OLAF at the Gates of Criminal Law

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ABSTRACT

The article analyses OLAF's future role in light of the establishment of the EPPO under Regulation 2017/1939. Although OLAF remains focused on administrative investigations, its mandate will increasingly intertwine with EPPO criminal proceedings under a "complementarity model." Klement highlights key challenges: avoiding duplication of work, ensuring secure and efficient information exchange, and reconciling the different natures of administrative vs. criminal investigations. The risk of inadmissible evidence, conflicts of competence, and strained relations with non-EPPO states is significant. To be an effective EPPO partner, OLAF must raise its standards of guarantees and judicial control, gain easier access to financial data, and ideally acquire legal personality to reinforce its independence and accountability. The conclusion: OLAF now stands "at the gates of criminal law" and requires reform to fully support and complement the EPPO.

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I. Introductory Remarks: OLAF and the Setting of the EPPO

There were certain periods in the past that brought expectations of change in the legal position and powers of OLAF (hereinafter also referred to as "the Office") together with the entire layout of the system of protection of the Union's financial interests. Since establishment of the Office, the expected changes seemed to be inextricably linked with the destiny of the European Public Prosecutor's Office (the "EPPO"). The first proposals concerning the project of the European Prosecutor[1] were later rejected, however, and had no effect on functioning of OLAF.

Discussions affecting the future existence of the Office gave OLAF a strong motivation and the ambition to play a decisive role in designing the EPPO. The actual influence of the Office would not be diminished, even if OLAF were to be "just" absorbed by the EPPO[2] and become one of its chambers.[3] Art. 86 TFEU envisaged, however, the establishment of the EPPO from Eurojust, and it became obvious that international judicial cooperation and financial investigations were two different disciplines. In this context, OLAF, unlike Eurojust, disposed of a well trained staff, functioning administration, and technical background. The Office was particularly interested in building up the EPPO when model studies on a more authoritative European Prosecutor appeared.[4] Later on the interest declined, when ideas about such a model were ultimately abandoned and it became clear that the EPPO would be designed in a decentralised manner. In addition, it appeared that OLAF was to further exist as a separate body, was not to investigate into the same facts (unless requested by the EPPO), that it would focus on the investigation of administrative irregularities, and that it would only assist and support the EPPO. This co-existence is referred hereinafter as the "complementarity model".[5]

Apparently overlapping competences of the future EPPO and OLAF gave even rise to opinions that OLAF might not be needed anymore[6] or that it would be possible to significantly reduce its staff, budget, and capacity. But, if we look into the problem a little more closely, we inevitably come to the opposite conclusion.

II. OLAF's raison d'être

After the adoption of Regulation 2017/1939 ("the EPPO Regulation"),[7] the EPPO will mainly deal with investigations of carrousel fraud/missing trader fraud/VAT fraud involving €10 million and above as well as criminal offences infringing the financial interests of the EU above €10,000 according to Art. 22 of the EPPO Regulation. OLAF will retain its competence to investigate irregularities and acts on suspicions of fraud, corruption, or any other illegal activity affecting the financial interests of the EU. The Commission is counting on OLAF – especially as regards investigations into VAT fraud[8] – not to mention the recent adoption of the "PIF Directive",[9] which broadened the criminal law competence for the protection of the EU's financial interests and expanded the scope of OLAF investigations to cover VAT. Of course, OLAF will keep its exclusive powers in the field of internal investigations[10] and continue to proceed with coordinating the actions of the Member States' authorities in so-called "coordination cases."[11] The Office will still join national administrative investigations opened on its request and take part in so-called mixed inspections.[12] All these actions have remained and will stay in place in the course of administrative proceedings, because only a small percentage of OLAF's agenda concerns clearly criminal cases or, in other words, only a very small percentage of OLAF investigations are followed up by criminal proceedings in the Member States.

