

SUCCESSOR TO AGON



**Focus: Tenth Anniversary of the European Anti-Fraud Office**  
**Dossier particulier: Le dixième anniversaire de l'Office de Lutte Antifraude**  
**Schwerpunktthema: Zehn Jahre Amt für Betrugsbekämpfung**

The Context of OLAF's Work

OLAF's Achievements

Optimising OLAF

OLAF's Interplay with National Law and Institutions

OLAF's Future Role and the European Public Prosecutor

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This issue of eucrim specialises in news items related to financial interests. In addition, information is given on upcoming events in European criminal law. Other regularly published news sections of eucrim, including developments on Europol, data protection, ne bis in idem, police and judicial cooperation, etc., will appear in the next issue.

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\* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage [www.mpicc.de/eucrim/search.php](http://www.mpicc.de/eucrim/search.php) and then entering the ID-number of the link in the search form.

# Editorial

## Happy Birthday, OLAF!

The European Anti-Fraud Office – OLAF – is now 10 years old: The European Parliament is proud of this anniversary and extends its cordial best wishes. If it hadn't been for the Committee on Budgetary Control's perseverant demands to intensify the European fight against fraud, the constitutive Regulation No. 1073/99 would probably never have been established. In the meantime, enlargement from 15 to 27 Member States and an increasing global commitment have brought about new fields of activity and challenges for both the EU and the Office. Presently, 50% of OLAF's caseload is connected to non-EU states. Since 2000, monies spent by the Commission conjointly with the UN or other international institutions have increased sevenfold.

The constitutive Regulation has not adapted to the change. It also falls short of providing fully satisfactory answers to grave legal problems, in particular with regard to the rule of law – a fact the architects of the Regulation were aware of – thus calling for interpretation in the judicature of the European Court of Justice. Hence, the procedural rights of potential suspects are solely mentioned within the recitals of said Regulation – without extending to its actual provisions. The OLAF Supervisory Committee has formally been charged with safeguarding procedural guarantees that have not yet been codified. However, with OLAF being obliged to conduct its investigations in an independent manner and not being allowed to provide information on pending investigations, the Supervisory Committee's means are limited and a matter of controversy.

The founders assumed the creation of a European Public Prosecution Service – as included now in the Lisbon Treaty. The question remains: What to do until it comes into effect and the European Public Prosecutor is actually operative? Even though OLAF and its committed staff – together with the Supervisory Committee – have found ways to make this Regulation workable, there is no way round its thorough revision. Parliament stands side-by-side with OLAF and continues to demand its institutional evolution towards a Commission-independent, autonomous European investigation unit.

MEPs attach great importance to a truly efficient fight against fraud: There is no issue of greater concern to the European taxpayers than the correct appropriation of funds. Parliament has done its share: Our statement has been submitted. It confers

upon OLAF full responsibility for compliance with procedural guarantees and protection of privacy, and, entrusts to the judges and public prosecutors employed by OLAF the task of upholding these rights for the duration of the investigations and exchanging information with the Member States. We have integrated the Director General into internal structures and installed a complaints service with an independent review adviser. The standard attained thereby exceeds by far the general rules for administrative investigations and holds a cutting edge on an international scale.

Now, it is up to the Council to act: We note with regret the failure of EU Member States when it comes to concrete steps regarding either the Office or the legal processing of OLAF's caseload. 36 OLAF-files resulting in 63 trials have been transferred to the national authorities; a follow-up is available for only two of them. The same applies to the structural funds: Only nine of 30 files resulting in 40 trials are still able to be tracked down. Lack of knowledge about these cases is amplified by the national authorities' reluctance to act: Luxembourg, hosting 10,000 EU staff members, has so far not brought any charges against a single OLAF case. Nothing is worse for general faith in a proper administration of justice than the perception that fraudulent acts remain unpunished.

Member States have put the revision of OLAF's constitutive Regulation on hold for an indefinite term. Instead of taking one comparatively small but obvious step now, they are asking for a consolidation of OLAF's three legal bases in "a giant leap". Thus many precious years will be lost for OLAF and a more efficient fight against fraud – with an uncertain outcome to boot.

Dr. Ingeborg Gräßle  
Member of the European Parliament



Dr. Ingeborg Gräßle



## European Union

Reported by Thomas Wahl

### OLAF

#### Court Strengthens Judicial Rights in Case of Internal Investigations

After the far-reaching judgment of the Court of First Instance of July 2008 in the “Franchet & Byk” case (►[eucrim ID=0801042](#)), the Civil Service Tribunal rendered a further judgment on 28 April 2009 that will have a considerable impact on the rights of EC officials affected by OLAF’s internal investigations (Joined Cases F-5/05 and F-7/05, *Violetti and Others v Commission, Schmit v Commission*).

In the case at issue, OLAF investigated manipulations of accident declarations within the Joint Research Centre (JRC) of the European Commission based in Ispra, Italy. OLAF concluded that the behaviour of 42 officials of the JRC may give rise to criminal proceedings and sent the information to the public prosecutor of Varese, Italy (pursuant to Art. 10(2) of Regulation 1073/99). The officials affected by the OLAF inquiry were not heard before the sending of the information to the public prosecutor and, in fact, heard nearly one year later. However, the Italian authorities did not take action, since they believed that the accident declarations as described were

not sufficient proof of fraud. Hence, the Italian judge responsible for preliminary investigations shelved the proceedings.

The officials affected lodged a complaint with the Director of OLAF against the transmission of information by OLAF to the Italian authorities in accordance with Art. 90a of the Staff Regulations of Officials of the European Communities. This provision stipulates that an official may submit to the Director of OLAF a complaint (...) against an act adversely affecting him in connection with investigations by OLAF. The complaint was rejected by OLAF. The complainants subsequently lodged an action before the Civil Service Tribunal, seeking annulment of OLAF’s investigations and compensation for damages due to OLAF’s inquiries (Art. 91 of the Staff Regulations).

The first question that the Civil Service Tribunal had to decide on was the admissibility of the action, i.e., whether the transmission of information to national (judicial) authorities is *an act adversely affecting* an official. The Commission and the Council resorted to the case law of the European Court of Justice and the Court of First Instance which had ruled that transmissions of information to the judicial authorities pursuant to Art. 10(2)

of Reg. 1073/99 are only preparatory acts with no binding effect (e.g. case “Tillack”; Cases T-193/04 and C-521/04 P(R)). The Commission/Council concluded that the contested decision cannot have adversely affected the complainants.

The Civil Service Tribunal objected to this view and affirmed that the transmission of information indeed adversely affected the officials. The Tribunal mainly used two arguments for its justification: First, it states that the provisions of the Staff Regulations, which allow an official to submit a complaint vis-à-vis the Director of OLAF, are the corollary of the new powers for internal investigations conferred upon OLAF by the new legislation of 1999.

Secondly, the Tribunal points out that a denial of the decision being an act adversely affecting an official would make no sense with regard to the requirements resulting from the principle of effective judicial protection and given the consequences liable to be entailed by a decision to send information to national judicial authorities. It closely connects this conclusion with the procedural guarantees, such as the right to be informed about the opening and closing of the investigation, and the right to be heard, which the Community legislature explicitly attached (cf. Art. 4 of Commission Decision 1999/396/EC, ECSC, Euratom of 2 June 1999), and which must be ensured. In this context, the Tribunal indicates that it is the only court which may censor a violation of the provisions of Reg. 1073/99, and thus should control the legality of OLAF’s decision to transmit information to judicial authorities (in application of Art. 10(2) Reg. 1073/99) in a timely manner.

It will be interesting to observe whether the findings of the Civil Service Tribunal will also have an impact on a possible revision of the established case law of the ECJ and CFI in that the transmission of information to national judicial authorities is not challengeable. The Civil Service Tribunal, however, argues in a formal way and points out that the seemingly conflicting case law concerns the interpretation of “direct and individual concern” in the framework of annulment procedures pursuant to Art. 230 TEC and not the legal dispute in question, which refers to judicial protection under Staff Regulations.

As to the merits of the action, the Civil Service Tribunal held that OLAF did breach the procedural rights of the officials to be informed and heard before sending the information to the judicial authorities of Italy (cf. Art. 4 of the aforementioned Commission Decision 1999/396); the conditions for grounds of dispensation had not been complied with. As a consequence, the Tribunal annulled the contested decision and ordered the Commission to pay each of the applicants €3000 to make good their loss.

►eucrim ID=0803001

### **Ombudsman: OLAF Failed to Respect Presumption of Innocence**

On 9 March 2009, the European Ombudsman, *P. Nikiforos Diamandouros*, released a decision closing his inquiry into complaint 1748/2006/JMA against OLAF, in which he criticised OLAF for not having respected the principle of the presumption of innocence in an investigation case leading to the complaint.

In 2006, the complainant, a British consultant, received a letter (dated 31 March 2006) from OLAF, stating that the complainant had committed serious irregularities while working in an EU-funded project. OLAF had also sent similar letters requesting information on the complainant to some of the complainant’s former and current employers. According to the complainant, this seriously damaged his reputation. OLAF

replied that the letters only requested information and did not cast any suspicion on the complainant. The complainant submitted a complaint to the European Ombudsman in June 2006.

The Ombudsman found that OLAF had indeed used incriminating language in its letters. Although he acknowledged that OLAF needs to request information from third parties, the Ombudsman stated that the letters implicated that OLAF already possessed evidence linking the complainant to the irregularities. Thus, the Ombudsman decided that OLAF failed to respect the principles of fairness, proportionality, and the presumption of innocence.

*Background:* The office of the European Ombudsman was created by the Maastricht Treaty of 1992. The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union. Maladministration means poor or failed administration. This occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights (e.g. unfairness, discrimination, abuse of power, refusal of information). Citizens of a Member State of the Union or persons who reside in a Member State can make a complaint to the Ombudsman. Businesses, associations or other bodies with a registered office in the Union may also complain to him. He can also launch inquiries on his own initiative.

►eucrim ID=0803002

### **Tillack Case Closed by Belgian Judicial Authorities**

The media reported that the Belgian public prosecutor officially closed the “Tillack case” on 6 January 2009, since there was not enough evidence against the Brussels-based German journalist Hans-Martin Tillack. The case was brought up by OLAF in 2004 and subject to long-time legal disputes between the Office and the journalist. OLAF suspected Tillack of having bribed EU offi-

cial in order to gather documents for an article he published in 2002 on alleged irregularities in the Commission. The forwarding of information by OLAF to the Belgian authorities resulted in a Belgian police raid of the journalist’s home and office including the detention of the journalist for several hours and the seizure of hundreds of pages of documents, two archive boxes, two computers, and four mobile phones. Whereas a complaint of Mr. Tillack against the action of the Belgian authorities before the European Court of Human Rights in Strasbourg was successful, the European Court of Justice (ECJ and CFI) in Luxembourg dismissed a complaint against the action of OLAF (see eucrim 3-4/2006, p. 49, and 3-4/2007, p. 82).

►eucrim ID=0803003

## **Protection of Financial Interests**

### **Second PFI Protocol Enters into Force**

After Italy notified the Council its ratification of the “Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities’ financial interests” it will finally come into force on 19 May 2009. Italy was the last of the old Member States to complete the ratification. The Second Protocol had already been concluded in 1997 as a “third pillar” instrument under the Maastricht Treaty. The Second Protocol mainly contains the following:

- Member States are obliged to penalise acts of laundering of proceeds of fraud or active and passive corruption that damage or are likely to damage the European Communities’ financial interests.
- The law of the Member States must provide that legal persons can be held liable for fraud, active corruption, and money laundering committed for their benefit.
- Member States must ensure that legal persons held liable for one of the above-mentioned offences committed

by a person in a leading position may be punished by “effective, proportionate and dissuasive sanctions” which shall include criminal or non-criminal fines and other sanctions, such as (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placement under judicial supervision; (d) a judicial winding-up order.

- Member States must put in place the seizure and without prejudice to the rights of bona fide third parties, the confiscation and removal of instruments used in order to commit fraud, active or passive corruption, or money laundering, and the proceeds of these offences; property, the value of which corresponds to such proceeds, must also be covered.

- Member States shall not refuse mutual legal assistance solely because offences covered by the Protocol concern or are considered as tax or customs duty offences.

- In order to ensure effective action against fraud, corruption, and related money laundering that is damaging or likely to damage the ECs’ financial interests, the Protocol lays down provisions for the cooperation between the Member States and the Commission, including the exchange of information. To this end, rules for the protection of personal data are regulated.

The Second Protocol was initially intended to be a further milestone of the criminal law protection of the EC’s financial interests (PFI) after the Convention of 1995 – which deals with fraud affecting the European Communities’ budget, its definition, and establishes criminal consequences – and a First Protocol (also called “Corruption Protocol”) to the Convention (signed in 1996) that primarily aims at acts of corruption involving national and Community officials and their impact on the European Communities’ financial interests. Both the Convention and the First Protocol, together with a further Protocol (on the role of the European Court of Justice

regarding the interpretation of the PFI instruments by way of preliminary ruling) entered into force on 17 October 2002 following ratification by the then 15 Member States.

The Second Protocol finally became a “victim” of the peculiarities of inter-governmental cooperation within the third pillar, since it required ratification by all of the old 15 EU Member States in order to come into force. A provisional application was not foreseen. Although the new EU Member States have been obliged to align their legislation with the PFI instruments as part of the Community *acquis* by the date of accession, they must additionally ratify the Convention and its protocols (cf., e.g., Art. 17 of the Second Protocol). The Czech Republic, Hungary, and Malta have neither ratified the Convention nor the protocols yet. The accession of Bulgaria and Romania to the PFI instruments was additionally effected by means of adhesion requiring a unanimous Council decision that determined the date of entry into force in relation to Bulgaria and Romania (cf. Art. 3(3) 2005 Act of Accession, OJ 2005 L 157, p. 29 and Council Decision 2008/40/JHA, OJ 2008 L 9, p. 23).

➤ [eucrim ID=0803004](#)

### Provisional Application of Anti-Fraud Agreement with Switzerland

Pending ratification by all EU Member States, “the Cooperation Agreement between the European Community and the Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests” provisionally entered into force with the effect of bilateral application. The provisional application among the Contracting Parties that already ratified the agreement is possible due to Art. 44 para. 3 of the Agreement, according to which each Contracting Party may declare that it shall consider itself bound by the Agreement in its relations with any other Contracting Party having made the same declaration. These dec-

larations shall take effect 90 days after the date of receipt of the notifications. As a result, the agreement became applicable between Switzerland (which notified ratification on 8 January 2009) and the European Community and other EU Member States, including France, Poland, Sweden, Bulgaria, and Romania from 8 April 2009 on. The agreement is applicable in relation to Germany as of 9 April 2009, to Finland as of 15 April 2009, and to the United Kingdom as of 20 April 2009.

The Agreement was already signed on 26 October 2004. It extends administrative and mutual legal assistance in criminal matters between the European Community and its Member States, of the one part, and Switzerland, of the other part, so as to combat fraud and other illegal activities of both the EU and Switzerland more efficiently. Within the scope of the Agreement are indirect tax (VAT and excise duties), customs duties (including smuggling), corruption and money laundering. Direct taxation is excluded from the scope of application. Attached to the Agreement are:

- A joint declaration on money laundering;
- A joint declaration on cooperation by the Swiss Confederation with Eurojust and, if possible, with the European Judicial Network;
- Agreed Minutes of the negotiations, which contain clarifications on the interpretation of some provisions of the final agreement and which are binding.

In the declaration on money laundering, Switzerland agrees in that cooperation on money laundering shall include as precursor offences those which constitute tax fraud and professional smuggling under Swiss law. For the protection of EC and Swiss financial interests, see also [eucrim 3-4/2007](#), p. 93.

➤ [eucrim ID=0803005](#)

### Anti-Fraud Agreement with Liechtenstein Still under Discussion

On the basis of a mandate by the Council of 2006, the European Commission has



negotiated an Agreement between the European Community and its Member States, of the one part, and the Principality of Liechtenstein, of the other, to combat fraud and all other illegal activity to the detriment of their financial interests. The negotiations were concluded on 27 June 2008. The Commission submitted to the Council draft decisions on the signing and on the conclusion of the Agreement on behalf of the European Community (Council Doc. 17247/08).

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However, the Council requested that the Commission continue negotiations with Liechtenstein and set certain parameters that the agreement should fulfil. In two meetings of November 2008 and February 2009, the Council for Economic and Financial Affairs (ECOFIN) stressed that (1) the agreement should fully apply to direct taxation given the absence of a convention with Liechtenstein on the exchange of information on taxation of savings, and (2) the agreement should ensure effective administrative assistance and access to information with regard to all forms of investment, particularly foundations and trusts. Another point at issue is that Liechtenstein should agree on at least a similar scope of obligations as Liechtenstein recently agreed on with third countries.

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*Background:* In the context of negotiations with the Principality concerning its association with the implementation, application and development of the Schengen acquis, it was revealed that, according to Liechtenstein's domestic law, legal assistance is excluded for certain specific offences regarding taxes, customs, or infringements of foreign trade provisions. Hence, a specific anti-fraud agreement with Liechtenstein was held necessary. The major aim of the agreement is to extend administrative and judicial assistance which is presently neither covered by the European Economic Area (EEA) and Schengen Acquis. In this context, negotiations followed the model of the above-mentioned EU-Swiss Anti-Fraud

Agreement. In particular, the agreement with Liechtenstein would allow for:

- Administrative assistance and assistance in recovery, including for illegal activities affecting grants and public procurement, which are not covered by the EEA-Agreement at present;
- Judicial cooperation, including the evasion of value-added tax, in particular allowing for searches and seizure and access to bank information that, as such, is not foreseen by Liechtenstein's association with the Schengen area, given that Liechtenstein explicitly declared that tax offences being investigated by the Liechtenstein authorities may not give rise to an appeal before a court competent *inter alia* to hear criminal matters.

#### Not Much Known about OLAF by EU Citizens, Eurobarometer Reveals

Although OLAF undertakes many efforts to communicate to the public the EU's anti-fraud policy and OLAF's efforts to combat fraud, corruption, and other wrongdoings detrimental to the Communities' financial interests (see also *Wojahn/Butticé* in this issue), awareness of the European Anti-Fraud Office is not high, with only slightly more than one-tenth of EU citizens having heard of OLAF, while the large majority (86%) had no knowledge of the anti-fraud body at all. This is one of the main findings of a Eurobarometer survey, carried out between 26 and 30 June 2008 (published in October 2008).

The survey, requested by OLAF (Directorate D/Unit D.1 "Spokesman, Communication, Public Relations" and coordinated by Directorate-General Communication), evaluated interviews with over 25,000 individuals randomly selected across the EU. The report addressed the following items and provided the following main results:

- *Citizens' perception of fraud and corruption in the 27 EU States.* More EU citizens reasoned that there was fraud, corruption, and other wrongdoing at the national level than at the EU level or within the European institutions. 63% of

#### New Horizons for EU Criminal Justice: From Tampere to the Stockholm Programme

ERA, Trier, 25–26 May 2009

From 25–26 May 2009, the Academy of European Law (ERA) will hold a conference on the upcoming Stockholm Programme in Trier, Germany. The Stockholm Programme will be designed to set the future priorities of the EU's policy in the area of justice, freedom and security for the period of 2010-2014. It will be the successor to The Hague Programme of 2004 which will come to an end in 2009. The new Programme is likely to be launched under the upcoming Swedish Council Presidency in autumn 2009. The ERA conference in May focuses on the issues of criminal justice and police cooperation. The implications of the Stockholm Programme for judicial cooperation in civil matters will be discussed at another ERA conference on 26-27 November 2009.

Among the items to be discussed are:

- The priorities in European criminal law within the next five years;
- Potential improvements to or simplification of legislation;
- Ways to make existing instruments more effective;
- The use of new technologies in order to promote a coherent judicial area and reinforce police cooperation;
- Improvements of defence rights.

Discussions will be based on the reports of the two "Future Groups" on Justice and Home Affairs respectively which presented their ideas on the future European criminal justice in June and July 2008 (see *eucri*m 1-2/2008, pp. 4-5) as well as on the public debate as initiated by the European Commission in September 2008.

Conference languages will be English, French, and German, but simultaneous translation will be provided for. For more information see:

► **eucri**m ID=0803008

all EU respondents reasoned that corruption occurred in their national governments. Respondents in the new Member States more often than those in the old 15 EU Member States thought that fraud and corruption were common in their own country.

■ *Ways of fighting EU budget fraud.* The large majority of EU citizens supported more cooperation with the anti-fraud services of the EU and other Member States and agreed that the EU should coordinate national investigations into EU budget fraud. 78% of all respondents agreed that the EU needed its own EU-level anti-fraud organisation, with respondents from Finland, the Czech Republic, and Germany giving the least support (about one fifth tended to disagree that the EU needs its own body) and Greek citizens giving the most support (88%).

■ *Familiarity with OLAF* (see above). The level of awareness of OLAF ranged from 8% in Finland, Sweden, and Ireland to 29% in Bulgaria.

■ *Trust in organisations to fight EU budget fraud.* As regards national institutions, approx. eight of 10 respondents found the national police forces and customs services the most trustworthy national authorities in the fight against fraudulent use of the EU budget (84% and 78%, respectively). Trust in the national police force to fight EU budget fraud was the highest in Finland (97%), followed by Denmark (94%), Germany (93%), Austria and Italy (both 91%). Respondents from the Nordic countries – Finland, Denmark, and Sweden – were also the ones most likely to trust their national customs service (95%, 93%, and 92%, respectively). Respondents in Bulgaria and Romania, by contrast, showed the least level of trust in this regard. The “press and media” was the most actively distrusted body in the fight against EU budget fraud. 37% of respondents had no trust at all in the “press and media.” Since OLAF, and also other European bodies, such as Eurojust, Europol, or the European Court of Auditors are not well known, the survey revealed that a lot of citizens considered it difficult to evaluate trust in European bodies fighting fraud.

■ *Actual reports of corruption in the EU-27.* Only a small minority of EU citizens (4%) reported being asked to pay a bribe in return for services in the past 12

months. The prevalence of bribery was higher in the new Member States than in the “EU-15” (12% vs. 2%).

■ *Sources of information as regards EU budget fraud.* “Radio and TV” was by far the preferred option (two thirds of respondents – 67%) as a means of receiving information about the fight against EU budget fraud.

The 2008 survey on the EU citizens’ perception of EU budget fraud is the second large Eurobarometer survey after the one carried out in 2003 in the 15 old Member States and the candidate countries (entitled “Attitudes related to defrauding the EU and its budget”). All surveys can be retrieved from the following Internet site at OLAF:

► [eucrim ID=0803009](#)

### Italian Supreme Court’s Ruling on Infringements of Milk Quota Regime

OLAF reported an important judgment by the Italian Supreme Court concerning the evasion of extra levies in the milk quota payment scheme. The Italian Court, in a judgment of 21 January 2009, confirmed that the evasion of paying extra levies to the Italian authorities for overproduction of milk must be considered a criminal offence, i.e., fraud against the EU’s financial interests in the sense of Art. 640bis of the Italian Criminal Code. In the case at hand, Italian economic operators created a network of fake companies with the sole purpose of simulating the commercial activity of sale and purchase in order to avoid the payment of the extra levy in the milk quota payment scheme. As a consequence of the Supreme Court’s ruling in which it judged the fraudulent scheme as a criminal offence and not just a minor irregularity, actual criminal proceedings leading to punishment can be pursued. The ruling is also a precedent for further similar cases under investigation in Italy. OLAF supported the investigations in the case at issue, resulting in a temporary seizure of assets to the amount of €21 million.

► [eucrim ID=0803010](#)

*Background:* The milk quota system was introduced in 1984 to steer milk prices and tackle the problem of overproduction, which had led to huge surpluses. In principal, the first purchaser of “extra-quota” milk is obliged to pay a levy to the authorities competent for the collection of levies. The revision behind the EC’s milk quota regime is a major issue in its agricultural policy. The EU plans to phase out milk quotas by 2015, but the Commission suggested a “soft landing” for the sector by allowing a gradual increase of 1% annually between 2009 and 2013. However, milk farmers in the EU currently face a dramatic drop in milk prices on the international market, leading to uncertainties about their future.

► [eucrim ID=0803011](#)

### Practice: Detection of Fraud Against EU’s Rural Development Sponsoring

OLAF assisted Italian authorities in uncovering another fraudulent scheme, which resulted in the seizure of assets of approx. €17 million. This time, perpetrators manipulated the so-called “set-aside” scheme of the EU’s Rural Development policy (in force until 1998), under which owners of unused arable land could receive certain primes. OLAF co-ordinated and supported the work of the Italian authorities in this complex matter.

► [eucrim ID=0803012](#)

## Tax Fraud / VAT

### Activities in the Fight against Tax Fraud – General Remarks

The last few months were marked by several activities on the part of the European Community (EC) to tackle tax (in particular, VAT) fraud more effectively. The measures, which are presented in the following, concern both new legislative proposals from the Commission and legislation already adopted by the Council and the European Parliament. The activities envisage implementing and fur-



ther pursuing the Community's strategy to fight fiscal fraud, which was launched by the Commission in 2006 and endorsed by the Council in 2007. Further follow-up work has been completed in the meantime (for details, see eucrim 3-4/2006, p. 57, eucrim 1-2/2007, pp. 20/22, and eucrim 3-4/2007, pp. 91-94).

It is also worth mentioning that the Council responsible for Economic and Financial Affairs (ECOFIN), at its meeting on 7 October 2008, adopted further conclusions on the fight against tax fraud. They deal with the facilitation of the exchange of information among the Member States' tax authorities on operators suspected of fraud (the EUROFISC project). The conclusions are referred to in the following eucrim ID. For the EUROFISC project, see also below.

Since the Member States in the ECOFIN Council could not reach political agreement on the "more *far-reaching measures*", the Commission's work has focused on the so-called *conventional measures*, i.e., alterations to the rules on VAT that do not require root-and-branch changes to the system in place and are aimed at introducing technical improvements to the administration of the tax. Thus, the following EC activities reflect this "branch of measures". Measures which concentrate on (mutual administrative) cooperation are reported on in the corresponding section below.

➤ eucrim ID=0803013

### New Provisions on Better Information Exchange to Combat VAT Evasion

The EC changed the legal basis regarding the system for the exchange of information on supplies of goods within the Community. The amendments concern Directive 2006/112/EC on the common system of value added tax (the "VAT Directive") and Regulation (EC) No. 1798/2003 on administrative cooperation in the field of VAT.

The new legislative acts are intended to ensure that information on cross-border transactions is collected and exchanged between Member States more

quickly, thus enabling more rapid detection of cases of fraud and, in particular, of "VAT carousels".

The legislation provides for a harmonisation and reduction of the period for declaration of intra-Community transactions via the summaries referred to in the VAT Directive, together with a reduction of the time limits for transmission of such information among Member States. However, taking into account the administrative burden of such undertakings, the legislative amendments focus particularly on the supply of goods, which is the principal conduit for "carousel" fraud. As a consequence, the main contents of the amendments are as follows:

- As a general rule, as from 1 January 2010, transactions for VAT purposes will be declared on a monthly basis;
- Member States will nevertheless be able to authorise operators with less than €50,000 (excluding VAT) per quarter for cross-border supplies of goods (€100,000 up to 31 December 2011) and all service providers to continue to submit recapitulative statements on a quarterly basis;
- The declarations referred above can be made by means of simple electronic procedures;
- The Commission will evaluate the impact of the new provisions on Member States' capacity to fight fraud before 30 June 2011.

