| Chapter 14 |

Fundamental Questions of Administrative and Criminal Investigations for the Protection of the Financial Interests of the EU

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ABSTRACT

One of the most meaningful results of the past decades in the EU is forming a new criminal law cooperation system which is building on a new paradigm of operational cooperation between EU MSs. The new system pushed back to the background of the traditional, legal aid-based system. One of the characteristics of this is tighter cooperation in the investigation of both administrative and criminal. This contribution concentrates on presenting the features of this topic.

KEYWORDS

the administrative investigation, criminal investigation, protection of the financial interests of the EU, OLAF, Eurojust, EPPO

1. Foreword

After 30 years of the Maastricht Treaty, we live in a new era with regard to the law and institutional background of the EU. This long-lasting period brought many fundamental changes to the information on European criminal law. The common denominator of changes was the protection of the financial interests of the EU. However, as Stefanou et al. highlight, the catalyzer of changes was the unsolved problem of the illegal outflow of EU subsidies.

> 'By the late 1980s, Common Agricultural Policy (CAP) subsidies fraud was rife in some MS (Member States). The main problem was the unwillingness of national authorities and enforcement agencies to investigate, let alone prosecute – the alleged offenders. Most national enforcement agencies were geared towards protecting domestic financial interests, and fraud that involved

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> 'Community funding' was not a priority... The general picture that emerged was that some MS EU funding was seen as a 'fair game' and the inability of national authorities to investigate and prosecute reinforced the misconception that fraud against the EU was somehow not a priority.'[1]

This situation inspired the EU in 1995—by creating the Public Investment Fund convention—to create a supranational frame to protect financial interests. Since then, many changes have occurred. The changes had two directions: administrative and criminal law.

From the Maastricht Treaty to the Lisbon Treaty in the Three-Pillar System of the EU, the evolution of administrative law was faster because the law-making procedure on the First Pillar (FP) was more business-like, and the FP has an exclusive competence of administrative law, both legal and institutional. The direct application of EU law made the vertical connection between the EU Member States (MS) more manageable, making it possible to harmonize the material and procedural rules of agencies wholly or partly, whose exclusive or part-task is the protection of the financial interests of the EU, like European Anti-Fraud Office (OLAF), the European Security and Market Authority (ESMA), or DG Competition (DG Comp).

2. The characteristics of administrative investigations

The antecedent of OLAF was the Unité de Coordination de La Lutte Anti-Fraude (UCLAF), established in 1986. Until 1999, the creation of OLAF, the Commission transformed UCLAF several times as the MS and the Commission attempted to solve fraud problems. As Stefanou et al. note, the main problem with UCLAF was the operational level. Regarding the competencies of UCLAF, the Commission is divided between DG VI (Agriculture), DG XX (Financial Control), and DG XXI (Customs and Indirect Taxation). UCLAF did not have natural powers of investigation. The Court of Auditors Reports indicated that fraud continued to be a severe problem. Essentially, the first period in the development of EU anti-fraud bodies was characterized by the Commission's attempts to convince MS that tackling fraud against the interests of the Community is a severe problem and one that the MS should tackle directly.

The establishment of OLAF characterizes the post-1999 period. The main features of the institutional frame include functional independence, parallel functioning, and not sharing information, though they do not function in a network. As noted later, the situation changed regarding OLAF after establishing the European Public Prosecutor's Office (EPPO). These agencies are authorized to make administrative investigations of breaches of EU law and sanction the violations. The sanctions have a punitive character.

1 Stefanou, White and Yanthski, 2011, p. XV.

As Luchtman and Vervaele note, they sometimes intersect with criminal law enforcement primarily for natural reasons but sometimes for undertakings concerned.[2] During investigations, the agencies interact at the national and EU level. Therefore, they have an EU comprehensive mandate as EU authorities are also active on the territories of Various MS. These activities are complex. Luchtman and Vervaele note that the EU authorities can have autonomous or shared competencies and make investigations autonomous or shared with national authorities.