In addition to the existing powers and corresponding competences, however, OLAF will be obliged to broadly assist the EPPO in preparatory steps for investigations of criminal offences. The Office will also assist the EU

institutions, bodies, offices, and agencies with the preliminary evaluation of suspicions of offences to be reported to the EPPO. OLAF (together with Eurojust and Europol) will be obliged to actively support the investigations and prosecutions of the EPPO, which in turn will supply OLAF with information on cases falling outside the competence of the EPPO but in which an administrative follow-up or recovery would be desirable. This solution – to refer a case to OLAF after its dismissal by the EPPO[13] – may become particularly popular at the EPPO in order to show that the EU authorities did not completely abandon the case (and the rights or interests of the damaged party).[14]

III. Challenges Ahead

1. Challenges from the complementarity model

Notwithstanding, the established complementarity model (see above) will entail several problems and challenges. It will be particularly demanding on the exchange of information and on the compatibility of the case management systems of both OLAF and the EPPO. The necessity of the information exchange also requires building secure lines between Brussels and Luxembourg, as it will have to run electronically and remotely. The same holds true for cooperation and coordination of work in the EPPO, OLAF, and EUROPOL triangle.[15] It should be noted that the entire system of protection of the financial interests of the EU needs a certain extent of authoritative coordination and supervision.[16]

The aim of the complementarity model is to avoid duplication of work. Indeed, OLAF shall not open any parallel administrative investigation into the same facts[17] if the EPPO is already conducting a criminal investigation. It may also be derived from the EPPO Regulation that OLAF should even discontinue its already initiated investigation if such another exists. The key points are, however, the time needed for assessment before concluding that a particular case falls within the competence of the EPPO and the nature of both administrative and criminal investigations.

In the new architecture of protection of the financial interests of the EU, OLAF will continue to analyse and assess information coming from various sources (including from the EPPO) in order to determine whether there is a founded suspicion of occurrence of irregularities or more serious facts. If the preliminary information leads to the opening of an administrative investigation, the national authorities and other subjects are usually asked for their cooperation and further information and evidence. Their assistance as well as gathering other evidence in the administrative investigation in order to determine whether elements of crime exist and, therefore, whether the case falls within the competence of the EPPO may take considerable time. In the majority of cases, the time needed for assessment before transferring the case to the EPPO may be equal to the time currently needed for investigation before the final report is sent to national authorities.[18] Moreover, the EPPO Regulation does not contain provisions on resolution of conflicts of competence between the two offices in situations in which either both of them wish to investigate or both would like to refer a case to the other. While one can discern from the recitals and provisions of the EPPO Regulation that the opinion of the EPPO should prevail, the legislator has left this question open and subject to conclusion of a working agreement between OLAF and the EPPO.

Even more complex becomes the procedure if one looks at the way of transferring cases. Even after transferring of a case, the EPPO may request OLAF to provide information, analyses, expertise, and operational support in order to coordinate specific actions of the competent national administrative authorities and EU bodies or to conduct an administrative investigation.[19] Therefore, a case may be opened by OLAF, followed by a period of administrative investigation in which elements of crime are determined and proven by the collected evidence; the case may then be transferred back to the EPPO, which will continue it in a criminal investigation. At the same time, the latter may task OLAF with launching its (now parallel) investigation into

the same facts, because, e.g., a part of the investigation may concern a Member State not participating in the EPPO project. Hypothetically, after dismissal of such a case by the EPPO, it may formally come back to OLAF,[20] even if, in reality, OLAF has never stopped dealing with the case.

Because of the duty to support the EPPO in multiple ways, OLAF will have to keep its force of current structures. It may even have to create a new unit specializing in information flow and "case flow" between the Office and the EPPO. OLAF will keep its full competence over cases in which damage to the financial interests of the EU is less than €10,000[21] and it will also be fully operational in the Member States not participating in the EPPO project.[22] From all the above-mentioned facts, the only possible conclusion is that OLAF's workload will not remain the same but instead be even heavier than it is today. Lastly, together with the alleged agenda transfer from OLAF to the EPPO,[23] transfer of some staff positions is also envisaged, but this administrative step may be reconsidered, especially after the system becomes fully operational.

2. Challenges from the different types of investigations

Another more serious point concerns the different nature of both types of investigations/proceedings in situations in which OLAF would be acting on request of the EPPO in the sense of Art. 101(3) of the EPPO Regulation. The EPPO will investigate, prosecute, and bring to judgment offenders against the Union's financial interests exclusively in the criminal proceedings. No matter which structural unit of the EPPO requests OLAF to undertake an action (most probably the Permanent Chambers will request on behalf of the EPPO), the request itself will originate from the criminal proceedings and be for the purposes of collecting and giving evidence in criminal proceedings, including the criminal trial. Even if OLAF's subsequent investigation is "administrative" in nature, its clear purpose is collection of evidence for criminal proceedings on request of the prosecutor – one of the parties to criminal trial. OLAF investigations on request of the EPPO will be performed within the strict regime of supervision and guarantees provided both by the EPPO Regulation[24] and by national law. This situation may be particularly painful in those Member States in which the rights of the defence to take part in the pre-trial investigation are strong, and the evidence may be later declared inadmissible by a court in the trial if such defence rights are not taken into account.[25]

The Member States that decided not to participate in the EPPO project had various reasons for doing so – one of them being to keep complete control over their national criminal law jurisdiction. These Member States then could consider an intervention of OLAF acting on request of the EPPO as bypassing the standards of mutual legal assistance in criminal matters and even as interfering with their sovereignty.

