The Reform of the EU's Anti-Corruption Mechanism

Alexandre Met-Domestici

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Article

ABSTRACT

This article examines the ongoing reform of the European Union's anti-corruption mechanism against the backdrop of a large and vulnerable EU budget and persistent shortcomings in protecting the Union's financial interests. It identifies two core weaknesses of the current framework centred on OLAF: the lack of effective criminal follow-up by national prosecuting authorities and recurrent concerns over the compatibility of OLAF's investigative practices with fundamental procedural rights. The article analyses the Commission's post-Lisbon reform initiatives, including proposals to strengthen OLAF's investigative efficiency and accountability, improve cooperation with national authorities, Eurojust and Europol, and develop a more integrated administrative–criminal law approach. Particular attention is paid to the envisaged establishment of a European Public Prosecutor's Office (EPPO) under Art. 86 TFEU as a potential game-changer for prosecutions of offences affecting the EU's financial interests. The contribution argues that, if properly implemented, the combined package of enhanced OLAF supervision, better coordination, and a functioning EPPO could significantly improve both the effectiveness and the fairness of EU anti-corruption enforcement, but stresses that the success of the reform will ultimately depend on Member State political will and the concrete design of the new mechanisms.

AUTHOR

Alexandre Met-Domestici

Associate Professor – Maître de Conférences –
Sciences-Po, Aix-en-Provence, France

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The budget of the EU in 2012 amounts to over € 142 billion, which is more than the budget of 20 of the 27 Member States. It can easily be tempting to misuse part of these funds. The current preparation of the multi-annual financial framework provides the Commission with an opportunity to reinforce the fight against corruption. Such an approach is of particularly high importance in a time of budget cuts and austerity measures.

More than twelve years after the creation of the European Anti Fraud Office (OLAF)[1], the fight against corruption still faces major challenges. Although OLAF has proven to be highly effective in uncovering and investigating offences against the EU's financial interests, its investigations often lack proper follow-up. Since OLAF is deprived of any prosecuting power, it must refer the cases it has investigated to national prosecuting authorities. At this point, many cases are simply dropped or not thoroughly prosecuted. Despite the signing of the Convention on the Protection of the Financial Interests of the EU (PFI)[2] more than 15 years ago, criminal investigations into offences committed against the Union's financial interests are conducted within the Member States and according to national law. It is indeed entirely up to national authorities to decide whether or not to prosecute a case referred by OLAF. This major flaw needs to be addressed in the ongoing reform process.

The reform process of the EU's anti-corruption mechanism has been a protracted one. It started with the Commission's 2003 Communication on a Comprehensive Policy Against Corruption. It underlined several goals such as the need to detect and punish all acts of corruption, to establish transparent and accountable public administration standards, and to establish transparency in the financing of political parties and trade unions. It emphasized the need to set up peer-review evaluations. Finally, the Commission laid out ten anti-corruption principles designed to help candidate countries and third countries fight corruption.

The Commission first issued a proposal in 2006 on achieving better operational efficiency and improved governance. It aimed at improving the information flow between OLAF, European institutions, and Member States. It also set the goal of strengthening the procedural rights of persons subject to OLAF's investigations.

The Lisbon Treaty provides for some improvements in the fight against corruption, starting with Arts. 82 and 83 TFEU, which deal with general criminal law rules.[3]

The most striking provision is Art. 86 TFEU providing for the creation of a European Public Prosecutor's Office (EPPO) from Eurojust. The establishment of such an EPPO shall stem from a unanimous decision of the Council. The office will be in charge of investigating, prosecuting, and bringing to justice the perpetrators of offences against the EU's financial interests, as well as serious crimes with a cross-border dimension. Thanks to this EPPO, European institutions will be able to undertake direct action, with an increased efficiency, in comparison to mere cooperation between national prosecuting authorities.

Art. 317 TFEU provides for the general fight against fraud and illegal activities affecting the financial interests of the EU. Art. 325 TFEU provides for the coordination between the Union and its Member States as well as between Member States themselves.