The amendments to the VAT Directive and the Regulation on administrative cooperation are part of the 2006 strategy to fight fiscal fraud. For the relating Commission proposal to the aforementioned amendments, see eucrim 3-4/2007, p. 92.

➤ eucrim ID=0803014

### Action Plan to Tackle VAT Fraud

On 1 December 2008, after two years of extensive discussions with the Member States, the Commission presented an action plan containing legislative measures to better combat VAT fraud in the *short term*. The plan is designed for tax administrations with the aim of improving the prevention and detection of VAT

### Fiscalis Seminar on Fiscal Fraud

Amsterdam, 23 January 2009

Participants at a one-day conference in Amsterdam exchanged views and ideas on measures developed in the aforementioned Commission's communication on a coordinated strategy to improve the fight against VAT fraud in the EU, adopted on 1 December 2008. The conference was organised by the Dutch Tax and Customs Administration and the European Commission. It convened representatives from businesses, national tax administrations, and the European institutions. More information about the programme and background documentation is available via the following website:

➤ eucrim ID=0803015

fraud (in particular, missing trader fraud) and the recovery of taxes.

The Commission plans to table these legislative proposals in three packages:

- The first set of upcoming proposals focuses on the *collection and recovery of taxes* in cross-border situations. It includes (1) joint and several liability of operators for tax losses if they do not comply with reporting obligations in cases of cross-border transactions; (2) harmonisation of rules at the Community level for the application of the exemption of VAT upon importation; and (3) improvements of the Member States' capacity in cross-border collection of taxes.
- The second package deals with the *strengthening of administrative cooperation* between the Member States and relates to the following measures: (1) establishment of a sound legal framework allowing for a competent authority of one Member State to have automated access to specific data available in the database of another Member State, which relates to the identification and activities of a taxable person; (2) harmonisation of the provision of information on the names and addresses of business partners identified for VAT purposes in another Member State; (3) common minimum stand-

ards for registration and deregistration of taxable persons in the VAT Information Exchange System (VIES); (4) putting in place a legislative regime by which all Member States provide for comparable protection in terms of sanctions and criminal proceedings against VAT fraudsters, regardless of whether the committed fraud leads to losses of revenue on their own territory or on the territory of other Member States (“shared responsibility for the protection of all Member States’ revenues”); and (5) creation of “EUROFISC”, a decentralised network enabling the Member States to share information on VAT fraud. EUROFISC would operate via coordination measures for each of its tasks, namely to set up a multilateral early warning system on VAT fraud and to coordinate the exchange of information as well as the work of participating Member States when acting on warnings received.

■ The third package of legislative proposals addresses *certain anti-fraud aspects*, but is aimed more generally at improving the functioning of the VAT system. It includes, above all, the following measures: (1) simplification, harmonisation and modernisation of the current rules on invoicing; (2) removal of differences as to the chargeability of VAT for intra-Community supply and acquisition of goods. The latter measure will complement the above-mentioned legislation on the reduction of time frames for recapitulative VAT statements.

Beyond the presented short-term action plan, the Commission has also communicated some reflections on a *longer term* scale, notably on the relationship between taxpayers and tax administrations as well as the opportunities offered by IT methods in this context. Therefore, the Commission proposes creating an ad hoc group involving tax authorities and representatives of large as well as small and medium enterprises. The group is to examine how the use of IT tools could improve the relationship between taxpayers and the tax authorities in terms of VAT obligations, audit, and communica-

tion in general as well as to which extent an agreement on the collection of core data would be feasible.

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### Commission Proposes Alteration of Rules on Exemption of VAT and Joint and Several Liability

In parallel to the presentation of the above-mentioned short-term action plan, the Commission presented a legislative proposal that would amend Directive 2006/112/EC on the common system of value added tax (the “VAT Directive”) in two specific areas: As already announced in the action plan, the Commission proposes changes to the existing rules on the exemption of VAT at importation and intends to introduce joint and several liability for traders in intra-Community supplies. Both proposed amendments to the VAT Directive aim at countering two common patterns of VAT fraud that have been often detected by fraud investigators. In detail:

■ Article 143(d) of the VAT Directive provides for an exemption from VAT on importation when this importation is followed by an intra-Community supply or transfer of the imported goods to a taxable person in another Member State. Additional analyses have revealed that inadequate implementation of this exemption in national law has led to the difficult situation whereby the follow-up of the physical movement of the imported goods by the customs and tax authorities within the EC is not guaranteed. The Commission therefore envisages modifying Art. 143(d) by introducing conditions for the exemption to apply. In the future, the importer shall clearly indicate to the Member State of import his VAT identification number, the VAT identification number of his customer, and he shall prove that the imported goods will be transported to another Member State.

■ The second item modifies Art. 205 of the VAT Directive which foresees the possibility of joint and several liability for VAT payment. It is a reaction to the fraudulent scheme in which the Mem-

ber State of destination often does not receive information about the arrival of goods on its territory, which impedes the detection of potential VAT losses because traders in intra-Community supplies intentionally do not report their supply to the tax authorities (or report incomplete/false data or report late). According to the proposal, the supplier of inter-Community transaction shall be held jointly and severally liable for the VAT loss created by his missing customer in another Member State when the supplier contributed to the loss by not reporting his supply to his VAT authority (or by reporting false or incomplete information or by reporting late). He will be exempt from liability if (1) the customer has, for the period during which the tax became chargeable on the transaction concerned, submitted a VAT return containing all the information on this transaction; or (2) the supplier can duly justify to the satisfaction of the competent authorities his shortcoming (and thus refute the presumption of liability).

In this way, Member States receive an additional legal basis allowing them to collect the VAT due upon the intra-community acquisition from a taxable person involved in a fraudulent transaction or chain of transactions, thus increasing the risks and costs for these fraudsters and complicating the setting up of such fraudulent schemes.

► [eucrim ID=0803017](#)

### Commission Proposes Review of Invoicing Rules to Help Tackle Fraud

On 28 January 2009, the Commission proposed a new set of rules which modernise, simplify, and harmonise the EC’s rules on VAT invoicing as established by Directive 2001/115/EC (the “Invoicing Directive”), which had been incorporated into VAT Directive 2006/112/EC (for the latter, see [eucrim 3-4/2006](#), p. 58). The legislative proposal, which would change the 2006 VAT Directive, is based on an accompanying Communication on the technological developments in the field of electronic invoicing. In particu-

lar, the proposal eliminates the current barriers to “e-invoicing” in the VAT Directive by treating paper and electronic invoices equally.

The proposal pursues mainly two objectives: On the one hand, an increase in the use of electronic invoicing shall reduce burdens on businesses and support small and medium-sized enterprises (SMEs); in this regard, the proposal is part of the Commission’s plan to reduce burdens on businesses by 25% by 2012 (see also eucrim 3-4/2007, p. 81). On the other hand, the changes to the VAT Directive of 2006 implement an element of the Commission’s strategy to combat VAT fraud more efficiently (cf. eucrim 3-4/2006, p. 57).

Since the invoice plays a major role in the perpetration of VAT fraud, such as unauthorised deduction and carousel fraud, the envisaged reform includes measures to help tax authorities better tackle VAT fraud: rules on the role of the invoice in VAT deduction are tightened and the exchange of information on intra-Community supplies is made speedier. The latter measure complements the Commission proposal to cut the time limit for exchanging information on recapitulative statements between Member States.

➤ eucrim ID=0803018

### New Directive for General Arrangements for Excise Duty

On 15 January 2009, a new Directive concerning the general arrangements for excise duty (which concerns alcoholic beverages, tobacco products, and energy products) entered into force. The Directive recasts and modernises excise duty arrangements in the EU and repeals Directive 92/112/EEC. It includes the objective to combat excise duty fraud more effectively.

The Directive will, inter alia, permit the introduction of a computerised system to monitor movements of excise goods between Member States under duty suspension (EMCS). The system will make excise duty procedures

simpler and more effective without, however, compromising the quality of monitoring. The existing provisions on the movement of products are being adjusted to the procedures of the new system, which was provided for in a Decision adopted in 2003. The computerised system will offer a simplified, paperless environment for business and will facilitate more integrated and faster monitoring for the authorities.

➤ eucrim ID=0803019

### ECJ: “Additional Tax Liability” in Line with EC Law

Upon preliminary ruling (Case C-502/07, *K-1 sp. z o.o. v Dyrektor Izby Skarbowej w Bydgoszczy*), the European Court of Justice (ECJ) had to decide whether an “additional tax” such as that provided by Polish VAT law complies with the Sixth VAT Directive. The Polish VAT law stipulates that “in the event that it is established that the taxable person has indicated in the tax declaration submitted an amount of tax difference to be repaid or an amount of input tax to be repaid which is greater than the amount due, the head of the tax office or tax inspection authority shall determine the correct amount to be repaid and fix an additional tax liability equivalent to 30% of the amount of the overstatement.”

In the underlying national proceedings, a Polish company, on which the additional tax liability had been imposed, argued that the additional tax is not allowed by the EC Directive 77/388/EC on the harmonisation of the laws of the Member States relating to turnover taxes as amended by Directive 2004/66/EC (the “Sixth VAT Directive”). As had the first instance of the Polish court, the ECJ could not find a breach. The ECJ subsumed the “additional tax” at issue under the four characteristics of VAT:

- (1) VAT generally applies to transactions relating to goods or services;
- (2) It is proportional to the price charged by the taxable person in return for the goods and services which he has supplied;
- (3) It is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place;
- (4) The amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at

### Summer Course: “European Criminal Justice”

ERA, Trier, 6–10 July 2009

From 6–10 July 2009, the Academy of European Law (ERA) will hold a summer course on European Criminal Justice at its Congress Centre in Trier, Germany. The course will provide participants with an introduction to EU criminal law and to the instruments for cooperation in criminal justice matters. It will consider the origins, the institutional system and the legal framework of criminal justice cooperation in the EU, including:

- European police and judicial cooperation under the Schengen Conventions;
  - EU criminal justice developments since the Maastricht Treaty;
  - Legal instruments dealing with police and judicial cooperation in criminal matters (Europol Convention, Convention on Mutual Legal Assistance);
  - Mutual recognition in the EU: existing legislation and proposals (European Arrest Warrant)
  - EU legislation referring to serious cross-border crime
  - Organisation of police and criminal justice cooperation (European Judicial Network, Eurojust, Europol, OLAF)
  - Defence rights in the EU
  - The EU Reform Treaty and its future implications for the “third pillar”
- Participants will have the opportunity to prepare in advance through an e-learning course via the ERA website, and to deepen their knowledge through case-studies and workshops during the summer course.

A visit to the European Court of Justice in Luxembourg with the opportunity to attend a hearing is an integral part of the programme. Course language is English.

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that stage and the final burden of the tax rests ultimately on the consumer.

The Court concluded that the “additional tax” for overstatement under Polish law does not arise from any transaction but from a declaration error and, in addition, the amount thereof is not proportional to the price charged by the taxable person. In fact, the Court notes, it is not a tax but an *administrative penalty*.

The Court rules that the principle of a common system of VAT does not preclude the introduction by the Member States of such measures. On the contrary, it points out that the Member States may, under the Sixth VAT Directive, impose obligations which they deem necessary for the correct levying and collection of VAT.

In addition, the Court states that the Polish additional tax does not constitute “a special measure for derogation” for preventing or avoiding certain types of tax evasion, the adoption of which by a Member State would require the authorisation of the Council, acting unanimously on a proposal from the Commission (Art. 27(1) of the Directive).

► [eucrim ID=0803021](#)

## Money Counterfeiting

### New Legislation for Protecting the euro

On 18 December 2008, the Council adopted four amendments to existing legislation, all of which aim to strengthen the protection of the euro against counterfeiting. The new legislation was published in the Official Journal L 17 of 22 January 2009.

■ Council Regulation (EC) No. 44/2009 amends Regulation (EC) No. 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting. Its main purpose is to make it mandatory for financial institutions to ensure that euro coins and banknotes are authentic before putting them back into circulation. To this end, the new Article 6 of the Regulation stipulates that credit institutions, and, within the limits of their

payment activity, other payment service providers, and any other institutions engaged in the processing and distribution to the public of notes and coins, including: (1) establishments whose activity consists in exchanging notes and coins of different currencies, such as bureaux de change, (2) transporters of funds, and (3) other economic agents such as traders and casinos engaged on a secondary basis in the processing and distribution to the public of notes via automated teller machines (cash dispensers), within the limit of these secondary activities, shall be obliged to ensure that euro notes and coins, which they have received and which they intend to put back into circulation, are checked for authenticity and that counterfeits are detected. For euro notes, this check shall be carried out in line with procedures defined by the ECB. For the new provision, see also the article by *Xenakis/Kasimis* in this issue.

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■ Council Regulation (EC) No 45/2009 amending Regulation (EC) No 1339/2001 extends the application of Articles 1 to 11 of Regulation (EC) No. 1338/2001 as amended by Regulation (EC) No. 44/2009 to those Member States which have not adopted the euro as their single currency.

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■ The amendment of Regulation (EC) No 2182/2004 by Council Regulation (EC) No 46/2009 ensures that medals and tokens are sufficiently different from euro coins so as to avoid potential confusion to the public. It is specified that distinctive elements of the designs on legal tender euro coins should not be reproduced on medals and tokens. In addition, symbols that are representative of the issuing Member State’s sovereignty should not be reproduced on medals and tokens in the way they are depicted on euro coins. If the conditions on the design set out are not met, Member States are obliged to prohibit the production and sale of the medals and tokens as well as their importation and distribution for sale or for other commercial purposes.

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■ Again, Council Regulation (EC) No 47/2009 (amending Regulation (EC) No 2183/2004) ensures that the new rules concerning medals and tokens as applicable by the aforementioned Regulation (EC) No. 46/2009 are uniform throughout the Community, i.e., also in the Member States that do not participate in the euro system.

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### Euro Counterfeiting in 2008

On 12 January 2009, the European institutions and bodies reported on the actions and “successes” of euro counterfeiting in the previous year 2008.

The European Commission, at which the European Technical and Scientific Centre (ETSC) has been established (task: carrying out analysis and classification of new stamped counterfeit euro coins), reported on euro *coin* counterfeiting in 2008. The total number of euro coins which were removed from circulation in 2008 amounts to 195,900, that is 7% less than in 2007 (211,100 coins). The Commission traces back the decline to the fact that euro coins have been made safer for users, but simultaneously called on the Member States to maintain and intensify efforts to remove counterfeits from circulation (see also the new legislation reported above). The 2-euro coin remains by far the most counterfeited coin.

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The European Central Bank (ECB) reported on euro *banknote* counterfeiting. The ECB performs a technical analysis of counterfeit euro banknotes of a new type, stores the technical and statistical data on counterfeit banknotes and coins in a central database, and disseminates the relevant technical and statistical information to all those involved in combating counterfeiting. The ECB’s reports on banknote counterfeiting are issued biannually. In 2008, approximately 660,000 euro banknotes were withdrawn from circulation. The figures show that, since the second half of 2006, there has been a gradual increase in the number of counterfeits. It is also noteworthy that,



while the €50 has historically been the most counterfeited banknote, in the second half of 2008 the most counterfeited banknote was the €20 banknote.

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In addition to the Commission and the ECB, Europol – the EU’s Central Office for the suppression of euro counterfeiting – reported major *law enforcement* successes in combating euro counterfeiting. In this field, Europol’s roles are mainly to facilitate the exchange of information and provide support for the Member States’ law enforcement authorities (provision of operational and strategic analysis, provision of expertise, training, technical support, etc.). According to the report, numerous operations carried out by the national authorities led to the seizure of approx. 500,000 counterfeit euro banknotes, the arrest of nearly 400 suspects, and the prevention of criminal profit of 34 million euros. Furthermore, 20 illegal print shops were dismantled and several criminal networks disrupted. Europol highlights its cooperation with Columbia, where more than 11 million counterfeit euros were seized in August 2008. This sum represents the highest seizure so far in a single operation. The counterfeits were foreseen for distribution in South-West Europe.

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In sum, all European institutions and bodies involved in the fight against euro counterfeiting stressed that the number of counterfeit euros remains low in comparison with the overall number of genuine euro banknotes and coins in circulation. However, all users and national public authorities should maintain vigilance as regards counterfeits.

## Counterfeiting and Piracy

### New EU Action Plan to Combat IPR Infringements

On 16 March 2009, the Council adopted a resolution endorsing an EU customs action plan for the years 2009–2012,

aimed at combating infringements of intellectual property rights. The action plan is intended to tackle the growing threat posed by counterfeit goods to health and safety and to the environment, through strengthened cooperation between administrations and between customs authorities and businesses. Like its predecessor, the new Action Plan will prioritise the following:

- Improvements in legislation;
- The carrying out of targeted and EU coordinated customs controls actions;
- Strengthened cooperation with industry and at the international level;
- Raising of awareness of EU citizens.

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### EU-China Action Plan for IPR Protection

On 30 January 2009, the EU and China agreed on an action plan which aims at strengthening customs cooperation on protecting Intellectual Property Rights (IPR). The action plan includes:

- Setting up of a working group to study the flow of counterfeit goods between China and the EU;
- Exchange of information on IPR risks;
- Operational cooperation between key ports and airports;
- Exchange of officials;
- Development of partnerships with the private sector in China in order to better target suspect shipments.

IPR protection in China is an important issue of concern for EU businesses since China is the major source (estimated at around 60%) of counterfeit and pirated products. Legal cooperation to combat commercial fraud and counterfeiting is founded on an agreement between the EU and China on customs cooperation that was signed in 2004. Since 2007, a second common EU-China project, called IPR2 Project, aims at improving the reliability, efficiency, and accessibility of the IPR protection system in China.

A further major problem in EU-China trade relations are illicit imports of

chemical substances used for synthetic drug production. Therefore, on 30 January 2009, the EU and China also signed an agreement on drug precursors (chemicals that are essential to the illicit manufacture of narcotic drugs). On the basis of this agreement, China and the EU will, for the first time, establish a wide system to monitor the legal movements of precursors. This will help to prevent drug precursors from being diverted from legal trade and misused in illicit drug manufacture in the Community.

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### Manual for Applications for Customs Action

On 27 February 2009, the Commission published a manual to guide intellectual property right holders through the lodging of applications for action with the competent customs department. Cooperation between the rights holders and the customs authorities play an important role in fending off attacks by counterfeiters. The manual explains the IPR application procedure and provides guidance on questions that might arise. It consists of two main parts: one for national applications and one for Community applications. It further contains forms recommended for providing information to the customs authorities. The manual forms and additional background information are available here:

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### Practice: MEDI-FAKE Action

On 16 December 2008, the European Commission announced the results of the first coordinated action based on the new Customs Risk Management Framework. On the basis of a common risk profile – elaborated by the Commission’s and Member States’ experts as well as specialists from the pharmaceutical industry – customs authorities/agents from 27 EU Member States targeted and stopped illegal medicines from entering the EU. The action, which was dubbed “MEDI-FAKE”, was a coordinated action and lasted over two months. Among



the products that were intercepted were antibiotics; anti-cancer, anti-malaria and anti-cholesterol medicines; painkillers; Viagra; and drug precursors. The action was very successful, having a historic seizure level (over 34 million illegal medicines) and new types of medicines being stopped. “MEDI-FAKE” also provided valuable experience for future, similar actions.

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## Mutual Administrative Assistance

### Good Governance in the Tax Area

In the midst of the aggravating financial crisis and the need for governments to safeguard their tax revenues, the Commission presented a Communication on 28 April 2009 in which it addresses answers for the present challenges at the international level. The Communication identifies actions that EU Member States should take to promote “good governance” in the tax area (i.e., more transparency, the exchange of information and fair tax competition). Improvements within the EU are considered alongside specific tools, which the European Community and EU Member States may have at their disposal to promote good governance internationally, as well as the scope for more coordinated action by EU Member States, so as to support, streamline, and complement international action taken in other fora, such as the OECD and the UN.

As regards improvements within the EU, the Commission calls on the EU Member States to adopt recent legislative proposals, most notably on:

- More effective administrative cooperation in the assessment of taxes, which would, in particular, prohibit Member States from invoking bank secrecy laws in the future as a justification for not assisting the tax authorities of other Member States;
- Administrative cooperation in the recovery of tax claims;

- Modifications as to the functioning of the Savings Tax Directive.

For the European Commission’s proposals on these three issues, see the following news items.

► eucrim ID=0803033

### Commission Proposes Modernising Cooperation between Tax Authorities

On 2 February 2009, the Commission tabled two legislative proposals for new Directives aimed at improving mutual assistance between Member States’ tax authorities in order to better combat tax evasion and fraud. The first proposal concerns administrative cooperation in the assessment of taxes, the second one deals with mutual assistance in the recovery of taxes.

Both proposals would repeal the assistance system in place to date, which is based on Directives from the 1970s. This legal footing is deemed outdated. The Commission points out that, at that time, the mobility of persons and capital was incomparable to what it is today. Today, fraudsters take advantage of the territorial limitations on national tax authorities in order to hide income obtained in other countries or organise insolvencies in countries where they have tax debts. The new legal bases are to keep up with these developments. Their main contents are as follows:

- As regards better administrative cooperation in the *assessment of taxes*, a first novelty of the proposal is that it widens the scope of the directives to cover all taxes (indirect and direct), except those that are dealt with under a specific European Community legislation, i.e., VAT and excise duties. The proposal provides clearer and more precise rules in the area of cooperation. In particular, it sets up common rules of procedures, common forms, formats, and channels for exchanging information. It also allows tax administration officials of the requesting Member State to be on the territory of the requested Member State and to participate actively – with the same powers of inspection – in administrative enquiries carried out there.

One of the main elements of the new draft Directive – which caused a stir in the press – is to tackle the question of *bank secrecy* being invoked to refuse cross-border cooperation. Based on the OECD Model Tax Convention, the proposal contains a provision by which a requested Member State cannot refuse to supply information concerning a taxpayer of the requesting Member State solely because this information is held by a bank or other financial institution. As such, the proposal abolishes bank secrecy in the relations between tax authorities when a requesting Member State is assessing the tax situation of one of its resident taxpayers.

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The other proposal provides for a drastic reform of the existing recovery assistance system within the internal market. It will guarantee swift, efficient, and uniform recovery assistance procedures among Member States. As far as the scope is concerned, the Directive would apply to all taxes and duties levied by or on behalf of a Member State or on behalf of the EC, and taxes and duties levied by or on behalf of Member States’ territorial or administrative subdivisions as well as compulsory social security contributions.

The new instrument foresees uniform instruments permitting enforcement or precautionary measures that aim at avoiding the need to have national instruments acknowledged, completed, replaced, or translated. For similar reasons, a standard form for the notification of documents, relating to these claims, on the territory of another Member State is to be adopted.

Furthermore, a system of compulsory spontaneous exchanges of information concerning tax refunds made by national tax authorities to non-residents is introduced. Like the above-mentioned proposal on the assessment of taxes, national officials may be given the competence to actively participate in administrative enquiries on the territory of another Member State.

Other revisions are aimed at facilitating assistance in practice and making the legislation easier to apply.

With these measures, the Commission expects a considerable increase in the recovery ratio, which currently only amounts to approximately 5% of the total for which recovery assistance is requested.

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### Commission Proposes Changes to Taxation of Savings

On 13 November 2008, the European Commission proposed amendments to the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (the “Savings Taxation Directive”). The main aim of the proposal is to close existing loopholes and eliminate tax evasion.

Since 2005, the Savings Directive ensures that paying agents either report interest income received by taxpayers resident in other EU Member States or levy a withholding tax on the interest income received. The Commission proposal seeks to improve the Directive, so as to better ensure the taxation of interest payments which are channelled through intermediate tax-exempted structures. It also proposes to extend the scope of the Directive to income equivalent to interest obtained through investments in some innovative financial products as well as in certain life insurance products. Moreover, simplification of the technical operation of the Directive should lead to a more user friendly system and more efficient implementation.

*Background information:* On 1 July 2005, the provisions of the Savings Taxation Directive started to be applied by all EU Member States. The purpose of the Savings Directive is to promote exchange of information automatically between Member States and thereby enable them to apply their own taxation rules to interest payments which their residents receive from paying agents in other Member States. Belgium, Luxembourg

and Austria, instead of exchanging information automatically, are obliged to levy a withholding tax at a rate of 20% on a transitional basis, until 30 June 2011 and at a rate of 35% thereafter. Nevertheless, citizens receiving interest in these three Member States may opt individually for the exchange of their information and then no withholding tax is levied.

The same or equivalent provisions to the Directive (exchange of information or withholding tax) have also been

applied in five European third countries (Switzerland, Liechtenstein, Monaco, Andorra and San Marino) and in 10 dependent or associated territories of the United Kingdom and the Netherlands (Anguilla, Aruba, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Montserrat, the Netherlands Antilles as well as the Turks and Caicos Islands) through the implementation of bilateral agreements.

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## Council of Europe

Reported by András Csúri

### Corruption

#### GRECO: Ninth General Activity Report (2008)

On 16 March 2009, GRECO published its Ninth General Activity report for the Year 2008. In 2008 alone, GRECO carried out twelve on-site evaluation visits, adopted the same number of evaluation reports and some 20 compliance reports. The majority of these reports are already accessible at GRECO’s homepage.

The report contains a detailed account of cooperation with other international players as well as a feature article on the independent monitoring of party funding – one of the priority themes in the third evaluation round. The article focuses on the role of supervisory bodies in identifying, monitoring, and addressing corruption in political financing. It stresses that, despite numerous laws on their books, many States lack effective monitoring and enforcement mechanisms, and it points out that the evaluation reports adopted by GRECO reflect

the full range of issues and practices as regards the independent monitoring of political financing – valuable input for States eager to upgrade legislation and practice in this critical area.

In his presentation, GRECO’s President, *Drago Kos*, stressed his hope that the current financial and economic crisis would not lead – under the pretext of austerity measures – to the undermining of anti-corruption institutions and their efforts, as this would only breed cynicism vis-à-vis policy makers as well as within the entire political system. GRECO’s membership currently stands at 46, including the United States of America. For more background information on the mutual evaluation, see the following news item.

►eucrim ID=0803037

#### GRECO Evaluation Reports – General Remarks

The following news items continue the overview of country reports by GRECO, the Council of Europe’s anti-corruption

### Summer School: “The European Area of Criminal Justice”

Université Libre de Bruxelles,  
29 June – 3 July 2009

An in depth legal education course on judicial and police cooperation, and European criminal law will be held from 29 June to 3 July in Brussels, Belgium. The one-week course is organised by the Institute for European Studies (Université libre de Bruxelles) in collaboration with the European criminal law academic network (ECLAN). It is the sixth edition of the Summer School on this topic.

Topics of the course will include:

- A general introduction to the European area of justice (historical evolution, institutional and decision-making aspects, judicial control);
- Judicial cooperation, including mutual recognition;
- Mutual recognition and approximation of legislation;
- Police cooperation, including the exchanges of information and data protection issues;
- Terrorism and external relations;

Furthermore, the programme will dedicate an evening conference on the new Stockholm Programme (for the Programme, see also eucrim 1-2/2008, p. 4). The course will include the study of practical cases and negotiation exercises. The programme lectures will be held in English, and the recognition of 3 ECTS credits for students is foreseen provided that the participants pass an examination at the end of the courses. The application deadline is 15 June 2009. Please refer to the following website for more information.