Finally, they must solve the problem of the applicable law in a vertical setting to achieve a level playing field (from unification to harmonization to bottom-up accommodation of EU law by national legal systems). Luchtman and Verveale emphasize that fulfilling these tasks requires a high degree of integration (substantive and procedural laws). Furthermore, a clear delineation of duties between the EU and national authorities is necessary to avoid problems with the principle of legal certainty, stipulating that rules involving negative consequences for individuals should be clear and precise and the application predictable for those subject to them. Per Luchtman and Verveale, while EU authorities conduct exclusive investigations, essential competencies and power remain in the hands of the MS:

1. the use of genuine coercive powers remain in the hand of the member states
2. autonomous EU inspections may be hampered by clashing national interests
3. EU authorities may need information from their national partners for the exercise of their duties (before and after the investigation)
4. The results of the independent investigation may be used in national proceedings

However, the admissibility of these results in the MS's administrative or criminal procedure requires coordination, particularly in harmonizing defense rights. Notably, where competencies are exclusively European, national law and authorities continue to play a role. Mixed investigations and mutual assistance are less intrusive from the perspective of MS and can better accommodate conflicts between national and EU legal order.

Accordingly, Luchtman and Verveale rightly note that there is a clear link between the models and the applicable rules.[3] In their view, particularly for an independent investigation, regulations must be based on a uniform legal framework defining the powers of authorities, including the possible consequences in cases of non-cooperation (through imposing fines but via ensuring assistance by national law enforcement). Moreover, it implies the power to enforce investigative acts (and introduce remedies at the corresponding EU level). This power is the case for European Central Bank (ECB), ESMA, and DG Comp.

Nevertheless, the OLAF framework differs significantly from the other authorities who conduct the independent investigation. In the OLAF regulations, the principal

2 Luchtman and Vervaele, 2017, p. 314.
3 Ibid., p. 326.

instruments do not state that the necessary investigative power should work autonomously; instead, they indicate what information should ultimately be made available to OLAF via forces of national law. In turn, the national-level specific legislation for OLAF is fragmented or absent in many cases. One refreshing example is the Netherlands, where specific legislation covered this aspect, but cooperation remains problematic, particularly in expenditure.

Luchtman and Vervaele note that the absence of such a framework induces uncertainty in practice (i.e., in France).[4] The OLAF 'administrative' statute before the EPPO regulation led to additional hurdles in Germany and the Netherlands, where customs and tax authorities have far-reaching (criminal law) powers in the national settings (e.g., Guardia di Finanza in Italy). Even so, they are not used or cannot be used for OLAF investigations. As soon as on-the-spot checks turn into suspicions, the inquiry must be halted and handed to the judicial authorities.

Notably, the diversity of rules among the MSs is sometimes disturbing, which is why there is a strong need for uniform regulations parallel to a robust national cooperation framework. Moreover, independent investigations still need cooperation with MS's law. The examples of ECB, ESMA, and DG Comp also show how vital a robust framework is for the national authorities. Luchtman and Verveale rightly note that only relevant rules and regulations can ensure

1. that there is a national counterpart for cooperation with the EU authority in each sector
2. that these authorities cooperate with the EU authority by sharing operational information
3. possess specific investigative power for that purpose (interviews, production orders, site visits), including the assistance of the police or equivalent forces and, in cases of concurrent jurisdiction, such as in competition law
4. provisions concerning admissibility as evidence (including the need for equivalent standards of legal protection)

However, such a framework was unavailable for the OLAF until recently. Thus, the national anti-fraud coordination service (AFCOS) provides beneficial services but is (mostly) a coordinative body. Given that OLAF's complicated mandate makes operational cooperation at the national level challenging, particularly for EU expenditure, other issues like powers, the sharing of information, and coordination have not come into play until now. The dividing ridge was the Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013 regarding cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations (Reg.Am.). The new Reg amends the former in two directions: efficiency enhancement and the relationship to EPPO.

4 Ibid., p. 322.

Efficiency regards the importance of procedural rights under the OLAF administrative investigation as a right to avoid self-incrimination, to be assisted, to use any of the official languages of the EU, to approve the record, or add observations. There was no controlling body for these rights that could validate the fair procedure in administrative and criminal procedures. The stake is the admissibility of evidence in both scenarios, which is why the Reg.Am created a new position in OLAF procedure, the controller, who shall monitor the Office's compliance with procedural guarantees referred to in Article 9, and the rules applicable to investigations by the Office.