Most importantly, the Commission published in 2011 a regulation proposal and three communications dealing with the fight against corruption. These documents set the framework for the current reform process.

Initially, in its 17 March 2011 proposal,[4] the Commission called for a new regulation concerning OLAF's investigations. It set two main goals: "strengthening the efficiency of the Office's investigations"[5] and achieving a better "balance between independence and accountability of the Office,"[6] thus improving its governance.

In its 26 May 2011 communication entitled "an integrated policy to safeguard taxpayers' money,"[7] the Commission identified the main flaws in the fight against corruption[8] and stressed the need for better coordination between criminal law and administrative investigations. It called for the strengthening of both substantive criminal law and procedural rules.[9] A comprehensive approach is therefore needed, especially in order to overcome the differences between national legal systems.

In its 6 June 2011 communication,[10] the Commission then paved the way for further improvements. It advocated stronger monitoring of anti-corruption efforts, both at the national and EU levels,[11] and called for a better implementation of existing anti-corruption instruments[12] as well as a stronger focus on corruption in both EU internal policies[13] and external policies.[14]

Finally, in its 24 June 2011 communication,[15] the Commission laid the foundations for its anti-fraud strategy. It stressed aspects such as prevention and detection of fraud,[16] OLAF's investigations,[17] and sanctions.[18] It ultimately underlined the task of monitoring and reporting of OLAF's activities.[19]

These various reform paths show the need for further study into the current anti-corruption mechanism.

The shortcomings in the fight against corruption in the EU require further analysis prior to describing the solutions offered by the ongoing reform process.

I. Shortcomings in the Fight against Corruption

The main shortcomings of the current mechanism lie within the transmission of OLAF's investigation reports to national prosecuting authorities and the compliance of the Office's investigation reports with procedural rights.

A - Transmission of OLAF's Reports to National Prosecuting Authorities

One of the main goals of the ongoing reform process is to strengthen the efficiency of OLAF's investigations. The Office can carry out both internal investigations (within European institutions and bodies) and external investigations (in Member States and third countries). In the latter, OLAF can investigate both individuals and legal entities such as companies, state agencies, and bodies, even NGOs. These investigations may consist of on-the-spot inspections, checks of financial books and business records, examination and copying of all relevant documents. Member States must provide OLAF with all necessary support.

OLAF's investigating powers are thwarted by a major limitation. Whatever the in-depth nature of the investigations conducted by the Office, their follow-up relies entirely on national prosecuting authorities.[20] OLAF is deprived of any means to force national authorities to act. Member States tend to favour the recovery of unpaid national taxes or undue social benefits rather than that of unduly spent EU funds.

This lack of follow-up threatens the efficiency of the fight against corruption. The admissibility of OLAF's reports as evidence in criminal cases is limited. OLAF does not enjoy a specific procedural status in national criminal proceedings. Member States do not have any judicial authority with specific competence to deal with cases referred by OLAF. Moreover, national prosecuting authorities sometimes lack the adequate means and structures to prosecute offences committed against the EU budget.

B - Compliance of OLAF's Investigations with Procedural Rights

OLAF's investigations are under scrutiny, especially judicial review performed by the European Court of Justice (ECJ) and the Court of First Instance[21] (CFI). The Office might unfortunately breach the fundamental

rights of those investigated. Procedural rights – such as the presumption of innocence, the right to be informed and heard, and defence rights as a whole – are at stake during the Office's investigations.

The ECJ, however, has always held that requests for annulment of OLAF's reports are inadmissible.[22] As far as external investigations are concerned, OLAF's investigations are preparatory measures. Its reports are therefore not subject to judicial review,[23] as is the case with internal investigations. Such reports indeed have no legal binding force, since national authorities are free to decide whether or not to prosecute in light of OLAF's findings. In its Commission v. ECB ruling,[24] the ECJ held that procedural guarantees apply to all investigations conducted by OLAF, whether internal or external.