But also OLAF's involvement in the mechanisms of investigations within the participating states will pose problems. The national law enforcement authorities and the European Delegated Prosecutors will be bound by strict rules in criminal proceedings relating to fundamental rights and procedural guarantees. OLAF should not be allowed to avoid mechanisms of control and supervision within the regime of Art. 101 of the EPPO Regulation and to implement the investigation acts planned in the criminal proceedings under the cover of an administrative investigation.[26]

The Permanent Chambers of the EPPO can hardly order prosecution in a Member State if documents gathered by OLAF up to that point are not admissible evidence according to the procedural law in the given state. Furthermore, the evidence gathered as part of such investigations performed on the request of the EPPO could be subject to serious challenges based on lacking judicial control as well as on the lower level of procedural rights and guarantees compared to (20 different) national criminal proceedings.

Another issue worth mentioning here are factual impacts on the proceedings. One of the reasons for the establishment of the EPPO was the inability (lack of expertise), incapacity (lack of resources), or reluctance (lack of will) of the national law enforcement authorities to proceed with criminal cases affecting financial

interests of the Union. In many situations, if this inability/incapacity/reluctance were to be in favour of national investigating authorities, the EPPO would desperately need a partner body that could step in if the national authorities cannot or do not wish to proceed with individual investigative steps. The EPPO, as a prosecuting body, will need an effective, reliable investigator. Although the EPPO Regulation has supplied one with OLAF, the Office is not equipped with updated status, powers, and policies.

IV. Needed Solutions

Against this backdrop and in order to become an effective partner providing admissible evidence to the EPPO, OLAF not only needs to raise its standards of guarantees, control, and supervision, but its powers should also be levelled up to correspond to current threats in the field of financial fraud and to the future further involvement of OLAF in VAT fraud investigations. Easy access to banking accounts and to databases facilitating the exchange of information and international cooperation should be a standard if the EU institutions as well as the OLAF Supervisory Committee wish the Office to act effectively within the due process of law and the 12-month time limit set for its investigations. Any extension of powers, however, should always go hand in hand with strengthened control over the empowered body, especially if the evidence gathered serve to prove guilt or innocence in criminal trials and thereby change the destinies of legal entities and individuals.

In order to avoid challenges stemming from the different nature of both types of proceedings, the acts OLAF performs at the request of the EPPO should be considered actions of the EPPO itself, and, as such, they should be subject to judicial control by national judicial authorities and to review by the European Court of Justice.[27] In order to enhance the admissibility of evidence, the procedural guarantees and standards set for the EPPO's actions should apply equally to OLAF acting within the regime of Art. 101 of the EPPO Regulation.[28] OLAF can only benefit from self-reflection if it is based on judicial decisions controlling its individual actions. It gives the Office a chance to shift away from practices that were challenged by the persons concerned and defendants at the national courts and the Court of Justice of the EU in the past and from doubts raised as to its independence and respect for fundamental rights and guarantees.

Lastly, even if OLAF is supposed to act independently from the Commission, the lack of legal personality and organisational dependence on the Commission has always cast a shadow on the perception of OLAF's independence, and the Office has always had to defend itself against allegations of being the "armed hand of the Commission." It is a fact that OLAF performs its investigations fully independent of the Commission and is, in fact, more independent than some satellite bodies that are not part of the Commission.[29] In order to dispel lasting doubts about the influence of the Commission on OLAF's work, the Office should be given a legal personality that would also raise its direct accountability and facilitate judicial review of OLAF investigations.

V. Conclusion

The new legislation concerning the establishment of the EPPO has brought OLAF closer to the gates of criminal proceedings than ever by making the Office "the right hand" of the European Prosecutor. However, questions as to OLAF's powers, supervision, judicial review, and procedural guarantees remain open. The EPPO deserves a strong partner with equal standards in order to avoid the drawbacks of different types of proceedings and levels of procedural guarantees, which could ultimately be reflected in decisions of the constitutional courts of the Member States. OLAF has already become a partner of the EPPO that is supposed to collect evidence for the purpose of criminal proceedings and criminal trials and, as such, should not

be forced to act "under the cover" of an administrative investigation. Instead, it should finally get a well-deserved official invitation to enter through the gate.

