Reporting of Crime Mechanisms and the Interaction Between the EPPO and OLAF as Key Future Challenges

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

The EPPO and OLAF shall not only co-exist, but also take advantage of their capacities, professional knowledge and the new legal options in order to become a powerful tool for combating fraud.

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CITE THIS ARTICLE

Klement, P. (2021). Reporting of Crime Mechanisms and the Interaction Between the EPPO and OLAF as Key Future Challenges. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2021-005

Published in eucrim 2021, Vol. 16(1) pp 51 – 52

https://eucrim.eu

ISSN:

The establishment of the EPPO overwrote the topography of both EU and national bodies protecting the financial interests of the EU and created a breaking point in the field of criminal law. For the first time in history, apart from international criminal tribunals, the right to investigate and prosecute criminal offences was given to a supranational authority in the EU. National prosecution services will hand over control of their policies to combat PIF offences to the new body at the EU level. This contribution highlights two future challenges: the need for effective reporting channels between the EPPO and other bodies involved in detecting PIF crimes (a)) and the interplay between the EPPO and OLAF (b))

a) In order to achieve its goals, the EPPO will need to establish smart information flows between the central office in Luxembourg, delegated prosecutors, and national authorities and, at the same time, avoid causing delays in the information exchange. Aside from adjusting the reporting mechanism to the various procedural rules of the 22 participating Member States, the reporting system will have to incorporate lines of communication and case-related information exchange with other EU bodies like Eurojust, Europol, the European Court of Auditors (ECA), the European Investment Bank (EIB), and especially with OLAF.

The EPPO Regulation left untouched the duty of the national authorities to report to the Commission any irregularities that were the subject of primary administrative or judicial findings and to update and amend the information on a quarterly basis.[1] This is one of the ways in which OLAF receives information about irregularities, usually through the system of the anti-fraud coordination service (AFCOS) established to facilitate effective cooperation.[2] The national authorities shall also transmit to OLAF any other document or information relating to the fight against fraud, corruption, and any other illegal activity affecting the financial interests of the Union.[3] Fraud and corruption, however, are not purely administrative irregularities but typical categories of criminal law.

In parallel to the obligation to inform OLAF, the national authorities shall, without undue delay, report to the EPPO any criminal conduct in respect of which it could exercise its competence,[4] even cases involving damage caused to the EU's financial interests of less than €10.000. We should bear in mind that the requirements for the initial reports to the EPPO are much lower than to those for the system of reporting irregularities.[5]

Without prejudice to the ideas of shared competence between the EPPO and national authorities and the complementarity of OLAF investigations, it is necessary to streamline and rationalize the existing information and reporting channels so that the national authorities can report PIF crimes to one single point of contact. In this context, it is important to underline that the EPPO is the only EU institution able to apply means of criminal law to combat crime affecting the EU's financial interests. Therefore, if "there are reasonable grounds to believe" that an offence within the EPPO's competence has been committed, all information should be forwarded directly to the EPPO, which is in the exclusive position of being able to assess its own competence. In this regard, some of the existing EU mechanisms concerning *de facto* reporting of PIF crimes seem to be obsolete, as well as national law duties to report such information to a national prosecution office in advance or in parallel to the EPPO.

Similarly, if OLAF finds there are facts that could give rise to criminal proceedings and trigger the competence of the EPPO as late as the final drafting of the OLAF report, it seems to be reasonable to inform the EPPO exclusively.[6] Spreading information across too many communication lines may be harmful to the main objective of the EPPO, namely the effective prosecution of PIF crimes and bringing criminal offenders to trial.

b) Art. 101 of the EPPO Regulation is an opportunity for the EPPO and OLAF to overcome obstacles of cooperation with the authorities in the 22 participating Member States and to imbue the results of OLAF investigations with a new value in criminal proceedings. According to Art. 101, the EPPO may request OLAF to

https://doi.org/10.30709/eucrim-2021-005

support and complement the EPPO's activity, *inter alia,* by providing information or conducting administrative investigations. However, such requests will need to come from the prosecution in open criminal proceedings, with the clear intent of giving evidence in trial.

Two conditions are crucial for the success of this cooperation. First, it is important not to diverge from the standard of procedural safeguards in Chapter VI of the EPPO Regulation and from EPPO instructions to adhere to specific formal procedures. Second, OLAF investigators shall, upon instruction and in cooperation with the EPPO prosecutors, focus on the investigation of facts concerning particular offences and on building up a criminal case.

In particular the latter aspect will entail changes at the part of OLAF. Until now, OLAF's remit has not been to document all elements of a particular criminal offence (*actus reus* and *mens rea*) beyond reasonable doubt in its final reports. Regulation 883/2013 merely indirectly indicates OLAF's burden of proof as "facts, which could give rise to criminal proceedings" or it remains completely silent. There is a much higher standard of proof in criminal proceedings, especially for proving the *mens rea* beyond reasonable doubt. Until now, OLAF was supposed to document suspicion of fraud more on the balance of probabilities and, in most cases, did not receive sufficient feedback from any subsequent criminal proceedings.

Building up a criminal case means focusing on proving all elements of crime while taking into account national procedural rules from the outset of the investigation, especially specific guarantees and the rights of suspects and victims. This approach is the only way to avoid diminishing the value of evidence in trials, having to recollect evidence (on the part of national authorities), and the procedures becoming thwarted, on occasion, as a result of the deliberate destruction of evidence by criminals.

The new legal framework introduces unique options for OLAF/EPPO cooperation, a cooperation which could benefit from OLAF's networks and experience and from the EPPO's powers. The new situation requires streamlining of information channels, however, as well as respecting the *sine qua non* conditions of criminal procedures. The will towards an effective cooperation, not just co-existence, has already been expressed by both sides.

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1. Art. 28 (1), (3) of Commission Regulation (EC) No 1828/2006 of 8 December 2006.↩
2. Cf. Art. 12a of Regulation (EU, Euroatom) No 883/2013 of 11 September 2013 as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020.↩
3. Art. 8 (3) of Regulation No 883/2013 .↩
4. Art. 24 of Council Regulation (EU) 2017/1939 of 12 October 2017 establishing the EPPO.↩
5. Art. 24 (4) of Regulation 2017/1939 vs. Art. 28 of the Commission Regulation (EC) No 1828/2006.↩
6. Pursuant to Art. 24 (1) and 25 (1) of Regulation 2017/1939 and Art. 12c of Regulation 883/2013.↩

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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

https://doi.org/10.30709/eucrim-2021-005