

The future cooperation between OLAF and the European Public Prosecutor's Office

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The future cooperation between OLAF and the European Public Prosecutor's Office (EPPO)

IN-DEPTH ANALYSIS

Abstract

This paper, commissioned by the European Parliament's Policy Department for Budgetary Affairs, at the request of the Committee on Budgetary Control, analyses the future cooperation between OLAF and the EPPO, two bodies specialised in the protection of the Union's financial interests. Three main dimensions of their cooperation are analysed, as well as elements of complexity that may influence it. The paper highlights elements essential for their close cooperation and complementarity, especially considering a potential revision of OLAF's legal framework.

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LIST OF ABBREVIATIONS

CMS	Case Management System
EPPO	European Public Prosecutor’s Office
EU	European Union
IBOAs	Institutions, bodies, organs and agencies
MS(s)	Member State(s)
OLAF	Anti-Fraud Office
PIF	Protection of the EU’s financial interests, from the French <i>Protection des Intérêts Financiers de l’Union</i> .
PIF Directive	Directive on the protection of the Union’s financial interests by criminal law

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Table 1: Summary of the differences between OLAF and the EPPO

EXECUTIVE SUMMARY

Background

For many years, the European Union has been concerned with the protection of its financial interests, and the fight against fraud, corruption and any behaviour affecting them. The Anti-Fraud Office (OLAF) has been active in this field for almost 20 years, carrying out administrative investigations on administrative irregularities.

2017 will be a pivotal year for the legal landscape in the field of PIF. The regulation establishing the European Public Prosecutor's Office (EPPO) will be adopted soon, and will lead to the establishment of a new EU criminal justice body, competent to investigate, prosecute and bring to judgment PIF offences. The forthcoming adoption of the Directive on the protection of the Union's financial interests by criminal law will participate to the approximation of the substantial definition of PIF offences and the sanctions to be applied. In addition, the Commission currently evaluates the Regulation 883/2013 defining the rules concerning OLAF's investigations, which might lead to amendments of the text.

Aim

The aim of this briefing paper is to provide a detailed analysis of the future cooperation between two key actors in the field of PIF, OLAF and the EPPO. These bodies are bound to develop close links, as they possess complementary competences and pursue similar objectives. Nevertheless, the issue of their future cooperation is particularly complex, since it implies a forward-looking exercise in a rather "unsettled context".

This paper firstly intends to give an account of their cooperation as it is currently envisaged in EU secondary law, i.e. the provisions contained in the EPPO Regulation. It also aims at reflecting upon elements that should be included in future policy developments, and in particular in a revised version of OLAF's Regulation 883/2013. It is indeed essential for the efficiency of the protection of the Union's financial interests to ensure that the OLAF-EPPO cooperation can develop itself in the most favourable legal framework.

Respective competences and tasks of OLAF and the EPPO

OLAF and the EPPO can appear at first sight as very similar actors: they are both EU bodies specialised in the protection of the Union's financial interests. A closer look reveals certain differences in their natures (Community body vs criminal justice body), in their respective competences and investigative powers (administrative investigations of administrative irregularities vs criminal investigations of criminal offences) and in their capacity to conduct criminal proceedings (inexistent for OLAF). Their differences, that strictly limit the risk of overlap between their activities, will influence their relationship. Indeed, as a result, both bodies are highly complementary, reflecting the complementarity between the administrative and criminal justice tracks in protecting the Union's financial interests. The co-existence of OLAF and the EPPO will allow to determine on a case-by-case basis which proceedings – administrative or criminal – are best suited to pursue a specific behaviour. In this regard, their cooperation will be essential to foster new synergies and improve the efficiency of PIF.

The cooperation between OLAF and the EPPO

In the course of negotiations, the EU legislator introduced a specific provision in the EPPO Regulation relating to the OLAF-EPPO cooperation (Art. 57a). Even though this provision does not suffice to

provide a comprehensive overview of the future modalities of their cooperation, it already gives valuable indications on its content and the challenges it may face.

It provides as a basic principle that the EPPO and OLAF must have a close relationship based on mutual cooperation within their respective mandates and on information exchange. Their relationship shall in particular aim “to ensure that all available means are used to protect the Union’s financial interests through the complementarity and support by OLAF to the EPPO”.

Analysing in further detail this provision, and the EPPO Regulation as a whole, three main dimensions in their cooperation can be identified.

- Firstly, the non-duplication of efforts will prevent parallel administrative and criminal investigations into the same facts. As a consequence, the text provides for the obligation for OLAF not to conduct parallel administrative investigations when the EPPO conducts its own investigations.
- Secondly the exchange of information in both ways, i.e. from OLAF to the EPPO and from EPPO to OLAF, will probably constitute the core of their bilateral cooperation. In addition to the general duty to report any suspicion to the EPPO, also binding national authorities and other EU institutions, bodies and agencies, OLAF is bound by additional obligations. The EPPO shall also have an indirect access to OLAF’s Case Management System. The exchange of information shall also function the other way: the EPPO shall transfer information to OLAF whenever it decides not to conduct an investigation or to dismiss a case.
- Thirdly, OLAF shall also provide a broader support to the EPPO’s activities, for instance through the provision of analyses, the facilitation of coordination of specific actions of administrative authorities, or the conduct of administrative investigations complementing those conducted by the EPPO.

Yet the current legal framework remains rather general, and should be complemented by more detailed provisions. These could be included via amendments to OLAF’s Regulation 883/2013, which are essential to ensure the coherence of OLAF’s and EPPO’s legal frameworks. Such details could also be dealt with in a working arrangement between the two bodies. Given the risk of a lack of transparency and democratic deficit, the involvement of EU institutions, and especially the Council and the European Parliament in the negotiations and adoption of such arrangement, is crucial. However, the precise content of these provisions remains a very sensitive question, depending on the vision on OLAF’s role (main operational support of the EPPO, or close yet independent partner). The current version of the EPPO regulation remains ambiguous. In this respect a clearer position must be taken, and should be reflected in OLAF’s legal framework.

Elements of complexity in OLAF-EPPO cooperation

The OLAF-EPPO cooperation takes place in diverse situations. In intra-EU cases, complexity will particularly be present when non-participating MSs are involved. Indeed, the precise modalities of their cooperation with the EPPO are not clearly defined. As a provisional solution, participating MSs shall notify the EPPO as a competent authority able to rely on EU instruments on judicial cooperation in criminal matters in its relations with non-participating MSs. In the longer run, a separate instrument will give substance to the obligation of non-participating MSs to cooperate sincerely with the EPPO.

In their cooperation with external partners, OLAF and the EPPO are complementary: they develop different types of cooperation (administrative cooperation vs judicial cooperation in criminal matters) and they may identify different countries as partners.

Finally, the involvement of other EU agencies/bodies, especially of Europol and Eurojust, will present a real added-value, especially in cases involving non-participating MSs. Mirroring – or at the least coherent – provisions in their respective instruments are essential to favour an effective interagency/body cooperation, and hence to improve the efficiency of PIF.

Conclusions

The high degree of complementarity between OLAF and the EPPO is undeniable. The establishment of the EPPO does not undermine OLAF's importance and relevance for PIF matters. The on-going evaluation of Regulation 883/2013 shall be essential to further reflect on the OLAF-EPPO cooperation, and particularly to make a clear choice between the two competing visions of their bilateral relationship.

Establishing a favourable legal context supporting their mutual trust and effective cooperation is of crucial importance. Although the transfer of resources from OLAF (and from Eurojust) to the EPPO presents certain advantages, it also creates risks, such as the loss of experience and expertise, or the creation of tensions undermining their mutual cooperation.

1. INTRODUCTION

KEY FINDINGS

- The legal framework in the field of the protection of the European Union's financial interests will be subject to fundamental changes in the next months.
- Some elements that are still pending concern directly OLAF and the EPPO, such as the future adoption of the EPPO Regulation and the evaluation of OLAF's Regulation 883/2013. Other elements will influence the context in which the two actors will develop their cooperation, i.e. the forthcoming adoption of the PIF Directive, and the negotiations on the proposal for a Regulation on Eurojust.
- In this rather "unsettled" context, the future cooperation between OLAF and the EPPO is particularly complex to analyse, since it implies a forward-looking exercise.

The protection of the European Union's financial interests has always been an issue at the core of many sensitive discussions. These discussions have gained a new momentum, as after nearly 20 years of debates in European circles, the EPPO Regulation is likely to be adopted in the coming months. This briefing paper focuses on the cooperation between OLAF and the EPPO, which are both competent for protecting the Union's financial interests. Given the convergence of their objectives and the complementarity of their mandates and competences, an effective cooperation between them is essential. This paper reflects upon the context that would favour such sound cooperation.

