

The European Anti-Fraud Office and the European Public Prosecutor's Office : A Work in Progress



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ABSTRACT

The European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) are the two investigative bodies at the EU level that together will effectively detect, investigate, and protect the EU's financial interests by combining the strengths of an administrative investigation with those of a criminal investigative approach. This article outlines in concrete terms how this cooperation is being organised. It illustrates how both offices have been equipped to follow the trail of money irregularly spent on criminal organisations, fraudsters, and corrupt individuals. It also explains the links between the two offices, the new legal framework at the basis of their cooperation, and their operational relationship. Lastly, the authors give a preview of future challenges and opportunities, with a view to outlining improvements that will contribute to the common goal of both bodies: the protection of the EU's financial interests.

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I. Introduction

On 1 June 2021, the European Public Prosecutor's Office (EPPO) started its operations.¹ The establishment of the EPPO marks an important step towards creating a common criminal justice area in the European Union as a whole, enhancing efficiency in prosecutions. A first of its kind, the entrance of this new player into Europe's anti-fraud architecture also marks a collective success for the institutions that have advocated for and contributed to its creation. The EPPO embodies a new era in the investigation and prosecution of financial crime at a judicial level in the EU and is likely to significantly change the European enforcement landscape. With over 20 years of experience in successfully investigating fraud related to European funds at the EU and international levels, the European Anti-Fraud Office (OLAF) will be EPPO's privileged partner and continue to contribute to the fight against fraud affecting the EU's financial interests. Undoubtedly, the EPPO's arrival has triggered change and from now on will lead to the implementation of new forms of co-operation among its partners within the European anti-fraud environment, both at the EU and national levels. This new cooperation scheme is not only reflected by changes to the existing legislative framework but also in the operational thinking of all those involved. OLAF is no exception in this regard.

Against this background, this article first examines the new legal framework, including the ways in which OLAF has been equipped to work alongside, and in close cooperation with, the EPPO. Second, the article assesses the operational relationship of both EU bodies, which has already benefitted immensely from the preparatory steps taken before the EPPO became operational. Ultimately, future challenges and opportunities are examined, with a view to outlining improvements contributing to the common goal of the two offices: the protection of the EU's financial interests.

II. New Adjustments and Framework

Both OLAF and the EPPO have distinct but interlinked and complementary mandates. The protection of the EU's financial interests is a common objective for both. The EPPO's mandate to conduct criminal investigations and prosecutions in the anti-fraud field is achieved by means of criminal law enforcement, but OLAF remains the body responsible for administrative investigations at the Union level, which ensures that both avenues award the full financial protection of the EU budget. An effective, immediate, and full response to a fraud case requires from the outset that criminal liability is established by the EPPO and that that anti-fraud action is accompanied by an administrative investigation. In concrete terms, this means that the EPPO conducts criminal investigations (limited to the Member States participating in the EPPO cooperation scheme), while OLAF conducts administrative investigations as an administrative body, which also encompasses investigations in EU Member States currently not participating in the EPPO and third countries.²

The EPPO Regulation³ sets out rules to ensure efficient cooperation among European bodies and agencies and to prevent the duplication of activities. This new framework necessitated adjustments to the rules and legal frameworks of its partners, including OLAF. On 17 January 2021, Regulation 2020/2223 amending Regulation 883/2013 (the OLAF Regulation) came into force.⁴ The new Regulation stipulates the necessary provisions in the OLAF legal framework governing the overall relationship with the EPPO. This includes the efficient exchange of information between the two bodies, the possibility of OLAF's support in EPPO investigations, the complementarity of actions on the part of both bodies, and the non-duplication of investigative work. More specifically, the new provisions⁵ in the amended Regulation set out how this new cooperation will take shape in practice, providing both offices with a solid legal foundation for their interactions:

- Obliging OLAF to report any criminal conduct to the EPPO, mirroring Art. 24(1) of the EPPO Regulation;