Regarding the presumption of innocence, the CFI held in Franchet and Byk[25] that this right had been breached by OLAF's statements reflecting on the guilt of the persons involved. The Office referred to the two Eurostat officials who were under investigation, well before a final decision was taken. The Commission breached the presumption of innocence by issuing a press release on the investigation. In contrast, OLAF's Director General did not breach the presumption of innocence by mentioning the two officials in his statement before the European Parliament's Committee on Budgetary Control. OLAF's approach may further influence the assessment of the facts by the national court to which the case is then referred. In Franchet and Byk, the Office did not inform the persons under investigation nor the Supervisory Committee that it had handed over the case to national prosecuting authorities. Since the role of the Committee is to protect the rights of the persons under investigation, the Office must consult it prior to forwarding information to national prosecuting authorities. Moreover, this investigation did not meet the conditions for cases requiring absolute secrecy. This amounted to further non-material damage undergone by the two Eurostat officials.

In Camos Grau,[26] the CFI held that OLAF was responsible for impairing an official's honour and reputation. Moreover, the investigation had been conducted by an investigator whose impartiality was questionable. Even though he was later dismissed, the evidence he had collected was not reassessed. OLAF thus included undue accusations in its final report. The CFI held that the Office's undue accusations and breach of impartiality – resulting from the presence of evidence gathered by a potentially partial investigator – constitute non-pecuniary damage and granted the official compensation.

In Giraudy,[27] the CFI awarded compensation to an official whose reputation had been harmed by the publicity following the opening of OLAF's investigation. According to the CFI, the Office suggested that the official was involved in the irregularities it was investigating. The CFI interpreted Art. 8 paragraph 2 of regulation 1073/1999 in such a way that it should be understood as protecting not only the confidentiality of information obtained by OLAF but also the presumption of innocence. Moreover, the Office had violated defence rights by confirming facts that had already been reported in the press. This is also the case when OLAF, though only confirming indirect information without mentioning an official's name, makes it easy to identify this person.

The right to be informed and heard allows the persons affected by an administrative investigation to make their own views known. In Franchet and Byk,[28] the CFI held that OLAF had breached this right, since it had investigated the case and then transmitted its report to national prosecuting authorities without hearing the persons concerned beforehand.

In Nikolaou,[29] the CFI added that OLAF must inform the persons affected by its investigations of all the facts at an early stage of the investigation. The Office must then allow them to be heard in order for them to be able to express their views. It is obligated to record any comments made by these persons. OLAF must make sure that no information regarding its investigations is leaked, and it must avoid any publicity, especially the publication of allegations which could seriously harm an official's reputation.

Defence rights are, of course, at the heart of procedural rights.[30] The CFI held in its Gomez-Reino[31] order that its failure to take into account the defence rights of an EU official under investigation amounts to an infringement of the formal requirements applicable to the procedure. The principle against self-incrimination protects persons under investigation. They cannot be forced to implicate themselves. When assessing the violation of this principle, the Court should examine the degree of coercion used to obtain the evidence, the degree of public interest in the investigation, and the existence of procedural safeguards. Hence, the ECJ has held that an individual under investigation may be forced to provide all necessary information but not to answer in a way which might imply acknowledgement of an infringement.

On the contrary, a person's right to access his or her case file does not benefit from standard protection where OLAF's investigations are concerned.[32] Unlike the protection granted in the course of judicial proceedings, the CFI has held that the effectiveness and the confidentiality of such investigations could be hampered if a person under investigation were to have access to the file before the investigation is concluded.[33] Such a limitation of the rights of defence is justified by the fact that OLAF's reports are not documents adversely affecting the persons under investigation. Therefore, access need not be granted.

The reform process of the EU's anti-corruption mechanism aims at addressing its main shortcomings. Several solutions are put forward in the Commission's proposals.

II.Solutions

The solutions advocated by the Commission consist of ensuring an increased efficiency of OLAF's investigations and a reinforced supervision of its activities.

1. Towards More Efficient Investigations: Better Cooperation and the Creation of the EPPO

A Coordinated Fight against Corruption

The Commission calls for an integrated approach, which is to enable a more efficient fight against corruption.[34] This approach will encompass both the criminal law aspects and the administrative law dimension of anti-corruption investigations.