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monitoring body, which evaluates the CoE Member States' compliance with the organisation's anti-corruption standards. First, recent country reports of the ongoing third evaluation round (launched in January 2007) are presented, followed by joint first and second evaluation round reports. Ultimately, information is provided for compliance reports.

*Background:* The evaluation is divided into two main parts.

■ During the *evaluation procedure*, GRECO drafts the said evaluation report, which is largely based on information gathered by means of questionnaires and on-site country visits by a team of independent evaluators. The evaluation reports contain recommendations for the evaluated countries in order to improve their level of compliance with the provisions under consideration. The States are called upon to follow these recommendations.

■ The ensuing *compliance procedure* is designed to assess the measures subsequently taken by the evaluated country to implement the recommendations. A key ingredient of the procedure is the so-called Situation Report prepared by the country concerned, which must be submitted 18 months after the adoption of the relevant Evaluation Report. On the basis of the Situation Report, a Compliance Report is prepared that assesses the level of implementation of each recommendation issued by GRECO in the Evaluation Report. The assessment can lead to three possible conclusions, namely that a given recommendation

- has been implemented satisfactorily or otherwise dealt with in a satisfactory manner;
- has been partly implemented;
- has not been implemented.

Members are required to report back to GRECO (within another 18 months) on the action(s) taken in order to address partially or non-implemented recommendations. The additional information submitted is appraised by GRECO and leads to the adoption of an Addendum to the relevant Compliance Report. The adoption of the Addendum usually terminates the compliance procedure in respect of the country concerned.

As mentioned in eucrim 1-2/2008, p. 50, compliance assessments have been carried out in three evaluation rounds. Each cycle of the evaluation round focuses on specific themes. The ongoing third evaluation round addresses two topics: (a) the incriminations provided for in the Criminal Law Convention on

Corruption, and (b) the transparency of party funding. GRECO's first evaluation round (2000-2002) dealt with the independence, specialisation, and means of national bodies engaged in the prevention of and fight against corruption. It also dealt with the extent and scope of immunities of public officials from arrest, prosecution, etc. The second evaluation round (2003-2006) focused on the identification, seizure, and confiscation of corruption proceeds, the prevention and detection of corruption in public administration, and the prevention of legal persons (corporations, etc.) from being used as shields for corruption. Current evaluations covering topics of the first and second evaluation round have been drafted in a joint report and concern those GRECO Member States that joined the body after the closing of the evaluation rounds. Reports are made public after the agreement of the countries' authorities

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### GRECO: Third Round Evaluation Report on Sweden

On 31 March 2009, GRECO published its Third Round Evaluation Report on Sweden.

Regarding the *criminalisation of corruption*, GRECO recognised that Swedish legislation on bribery complies with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) in a strict legal sense. However, the Report noted that the rather general legislation and limited practice in Sweden makes it difficult to foresee all the consequences of corruption. Moreover, the offence “trading in influence” (Art. 12 of the Convention) is not criminalised as such under Swedish law. GRECO stressed that current legislation, which has been subject to domestic criticism for several years, would benefit from a revision in respect of public and private sector corruption. It also should be taken into consideration to make trading in influence a separate offence as well as to widen the possibili-

ties for prosecuting corruption offences committed abroad. Following the adoption of the Report, GRECO was informed that, on 19 March 2009, the Swedish Government entrusted the former Chief Justice of the Supreme Court to carry out a study with a view to modernising current anti-corruption legislation.

►eucrim ID=0803040

As regards the *transparency of party funding*, the report stated that it falls short of the standards provided for in Recommendation Rec(2003)4 of the Committee of Ministers of the Council of Europe on common rules against corruption in the funding of political parties and electoral campaigns.

Sweden has a longstanding tradition of self-regulation in this area but it provides neither for a sufficiently broad and comprehensive approach, nor is there an independent monitoring mechanism in place. Furthermore, there are no particular sanctions or other legal means for the enforcement of the few principles that have been agreed upon by the political parties.

As a consequence, it is difficult to assess the flow of private donations to political parties. GRECO stated that the generally low level of transparency in political financing is difficult to understand in a country that guarantees a high degree of transparency in most areas of public life. The current system needs to be reviewed in order to comply with Council of Europe standards.

The report addresses for both themes a total of 10 recommendations to Sweden, inter alia, to require political parties at the central, regional, and local levels to keep proper books and accounts (including those in connection with election campaigns), to make sure that the annual accounts are made public in a way that provides for easy access by the public, to introduce a general ban on donations from donors whose identity is not known to the party/candidate, and to introduce a general requirement for parties/election candidates to report individual donations above a certain value together with

the identity of the donor. GRECO also recommended that existing and yet-to-be-established rules on the financing of political parties and electoral campaigns be accompanied by appropriate (flexible) sanctions, which are effective, proportionate and dissuasive.

►eucrim ID=0803041

### GRECO: Third Round Evaluation Report on France

On 12 March 2009, GRECO published its Third Round Evaluation Report on France. Regarding the *criminalisation of corruption*, GRECO recognised that, following various changes, France has a well developed legal framework that enables it to respond, to a very large extent, to the relevant requirements of the Criminal Law Convention on Corruption and its Additional Protocol. France also uses these criminal provisions in practice, which has allowed the development of relevant case law.

Nevertheless, GRECO stated that considerable uncertainty remains as regards the concept of a corruption agreement, in particular as to whether proof of the existence of an agreement must be established in every case. Moreover, France has severely restricted its jurisdiction and its ability to prosecute cases with an international dimension, which is regrettable given the country's importance in the international economy.

GRECO invited France to lift or not renew its reservations to Art. 12 [criminalisation of the conduct of trading in influence] and 17 [jurisdiction] of the Convention. Other possible improvements concern the length of the limitation period for prosecution of lesser offences of corruption and trading in influence, as well as the fact that the fines levied in these types of cases are not always collected in practice.

Concerning *transparency of party funding*, French legislation on political funding generally implements the provisions under evaluation of the aforementioned Recommendation Rec(2003)4 of the Committee of Ministers. France has

various rules to ensure a certain level of transparency in the funding of politics, which include supervision and sanction procedures. No serious divergence between the applicable texts and political practice was noted.

The report nonetheless stated that the system does not yet apply to certain fields, such as elections to the Senate and the funding of parliamentary groups. Furthermore, parties have significant room for manoeuvre in defining the scope of their accounts.

GRECO welcomed the putting in place of specialist supervisory bodies in the fields of party funding and the fight against corruption, but regretted that they are not always given genuine powers. There is also a range of administrative and criminal penalties for the vast majority of breaches, but there should ideally be greater flexibility in the allocation of these sanctions according to the gravity of the crime.

The report addressed a total of 17 recommendations to France, such as ensuring that the various offences of passive bribery and trading in influence cover all the material elements included in the Criminal Law Convention on Corruption, considering the criminalisation of trading in influence in connection with foreign public officials or members of foreign public assemblies.

►eucrim ID=0803042

### GRECO: Third Round Evaluation Report on Poland

On 17 February 2009, GRECO published its Third Round Evaluation Report on Poland.

Regarding the first theme – *criminalisation of corruption* – GRECO recognised that Polish legislation, on the whole, complies with the Council of Europe's Criminal Law Convention on Corruption and its Additional Protocol. GRECO acknowledged the recent legislative amendments relating to private sector bribery.

Nevertheless, GRECO called on Poland to address some deficiencies identi-



fied in the current legislation, regarding, *inter alia*, the applicability of corruption offences to foreign arbitrators as defined by the Additional Protocol to the Convention, the jurisdiction over corruption offences committed abroad, and the potential misuse involved in the defence of ‘effective regret’, which occurs when an offender reports a crime after its commission. Moreover, further efforts are needed to significantly reduce the occurrence of corruption in Poland, all the more so as new types of corruption have recently been identified by the authorities in areas such as sports and the private sector, where only a few cases have been investigated so far.

Concerning the second theme – *transparency of party funding* – the existing legal and institutional framework was found to be well developed and largely in line with the provisions of Recommendation Rec(2003)4.

However, it appears that the system of political financing suffers from a lack of substantial and proactive monitoring beyond the formal examination of submitted information. GRECO stated that the National Electoral Commission requires more powers and resources in order to detect illegal practices and the bypassing of transparency rules. Furthermore, current legislation needs to be upgraded in order to increase the level of disclosure obligations and align the law on the election of the President of the Republic with the general standards set by the Polish election laws.

The report addressed altogether 13 recommendations to Poland, such as harmonising the provisions on political financing or ensuring that the financial reports of political parties and election committees are made public in a coherent and comprehensible manner.

►eucrim ID=0803043

### GRECO: Joint First and Second Round Evaluation Report on Austria

The Joint First and Second Round Evaluation Report on Austria was published on 19 December 2008. Austria became

member of GRECO on 1 December 2006. The GRECO report focuses on the following themes:

- Independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption
- Extent and scope of immunities
- Proceeds of corruption
- Public administration and corruption
- Legal persons and corruption

The main conclusions of the report are as follows: Austria has adopted interesting anti-corruption initiatives but the country is still at an early stage in the fight against corruption, with the exception of the Municipality/Land of Vienna. Various sectors of society seem exposed to risks of corruption that have not necessarily been assessed or acknowledged yet. The report suggests that a study of the phenomenon of corruption and the establishment of a national coordination mechanism would provide a general framework to trigger or accompany various future improvements. In this connection, the role of the Bureau of Internal Affairs of the Ministry of the Interior (BIA) needs to be strengthened and clarified.

Overall, the Austrian police and prosecutorial bodies were perceived as not being independent enough, and they sometimes suffer from a lack of staff, training opportunities, and coordination mechanisms. As regards the immunity of parliamentarians, there is a need to establish criteria to better distinguish acts that are connected with their duties and those which are not. GRECO also found that insufficient attention is paid by law-enforcement agencies to the proceeds from corruption and that the legal framework for seizure and confiscation of criminal proceeds requires improvements.

Furthermore, there is room for improvement as regards transparency and other preventive anti-corruption measures in the administration (concerning, for example, the legal basis for access to information, the involvement of the Austrian Court of Audit in the prevention and

detection of corruption, “whistleblower” protection, and the elaboration of a code of conduct for public officials). Moreover, although the recent introduction of corporate criminal liability is welcomed, more measures, such as raising the initial maximum amount of fines for legal entities held criminally liable or establishing a register of convicted legal persons, are needed to ensure the full application of this new mechanism.

In total, the report formulated 24 recommendations to Austria, such as undertaking studies covering the scale and the nature of corruption, establishing an inter-institutional and multi-disciplinary coordination mechanism with a clear mandate, clarifying the role and jurisdiction of police bodies in respect of corruption investigations, proceeding with the reform of the statute of prosecutors in order to bring it closer to the statute of judges, and ensuring that the planned special prosecution office for corruption becomes operational at the beginning of 2009. The assessment of the implementation of these recommendations by Austria is likely carried out in the first half of 2010.

►eucrim ID=0803044

### GRECO: Compliance Report on Andorra

On 4 March 2009, GRECO published its Compliance Report on Andorra. The report assesses the measures taken by the Andorran authorities to comply with the 18 recommendations made by GRECO in the joint first and second round evaluation report published on 7 February 2007.

GRECO concluded that Andorra has satisfactorily implemented or dealt with half of the recommendations of the joint first and second round evaluation report. Yet other recommendations have only been partly implemented and two of them have not been implemented at all.

The report acknowledged that Andorra is making important efforts to raise awareness within the public administration and the country altogether about



the need to combat corruption. Decisive reforms have also taken place in areas such as special investigative techniques applicable during corruption investigations, the legal framework on confiscation, rules on professional secrecy, as well as the definition of the money laundering offence so as to include the underlying corruption offences.

The Principality is still studying the phenomenon of corruption in Andorra, working on the legal statute of judges and prosecutors, and making practitioners more familiar with the liability of legal persons.

GRECO regrets, however, that no noticeable progress has been made so far as regards a legal framework on conflicts of interest and incompatibilities as well as on whistleblower protection.

➤ [eucrim ID=0803045](#)

### **GRECO: Compliance Report on Montenegro**

On 7 January 2009, GRECO published its Compliance Report on Montenegro. GRECO addressed 24 recommendations to Montenegro in the joint first and second round report published on 9 January 2007.

GRECO concluded that Montenegro has made concrete improvements in virtually all fields targeted by the relevant GRECO recommendations. The Montenegrin authorities have launched a flexible anti-corruption strategy, based on both preventive and repressive mechanisms, according to which objectives, activities, deadlines, and indicators of achievement are framed and monitored. Efforts have been made to put in place a legislative framework to fight corruption (e.g., the introduction of criminal corporate liability and the establishment of a register of convicted legal persons). Extensive training and public information campaigns on anticorruption policies have taken place over the last two years. Initiatives have been pursued to actively involve local authorities, as well as the general public, in the development of anticorruption policies.

Nevertheless, GRECO called for additional efforts with respect to the ongoing reform of the judicial system, the simplification and speeding up of licensing/permit procedures, and the development of rules on conflicts of interest (e.g., gifts).

Moreover, GRECO stated that formal adaptation of the Criminal Procedure Code would be essential, since it includes a number of provisions that would further facilitate the prosecution of corruption offences, e.g., by enabling the seizure of property at early stages of an investigation or by expanding the application of special investigative techniques to cover a wider number of corruption offences.

➤ [eucrim ID=0803046](#)

### **GRECO: Addendum to the Compliance Report on the United Kingdom**

On 24 February 2009, GRECO published its Addendum to the Second Round Compliance Report on the United Kingdom. The report assesses the implementation of the following two recommendations which were considered only partly implemented in the Compliance Report:

- Further enhancement of the possibilities of recovering the proceeds of crime.
- More in-service training of officials for a proper implementation of the UK's civil service legislation.

In the light of additional information submitted by the UK in November 2008, GRECO concluded that both recommendations have been implemented satisfactorily and that the UK has thus complied with all recommendations issued in connection with GRECO's Second Evaluation Round. The adoption of the Addendum to the Compliance Report terminates the second evaluation round compliance procedure in respect of the United Kingdom.

➤ [eucrim ID=0803047](#)

### **GRECO: Addendum to the Compliance Report on Latvia**

On 24 February 2009, GRECO published its Addendum to the Second

Round Compliance Report on Latvia. The Addendum examines the implementation of eight recommendations which the Second Round Compliance Report assessed as having only been partly or not yet implemented. The Addendum takes into consideration the additional information submitted by Latvia in June 2008.

GRECO concluded that, of the 13 recommendations issued to Latvia, a total of nine recommendations have now been implemented satisfactorily or dealt with in a satisfactory manner. The body expects further positive developments, particularly in respect of the provision of guidelines on the tracing of assets, the applicability of public service regulations to local government employees as well as the reporting of corruption. The Addendum officially terminates the second evaluation round compliance procedure in respect of Latvia. However, the Latvian authorities are invited to inform GRECO of the further developments as regards the implementation of the recommendations not yet fulfilled.

➤ [eucrim ID=0803048](#)

### **New Anti-Corruption Projects – State of Play**

The following news items continue reporting on the latest activities regarding technical cooperation projects, which are currently underway in four countries, Azerbaijan, Georgia, Turkey, and Ukraine (cf. [eucrim 1-2/2007](#), p. 44 and [1-2/2208](#), p. 52-54). By means of these technical cooperation projects the Council of Europe/GRECO aims at supporting the countries in the implementation of European and international anti-corruption standards. The projects support the governments of in their ongoing reforms and efforts to restrict and prevent corruption and strengthen good governance in line with European standards.

➤ [eucrim ID=0803049](#)

### **Azerbaijan: AZPAC**

On 11 February 2009, a conference on "Improving the Transparency and Efficiency in the Legislative Process" was

held in the Parliament of the Republic of Azerbaijan in Baku. The event dealt with possible improvements in order to facilitate the efficient passage of high-quality legislation and maximise its resistance to corruption.

The Steering Committee of the AZPAC project met on 12 December 2008 in Baku. It discussed the update of the workplan in accordance with the project needs, current priorities of the beneficiaries and a timetable of activities to be held by the end of project implementation in September 2009.

► [eucrim ID=0803050](#)

### Georgia: GEPAC

On 27 April 2009, the Council of Europe tabled the third progress report on the GEPAC project. The report evaluates the results of the activities which took place since September 2008 focusing mainly on strengthening the capacities for prosecuting and investigating high level corruption cases, as well as the support to the new Coordination Council for Fighting against Corruption. The report further points out that, while the creation of the Coordination Council for Fighting against Corruption and the ratification of the United Nations Convention Against Corruption (UNCAC) is promising, updates and implementation of the anti-corruption strategy and action plan for Georgia are necessary.

On 11 March 2009, a workshop on “Best Practices” in anti-corruption bodies took place in Tbilisi, Georgia. It was organised for the newly established Georgian “Coordination Council for Fighting against Corruption”. It aimed to provide the council with the international legal instruments and requirements concerning anti-corruption bodies, as well as convey the success and failure of some other countries’ anti-corruption efforts.

From 2 to 6 February 2009, the GEPAC project team met with the Deputy Chairperson as well as several members from the government, administration, and representatives of the civil society, composing the “Coordination

Council for Fighting against Corruption” (established on 26 December 2008), in Tbilisi. A Technical Paper with recommendations, especially the review of the Anti-Corruption Strategy and Action Plan, was prepared and handed-over to the Deputy Chairperson of the Council.

From 12 to 16 January 2009, police officers and prosecutors from Georgia visited the Office for the Suppression of Organised Crime and Corruption (USKOK) in Zagreb, Croatia and the Department of Internal Investigations of the Ministry of Interior of Hamburg, Germany. The aim of the study visit was to provide first-hand experience to complement the theory learned and to help the Georgian officials examine possible changes to their own procedures as well as initiate the basis for launching cooperation and networking with other CoE Member States.

On 9 and 10 December 2008, training on the use of special investigative means took place in Tbilisi, convening professionals from the Ministry of Interior and the Prosecutor’s Office working on the investigation and prosecution of corruption cases. The discussion focused on relevant issues related to the effective use of special investigative techniques in Georgia and on exchanging experience with practitioners from abroad.

► [eucrim ID=0803051](#)

### Turkey: TYEC

The project on “Ethics for the Prevention of Corruption in Turkey” (TYEC) was further implemented by several workshops and conferences in the past months. From 17 to 20 March 2009, a seminar trained senior officials and officials from the human resources units on ethical leadership. The seminar was held in Ankara and aimed at familiarising the participants with the topic by means of case studies.

From 16 to 18 February 2009, two workshops and an international conference entitled “Developments on Legislative and Judicial Ethics” were also hosted in Ankara. The discussions in

the workshops centred on the developments, roles, contents, and implementations of the code of ethics. The public conference gave a general overview on the major themes and initiatives on Parliamentary and Judicial Ethics.

A further training seminar took place in Ankara on 17 December 2008, following the Ethics Training Programme in October (see also [eucrim 1-2/2008](#), p. 53) and a pilot training exercise to test the design and relevance of the case studies in November. The seminar focused on the training of trainers on “public ethics”.

Beyond the workshops and conferences, the Council of Europe published an Interim Evaluation Report in December 2008. The report assesses the design, delivery and impact of the TYEC project, and includes several recommendations on how to strengthen the impact. In addition, considerations on a possible follow-up of the project are indicated.

On 16 January 2009, the 2nd TYEC Steering Committee meeting took place in Ankara. The meeting brought together representatives of the Council of Ethics for Public Service (the main counterpart institution), the Turkish Ministries, the Delegation of the European Commission to Turkey, and the Council of Europe. The meeting assessed the project’s achievements during the last six months. The project workplan was updated, current priorities of the beneficiaries were defined and a timetable of activities was set.

► [eucrim ID=0803052](#)

### Ukraine: UPAC

In the framework of the UPAC project, which aims at strengthening Ukrainian institutions’ capacity building, various round table discussions, workshops and training seminars have taken place since November 2008.

On 27 April 2009, a roundtable discussion concerning the identification of corruption risks took place in Kyiv. Experts shared experiences in identifying and assessing corruption risks as well as in defining appropriate methodologies to

be applied in Ukraine. Two training seminars in Kyiv (on 22-23 April and on 20 March 2009) looked into the detection and investigation of corruption offences. They were aimed at improving capacities of police officer in the detection and investigation of corruption offences.

On 26 March 2009, a round table discussion was dedicated to the elaboration of legal provisions regulating public ethics and conflicts of interest.

On 19-20 December 2008, an expert workshop was organised on the topic of transparency of political funding in Simmeiz, Crimea. The event was designed to formulate amendments to the domestic legislation in order to enhance transparency of funding of political parties and electoral campaigns and was a follow-up of a previous conference on "Prevention of political corruption" of 1-2 July 2008.

On 5 December 2008, a Round Table on "Legislation on civil service and conflicts of interest" took place in Kyiv. This event was aimed at supporting "anti-corruption mainstreaming" in the civil service reform in the Ukraine.

Beyond these meetings, two system studies on corruption risks within the public administration (in particular, the field of administrative services, control, and supervision), in the judiciary, and in the bodies in charge of investigation and prosecution of criminal cases were conducted throughout the Ukraine in March 2009. The studies aimed at supporting the enhancement of the preventive capacities against corruption in the public administration, the judiciary, and the bodies in charge of investigation and prosecution of criminal cases in the Ukraine. The results of the study were the basis of the said conference on corruption risks in April 2009.

On 27 February 2009, the UPAC project gathered representatives of the partner institutions, the European Commission, and the Council of Europe Secretariat for an extraordinary Steering Committee meeting in Kyiv. The participants reviewed the progress made since

November 2008, revised the workplan pursuant to the needs and priorities of the beneficiaries, and agreed on the activities to be organised by June 2009.

►eucrim ID=0803053

## Money Laundering

### First Meeting of New Anti-Money Laundering and Anti-Terrorist Monitoring Body

On 22-23 April 2009, the "Conference of the Parties" (COP) to the 2005 Council of Europe Convention on laundering, search, seizure, and confiscation of the proceeds from crime and on the financing of terrorism (ETS no. 198) held its first meeting in Strasbourg. On the agenda were discussion on the main aspects of the Convention and its relationship with other international standards as well as ways of monitoring its implementation in participating countries.

The COP is foreseen in Art. 48 of the Convention and has the tasks

- to monitor the proper implementation of the Convention by the Parties;
- to express, at the request of a Party, an opinion on any question concerning the interpretation and application of the Convention.

During the monitoring procedure, the COP shall rely on select committees of MONEYVAL experts, public summaries (for MONEYVAL countries), and available FATF public summaries (for FATF countries). If appropriate, periodic self-assessment questionnaires will additionally carried out. The monitoring procedure will only deal with areas of the Convention which are not subject to other mutual evaluations (as carried out by the FATF and MONEYVAL).

The Convention of 2005 updates and widens the CoE 1990 Convention on Money Laundering (ETS no. 141). It takes into account the fact that not only could terrorism be financed through money laundering from criminal activity, but also through legitimate activities.

The new Convention is the first international treaty covering both the prevention and the control of money laundering and the financing of terrorism. The text addresses the fact that quick access to financial information or information on assets held by criminal organisations, including terrorist groups, is the key to successful preventive and repressive measures, and, ultimately, is the best way to stop them.

The Convention entered into force on 1 May 2008. So far the Convention has been ratified by Albania, Armenia, Bosnia Herzegovina, Croatia, Cyprus, Malta, Moldova, Montenegro, the Netherlands, Poland, Romania, Serbia, Slovakia and Hungary, while another 19 CoE Member States have signed it but not ratified it yet.

►eucrim ID=0803054

### MONEYVAL: Third Round Evaluation Report on Estonia

On 16 February 2009, the Council of Europe MONEYVAL Committee (Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism) published its Third Round Evaluation Report on Estonia (For the CoE evaluation procedure in the area of money laundering, see eucrim 1-2/2008, p. 54).

MONEYVAL welcomed the fact that, since the second evaluation in November 2002, there have been a number of improvements, such as the new Money Laundering and Terrorist Financing Prevention Act. One of the goals of the new act was to harmonise Estonian legislation with the requirements of the 3rd EU AML Directive. Though it was too early to evaluate the effectiveness of this law, it will significantly strengthen the AML/CFT regime of Estonia. The rewording of the definition of the money laundering offence brought it very close to the requirements of the relevant international conventions. However, it is still unclear whether a money laundering conviction can be obtained without a prior or simultaneous conviction for the

predicate offence. Although Estonia ratified the International Convention for the Suppression of the Financing of Terrorism and its legal framework criminalising the financing of terrorism has been significantly improved in recent years, the financing of individual terrorists remained uncovered. At the time of the on-site visit of the evaluation team, a draft law to remedy this shortcoming was being prepared.

The report also stated that, apart from the banks, no other financial institutions or designated non-financial businesses and professions were aware of the procedures to be followed in order to implement the United Nations Resolutions for freezing terrorist assets. Though the shortcomings of Estonia's preventive law were labelled as being of a minor nature, a major shortcoming is still that the Act does not provide direct administrative sanctions for all of its obligations. Furthermore, not all kinds of attempted transactions are clearly covered by the reporting obligations.

The report identified that, although the Estonian authorities reviewed the activities, size, and other features of the domestic non-profit organisations (NPO) sector, there was no review of the adequacy of relevant laws and regulations to prevent the abuse of NPOs for the financing of terrorism. Finally, the Committee stated that the Estonian Financial Intelligence Unit (FIU) is a police-type FIU, which substantially meets international standards and appears to be generally effective. Even though resources of the FIU have been significantly strengthened since the last evaluation, both the FIU and the Financial Services Authority lack the manpower required to assure a proper level of monitoring and supervision in relation to the number of supervised entities for which they are each responsible.

►eucrim ID=0803055

### **MONEYVAL Third Round Evaluation Report on Azerbaijan**

On 14 January 2009, MONEYVAL published its Third Round Evaluation Report on Azerbaijan. The report analysed the implementation of international and European standards to combat money laundering and terrorist financing, assessed levels of compliance with the Financial Action Task Force (FATF) 40+9 Recommendations, and included a recommended Action Plan to improve the Azerbaijan anti-money laundering and combating the financing of terrorism (AML/CFT) system.

The Committee stated that there is still no comprehensive AML/CFT legislation in place in Azerbaijan as well as no Financial Intelligence Unit that meets international standards. Some preventive measures have been taken to reduce the risks inherent in the lack of a preventive law. However, the steps which have been taken (mainly by the National Bank and the State Committee on Securities) are limited and fragmented and would not constitute a substitute for comprehensive AML/CFT legislation which meets international standards. The Azerbaijan authorities should, without further delay, introduce a comprehensive AML/CFT law. MONEYVAL welcomed that Azerbaijan ratified the Vienna and Palermo Conventions and the Terrorist Financing Convention as well as the fact that money laundering incrimination has been improved since the last evaluation and is now broadly an "all crimes" offence. However, many uncertainties remained in the definition of the criminal offence, in part because the legislative provisions differ significantly from the wording used in the relevant Conventions.

The report requires legislative improvements to better reflect all the physical aspects of the money laundering offence. Since no money laundering investigations, indictments, or court

decisions had taken place, the evaluators came to no true understanding of the value of money laundering investigations and prosecutions. Much more training of prosecutors and investigators is required. Furthermore, MONEYVAL observed that the financing of terrorism offences does not cover the financing of individual terrorists or terrorist organisations. Although the sums confiscated are increasing year after year, not all predicate offences have an associated power of confiscation. Moreover, it appears that financial investigation with a view to major confiscation orders was not really embedded in practice other than in corruption cases.