The future cooperation between OLAF and the EPPO has to be analysed in the light of the recently agreed EPPO Regulation and a certain number of pending elements/parameters.

The negotiations on the text of the EPPO Regulation have reached their end within the Council. A first compromise text had been agreed upon in January 2017.¹ 16 MSs notified the three EU institutions of their intention to launch an enhanced cooperation to establish the EPPO.² In March 2017, the European Council acknowledged the absence of unanimity in the Council, and thus opened the way to the establishment of the EPPO via an enhanced cooperation. On 8 June 2017, the Council has adopted its general approach on the EPPO Regulation;³ a total of 20 MSs shall participate in the establishment of this new EU body.⁴ The negotiations among the MSs participating in the establishment of the EPPO have led to certain changes in the text, and have answered some questions that were previously pending. For instance, it has been confirmed that the seat of the EPPO will be in Luxembourg. In order to finalise the adoption of the text, the consent of the European Parliament is required. It has been consulted throughout the negotiations, so that there is hope that it will give its consent before the summer break, thus allowing for the final adoption of the text in October.⁵

¹ Council, Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - General approach, 31 January 2017, Council doc. 5445/17.

² Council, Press release 'European public prosecutor's office: 16 member states together to fight fraud against the EU budget', 3 April 2017, doc. 184/17.

³ The last publicly available version is: Council, Draft Regulation implementing enhanced cooperation on the establishment of the EPPO – Presidency text, 3 April 2017, Council doc. 7761/17. A version of the Regulation, reflecting the changes introduced since April (24 May 2017, Council Doc. n°9545/17, available at: <http://statewatch.org/news/2017/jun/eu-council-eppo.htm>).

⁴ The participating MSs are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia, Slovakia and Spain.

⁵ Council, Press release "20 MSs agree on details on creating the EPPO", 8 June 2017, doc. 333/17.

Concerning OLAF, the Regulation 883/2013,⁶ which defines rules concerning its investigations, is currently under evaluation. The Commission should present its results by October 2nd 2017, which could lead to amendments to the Regulation.⁷

Other elements will influence the context in which OLAF and the EPPO shall exercise their competence and cooperate with each other. The proposal for a Directive on the protection of the Union's financial interests by criminal law (PIF Directive), which will determine the material scope of competence of the EPPO, is almost adopted. The negotiations are finalised.⁸ The Council has adopted its position at second reading in April 2017,⁹ and the European Parliament is expected to approve soon the text of the Directive.¹⁰ The proposal for a Regulation on Eurojust,¹¹ which is an actor with key competences in the field of PIF and a partner for both OLAF and the EPPO, is still under negotiation. The negotiations, which had been put on hold after the adoption of a partial General Approach within the Council in February 2015,¹² have also been relaunched, especially to discuss the provisions organising its relations with the EPPO.¹³

Due to the uncertainties relating to the above-mentioned elements, the legal framework in the field of the protection of the Union's financial interests will be subject to fundamental changes in the coming months. Consequently, addressing the issue of the future cooperation between OLAF and the EPPO is particularly complex, since it implies a forward-looking exercise in a still rather "unsettled" context or "changing" landscape. As a disclaimer, the discussions in this paper are based on the consolidated version of the EPPO Regulation of 30 May 2017 (Council doc. 9545/1/17 REV 1) and on the current wording of Regulation 883/2013.

The following reflections will be conducted in five steps. Firstly, the respective competences and tasks of OLAF and the EPPO will be addressed (2.). Their mutual cooperation, as currently envisaged in the draft EPPO Regulation, will then be discussed (3.). Thereafter, factors of complexity in their cooperation, starting with the establishment of the EPPO via enhanced cooperation will be analysed (4.). Finally, three main final remarks will conclude the paper (5.).

⁶ Regulation (EU, Euratom) No. 883/2013 of the European Parliament and of the Council of 11 September 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, OJ L 248, 18.09.2013, p. 1.

⁷ See Article 19 of Regulation 883/2013, which provides that by 2 October 2017, the Commission shall submit an evaluation report on the application of this Regulation, which shall state whether there is a need to amend this Regulation.

⁸ See Commission, Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012. The text of the directive is in the process of being finalised; (2nd reading)) and the position of the European Parliament is pending.

⁹ Council, Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law - Adopted by the Council on 25 April 2017, 27 April 2017, Council doc. 6182/1/17 REV 1.

¹⁰ See European Parliament, Draft Recommendation for second reading on the Council position at first reading with a view to the adoption of a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, 19 May 2017, PE604.640v01-00.

¹¹ Commission, Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, 17 July 2013.

¹² Council, Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) - General approach, 27 February 2015, Council. Doc n° 6643/15.

¹³ As an indication of the relaunch of the negotiations, see document prepared by the Presidency on EPPO related provisions (19 May 2017, not publicly available).

2. RESPECTIVE COMPETENCES AND TASKS OF OLAF AND EPPO

KEY FINDINGS

- OLAF and the EPPO share common features: they are both EU bodies, specialised in the protection of the Union's financial interests. A closer look reveals certain differences in their nature, their respective competences, their investigative powers and their capacity to conduct criminal proceedings. Whereas a comparison may lead to consider OLAF as a more supranational body than the EPPO, this should be tempered, especially due to the displacement of the decisional power (and especially of the prosecutorial decisional power) to a more or less supranational level, namely to the permanent chambers.
- OLAF and the EPPO are highly complementary, reflecting the complementarity between the administrative and criminal justice tracks in fighting fraud affecting the Union's financial interests.

OLAF and the EPPO can at first sight appear as very similar actors. They are indeed two EU bodies, specialised in the protection of the Union's financial interests. They share the same field of action, and they pursue the same objective of guaranteeing the protection of such interests. Nevertheless, when looking into details, these two bodies appear to differ on several points.

2.1. MAIN DIFFERENCES BETWEEN OLAF AND THE EPPO

A first difference resides in the fact that these two bodies have been **established in different contexts**, and via the adoption of **instruments of different generations**. OLAF has been established in 1999 to replace UCLAF (*'Unité de Coordination de la Lutte Anti-Fraude'*). This unit had been created as a service, part of the Secretariat General of the Commission in 1988, and was initially reporting to the President of the Commission.¹⁴ It worked alongside national anti-fraud departments, and provided the coordination and assistance needed to tackle transnational organised fraud. Its powers increased gradually, and included the possibility to launch investigations on its own initiative, or the obligation for all Commission Departments to inform it of any suspected instance of fraud. However, the events which led to the resignation of the Santer Commission, i.e. accusations of misuse of power, corruption and fraud against several Commissioners, created pressures for a stronger unit to safeguard the financial interests of the Union. As a consequence, OLAF was established as a new anti-fraud body. It structurally belongs to the Commission, but functionally it enjoys complete autonomy for certain missions (e.g. internal investigations),¹⁵ and possesses stronger investigative powers.¹⁶ It is a body of the European Community, established under the First 'Community' Pillar of the European Union, via a Commission Decision based on Article 162 TEC.¹⁷ The text has been amended since then; it has to be read together with other instruments, defining OLAF's investigative powers and/or mandates in

¹⁴ E. Lambert Abdelgawald (ed), *Dictionary of European actors*, Larcier 2015.

¹⁵ As indicated in M. Luchtman and J.A.E Vervaele, "Summary of main findings and overall conclusions", in M. Luchtman and J.A.E Vervaele (eds), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, April 2017, p. 328: "As far as the EU level is concerned, it is clear from the comparison that although OLAF is mandated as an investigative office, it has only autonomous and well-defined powers in the area of internal investigations. As far as external investigations are concerned OLAF is very much dependent for the existence and the reach of its powers upon the administrative powers of similar administrative enforcement authorities. This is also the case when OLAF wants to trigger autonomous investigations under Regulation 2185/96."

¹⁶ "The Added Value of OLAF, A few thoughts on the evidential value of OLAF reports in criminal investigations and for the criminal justice authorities in Belgium", Speech given by Advocate-General Francis Desterbeek at the formal inaugural sitting of the Court of Appeal in Ghent on 1 September 2005, OLAF/838/05-EN.

¹⁷ Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136, 31.05.1999, p. 20

specific sectors.¹⁸ After almost 20 years of existence, OLAF has developed a long standing experience and expertise in the field of PIF.