- Ensuring that the principle of non-duplication in investigations is respected by guaranteeing the discontinuity of OLAF's investigations if the EPPO is conducting an investigation into the same facts;
- Establishing a system of hit/no-hit in the case management systems of both offices in order to ensure that the principle of non-duplication in investigations is respected;
- Regulating OLAF's support to the EPPO;⁶
- Enabling OLAF to conduct, where necessary and approved by the EPPO, complementary investigations with a view to facilitating the adoption of precautionary measures or of financial, disciplinary, or administrative action;
- Obliging and enabling the EPPO to provide information of potential investigative interest to OLAF with a view to taking administrative action when the EPPO has dismissed⁷ a case or decided not to conduct an investigation (including together with OLAF);⁸
- Enabling the two offices to conclude operational working arrangements, which will govern their operational relationship.

On 5 July 2021, the latter aspect was implemented when OLAF and the EPPO signed a working arrangement.

⁹ This working arrangement sets out, *inter alia*, the practicalities of how the two offices will exchange information, report and transfer potential cases, and support each other in their respective investigations.

Overall, the combination of the provisions in the EPPO Regulation and the newly introduced articles in the amended OLAF Regulation lay out a solid and reliable legal framework, which enhances both offices' capacities without prejudice to their independence and respective mandates.

III. Operational Relationship Established in Working Arrangement

The working arrangement between OLAF and the EPPO (see above) marks an important milestone, as it will serve as the major operational framework for both offices. It will contribute to the efficient and transparent cooperation between OLAF and the EPPO and help achieve their common goal: the protection of the EU's financial interests. The agreement aims to establish a close partnership between the two offices in the exercise of their respective investigatory and prosecutorial mandates, in particular through the exchange of information and mutual support. The working arrangement further simplifies the cooperation and sets up an operational framework (on the basis of the legislation described above). The working arrangement provides that both offices can assess the text after an appropriate period of time and address any potential shortcomings. In accordance with the legal framework, the working arrangement specifically includes the following aspects of mutual cooperation:

- **Mutual exchanges of information:** Both offices will be able to exchange operational information where necessary. In practice, this can be done spontaneously or upon request; the necessary confidentiality and data protection rules must be respected. This exchange is crucial to the enhancement of operational cooperation and to the enrichment of each other's capacities, while fully respecting the remits of their mandates. Additionally, this aspect applies to the hit/no-hit approach in each other's case management systems, which is an effective tool for streamlining and accelerating the bodies' work by enabling checks on whether an investigation is already ongoing in the partner institution.

- **Mutual reporting and transmission of potential cases:** An effective system for mutual reporting of information needs to be in place. This allows both offices to share relevant information on allegations that fall under their respective mandates, so that unwarranted delays in starting an investigation can be avoided. On the one hand, OLAF can transmit to the EPPO any cases, in which it has identified possible criminal offences that could fall under the EPPO's mandate. On the other hand, the EPPO can transmit to OLAF any allegations, which it has received outside the EPPO's mandate but which affect the Union's financial interests, such as non-fraudulent irregularities and cases relating to non-participating Member States or international cases. The Union legislator established this system to ensure that no case goes undetected at the Union level, thus guaranteeing maximum protection of the EU's financial interests. This system is without prejudice to the action taken at the national level by competent authorities with whom both EU bodies work closely.
- **Support in investigations:** The working arrangement provides a non-exhaustive list of instances covering where OLAF may support the EPPO in its investigations by means of operational, forensic, and analytical expertise and tools, with a view to enhancing OLAF's and EPPO's activities in full respect of applicable procedural guarantees. The EPPO will also be in a position to support OLAF by identifying necessary protective measures to be taken during the course of its investigations and by exchanging information on any fraud patterns discovered.
- **Complementary investigations by OLAF:** The working arrangement provides for a scheme that allows the EPPO to request OLAF to conduct a complementary investigation in parallel to its own criminal investigation. In the same vein, OLAF can propose such complementary action to the EPPO. Complementarity of action means that OLAF can address essential aspects of the protection of the EU's financial interests, such as speedy recovery, the adoption of administrative precautionary measures, and the development of systemic recommendations for improvement, where shortcomings are identified in administrative investigations, e.g., procurement procedures. These actions represent a fundamental added value for a comprehensive approach towards protecting the EU budget.

