

EPPO Frameworks for Cooperation with OLAF, Eurojust and Europol

26 April 2021

Introduction

The establishment of the European Public Prosecutor's Office (the "EPPO")¹, competent to investigate and prosecute offences defined in the PIF Directive², fundamentally changed and strengthened the European Union's anti-fraud enforcement framework. The question therefore arises how the EPPO will work with and relate to the European Union's pre-existing, and relatively better resourced administrative anti-fraud body, the *Office européen de lutte antifraude* or OLAF, as well as its judicial and police cooperation bodies Eurojust and Europol. To this end, a new OLAF regulation has now been adopted³, and the EPPO has concluded working arrangements with Eurojust and Europol.

OLAF—Background

OLAF is an EU body mandated to detect, investigate and stop fraud with EU funds. OLAF focuses on investigations into fraud, corruption and other offences involving EU funds, and into serious misconduct by EU staff and members of the EU institutions.

In 2019, OLAF concluded 181 investigations and issued 254 recommendations to Member State and EU authorities. In total, OLAF recommended the recovery of EUR

¹ Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the "EPPO"); for details see our various articles dealing with EPPO under <https://www.debevoise.com/topics/eppo>

² Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive"), for details on the PIF Directive see Debevoise Article "The EPPO—A New Player in European White Collar Crime Enforcement", available here: <https://www.debevoise.com/insights/publications/2019/11/the-eppo-a-new-player-in-european-white-collar>

³ Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations.

485 million to the EU budget. In addition, OLAF co-organized or provided support to 13 joint customs operations concerning the illicit trade in tobacco products by helping national authorities to seize more than 251.4 million cigarettes.⁴

While OLAF has the power to conduct administrative investigations, it cannot impose sanctions in cases where criminal conduct is found; it can merely make financial, administrative, disciplinary and judicial recommendations.⁵ Until the advent of the EPPO, therefore, OLAF could only recommend to the competent authorities of the Member States concerned to launch any proceedings justified by its findings.⁶ In any subsequent criminal proceedings, OLAF's investigation report is admissible to the extent that reports drawn up by national administrative inspectors would be.⁷ This obviously does not guarantee admissibility (or that the report would be afforded any particular evidential weight) and the whole system has been dogged by delays and procedural incompatibilities. This, in turn, has led to a disappointing level of conversion of OLAF findings of fraud into criminal enforcement action. This enforcement gap was an important argument in favour of setting up the EPPO.

In addition to the differences in enforcement competence and powers between OLAF and the EPPO, due to the non-adherence of five Member States to the EPPO, OLAF's territorial competence is larger, covering the whole of the European Union⁸.

OLAF and EPPO—Working Arrangements

The EPPO Regulation and the amended OLAF Regulation aim at co-ordinating the action of the EPPO and OLAF to enhance the overall protection of the European Union's financial interests. The EPPO's criminal competence will take priority, and OLAF will need to co-ordinate its activities with the EPPO to ensure its activities do not jeopardise the latter's investigations.

Article 101 of the EPPO Regulation and Articles 12 to 12g of the amended OLAF Regulation set out in detail how the cooperation between the two bodies should work:

⁴ See page 3 of OLAF's report of 2019, available under https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2019_en.pdf.

⁵ See https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2437.

⁶ See Article 12 Regulation 883/2013.

⁷ See Article 11 (2) Regulation 883/2013. This admissibility rule instructs how a competent national authority should assess materials gathered by OLAF. However, in reality, problems may emerge e.g. if no comparable national administrative authority exists; see Giuffrida/Ligeti, Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings, June 2019, p.44, available here: https://orbi.lu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf.

⁸ See Article 3 para 1 Regulation 883/2013.

- General principles included in the EPPO Regulation and the OLAF Regulation such as mutual cooperation or steady information exchange define the relationship between OLAF and EPPO;
- OLAF must report without delay to the EPPO any suspected criminal offence it comes across that falls within the EPPO's competence;⁹
- OLAF will generally not open an investigation if the EPPO is conducting its own investigation into the same facts;¹⁰
- OLAF will inform the EPPO if it considers that it should open a complementary investigation to one already being carried out by the EPPO. The EPPO can reject the calls for a complementary OLAF investigation, or to specific measures within that investigation, if it considers them a risk to its own investigations. Any complementary investigation by OLAF must be carried out in close cooperation with the EPPO;¹¹
- OLAF and EPPO will establish a constant exchange of information and operational contacts, thus allowing OLAF and the EPPO to promote complementarity¹². To improve information exchange the amended OLAF Regulation provides for the EPPO and OLAF to have access to each other's Case Management System on a hit/no-hit basis;¹³
- OLAF shall agree with the EPPO, where necessary, on administrative arrangements aiming at ensuring the effectiveness and efficiency of internal and external investigations led by both OLAF and the EPPO;¹⁴
- Under the EPPO Regulation the EPPO may ask OLAF to conduct administrative investigations.¹⁵ Unlike EPPO investigative measures, OLAF's investigative measures are not subject to effective review by national courts.¹⁶ Thus the question arises to what extent the EPPO will be able to rely on information gathered by OLAF, operationally or evidentially, in circumstances not providing equivalent procedural

⁹ Article 12c para 1 of the amended OLAF Regulation.