The EPPO has been compared to a “phoenix”,¹⁹ as its establishment has been successively announced, postponed, and relaunched. In 1997, a group of academics under the leadership of Mireille Delmas-Marty presented the *Corpus Juris* for the protection of the EU’s financial interests, which among other things proposed the creation of an EPPO.²⁰ At the time, MSs opposed the idea, which seemed premature. In 2001, the Commission re-launched the debate with the presentation of a Green Paper on criminal law protection of the financial interests of the EC and the establishment of an EPPO.²¹ Again, nothing concrete resulted from it. The EPPO came back to the agenda, but this time via EU primary law, with the insertion of Art. 86 TFEU by the Lisbon Treaty, which grants the EU the competence to set up an EPPO. This is one of the provisions of the Treaty which raises numerous questions and which has been most debated. The Stockholm Programme of 2009 was quite vague with regard to the setting-up of a European Public Prosecutor, speaking about it as a mere possibility that could be considered. The Commission’s action plan was more direct, mentioning the adoption of a Communication on the establishment of an EPPO.²² A Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office was finally published on 17 July 2013.²³ As mentioned earlier, it is likely that the EPPO’s Regulation will be adopted before the end of 2017. Its establishment will approximately take up to two years before the EPPO being operational.²⁴ The future body differs from OLAF with regard to its historical logic and its institutional origin. The EPPO will be set up via the adoption of a Council Regulation, based on Article 86 TFEU, and subject to a special legislative procedure, i.e. unanimity in the Council and consent of the European Parliament. The EPPO remains marked by the legacy of the ex-Third Pillar of the EU, dealing with police and judicial cooperation in criminal matters, which has been “communitarised” with the adoption of the Lisbon Treaty. This is particularly manifest when reading Art. 86 TFEU, which provides for its establishment “from Eurojust”.

Their differences are also apparent when considering **their respective tasks**, which are of a different nature. Whereas OLAF deals with an administrative answer to fraud against the Union’s financial interests and other behaviours forming part of its mandate, the EPPO provides a criminal justice answer. They thus belong to two distinct tracks, i.e. the administrative and criminal justice tracks, which can be used to protect the Union’s financial interests. This notably impacts on the procedural guarantees to be granted to individuals.²⁵ These guarantees are higher in criminal proceedings, considering the more severe sanctions persons may face, e.g. deprivation of liberty and social stigma attached to a criminal conviction. In contrast, for the persons affected by administrative inquiries, the

¹⁸ E.g. Commission Regulation (EC) No 1848/2006 of 14 December 2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field, OJ L 355, 15.12.2006, p. 56; Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, OJ L 343, 22.12.2009, p. 1; and Council Regulation (EC) 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, OJ L 082 22.3.1997, p. 1.

¹⁹ For a comparison of the EPPO with a Phoenix, see presentation of S. Gless about “European Public Prosecutor, Eurojust & OLAF – Current State of Affairs & Constitutional Issues” at the Expert Meeting on The European Prosecution Service, Maastricht University, 23rd April 2008.

²⁰ M. Delmas-Marty, *Corpus Juris, Introducing Penal provisions for the purpose of the financial interests of the European Union*, éditions Economica, 1997; M. Delmas-Marty – J.A.E. Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States*, Intersentia, 2000.

²¹ Commission, Green paper on the criminal law protection of the financial interests of the Community and the establishment of an European Prosecutor, COM (2001)715 final, 11 Dec. 2001.

²² Commission, Delivering an area of freedom, security and justice for EU’s citizens, Action plan implementing the Stockholm Programme, COM (2010) 171 final, 20 April 2010, p. 5.

²³ Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, COM (2013) 534 final, 17 July 2013.

²⁴ See intervention of Commissioner Jourova at the JHA Council meeting of mid-October 2016.

²⁵ See in this regard K. Ligeti, Briefing paper on “The protection of procedural rights of persons concerned by OLAF administrative investigations and on whether OLAF case reports can be admitted as criminal evidence”, forthcoming.

scope and content of procedural guarantees differ from one MS to another. They are not always specified, and administrative authorities enjoy a certain flexibility in preserving them.²⁶

The respective competences of OLAF and the EPPO share similarities: they are both competent to investigate in matters of PIF, and they share this competence with national authorities. However, when considering **their competences** in detail, one can notice a difference.

OLAF's main competence is to "conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union" (Art. 1 (4) Regulation 883/2013). OLAF is thus competent to conduct **administrative investigations**, defined as any inspection, check or other measure undertaken with a view to achieving the objectives set out in Article 1 and to establishing, where necessary, the irregular nature of the activities under investigation (Art. 2 (4) Regulation 883/2013). OLAF's material competence is to conduct such investigations when the EU budget is allegedly affected by illegal activities, in particular EU expenditures and most of its revenues (e.g. custom duties, agricultural duties, etc.).²⁷ This large spectrum of behaviours can evolve over time: new areas of competences can be granted to it via the adoption of new instruments of EU secondary law, or EU international agreements. For instance, whenever an EU body/agency/office is created (such as the EPPO – Art. 66), a provision is included in its constitutive instrument granting competences to OLAF to conduct internal investigations.²⁸

The EPPO is in contrast responsible for "investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, the criminal offences affecting the financial interests of the Union" (Art. 4 (1) EPPO Regulation). This indicates that the EPPO shall conduct **criminal investigations**, i.e. investigations whose final purpose is to determine the presence of a criminal offence, and the innocence or guilt of a person. Its material competence is provided for via a reference to the PIF Directive, which defines minimum rules on the offences affecting the Union's financial interests. The EPPO's material competence also includes offences regarding participation in a criminal organisation whose activity is focused on committing any of the offences referred to in the PIF Directive, and any other criminal offence which is inextricably linked to a criminal conduct falling in the scope of offences defined in the PIF Directive (Art. 17 EPPO Regulation). Over the course of the negotiations, the material scope of the EPPO's competence has evolved. Generally speaking, these changes restrict the EPPO's competence. In this regard, one can recall the decision to abandon its exclusive competence over offences defined in the PIF Directive,²⁹ or the insertion of provisions subordinating its competence to certain seriousness thresholds, e.g. the importance of the damage (Art. 20 (2) and Art. 20 (3) b)) or the sanctions concerned (Art. 20 (3) a)).³⁰ Whereas it is to be welcomed that serious forms of VAT-related fraud are covered in the PIF Directive (Art. 3 (1)), the EPPO's competence in this field remains seriously limited by additional conditions (connection with the territory of two or more MSs and damage of at least EUR 10 million – Art. 17 (1)).³¹ Recently, negotiations have followed a new direction. Firstly, a new

²⁶ K. Ligeti and M. Simonato, 'Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept', in F. Galli and A. Weyembergh (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law, The influence of the EU* (Editions de l'Université de Bruxelles, 2014), p. 93

²⁷ M. Scholten and M. Simonato, "EU Report", in M. Luchtman and J.A.E. Vervaele (eds), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, April 2017, p.14.

²⁸ E.g. Art. 66 – Combating fraud, of Regulation (EU) 2016/794 of the European Parliament and the Council of 11 May 2016 on the EU Agency for Law Enforcement Cooperation (Europol) (OJ L 135, 24.05.2016, p. 53)

²⁹ See Art. 11 (4) of the Commission's Proposal.

³⁰ On this issue, see A. Weyembergh and C. Brière, *Towards an EPPO* (study realised for the LIBE Committee, 2016), p. 25.

³¹ See Art. (3) 1 PIF Directive. See also see A. Weyembergh and C. Brière, *Towards an EPPO* (study realised for the LIBE Committee, 2016), p. 24.

provision softens the application of the seriousness threshold regarding the damage suffered (Art. 20 (3a) and Rec. 51b). With the consent of national authorities, the EPPO will be able to exercise its competence in cases that would otherwise be excluded due to the application of Art. 20 (3) (b), if it appears that the Office is better placed to investigate or prosecute. Secondly, concerning the EPPO's competence over ancillary offences, the text indicates that the EPPO will be able to exercise its competence when the PIF offence is not preponderant in terms of sanctions levels, but the inextricably linked other offence is deemed to be ancillary in nature, because it is merely instrumental to the PIF offence (Rec. 49b). This applies in particular when the ancillary offence has been committed for the main purpose of creating the conditions to commit the PIF offence. Finally, a recital refers explicitly to the priority of the EPPO's competence over national claims of competence (Rec. 51). This general rule serves to ensure consistency and steering of investigations and prosecutions at Union level. As a result of these back-and-forth evolutions, the outlines of the EPPO's material competence are particularly complex, which will of course impact its cooperation with its partners, including OLAF.

