

The New Frontier of PFI Investigations

The EPPO and its Relationship with OLAF



Article

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ABSTRACT

The piece explains how Regulation (EU) 2017/1939 creates the EPPO—the EU's first true criminal investigation and prosecution office—focused on crimes affecting the Union's financial interests (PFI) as defined in the PFI Directive (EU) 2017/1371. Set up via enhanced cooperation (20 participating states), the EPPO has a central level (Chief Prosecutor + College) and European Delegated Prosecutors operating nationally. While cross-border work is a step beyond classic mutual recognition, the absence of a single EU criminal procedure leaves tensions between *lex fori* and *lex loci*, and a complex decision system (Permanent Chambers) whose efficiency will be tested in practice.

On EPPO–OLAF relations, the article stresses complementarity: OLAF remains an administrative investigator whose reports can feed national criminal cases, and—per Art. 101 EPPO Reg.—should not run parallel admin inquiries when an EPPO criminal case is open, though close information exchange is expected. OLAF's role stays crucial (especially with non-EPPO EU and third states) and its investigative experience, databases, and financial follow-up can add clear value to EPPO operations. Overall, loyal cooperation—not institutional overlap—is framed as the “new frontier” for protecting the EU's financial interests.

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I. Introduction

On 20 November 2017, twenty days after its publication in the Official Journal of the European Union, Regulation 1939/2017 establishing the European Public Prosecutor's Office – commonly referred to as the EPPO – entered into force. It is the most advanced stage in the creation of a common criminal justice area in the EU, as the EPPO is a true prosecutor's office for conducting criminal investigations. It is – from the outset – not a coordination office, like Eurojust, and it is not an office for administrative investigations, like OLAF, but indeed a criminal investigation and prosecution office. The field in which the EPPO is competent to conduct such investigations is precisely the protection of the Union's financial interests,¹ the so-called "PFI area." It addresses specific offences concerning the revenue and expenditure of the Union's budget, as defined in Directive 1371/2017 (the so-called PFI Directive).² Once more, the PFI area proves to be the most important sector in EU law involved in the creation of a true area of European criminal justice.

To date, the establishment of the EPPO completes a development, the start of which is traditionally seen in the ruling of the European Court of Justice in the 1989 "Greek Maize" case, when the Union's criminal law was born and advanced. This always happened with a view to the creation of a common legal and judicial space. In all honesty, however, one cannot be completely enthusiastic about the approved version of the EPPO Regulation yet, because further steps could have been accomplished.

This opinion will be made clearer in the following, when we will go through some of the most significant parts of the EPPO regulation: the EPPO's powers and structure, the cross-border investigations and the relationships with the other existing bodies of the EU dealing with investigations and judicial cooperation, especially with OLAF.

II. The EPPO: General View

1. Powers and structure

At first, it should be recalled that the EPPO Regulation originates from a European Commission proposal of 17 July 2013.³ When comparing the text of this Commission proposal and the final version of the regulation, several differences now become clearly apparent. One of the most striking, even symbolic, difference is that Art. 25 of the proposal explicitly proclaimed the establishment of a "single legal area" as the objective of the EPPO investigations. This provision genuinely envisaged the practical accomplishment of the concept of "common European legal space."

However, the above-mentioned article no longer appears in the final version of the regulation. In the negotiations, the Member States agreed to rule it out, as they do not entirely share such an idea. It has also come to pass that not all EU Member States have decided to join the new office. In line with Art. 86 TFEU, the EPPO has been approved with enhanced cooperation, which allows a closer cooperation on certain subjects only among a limited number of Member States. To date, twenty Member States decided to join the EPPO on this basis. The United Kingdom, Ireland, and Denmark (which, according to the Treaty, already enjoy a specific regime on criminal justice issues), but also Poland, Malta, Sweden, and Hungary are not taking part to it, in addition – at least and at present – to a founding State of the EEC, the Netherlands (although there might be some expectation that they will join at a later stage⁴). Twenty states, however, are still a significant number for establishing an office that will carry out criminal investigations in the field of the protection of the EU's financial interests.

The EPPO will consist of two layers: a central level and a decentralised one. The central office, based in Luxembourg, will comprise the European Chief Prosecutor and – unlike the 2013 proposal – a college of twenty prosecutors: one for each participating Member State. However, so-called European Delegated Prosecutors will carry out investigations exclusively at the local level. They are members of the national judiciary as regards their administrative status, but, when dealing with an “EPPO case,” they will operationally belong to the European office.

2. Cross-border investigations

The critical point of the described entire structure of the EPPO is cross-border investigations. In principle, a common European legal area, in the true sense of the word, requires the same procedural rules regardless of the state in which an investigation is carried out, especially once a single investigation office is set up. The EPPO Regulation, however, does not foresee any sort of European criminal procedural code. It is true that the 2013 proposal was also lacking such common rules, but it at least tried, in Art. 26, to provide for a unification of investigative measures, by establishing the conditions and pre requisites for their adoption at the European level.