In this respect, the Commission suggests that the distinction between internal and external investigations conducted by OLAF be limited. The boundary between internal and external investigations can easily be blurred. Some investigations start as internal ones and turn into external ones. The opposite happens as well. The persons who are the subject of internal investigations must cooperate according to Staff Regulations or the Protocol on the Privileges and Immunities of the European Union. The Office also enjoys more detailed powers in internal investigations as opposed to external investigations. The distinction may, however, hamper the efficiency of OLAF's investigations.

This policy requires cooperation between national authorities, as well as OLAF and Eurojust, throughout investigation and prosecution. Firstly, the judicial authorities of a Member State that are involved in OLAF's investigations have to inform the Office of the actions they have taken in the wake of its report. They must let OLAF know whether they have prosecuted the case or not. However, this obligation exists only where national law does not rule it out. Secondly, OLAF is granted the right to provide evidence in proceedings before national courts, insofar as this complies with national law and staff regulations. Another improvement might result from cooperation between OLAF, Eurojust, and Europol. Such cooperation will allow for a greater

involvement of Eurojust in the protection of the EU's financial interests and may induce national authorities to better collaborate with OLAF and Eurojust altogether.

Contact points in Member States will play an increased role. They are part of the EU contact-point network against corruption (EACN) made up of OLAF, the Commission, Europol, and Eurojust. According to the Commission, the EACN will adopt a more concrete approach, providing operational support to anti-corruption investigators.[35] The network fosters cooperation between national authorities involved in the fight against corruption, thus facilitating the exchange of information. Moreover, OLAF could take part in joint investigation teams.

In addition, an enhanced fight against corruption requires better cooperation between Member States. Such cooperation is often still hampered by the fact that evidence collected in one jurisdiction is often not admissible in another. This issue may be addressed through the creation of a European Investigation Order (EIO). It would enable Member States to request evidence with standard characteristics. It would then be admissible before national courts in other Member States. Moreover, the evidence could be required by a prosecuting authority in a given Member State from an authority in another Member State. This would be a major improvement over the current European Arrest Warrant (EAW), which only permits the exchange of information that has already been acquired.

The EU's anti-corruption policy should also be coordinated with the fight against money laundering. Corruption is one of the predicate offences that can lead to money laundering.[36] The proceeds of corruption can be washed into the legal economy. This is why the Commission calls for strengthened cooperation between national financial intelligence units, whose task is to combat money laundering, and anti-corruption and law enforcement agencies.[37] It calls upon Member States to carry out financial investigations more thoroughly, especially in corruption cases. National prosecuting authorities should always take into consideration any links – or potential links – with regard to money laundering and organized crime.

The EPPO

The establishment of an EPPO is probably the most striking improvement in the area of criminal law provided for in the Lisbon Treaty. In the Stockholm Programme, the European Council made it clear that the establishment of the EPPO required a thorough implementation of the decision on Eurojust by Member States in advance. The Action Plan of the Stockholm Programme has therefore scheduled a proposal for a regulation on Eurojust in 2012 – which is to streamline its internal structure and provide Eurojust with powers to initiate investigations – and then a communication on the establishment of the EPPO in 2013.

The EPPO could be very helpful in the fight against corruption. It could improve communication between national prosecuting authorities. This is especially necessary given the lack of follow-up on OLAF's investigations by national authorities. Moreover, direct action undertaken by the European institutions could play a major role.

The EPPO could be established in different ways. On the one hand, a "minimalist" EPPO would be a supranational body entitled only to issue EAWs or EIOs, which would be executed in a decentralized fashion by national prosecuting authorities. On the other hand, a full-fledged EPPO would be a centralized supranational body capable of performing investigations and prosecuting thanks to harmonized rules. An in-between solution may well be chosen by the Council, as Art. 86 leaves open the choice between supranational criminal law rules and mutual recognition.