The **investigative powers at the disposal of the two bodies** also differ. OLAF's investigative powers are mainly defined in Regulation 883/2013, read together with other instruments, and particularly with Regulations 2185/96³² and 2988/95.³³ Its powers include the possibility to conduct on-the-spot checks and inspections. These investigative measures can be conducted in the EU institutions, bodies, agencies and offices (internal investigations – Art. 4 Regulation 883/2013), or in the premises of economic operators in the MSs, and eventually in third countries and in premises of international organisations (external investigations – Art. 3 Regulation 883/2013). The Office can also interview a person concerned or a witness at any time during an investigation (Art. 9 Regulation 883/2013), and it must - when conducting such interviews - respect certain procedural guarantees.³⁴ The extent of OLAF's investigative powers has become an issue, especially in the context of its evaluation. Its Director General has stressed the variable geometry in OLAF's capacity to conduct on-the-spots checks, depending on national law, and he regretted that OLAF has no access to financial flows and bank accounts, no access to records of telephones and data traffic, nor the ability to seal premises of economic operators.³⁵ He thus considered OLAF's investigative powers insufficient and pleaded for their extension, a position in line with the one expressed by the European Parliament.³⁶ The investigative measures at the disposal of the EPPO are defined in the EPPO Regulation; they are more extensive than the ones at the disposal of OLAF, with the limit that they depend to a certain extent on national law. Participating MSs are obliged to ensure that the European Delegated Prosecutors can rely on certain investigative measures, i.e. a common tool-box of measures, such as search of premises, production of object and computer data, freezing of proceeds, interception of telecommunications and tracking and tracing of an object (Art. 25 (1) EPPO Regulation). In addition, the European Delegated Prosecutors can order or request all investigative measures that are available under national law in

³² Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996, p. 2.

³³ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23.12.1995, p. 1

³⁴ See in this regard K. Ligeti, Briefing paper on "The protection of procedural rights of persons concerned by OLAF administrative investigations and on whether OLAF case reports can be admitted as criminal evidence", forthcoming.

³⁵ G. Kessler, Speech « the OLAF model after 1999 : where are we ? », OLAF Conference on the evaluation of Regulation 883/2013, held on 01 – 02 March 2017 in Brussels, p. 4, available at: https://ec.europa.eu/anti-fraud/media-corner/news/03-03-2017/speaking-points-giovanni-kessler-olaf-director-general-stakeholder_en.

³⁶ European Parliament, Resolution of 16 May 2017 on the Annual report 2015 on the protection of the EU's financial interests (2016/2097(INI)), P8_TA-PROV(2017)0206, para. 99.

similar national cases (Art. 25 (2) EPPO Regulation). For conducting investigative measures in another MS, they can rely on a *sui generis* mechanism for cooperation (Art. 26 EPPO Regulation).³⁷

Once the investigations are completed, the two bodies have different powers concerning **the decision to prosecute a case and/or to open criminal proceedings**. OLAF can draft a report under the authority of its Director General and make recommendations on the relevant (administrative, disciplinary, financial and/or judicial) action to be taken by the institutions, bodies, offices and agencies (in cases of internal investigations) or by the competent national authorities of the MSs concerned (in cases of external investigations) (Art. 11 (1) Regulation 883/2013). However, OLAF has no prosecutorial power: the decision to open criminal proceedings remains so far the exclusive competence of the national judicial authorities. In contrast, the EPPO is responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, PIF offences (Art. 86 (2) TFEU). Under the supervision of the competent Permanent Chamber, the European Delegated Prosecutors can decide to initiate investigations or exercise their right of evocation (Art. 22 and 22a EPPO Regulation) and to conduct the investigations (Art. 25 EPPO Regulation). On the basis of a proposal by the European Delegated Prosecutor handling the case, the Permanent Chamber is then competent to decide to bring it to judgment before national courts (Art. 30 draft EPPO Regulation).

Table 1: Summary of the differences between OLAF and the EPPO

	OLAF	EPPO
Different contexts and instruments of different generations	Created as a Community body under the First pillar of the TEU with a long history (UCLAF)	Created as a Union body in the field of EU criminal law after communautarisation by Lisbon Treaty
Different natures	Belongs to the administrative track	Part of the criminal justice track
Material competences	Irregularities affecting the EU financial interests (Regulation No 2988/95) + sectoral instruments (CAP, EU funds...)	PIF offences as approximated by PIF Directive + possibility to extend its scope of competence (Art. 86 (4) TFEU)
Types of tasks	In charge of carrying out administrative investigations	In charge of carrying out judicial investigations, prosecuting and bringing to judgment
Available investigative powers	Investigative measures defined in Regulation 883/2013 (including on the spot checks and inspections and interviews), read together with other instruments	Investigative measures as defined by draft EPPO Regulation with major references to national law (Art. 25 and 26 Draft EPPO Regulation)

Source: the authors (2017).

³⁷ For further details, see A. Weyembergh and C. Brière, Towards an EPPO, study realised for the LIBE Committee, 2016, p. 28 – 33.

2.2. IMPORTANCE OF OLAF-EPPO COMPLEMENTARITY

The comparison between OLAF and the EPPO reveals that they present certain similarities, such as their common objective to protect the Union's financial interests, but that they also have strong differences, for instance with regard to the scope of their competences or their investigative powers. More generally, it could be considered that they represent different degrees of verticalisation and/or supranationalism. At least under certain aspects, OLAF presents a more supranational nature than the EPPO. This especially derives from its status as a Community body, its capacity to deal autonomously with administrative investigations, the uniform definition of its material competence and investigating powers. The EPPO is in contrast marked by a certain degree of inter-governmentalism. This is noticeable when looking for instance at its Collegial structure, the importance of national laws in the definition of its material scope of competence and of applicable procedural rules.³⁸ However, such comparison should be taken cautiously. The EPPO also presents supranational elements, and its establishment will result in the displacement of the decisional power, and especially of the prosecutorial decisional power, to the Permanent Chambers (Rec. 20, Art. 9 (2) and 30 EPPO Regulation).

The differences identified in their respective natures, mandates and competences will directly influence their relationship. In particular, their difference in nature - OLAF being an administrative body and the EPPO belonging to the criminal justice track - strictly limits the risk of overlap between their mandates and activities. This contrasts with the relationship between the EPPO and Eurojust,³⁹ which both pertain to the criminal justice track. However, since Eurojust is competent for all kinds of serious transnational crimes, its mandate is much broader⁴⁰ than the mandate of the EPPO, which is specialised (at least for the moment) in PIF offences.⁴¹ However, avoiding overlap between OLAF's and the EPPO's activities will depend on the success of their cooperation, and especially on the efficiency of the exchange of information between them (see *infra*).

OLAF's and the EPPO's respective specificities result in a **strong complementarity**. This is closely linked to the complementarity between the administrative and criminal justice tracks in protecting the Union's financial interests. The criminal justice track will become more efficient with the establishment of the EPPO, which will be able to conduct criminal proceedings on its own. However, its establishment does not mean that the administrative track should be neglected. Administrative proceedings (and sanctions) are also efficient to protect the Union's financial interests; they are in certain cases better suited. The co-existence at the EU level of two bodies, OLAF and the EPPO, will allow to determine on a case-by-case basis which proceedings will be best suited to pursue a specific behaviour affecting the Union's financial interests. In that regard, their cooperation will be of crucial importance to foster new synergies and improve the efficiency of PIF.

³⁸ On the "re-nationalisation" and the "de-verticalisation" of the EPPO during the negotiations of the proposal, see A. Weyembergh and C. Brière, *Towards an EPPO* (study realised for the LIBE Committee, 2016).

³⁹ Concerning this relationship see A. Weyembergh and C. Brière, "Cooperative relations between EPPO and Eurojust", in Geelhoed P., Meij A., and Erkelens L. (eds), *Shifting Perspectives on the European Public Prosecutor's Office. Proceedings of the Hague Conference, July 2016*, T.M.C. Asser Press (forthcoming, 2017).

⁴⁰ As an example, see Eurojust, Annual Report, 2015, p. 28: Eurojust registered in 2014 around 1850 cases. Whereas the agency registered 69 PIF cases, it also registered 647 fraud cases (including excise fraud and VAT fraud) and 90 corruption cases.

⁴¹ See in this regard, the possibility foreseen in Art. 86 (4) TFEU: the European Council may adopt a decision in order to extend the powers of the EPPO to include serious crime having a cross-border dimension. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

3. THE COOPERATION BETWEEN OLAF AND EPPO

KEY FINDINGS

- In the course of negotiations, the content of the provisions relating to the cooperation between OLAF and the EPPO evolved. Their bilateral cooperation is now dealt with in a specific provision in the EPPO Regulation.
- It provides as a basic principle that OLAF and the EPPO must have a close relationship based on mutual cooperation within their respective mandates and on information exchange. Their relationship shall in particular aim “to ensure that all available means are used to protect the Union’s financial interests through the complementarity and support by OLAF to the EPPO”.
- Three dimensions can be identified: 1) the absence of duplication of efforts, and the obligation for OLAF not to conduct parallel administrative investigations when the EPPO conducts its own investigations; 2) the exchange of information in both ways, i.e. from OLAF to the EPPO and from the EPPO to OLAF; and 3) OLAF’s broader support to the EPPO’s activities.
- However, the current legal framework remains rather general, and should be complemented by more detailed provisions. These could be included in a working arrangement between the two bodies, yet with the involvement of EU institutions, and especially of the Council and the European Parliament.
- The content of their cooperation will furthermore depend on the vision on OLAF’s role, which remains ambiguous in the EPPO Regulation. In this respect, a clearer position must be taken and should be reflected in OLAF’s legal framework.

