contributes to the development of the anti-fraud policy, legislative measures, and fraud-proofing mechanisms. OLAF's experience may identify aspects that usually hinder a judicial follow-up of fraud investigations, e.g., a behavioural norm that is not punished under domestic law, strict rules of evidence, or simply a national judicial policy that does not consider fraud against the EU budget as a priority. The proposal amending Regulation 1073/99 underlines the importance of the monitoring activity by suggesting that Member States report actions undertaken by national authorities when OLAF recommends to them the follow-up of the case.¹²

Second, the EU budget is a complex and technical field. In order to detect and deal with fraud cases, the competent authorities need to be familiar with the functioning of the European financing system as well as with the methods of fraud. In these cases, OLAF's experience and knowledge could help national authorities in the prosecution of a case. In particular, its officers can testify as witnesses or experts in front of national courts.¹³

Third, OLAF is responsible for coordinating complex fraud cases, including when third countries are involved.¹⁴ Its Europe-wide view is helpful in dealing with cross-border investigations. Thus, the Office can play a crucial role in promoting standards as well as improving cooperation with those States. Since 2008, for instance, an OLAF representative has been posted in China with the aim of ensuring a daily contact with the Chinese law enforcement authorities.

Fourth, its core operational activity consists of exerting autonomous powers of investigation. The director general can independently open a case and decide to carry out an investigation.¹⁵ Thus OLAF's operational activity overcomes to some extent the reluctance that Member States show in combating fraud. On this point, the added value of OLAF has been particularly demonstrated with regard to internal investigations and direct expenditure.

III. Towards a Comprehensive Approach

Despite its added value, OLAF's work still suffers from significant limitations that may be explained by a range of factors. During its early years, OLAF's resources and time were also employed in closing investigations opened by its predecessor, UCLAF. The accession of new Member States to the EU increased the number of fraud cases tenfold. OLAF must also rely on national authorities in order to prosecute fraud. Finally, some controversial cases, e.g., the Eurostat case¹⁶ and the Tillack case,¹⁷ brought to light dubious investigating practices. Improving the effectiveness of investigations, reducing their length, guaranteeing the rights of persons under investigation as well as those of informants and whistle blowers has increased OLAF's accountability: these are the objectives the proposal amending Regulation 1073/99 intends to achieve.¹⁸

While the reform of the procedural framework is a necessary and significant step forward, it is not sufficient to achieve the efficiency of anti-fraud investigations. OLAF still faces differences between national substantive law and procedure, difficulties in cooperating with national authorities. Accordingly, OLAF's activities should also be analyzed as regards the entire construction of the European criminal law area. This is all the more important insofar as its competences overlap those of other supranational agencies.

Compared to Europol's activity, OLAF analyses trends and methods used to commit fraud.¹⁹ Compared to Eurojust's role, OLAF also interacts directly with national judicial authorities. The overlapping tasks allocated to the three bodies leads OLAF, Eurojust, and Europol to work together. Therefore, the more consistent the European criminal law area would be in conferring to each body powers and tasks, the more successful their cooperation would be.

This may seem obvious. However, the three actors were created in a piecemeal fashion.²⁰ After Europol, Eurojust, and OLAF were created, the main concern was to ensure cooperation with national authorities. Policy-makers did not pay much attention to the relationship between the EU bodies. Nevertheless, the protection of EU financial interests falls within the competences of each of them. As a result, while the tasks of Europol, Eurojust, and OLAF overlap, they encounter difficulties in cooperating together. The lack of cooperation between OLAF and Europol is a prime example.

IV. Lack of Cooperation between OLAF and Europol

Europol was established for the purpose of improving police cooperation between the Member States and thus collaborates with the same law enforcement authorities OLAF liaises with. Its activity consists of collecting, storing, and processing intelligence Europe-wide in order to facilitate the exchange of information between competent authorities of the Member States. Thus, OLAF may anticipate that the possibility of sharing intelligence with Europol would be invaluable for its investigations.²¹ According to the Europol decision, Member States agreed that there is a necessity for the European Police Office to establish and maintain cooperative relations with the European institutions, including OLAF. Europol and OLAF signed an administrative agreement to this end in 2004.²² The agreement has the objective of organizing the exchange of strategic information, intelligence, and technical information in areas of common interest.