Some steps have been taken to ensure compliance with the United Nations Security Council Resolutions; however, a comprehensive legal structure still needs to be put in place. While an Anti-Money Laundering Division within the National Bank of Azerbaijan has some shadow functions of a Financial Intelligence Unit, there is still no law or regulation creating a suspicious transaction reporting (STR) regime. In 2007, not a single money laundering case took place.

MONEYVAL criticises that Full Customer Due Diligence (CDD) requirements, which comprehensively and clearly cover both the identification and verification process as provided for in the FATF Recommendations, have not been implemented. There are also no enforceable provisions in place containing specific or enhanced CDD measures in relation to politically exposed persons. Interviews with relevant market participants nonetheless showed some general understanding of AML/CFT issues. Furthermore, coverage of designated non-financial businesses and professions for AML/CFT purposes is missing, which is also not in line with international standards.

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## Life of the Associations

### Österreichische Vereinigung für Europäisches Strafrecht

#### Ein Rückblick auf 14 Jahre Gedankenaustausch

Die Österreichische Vereinigung für Europäisches Strafrecht wurde über Initiative des seinerzeitigen Direktors der Generaldirektion für Finanzkontrolle der Europäischen Kommission (GD XX), *Francesco De Angelis*, am 23. Oktober 1995 in Wien feierlich gegründet. Das war kurz nach dem österreichischen Beitritt zur Europäischen Union.

In Kürze hatte die Vereinigung 150 Mitglieder. Die Mitglieder sind mehrheitlich Richter und Staatsanwälte; aber auch Polizei- und Zollbeamte sowie Vertreter der österreichischen Universitäten engagieren sich in der Vereinigung. Die Auseinandersetzung mit den Grundlagen der Europäischen Union und den Problemen im Zusammenhang mit dem Schutz ihres Haushalts war eine sehr spannende Aufgabe, die Österreich als neues Mitglied der Europäischen Union mit großem Elan in Angriff nahm.

Beträchtlichen Einfluss auf die Entwicklungen der österreichischen Vereinigung hatte die Teilnahme an den Programmen von Schwesternvereinigungen. Die österreichische Vereinigung war beispielsweise vertreten bei der Gründungsveranstaltung der finnischen Vereinigung oder holte sich „Know-how“ von der bereits etablierten „Association de Luxembourg“.

Nach nun beinahe 14 Jahren kann die Österreichische Vereinigung auf eine Vielzahl von spannenden und wichtigen Veranstaltungen zurückblicken, die den Blick auf die europäische Dimension des Strafrechts und den EG-Finanzschutz schärfen. Zum Teil wurden die Veranstaltungen gemeinsam mit anderen juristischen Vereinigungen Österreichs, wie dem Juristenverband und der Landesgruppe Österreich der AIDP organisiert. Die Veranstaltungen wurden oft bereichert durch die Teilnahme renommierter Experten aus dem In- und Ausland. Die Themen deckten eine breite Palette ab, darunter:

- Absprachen bei der Verfolgung von Unregelmäßigkeiten zum Nachteil des Gemeinschaftshaushaltes
- Organisierte Kriminalität und ihre Bekämpfungsmöglichkeiten durch das Internationale Strafrecht
- Strafrechtliche Verantwortlichkeit der juristischen Person
- Zukunft der Auslieferung in Europa
- Aussprache über das Grünbuch der Kommission zum „Europäischen Staatsanwalt“
- Grünbuch über Verfahrensgarantien in Strafverfahren und zum Verbot der doppelten Strafverfolgung
- Weiterentwicklung Europäischer Zusammenarbeit im Strafrecht und des EJR
- strafrechtliche Implikationen der neuen EU Verfassung
- die Judikatur des EuGH und ihre Reflexe auf das nationale Recht
- die gegenseitige Anerkennung von vermögensrechtlichen Sanktionen innerhalb der Europäischen Union und ihre Umsetzung im österreichischen Justizstrafrecht u.v.m.

Aus den Veranstaltungen resultierten auch mehrere wichtige Publikationen, so u.a.:

- Verhältnis von Gemeinschaftsrecht und Strafrecht und neue Instrumente gegen den Betrug zum Nachteil des Haushalts der

Europäischen Gemeinschaft (Prof. Dr. *John Vervaele* in der Österreichischen Richterzeitung 1997)

- Betrug zum Nachteil der Europäischen Gemeinschaften (EU-Kommissar Dr. *Franz Fischler*, in der Österreichischen Juristenzeitung 1997)

- Beweisgewinnungsmethoden und Beweisverwertungsverbote in den Ländern der Europäischen Union und vergleichbaren Rechtsordnungen (Veröffentlichung in der Publikationsreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht 1997)

- Diskussionen zur Einführung der strafrechtlichen Verantwortlichkeit juristischer Personen (Österreichische Juristenzeitung 2000 und 2001)

- Publikation – zusammen mit der kroatischen Vereinigung organisierten Tagung – zum Thema „Current Issues in European Criminal Law and the Protection of EU Financial Interests“ (hrsg. von *Zlata Durdevic* 2006)

- Sammelband zum Kartellstrafrecht (2007)

Hervorzuheben ist, dass die Königsidee von *Francesco De Angelis*, die Problematik der Haushaltbewirtschaftung der EU durch die Gründung von innerstaatlichen Strafrechtsvereinigungen in die einzelnen Mitgliedstaaten hineinzutragen, meiner Meinung nach voll und ganz aufgegangen ist. Sie ermöglichte die vertiefende Auseinandersetzung mit den Gründen des Phänomens und den zweckmäßigsten Mitteln der Verhinderung. Rückblickend lässt sich festhalten, dass das Interesse von österreichischen Juristen unterschiedlicher Metiers am bisher unbekanntem Thema „Europäisches Strafrecht“ deutlich zugenommen hat.

Die vorerst letzte Veranstaltung im Sommer 2008 fand zum Thema „Lissabonner Vertrag“ statt, just am Tag nach der Ablehnung Irlands. Diesen Umstand, von einigen als unglückliche Terminwahl belächelt, haben die Veranstalter nicht als Schlusspunkt des gemeinsamen Projektes der weiteren europäischen Integration betrachtet, sondern als besondere Herausforderung, nicht locker zu lassen, um sich ständig mit den neuen Herausforderungen auseinanderzusetzen.

Die Flexibilität im Umgang mit den Instrumenten, die man bereits geschaffen hat, und die Bereitschaft und Fähigkeit, schnell und wirksam zu reagieren bzw. notwendige Änderungen rasch zu veranlassen, scheint das Gebot der Stunde für die Handlungsweise der gesamten Union. Eine neue Aufgabe der nationalen Juristenvereinigungen zum Europäischen Strafrecht bzw. zum Schutz der finanziellen Interessen der EG könnte es sein, in dieser „Besinnungsphase“ die weiteren notwendigen Schritte vorzudenken und ohne politischen Druck – jedoch die Erfahrungen der Praxis nutzend – die dringendst notwendigen weiteren Maßnahmen vorzuschlagen.

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# The Approximation of National Substantive Criminal Law on Fraud and the Limits of the Third Pillar

Dr. Bernd-Roland Killmann\*

OLAF is the only Community body whose tasks include administrative investigations on behaviour detrimental to the financial interests of the EU that may have “criminal” and “trans-national” aspects simultaneously. Trans-national European crime requires new solutions to be found in what is commonly referred to as European criminal law. For this reason the protection of financial interests has been the motor of the emerging European criminal law and continues to play a vital role.<sup>2</sup>

Even before the existence of OLAF, its predecessor, the unit charged with the protection of the financial interests within the Commission (UCLAF), put forward first instruments on an approximation of national substantive criminal law, namely in the field of protecting the financial interests.<sup>3</sup> These instruments are the so-called PFI-instruments, consisting of the PFI-Convention of 26.7.1995, the First Protocol of 27.9.1996, the ECJ Protocol of 29.11.1996 and the Second Protocol of 19.6.1997,<sup>4</sup> all adopted under Title VI TEU. Protection of financial interests through criminal law began and has remained in the third pillar. This paper sets out to briefly outline the future outlook on the PFI-instruments and how OLAF could utilise these instruments in order to step up the fight against economic crime.

## I. State of Affairs

The PFI-instruments cover a part of substantive criminal law, where the harmonisation of national law of EU Member States was considered necessary.<sup>5</sup> They require a number of offences to be incorporated in national criminal law, such as a variety of different forms of fraud concerning both EU expenditure and income, passive and active corruption and money laundering. Moreover, they also require the incrimination of attempt and even of preparatory acts, of complicity and the association to commit the relevant crimes. The PFI-Convention itself sets out the criminal liability of “heads of businesses” and the Second Protocol foresees, for the first time and in an innovative way, the criminal or administrative liability for legal entities.

The Second Protocol also contains provisions on information exchange and assistance by the Commission (OLAF) to national judicial authorities. However, the PFI-instruments pose two difficulties to the Commission in terms of enhancing the level of protection of the EU’s financial interests through national criminal law:

■ Firstly, the Commission has struggled with the purely *formal aspects* of these instruments. They were devised as international law conventions and before the directive-like framework decisions were introduced in the TEU; their entry into force depends on national ratification. Ratification procedures only accelerated when the Commission proposed an alternative first-pillar instrument, namely a Directive on the criminal-law protection of the financial interests on the basis of Article 280 TEC, the so-called PFI-Directive.<sup>6</sup> Although the subsequent case-law of the Court revealed that the proposal for the directive was based on the right assumption that the TEC would also allow to introduce criminal law measures,<sup>7</sup> it was never adopted, but remained as a stick for the Commission to insist on compliance with the PFI-instruments. Only now – more than 10 years after signature –, the Second Protocol has entered into force due to the late Italian ratification.<sup>8</sup> Further, all of the instruments still wait for ratification by the new EU Member States (the Czech Republic, Hungary and Malta), which seem in no hurry in that regard.<sup>9</sup>

■ Secondly, the *material compliance* of Member States’ legal systems with the requirements of the PFI-instruments has still not been achieved. The Commission issued two reports on the Implementation of the PFI-instruments<sup>10</sup> and, although these reports limit themselves to review the Member States’ compliance on paper,<sup>11</sup> they both come to a damning conclusion: Loopholes in the national legislations allow offences covered by the PFI-instruments to go unpunished. The Commission even had to scale down its approach from the first report to the second report, in which it threatens to limit its follow-up only to “serious shortcomings” in some of the 15 Member States that were already subject to the first report and thus alerted on the Commission’s views.

Both, formal and material issues are also at stake for each enlargement negotiation in that the availability of EU monies for each newly acceding country also requires the adequate protection of financial interests through criminal law.<sup>12</sup>

## II. Future Challenges in Relation to the PFI-Instruments

OLAF, as the Commission service in charge of the PFI-instruments, has to cope with these challenges. However, the TEU only offers very limited third-pillar tools to OLAF to deal with the PFI-instruments in their present state.

On the formal side, the TEU does not contain a mechanism to trigger national ratifications. Past experience of enlargement indicates that the ratification process may be even more cumbersome with the new Member States. For this reason, a mechanism was devised for Bulgaria and Romania whereby the accession of these countries was automatic on a date fixed by the Council and no longer depended on national ratification procedures.<sup>13</sup>

Regarding material compliance, the TEU does not provide a monitoring mechanism for the implementation as is foreseen under the first pillar. The Commission stated its intention to consider proceedings under Article 35(7) TEU in its second report on the implementation of the PFI-instruments. That provision is essentially different from an infringement procedure set out in Article 226 TEC reflecting also the intrinsic dichotomy between the Community legal order and intergovernmental cooperation as under the third pillar. Article 35 TEU states that the dispute may only concern the interpretation or the application of conventions, yet not the failure to comply with the obligations under the conventions. The Court of Justice is only authorised to pass judgment if the dispute cannot be settled amicably by the Council. How the judgment is supposed to be dealt with subsequently is specified in the TEU.

It will be interesting to see how the Commission will tackle the "serious shortcomings" in implementation as identified in its second report. However, it has not been ruled out that such a "serious shortcoming" by a Member State in complying with the PFI-instruments, including even an inadequate implementation or enforcement practice, may also be pursuable under Article 280 TEC. Such a procedure would put the onus on the Commission to show that the concerned Member State's behaviour amounts to an actual failure in countering "fraud and illegal activities affecting the financial interests", whereby the Member State concerned no longer affords "effective protection" or protects the EU's financial interests in the same way as its own financial interests. For such a procedure, the Commis-

sion would have to produce a proof that goes beyond the mere review of Member States' compliance on paper as done by the Commission's implementation reports.

Additionally, the issue of reforming the legal set-up of the criminal-law protection of the financial interests as such remains unresolved. The Commission has not withdrawn its proposal for a PFI-Directive yet. The advantage of such a Directive remains to be that it offers the benefits that go with first-pillar Community legislation, in particular the supervisory mechanism not available under the third pillar. Even so, a directive cannot, of itself and independently of a national implementation law adopted by a Member State, have the effect of determining or intensify the criminal liability of persons acting in contravention of the provisions of that directive.<sup>14</sup> Furthermore, the proposal dates back to 2001. In the meantime, while European legislation on criminal law has evolved, OLAF has also had the opportunity to accumulate experience on what is further needed. Any new proposal would need to take these elements into account.<sup>15</sup>

In the future, the novelties introduced by the Treaty of Lisbon may make a balanced combination of the reform of the PFI-instruments and a better enforcement mechanism possible. Article 10 of the Protocol (No. 36) on transitional provisions<sup>16</sup> extends the supervisory mechanism of the Community to previously existing third pillar acts, such as the PFI-instruments, but only five years after the date of entry into force of the Treaty of Lisbon. Even then it remains open whether the instruments still first need ratification by a Member State in order for that Member State to be subject to an infringement procedure.

Instead, the full set of measures to enforce implementation will be immediately available for any new acts adopted under the Treaty of Lisbon. The Commission could try to propose a newly revised legal act on the criminal-law protection of the financial interests as soon as the Treaty of Lisbon comes into force. Thereby, the OLAF experience in this field would prove valuable to justify new and advanced elements in such a proposal. This way of proceeding firstly requires finding out whether the appropriate instrument under Article 325 (ex-Article 280) of the future Treaty on the Functioning of the European Union is a directive or a regulation.<sup>17</sup>

Additionally, the Commission faces another choice, namely whether it would be better to insist on establishing the European Public Prosecutor's office competent for offences affecting the financial interests as foreseen in the future Article 86 of the mentioned Treaty. All of these options, pursued separately or combined, may be met with political resistance by some

Member States insisting further on a necessity test in order to exercise these future competences, even though the Treaty of Lisbon does not at any point hint at a need for such a test and although the two implementing reports seem to convincingly confirm that it is necessary to act regarding the protection of the EU financial interests through criminal law.

### III. Outlook on OLAF's Role in Fostering the PFI-Instruments

The future perspectives on an improved protection of the financial interests through criminal law remain vague in the light of political uncertainties surrounding the Treaty of Lisbon. The problem of enhancing the protection of the financial interests, however, is an immediate concern and cannot wait. As an operational service, OLAF also has an interest to ensure that compliance is not just limited to the texts of the national provisions, as evaluated by the Commission reports, but also covers adequate implementation and enforcement practice of these national provisions in the Member States.

The practical work with the actual application of national criminal law puts OLAF in a good position to verify whether national courts are able to sanction all the different forms of fraud, corruption and money laundering, committed to the detriment of the EU budget, in an effective, proportionate and dissuasive way. The Second Protocol complements the national provisions<sup>18</sup> allowing national judicial authorities to collaborate with OLAF as a European layer reinforcing this cooperation. In practice, OLAF has close contact with national judicial authorities that receive OLAF reports of suspected criminal behaviour. In fact, national courts may be in a good place to promote compliance of national law with the PFI-instruments, since they have two powerful tools in their hand, both available under the present legal framework and without need to wait for the Treaty of Lisbon: conform interpretation of national criminal law with European law and the possibility of asking preliminary questions in case of doubts on the scope of European law.

■ *Conform interpretation* of national criminal law may be exploited more efficiently. Conform interpretation is applicable to criminal legislation regardless of whether the European act, with which conformity is sought, was enacted under the first or third pillar.<sup>19</sup> Conform interpretation ensures that formal compliance matches with material compliance: an example are national corruption offences, which leave the qualification of “official” or “public function” open so that these legal terms could cover not only national officials but also European officials in line with the assimilation princi-

ple.<sup>20</sup> However, conform interpretation is limited, since it must respect the principle that criminal law may not be applied extensively to the detriment of the defendant, with the effect that it may not lead so far as to allow bringing criminal proceedings in respect of conduct not clearly defined as culpable by national law.<sup>21</sup>

■ *Preliminary questions* lead to correct application of existing European provisions. Although the so-called ECJ Protocol allows such preliminary questions with regard to the PFI-instruments, no national jurisdiction has yet taken advantage of this possibility. Still, the European Court of Justice already had to pronounce itself on cases concerning materially offences falling under the PFI-Convention, namely smuggling which is fraud to the detriment of the EU own resources. The relevant preliminary questions explored the scope of the notion of intra-EU *ne bis in idem* as enshrined in Article 54 of the Convention implementing the Schengen Agreement.<sup>22</sup> Interestingly enough that the provision of the Schengen *acquis* inspired Article 7 of the PFI-Convention; the basis for the procedure on the preliminary question used was Article 35 TEU, which on its side was inspired by the ECJ Protocol. Thus, the European Court of Justice could have decided the cases – with the same outcome – with reference to the PFI-instruments as well. Given that criminal procedures need to be swift in particular in view of protecting fundamental rights, it is understandable that national jurisdictions were not eager to put forward preliminary questions in the past. This justified concern led to the introduction of a new fast-track procedure for preliminary questions in the field of criminal law in 2008.<sup>23</sup> One may hope that the urgency procedure raises national judges' awareness of this way of promoting European criminal law.

In raising awareness for these tools, OLAF has a role to play in fostering the PFI-instruments in their practical application. However, there should be no doubt, that neither conform interpretation nor a preliminary question enable court judgements on the conformity of national measures with European law and are thus no substitute for an enforcement mechanism.

### IV. Conclusion

More than 10 years of PFI-instruments and ten years of OLAF still leave a situation whereby the protection of financial interests through criminal law is not ensured equally EU-wide. The tools of the third pillar provide direct measures to ensure compliance with the PFI-instruments, such as reports and litigation on interpreting their provisions, as well as indirect ones, such as conform interpretation or preliminary questions. However, these tools are limited in their impacts and ultimately unsatisfactory.

The challenge to come with the Treaty of Lisbon is what to do with these instruments and how far to push any reform of the set-up of the criminal-law protection of the financial interests. OLAF will have to face the choice on what to propose to the Commission, ranging from the European Public Prosecutor's

office or a new legal act on the PFI to keeping the old set-up but taking advantage of new and improved enforcement mechanisms as soon as available. No doubt, interesting developments lie ahead in the next ten years as to OLAF's role in the approximation of national substantive criminal law on fraud.



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\* The views expressed are purely those of the authors and may not in any circumstances be regarded as stating an official position of the European Commission or the European Anti-Fraud Office (OLAF).

2 Sieber, Editorial to the first eucrim, eucrim 1-2/2006, p. 1.

3 See Van Den Wyngaert, Protection 'PIF' et espace judiciaire européen: bilan et perspectives à l'aube du 3ème millénaire, AGON 25/1999, p. 10 and Kuhl, The Criminal Law Protection of the Communities' Financial Interests against Fraud, The Criminal Law Review 1998, pp. 259 und 323.

4 Convention on the protection of the European Communities' financial interests: OJ C 316, 27.11.1995, p. 49; Protocol to the Convention on the protection of the European Communities' financial interests: OJ C 313, 23.10.1996, p. 2; Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests: OJ C 151, 20.5.1997, p. 2; Second Protocol to the Convention on the protection of the European Communities' financial interests: OJ C 221, 19.7.1997, p. 12. Except for the ECJ Protocol the Council approved an explanatory report for each of the PFI instruments, to be found in OJ C 11, 15.1.1998, p. 5; OJ C 191, 23.6.1997, p. 1 and OJ C 91, 31.3.1999, p. 8.

5 Note the "whereas-clause" of the PFI-Convention reading that the PFI-instruments are "necessary ... to improve the effectiveness of protection under criminal law of the European Communities' financial interests." The PFI-instruments draw inspiration essentially from the study of Delmas-Marty, Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community" in Commission (Editor), The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989, Brussels, 25 and 26 November 1993, p. 59.

6 COM(2001) 272 final of 23.5.2001, OJ C 240 E, 28.8.2001, p. 125, as amended by COM(2002) 577 final of 16.10.2002, OJ C 71 E, 25.3.2003, p. 1.

7 See Kuhl/Killmann, The Community Competence for a Directive on Criminal Law Protection of the Financial Interests, eucrim 3-4/2006, p. 100.

8 The Second Protocol entered into force on 19 May 2009 after Italy had notified ratification on 18 February 2009. See also the news part of eucrim in this issue.

9 See on the Czech Republic and Hungary Fenyk, eucrim 1-2/2007, p. 51 and Farkas, eucrim 1-2/2007, p. 55.

10 (First) Report on the Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols, COM(2004)709 final, and Second Report, COM(2008) 77 final. The detailed evaluation of all Member States' legislation is to be found in the Commission staff working papers associated with the reports, namely SEC(2004) 1299 and SEC(2008) 188. See also Killmann, eucrim 1-2/2007, p. 48.

11 See this critique for all third-pillar implementation reports in Borgeers, Implementing Framework Decisions, Common Market Law Review 44/2007, p. 1361.

12 On OLAF's role in this context Hamdorf, The Role of the European Anti-Fraud Office in the Process of EU-Enlargement, AGON 31/2001, p. 8.

13 Article 3(3) of the 2005 Act of accession, OJ L 157, 21.6.2005, p. 203, provides simply that Bulgaria and Romania accede to the PFI-instruments by virtue of the Act of Accession itself. The related Council decisions were published in OJ L 9, 12.1.2008, p. 23 for Bulgaria and in OJ L 9, 12.1.2008, p. 23 for Romania.

14 See Joined Cases C-387/02, C-391/02 and C-403/02, Berlusconi and others [2005] ECR I-3565, paragraph 74 and the case-law cited there.

15 See for instance the proposal for offences such as market-rigging (Article 2), conspiracy (Article 4), abuse of office (Article 7) and disclosure of secrets pertaining to one's office (Article 8) of the *Corpus Juris 2000*, as contained in Annex III of Part I, Delmas-Marty/Vervaele (eds.), The Implementation of the *Corpus Juris* in the Member States, 2000, Volume I, p. 189.

16 The citation refers to the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, as published in OJ C 115, 9.5.2008, p. 1.

17 Picotti, La perspective de réforme des traités européens et la lutte contre la fraude, eucrim 1-2/2008, p. 64.

18 See for instance Desterbeck, 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 at the formal inaugural sitting of the Court of Appeal in Ghent on 1 September 2005 (available at [http://ec.europa.eu/anti\\_fraud/partners/tribune/others\\_en.html](http://ec.europa.eu/anti_fraud/partners/tribune/others_en.html)).

19 For the first pillar ever since Case 14/86, Pretore di Salò, [1987] ECR 2545 and Case 80/86, Kolpinghuis Nijmegen [1987] ECR 3969; for the third pillar since Case C-105/03, Pupino [2005] ECR I-5285, setting out also the limits to conform interpretation in criminal law.

20 See for example Killmann/De Moor, De assimilatie van communautaire ambtenaren met nationale ambtenaren bij de bestraffing van ambtenarenmisdriven, Rechtskundig weekblad, 12/2007-2008, p. 482.

21 As clearly expressed for the first time in Joined Cases C-74/95 and C-129/95, Criminal proceedings against X [1996] ECR I-6609, paragraph 25.

22 See Case C-467/04, Gasparini and others [2006] ECR I-9199 and Case C-288/05, Kretzinger [2007] ECR I-6441.

23 See Wahl, eucrim 3-4/2007, p. 78f.



# La protection des intérêts financiers de l'UE: un grand avenir derrière elle ...

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The article aims at pointing out the fundamental contributions made by the area of the protection of the financial interests (PFI) of the European Community to the establishment and development of a criminal law system of the European Union; a contribution which still continues. From the entry into force of the Maastricht Treaty up until now, various texts adopted in the field of the protection of the EC's financial interests have played a "cutting-edge" role for most of the instruments which compose the "Common Space on Justice" nowadays. The article demonstrates this continuous role by referring to the most original and innovative content of these texts, starting at the very first proposals of the Commission in 1976 and presenting the relevant case law of the Court of Justice (on sanctions, the principle of assimilation and the criminal law competence of the Community). Examples for this "cutting-edge" role are, for instance, the initial approaches of approximation in the field of criminal law, the system for introducing a liability of legal persons, the obligation to provide for value confiscation, the "principle of assimilation", which is already incorporated in the EC Treaty, the legal basis for the establishment of a European Public Prosecutor and the new competences of the Community in the criminal-law field which are both provided for in the Lisbon Treaty. In its final part, the article presents some possible perspectives in view of the entry into force of the Lisbon Treaty, including those which are provided for by the new Art. 325 TFEU. Accordingly, the new article not only offers relevant potential for further innovation, but, in view of the future scenario, it seems to be the only legal basis for a criminal approximation in the area of PFI binding all Member States. For the protection of the financial interests, an exciting future behind ...

## I. Le contexte

La lutte contre la fraude au détriment des intérêts financiers de la Communauté et celle contre la corruption des fonctionnaires ont toujours fortement influencé l'évolution et le rapprochement progressif intervenu entre le droit pénal et le droit communautaire. Cette «convergence» vient aujourd'hui de s'achever ou presque mais la protection des intérêts financiers (PIF) semble maintenir intacte toute sa capacité de dynamiser le cadre du droit pénal européen en constituant, même à la veille de la possible entrée en vigueur d'un nouveau Traité, le laboratoire juridique à l'intérieur duquel des nouvelles voies peuvent se développer.

Les notes qui suivent s'efforceront de démontrer l'actualité de ce postulat non seulement vis-à-vis du passé mais également à la lumière des évolutions futures. A cette fin, il est nécessaire de rappeler les principales étapes que la construction du cadre de la protection pénale des intérêts financiers communautaires a traversées, sans rentrer bien évidemment dans les détails d'instruments déjà bien connus par la plupart des praticiens de la matière, mais en se limitant à signaler leurs principaux éléments innovants vis-à-vis du cadre juridique préexistant.

Il n'est pas inutile de rappeler que les premières propositions législatives de la Commission européenne en matière de protection des intérêts financiers des Communautés européennes

remontent à 1976 (époque, où l'idée d'un «espace judiciaire européen» venait d'être évoquée pour la première fois) avec le projet de traité<sup>1</sup> visant à introduire une réglementation commune dans le domaine de la protection pénale des intérêts financiers des Communautés et dans le secteur de la responsabilité et de la protection en matière pénale des fonctionnaires et des autres agents des Communautés. Le Conseil des Ministres n'ayant réservé aucune suite concrète à ces propositions, ce sera finalement à la Cour de Justice, à travers son arrêt «*mais grece*»<sup>2</sup> de 1989, de relancer effectivement le débat en la matière en consacrant le principe dit «d'assimilation» et l'obligation pour les Etats membres de prévoir des sanctions efficaces, proportionnées et dissuasives contre la fraude communautaire.