The cooperation between OLAF and the EPPO was initially a blind spot, as Art. 86 TFEU did not mention it, contrary to the cooperation of the EPPO with Eurojust and Europol. The Commission’s proposal for an EPPO Regulation⁴² mentioned OLAF several times,⁴³ but it did not contain a provision specifically devoted to the OLAF-EPPO cooperation.⁴⁴ During the negotiations, a clear evolution was noticed, notably due to the abandonment of the EPPO’s exclusive competence in prosecuting PIF offences, and the perspective of its establishment via enhanced cooperation. It became progressively clear that OLAF will remain a key actor in PIF, especially in the non-participating MSs, and that it would become one of the closest – if not the closest – partners of the EPPO. As a consequence, the EPPO Regulation now contains a provision dealing exclusively with its cooperation with OLAF, namely Art. 57a, complemented by references to OLAF in other provisions and recitals. It is worth highlighting that the provision on the EPPO’s cooperation with OLAF is more detailed than the ones devoted to its cooperation with Eurojust (Art. 57) and with Europol (Art. 58).

⁴² Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, COM (2013) 534 final, 17 July 2013.

⁴³ In the explanatory memorandum (budgetary implications), mention of the gradual transfer of staff members from OLAF to the EPPO. In the text, references to OLAF in respect of a dismissal of a case by EPPO and referral to OLAF for recovery or the administrative follow-up or monitoring (Art. 28 § 3), or the obligation to immediately inform the EPPO of any suspicious conduct (Art. 15 (1)) and role of OLAF in the transfer of information to the EPPO by MS and IBOAs (Rec. 27).

⁴⁴ There was only a general reference to their cooperation (Art. 58 (2) on relations with Union institutions, agencies and other bodies).

3.1. COOPERATION COMPOSED OF THREE DIMENSIONS

If one discards the issue of OLAF's internal investigations in the EPPO (Art. 66), their bilateral cooperation will be based on a fundamental principle and will encompass three main dimensions.

The basic principle of their cooperation is enshrined in Art. 57a (1). It must be read together with Recital 59, which recalls the application of the principle of sincere cooperation (Art. 4 (3) TEU) in the relations between the EPPO and its partners. In substance, this basic principle provides that the EPPO and OLAF must have a close relationship based on mutual cooperation within their respective mandates and on information exchange. Their relationship shall in particular aim "to ensure that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO".

When analysing the rest of the provision, and the Regulation as a whole, three main dimensions can be identified in their mutual cooperation.

3.1.1. Avoiding the duplication of efforts

A first dimension of the OLAF – EPPO cooperation aims at avoiding the duplication of efforts (Art. 57a (2) and Rec. 98). The text clearly provides that when the EPPO conducts a criminal investigation, OLAF shall not open any parallel administrative investigations into the same facts. This can be interpreted as granting a certain priority to the EPPO.

Such prohibition of duplication of efforts should contribute to avoid situations where the *ne bis in idem* principle would apply and constitute an obstacle for the exercise of the EPPO's competence (Art. 33 (1) e)). The case law of the CJEU allows the combination of administrative and criminal sanctions,⁴⁵ except where the administrative sanctions imposed are to be considered as criminal sanctions according to the *Engel* criteria.⁴⁶ Besides, all national legal orders do not necessarily accept such combination of administrative and criminal sanctions, so that the adoption of administrative sanctions could jeopardise the legality of the EPPO's investigations, depending from the MS concerned.

More generally, it can be considered that the prohibition made to OLAF to conduct parallel investigations also contributes to an effective use of the tools available to the EU to protect its financial interests. In a context of scarce EU resources, it constitutes mismanagement if both bodies lead at the same time investigations on the same behaviours, especially given the gaps in the protection of the Union's financial interests, the low number of investigations, and the even lower number of convictions.

One of the issues raised by the non-duplication rule is to know when and how OLAF should interrupt its own investigations once the EPPO decides to launch its own. Indeed, the moment and the manner in which the handover takes place will be key to ensure that the interest of justice prevails, and to avoid

⁴⁵ See a.o. CJEU, Case C-489/10, *Bonda* (05 June 2012), CJEU, Case C-617/10, *Aklagaren v. Hans Akerberg Fransson* (26 February 2013), para. 37, or CJEU, Joined cases C-217/15 and C-350/15, *Criminal proceedings against Massimo Orsi and Luciano Baldetti* (5 April 2017), para. 27. Reference is made to case law of European Court of Human Rights, in which the notion of "penal procedure" is interpreted autonomously, and the nature of a measure labelled as administrative in a specific legal system can be put into question ([ECHR, *Sergey Zolotukhin v. Russia*, 10.02.2009, Application 14939/03, para 52 – 53](#)).

⁴⁶ In the *Engel and others* case (8 June 1976, Appl. N°5100/71 and al, para 82-83), the European Court of Human Rights enounced three criteria to determine a sanction can be considered as a criminal sanction: the classification in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring.

the loss of the information/evidence already collected or gathered. For instance, will OLAF be required to draft a report on the investigations conducted so far?

This first dimension appears narrowly linked to the next dimension of their cooperation, namely the exchange of information. Such exchange will for instance allow OLAF to know when the EPPO has started an investigation and to transmit the outcomes of its own investigations. The effective implementation of the non-duplication rule will thus depend on the effective exchange of information between OLAF and the EPPO.

3.1.2. Exchange of information

The second dimension of the OLAF – EPPO cooperation lies in the exchange of information, which will be of crucial importance in both directions, i.e. from OLAF to the EPPO and from the EPPO to OLAF.

- Exchange of information from OLAF to the EPPO

OLAF is bound by several provisions, foreseeing such exchange under different modalities.

OLAF is bound by a general obligation, also binding for national authorities and IBOAs, to inform the EPPO without undue delay of any criminal conduct in respect of which it could exercise its competence (Art. 19 EPPO Regulation, and Rec. 46).⁴⁷ This reporting duty is essential for the good functioning of the EPPO. However, the interpretation of the precise circumstances triggering its implementation will be key. The preamble provides that national authorities and IBOAs, including OLAF, must report an information to the EPPO whenever they identify a suspicion of an offence within its competence (Rec. 46). This implies that they carry out a preliminary evaluation of the facts, notably to determine the presence of such suspicion, and consequently transfer the information to the EPPO. OLAF having an expertise in the evaluation of suspicious behaviours in PIF matters,⁴⁸ the text refers to the possibility for the IBOAs to make use of OLAF to that effect (Rec. 46). In order to avoid depriving this duty of its efficiency and added-value, the notion of suspicion should not be interpreted narrowly. National authorities must for instance report cases where the assessment of some criteria, such as the level of damage or the applicable penalty, is not immediately possible (Rec. 48). The negotiations have reinforced this reporting duty, as a new provision has been introduced: national judicial or law enforcement authorities shall inform the EPPO when they open a criminal investigation in respect of a PIF offence, even if they consider that the EPPO could not exercise its competence (Art. 19 (1aa)). The effectiveness of this reporting duty will also depend on its addressees, and especially on the types of national authorities concerned. Indeed, the text refers to the “authorities of the Member States competent under applicable national law”, without providing more details.

The Regulation contains other modalities of exchange of information which are specific to OLAF.

The EPPO shall also benefit from an indirect access to the information stored in OLAF’s Case Management System (CMS) on the basis of a hit/no hit system, and in case of a match, the fact that there is a match will be communicated to both OLAF and the EPPO (Art. 57a (5)). One can wonder why

⁴⁷ A similar obligation, albeit formulated in weaker terms, also applies regarding the transmission of information to OLAF by IBOAs, and by competent national authorities in so far as their national law allows it (Art. 8 Regulation 883/2013).

⁴⁸ See e.g. OLAF, Guidelines for Investigation Procedures for OLAF staff, 2013, ARES(2013)3077837, Art. 1 – 7 Selection.

it is only about ensuring an indirect access on the basis of a hit/no hit system. If it can be understood that this provision is consistent with those organising the indirect access of databases of other EU agencies (Europol or Eurojust), it is questionable why the specificity of the OLAF-EPPO relation was not more taken into consideration, in particular to ensure, via a direct access, a more efficient exchange of information.