At the national level, Section 12a, apart from the AFCOS units, established the anti-fraud coordination services to facilitate practical cooperation and the exchange of information between OLAF and the MSs, including operational details. The anti-fraud coordination services may assist the OLAF upon request such that the Office may conduct coordination activities following Article 12b, including, where appropriate, horizontal cooperation and exchange of information between anti-fraud coordination services.

The Reg.Am. gives a new dimension to the OLAF activity by opening the cooperation between other EU agencies. Within its mandate to protect the financial interests of the Union, the OLAF shall cooperate, as appropriate, with the European Union Agency for Criminal Justice Cooperation (EUROJUST) and with the European Union Agency for Law Enforcement Cooperation (EUROPOL). The Office shall agree with EUROJUST and EUROPOL on administrative arrangements to facilitate the cooperation. Such working arrangements may involve exchanging operational, strategic, or technical information, including personal data, classified information, and progress reports. The Reg.Am. makes connections to EPPO. This connection establishes new tasks for OLAF, primarily helping the EPPO's criminal investigations. The Office shall submit a report to the EPPO without undue delay on any criminal conduct in which the EPPO could exercise its competence.

Further tasks of the OLAF following its mandate to support or complement the EPPO's activity include

1. providing information, analyses (including forensic analyses), expertise, and operational support;
2. facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union;
3. conducting administrative investigations.

These changes in OLAF activity serve the proper fulfillment of the protection of the financial interests of the EU and address a new phenomenon: the networking of EU agencies. The Commission Special Report on Future of EU agencies notes that the potential for more flexibility and cooperation in 2021 emphasizes that EU agencies have a network function to share expertise and collaborate with national, European, and international partners. However, agencies have not yet explored the possibilities for achieving synergies and economies of scale, where they have similar activities. Moreover, the agencies depend on the necessary support from the Member States.

Further, some agencies operate in policy areas with a strong international dimension. Even so, they sometimes lack support from the Commission to share expertise with non-EU partners and more flexibility. To this flexible functioning belongs the harmonization of administrative and criminal procedural rules.[5]

3. Criminal investigation and the protection of the financial interests of the EU

In the classical view of criminal procedure, truth-seeking is the waiting room of criminal justice. Without finding the truth, it is not possible to decide on criminal responsibility. It is no accident that the search for truth is the primary function of the criminal process across diverse legal traditions. However, the criminal process of finding the naked truth is not complete. While searching for truth is a broadly accepted goal in the criminal process, no system seeks the truth at all costs. On occasion, the search for truth must yield to various aspects.

First, consider the characteristics of uncovering the facts of a criminal case (Tatbestand).

a) The general view is that the search for truth is retrospective. Thus, criminal authorities try to investigate the evolution of a criminal event that is complete. The methodology of such an investigation is to set up versions. In this context, performance is not unambiguous evidence to answer the whos and whys. Finding the correct version sometimes takes time. The duration can influence the uncovering of the facts of crimes.
b) The criminal authorities should use investigation tools defined in criminal procedural laws and use these tools only in the ways the laws prescribe. If the rules breach these regulations, it can have severe consequences for the criminal case and responsibility.
c) The most universally accepted principle of truth-finding protects individual rights like dignity, privacy, and liberty. Many procedural rights developed in the process—the right to counsel, to an impartial adjudicator, to confront adverse witnesses, to receive notice of changes—are generally consistent with an emphasis on accuracy.

These characteristics regard the basis of uncovering the truth in criminal procedure and the limits of truth-seeking. Likewise, regarding performance, it is not unambiguous evidence to answer the questions of whos and whys. Finding the correct version sometimes takes time. The duration can influence the uncovering of the facts of crimes. If the performance is terrible, the investigation runs incorrectly. The

5 European Court of Auditors, 2020, p. 45.

measures taken will be vain, and mistaken concepts of committing crimes can lead to the wrong verdict.