## II. Les quatre instruments du troisième pilier

### 1. La convention PIF

En 1995, à moins de deux ans de l'entrée en vigueur du Traité fondateur de l'Union européenne, on a pu assister à l'adoption du premier instrument en matière de rapprochement du droit pénal des Etats membres avec l'adoption de la Convention relative à la protection des intérêts financiers des Communautés européennes («Convention PIF»)<sup>3</sup>.

Si, du point de vue juridique, cette convention se fondait sur les dispositions du titre VI du Traité de Maastricht (et notamment

sur son art. K.1, point 5, qui faisait rentrer la «*lutte contre la fraude à l'échelle internationale*» dans la liste des questions d'intérêt commun sur lesquelles les Etats membres s'étaient engagés à instaurer une coopération étroite et régulière), du point de vue politique son chemin périlleux avait été ouvert par trois différentes résolutions des Ministres de la Justice soucieux de mettre en place les instruments pour une lutte plus efficace contre la fraude au détriment du budget communautaire<sup>4</sup>.

Pour rappel, le Traité de 1992 ne prévoyait aucune base légale en matière de rapprochement des législations pénales, se limitant à une référence générale à la «coopération judiciaire [classique] en matière pénale». Pour cette raison, on pourrait affirmer que c'est seulement avec la Convention PIF que le rapprochement en matière pénale a fait son apparition dans le droit de l'Union «par la petite porte» et que par la suite il a su gagner ses titres de noblesse grâce notamment aux instruments qui sont issus de cette «convention mère».

La convention PIF définissait la notion de fraude portant atteinte aux intérêts financiers des Communautés européennes et posait une obligation d'incrimination pour les Etats membres assortie de sanctions pénales conformes aux critères établis par la Cour de Justice dans son arrêt de 1989 (c'est-à-dire de sanctions «effectives, proportionnées et dissuasives»). Les temps n'étant pas encore mûrs pour l'introduction de dispositions en matière de responsabilité des personnes morales (comme d'ailleurs le réclamait la résolution ministérielle de 1994), la convention PIF se limitait à introduire une disposition sur la «Responsabilité pénale des chefs d'entreprise» visant à permettre que ces derniers puissent être déclarés pénalement responsables pour les actes frauduleux commis pour le compte de l'entreprise par une personne soumise à leur autorité. Le restant du dispositif prescrit des règles minimales concernant la coopération pénale, une grande partie desquelles a été dépassée ou bien intégrée par les nouveaux instruments adoptés dans le cadre de l'Union, notamment la décision-cadre sur le mandat d'arrêt européen et la convention d'entraide judiciaire en matière pénale de mai 2000. Conformément à l'un de ses considérants initiaux, la convention fut rapidement complétée par trois protocoles additionnels.

## 2. Le «premier» protocole et la convention sur la corruption

Un premier protocole<sup>5</sup> porte sur la lutte contre la corruption, phénomène dont le lien indissoluble avec les actes de fraude ne semble pas nécessaire de démontrer et n'avait pas d'ailleurs échappé aux Ministres de la justice de l'UE qui dans leur résolution de 1994, avaient déjà ouvert la voie à une incrimination des actes de corruption liés à la fraude communautaire, se

ralliant ainsi aux propositions de la Commission de 1976. Ce protocole introduit donc l'obligation, pour les Etats membres, d'incriminer la corruption active et passive des fonctionnaires – communautaires ou de tout autre Etat membre – portant préjudice aux intérêts financiers des Communautés. Il s'agit, cette fois-ci du premier instrument contraignant<sup>6</sup> ayant pour effet d'obliger les parties à procéder à l'incrimination d'actes de corruption impliquant des sujets autres que leurs propres fonctionnaires nationaux (les fonctionnaires des autres Etats membres et des Institutions européennes). On s'écartait ainsi de l'approche «égoïste» que le droit pénal avait jusqu'à la mis en œuvre pour affronter ce fléau qui, en raison notamment du développement des transactions d'affaires internationales, ne peut plus être combattu efficacement à un niveau purement national.

Une fois cette étape fondamentale franchie, ce premier protocole fut rapidement suivi par l'adoption, le 26 juin 1997, de la Convention de l'Union européenne sur la lutte contre la corruption impliquant des fonctionnaires des Communautés ou des Etats membres<sup>7</sup>. Cette convention a offert la base juridique pour l'incrimination de tout acte de corruption active et passive, en éliminant tout besoin, aux fins d'incrimination, d'un lien entre l'acte de corruption et la PIF. On pourrait ainsi dire qu'il s'agit là d'un petit pas pour le droit (car la convention reprend presque à la lettre le texte du protocole) mais d'un pas de géant pour le droit pénal européen: cette convention de 1997 constitue en effet le premier instrument d'harmonisation pénale établi au niveau de l'Union qui ne présente aucun lien avec la lutte antifraude. Bien qu'il faille encore attendre jusqu'en 1999 pour disposer d'une véritable base juridique dans le Traité fondant une compétence sur ce plan, le droit pénal de l'Union semble sortir de son «enfance» pour devenir, sinon adulte, au moins adolescent.

## 3. Le protocole sur la Cour de Justice

La Convention PIF et son premier protocole sur la corruption contenaient déjà une disposition sur la Cour de Justice, mais celle-ci se limitait à prévoir le seul règlement des différends entre Etats membres relatifs à l'interprétation ou à l'application des instruments. La possibilité de s'adresser directement à la Cour à travers le mécanisme du renvoi «préjudiciel» ne sera offerte qu'un peu plus tard aux magistrats nationaux, par le protocole signé le 9 novembre 1996 concernant l'interprétation préjudicielle de la part de la Cour de Justice des Communautés européennes de la convention et de son premier protocole<sup>8</sup>.

Cet instrument fut le premier à ouvrir aux magistrats nationaux l'accès direct à la Cour sur des sujets relevant de la coopération judiciaire pénale en prévoyant un dispositif «à la carte» ou

d'*opt-in*, dont l'introduction fut nécessaire pour vaincre les réticences de la part de certains Etats membres à céder devant ce qui était vécu par eux comme une véritable «intrusion» d'une institution communautaire dans un territoire jusque-là strictement réservé à l'intergouvernemental. Par le biais d'une déclaration *ad hoc* les Etats membres «pouvaient», ainsi, accepter la compétence de la Cour à connaître des questions soulevées par leurs juges nationaux à travers un modèle précurseur de la solution finalement retenue par le traité d'Amsterdam conclu l'année suivante.

#### 4. Le «deuxième» protocole à la convention PIF et la responsabilité des personnes morales

Le «deuxième» protocole<sup>9</sup> à la Convention PIF, signé le 19 juin 1997, achève la mise en œuvre de la «table des matières» esquissée dans la résolution des Ministres de 1994 pour ce qui touche notamment au blanchiment, à la confiscation et à la responsabilité des personnes morales.

Le protocole oblige, tout d'abord, les Etats membres à incriminer le blanchiment de l'argent au moins en ce qui concerne les produits de la fraude grave et de la corruption active et passive, contribuant ainsi à élargir la portée de l'infraction de blanchiment au-delà des seuls produits du trafic de drogue, comme semblaient déjà le préconiser les recommandations provenant de différentes instances internationales de l'époque<sup>10</sup>. Cette obligation d'incrimination est assortie d'un engagement des Etats à permettre la saisie et la confiscation des instruments et du produit de ces actes délictueux, ou des biens d'une valeur équivalente. La «confiscation en valeur» – jusqu'alors uniquement reprise dans des instruments de droit international<sup>11</sup> – fait, à cette occasion, son entrée sur la scène du droit de l'Union pour être ensuite reproduite, avec une portée générale, dans l'action commune de décembre 1998 sur le blanchiment de l'argent et la confiscation des produits<sup>12</sup>.

Tout en reconnaissant la valeur et la portée de ces obligations, il faut noter que la disposition peut-être la plus significative du protocole est celle qui introduit, pour la première fois, en droit européen, un régime de responsabilité pour les personnes morales qui servira de modèle pour la plupart des instruments à venir tant dans l'Union européenne qu'en dehors de ses frontières. En vertu du protocole, les Etats membres sont tenus de prévoir vis-à-vis des personnes morales des sanctions qui ne doivent pas nécessairement être de nature pénale: elles peuvent aussi relever du droit administratif ou du droit civil. Mais, indépendamment de leur nature, elles devront être proportionnées, efficaces et dissuasives, et ce conformément aux enseignements de l'arrêt «*maïs grec*» de la Cour de justice évoqué ci-dessus. Ces sanctions «doivent» inclure des sanctions pé-

culaires et «peuvent» inclure des sanctions d'une autre nature telles que des mesures d'exclusion d'aides, de suspension ou d'interdiction d'exercer une activité commerciale, de surveillance judiciaire ou encore de dissolution. L'«effet utile», c'est-à-dire celui d'obtenir que les personnes morales puissent partout dans l'Union faire l'objet de sanctions efficaces, proportionnées et dissuasives, est donc atteint, mais avec toute la souplesse nécessaire pour ne pas heurter les Etats membres les plus réticents à la consécration de la responsabilité pénale des personnes morales (suivant le principe «*societas delinquere non potest*»).

*Last but not least*, le deuxième protocole introduit des dispositions d'une importance primordiale quant à la création d'une base légale pour fonder une coopération entre les Etats membres et la Commission européenne dans le secteur de la lutte contre la fraude, la corruption et le blanchiment d'argent, dispositions assorties de garanties relatives à la protection des données à caractère personnel. Il s'agit là d'une véritable obligation réciproque de coopérer (annonçant le futur article 280, paragraphe 3, TCE), qui s'adresse aussi bien aux Etats membres qu'à la Commission. Le protocole prévoit aussi des règles à suivre pour le transfert des données par la Commission vers d'autres Etats membres (avec une simple obligation d'information de l'Etat ayant fourni l'information) ou vers des Etats tiers (avec, cette fois-ci, l'obligation d'obtenir une autorisation de la part de l'Etat en question). Une fois le protocole en vigueur, l'Autorité européenne de contrôle des données sera compétente pour exercer le contrôle à l'égard des données à caractère personnel détenues par la Commission en vertu de celui-ci: il s'agit là d'une autre «*Première*» dans le cadre d'un instrument du troisième pilier.

### III. Les développements subséquents

Bien que l'adoption de la Convention PIF soit intervenue en juillet 1995, il aura fallu plus de sept ans, jusqu'en octobre 2002, pour voir la convention, son premier protocole et celui sur la compétence de la Cour entrer en vigueur, à la suite de leur ratification par le dernier des Etats membres signataires. Il aura en revanche fallu presque 12 ans au deuxième protocole pour le voir finalement entrer en vigueur à la suite de la dernière ratification encore manquante, celle de l'Italie.

Dans les années qui ont suivi l'adoption de ces textes, l'Europe pénale est devenue une réalité incontournable, notamment à la suite de l'entrée en vigueur du Traité d'Amsterdam en mai 1999 et aux conclusions du Conseil européen de Tampere.

Pour ce qui est de la PIF, la création de la base juridique de l'article 280 du TCE (constituant l'évolution du précédent

article 209A du traité de Maastricht) et son entrée en vigueur se sont accompagnées avec la création de l'Office européen de lutte antifraude (OLAF)<sup>13</sup>, successeur de l'UCLAF, et par l'adoption des textes régissant ses enquêtes administratives<sup>14</sup>.

Le contenu de cette disposition est désormais bien connu et intégré par la doctrine. L'obligation de combattre la fraude par des mesures dissuasives et qui offrent une protection effective s'adresse aussi bien aux Etats membres qu'à la Commission; le «*principe d'assimilation*» y est également repris. La disposition définit en outre le cadre d'une coordination de l'action des Etats membres et l'organisation, avec la Commission, d'une collaboration étroite et régulière entre les autorités nationales compétentes. Enfin, sur le plan des procédures législatives communautaires, la possibilité est ouverte pour le Conseil d'adopter, à la majorité qualifiée et en co-décision avec le Parlement européen, les mesures législatives nécessaires afin de mettre en place une protection effective et équivalente dans les États membres des intérêts financiers de la Communauté. Toutefois, aux termes de la disposition en question, ces mesures «...ne concernent ni l'application du droit pénal national ni l'administration de la justice dans les États membres».

Le chemin de convergence entre la PIF et le droit pénal n'ayant pas connu de repli non plus après le traité d'Amsterdam, un livre vert sur la protection pénale des intérêts financiers communautaires et la création d'un Procureur européen<sup>15</sup> fut présenté par la Commission en 2001 pour promouvoir le débat sur les possibilités de mise en oeuvre d'un Parquet européen responsable de la poursuite, au niveau européen, de toute activité portant atteinte aux intérêts financiers communautaires. Toujours en 2001, la Commission avait aussi présenté une proposition de directive fondée justement sur l'article 280, paragraphe 4, reprenant la substance de l'acquis de la Convention PIF et de ses protocoles<sup>16</sup>, qui ne fit jamais vraiment l'objet de discussions au sein du Conseil, d'une part à cause de l'aboutissement du processus de ratification de la plupart des instruments du troisième pilier, et d'autre part à cause du refus systématique de la plupart des Etats membres d'accepter une compétence de la Communauté à légiférer en matière pénale par voie de directive.

Ce refus semble aujourd'hui constituer un reliquat du passé à la suite de deux arrêts successifs de la Cour de Justice<sup>17</sup> qui ont reconnu la compétence de la Communauté pour édicter des dispositions relevant du droit pénal par le biais d'un instrument du premier pilier ouvrant ainsi la voie à l'adoption, fin 2008, de la première véritable «directive pénale» en matière de protection de l'environnement.<sup>18</sup> On a donc donné finalement raison à l'approche «visionnaire» de ceux qui, encore au

début des années '90, avait déjà affirmé l'existence de cette compétence en partant, encore une fois, de l'incontournable terrain de la PIF.

De la même manière, la Constitution européenne d'abord et le Traité de Lisbonne par la suite ont couronné le rêve de ceux qui avaient donné vie au projet d'un parquet européen. La base légale permettant sa création, soit à l'unanimité soit en coopération renforcée, se trouve désormais inscrite dans le Traité à l'art. 86 TFUE. Certes, suite à l'abandon du projet constitutionnel et à l'incertitude qui règne quant à la ratification du nouveau Traité, il peut sembler prématuré de se pencher sur un de ses atouts majeurs. Prématuré peut être mais non inutile.

Le Traité de Lisbonne porte en effet ses progrès majeurs justement dans le secteur de la coopération pénale, grâce à l'élimination des piliers, au passage à la majorité qualifiée en co-décision avec le PE etc. Cependant le prix à payer pour l'obtention du compromis final fut lourd et a consisté notamment dans la concession d'un *opt-out*, dans les protocoles respectifs, non seulement du Danemark mais aussi du Royaume Uni et de l'Irlande pour ce qui est de la participation de ces trois Pays au Titre V en entier du nouveau Traité.

Une Europe «à géométrie variable», par ailleurs déjà existante dans les faits avec l'étrange composition de l'espace Schengen, est désormais inscrite dans le traité bien au-delà du simple potentiel offert par les coopérations renforcées. Le rapprochement des législations pénales des Etats membres, qui se décline sous trois différentes formes aux articles 82 et 83 du TFUE, est un rapprochement qui sera en principe applicable à 24 Etats membres et non pas à 27 ou, tout au plus, à 26 en cas d'un *opt-in*. Même l'unanimité requise pour la création d'un Parquet européen par l'article 86 est en effet une unanimité à poursuivre «seulement» à 24...

En matière de protection des intérêts financiers de l'Union, en revanche, le nouvel art. 325 TFUE consacre les principaux achèvements de l'article 280 tout en éliminant de son paragraphe 4 la clause de limitation des mesures pour ce qui est de l'application du droit pénal national ou de l'administration de la justice dans les États membres. La conséquence nécessaire qu'on peut tirer de l'élimination de cette référence semble être que l'on pourra adopter des mesures législatives dans le secteur de la prévention et de la lutte contre la fraude qui pourront également comprendre la matière pénale.

Cette fois-ci il s'agira bien d'une harmonisation qui ne pourra pas se faire que à 27, en impliquant nécessairement la participation de tous les Etats membres dans le cadre d'un système de vote à la «double majorité» et en codécision avec le Parlement. Cette harmonisation semble constituer la seule



opportunité pour les Etats membres de progresser encore tous ensemble sur la voie d'un rapprochement de leurs législations pénales nationales dans la mesure où cela se révèle nécessaire pour assurer une protection efficace et équivalente dans tous les Etats membres du budget de l'Union. Si cette lecture se révèle correcte, il s'agirait bien là du seul domaine relevant du droit pénal dans lequel on pourra continuer à procéder à l'adoption de mesures qui seront directement contraignantes aussi pour le Danemark, le Royaume Uni et l'Irlande.

Même du point de vue institutionnel par ailleurs, et toujours pour le cas d'une éventuelle entrée en vigueur du nouveau Traité, il serait également intéressant de voir l'OLAF retourner sous la responsabilité du Commissaire européen en charge de la Justice (comme il avait été déjà le cas avant 1999) en sortant du portefeuille de celui en charge de l'Administration. Quelle meilleure carte de visite, en effet, pour un Office qui pourrait devenir, dans un avenir pas trop lointain, l'interlocuteur privilégié, sinon le «bras armé», du futur Parquet européen!

#### IV. Conclusions

Bien qu'aujourd'hui d'autres sujets d'actualité (terrorisme, crime organisé, immigration clandestine et traite des êtres humains) semblent au premier chef retenir l'attention des Ministres ainsi que de la plupart des commentateurs, le secteur de la protection des intérêts financiers communautaires n'a pas perdu sa nature de véritable «laboratoire du droit pénal de l'Union» tout en constituant au même temps un corpus de dispositions doté d'une cohérence propre. C'est dans ce «laboratoire» qu'on a conçu les premières dispositions en matière de

rapprochement des législations pénales, d'élargissement de la définition des actes de corruption au-delà des frontières nationales et vis-à-vis des fonctionnaires communautaires, d'introduction d'un régime de responsabilité des personnes morales liée à des infractions pénales, d'incrimination du blanchiment des produits, de leur confiscation ou de celle «en valeur» portant sur leur équivalent, d'accès des juridictions pénales à la Cour de Luxembourg. C'est en bonne partie à travers les différents instruments adoptés le domaine de la protection des intérêts financiers de la Communauté entre 1995 et 1997 que ces mêmes sujets ont pu trouver une première réglementation et application concrète, grâce aussi à l'action menée par l'Office européen antifraude dont il recourt cette année le dixième anniversaire de la création.

Toute évolution future, et notamment la perspective de la création effective d'un parquet européen à partir d'Eurojust, avec une compétence limitée à la matière de la PIF ou étendue à la criminalité grave transnationale, reste en grande partie liée à l'avenir toujours incertain du processus de ratification et entrée en vigueur du nouveau traité de Lisbonne.

Néanmoins, même dans le cas où l'on resterait restant dans le cadre des Traités existants, l'évaluation de la mise en œuvre complète des instruments en place – et qui sont aujourd'hui tous finalement entrés en vigueur – pourrait donner lieu à des propositions renouvelées de la part de la Commission européenne qui, dans une phase de perte de vitesse de la dynamique inaugurée à Tampere en Octobre 1999, pourrait ouvrir encore la voie à des avancées audacieuses. Pour reprendre l'expression célèbre d'un grand acteur d'un passé récent, la PIF semble avoir encore un grand avenir derrière elle ...

\* Les opinions exprimées sont personnelles à l'auteur et n'engagent pas l'Institution pour laquelle il travaille. 1 JO, C 222, 22.9.1976, 2.

2 Arrêt du 21.9.1989, dans l'affaire C-68/88, Commission c. Grèce.

3 JO, C 316, 27.11.1995, 49.

4 Seulement deux résolutions sont publiées au JO: v. JO, C328, 17.12.1991, 1; JO, C355, 14.12.1994, 2.

5 JO, C 313, 23.10.1996, 1.

6 Au niveau mondial, le protocole a été précédé sur ce point uniquement par la Convention signée dans le cadre de l'Organisation des Etats Américains (OAS) le 29.3.1996. Au niveau international, les instruments de l'UE en cette matière seront rapidement suivis par les conventions de l'OCDE (Paris, décembre 1997), du Conseil de l'Europe en matière pénale et civile (Strasbourg, janvier et décembre 1999) et des Nations Unies (Merida, décembre 2003), auxquelles ils ne manqueront pas de fournir des solutions et des sources d'inspiration.

7 JO, C195, 25.6.1997, 1.

8 JO, C 151, 20.5.1997, 1.

9 JO, C 221, 19.7.1997, 11.

10 V. Rapport explicatif du deuxième protocole, JO C91, 31.3.1999, 10.

11 Tels que la Convention de Vienne des Nations Unies de décembre 1988 contre le trafic illicite de stupéfiants ou bien la Convention de Strasbourg de 1990 du Conseil de l'Europe sur la confiscation et le blanchiment.

12 JO, L 333, 9.12.1998, 1; l'action commune sera ensuite partiellement remplacée

par la décision-cadre concernant le blanchiment d'argent, l'identification, le dépistage, le gel ou la saisie et la confiscation des instruments et des produits du crime (2001/500) du 26.6.2001, JO L182, 5.7.2001, 1, dont l'art.3 vise expressément la confiscation en valeur.

13 Décision de la Commission du 28.4.1999, JO L136, 31.5.1999, 20.

14 Règlement (CE) 1073/1999, JO L136, 31.5.1999, 1.

15 Doc. COM(2001) 715 du 11.12.2001.

16 Doc. COM(2001) 272, du 23.5.2001.

17 Arrêts du 13.9.2005, dans l'affaire C-176/03, Commission c. Conseil, et du 23.10.2007, dans l'affaire C-440/05, Commission c. Conseil.

18 Directive 2008/99/CE, JO L 328, 6.12.2008, 28.

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# Die geltenden primär- und sekundärrechtlichen Rahmenbedingungen des EG-Finanzschutzes

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This article outlines the framework of the European Community's primary and secondary law regarding the protection of its financial interests. It starts in part I with an historical review ranging from the first attempts of the Commission to harmonise the criminal law of the Member States with regards to the fight against fraud detrimental to the EC budget, the development of the Anti-Fraud Coordination Unit (UCLAF) and the embedding of the financial interests in the Maastricht Treaty. The article continues with a presentation of the existing legal framework for the protection of the EC's financial interests in part II. First, the different aspects regarding Art. 280 EC are explained, including the dispute of whether Art. 280 para. 4 can serve as a legal basis for a supranational criminal law set-up for the protection of the EC's financial interests. In a pragmatic way, the Community legislator has established the criminal law protection of the financial interests using the instruments of the third pillar whereas administrative sanctions and investigations are based on first pillar instruments. These latter instruments, of which the most important are the "PFI-Regulation" No. 2988/95, the "control Regulation" No. 2185/96 and the "OLAF-Regulation" No. 1073/99, are being examined in the following sections of the article. As regards the OLAF Regulation, the decisive step was its codification of powers for internal investigations. However, as the article shows, there was reluctance of various EC institutions and bodies to ensure effective investigations by the new Office within their sphere of control. Despite these obstacles, the article concludes that in the course of the existence of the EC, the protection of its financial interests has been continuously extended. Still, friction remains regarding the apparently outdated separation between administrative and criminal law protection due to the pillar structure – a status which may crucially be removed by the Lisbon Treaty which may lead to the creation of a genuine supranational criminal law in the specific area of the protection of the EC's financial interests after all.

## I. Historischer Rückblick

### 1. Entwicklung von Anti-Betrugsbekämpfungsmechanismen der EG

Schon während der 1960er Jahre gab es Betrügereien in größerem Ausmaß zu Lasten des Budgets der Europäischen (Wirtschafts)Gemeinschaft<sup>1</sup> und die Kommission war alarmiert über das Problem des Finanzbetruges von EG-Ressourcen und Korruption.<sup>2</sup> Bereits im Jahr 1962 wurde eine Ad-hoc-Arbeitsgruppe gebildet, welche Wege finden sollte, wie eine bessere *Harmonisierung* der strafrechtlichen Bestimmungen der damals sechs EWG-Staaten im Hinblick auf den Betrug zu Lasten der Gemeinschaft erreicht werden konnte. Die Kommission unternahm zunächst den Versuch, den Schutz der finanziellen Interessen der Gemeinschaft durch gemeinsame *strafrechtliche* Regeln auf der Primärrechtsebene sicherzustellen. Ein 1976 von einer neuen Arbeitsgruppe gemachter Vorschlag, dem früheren EWG-Vertrag ein „Protokoll über den strafrechtlichen Schutz der finanziellen Interessen der Gemeinschaft und die Verfolgung von Verletzungen der Bestimmungen des EWG-Vertrages“ hinzuzufügen, scheiterte am Widerstand der Mitgliedstaaten.<sup>3</sup> Die Kommission konzentrierte sich in der Folge darauf, einen sektorspezifischen Ansatz weiter zu entwickeln.<sup>4</sup> Spezielle Maßnahmen zur Betrugsbekämpfung wurden durch Verordnungen insbesondere im Agrarsektor initiiert.

Richtungweisend für den EG-Finanzschutz war das Urteil des EuGH im „Griechischen Maisskandal“,<sup>5</sup> in dem die sich aus dem Loyalitätsgebot (Art. 5 EGV a.F., jetzt Art. 10 EG) ergebenden Verpflichtungen der Mitgliedstaaten präzisiert wurden:

- Der Gerichtshof führt zu einem das *Gleichstellungserfordernis* der Sanktionierung ein, wonach Verstöße gegen das Gemeinschaftsrecht nach ähnlichen sachlichen und verfahrensrechtlichen Regeln geahndet werden müssen wie nach Art und Schwere gleichartige Verstöße gegen nationales Recht (auch Prinzip der Assimilierung genannt).
- Zum zweiten schränkt der EuGH die Wahlfreiheit der Mitgliedstaaten, wie sie Sanktionen gegen das Gemeinschaftsrecht ahnden, ein, indem er fordert, dass die *Sanktion* „jedenfalls *wirksam, verhältnismässig und abschreckend* sein muß“ (*Wirksamkeitsgebot*). Dies führt zu zwei Konsequenzen: Bestehende punitive Sanktionen müssen sich an diesen Mindestvorgaben messen lassen. Neue Sanktionen müssen geschaffen werden, falls nur so dem gemeinschaftsrechtlichen Schutz entsprochen werden kann (Pönalisierungsgebot).<sup>6</sup>

### 2. Zentrale Koordinierungsstelle UCLAF

Organisatorisch war Betrugsbekämpfung sowohl in den Mitgliedstaaten, als auch bei der Kommission ursprünglich Aufgabe der mittelverwaltenden Dienststellen selbst. Die dadurch bedingte Aufsplitterung der Kontrolltätigkeit verbunden mit

Doppelarbeit führte einerseits dazu, dass die Kommission 1988 von dieser rein dezentralen Durchführung der Betrugsbekämpfung Abstand nahm. Andererseits konnte man sich nicht auf eine rein zentrale Struktur einigen: Auf der einen Seite wurden die Betrugsbekämpfungszellen in den einzelnen relevanten Kommissionsdienststellen beibehalten, auf der anderen Seite wurden die Dienststellen sowie die Behörden der Mitgliedstaaten durch die Gründung der zentralen Koordinierungsstelle für die Betrugsbekämpfung UCLAF (*Unité de Coordination pour la Lutte Anti-Fraude*) unterstützt. Ausgehend von der Aufgabenverteilung zwischen Mitgliedstaaten und Kommission bei der Verwaltung des Gemeinschaftshaushalts war UCLAF zunächst damit betraut, (1) die Aktivitäten der Gemeinschaft im Bereich der Betrugsbekämpfung zu koordinieren, (2) die Kommission gegenüber den übrigen mit diesem Bereich befassten Gemeinschaftsorganen und -institutionen (Haushaltskontrollausschuss des Parlaments, Rat, Rechnungshof) und den Mitgliedstaaten zu vertreten, und schließlich (3) eine eigene Betrugsbekämpfungspolitik der Gemeinschaft zu entwickeln bzw. durchzuführen.