Furthermore, exchange of information is foreseen as one of the modalities of OLAF's support. According to Art. 57a (3) a), OLAF provides to the EPPO information, analyses (including forensic analyses) and operational support (see *infra*).

- **Exchange of information from the EPPO to OLAF**

The exchange of information **from the EPPO to OLAF** will take place in cases where the EPPO has decided not to conduct an investigation (Art. 57a (4)). The EPPO shall then provide relevant information to OLAF, with a view to enabling the latter to consider appropriate administrative action in accordance with its mandate. This situation can occur for instance when information is referred to the EPPO, but the latter decides to refrain to exercise its competence because there are no reasonable grounds to believe that an offence within its competence has been committed (rec. 100); the level of damage is below the *de minimis* threshold provided for in the Regulation; or other circumstances (Art. 20 EPPO Regulation).⁴⁹ Similarly, if after initiating an investigation, the EPPO decides to dismiss a case, notably because of a lack of relevant evidence, it can refer it to OLAF for recovery or other administrative follow-up (Art. 33 (4)).

For the moment, there is no reciprocal indirect access from OLAF to the Case Management System of the EPPO. This is problematic. Such access should be provided for in a revised OLAF Regulation.⁵⁰

3.1.3. OLAF's support to the EPPO's activities

A third dimension of the OLAF-EPPO cooperation consists in OLAF supporting and complementing the EPPO's activities. Art. 57a (3) provides that, in the course of an investigation by the EPPO, the latter may request OLAF, in accordance with the mandate of OLAF, to support or complement its activity. The same provision mentions a few examples: the provision of information, analyses (including forensic analyses), expertise and operational support; the facilitation of coordination of specific actions of the competent national administrative authorities and EU bodies; and the conduct of administrative investigations. The idea is not to have parallel investigations but rather to have OLAF assisting the EPPO within its own mandate and expertise. For example, in order to proceed to administrative recovery, the collection of certain evidence, irrelevant for the EPPO's criminal investigations, might be necessary, and OLAF could rely on its investigative powers to collect it.

⁴⁹ See in this regard the addition of a new provision, Art. 20 (3a)

⁵⁰ See in this regard the provision on Eurojust also foreseeing an indirect access (Art. 57 EPPO Regulation), and the draft Eurojust Regulation, foreseeing similar mechanism (Art. 41 (5) Proposal, COM (2013) 535 final).

3.2. COMMENTS

The EPPO Regulation is for the moment the only text referring to the cooperation between OLAF and the EPPO. The regime it provides for, discussed above, raises the four following issues.

3.2.1. The need for further clarification

The provisions contained in the EPPO Regulation remain general; there is a clear need to organise the mutual cooperation between OLAF and the EPPO in a more detailed manner.

A first question is to determine where such details should be provided for: two possibilities can be envisaged.

On the one hand, more details could be provided in EU secondary law instruments, i.e. the EPPO Regulation and/or an amended version of Regulation 883/2013. In order to ensure consistency and balance in their respective duties, mirroring provisions on the OLAF-EPPO cooperation should be inserted in both instruments. However, the text of the EPPO Regulation being now finalised, it is unlikely that negotiations to further develop Art. 57a will be reopened. Besides, it would also imply to further specify the provisions devoted to the cooperation of the EPPO with Eurojust and Europol.

On the other hand, a second and more realistic option could be to rely on the possibility granted by the EPPO Regulation to negotiate and conclude a working arrangement between the EPPO and OLAF (Art. 56 (2a)). This presents the advantage of flexibility. Indeed, technical discussions will be conducted bilaterally between the two concerned bodies, which will know best what is needed for ensuring a good working relationship and efficient operational cooperation. However, one can wonder whether it is a good option to leave the details to a working arrangement. In the past, bilateral arrangements between EU agencies and bodies have proven to be delicate to negotiate, and sometimes remained dead letters.⁵¹ Moreover, this entails the risk of a lack of transparency and democratic deficit. The EU institutions, and in particular the Council and the European Parliament, should be involved, as well as national parliaments, not only to follow the negotiation and conclusion of such working arrangement, but also to monitor its implementation.⁵²

3.2.2. Two visions of OLAF's relations with the EPPO

A second question arises on the content to be given to these more detailed provisions organising the OLAF-EPPO cooperation. This is a quite sensitive question, as it requires to choose between two visions of the relationship between OLAF and the EPPO. The EPPO Regulation entertains some sort of "constructive ambiguity" around the notion of OLAF's supporting and complementing the work of the EPPO. To understand the roots of such ambiguity, it is worth recalling that, at least schematically and theoretically, there are two different visions of OLAF's relations with the EPPO.

According to a first vision, the EPPO's main support in conducting its investigations would come from OLAF. This first vision presents the advantages of strengthening to a certain extent the EPPO's

⁵¹ A. Weyembergh, I. Armada and C. Brière, "The interagency cooperation and future architecture of the EU criminal justice and law enforcement area", Research paper for the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, June - Nov. 2014, p. 15. See also D. Bigo, L. Bonelli, D. Chi and C. Olsson, "Mapping the field of EU Internal Security Agencies", p. 27.

⁵² See for instance the annual report presented to the Standing Committee on operational cooperation on internal security (COSI) by the JHA agencies, notably through a scorecard on cooperation, which is annexed to the annual report. For more details, see. Weyembergh, I. Armada and C. Brière, "The interagency cooperation and future architecture of the EU criminal justice and law enforcement area", *ibid*, p. 9.

supranational/vertical nature, and of limiting its need to rely on national authorities. However, it also encompasses disadvantages. It may lead to an “administrativisation” of criminal proceedings.⁵³ Such possibility faces the obstacle of existing Chinese walls between administrative and criminal tracks, and may imply a change of the nature of OLAF’s mandate, i.e. the end of its mandate for autonomously conducting administrative investigations according to its own procedural rules. Following this first option would in any case lead to a fundamental reform of OLAF’s legal framework, and it would especially require a reinforcement of the procedural safeguards applicable to OLAF’s investigations. Besides, if OLAF was to be transformed in the “EPPO’s investigatory arm”, bound to obey the EPPO’s orders, this may not only affect OLAF’s capacity to efficiently carry out its other functions, but it may also be incompatible with Art. 86 TFEU, which focuses on the assistance of national authorities and Europol. The treaty drafters had furthermore used this article to exclude the proposal made by the Dutch Minister of Justice several years ago, concerning the creation of a whole set of EU supranational/federal bodies in charge of fighting PIF crimes and serious cross-border crimes.⁵⁴

According to a second vision, the EPPO’s main support would come from the national authorities; and the relation between the EPPO and OLAF is envisaged as a relation between two autonomous bodies. In this context, OLAF is still supporting the EPPO’s work, but in a more “subsidiary manner”, and OLAF keeps its own margin of manoeuvre. Whereas this second vision presents the advantage of less affecting OLAF’s current nature and mandate, it also means that the verticalisation in the field of PIF remains limited and the efficiency of the EPPO’s activities depends largely from national authorities.

The EPPO Regulation seems to give a preference to the second vision. It states very clearly in the preamble that the EPPO “should rely on national authorities, including police authorities, in particular for the execution of coercive measures” (Rec. 59). Concerning its relationship with OLAF, the text also seems to envisage them as two separate and autonomous bodies. The text refers several times to “requests” that may be addressed by the EPPO to OLAF.⁵⁵ The question is how to interpret these words. They are similar to the ones employed in Eurojust’s Council Decision,⁵⁶ which do not entail binding obligations for the addressee of such requests. Should a similar interpretation apply, OLAF would retain a margin of appreciation, allowing it not to follow the EPPO’s requests. This could severely endanger the efficiency of the EPPO. Interpreting the EPPO regulation by analogy with Eurojust’s Council Decision is questionable. The relationship between Eurojust, an EU agency which remains so far predominantly of an intergovernmental nature, and national authorities is not comparable to the relationship between the EPPO and OLAF, two (more or less) supranational bodies of different natures, one belonging to the criminal justice system and the other to the administrative track (see *supra*). Besides it should be noted that, in contrast with the Eurojust’s Council Decision, the EPPO Regulation does not even provide for an obligation to give the reasons for not following a request. This ambiguity in the EPPO Regulation should be clarified through the provision of further details on the impact and nature of an EPPO’s request in a revised OLAF’s Regulation. Given the political sensitivity of this issue, it should not be left to a working arrangement, and requires a decision at political level.

⁵³ This refers to the increased intervention of administrative actors as supporters of criminal proceedings. See in this regard F. Galli and A. Weyembergh (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law, The influence of the EU* (Editions de l’Université de Bruxelles, 2014).