The application of the above will help ensure a seamless administrative and criminal response to fraud at the Union level – the joint forces of OLAF and the EPPO, and the exercise of their powers will lead to maximum protection of the Union's financial interests.

IV. OLAF and the EPPO – Future Challenges and Opportunities

To date, only a few months have passed since the EPPO started its operational activities. This means that practical aspects of the framework described above have already been triggered and are currently undergoing a first test. It will be essential for both offices draw lessons from this initial experience and then to streamline, enhance, and intensify their cooperation both in the short and medium terms. This reflection process must also include a longer-term, strategic view of the entire European anti-fraud architecture. The development of a solid and reliable technical solution for a hit/no-hit system, for instance, will be crucial to ensuring an efficient and flexible way of checking whether an investigation is ongoing in the partner institution. The interoperability of case management systems within the limits required by EU legislation will be of particular importance. The operational aspects of cooperation, in the form of supporting cases or by conducting complementary investigations, will become more defined once operational personnel has had the occasion to work side by side. In practice, this will also trigger the need for a thorough knowledge exchange and for clarification of the applicable procedural guarantees and rules in each Member State

participating in the EPPO – an exercise that both offices will have to perform together.¹⁰ Common trainings, regular exchanges of experiences, and close cooperation at all levels will also be key elements.

In the future, both offices should look at how to enhance their cooperation by benefitting from each other's networks and experiences, namely by leveraging their respective strengths and taking into account their different set-ups. OLAF brings years of operational experience and the analysis of complex data sets in various forms and languages to the EU's anti-fraud work. The EPPO now contributes experienced national prosecutors with their vast know-how, a newly established cooperation scheme across the Member States participating in the EPPO, and their national practices and networks. By exchanging information on trends and patterns in fraud offences, OLAF and the EPPO will enhance and strengthen the EU's anti-fraud detection and prevention work overall. In this system, OLAF can be considered the knowledge centre for the European Commission. The resources of both bodies must be used, however, in order to benefit from and enhance each other's potential, with a view to carrying out effective, successful, cross-border investigations.

Ultimately, OLAF's newly adapted legal framework and the recently agreed operational working arrangement between OLAF and the EPPO provide a solid basis for both offices to ensure a newly efficient, effective, and reliable European response to fraud. Close cooperation and transparency between the two offices will be key to ensuring that future anti-fraud efforts benefit from the combined powers and results of both offices – a future driven by the capability to protect EU taxpayers' money to the maximum.

1. For this event, see also the special eucrim issue no. 1/2021 "EPPO Now Operational – Perspectives from European Prosecutors" (<<https://eucrim.eu/issues/2021-01/>>).↵

2. Denmark, Hungary, Ireland, Poland, and Sweden.↵

3. 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, 1.↵

4. A consolidated text of Regulation (EU, Euratom) No 883/2013 of 11 September 2013 as amended by Regulation (EU, Euratom) 2020/2223 of 23 December 2020 (O.J. L 437, 28.12.2020, 49) is available here: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0883-20210117>>.↵

5. Arts. 12c-12g of the amended OLAF Regulation, *op. cit.* (n. 4).↵

6. Cf. Art. 101(3) of the EPPO Regulation, *op. cit.* (n. 3).↵

7. Art. 39 of the EPPO Regulation, *op. cit.* (n. 3).↵

8. This mirrors Art. 8(1) and (4) of the amended OLAF Regulation, *op. cit.* (n. 4).↵

9. For the legal basis of this working arrangement, see Art. 12g of the amended OLAF Regulation, *op. cit.* (n. 4). The full text of the working arrangement is available here: <https://ec.europa.eu/anti-fraud/sites/default/files/working_arrangement_olaf_eppo_en.pdf> accessed 11 November 2021.↵

10. Art. 12e of the amended OLAF Regulation, *op. cit.* (n. 4).↵

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