1994 markiert ein wichtiges Jahr für UCLAF, weil die Aufgaben der Stelle auf operationellem Gebiet erweitert wurden. UCLAF wurden sämtliche Ermittlungs-, Untersuchungs- und Kontrollaufgaben der Kommission im Bereich der Betrugsbekämpfung zugewiesen, was auch die Befugnis zur Durchführung von Vor-Ort-Kontrollen im Rahmen des bestehenden Verordnungsrechts (s.u. II.) umfasste.<sup>7</sup>

Im Zuge der Kritik an der Effizienz der neuen zentralen Stelle durch das Europäische Parlament erfolgte 1998 die Umwandlung von UCLAF in eine mit größerer Eigenständigkeit ausgestattete Task Force „Koordinierung der Betrugsbekämpfung“. Wesentliche Neuerung war, dass UCLAF die Kompetenz zugewiesen wurde, interne Durchsuchungen innerhalb der Kommission durchzuführen. Einer wirksamen Durchführung interner Untersuchungen standen jedoch die fehlende Unabhängigkeit von UCLAF, die selbst in die hierarchische Struktur der Kommission eingebunden war, sowie das Fehlen notwendiger Ermittlungsbefugnisse entgegen.<sup>8</sup> Diese Defizite sollten schließlich durch die Gründung ihrer Nachfolgeorganisation OLAF behoben werden.

### 3. Betrugsbekämpfung im Maastrichter Vertrag

Erst mit der Regierungskonferenz von Maastricht 1992 gelang die primärrechtliche Verankerung des Schutzes der finanziellen Interessen der EG. In den Abschnitt über die Finanzvorschriften des EG-Vertrages wurde Art. 209a neu eingefügt, der die im „Griechischen Maisskandal“ artikulierten Aussagen des EuGH festschrieb. Nach Abs. 1 ergreifen die Mitglied-

staaten zur Bekämpfung von Betrügereien, die sich gegen die finanziellen Interessen der Gemeinschaft richten, die gleichen Maßnahmen, die sie auch zur Bekämpfung von Betrügereien ergreifen, die sich gegen ihre eigenen finanziellen Interessen richten; damit wird also das Gleichstellungsgebot positiv niedergelegt. Abs. 2 bestätigte u.a. die unterstützende und nachrangige Rolle der Kommission beim Schutz der finanziellen Interessen der Gemeinschaft vor Betrügereien. In der Folge legte die Kommission – erstmals 1994 – ein Arbeitsprogramm zum Schutz der finanziellen Interessen der Gemeinschaft vor,<sup>9</sup> welches jährlich überarbeitet wurde.<sup>10</sup>

Die durch den Maastrichter Vertrag eingeführte Säulenstruktur brachte ein bis heute ungelöstes Problem mit sich, nämlich die Abgrenzung zwischen der gemeinschaftsrechtlichen und intergouvernementalen Zuständigkeit bei der Betrugsbekämpfung. Die gesonderten, die Souveränität der Mitgliedstaaten herausstreichenden Bestimmungen für die Zusammenarbeit in den Bereichen Justiz und Inneres („dritte Säule“) sahen die „Bekämpfung von Betrügereien im internationalen Maßstab“ als Angelegenheit von gemeinsamem Interesse an (Art. K.1 Nr. 5 EUV). Pragmatisch gingen Kommission und Rat so vor, dass Instrumente zum Schutz der finanziellen Interessen der Gemeinschaft hinsichtlich verwaltungsrechtlicher Sanktionen auf das Gemeinschaftsrecht gestützt wurden,<sup>11</sup> solche im strafrechtlichen Bereich auf das intergouvernementale Recht der dritten Säule. Das Europäische Parlament hat dem widersprochen und hielt auch für strafrechtliche Sanktionen eine Gemeinschaftsregelung für zulässig.<sup>12</sup> Erste Instrumente, die nach diesem System angenommen wurden, waren einerseits die sogleich näher zu erläuternde Verordnung Nr. 2988/95 zu verwaltungsrechtlichen Maßnahmen und Sanktionen und andererseits das auf die Harmonisierung strafrechtlicher Bestimmungen zielende Übereinkommen zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften von 1995.

## II. Der rechtliche Rahmen der Betrugsbekämpfung im Primär- und Sekundärrecht der EG

Der gegenwärtige gesetzliche Rahmen hinsichtlich des Schutzes der finanziellen Interessen der Gemeinschaft ist *einzigartig*, denn er beruht auf zwei separaten Rechtsgrundlagen mit unterschiedlichen Verfahren und Konsequenzen: Zum einen auf der ersten Säule (Art. 274 und 280 EG sowie verschiedenen Rechtsakten des gemeinschaftsrechtlichen Sekundärrechts), zum anderen auf der dritten Säule (Art. 29 ff EUV). Im Folgenden sollen die verwaltungsrechtlichen Betrugsbekämpfungsmaßnahmen der ersten Säule im Vordergrund stehen; hinsichtlich des strafrechtlichen Schutzes der Finanzinteressen durch die dritte Säule wird auf die Beiträge von *Salazar* und *Killmann* (in diesem Heft) verwiesen.

## 1. Primärrecht

### Art. 274 EG

Eine erste wichtige primärrechtliche Grundlage für ein Tätigwerden der Gemeinschaft gegen Betrug ist Art. 274 EG. Danach führt die Kommission den Haushaltsplan gemäß der nach Art. 279 festgelegten Haushaltsordnung in eigener Verantwortung und im Rahmen der zugewiesenen Mittel entsprechend dem Grundsatz der Wirtschaftlichkeit der Haushaltsführung aus. Die Mitgliedstaaten arbeiten mit der Kommission zusammen, um sicherzustellen, dass die Mittel nach dem Grundsatz der Wirtschaftlichkeit der Haushaltsführung verwendet werden. Mit Inkrafttreten des Haushaltsplanes ist die Kommission verpflichtet, alle erforderlichen rechtlichen und tatsächlichen Schritte zu dessen Verwirklichung einzuleiten und durchzuführen.

### Art. 280 EG

Durch den Amsterdamer Vertrag (in Kraft getreten am 1.5.1999) gelang eine Neujustierung des EG-Finanzschutzes auf primärrechtlicher Ebene. Der neugefasste Art. 280 EG löst Art. 209a EGV ab. Art. 280 übernimmt in seinen Absätzen 2 und 3 seine Vorgängernorm, geht aber in den anderen Absätzen darüber hinaus. Er inkorporiert jetzt auch das Wirksamkeitsgebot, erklärt die Gemeinschaft – zusammen mit den Mitgliedstaaten – ausdrücklich für die Betrugsbekämpfung zuständig (Abs. 1) und verleiht dem Rat eine Rechtssetzungskompetenz für „die erforderlichen Maßnahmen zur Verhütung und Bekämpfung von Betrugereien, die sich gegen die finanziellen Interessen der Gemeinschaft richten (Abs. 4).“

Gemäß *Art. 280 Abs. 1* bekämpfen die Gemeinschaft und die Mitgliedstaaten Betrugereien und sonstige gegen die finanziellen Interessen der Gemeinschaft gerichtete rechtswidrige Handlungen mit Maßnahmen nach diesem Artikel, die abschreckend sind und in den Mitgliedstaaten einen effektiven Schutz bewirken. Zunächst wird dadurch die „geteilte Zuständigkeit“ zwischen der Gemeinschaft und den Mitgliedstaaten beim EG-Finanzschutz klargestellt. Die Anforderungen an die Maßnahmen („abschreckend und effektiv“) entsprechen der vom Gerichtshof verwendeten Wortwahl, wonach Maßnahmen „wirksam, verhältnismäßig und abschreckend“ sein müssen.<sup>13</sup> Art. 280 Abs. 1 schränkt nicht die gemeinschaftlichen Grenzen für die Sanktionierung ein, wie etwa das Gesetzlichkeitsprinzip, das Schuldprinzip, die Irrtumslehre, Rechtfertigungs- und Entschuldigungsgründe, Grund- und Verteidigungsrechte des Beschuldigten oder das Verbot der Doppelbestrafung. Anzumerken ist, dass hinsichtlich der Grenzen nicht zwischen verwaltungsrechtlichen und strafrechtlichen Sanktionen unterschieden wird, so dass die strafrechtlichen Garantien auch auf die strafähnlich wirkenden Verwaltungssanktionen Anwendung finden.<sup>4</sup>

*Art. 280 Abs. 2* übernimmt die vom Gerichtshof hergeleitete Pflicht zur Assimilierung. Sie bezieht sich sowohl auf das materielle Recht (v.a. Straf- und Ordnungswidrigkeitenrecht) als auch auf das Verfahrensrecht der Mitgliedstaaten. Die Pflicht richtet sich nicht nur an den Gesetzgeber, sondern auch an die Gerichte, die nach den Grundsätzen der gemeinschaftskonformen Auslegung sicherstellen müssen, dass nationale Rechtsvorschriften auch den Schutz der finanziellen Interessen der Gemeinschaft umfassen.

Gemäß *Art. 280 Abs. 3* sind die Mitgliedstaaten dazu angehalten, ihre Tätigkeit zum Schutz der finanziellen Interessen der Gemeinschaft vor Betrugereien zu „koordinieren.“ Sie sorgen zu diesem Zweck zusammen mit der Kommission für eine enge, regelmäßige Zusammenarbeit zwischen den zuständigen Behörden. In diesem Zusammenhang bedeutend ist der „Beratende Ausschuss für die Koordinierung der Betrugsbekämpfung“ (*Comité consultatif pour la Coordination de la Lutte contre la Fraude – COCOLAF*), der aus Vertretern der Mitgliedstaaten und der Kommission zusammengesetzt ist. Der Ausschuss berät (d.h. er trifft keine Beschlüsse) die Kommission im Hinblick auf eine bessere Organisation der von Art. 280 vorgegebenen Zusammenarbeit und kann von der Kommission zu allen Fragen gehört werden, die Tätigkeiten berühren, welche mit dem Schutz der finanziellen Interessen der Gemeinschaft und der Euro-Banknoten und -Münzen gegen Geldfälschung verbunden sind. Er kann zudem zu allen Fragen des rechtlichen Schutzes der finanziellen Interessen der Gemeinschaft einschließlich der strafrechtlichen und justiziellen Aspekte der Entwicklung und Zusammenarbeit auf dem Gebiet der Betrugsbekämpfung gehört werden.<sup>15</sup>

Nach *Art. 280 Abs. 5* legt die Kommission jährlich einen Bericht über die Maßnahmen vor, die zur Durchführung des Artikels 280 getroffen wurden.<sup>16</sup> Die Mitgliedstaaten sind verpflichtet, der Kommission Informationen über Fälle von Unregelmäßigkeiten sowie über Fortschritte bei der Durchsetzung von Ersatzansprüchen zu liefern.

Besondere Tragweite kommt *Art. 280 Abs. 4*, der Kompetenzgrundlage für Gemeinschaftsrechtsakte zur Betrugsbekämpfung, im Hinblick auf Sanktionsmaßnahmen zu. Umstritten ist insbesondere die Auslegung des Zusatzes in Satz 2, wonach die „Anwendung des Strafrechts der Mitgliedstaaten und ihre Strafrechtspflege ... von diesen Maßnahmen unberührt bleiben.“ In dieser Vorschrift offenbart sich, dass Art. 280 Ergebnis eines „subtilen Kompromisses“ ist, zwischen der auf eine spezifische, möglichst umfassende Gesetzgebungskompetenz für die Gemeinschaft, auch unter Einschluss des Strafrechts, drängenden Position der Kommission und dem Bestreben der Mitgliedstaaten, die Gemeinschaftszuständigkeit auf Betrugereien zu Lasten des Gemeinschaftshaushalts zu beschränken



und den Bereich des nationalen Strafrechts weiterhin von der „gemeinschaftsrechtlichen Methode“ auszunehmen.<sup>17</sup>

Weitgehende Einigkeit besteht darin, dass der Gemeinschaftsgesetzgeber auf der Grundlage des Art. 280 Abs. 4 unmittelbar anwendbare *Verwaltungssanktionen* durch Verordnung erlassen oder Verwaltungssanktionen der Mitgliedstaaten (durch Richtlinien) harmonisieren kann.<sup>18</sup>

Die Kommission und ein Teil der Literatur sehen Art. 280 Abs. 4 in gleichem Maße als Rechtsgrundlage für *strafrechtliche Sanktionen* an. Nach dieser Auffassung regle der Zusatz in Satz 2 nur den allgemeinen Anwendungsvorrang des Gemeinschaftsrechts. Danach erlaube Art. 280 Abs. 4 auch den Erlass von unmittelbar anwendbaren, supranationalen Strafnormen im Bereich der Betrugsbekämpfung. Diese würden das nationale Strafrecht jedoch nur ergänzen, kämen also nicht zur Anwendung, wenn bereits das nationale Recht die im Gemeinschaftsrecht beschriebene Verhaltensweise erfasse.<sup>19</sup>

Die Mehrheit der Regierungen der Mitgliedstaaten sowie ein anderer Teil der Literatur lehnen eine Kompetenz der EG kategorisch ab, sei es für eine Harmonisierung des nationalen Strafrechts im Bereich der Betrugsbekämpfung, sei es gar für eine supranationale Strafrechtssetzung. Hauptargument ist die allgemeine Kompetenzverteilung zwischen erster und dritter Säule für das Kriminalstrafrecht sowie der Hinweis, dass sowohl bei strafrechtlichen Harmonisierungsmaßnahmen als auch der Setzung supranationalen Strafrechts die Vorbehaltsklausel des Art. 280 Abs. 4 Satz 2 greife, d.h. das Strafrecht der Mitgliedstaaten „berührt“ werde.<sup>20</sup>

Eine dritte Ansicht verweist schließlich auf die Systematik des Art. 280 und seine Entstehungsgeschichte und sieht Abs. 4 als spezielle Kompetenzgrundlage für die Harmonisierung des mitgliedstaatlichen Strafrechts an, jedoch nicht für die Setzung (unmittelbar anwendbarer) supranationaler Strafvorschriften.<sup>21</sup>

Nach dem EuGH-Urteil zur Gültigkeit des Rahmenbeschlusses zum strafrechtlichen Schutz der Umwelt<sup>22</sup> fühlte sich die Kommission bestätigt, dass ihr Vorschlag für eine Richtlinie zum strafrechtlichen Schutz der finanziellen Interessen der Gemeinschaft aus dem Jahre 2001 auf Art. 280 Abs. 4 EG gestützt werden könne.<sup>23</sup> Im Urteil zur Gültigkeit des Rahmenbeschlusses zur Verstärkung des strafrechtlichen Rahmens zur Bekämpfung der Verschmutzung durch Schiffe, stellte der EuGH klar, dass Bestimmungen von Art und Maß der anzuwendenden strafrechtlichen Sanktionen über die Rechtsinstrumente der dritten Säule angenommen werden müssen, eine Harmonisierung der Tatbestände jedoch über die erste Säule möglich sei.<sup>24</sup> Ob dieser Lösung im Bereich des Finanzschut-

zes der Vorbehalt des Art. 280 Abs. 4 Satz 2 entgegensteht, wurde vom EuGH freilich nicht entschieden. Sollte der Lisabonner Vertrag in Kraft treten, so würde Art. 325 des neuen EG-Vertrages durch Streichung der „Unberührtheitsklausel“ Klarheit bringen: Danach können Rat und Parlament auch durch unmittelbar anwendbare Verordnungen supranationale Kriminaltatbestände und -sanktionen im Bereich der Betrugsbekämpfung erlassen.

## 2. Sekundärrecht

Um einen möglichst umfassenden Schutz der finanziellen Interessen zu etablieren, hat die Gemeinschaft eine Reihe von Regelungen des Sekundärrechts erlassen. Diese schließen *horizontale* Instrumente ein, welche für alle verwaltungsrechtlichen Sanktionen und Ermittlungen in allen Bereichen der Gemeinschaftspolitik einen gemeinsamen rechtlichen Rahmen festlegen (Verordnungen 2988/95 und 2185/96). Darüber hinaus gibt es *sektorspezifische* Instrumente, welche durch spezielle verfahrensrechtliche oder materielle Regelungen den Besonderheiten einer Gemeinschaftspolitik Rechnung tragen. Wichtige Vorgaben und Grundsätze für Untersuchungsverfahren enthält schließlich die im Zuge der Gründung von OLAF ergangene VO 1073/99 („OLAF-Verordnung“). Sie ist insbesondere für interne Untersuchungen im Verbund mit institutionellen Beschlüssen von Bedeutung.

### Verordnung (EG, Euratom) Nr. 2988/95

Mit der seit Dezember 1995 unmittelbar geltenden VO 2988/95<sup>25</sup> (auch als „PIF-Verordnung“ bezeichnet) wird eine Rahmenregelung für einheitliche Kontrollen sowie für verwaltungsrechtliche Maßnahmen und Sanktionen bei Unregelmäßigkeiten in Bezug auf das Gemeinschaftsrecht getroffen. Sie stellt eine Art „Allgemeiner Teil“ für sowohl bestehende als auch zukünftig einzuführende Vorschriften des europäischen Verwaltungssanktionenrechts dar.<sup>26</sup> In Art. 1 Abs. 2 wird der Begriff der *Unregelmäßigkeit* definiert. Hierunter zu verstehen ist jeder Verstoß gegen eine Gemeinschaftsbestimmung als Folge einer Handlung oder Unterlassung eines Wirtschaftsteilnehmers, die einen Schaden für den Gesamthaushaltsplan der Gemeinschaften oder die Haushalte, die von den Gemeinschaften verwaltet werden, bewirkt hat bzw. haben würde, sei es durch die Verminderung oder den Ausfall von Eigenmittleinnahmen, die direkt für Rechnung der Gemeinschaften erhoben werden, sei es durch eine ungerechtfertigte Ausgabe.

Hinsichtlich der Folgen des Verstoßes differenziert die VO nach dem Verschulden: Schuldlose Verstöße sollen keine Sanktion, sondern nur *verwaltungsrechtliche Maßnahmen* nach sich ziehen; danach bewirkt jede Unregelmäßigkeit i.d.R.

den Entzug des rechtswidrig erlangten Vorteils (Art. 4). Wurde die Unregelmäßigkeit vorsätzlich oder fahrlässig begangen, sollte sie gem. Art. 5 zusätzlich mit folgenden *verwaltungsrechtlichen Sanktionen* geahndet werden:

- a) Zahlung einer Geldbuße;
- b) Zahlung eines Betrags, der den rechtswidrig erhaltenen oder hinterzogenen Betrag, gegebenenfalls zuzüglich der Zinsen, übersteigt;
- c) vollständiger oder teilweiser Entzug eines nach Gemeinschaftsrecht gewährten Vorteils auch dann, wenn der Wirtschaftsteilnehmer nur einen Teil dieses Vorteils rechtswidrig erlangt hat;
- d) Ausschluss von einem Vorteil oder Entzug eines Vorteils für einen Zeitraum, der nach dem Zeitraum der Unregelmäßigkeit liegt;
- e) vorübergehender Entzug einer Genehmigung oder einer Anerkennung, die für die Teilnahme an einem gemeinschaftlichen Beihilfesystem erforderlich ist;
- f) Verlust einer Sicherheit oder einer Garantie.

Daneben kommen weitere ausschließlich wirtschaftliche Sanktionen gleichwertiger Art und Tragweite in Betracht. Gemäß Art. 7 können die verwaltungsrechtlichen Maßnahmen und Sanktionen gegen natürliche oder juristische Personen verhängt werden.

Die VO enthält auch einige allgemeine Grundsätze, wie das Gesetzlichkeitsprinzip, das Verhältnismäßigkeitsprinzip und die Verjährung. Die VO trägt außerdem dem Grundsatz *ne bis in idem* Rechnung. Um eine Kumulierung finanzieller Sanktionen der Gemeinschaft und einzelstaatlicher strafrechtlicher Sanktionen bei ein und derselben Person für dieselbe Tat zu verhindern, soll die Verhängung finanzieller Verwaltungs-sanktionen wie Geldbußen ausgesetzt werden, wenn ein Strafverfahren eingeleitet wurde (näher Art. 6). Die allgemeinen Grundsätze werden in der Verordnung allerdings nur fragmentarisch geregelt. Es fehlen Regelungen zum Schuldprinzip, Versuch, Beteiligung, Sanktionszumessung, etc.

### Verordnung (EG, Euratom) Nr. 2185/96

Hinsichtlich der Kontrollbefugnisse der Kommission bei Unregelmäßigkeiten konnte man sich in der VO 2988/95 nur auf allgemeine Regelungen einigen (Art. 8 und 9). Art. 10 bestimmte, dass zusätzliche allgemeine Bestimmungen für die Kontrollen und Überprüfungen (der Kommission) vor Ort zu einem späteren Zeitpunkt festgelegt werden. Dies geschah durch die VO 2185/96 („Kontrollverordnung“), welche seit 1.1.1997 gilt.<sup>27</sup>

Die VO ist nicht frei von Abgrenzungsschwierigkeiten. Ausdrücklich klargestellt in der VO ist, dass die Durchführung von Vor-Ort-Kontrollen aufgrund sektorspezifischer Vorschriften nicht berührt wird.<sup>28</sup> Die aufgrund der VO 2185/96 durchzuführenden Vor-Ort-Kontrollen der Kommission bezwecken primär die Kontrolle privater Wirtschaftsteilnehmer zur Bekämpfung von Subventionsmissbrauch und Unregelmä-

Bigkeiten, während die sektorspezifischen Vorschriften dem ordnungsgemäßen Finanzmanagement in den Mitgliedstaaten dienen.<sup>29</sup> Die Befugnis der Kommission zu den Vor-Ort-Kontrollen nimmt seit seiner Gründung OLAF wahr.

Die Kontrollen werden gem. Art. 2 durchgeführt,

- um schwerwiegende oder grenzüberschreitende Unregelmäßigkeiten oder Unregelmäßigkeiten, an denen in mehreren Mitgliedstaaten handelnde Wirtschaftsteilnehmer beteiligt sein könnten, aufzudecken;
- um Unregelmäßigkeiten aufzudecken, wenn es sich aufgrund der Lage in einem Mitgliedstaat in einem Einzelfall als erforderlich erweist, die Kontrollen und Überprüfungen vor Ort zu verstärken, um einen wirksamen Schutz der finanziellen Interessen zu erreichen und somit die Interessen innerhalb der Gemeinschaft in gleichem Umfang zu schützen;
- wenn der betreffende Mitgliedstaat dies beantragt.

Die Kontrollverordnung ermöglicht den Kontrolleuren von OLAF den Zugang zu gewerblichen Räumen und relevanten Dokumenten von Wirtschaftsteilnehmern, gegen die die begründete Annahme besteht, dass sie eine Unregelmäßigkeit i.S.d. VO 2988/95 begangen haben.<sup>30</sup> Die Kommissionsbeamten haben unter Beachtung der nationalen Rechtsvorschriften Zugang zu allen relevanten Informationen wie die nationalen Behörden. Die nationalen Behörden unterstützen OLAF im Falle von Widerstand seitens der Wirtschaftsteilnehmer.

Auch wenn die Kontrollen nach der VO nur verwaltungsrechtlicher Natur sind, zeigt sich in der Kontrollverordnung die Ambivalenz zwischen verwaltungs- und strafrechtlichen Ermittlungen. Abgesehen von der allgemeinen Zielsetzung der VO ist zu beachten, dass die gesammelten Beweise in den Kontroll- und Überprüfungsberichten so aufzubereiten sind, dass sie auch in einem Strafverfahren vor einem nationalen Gericht verwendet werden können (vgl. Art. 8 Abs. 3).<sup>31</sup> Aufgrund dessen kommt Verteidigungsrechten, wie dem Anspruch auf rechtliches Gehör, dem Akteneinsichtsrecht, der Vertraulichkeit des anwaltlichen Schriftverkehrs und den Auskunftsverweigerungsrechten eine große Bedeutung zu.<sup>32</sup>

Die VO 2185/96 begründet eigenverantwortliche Kontrollbefugnisse des OLAF, welches über Vorbereitung, Einleitung und Durchführung der Kontrollen selbst entscheidet. Dadurch wird ein echtes supranationales Kontrollverfahren mit strafrechtlichen Implikationen geschaffen. Durch die VO wird OLAF schließlich in die Lage versetzt, unmittelbar Exekutivbefugnisse gegenüber Einzelpersonen in den Mitgliedstaaten auszuüben, freilich ohne die Möglichkeit polizeiliche Zwangsbefugnisse anzuwenden. Diese operativen Ermittlungsmöglichkeiten unterscheidet jedoch OLAF gegenwärtig grundlegend von Europol und Eurojust.

## Verordnung (EG) Nr. 1073/99

Nach Feststellungen von Betrug, Missmanagement und Nepotismus in den Reihen der Kommission, welche am 16. März 1999 zu ihrem kollektiven Rücktritt führten, war die Kommission gezwungen, die Defizite ihrer eigenen Betrugsbekämpfungseinheit UCLAF (s.o. I.2) zu beseitigen. Ergebnis war, wie erwähnt, die Errichtung des Europäischen Amtes für Betrugsbekämpfung (*Office européen de lutte antifraude* – OLAF) durch den Beschluss der Kommission vom 28. April 1999.<sup>33</sup> Aufgrund des institutionellen Rechts der EG und den Aufgabenzuweisungen zur Betrugsbekämpfung in Art. 280 Abs. 3 EGV blieb das neue Amt weiterhin eine Dienststelle der Kommission, übt aber seine Untersuchungsbefugnisse in voller *Unabhängigkeit* aus. Untersuchungen werden durch einen weisungsfreien Direktor geleitet und ein Überwachungsausschuss sichert die Unabhängigkeit des Amtes.

Neben dem Errichtungsbeschluss – ein interner Organisationsakt – legte der Gemeinschaftsgesetzgeber (Rat und Europäisches Parlament) in der Verordnung 1073/99 die Rahmenbedingungen für die Befugnisse des neuen Amtes für die Verwaltungsuntersuchungen fest. Neben Zielen und Aufgaben des Amtes werden näher geregelt die rechtlichen Voraussetzungen für die Untersuchungen, die Art und Weise ihrer Durchführung sowie die Konsequenzen. Die VO ist der erste Anwendungsfall der neuen Gesetzgebungskompetenz der Gemeinschaft gem. Art. 280 Abs. 4 EG. Kernstück der Regelung ist die Unterscheidung von externen und internen Untersuchungen. Ziel der Untersuchungen ist jeweils die Bekämpfung von Betrug, Korruption und sonstigen rechtswidrigen Handlungen zum Nachteil der finanziellen Interessen der EG.