The scope of the EPPO's competences is yet to be defined. Crimes against the financial interests of the EU will be part of it. It may also encompass serious crimes with a cross-border dimension.

The degree of harmonization required is also to be defined. The need for a minimum set of harmonized procedural rules is obvious. The EAW shows the effectiveness of harmonized rules to fight crime at the EU level. The EPPO will hopefully take this process one step further. It is worth considering whether it is necessary to adopt common substantial rules or to leave substantial rules up to national legislation implementing EU directives. Were the full-fledged approach to prevail, the EPPO might need actual European substantive criminal law rules, on top of harmonized rules for investigative measures such as warrants valid throughout the EU. This would allow centralized investigations into offences defined at the EU level, thus increasing the efficiency of EU-wide criminal prosecutions into offences such as corruption, organized crime, and money laundering. Will the EPPO be allowed to investigate into such cases, even to prosecute cases referred by OLAF, and bring suspected offenders to justice? Will its role be limited to pre-trial proceedings, or will the EPPO be able to be heard in court? OLAF might also become less of an administrative body and more of a financial police body investigating cases, then referring them to the EPPO. In this case, the Office would require greater independence from the Commission. This would probably justify another reform process, exceeding the scope of the current one.

The actual establishment of the EPPO might, however, require a more pragmatic approach. A political consensus among Member States could probably more easily be found on a less ambitious EPPO that still relies on national prosecuting authorities' investigations into offences defined at the national level. Under such a premise, the competence for authorizing the use of coercive powers would still lie with national judges. However, harmonized rules governing investigative measures would nonetheless be needed. Such rules may indeed help increase the efficiency of investigations initiated at the EU level – through the EPPO – and then carried out at the national level.

2. OLAF's Supervision

OLAF's accountability is key to the efficiency of the fight against corruption within a democratic union. It balances the independence the Office enjoys in its investigations. It is of a disciplinary, political, auditable, administrative, and judicial nature. OLAF is answerable to the Commission, the Parliament, the Council, the Court of Auditors, the Supervisory Committee, the European Ombudsman and, of course, the ECJ.

The proposed reform will lead to the amendment of the role of OLAF's Supervisory Committee. It will still monitor the Office's activities in order to make sure that they are performed in full independence.[38] It will supervise information exchanges between the Office and the various institutions and bodies. It will moreover examine the duration of OLAF's investigations. When they exceed one year, OLAF will be required to inform the Supervisory Committee of the reasons preventing it from completing them. OLAF must provide the Committee with such information every six months. The Committee must perform its tasks without interfering with the proper conduct of investigations. It will be informed of the transmission of OLAF's reports to prosecuting authorities.

The Commission also calls for a periodical exchange of views[39] on OLAF's investigations between the Supervisory Committee and the Commission, the Council, and the Parliament. This exchange of views is to be performed in an informal fashion rather than through structured dialogue, in order not to threaten OLAF's independence. This exchange of views will address OLAF's strategic priorities and its relations with national authorities. It will also encompass the effectiveness of the Office's work and that of the Supervisory Committee.

The proposal also provides for improved supervision of the cooperation between OLAF and EU institutions. In the course of its investigations, the Office shall inform the staff and members of the institutions and bodies concerned without undue delay in order to enable them to take precautionary measures. They could therefore avoid further harm to the EU's financial interests by putting an end to irregularities and limiting

financial loss. OLAF's duty to inform should be performed through alternative channels when confidentiality is required. This could be the case if the top management or the highest political level of a body or an institution were involved in a corruption case. OLAF will retain its right to immediate and unannounced access to information held by these institutions and bodies.

III. Conclusion

The reform of the EU's anti-corruption mechanism is currently standing at a crossroads.

The main shortcomings of the anti-corruption mechanism lie both within the efficiency of OLAF's investigations and their compliance with procedural rights.

The changes put forward in the Commission's proposal and communications seem viable to greatly enhance the fight against corruption. Improved cooperation between the Office and national prosecuting authorities could greatly improve the follow-up of its investigations. An increased scrutiny of OLAF's investigations could address the issues related to procedural rights. Moreover, the establishment of an EPPO would greatly improve the coordination between the Office, Europol, Eurojust, and national prosecuting authorities.