Nevertheless, the cooperation between OLAF and Europol is surprisingly limited.²³ A first explanation can be found in the activities both institutions perform: Europol's work focuses on gathering and analysing information, whilst OLAF also has the power to independently open and conduct investigations. Moreover, in the late 1990s, part of the Commission still had the idea that Europol was more interested in combating drug trafficking and terrorism than wider EU fraud cases. Recently, the joint operation Diabolo II demonstrated how cooperation between supranational bodies can lead to successful results through cooperation on customs issues.²⁴ The operation was coordinated by OLAF, with the support of Interpol and Europol, which enables cross-checking of information provided by national custom authorities. While such an example proves that a closer and more frequent cooperation between OLAF and Europol is feasible, the current legal framework still prevents them from exchanging personal data – OLAF and Eurojust already communicate this kind of information to each other. The ongoing discussion launched by the Commission on data protection rules could be an interesting starting point for exploring the issue by adopting appropriate standards of data protection.

V. Improving the OLAF-Eurojust Partnership

The situation is slightly different with regard to Eurojust. OLAF and Eurojust are empowered with overlapping tasks: both bodies may intervene as contact points for national prosecution and law enforcement authorities when they deal with cross-border criminality adversely affecting the EU budget. Indeed, OLAF not only provides the national judicial authorities with input necessary to start prosecution when it actively exerts its powers of investigation. When investigations are carried out at the national level, OLAF may also intervene in order to ensure coordination by facilitating the exchange of information between the national authorities involved (so-called "coordination cases").²⁵ It can further provide the Member States with assistance when

the competent national authorities carry out criminal investigation (so-called “criminal assistance cases”).²⁶ For these purposes, OLAF is in direct contact with national police and judicial authorities.

Instead of encouraging cooperation, the overlap between Eurojust and OLAF’s tasks led first to antagonism.²⁷ No sooner was the former created as a provisional unit in 2001 than the latter appointed a magistrate’s unit with the purpose of liaising directly with national judicial authorities. Eurojust regretted that OLAF was not informing the agency at an early stage about the cases the Anti-fraud Office transmitted to national judicial authorities, while OLAF felt that fraud was an issue which did not have the same level of priority as terrorism or organised crime for Eurojust. The competition between the two bodies may also be due to the fact that they embodied different models of European integration in the field of criminal law: OLAF as a communitarian and Eurojust as an intergovernmental response for coordinating prosecution Europe-wide. We should not forget that the EPPO was first conceived on the basis of Art. 280 TEC (the same legal basis used later for the establishment of OLAF), whilst Eurojust was originally perceived as rival to the EPPO.

Against this political background, OLAF and Eurojust signed a Memorandum of Understanding in 2003,²⁸ which was replaced by a new agreement in 2008.²⁹ The two bodies shall inform each other on any case of common interest, exchange all necessary information within the limits of confidentiality and data protection rules, and coordinate the assistance activities they offer to national judicial authorities. For this purpose, the agreement defines a procedure for exchanging case summaries in order to identify the situations in which cooperation is suitable. The exchange of information concerns both strategic and personal data. On this point, the agreement contains some specific provisions that regulate the security of documentation, data communicated, and the rights of data subjects. However, the issue still raises difficulties. First, there is the need to comply with confidentiality of judicial investigations regulated at the national level. Second, the current European legal framework is split into different standards of data protection inherited from the former pillar structure. The adoption of a comprehensive legal framework as suggested by the Commission may clarify the situation, as regards both enhancing the transfer of personal data and clarifying the rights of individuals. Finally, OLAF and Eurojust meet regularly and have the possibility to set up operational liaison teams consisting of their respective staff.