*Externe Untersuchungen* sind solche, die innerhalb der Mitgliedstaaten und u.U. Drittstaaten durchgeführt werden. Die VO 1073/99 (Art. 3) überträgt OLAF die vormals UCLAF übertragenen Befugnisse, also insbesondere die Befugnisse für Vor-Ort-Kontrollen aus der erwähnten VO 2185/96, die Kontrollbefugnisse nach Art. 9 Abs. 1 der VO 2988/95 und die sektorspezifischen Kontrollbefugnisse gem. Art. 9 Abs. 2 der VO 2988/95.<sup>35</sup> Rechtsgrundlage für externe Untersuchungen sind also die speziellen Verordnungen, nicht die OLAF-Verordnung.

Die maßgebliche Neuerung besteht in den Befugnissen des Amtes für *interne Untersuchungen*, d.h. innerhalb der Organe, Einrichtungen sowie Ämter und Agenturen, welche sich nach der VO 1073/99 richten. Die Verordnung gewinnt dadurch eine eigenständige Bedeutung, da erstmals eine Rechtsgrundlage für derartige Untersuchungen im Binnenbereich der Gemeinschaftsinstitutionen geschaffen wurde. Gem. Art. 4 umfassen die Untersuchungsbefugnisse von OLAF den Zugang

zu sämtlichen Informationen und Räumlichkeiten der EU-Institutionen, gegebenenfalls auch ohne Voranmeldung. OLAF darf deren Rechnungsprüfung kontrollieren und Kopien aller Dokumente und des Inhalts aller Datenträger anfertigen oder Auszüge davon machen, erforderlichenfalls kann es diese Dokumente und Informationen sicherstellen. Außerdem bestehen Befragungsrechte gegenüber den Bediensteten der Institutionen.<sup>36</sup>

Die VO 1073/99 schafft für beide Arten von Untersuchungen den rechtlichen Rahmen und sieht z.B. vor, dass OLAF dabei die Menschenrechte und Grundfreiheiten wahren muss. Allerdings wird dies nur in den Erwägungsgründen genannt, eine detaillierte Regelung fehlt.<sup>37</sup> Letzteres hat sich als Schwachstelle erwiesen, wie zunehmende Klagen von Betroffenen vor dem Europäischen Gerichtshof demonstrieren. Die genaue Festlegung von Verfahrensrechten blieb letztlich dem „case law“ überlassen.<sup>38</sup> Die Bedeutung für die Einhaltung von Verfahrensrechten als Grenzen von OLAF's Ermittlungen ergibt sich nicht nur aus dieser Rechtsprechung, sondern schließlich auch aus Art. 9 Abs. 2 Satz 2 der VO 1073/99, welcher – angelehnt an Art. 8 III der Kontrollverordnung – die Abschlussberichte der Ermittlungen des OLAF mit vergleichbaren Verwaltungsuntersuchungsberichten assimiliert. Obwohl dem Abschlussbericht des OLAF keine Rechtswirkungen zukommen sollen, ist das Hauptziel des Berichts die Nutzung als Beweismittel in nationalen Verfahren, welche Entscheidungen über die rechtswidrigen Handlungen zum Nachteil des EG-Budgets treffen. Hierbei handelt es sich zumeist um Strafverfahren.<sup>39</sup>

## Institutionelle Beschlüsse für interne Untersuchungen

Hinsichtlich der internen Untersuchungen hatte der Gemeinschaftsgesetzgeber den Spagat zu bewältigen zwischen den Befugnissen einer der Kommission zugeordneten Dienststelle zur Durchführung interner Verwaltungsuntersuchungen nach der OLAF-Verordnung und der Verwaltungsautonomie der Organe, Einrichtungen, Ämter und Agenturen. Diese Institutionen müssen OLAF die Aufgabe übertragen, interne Verwaltungsuntersuchungen bei ihnen durchzuführen. Zu diesem Zweck haben Rat, Europäisches Parlament und Kommission eine interinstitutionelle Vereinbarung getroffen, welche näher Bedingungen und Modalitäten der Untersuchungen festlegen. Beigefügt ist eine Modellvereinbarung, wobei die übrigen Organe, Einrichtungen, Ämter und Agenturen aufgefordert werden, diese zu übernehmen, damit die Untersuchungen unter gleichen Bedingungen ablaufen können (sog. Standardbeschluss). Der Standardbeschluss enthält die Pflicht zur Zusammenarbeit mit OLAF und verpflichtet Beamte bzw. Bedienstete zum „whistleblowing“, d.h. sie müssen der oberen Hierarchieebene oder direkt dem Amt mutmaßliche Fälle von Betrug, Korruption oder sonstige rechtswidrige Handlungen

gen zum Nachteil der Interessen der Gemeinschaften oder schwerwiegende Vorkommnisse im Zusammenhang mit der Ausübung beruflicher Tätigkeiten, die disziplinarrechtlich oder strafrechtlich geahndet werden können, mitteilen. Die Aufgabe, berufliche Verfehlungen zu untersuchen, zeigt, dass OLAF auch ermittelt, wenn es um „nicht-finanzielle“ Interessen der EG geht.<sup>40</sup> Darüber hinaus sieht der Standardbeschluss Verfahrensrechte vor, wie das Recht des Betroffenen über Beginn und Ende der Untersuchung unterrichtet zu werden und das Recht zur Stellungnahme.

Anfangs regte sich bei einigen Institutionen Widerstand gegen die Übernahme der Modellvereinbarung. Der EuGH schob internen Beschlüssen zur Betrugsbekämpfung, die substantiell von der VO 1073/99 und der interinstitutionellen Vereinbarung abwichen, einen Riegel vor. Er verpflichtete letztlich die Europäische Zentralbank und die Europäische Investitionsbank, sich an die Modellvereinbarung zu halten, und stärkte dadurch die Position des OLAF bei internen Ermittlungen.<sup>41</sup> Eine Klage von mehreren Mitgliedern des Europäischen Parlaments mit dem Argument, die OLAF Untersuchungen würden der Immunität der Parlamentarier entgegenstehen, wurde von den Europäischen Gerichten mangels individueller Betroffenheit als unzulässig zurückgewiesen.<sup>42</sup> Auch dann, wenn die Modellvereinbarung nicht angenommen wurde (so z.B. vom Europäischen Bürgerbeauftragten) oder die getroffene interne Entscheidung vom Modell abweicht (z.B. bei Eurojust), kann OLAF allerdings interne Untersuchungen durchführen.<sup>43</sup>

### Sektorspezifische Instrumente

Neben den erwähnten horizontalen Maßnahmen der ersten Säule, finden spezifische Verordnungen Anwendung auf die verschiedenen Bereiche (Sektoren) des EG-Budgets. Diese enthalten wiederum einzelne Rechtsgrundlagen für Untersuchungen von Unregelmäßigkeiten. Zwar sind grundsätzlich die Mitgliedstaaten zuständig, die Richtigkeit der Ein- und Ausgaben des EG-Budgets sicherzustellen, allerdings erhielt – gemäß der nun auch in Art. 280 Abs. 1 EG zum Ausdruck kommenden Kompetenzverteilung – auch die Kommission bzw. mit der Verordnung 1073/99 OLAF bestimmte Untersuchungsbefugnisse in diesen Sektoren. Die einzelnen Befugnisse ergeben sich aus den sektorspezifischen Verordnungen in Verbindung mit Art. 9 Abs. 1 oder 2 der VO 2988/95 (und Art. 3 VO 1073/99). Während Art. 9 Abs. 2 zu Vor-Ort-Kontrollen des OLAF bei den Wirtschaftsteilnehmern befugt, enthält Art. 9 Abs. 1 der VO 2988/95 rechnungsprüfungstypische Kontrollbefugnisse von nationalen Verwaltungssystemen, welche die EG-Programme umsetzen. OLAF greift auf diese rechnungsprüfungstypischen Kontrollen vor allem dann zurück, wenn strafrechtliche Folgemaßnahmen zu erwarten sind.

Die sektorspezifischen Instrumente lassen sich unterteilen in solche, welche sich auf die Einnahme- und solche, welche sich auf die Ausgabeseite des EG-Budgets beziehen. Auf der Einnahmeseite finden sich Befugnisse für die Eigenmittel sowie für die Zoll- und Agrarregelung. Auf der Ausgabenseite erhält OLAF bestimmte Untersuchungsbefugnisse insbesondere in den Bereichen Gemeinsame Agrarpolitik (GAP), Strukturfonds, Forschungs-, Technologie-, Umwelt- und Bildungsförderung sowie Finanzierungen für auswärtige Aktionen der EG (z.B. Programme für die Heranführung beitrittswilliger Länder [Phare, ISPA, Sapard], Unterstützung für die Partnerschaft Europa-Mittelmeer [MEDA]). Hinzuweisen ist ferner auf sektorspezifische Rechtsvorschriften, welche die Wiedereinzahlung zu unrecht gezahlter Beträge sicherstellen sollen.

### Beispiele:

- Gemäß Art. 18 Abs. 2 VO 1150/2000 (Eigenmittel der Gemeinschaft) i.V.m. Art. 9 Abs. 1 VO 2988/95 und Art. 3 VO 1073/99 kann OLAF Mitgliedstaaten auffordern zusätzliche Kontrollen durchzuführen und beantragen bei den nationalen Inspektionsmaßnahmen hinzugezogen zu werden; in letzterem Falle ist OLAF berechtigt, dass ihm alle zweckdienlichen Unterlagen zur Verfügung gestellt werden.
- Art. 72 Abs. 2 VO 1083/2006 mit allgemeinen Bestimmungen über den Europäischen Fonds für regionale Entwicklung, den Europäischen Sozialfonds und den Kohäsionsfonds i.V.m. Art. 9 Abs. 2 VO 2988/95 und Art. 3 VO 1073/99 erlaubt Bediensteten des OLAF vor Ort in den Mitgliedsstaaten Vorhaben des operationellen Programmes zu kontrollieren. OLAF Bedienstete können die Bücher und alle sonstigen Unterlagen, einschließlich der auf elektronischen Datenträgern gespeicherten Dokumente, die sich auf die aus den Fonds finanzierten Ausgaben beziehen, einsehen. Sie können jedoch keine Durchsuchungen oder Vernehmungen von Personen durchführen, welche den nationalen Beamten vorbehalten sind; sie haben jedoch Zugang zu den dabei gewonnenen Erkenntnissen.

### III. Fazit

Seit Bestehen der Europäischen Gemeinschaft wurde rechtlich der Schutz ihrer finanziellen Interessen kontinuierlich ausgebaut. Dies gilt sowohl für die Ebene des Primärrechts (Art. 280 EG idF. des Amsterdamer Vertrags) als auch des Sekundärrechts, bei dem entscheidende rechtliche Impulse in den 1990er Jahren erzielt wurden (PIF-Verordnung, Kontrollverordnung und OLAF-Verordnung). Friktionen entstanden jedoch durch die Trennung zwischen gemeinschaftsrechtlicher und intergouvernementaler Rechtsetzung aufgrund der seit der Gründung der Europäischen Union bestehenden Säulenstruktur. Dadurch musste sich die Gemeinschaft darauf beschränken, den Schutz ihrer finanziellen Interessen mit verwaltungs-



rechtlichen Mitteln bzw. Sanktionen zu schützen, während der strafrechtliche Schutz weiterhin der vom Souveränitätsgedanken bestimmten intergouvernementalen Zusammenarbeit (dritte Säule) vorbehalten blieb. Durch die Möglichkeit des Gemeinschaftsgesetzgebers, unmittelbar geltende und wirkende Verordnungen zum Finanzschutz zu erlassen, haben sich die Mittel der ersten Säule schon *de lege lata* als weitaus effektiver erwiesen als das schwerfällige Übereinkommen zum strafrechtlichen Schutz der EG-Finanzinteressen und seine Protokolle. Dass jedoch auch die erste Säule das Strafrecht nicht ganz ausblenden konnte, zeigen die umstrittene Unberührtheitsklausel in Art. 280 Abs. 4 Satz 2 EG, der Inhalt

der bestehenden Verordnungen sowie die OLAF Ermittlungen selbst.<sup>44</sup> Durch die Aufhebung der Säulenstruktur durch den Lissabonner Vertrag würde die heute nicht mehr zeitgemäße Unterwerfung von Verwaltungssanktionenrecht und Strafrecht zum EG-Finanzschutz unter unterschiedliche rechtliche Rahmenbedingungen aufgehoben. Man darf gespannt sein, ob sich – vorbehaltlich der Ratifizierung des neuen Vertragswerkes – die gegensätzlichen Positionen zwischen den im Rat vertretenen Mitgliedstaaten und dem Europäischen Parlament auflösen und ein echtes supranationales Sonderstrafrecht zum europäischen Finanzschutz geschaffen wird. Dies wäre ein auch für die Entwicklung des OLAF entscheidender Quantensprung ...

1 Die Maßnahmen zum Finanzschutz umfassten auch die anderen beiden Gemeinschaften, EGKS und Euratom. Im Folgenden wird jedoch nur auf die Entwicklungen der Europäischen Wirtschaftsgemeinschaft, heute Europäische Gemeinschaft, eingegangen, welche in der Praxis die wichtigste Rolle spielen.  
 2 Zur Phänomenologie des EG-Betruges vgl. statt vieler *Sieber*, Schweiz. Zeitschrift f. Strafrecht 114 (1996), 357; *Dannecker*, ZStW 108 (1996), 577.  
 3 ABl. 1976 C 222, S. 2.  
 4 Vgl. zur Entwicklung *Vervaele*, Fraud against the Community, Deventer 1992, S. 15f, 85f.  
 5 EuGHE 1989, 2695 - Rs. 68/88, Kommission gegen Griechische Republik.  
 6 Zur Bedeutung des Urteils, vgl. *Satzger*, Die Europäisierung des Strafrechts, Köln u.a. 2001, S. 336; *Hecker*, Europisches Strafrecht, 2. Aufl. 2007, § 7 Rn. 30f.  
 7 Zu UCLAF siehe *Kuhl*, Kriminalistik 1997, 105; *Prieß/Spitzer*, EuZW 1994, 297.  
 8 Siehe v.a. Sonderbericht Nr. 8/98 des Europäischen Rechnungshofes, ABl. 1998 C 230, S. 1 (21f.); *Vervaele*, European Journal of Crime, Criminal Law and Criminal Justice 1998, p. 331.  
 9 KOM(94) 92 endg.  
 10 *Murawska (Nowakowska)*, Administrative Anti-Fraud Measures within the European Union, 2008, S. 66.  
 11 Als Rechtsgrundlage wurden Art. 100a (Binnenmarktcompetenz) und Art. 235 (Ermächtigung zur Vertragslückenschließung) a.F. herangezogen, da Art. 209a nicht als Kompetenznorm angesehen wurde.  
 12 Vgl. zum Ganzen *Magiera*, Der Schutz der finanziellen Interessen der Europäischen Union, in: Festschrift für Karl Heinrich Friauf, 1996, S. 13 (24f.) m.w.N.  
 13 Zur Auslegung der „Mindesttrias“ vgl. *Prieß/Spitzer*, in: Von der Groeben/Schwarze (Hrsg.), Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, 6. Aufl., Art. 280 Rn. 34 ff; *Satzger*, Fn. 6, S. 368 ff.  
 14 Vgl. *Prieß/Spitzer*, a.a.O., Rn. 39 ff.  
 15 Näher siehe <http://ec.europa.eu/dgs/olaf/mission/mission/cocolaf/de.html>.  
 16 Abrufbar unter: [http://ec.europa.eu/anti\\_fraud/reports/anti-fraud\\_en.html](http://ec.europa.eu/anti_fraud/reports/anti-fraud_en.html).  
 17 Vgl. *Prieß/Spitzer*, a.a.O., Rn. 5.  
 18 Vgl. *Satzger*, in: Streinz (Hrsg.), EUV/EGV, 2003, Art. 280 Rn. 18.  
 19 Vgl. z.B. *Tiedemann*, EG und EU als Rechtsquellen des Strafrechts, in: Festschrift für Claus Roxin, 2001, S. 1402 (1409); *ders.*, AGON 23 (1999), 7; *Wolfgang/Ulrich*, EuR 1998, 616 (644).  
 20 Vgl. z.B. *Satzger*, a.a.O., Rn. 20; *ders.*, ZRP 2001, 549; *Jokisch*, Gemeinschaftsrecht und Strafverfahren, 2000, S. 64.  
 21 Vgl. z.B. *Hecker*, Fn. 6, § 4 Rn. 100; vgl. auch *Fromm*, eucrim 3-4/2006, S. 104, der eine EG-VO zum Finanzschutz durch Strafrecht aus dem Gesichtspunkt des Demokratiedefizits für nicht möglich hält.  
 22 EuGHE 2005 I-7879, Rs. C-176/03, Kommission gegen Rat. Vgl. dazu auch die Beiträge in eucrim 3-4/2006.  
 23 Vgl. Mitteilung der Kommission, KOM(2005) 583 endg. Zum Richtlinienvorschlag s. KOM(2001) 272 endg., ABl. 2001 C 240E, 125.  
 24 EuGHE 2007 I-9097, Rs. C-440/05, Kommission gegen Rat.  
 25 ABl. 1995 L 312, 1.  
 26 *Dannecker*, ZStW 108 (1996), 577 (604).  
 27 ABl. 1996 L 292, 2.  
 28 Erwägungsgründe und Art. 1 Uabs. 2. Vgl. auch Art. 3 der VO, wonach die

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Kommission sicherstellt, dass bei den betreffenden Wirtschaftsteilnehmern nicht gleichzeitig aus denselben Gründen Kontrollen und Überprüfungen nach sektorbezogenen Gemeinschaftsregeln durchgeführt werden.  
 29 *Fleckenstein*, Schutz der finanziellen Interessen der Europäischen Gemeinschaft, 2004, S. 47. Zum Verhältnis der VO 2185/96 zur späteren VO 1073/99, *Gemmel*, Kontrollen des OLAF in Deutschland, 2002, S. 107f, wonach in Überschneidungsbereichen die *lex posterior*-Regel anzuwenden ist.  
 30 Darunter fallen auch Verhaltensweisen, die betrügerische Praktiken i.S.d. PIF-Übereinkommens darstellen.  
 31 Vgl. zum Verhältnis zum Strafverfahren, *Kuhl/Spitzer*, EuZW 1998, 37 (40).  
 32 *Dannecker*, in: Wabnitz/Janovsky (Hrsg.), Handbuch des Wirtschafts- und Steuerstrafrechts, 3. Aufl., 2 Rn. 214.  
 33 ABl. 1999 L 136, 20. Art. 2 listet die Aufgaben des OLAF auf.  
 34 ABl. 1999 L 136, 1. Spiegelbildlich legt VO 1074/99 die Befugnisse des OLAF zur Betrugsbekämpfung in der Europäischen Atomgemeinschaft fest.  
 35 Vgl. Art. 3 der VO 1073/99.  
 36 Näheres zu OLAF, z.B. bei *Kuhl/Spitzer*, EuR 2000, 671; *Hallmann-Häbler/Stiegel*, DRiZ 2003, 241; *Hetzer*, Kriminalistik 2005, 419; *Wakefield*, European Public Law 12 (2006), 549.  
 37 Erw.grund Nr. 10 der VO 1073/99. Genannt werden dort ausdrücklich nur der Billigkeitsgrundsatz, das Recht der Beteiligten, zu den sie betreffenden Sachverhalten Stellung zu nehmen, und der Grundsatz, dass sich die Schlussfolgerungen aus einer Untersuchung nur auf beweiskräftige Tatsachen gründen dürfen.  
 38 Vgl. hierzu auch die Beiträge von *Balogova*, *White* und *Wojahn/Butticé*, in diesem Heft.  
 39 *Wade*, in diesem Heft. Zur Bedeutung der Berichte für das Strafverfahren *Gleiß*, EuZW 2000, 618 (621).  
 40 Vgl. dazu z.B. Urteil des Gerichts für den öffentlichen Dienst vom 28. April 2009 in den verbundenen Rechtssachen F-5/05 und F-7/05, *Violetti u. a. / Kommission*; *Schmit / Kommission*.  
 41 EuGH, Rs. C-11/00 und C-15/00, *Kommission v. EZB/EIB*.  
 42 EuG, Rs.T-17/00 und EuGH Rs. C-167/02P, *Rothley u.a. v. Parlament*.  
 43 Nach dem OLAF Manual, Fn. 25, 3.4.1.1 entsprechen die meisten bisher beschlossenen interinstitutionellen Vereinbarungen der Institutionen der Modellvereinbarung, keine ist jedoch identisch, so dass die Ermittler bei jeder internen Untersuchung zunächst die Rechtsgrundlage klären müssen.  
 44 Zur Stellung des OLAF als „strafrechtsermittelnde“ Institution siehe *Wade* (in diesem Heft).

# OLAF and the Push and Pull Factors of a European Criminal Justice System

Dr. Marianne Wade

## I. Introduction

When the European Anti-Fraud Office (OLAF) was created in 1999, it was in a context of determination that criminal behaviour to the detriment of the financial interests of the European Communities should face decisive reaction, but the focus was upon the creation of a body which was conclusively administrative in nature.<sup>1</sup> Although the need to address behaviour viewed as harmful and to prevent such behaviour in the future was strongly outlined, the methods chosen to achieve this were explicitly of this regulatory nature.

One was not, however, blind to the nature of the territory to which OLAF's work would apply. Article 1 of Regulation 1073/1999 identifies OLAF's *raison d'être* to be "in order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community." The threats to the European Community were clearly regarded as including crimes but OLAF was apparently created as an instrument to encourage the correct reaction to illegal activity, i.e. its prosecution. Discussion was of a purpose to "coordinate" the activities of Member States' competent authorities and to "contribute to the design and development of methods of fighting fraud and any other illegal activity affecting the financial interests of the European Community." Inevitably, one must conclude that the mechanism in existence were fundamentally viewed as being adequate to deal with the problems at hand or as having to be sufficient; at most, support in doing so was to be provided.

Fittingly, the vast majority of legislation providing for OLAF and its powers focus on administrative measures to counter and ensure the compensation for irregularities as well as undesired behaviour detrimental to the financial interest of the Communities. The impression is of a regulatory body intended to ensure the rules are stuck to; it's role was at most to provide, where necessary, a little assistance for pre-existent criminal justice institutions to ensure matters are adequately dealt with where extreme cases of their breach are discovered. The sense was of assistance needed to steer existing criminal justice

mechanisms in the right direction and certainly not of a need to create new criminal justice instances.

This paper sets out to review this perspective on OLAF's work ten years on. At a time when the Treaty of Lisbon throws up controversial questions as to the EU's criminal justice profile in an atmosphere already rife with discussion of the EC's criminal law competence, this aspect clearly deserves particular attention. It is submitted that OLAF's work is marked so strongly by a criminal justice character that a continued discussion of it as an administrative body is little short of a fallacy. OLAF's work does clearly display factors pulling for the creation of a European criminal justice system whilst the deficits arising out of the failure to place its work in the appropriate context give rise to problems which should cause one to insist upon placement within a criminal justice framework: a push towards a European criminal justice system.

## II. OLAF's Investigative Powers

The administrative role envisaged for OLAF is reflected firmly in the provision made for OLAF's powers (and the protection of any persons who might be affected by them). Regulation 1073/1999 lays down OLAF's ability to carry out "inspections, checks and other measures" – rather weak sounding powers which it goes on to state do not affect "the powers of the Member States to bring criminal proceedings" (e.g. in Article 2). As is usual in EC matters,<sup>2</sup> no powers equivalent to those of the respective Member States' criminal justice institutions are assigned.

The most invasive measure as regards external investigations: on-the-spot checks, are regulated more closely by Council Regulation 2185/96. Article 2 of the Regulation provides:

The Commission may carry out on-the-spot checks and inspections pursuant to this Regulation: for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States, or where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case

in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community, or at the request of the Member State concerned.

Article 4 stipulates very clearly:

On-the-spot checks and inspections shall be prepared and conducted by the Commission in close cooperation with the competent authorities of the Member State concerned, which shall be notified in good time of the object, purpose and legal basis of the checks and inspections, so that they can provide all the requisite help. To that end, the officials of the Member State concerned may participate in the on-the-spot checks and inspections. In addition, if the Member State concerned so wishes, the on-the-spot checks and inspections may be carried out jointly by the Commission and the Member State's competent authorities.

In other words, great care is taken to ensure that OLAF's powers cannot intervene with the affected state's jurisdiction and if the latter views any such actions as sensitive, provision can be made to prevent coercive powers being exercised in any way other than the one it wishes. OLAF's powers are clearly demarcated to leave it as an agency dependent upon good-will without the ability to act swiftly and independently one would usually expect from an investigative body. Thus, in respect of the ability to work independently of the good-will of those it investigates, it appears clearly to be located outside the criminal justice realm. This is to remain the reserve of the Member States – OLAF is expected to manage a parallel task, without parallel powers. Confirmation of this status can be found in Article 7 of said Regulation which states:

Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation.

And conclusively in Article 9 which reads:

Where the economic operators referred to in Article 5 resist an on-the-spot check or inspection, the Member State concerned, acting in accordance with national rules, shall give Commission inspectors such assistance as they need to allow them to discharge their duty in carrying out an on-the-spot check or inspection.

OLAF's powers explicitly are not of the coercive nature associated with policing bodies; at least where such policing bodies already exist. Article 9 goes on to reflect that it is the responsibility of national authorities to ensure compliance with their laws, perhaps reflecting an expectation that OLAF staff cannot ensure this.

In relation to internal investigations, however, OLAF has powers one might view as approaching policing measures, namely in accordance with Regulation 1073/1999 "the right of immediate an unannounced access to any information held by the institutions, bodies, offices and agencies and to their premises" and a right to "request oral information" (Article 4(2)). Internally it is to police the behaviour of those with potential to harm the EC in a seemingly straightforward manner. One might well feel justified in regarding these as the powers ap-

propriate to the results expected of OLAF, appreciating that there was no political opposition to prevent their assignment in this area.<sup>3</sup>

The freedom with which these powers were allotted is visible also by the lack of boundaries set to them. They are flanked by vague requirements to act proportionally and with a suitable attitude (Article 6) – provision which indicates that we are dealing with procedures far removed from the animosity of criminal trials and, which simultaneously ensure that – where considerable powers are exercised, these have maximum impact.

### III. The Nexus to Criminal Justice Systems or the Reality of OLAF's Work

Despite the emphasis of a non-criminal justice nature associated with OLAF the nexus to criminal justice matters is undeniable. The context of OLAF's creation displayed a clear connection to criminal offences such as corruption and fraud. The need to create OLAF was because existing mechanisms were not adequately dealing with the threats – both internal and external – to the financial interests of the EC.<sup>4</sup>

Any desire to ensure OLAF provides only quiet, administrative work in protecting the EC's financial interests or minimal assistance where a criminal justice system response is appropriate, has been stopped short by reality. OLAF's work of the past ten years bears witness to the EC's financial interests as under threat by criminal offences and to existing criminal justice mechanism as unwilling or unable to adequately address these.

There is plenty of reason to believe that this fact was known and assumed from the start. A key indicator is to be found in the requirement of Article 9 (3) of Regulation 1073/1999 that reports "shall constitute admissible evidence in administrative or judicial proceedings." In other words, it was always assumed that OLAF's work would need to be directly utilisable in criminal proceedings. Thus, it has always been clear that OLAF's staff are required to be competent to interact with criminal justice systems across Europe. Article 10 (2) made it clear that a role in criminal proceedings was and is foreseen for OLAF. The intent was certainly not to create a criminal justice agency but a door was left open for OLAF to play a role in criminal proceedings. It can also come as little surprise that frustration arises where staff must be capable of interacting with criminal justice systems across Europe in order to perform the tasks assigned to them but are deprived of the legal competence to do so and therewith the ability to impact in the most effective way possible.