1. Including the compact solution offered in Corpus Juris 2000. See: M. Delmas-Marty, J.A.E. Vervale (eds.), *Corpus juris 2000*, Florence version. Antwerp, Intersentia, 2000.↩
2. Committee of Independent Experts, "Second Report", Vol. II, 1999, pp. 181-186.↩
3. C. Stefanou, S. White and H. Xanthaki, *OLAF At the Crossroads: Action against EU Fraud*, 2011, pp. 163–164.↩
4. University of Luxembourg, "Model Rules the Procedure of the EPPO", http://www.eppo-project.eu/index.php/EU-model-rules/english, accessed 7 November 2017; K. Ligeti (ed.) *Toward a Prosecutor for the European Union. Draft Rules of Procedure*, Vol. 1, Oxford, Hart, 2014.↩
5. A. Marletta, "Interinstitutional Relationship of European Bodies in the Fight against Crimes Affecting the EU's Financial Interests", (2016) *eucrim*, 144.↩
6. V. Covolo, "From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?", (2012) *eucrim*, 86.↩
7. 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, pp. 1–71. See in this context also the articles in *eucrim* 3/2017.↩
8. See: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an Action Plan on VAT, "Towards a single EU VAT area – Time to decide", COM(2016) 148 final.↩
9. Directive (EU) 2017/1371 of The European Parliament and of The Council on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, 29. See in this context A. Juszczak and E. Sason, (2017) *eucrim*, 80 et seq.↩
10. Art. 4 of Regulation No 883/2013 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.↩
11. Art. 1(2) of Regulation No 883/2013.↩
12. E.g., Art. 18(4) of Council Regulation No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, O.J. L 82, 22.3.1997, 1.↩
13. Art. 39(4) Council Regulation (EU) 2017/1939.↩
14. See recitals 51, 69, 105 of Council Regulation (EU) 2017/1939.↩
15. Recital 100 of Council Regulation (EU) 2017/1939.↩
16. A.Weyembergh and I. Armada and C. Brière, *The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area*, Study for the LIBE Committee, European Parliament, 2014, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510000/IPOL_STU(2014)510000_EN.pdf, accessed 7 November 2017, pp. 59–62.↩
17. Art. 101(2) of Council Regulation (EU) 2017/1939↩
18. Art. 11 of Regulation No 883/2013.↩
19. Art. 101(3) of Council Regulation (EU) 2017/1939.↩
20. Art. 39(4) of Council Regulation (EU) 2017/1939.↩
21. Art. 25(2) of Council Regulation (EU) 2017/1939, with exceptions under a) and b).↩
22. Currently, the United Kingdom, Ireland, Denmark, Malta, The Netherlands, Poland, Sweden, and Hungary.↩
23. Setting up the exclusive competence of the EPPO over investigation of offences affecting the financial interests of the EU (as specified in the EPPO Regulation) should reduce workload of OLAF, which shall not investigate into the same facts. Reduction of workload implies reduction of staff positions as specified in working documents, e.g. Council of the EU, Working Paper, "EPPO: non-paper on the initial estimates of cost and benefits Analysis of the EPPO at the stage of enhanced cooperation", Doc. WK 5745/2017, 22.5.2017.↩
24. Mainly in the sense of Art. 42 of Council Regulation (EU) 2017/1939.↩
25. See also: P. Palcu, "The Warranty of The Right to Defense Under an Operating European Department of Public Prosecution", (2017) 19 *Journal of legal studies*, DOI: 10.1515/jles-2017-0009, 122–134.↩
26. In fact, Art. 101 of the EPPO Regulation allows the EPPO to request OLAF to make an „investigatory act" for the purpose of an open criminal investigation (e.g. to "interview a person", make an on-spot-check, obtain documents, etc.) outside of any judicial control and criminal law standards of procedural rights and guarantees.↩
27. In the sense of Art. 42 of Council Regulation (EU) 2017/1939.↩
28. Cf. European Ombudsman, 19 December 2014, case no. 1663/2014/OV.↩
29. J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor's Office,* 2011, p. 278.↩

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