Nonetheless, there is still room for improvement. Only five cases were officially communicated to Eurojust by OLAF between 2004 and 2009, and, even if the bodies share information about cases of potential interest, only a few investigations led to a real follow-up.³⁰ Recent developments still show the common will of OLAF and Eurojust to collaborate closely. The need for cooperation is expressly mentioned in Art. 26 of the 2009 Eurojust decision.³¹ The possibility of negotiating a new cooperation agreement is also taken into consideration.³²

Such a renewed interest is clearly fostered by the key role Eurojust will play according to the new treaties. In 2012, the Commission plans to present a regulation proposal, with the aim of empowering Eurojust to initiate criminal investigations.³³ Above all, Art. 86 provides a legal basis that allows for the creation of an EPPO, which may be competent to deal with criminal offences adversely affecting the EU’s financial interests. While OLAF often complains about the reluctance shown by some Member States to start criminal prosecution, it can reasonably expect an effective judicial follow-up of its investigations by strengthening the partnership with Eurojust. The implications go even beyond cooperation if an EPPO is established.

VI. OLAF and a European Public Prosecutor

According to Art. 86 TFEU, the EPPO shall be responsible not only for prosecuting and bringing to judgement but also for investigating perpetrators of offences against the EU’s financial interests. The latter task overlaps with OLAF’s mandate to carry out investigations related to irregularities that might also constitute

criminal offences. Therefore, could OLAF's role be sustained even after the setting-up of an EPPO? The elimination of OLAF has to be taken into consideration, all the more so as it is mentioned neither by the new treaty nor in the Stockholm programme. But some authors have painted a much more optimistic picture. The question arises as to whether OLAF might be given judicial investigation powers it could exert under the direction of the EPPO.³⁴

Transforming OLAF into a sort of European police unit will certainly provoke fierce criticism by some Member States. Let us assume that such a solution would be chosen: does the treaty provide decision-makers with a legal basis for assigning judicial investigative powers to OLAF? *De lege lata*, OLAF is established on the basis of Art. 325 TFEU. In its new formulation, the last sentence of the former Art. 280 TCE was omitted, which prevented the European legislator from adopting on that basis measures concerning the application of national criminal law or the national administration of justice. However it would be difficult to argue that empowering OLAF with judicial investigative powers falls within the scope of Art. 325, whilst Art. 86 specifically aims at empowering the EPPO with judicial powers including those for the pre-trial investigation phase. Consequently, Art. 325 merely allows for administrative investigations. In addition, it is worth noting that Art. 85 states that Eurojust can request prosecution on the basis of operations conducted and information supplied by the Member States' authorities and by Europol. No mention is made of OLAF or any other investigative body.

The sole possibility for OLAF to gain criminal investigation powers is to become an investigative unit of the EPPO. Art. 86 is rather vague, however, concerning any powers the EPPO would have, and it does not explicitly refer to any type of European police taskforce. Assuming that OLAF becomes such a unit acting under the lead of the EPPO, what would its scope of competences cover? On the one hand, if OLAF continues to carry out external investigations, it risks entering into competition with national police authorities. On the other hand, some authors stress the added value of internal investigations that OLAF could carry out even as a unit of the EPPO. Ultimately, OLAF will be detached from the European Commission and act under the direction of the EPPO. Such a solution would ensure both its full operational independence and its reliability, as long as judicial review of its acts is ensured through judicial control over the EPPO.

VII. Towards Institutional Reforms

Having identified the complementary and overlapping tasks allocated to the EU bodies, we shall now consider OLAF's institutional reforms. After the first proposal modifying Regulation 1073/99, different solutions were already pointed out.³⁵

The first scenario retains OLAF as a separate entity. As long as OLAF continues to be based on Art. 325 TFEU, it will remain in charge of administrative investigations. What could then change? Recently, President Barroso asserted in the political guidelines for the next Commission that OLAF must be given full independence outside the Commission.³⁶ Indeed, from an administrative point of view, OLAF is part of the European Commission. It only enjoys independence as regards its investigative activities. One may, however, question the wisdom of this semi-autonomous status. In particular, the large majority of internal investigations precisely involves the Commission. The latter takes the initiative in suggesting a list of candidates for the position of OLAF's Director-General and, ultimately, OLAF is still subject to its evaluation. All these aspects raise doubts as to its full impartiality.³⁷ A possible solution would be to give OLAF the status of a European inter-institutional office according to Art. 174 of Regulation 1605/2002.³⁸ In this case, the OLAF units participating in the design of legislative instruments would remain part of the Commission. However, this scenario does not help us as regards the relationship between the EU bodies involved in the fight against fraud. The protection of the EU's financial interests will still be problematic in the face of overlapping tasks, the duplication of efforts, and wasted resources.