The practical problem that arises concerns which law is applicable when European Delegated Prosecutor, conducting an investigation into allegations of crime that took place in the territory of his home country, needs to carry out some investigative actions in another Member State. According to Art. 31 of the EPPO Regulation the European Delegated Prosecutor who is handling the case “shall decide on the adoption of the necessary measure” and then “assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.” The regulation does the split between the EPPO acting within one territorial area and national sovereignty. On the one hand, the solution of the regulation is certainly more advanced than any cooperation instrument so far used, including the European Investigation Order.⁵ This is an example of language that truly represents the office’s unity beyond geographic barriers. On the other hand, the problem of the applicable law remains. In the absence of a common procedural law, the regulation seeks to achieve a difficult balance between *lex fori* and *lex loci*, tending to favour the latter (Art. 32) but without prejudice to the different level of guarantees that may be provided for in national legislation. The system is certainly not an expression of a common legal area, namely the “single legal area” mentioned in the Commission proposal of 2013. It leaves fully open the differences that national laws can engender regarding the adoption and execution of individual investigative measures. The contradiction of this system with the unity of the investigative office is, therefore, even greater.

The decision-making system within the investigation also seems rather complicated. The functioning of the “Permanent Chambers” mitigates the foreseeable disproportion of workload among the European Prosecutors at the central level, depending on the number of cases opened by the European Delegated Prosecutors. In principle, a Permanent Chamber could take a decision on a case involving a legal system whose European Prosecutor is not sitting in that chamber. In order to ensure proper knowledge of the legal system involved in the case, Art. 10 para. 9 of the EPPO Regulation stipulates the following: “In addition to the permanent Members, the European Prosecutor who is supervising an investigation or a prosecution in accordance with Art. 12(1) shall participate in the deliberations of the Permanent Chamber.” In some cases, the European Delegated Prosecutor may also attend the Permanent Chamber’s meeting (without any right to vote). The compatibility of a sort of “collegial” decision-making system in a prosecutorial office with the requirements of efficiency and speediness in an ongoing criminal investigation remains to be seen; only practice will show how effective it is in counteracting crimes that the EPPO must pursue.

These few aspects already show the dilemma between starting with something imperfect, but still existing, or waiting for a text that fully corresponds to the ideal. Of course, even ten years ago – after failure of the

2004 European Constitutional Treaty following the referendums in France and the Netherlands in 2005 – the concrete establishment of the European Public Prosecutor's Office appeared very difficult, despite the studies and analysis that preceded its inception, e.g. the "Corpus Iuris" project (1997–2000), directed by *Prof. Mireille Delmas-Marty* and, more recently, the project for the creation of EPPO "model rules" (2011–2012), directed by *Prof. Katalin Ligeti*.⁶ Against this background, the approval of the Office's founding regulation is certainly an important achievement for those who care about European integration and the creation of an authentic area of criminal justice in the Union. Nevertheless, regret remains that the Office was not set up in a more ambitious way, in full expression of the concept of a common legal area referred to above. This was not completely achieved, and some aspects of the future functioning of the EPPO, such as relations with national authorities, as well as with European bodies, especially Eurojust and OLAF, need to be verified in practice.

III. Relationship with OLAF

The EPPO's relationship with the other important body for the protection of the Union's financial interests, OLAF, is a very interesting and sensitive issue. OLAF conducts administrative inquiries in the PFI area, including the possibility to transfer its investigation report and related evidence to the national judicial authorities for admission in criminal proceedings under the national legislations. The OLAF Regulation stipulates that the OLAF report has the same value as the reports drawn up by the national administrative authorities in each national jurisdiction.⁷ OLAF is therefore a body – indeed the only body in the Union prior to the EPPO – which has the task of carrying out effective investigations in the area of the protection of the EU's financial interests – albeit of an administrative nature. In this sense, it can be considered the true progenitor of the new office, despite the formulation of Art. 86 TFEU that envisages that the EPPO should be "established from Eurojust".

From the time of drafting of the Commission proposal in 2013, the problem of relations between the two offices was analysed, in order to avoid the risk of having two bodies with overlapping investigative powers in the same matter, although both operate on two different levels. Art. 101 of the EPPO Regulation is the starting point for looking at the relationship between the two bodies; it establishes the general principle that no parallel administrative investigation led by OLAF be carried out when a criminal case at the EPPO is open. It also draws a line on the cooperation between the two offices in terms of exchanging information, in situations requiring assessment in relation to the concrete case, without excluding the possibility of parallel and simultaneous investigations.