Regarding the use of the tools of evidence, authorities often do not use the devices correctly or breach these rules. For example, the interrogator uses an incompetent interrogation technic; the interrogation protocol is incorrect. No wonder guarantees, like the right to avoid self-incrimination, double jeopardy, and the exclusion of unlawfully obtained evidence, may hurdle the search for truth. Nevertheless, under the influence of human rights ideals, countries worldwide have come closer together in their willingness to adopt such protections and limit the search for truth when necessary to ensure fairness.

Before finding the truth, there are further barriers that stem from the organizational characteristics of criminal justice. The organization of criminal justice everywhere in the world is a publicly financed institution where the operational costs available are inadequate to uncover and judge all crimes. Such a lack has two-fold consequences. First, criminal justice (police, prosecution services, courts) selects the cases per their significance. Thus, the criminal justice may give up uncovering the facts of crimes. Second, they try to find new ways to judge crimes. However, the rapid changes in the permanent staff of the police limit the chances of finding the truth, as the skilled 'old foxes' with knowledge and experience interrupt the smooth knowledge transfer. Self-education in truth-seeking can result in a high proportion of faulty products. The other characteristic of criminal justice organizations is work overload in the permanent pressure to produce more output, which can negatively influence accurate and efficient truth-finding.

Truth-finding has systemic limits. At least, in Hungary, the criminal judge has no obligation to uncover the accused person's guilt if there is no proposal from the prosecution side. Shortcomings in higher education and institutional training limit the chances of truth-finding. An excellent example from the Hungarian experiences is that, in the police higher education, the protocol making or interrogation techniques are in the curricula of the police academy but do not get enough importance. The result is devastating. Judges of the first-instance criminal courts do not study how to reason on the final judgment, which is why the reasoning and evidence are usually incomplete. Notably, in many cases, false and incomplete confessions or expert opinions cannot be filtered by judges successfully. Finally, plea bargaining, which in adversarial systems has been practiced for decades and accepted by courts since at least the 1970s, has spread rapidly since the 1990s in inquisitorial systems, overcoming longstanding resistance 'to trading' with justice.

In each MS, the goal of the criminal investigation is to find the truth. Nevertheless, truth-finding is realized in different languages under different rules and is not interchangeable among MSs. After establishing EPPO, the situation has become much more manageable in the case of budgetary crimes. However, these crimes represent only a tiny part of the content of criminal codes. This remote part is what Jung called sectoral integration.

The effect of the EPPO is that the information, the function of criminal investigation, and the accusation of all budgetary crimes is in the hand of the European public prosecutor, independent of which MS is the perpetrator of these crimes. The place of the commission of most budgetary crimes is a single MS, where the competencies, criminal procedural rules, and the language of the procedure raise no problems.

The EPPO has a network (EUROJUST, EUROPOL, OLAF, EJN [European Judicial Network] local authorities) from which it can obtain a wide range of information flow for its work and execute European investigation orders concerning budgetary crimes in its competence. It means that all data for its practical work and accusation are open, supposing that all the evidence meets the national Code of Criminal Procedure, especially the procedural guarantees. The situation is different from those mentioned above when the investigations concern two or more MSs. In such a situation, the EPPO must solve several problems.

1. First is the determination of the jurisdiction of which MS the EPP charges against the perpetrator of budgetary crimes. This decision will determine and fix the crucial rules of evidence, the court procedures, and procedural guarantees, and exclude the future problems of 'ne bis in idem.'
2. Second, the EPP must make a thorough examination of the legal elements of the criminal act (Tatbestand, büntető tényállás) that have a central role in evidence taking.
3. The EPP must determine the investigative tasks in the MS of jurisdiction and other MS(s) where the perpetrator(s) committed budgetary crimes under investigation.
4. The investigation may include cooperation with local and other MS authorities, executing European investigation order, initiation of the release European arrest warrant, initiation of arrest at the court with jurisdiction and
5. cooperate with the EPPO network (EUROJUST, EUROPOL, EJN, OLAF).

It is worthy of consideration to introduce the European testimony, which was part of the Corpus Juris 1997 (CJ). Article 32 of CJ notes that an affidavit, direct or presented at the trial via an audiovisual link, is admissible if the witness is in another MS or recorded by the EPP in the form of a 'European deposition.' If MSs would generally accept the European testimony, it could help eliminate the differences between national procedural regulations.

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