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1. OLAF was created in 1999 by Regulations No. 1073/99 /EC and 1074/99 /EC of 25 May 1999, OJ L 136, 31.5.1999, p. 1.↩
2. Convention of July 26th, 1995 (OJ C 316, 27.11.1995, p. 49).↩
3. Art. 82 deals with procedural criminal rules. The Council may adopt minimum common rules in order to facilitate mutual recognition of judicial decisions and police and judicial cooperation. Art. 83 provides for the approximation of substantive criminal law rules. The Council and the European Parliament can enact minimum common rules concerning the definition of offences and sanctions, provided that they include serious crimes of a cross-border dimension. Some offences are already defined by EU law such as terrorism, organized crime, money laundering, and corruption.↩
4. European Commission, 17 March 2011, Amended proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No. 1074/1999, COM (2011) 135 final.↩
5. COM (2011) 135 final, p. 3.↩
6. COM (2011) 135 final, p. 5.↩
7. European Commission, 26 May 2011, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Protection of the Financial Interests of the European Union – An integrated Policy to Safeguard Taxpayers' Money –, COM (2011) 293 final.↩
8. COM (2011) 293 final, p. 2.↩
9. COM (2011) 293 final, p. 10.↩
10. European Commission, 6 June 2011, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU, COM (2011) 308 final.↩
11. COM (2011) 308 final, op. cit., p. 5.↩
12. COM (2011) 308 final, p. 8.↩
13. COM (2011) 308 final, p. 10.↩
14. COM (2011) 308 final, p. 15.↩
15. European Commission, 24 May 2011, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission Anti-fraud Strategy, COM (2011) 376 final.↩
16. COM (2011) 376 final, p. 9.↩
17. COM (2011) 376 final, p. 13.↩
18. COM (2011) 376 final, p. 15.↩
19. COM (2011) 376 final, p. 17.↩
20. For instance, from 2003 to 2009, 73 of 438 cases referred to national authorities by OLAF were dismissed. In most cases, national authorities did not bother to explain why they dropped the case.↩
21. With the entry into force of the Lisbon Treaty, the Court of First Instance is renamed to General Court. However, the cases mentioned in this paper were dealt with before the entry into force of the Lisbon Treaty and therefore refer to the Court of First Instance.↩
22. For instance, Case C-521/04, *Tillack v. Commission,* 19.4.2005.↩
23. Case T-215/02, *Gomez Reino v. Commission*, 18.12.2003.↩
24. Case C-11/00, *Commission v. ECB*, 10.7.2003.↩
25. Case T-48/05, *Yves Franchet and Daniel Byk v. Commission*, 8.7.2008.↩
26. Case T-309/03, *Camos Grau v. Commission,* 6.4.2006.↩
27. Case F-23/05, 2.5.2007.↩

28. Case T-48/05. *Yves Franchet and Daniel Byk v. Commission*, 8.7.2008.↩
29. Case T-259/03, *Nikolaou v. Commission*, 9.12.2003.↩
30. They are part of the general principles of EU law (ECJ, 9.11.1983, *Michelin v. Commission,* case 322/81).↩
31. Case T-215/02, *Gomez Reino v. Commission,* 18.12.2003.↩
32. Read Simone White, Rights of the Defence in Administrative Investigations: Access to the File in EC Investigations, Review of European Administrative Law, Vol 2, no. 1, 2009, p. 57.↩
33. Such was the case in the *Franchet and Byk*, *Nikolaou,* and *Gomez Reino* cases.↩
34. COM (2011) 293 final, p. 2.↩
35. COM (2011) 208 final, p. 11.↩
36. Directive 2005/60 /EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, OJ L 309, 25.11.2005, p. 15.↩
37. COM (2011) 308 final, p. 12.↩
38. COM (2011) 135 final, p. 5.↩
39. COM (2011) 135 final, p. 6.↩

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