Hence, the first, basic conclusion that can be drawn from the text of the EPPO Regulation is that OLAF will not disappear because of the EPPO's establishment. Regarding OLAF's role in the upcoming scenario, we have to keep in mind, however, that the final text of the regulation derives from the Commission proposal of 2013. In this proposal, the EPPO central level was smaller; no college of the prosecutors was foreseen but just a Chief Prosecutor and four prosecutors. The rest of the central office was composed of administrative and investigative staff. Indeed, under the proposal, the central department of the EPPO was empowered to carry out criminal investigations directly, albeit in specific, exceptional, and limited situations. In these cases, the plan was for the central office that the prosecutors could avail themselves of the investigative experience of investigative staff, which was supposed to be transferred from OLAF. In this version, therefore, it was planned that OLAF substantially contributes to the EPPO by also supplying part of its investigative staff for the limited cases in which the EPPO central office would be carrying out investigations personally in a single legal area.

The underlying provisions of the proposal supporting this idea were vastly modified in the final version of the Council. Regulation 2017/1939 does not provide any possibility for the EPPO central office to carry out

investigations through European investigative staff. This might raise a number of questions as to OLAF's future, considering that the EPPO will have the power to carry out criminal investigations in the same substantial matter. However, the existence and continuing role of OLAF (and also Eurojust) in relation to the EPPO is necessary for at least two reasons:

The first reason is purely geo-political. The establishment of the EPPO through the mechanism of enhanced cooperation implies non-adherence to the office of all the EU Member States as mentioned above. The EPPO will have to deal with three categories of States:

- a) "EPPO States," all belonging to the European Union;
- b) "Non-EPPO states," but still members of the European Union;
- c) "Non-EPPO States" that are not members of the European Union.⁸

For investigations involving the second and third category of States where the EPPO cannot directly take actions in their territories, the coordination and facilitation action by bodies such as OLAF (and Eurojust) will remain essential, as it is the case today, even though there is a diversity of legal frameworks that will distinguish relations with the last two categories of States.

The second reason is that OLAF has some specificities that will make it very much involved in the relationships with the EPPO, although Art. 86 TFEU only refers to Eurojust. They are, as already mentioned previously:

- a) the field of action: both OLAF and the EPPO deal with offences in the framework of the PFI area;
- b) the powers: they both have effective investigative powers and not just coordination powers.

IV. Conclusion

So far, OLAF was the only European investigative body in the PFI area. It is true that OLAF investigations are on the administrative, not criminal, side. Under Art. 11 of Regulation 883/2013, however, an OLAF report (with evidence gathered during the enquiry) can be transferred to the judicial authorities, and used in criminal proceedings. OLAF has so far also been the only European body that has the power to carry out investigations into offences (affecting the Union's financial interests) in a European common space and to let evidence circulating in the same common space. These two features bring OLAF much closer to the new European investigation and prosecution office than any other European body in the field of judicial cooperation.

The EPPO would do well to make use of the OLAF's experience in the PFI field, within the scope of Art. 101 of the EPPO Regulation: as regards the exchange of information, OLAF can certainly provide added value in investigations to protect the Union's financial interests.⁹ Today, OLAF already deals with several issues alongside the investigations in the PFI area. We recall the management of databases with information on fraud or the "financial follow-up" of cases, which involve not only the administrative investigations but also specifically the criminal ones that are carried out in the Member States.

In sum, the current legal framework still leaves a wide margin for the co-existence of the two bodies – a loyal and close cooperation between them is highly recommended. The future ahead of us is thus very exciting.

The coming years, during which the EPPO will be made operational, will be sure to reveal more about the new frontiers of the protection of the Union's financial interests – a sector that deserves to be deeply analysed.

1. M. Scholten and M. Luchtman, Law Enforcement by EU Authorities: Implications for Political and Judicial accountability, 2017; A. Bernardi and D. Negri, Investigating European Fraud in the EU Member States, 2016. ↵
2. A. Juszczałk and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)", (2017) *eucrim*, 80. ↵
3. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17.7.2013. ↵
4. See the news section on EPPO, in this issue. ↵
5. Cf. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. L 130, 1.5.2014, 1. ↵
6. See K. Ligeti (ed.), "Toward a prosecutor for the European Union. A comparative analysis" Volume I, Oxford et al., 2013. ↵
7. See M. Simonato, "OLAF Investigations in a Multi-Level System. Legal Obstacles to Effective Enforcement", (2016) *eucrim*, 136. ↵
8. Commonly referred to as "third countries". ↵
9. See also: European Parliament, Policy Department for Budgetary Affairs – Directorate General for Internal Policies of the Union, *The future co-operation between OLAF and the European Public Prosecutor's Office*, June 2017. ↵

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