A second scenario puts special emphasis on the synergies that link OLAF with Europol. The merger between the two bodies was suggested in a notable report from the French Parliament³⁹ and further analysed by the House of Lords in 2004.⁴⁰ In order to rationalise the current system and consequently increase its coherence, Europol and OLAF may form a single agency responsible for gathering and analysing strategic intelligence to which national police authorities would address their requests. The question of sharing information between two separate bodies would consequently disappear. There is, however, a clear gap in the competences of the two bodies: while OLAF enjoys operational powers of investigation, Art. 88 of the TFEU only confirms Europol's role as an intelligence agency. The provision expressly states that the application of coercive measures shall be the exclusive responsibility of the competent national authorities. Should OLAF become part of Europol, it would not be empowered with investigating powers. Consequently, we shall also consider the possibility of bringing OLAF closer to Eurojust.

For this purpose, the third scenario aims at foreseeing the role of OLAF in assuming that an EPPO is emerging from Eurojust. However, many questions still remain unanswered: what exactly does establishing it "from Eurojust" mean; would it be specifically responsible for prosecuting fraud and corruption detrimental to the EU's financial interests or, in a broader sense, serious transnational crime; what kind of powers will it have; would it be a decentralised body or a fully supranational one? All these questions open up a plethora of possibilities that will influence the future of OLAF. Concerning the "optimistic" institutional reform we have already described, OLAF would become an investigative unit of the EPPO. Its status could then be defined as an auxiliary of justice⁴¹ that would provide the EPPO with its expertise capacity. According to some authors, it would even be possible to afford OLAF certain investigative powers by placing it under the responsibility of the EPPO.⁴² Minor fraud cases involving European civil servants would be subject to disciplinary proceedings carried out by the Investigation and Disciplinary Office of the Commission (IDOC). However, this scenario tends to reproduce at the supranational level the functioning of a continental criminal justice system in which a judicial body holds the responsibility for investigations with the power of issuing instructions to the investigating police. The ongoing discussions about the implementation of Art. 86 indicate that this is far from being the only model by which to establish an EPPO.

These observations lead us to a last scenario. The EPPO would certainly provide fraud and corruption cases with a more effective judicial follow-up insofar as it would be responsible for deciding on the committal proceedings. In this case, it would be difficult to further sustain the role of OLAF. This is why its elimination as an administrative investigating office must also be considered. Nevertheless, it is worth mentioning that the legislator might choose to enhance the powers of Eurojust instead of implementing Art. 86 TFEU. Again, the upcoming developments will serve to guide the discussion.

VIII. Conclusion

In conclusion, the ongoing debate on the implementation of Arts. 85 and 86 of the new treaty offers the opportunity to rethink the entire architecture of the European criminal law area as well as the future of OLAF. The current uncertainty enables us to consider different solutions: full independence of OLAF outside the Commission in the short term, a merger of OLAF with Europol, OLAF as an investigative unit of the EPPO, or simply OLAF disappearing in the long term. Its institutional reform can provide us with a possibility for clarifying its role and recognising it as a full actor in the European criminal law area. Nonetheless, such reform must not be twisted by the political objective to increase the EU's competences in criminal matters. We should not forget that civil and administrative law mechanisms could also be used as effective tools to tackle fraud.⁴³ Only this approach will prevent decision-makers from putting the institutional reform of OLAF

in a sort of “fly bottle” where European anti-fraud policy is no longer able to consider any other solution than criminal law.

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The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



Co-funded by
the European Union