⁵⁴ Minister of Justice (Netherlands), Note “the European criminal justice area”, submitted on 8 May 2003, CONV 0733, p. 3.

⁵⁵ see Art. 57a (3) c) “the EPPO may request OLAF to conduct administrative investigations” and Rec. 100 “the EPPO may request that OLAF considers whether to open an administrative investigation or take other administrative follow-up or monitoring action”.

⁵⁶ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust (and amending Decision 2002/187/JHA (...), OJ L 138, 4.06.2009, p. 14

The debate mentioned above is linked to the transfer of part of OLAF's staff to the EPPO, potentially including the transfer of investigators. This idea was mentioned in the Commission's proposal,⁵⁷ and it remains since then. One can wonder whether the transfer of OLAF's staff does not constitute a way to circumvent the obstacles to the realisation of the first vision (OLAF as the EPPO's investigatory arm). It is clear that the EPPO cannot rely solely on national authorities, as it cannot face the risk of seeing the efficiency of its investigations jeopardised by the lack of resources at national level, or by the adoption of national investigative priorities not linked to PIF. The idea of transferring part of OLAF's staff to the EPPO may thus enable the EPPO to be less dependent from the willingness and available resources of national authorities. Nevertheless, this transfer raises several remarks. It would concern a transfer of posts/FTE, and not actual persons. Should persons, and in particular investigators, accept to join the EPPO, they will be valuable, notably to develop the EPPO's expertise in PIF. Nevertheless, if they do not remain affiliated to OLAF and have not a double hat, they will lose their direct access to its resources and databases. Besides, in order to equip these persons with tools to assist efficiently the EPPO, they should be granted the right to carry out investigative measures in the territories of the MSs. However, it is difficult to predict whether participating MSs will attribute them such powers.

3.2.3. Essential importance of the exchange of information

It is important to highlight that the different dimensions of the OLAF-EPPO cooperation are not isolated from one another, particularly the exchange of information has an inextricable link with the rule concerning the non-duplication of efforts (see *supra*). The EPPO Regulation contains various provisions devoted to the exchange of information, but they should be complemented.

Indeed, difficulties may arise in the selection of cases, due for instance to the national variations in the definition of offences for which the EPPO is competent,⁵⁸ and the fact that some behaviours remain subject to different qualifications (administrative irregularity and criminal offence) in different MSs. The exchange of information must be dynamic and be continued throughout the duration of a case in order to take into account the evolution of the investigations. The identification of new factual elements may lead to the requalification of a behaviour initially considered as an administrative irregularity into a criminal offence, or on the contrary insufficient evidence may lead to an inverse result. Similarly, a further assessment of the value of the damage suffered may imply that the case falls outside the competence of the EPPO (Art. 20 (2) and (3) a)). Consequently, it might be necessary to accompany the existing provisions by some sort of mechanism for bilateral consultations to ensure that the cases are investigated by the best placed body.

Ensuring an effective exchange of information, not only between OLAF and the EPPO, but also among all actors active in the field of PIF (national authorities, IBOAs, etc.), is of crucial importance, as it guarantees the good functioning and efficiency of the whole system designed to protect the Union's financial interests. Given the difficulties faced in the past, notably for ensuring that national authorities transfer information to EU agencies,⁵⁹ the implementation of the provisions relating to the exchange of information shall be closely monitored and followed-up.

⁵⁷ See Commission, EPPO Proposal, COM (2013) 534 final, Explanatory Memorandum, p. 8: "As the set-up phase of the European Public Prosecutor's Office will probably take several years, staff members will be gradually transferred from OLAF to the European Public Prosecutor's Office. The equivalent number of the staff transferred and the corresponding credits to finance this staff will be reduced in the establishment plan and budget of OLAF."

⁵⁸ The PIF Directive does not cover all PIF offences, and only contains minimum rules on the approximation of PIF offences. MSs retain a certain margin of discretion when transposing it.

⁵⁹ See in this regard, Council, Final report on the sixth round of mutual evaluations - "The practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the

3.2.4. Amendments of OLAF's Regulation 883/2013

The legal framework governing the cooperation between OLAF and the EPPO is incomplete, as there is a strong need to adapt OLAF's legal framework, and particularly Regulation 883/2013, to the establishment of the EPPO. Such change is necessary to ensure that they can collaborate as efficiently as possible.

Amending OLAF's Regulation is firstly necessary to ensure coherence in the legal frameworks of the two bodies. This would imply for instance the insertion of a certain number of provisions mirroring those contained in the EPPO Regulation. A specific provision devoted to the relations of OLAF with the EPPO should provide for OLAF's indirect access to the EPPO's Case Management System. It should also include an explicit obligation for OLAF not to open an administrative investigation when the EPPO decides to exercise its competence. For the latter, an amendment of Art. 5 of Regulation 883/2013 would be needed.

Moreover, amendments will be necessary, depending on the choice made between the two visions of their mutual relations previously mentioned, i.e. OLAF as the investigatory arm of the EPPO, or two independent bodies. Regardless of the choice that will finally be made, a serious reflection should be conducted concerning the need to reinforce OLAF's investigative powers and to accompany them with higher procedural safeguards. This is indeed required to ensure that the EPPO can rely on a partner with adequate powers to efficiently investigate fraud affecting the Union's financial interests. For the same reason, a reflection should also be conducted concerning the need to reinforce the evidentiary value of OLAF's reports. Under the current legal framework, such value depends on national law, as they have the same value as administrative reports drawn by national administrative inspectors (Art. 11 (2) Regulation 883/2013). This results in a strong fragmentation, which undermines the follow-up of OLAF's actions and the efficiency of the protection of the Union's financial interests.⁶⁰

Council Decision 2008/976/JHA on the European Judicial Network in criminal matters", 2 December 2014, Council doc. n° 14536/2/14 REV 2, p. 33.

⁶⁰ See on this issue, K. Ligeti, Briefing paper on "The protection of procedural rights of persons concerned by OLAF administrative investigations and on whether OLAF case reports can be admitted as criminal evidence", forthcoming.

4. ELEMENTS OF COMPLEXITY IN OLAF-EPPO COOPERATION

KEY FINDINGS

- The cooperation between OLAF and the EPPO may be influenced by elements of complexity, which raise new legal questions, and require specific answers.
- A first element of complexity is linked to the status of the States involved in a case: participating MSs, non-participating MSs, or third countries. In cases involving States belonging to these different categories, the variable geometry regarding their cooperation with OLAF and/or the EPPO is a strong cause of concern; it will also impact the cooperation between OLAF and the EPPO.
- A second element of complexity consists in the insertion of the OLAF-EPPO cooperation in a large array of bilateral relationships between EU agencies and bodies in the field of PIF, and in the broader context of interagency/body cooperation.

The OLAF-EPPO cooperation takes place in diverse, frequently complex, situations. Two elements of complexity will be analysed: the status of the States concerned by the investigation and prosecution of PIF offences and the involvement of other EU agencies and bodies.

4.1. STATUS OF THE STATES CONCERNED BY THE INVESTIGATIONS AND PROSECUTIONS

The first factor of complexity derives from the States concerned by the investigation and prosecution of PIF offences.

4.1.1. Enhanced cooperation: the involvement of participating and/or non-participating MSs

Complexity may arise in intra-EU cases, as the recourse to enhanced cooperation has separated the EU MSs in two groups. 20 MSs out of 28 have accepted to take part in the establishment of the EPPO.⁶¹ The other (non-participating) MSs will continue to cooperate with OLAF and they will have to interact with the EPPO. Indeed, as MSs of the EU, they are bound by the principle of sincere cooperation (Art. 4 (3) TEU)⁶² and the general obligation to ensure the protection of the Union's financial interests (Art. 325 TFEU).

In order to understand the complexity of such situations and its impact on the OLAF-EPPO cooperation, three hypotheses are to be distinguished.

- Firstly, in cases involving only participating MSs, the OLAF-EPPO cooperation will take place according to the modalities described in the previous section.
- Secondly, in cases involving only non-participating MSs, the EPPO cannot exercise its normal competence. As a consequence, OLAF will have a predominant role for conducting administrative investigations and/or assisting national authorities. Such cases may also be referred to Europol and/or Eurojust, which could within their mandates support the activities of national police/judicial authorities. However, the question remains to know if the EPPO could play a role in such cases, and if so, what would be its role (see *infra*).

⁶¹ Council, Press release of 8 June 2017.

⁶² The application of this duty is explicitly reminded in Recital 102aa of the EPPO Regulation.