¹⁰ Article 101 para 2 of the EPPO Regulation.

¹¹ Article 12f of the amended OLAF Regulation.

¹² See Article 101 para 1 of the EPPO Regulation.

¹³ Article 12g para 2 of the amended OLAF Regulation.

¹⁴ Article 12g of the amended OLAF Regulation.

¹⁵ Article 101 para 3c of the EPPO Regulation.

¹⁶ The European Commission sought to bridge this gap in oversight by proposing the establishment of a Controller of procedural guarantees for OLAF, but this proposal has not been adopted by the European legislator; see OLAF (COM(2014) 340).

safeguards.¹⁷ In particular, in regard to evidence gathered by OLAF, even if gathered at the request of the EPPO, it remains unclear if this type of evidence will have the same status and quality as evidence gathered by the delegated EPPO prosecutor.¹⁸

EPPO and Eurojust—Working Arrangements

Eurojust, the European Union Agency for Criminal Justice Cooperation, is mainly responsible for coordinating the work of national authorities, including non-EU authorities, in investigating and prosecuting transnational crime.

Eurojust and the EPPO adopted a Working Arrangement laying down the details of their cooperation in the fight against crimes affecting the financial interests of the European Union.¹⁹

The Arrangement implements the modalities of cooperation put in place in the Eurojust and EPPO Regulations, for instance by regulating the exchange of information between the two organizations and Eurojust's support to the EPPO with regard to judicial cooperation requests and decisions involving Member States that do not take part in the establishment of the EPPO, and third countries. In particular, Eurojust will mediate competing jurisdictional claims between the national prosecuting authorities in non-participating Member States and the EPPO. Liaison teams between the EPPO and Eurojust will seek to ensure seamless cooperation.

EPPO and Europol—Working Arrangements

Europol, the European Union's law enforcement agency, supports the 27 EU Member States in their fight against terrorism, cybercrime and other serious and organised forms of crime. The 2020 working arrangement between the EPPO and Europol²⁰ establishes

¹⁷ See Jan Inghelram, EPPO, OLAF and CJEU – a brief look at their interplay, available here:

<https://medium.com/ecajournal/epo-olaf-and-cjeu-a-brief-look-at-their-interplay-ca7a0f25992f>.

¹⁸ Evidence gathered by the delegated EPPO prosecutor is directly admissible in all cases. See Article 37 of the EPPO Regulation and Giuffrida/Ligeti, Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings, June 2019, p.83, available here:

https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf.

¹⁹ Available here: <https://www.eurojust.europa.eu/sites/default/files/2021-02/d210016.pdf>. See also press release of 15 February 2021, available here: <https://www.eurojust.europa.eu/eurojust-and-epo-sign-working-arrangement-facilitate-cooperation>.

²⁰ Available for download here:

https://www.europol.europa.eu/sites/default/files/documents/working_arrangement_epo_-_europol.pdf. See

the rules for cooperation. These focus on the exchange of information on, inter alia, specialist knowledge or criminal investigation procedures, mutual participation in training activities and provision of advice and support in criminal investigations.²¹

Conclusion

The amended OLAF Regulation not only seeks to pre-empt any difficulties in co-ordinating the work of OLAF and the EPPO, but also to ensure that the work of the two bodies is complementary. It is thus a promising step in the direction of a more connected and coordinated European criminal investigation and prosecution approach.

With the framework for co-operation and co-ordination in place, the question is how the relationship will work in practice and whether OLAF and the EPPO manage to avoid inter-institutional rivalries. One issue which may give rise to tension is whether the increase in the EPPO's budget sought by both European Chief Prosecutor Kövesi and the European Commission will eventually be at the expense of OLAF. A first test in this regard may come with the planned transfer of 45 posts from OLAF to the EPPO.²²

The EPPO Working Arrangements with Eurojust and Europol are further elements seeking to ensure that the EPPO can live up to the high expectations the European Union places in the institution.

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Please do not hesitate to contact us with any questions.

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also press release of 21 January 2021, available here: <https://www.europol.europa.eu/newsroom/news/europol-and-epo-establish-working-relationship>.

²¹ See Article 4 of the EPPO/Europol Working Arrangement.

²² See No 33 of OLAF's preliminary draft budget, available here: https://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2-2020_on_olaf_draft_budget_2021.pdf.pdf.

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