- Finally, a last hypothesis concerns “mixed” cases involving both participating and non-participating MSs. These are particularly complex cases because of the asymmetry in the roles of OLAF and the EPPO. With regard to the investigations taking place in the participating MSs, the EPPO would be able to exercise its competences; the OLAF-EPPO cooperation would be carried out according to the modalities defined in EU secondary law. However, for the investigations taking place in the non-participating MSs, the question regarding the concrete role of the EPPO is once more raised (see *infra*); OLAF will be competent to carry out its “normal” activities, such as the conduct of administrative investigations, and the coordination of administrative authorities. In these mixed cases, the involvement of Eurojust could present a real added value, as it could help to coordinate the EPPO’s investigations with those conducted in the non-participating MSs.

Many issues will depend on the precise modalities under which the cooperation between the EPPO and non-participating MSs will be organised. In addition to the possibility for the EPPO to appoint contact points in these MSs, the EPPO Regulation provides for the conclusion of working arrangements, notably concerning the exchange of strategic information, and the secondment of liaison officers to the EPPO (Art. 59a (1) and (2)). The recent negotiations have provided further details on the future cooperation between the EPPO and non-participating MSs. A positive answer has been provided to the question as to whether a separate instrument will be adopted (Rec. 102aa). The Council has expressly invited the Commission to submit appropriate proposals in order to ensure effective judicial cooperation in criminal matters between the EPPO and all non-participating MSs (including those with a specific status, such as Ireland and Denmark).⁶³

In the absence of such instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the non-participating MSs, a provisional solution will apply. It is based on the reintroduction of a proposal, initially made by 4 MSs, according to which the participating MSs shall notify the EPPO as a competent authority for the purpose of implementing applicable Union acts on judicial cooperation in criminal matters (Art. 59a (3)). This means that the EPPO would be able to rely autonomously on existing EU instruments on judicial cooperation in its relations with non-participating MSs.⁶⁴

In the longer run, the adoption of a separate instrument should help reducing the variable geometry and fragmentation resulting from the application of working arrangements in the relations between the EPPO and non-participating MSs, thereby improving legal security. Such future instrument will give substance to these MSs’ obligation to cooperate sincerely with the EPPO. For instance, details could be provided for concerning the exchange of information with the EPPO and support to the EPPO’s investigations. It should also give precisions concerning the EPPO’s assistance to non-participating MSs in PIF matters. The EU legislator should take this instrument as an opportunity to organise the EPPO’s relations with other EU agencies/OLAF in cases involving non-participating MSs, for instance to facilitate the detection of links between cases.

⁶³ Council, Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Draft Council Declarations, 7 June 2017, Council doc. n° 9896/17 ADD 1.

⁶⁴ See Art. 59a (3) of the draft EPPO Regulation.

4.1.2. Complementarity in their cooperation with external partners

Complexity may also arise when a case involves third countries and international organisations. Both the EPPO and OLAF can rely on explicit legal bases in their instruments to develop cooperation with external partners, via the conclusion of working arrangements or cooperation agreements (Art. 59 EPPO Regulation and Art. 14 Regulation 883/2013). More ambitious provisions also allow the EPPO to be recognised as a competent authority with regard to the international agreements on mutual legal assistance concluded by the MSs, but the acceptance of the third country concerned is required (Art. 59 (4)). The content of the external agreements concluded by OLAF and the EPPO with external partners are likely to vary depending on the country concerned. This means that, in cases involving external partners, their respective cooperation with external partners, as well as their mutual cooperation, will be subject to different legal regimes, thus leading to variable geometry.

In this context, the OLAF-EPPO cooperation is difficult to analyse. Nevertheless, it is clear that the OLAF's and EPPO's activities with external partners will be complementary (as their activities within the EU) because of the different natures of the cooperation established and the partners concerned. OLAF is developing international administrative cooperation, while the EPPO will be developing international judicial cooperation in criminal matters. The external partners with whom they cooperate will not necessarily be identical, as the identification of partners may not follow the same logic. OLAF's partners are mainly recipients of EU funds, while the EPPO may identify partners on the basis of its operational needs.

Finally, the establishment of the EPPO via an "enhanced cooperation" confirms and even further increases the essential role of the other EU bodies/agencies in the protection of the Union's financial interests, and in particular the role of Eurojust and OLAF. This reinforces the importance to strengthen OLAF's investigative powers and the evidentiary value of its reports. It would indeed contribute to reduce the imbalance between the efficiency of PIF in participating MSs and non-participating MSs.

4.2. INVOLVEMENT OF OTHER EU BODIES AND AGENCIES

The complexity of OLAF-EPPO cooperation may also increase when other EU bodies and agencies, mainly Eurojust and/or Europol, are involved in a case. It is possible to imagine that the four agencies and bodies intervene in the same case; this might especially be relevant in mixed cases involving both participating and non-participating MSs. It will then be crucial to have an effective multilateral cooperation between OLAF, the EPPO, Europol and Eurojust. In this respect, there is a need to insert mirroring – or at the least coherent - provisions in the different relevant instruments. These provisions should ensure that the bilateral cooperation between two bodies/agencies can develop itself taking into account the bilateral cooperation with the others, as well as the initiatives for fostering interagency cooperation. In this regard, certain gaps are already noticeable, such as the absence of a provision organising the cooperation between Europol and the EPPO in the Europol Regulation.⁶⁵ This silence is due to the chronology of the negotiations of the concerned texts. However, it marks a difference with the provision on the cooperation with Europol in the EPPO Regulation (Art. 58), and with the provision on the cooperation of Europol with Eurojust and OLAF in the Europol Regulation (Art. 21).

⁶⁵ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) OJ L 135, 24 May 2016, p. 53.

5. CONCLUSIONS

The adoption on 8 June 2017 of the Council's General Approach on the EPPO Regulation answers several pending questions concerning the EPPO. The final text of the Regulation is almost known, the number of participating MSs is disclosed, as well as the location of the EPPO's seat in Luxembourg. In this context, it is possible to have a preliminary idea on how OLAF and the EPPO will cooperate.

The high degree of complementarity between both bodies is evident. It is undeniable that OLAF constitutes the privileged partner of the EPPO, since both bodies share the same objectives and are both competent to conduct investigations in the field of PIF. In this regard, the establishment of the EPPO, competent to conduct criminal investigations, does not mean that OLAF becomes irrelevant. On the contrary, OLAF's importance and relevance for PIF remains because of the complementarity between the administrative and criminal justice tracks. It is even further increased because of the establishment of the EPPO via an enhanced cooperation.

The on-going evaluation of Regulation 883/2013, for which the Commission shall present a report by 2nd October 2017, shall be essential to further reflect on the OLAF-EPPO cooperation. The revision of the Regulation is crucial, at least to reflect the changes in the PIF landscape and the establishment of a new actor. Amendments to the Regulation will be required to ensure the consistency between OLAF's and the EPPO's legal frameworks. In this regard, it is necessary to further define the modalities of the OLAF-EPPO cooperation, including from the perspective of OLAF, and ensure both bodies' complementarity. Such amendments will compel the EU legislator to make a clear choice on the vision of OLAF-EPPO bilateral relation and to manage the consequences of that choice. Reflections are also essential concerning the need to better equip OLAF in terms of its investigative powers and the evidentiary value of its reports.

Given the OLAF-EPPO complementarity and privileged partnership, it is of crucial importance to ensure that their mutual cooperation can develop in a favourable context, supporting their mutual trust and effective cooperation. In this regard, although the transfer of resources from OLAF (and from Eurojust)⁶⁶ to the EPPO presents certain advantages, it also creates risks. The loss of expertise and experience, as well as the loss in resources, for OLAF (and Eurojust) may not be compensated by the establishment of the EPPO. For instance, such transfer would mean that less resources would be available to conduct OLAF's activities falling outside the scope of PIF. Besides, such transfer of resources is, in a context of scarce EU resources, a factor of tensions between the EU bodies and agencies, which may undermine their mutual cooperation.⁶⁷

⁶⁶ See Commission, EPPO Proposal, COM (2013) 534 final, Explanatory Memorandum, p. 8. See also Commission, Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274 final, 17 July 2013, p. 35: "In addition, part of OLAF's and Eurojust's staff would be transferred to the EPPO in order to provide for investigative and prosecutorial resources, reflecting the transfer of the corresponding responsibilities from OLAF and from Eurojust."

⁶⁷ See in this regard, comparison between the annual budget of Europol and Eurojust.

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This paper, commissioned by the European Parliament's Policy Department for Budgetary Affairs, at the request of the Committee on Budgetary Control, analyses the future cooperation between OLAF and the EPPO, two bodies specialised in the protection of the Union's financial interests. Three main dimensions of their cooperation are analysed, as well as elements of complexity that may influence it. The paper highlights elements essential for their close cooperation and complementarity, especially considering a potential revision of OLAF's legal framework.

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