## 1. OLAF's Work in Numbers

OLAF's work so far is quite clearly marked by this interaction with criminal justice systems. The 2007 Activity Report features case study descriptions more frequently than not of clear criminal justice relevance.<sup>5</sup> Furthermore, there is evidence of OLAF's role as a specialist in the criminal justice process. The report emphasises that OLAF's work concentrates on serious cases.<sup>6</sup> Where these require judicial follow-up, they would appear to be very serious indeed with a third of penalties imposed being prison sentences, a slightly smaller proportion suspended sentences and financial penalties respectively (many of which are certainly punitive in nature) and only a small proportion of these cases punished resulting in damages.<sup>7</sup>

The penalties imposed so far relate only to a small proportion of cases but the conclusion drawn is confirmed by broader statistics. Over the years of OLAF's existence the figures relating to follow-up activity display 38% as requiring judicial follow-up, 42% financial and 15% administrative to the end of 2007.<sup>8</sup> For those who might wish to argue that these figures speak against OLAF's work being of a criminal justice nature (because the majority of cases do not lead to a criminal justice system follow-up), one should note that the proportion of cases brought to court by prosecution services in Member States (i.e. standing any chance of meeting a true criminal justice system response) are often below 30%.<sup>9</sup> Furthermore, the trend to replace classic criminal justice system reactions with financial penalties which are in fact punitive in nature is currently a global trend.<sup>10</sup> The implication is thus that OLAF cases are more strongly of criminal justice relevance than the caseloads of many classic, national criminal justice institutions across Europe.

In any case, judging by its follow-up recommendations, it would seem clear that its follow up decision choices indicate a legitimate claim that OLAF might well be regarded as part of a European criminal justice chain. Even if OLAF performs tasks which might be achieved by Member States' criminal justice agencies, the statistics indicate that the latter do not perform this task. OLAF appears to be better placed to deal with at least the investigation of serious cases requiring criminal justice follow-up. Speculation as to what this means can range far and wide: OLAF may merely be performing work which national criminal justice bodies could undertake themselves but choose not to due to a lack of resources or because OLAF does it for them. Given the complexity of fraud cases,<sup>11</sup> the multitude of specific European regulations and the trans-national nature of cases identified at the European level, one can, however, reasonably assume that OLAF's work is needed.<sup>12</sup>

As the Office has become a permanent feature of the legal landscape, the proportion of criminal assistance cases it deals

with has sunk, not least likely as a result of it choosing to deal with the "right" cases, the ones Member States' authorities can not deal with alone. These could not be brought to criminal trial without OLAF's analytical work. OLAF may not be a policing body, but what percentage of policing work in fraud or corruption cases is of the nature of work that OLAF can do? Is reality perhaps indicating the need for at least a European say in criminal justice processes?<sup>13</sup> Providing a push towards a European criminal justice system for such cases?

The trend noted by the 2007 Activity Report that OLAF work now consists of a "75% share of own investigations",<sup>14</sup> further indicates that OLAF covers a special niche in the "market," one which this office specialises in identifying and pursuing. Where such cases are of criminal justice relevance, OLAF is a criminal justice expert. Most significantly, this work is emphasised as being determined above all because OLAF's caseload increasingly comes from areas in which "Member States do not exercise specific responsibilities."<sup>15</sup> OLAF's work has come to filling a gap created by the nature of the EC set-up<sup>16</sup> in contrast to the national protection mechanisms in existence. This indicates a need for new mechanism to provide adequate protection: a push factor towards new, European criminal justice mechanisms.

## 2. Legal Aspects

All other factors apart, OLAF's status as other than criminal justice in nature, has left those subject to investigation feeling somewhat under-protected. OLAF investigations are a tool of sharp enough nature to leave those affected feeling that their procedural needs are not given sufficient consideration as demonstrated by cases resulting from internal investigations brought before the European Court of Justice<sup>17</sup> and the consensus that relevant reforms are necessary in the OLAF regulatory framework.<sup>18</sup>

The current system sees individual rights provided for in a patchwork of individual provisions rather than a Constitution or a "Code of Criminal Procedure". It is interesting to note, however, that (within the supra-national European context) procedural rights are either provided for in a way similar to in criminal justice systems or their absence is heavily criticised.<sup>19</sup> A system with ever more parallels to criminal justice frameworks is arising. The cases *Nikolaou*<sup>20</sup> and *Franchet & Byk*<sup>21</sup> as well as the planned creation of the office of a Review Adviser<sup>22</sup> demonstrate the need for a parallel rights system in administrative proceedings such as those OLAF is responsible for. One may be forgiven for wondering why a parallel system is to be created rather than the one tried and tested used, namely criminal procedure.



Above all, the desire of those affected, such as in the *Andalucía*<sup>23</sup> case to prevent the transfer of information discovered in the course of investigations as well as the opinions formed from OLAF to national authorities is demonstrative of the quality and influence of these. Such a conclusion is confirmed by the duty of the latter explored in the *Tillack*<sup>24</sup> case to examine the information transferred carefully and to take appropriate action to comply with Community law. The transfer will not automatically cause a certain response but a national prosecutor is bound e.g. by a standard of reasonableness, to act in order to enforce Community law. This means that OLAF can be an important chain link in a criminal justice process, where the information that its work has uncovered, is of relevance to it; significant enough for those affected to legitimately want a say. The failure to provide for this so far is a push towards mechanisms which might ensure this; towards a balanced (EU) set-up as arguably provided by national criminal justice systems.

Dissatisfaction with the protection afforded to suspects in OLAF investigations can be seen as a push factor to placing these in a framework better known to respect rights – perhaps to a European criminal justice system. Current alternative efforts can be seen as attempts to re-invent the wheel for the sake of not calling a spade a spade and placing criminal justice matters fully in the hands of a criminal justice system.

#### IV. Final Reflections

The European Community has advanced together with the second and third pillar policy areas to become a very significant level of governance – a true community of sorts. Above all a Community with a considerable budget and reach. Certainly,

with proportions one would expect to be protected. In a time when the EU finance ministers come together to make considerable efforts to counter tax-evasion at the national level, one would certainly expect such a large pool of tax payers money to be well shielded from fraud. The different quality of investigative powers in the national and supra-national context are doubtless food for thought seen from this perspective. “Opportunity makes the thief”, an old wisdom goes and unpoliced valuables are nothing, if not an opportunity. OLAF’s status as definitively not a police body is thus legitimately under review from many angles.

Mechanisms created to facilitate Member States’ criminal justice systems to protect the interests of the EU (arguably such as OLAF but perhaps most famously in the form of joint investigation teams) do not appear to be adequate to provide for their protection. This is perhaps not surprising in a time in which they are having to choose which interests of their own to protect when allocating precious criminal justice system resources. OLAF’s 10th birthday nevertheless provides an opportunity to reflect on the work done so far and lessons to be drawn from it. One is perhaps that OLAF is not merely an administrative agency.

OLAF’s anniversary comes at a decisive time: the Treaty of Lisbon provisions mean we stand at the brink of radical change for the European Union, not least for matters of criminal justice relevance within it. The qualification of OLAF’s work as administrative or not and the extent of powers assigned to it, as well as the position of those subject to its investigations must be assessed in detail and possibly considered anew. The last ten years have provided grounds for reflection, the next ten certainly will too.

1 On the difficulties of truly determining this see *Kuhl./Spitzer*, Die Verordnung (Euratom, EG) Nr. 2185/96 des Rates über die Kontrollbefugnisse der Kommission im Bereich Betrugsbekämpfung, *EuZW* 1998, 40 and Albrecht., Europäische Informalisierung des Strafrechts, *StV* 2001, 71 (72). See also the House of Lords European Union Committee’s comment that “[i]n practice, however, it is difficult to see how the investigations of the two bodies [OLAF and Eurojust] in fraud cases differ”, House of Lords European Union Committee, *The Judicial Cooperation in the EU: Role of Eurojust, 2003-2004: Report 23*, p. 33.

2 See e.g. Council Regulation 595/91.

3 These are clearly investigative powers providing a realistic chance that materials implicating a suspect in a fraud might be found. There is considerable opposition to providing OLAF with such powers in external investigations because it would involve searches which could and should be performed by local, national investigators. The ability of OLAF investigators to perform such searches against persons with a contract of the employment with the EC or within premises owned by it will not meet opposition because of the proprietary or contractual rights which can be invoked to provide OLAF employees with jurisdiction.

4 That OLAF work can affect criminal justice work has always been acknowledged: As article 6 of Regulation 2988/95 makes clear: administrative sanctions are not to be applied in addition to criminal sanctions – the punishments administered are

to count in a *ne bis in idem* sense – just as do informal sanctions of criminal justice system institutions across Europe (for the latter cf. ECJ., joint cases C-187/01, (*Gözütok*) and C-385/01 (*Brügge*), click on the respective case number at [http://curia.europa.eu/en/content/juris/index\\_tab.htm](http://curia.europa.eu/en/content/juris/index_tab.htm).

5 See Report of the European Anti-Fraud Office, Eighth Activity Report for the Period 1 January 2007 to 31 December 2007, e.g. pp. 16, 44-47 (available at: [http://ec.europa.eu/anti\\_fraud/reports/olaf\\_en.html](http://ec.europa.eu/anti_fraud/reports/olaf_en.html)).

6 *Ibid.*, e.g. the smuggling ring case study, p. 16.

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7 OLAF 2007 Activity Report, *op. cit.*, p. 59.

8 The 2007 Activity Report identifies 38% of cases in 2007 as requiring judicial follow-up, 41% financial and 17% administrative. *op. cit.*, p. 15 and p. 54. Information provided on the type of co-operation entered into by OLAF in 2007 displays clear evidence of a criminal justice leaning – see p. 67 et seq. but see also emphasis of the summary provided on p. 17 et seq of the Report.

9 Wade, *The Januses of Justice in the European Journal of Crime, Criminal Law and Criminal Justice*, 4/2008, 433-455.

10 Exemplified most famously by the UN and EU's "smart sanction's" programmes, but also the role of asset recovery agencies in national criminal justice systems. For the latter see *Gentle*, *Recovery overtakes prosecution in fight against fraud*. The Times, 24th April 2007.

11 See for instance, the rate of disposal of cases by the British Serious Fraud Office – see Annual Report 2007-08 available at <http://www.sfo.gov.uk/publications/2007-2008/> but note that the vast majority of cases are not opened.

12 This assumption will be tested by the EuroNEEDS project currently being carried out in the European criminal law section of the Max Planck Institute for Foreign and International Criminal Law.

13 It certainly does appear that investigations by OLAF are most likely to lead to criminal proceedings for the types of fraud within its mandate, and less so those performed by national authorities alone, see beck-aktuell-redaktion "EU-Statistik: Mehr Untersuchungen mit Folgen durch OLAF", becklink 12834, 13. October 2004, reporting that OLAF had handed over 300 cases to MS authorities by June 2004, 200 of which were still being dealt with.

14 *Op. cit.*, p. 11.

15 Direct expenditure and external aid cases – OLAF 2007 Activity Report, *op. cit.*, pp. 29 and 32.

16 The EU is for instance the "largest provider of development and humanitarian aid in the world" providing "€10 billion, or 8% of the Community's budget" for an area in which OLAF's work has uncovered irregularities employing the "modus operandi typical of organised fraud" – see p. 47 of the 2007 Activity Report.

17 See e.g. Case T-215/02 *Santiago Gómez-Reino v Commission* [2003] ECR II-1685.

18 See Article 6 of Regulation 1073/1999 - long regarded as inadequate – and e.g. the suggested Article 7a of the EP's amendment suggestion to COM(2004) 103 final and COM(2006) 244 final.

19 See for example the discussion surrounding the failed Framework Decision on Procedural Rights in Criminal Proceedings or the increasingly rights sensitive proceedings to be found in the competition area.

20 Judgment of the Court of First Instance of 12 September 2007 in Case T-259/03, *Nikolaou v Commission*, not yet published in the ECR. For the case law related to OLAF, see *Balogova*, in this issue.

21 Judgment of the Court of First Instance of 8 July 2008 in case T-48/05 *Franchet & Byk v Commission*, not yet published in the ECR. For the judgment, see also *White*, in this issue.

22 The proposed Article 14 of COM(2006) 244 final. See also p. 4 et seq of this document.

23 Order of the Court of First Instance of 13 July 2004 in Case T-29/03 *Comunidad Autónoma de Andalucía v Commission* [2004] ECR II-2923.

24 Judgment of the Court of First Instance of 4 October 2006 in Case T-193/04 *Tillack v Commission* [2006] ECR II-3995.

# The Protection of the euro against Counterfeiting

Yannis Xenakis and George Kasimis\*

## I. The Legal Status of the Single Currency

The international law fully recognises the monetary sovereignty of the States and their exclusive competence to define their currency. This definition is binding on any person who chooses to use a specific currency, under the terms of the "*lex monetae*" or monetary law. The jurisprudence of the international jurisdictions (in particular, the Permanent Court of International Justice in The Hague,<sup>1</sup> in a judgement of 12 July 1929,<sup>2</sup> allows conclusion of the universal principle that a State is entitled to regulate its own currency. This is also reflected in recital 8 of Council Regulation (EC) No. 1103/97.<sup>3</sup> "Whereas the introduction of the euro constitutes a change in the monetary law of each participating Member State; whereas the recognition of the monetary law of a state is a universally accepted principle".

Council Regulation (EC) No. 974/98 concerning the introduction of the euro,<sup>4</sup> establishes the principles that underlie any monetary law, i.e., (1) definition of the currency and the currency unit (Art. 2), (2) determination of the payment value of

the currency (Art. 3), and (3) determination of the currency of payment (Arts. 10 and 11). Upon expiry of the transition period (31 December 2001), only banknotes issued by the European Central Bank and coins issued by the Member States were to have the status of legal tender.<sup>5</sup>

The Member States that have adopted the euro share monetary sovereignty, which reflects an in-depth policy of European integration. The euro is incorporated into the Community and inextricably bound to the European legal order. As a result, the euro is a single currency, not a common currency. Considering that each currency is defined by the State that issues it, the definition of the *lex monetae* of the euro is a competence of the political bodies of the European Union.<sup>6</sup> Community rules applied by Community institutions and bodies support the monetary policy as regards the euro. Furthermore, Art. 123 paragraph 4 of the EC Treaty provides for the adoption of non-penal Community legislation for the protection of the euro against counterfeiting; in this way, Member States retain their legislative powers in the penal field.<sup>7,8</sup>

## II. Penal Protection of the euro

The replacement of national currencies with a single currency, together with the differences between the approaches to and structures for combating counterfeiting at the level of individual Member States, mean that the Community must take the necessary measures for effective coordination and cooperation. The Madrid European Council of 15 and 16 December 1995 and, subsequently, the Amsterdam Treaty considered equivalent protection to be an objective of the institutions and Member States.<sup>9</sup>

In order to assess the legitimacy of any punitive provision, it is useful to examine to what extent the penal protection of the euro constitutes a “protected interest” at the European level.<sup>10</sup> Within the framework of European legislation, there are two fundamental groups of legal interests: “institutional” interests and “functional” interests. The first group includes the interests that are essential for the existence of the Community, while the second one includes the interests related to the scope of activities of the EC institutions and, especially, to the four fundamental freedoms of the Treaties.<sup>11</sup>

Euro protection does not seem to belong to the institutional interests but it is linked more to the Community’s activities. From another point of view, the European legal interests could also be qualified as genuine if they are related to the political existence of the European Union. Thus, the authenticity of currency constitutes a purely social interest whose protection serves the interest of the individuals.<sup>12</sup> Another consideration put forward by academics concludes that the circulation of a single currency constitutes a new legal interest of a supranational nature and not merely a social interest.<sup>13</sup> Notwithstanding these analyses, the European Union is entitled to adopt penal provisions against euro counterfeiting on the basis of Art. 31 EU Treaty.

On 29 March 2000, the Council of Ministers adopted the first Framework Decision on the protection of the euro by criminal penalties.<sup>14</sup> The purpose of the Framework Decision is to supplement the provisions and facilitate the application of the International Convention on the Suppression of Counterfeiting Currency of 20 April 1929 (Geneva Convention)<sup>15</sup> by the Member States. While the Geneva Convention is considered a minimum standard for the protection by criminal law of the euro against counterfeiting, the Framework Decision completes its criminal provisions by establishing rules relating to the constituent elements of acts in the field of currency counterfeiting. Thus, the fraudulent making, receiving, obtaining or possession of instruments, articles, computer programs, and any other means particularly adapted for the counterfeiting or altering of currency, or holograms or other components of

currency that serve to protect against counterfeiting, are made punishable.<sup>16</sup> Furthermore, the unlawful use of legal installations is assimilated to counterfeiting<sup>17</sup> and legal persons can be held liable for offences that constitute counterfeiting committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person.<sup>18</sup> Finally, each Member State shall recognise, for the purpose of establishing habitual criminality, final sentences handed down in another Member State.<sup>19</sup>

In accordance with Art. 11 of the Framework Decision, the Commission adopted three reports on its implementation which set out in detail the various transposal requirements and the way in which each Member State complied with those requirements.<sup>20</sup> In its conclusions, the third report recognises that the Framework Decision has achieved its objectives in the most crucial areas. Although the penalties vary, they punish these criminal acts in compliance with the criteria laid down in the Framework Decision. Most Member States have introduced the principle of the liability of legal persons.

## III. Council Regulation for the Protection of the euro against Counterfeiting

Even though the establishment of common European rules on protection of the euro against counterfeiting by criminal penalties is crucial, consideration should be given to organising cooperation between national police forces in the field of the forgery of money. In the framework of the first pillar, the development of investigative powers given to police authorities is necessary. On the basis of a Commission proposal, the Council adopted on 28 June 2001 Regulation 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting.<sup>21</sup> It establishes procedures for the collection, storage, and exchange of information on counterfeits; requires that the credit institutions withdraw from circulation any suspected counterfeit and hand them over to the competent national authorities; and organises the cooperation at the national level or at the level of the European Union, third countries, and the international organisations in the field of the protection against counterfeiting.<sup>22</sup>

The detection and identification of counterfeits is an essential part of the Regulation. Therefore, Art. 6 (in its initial form) required that credit institutions and any other related institutions withdraw from circulation all euro notes and coins received by them which they know or have sufficient reason to believe to be counterfeit and hand them over to the competent authorities. Such an obligation relates to the due diligence of credit and other relevant institutions to ensure the authenticity of euro notes and coins that they put back into circulation or

to the actual detection of counterfeits. In 2001, the obligation for these institutions to check for counterfeits was not adopted mainly due to the lack of agreed uniform and effective methods for large-scale authentication of euro notes and coins or for the detection of counterfeits.

Following research in the methods for authenticating euro notes and coins, the European Central Bank issued an advisory framework for the detection of counterfeit notes<sup>23</sup> and the Commission adopted a Recommendation for authentication of euro coins.<sup>24</sup> Consequently, state-of-the-art methods are now available for the credit and other related institutions to detect counterfeits by processing the notes and coins received by them before they put them back into circulation.

Against this background, Regulation 44/2009<sup>25</sup> amended (inter alia) the aforementioned Art. 6 of Regulation 1338/2001 in order to establish the obligation for credit institutions to ensure that euro notes and coins, which they have received and which they intend to put back into circulation, are checked for authenticity and that counterfeits are detected. The amended Regulation also broadens the field of the institutions subject to the obligation of authentication. Thus, payment service providers, within the limits of their payment activity, and any other institutions engaged in the processing and distribution to the public of notes and coins, are affected by the Regulation, including: (1) establishments whose activity consists in exchanging notes and coins of different currencies, such as bureaux de change, (2) transporters of funds, and (3) other economic agents such as traders and casinos engaged on a secondary basis in the processing and distribution to the public of notes via automated teller machines (cash dispensers), within the limit of these secondary activities.<sup>26</sup>

#### IV. European Technical and Scientific Centre

According to Art. 6 of Regulation 1338/2001, the European Technical and Scientific Centre (ETSC) shall analyse and classify each new type of counterfeit euro coin. In December 2003,<sup>27</sup> the Council invited the Commission to establish the ETSC in order to ensure the continuity and independence of the measures to protect euro coins. In October 2004,<sup>28</sup> the Commission decided to formally establish the ETSC in the European Anti-Fraud Office (OLAF). For the technical analyses, the ETSC uses the premises and equipment of the Laboratory of the French Mint. The analyses are carried out by European Commission staff. Thus, the Commission ensures the functioning of the ETSC and the coordination of the activities of the competent technical authorities to protect the euro coins against counterfeiting.

At the European level, the ETSC carries out technical analyses of newly stamped (industrial) types of counterfeit euro coins. They are sent to the ETSC by the national centres for analysis of counterfeit coins (CNACs). According to the results of these analyses, the ETSC classifies the counterfeits at a dedicated database, for use by the competent authorities established by the Member States according to Art. 2 of Regulation 1338/2001. In particular, counterfeit coins detected in the Member States are analysed by the CNACs. They are classified by reference to already identified counterfeit types. Counterfeits that cannot be classified to one of the already identified types are sent to the ETSC in order to create a new class or variant. A distinction is made between common classes and local classes. Local classes correspond to cast counterfeit coins, usually produced in smaller quantities. Common classes are counterfeits made using a stamping process, similar to the one used in official minting. With such processes, larger amounts of counterfeits can be produced, which is why these counterfeits are monitored at the EU level and called common (EU) classes. The ETSC identified approximately 100 families of counterfeit coins by December 2008.

Furthermore, the coordination by the Commission of the measures taken by the competent technical authorities to protect euro coins against counterfeiting takes place within the Advisory Committee for Coordination of the Fight against Fraud<sup>29</sup> in the Counterfeit Coin Experts Group, comprising, among others, the experts of the ETSC.

#### V. Medals and Tokens Similar to euro Coins

The issue of medals and tokens similar to euro coins was addressed by the European Community authorities long before the actual introduction of the euro coins in 2002. In January 1999 already, the Commission issued a Recommendation<sup>30</sup> where, among other things, it advised against the use, on medals or tokens, of the words “euro” or “euro cent” or a design similar to the ones on future euro coins.

This Recommendation was valid during the transitional period of the euro, i.e. until the end of 2001. As the need was perceived to continue protecting the public against medals and tokens similar to the euro coins in circulation, the Commission issued, in August 2002, a new Recommendation on this issue.<sup>31</sup> That Recommendation contained additional provisions concerning the non-use of the euro symbol and a general size restriction.

However, a rising number of incidents involving medals closely similar to the euro coins soon demonstrated the need for

stricter and binding measures, aimed at creating a level playing field throughout the Community with regard to medals and tokens. Such incidents concerned, for example, cases of euro coin-like medals, some of which came into circulation instead of euro coins, as well as cases of coin-like objects fraudulently used in coin-operated machines. Consequently, the Commission/OLAF worked together with experts from Member States and the private sector and proposed a Regulation on “Medals and tokens similar to euro coins” adopted by the Council on 6 December 2004.<sup>32</sup> This Regulation was later streamlined with a further amendment upon an OLAF proposal adopted by the Council on 18 December 2008 in order to further clarify the protective provisions and the decision-making.<sup>33</sup>

In terms of substance, the relevant risk to the public is twofold. Firstly, citizens could believe that metallic objects (medals and tokens) have legal tender status if they show the text or designs appearing on the euro coins or if they use the euro symbol. Secondly, medals or tokens could fraudulently be used in coin-operated machines if their size and metal properties are similar to those of the euro coins. Accordingly, the Regulation addresses both the visual and the machine-readable characteristics that must be banned in medals and tokens.

Visual characteristics prohibited on medals and tokens include: the terms “euro” or “euro cent” or the euro symbol or a design similar to any design or parts thereof appearing on the surface of euro coins. The parts in question refer to features such as the stars, geographical representations, numerals, the way they appear on the euro coins, as well as signs of sovereignty of the Member States depicted on euro coins, such as the effigies of the Heads of State, coats of arms, etc. Technical features enabling coin-operated equipment to identify euro coins are generally size and their electrical and magnetic properties. The problem the legislator faced in this respect is that these issues – notably the size of coins – are particularly significant for private sector companies producing tokens for use in electricity meters, vending machines, gaming machines, parking

meters, etc. In order to avoid restrictions that might adversely affect such companies, a sophisticated system was specified in the Regulation. It consists of a broad area of combinations between coin diameters and coin edge heights, within which range medals and tokens are rejected unless they achieve specific combinations of size and metal properties that make them recognisably different from euro coins.

Finally, the Regulation assigns to the Commission the responsibility to interpret the Regulation in case of doubt and to provide derogations in cases where no risk of confusion exists. As a result, now, for the first time at European level, a complete mechanism exists that efficiently protects the public against objects that look like or can be used in the place of euro coins.

## VI. Conclusion

The euro is a cornerstone of Community policy and constitutes a major interest that must be efficiently protected. Thanks to the transposition of the provisions of the Framework Decision of 29 May 2000, the penalisation of acts of counterfeiting as well as the sanctions provided were generally introduced into the legislations of the Member States; in this way, a homogeneous level of protection of the euro is achieved. As a result, the protection of the euro was established at the level of efficiency and effectiveness required by the Framework Decision. Regulation 1338/2001 sets up an efficient framework for cooperation between the competent national and European authorities in the field of counterfeiting. Furthermore, in order to protect public trust in the single currency, credit institutions are obliged to check for counterfeits, and the production and distribution of medals and tokens similar to euro coins are strictly legally monitored. The euro is currently protected by a comprehensive legal framework. However, the legal structure of the protection of the euro against counterfeiting continues to evolve in relation to newly identified needs.

\* Opinions expressed in this article are made in a personal capacity. They do not commit the institution.

1 The establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice, was provided for in the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946. The work of the PCIJ, the first permanent international tribunal with general jurisdiction, made possible the clarification of a number of aspects of international law and contributed to its development.

2 Publications of the Permanent Court of International Justice, Collection of Judgments, Series A. Nos. 20/21: Case concerning the payment of various Serbian loans issued in France, p. 45.

3 Council Regulation (EC) No. 1103/97 of 17 June 1997 on certain provisions relat-

ing to the introduction of the euro; Official Journal (OJ) 1997 L 162, p 1.

4 Council Regulation (EC) No. 974/98 of 3 May 1998 on the introduction of the euro; OJ 1998 L 139, p. 1.

5 *Patrice de Lapasse*, The legal status of the Euro, in: European Central Bank (ed.), Legal aspects of the European system of Central Banks, 2005, p. 235.

*Jean-Christophe Cabotte et Anne-Marie Moulin*, Le statut juridique de la monnaie unique, Bulletin de la Banque de France – No. 108 – Décembre 2002, p. 47.

6 *Giuseppe Napoletano*, The legal protection of the Euro as a means of payment, in: European Central Bank (ed.), Legal aspects of the European system of Central Banks, 2005, p. 257.

7 *J.A.E. Vervaele*, Counterfeiting the Single European Currency (Euro): Towards the Federalization of Enforcement in the European Union?, in: The Columbia Jour-





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nal of European Law, 2002, p. 151 and 163. *Giuseppe Napoletano, op. cit.*, p. 259.

8 The distribution of competences was challenged by the European Court's of Justice judgment of 13 September 2005 in Case C-176/03, *Commission v Council*. The Court found that, although "as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence", "the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective". According to the communication from the Commission to the European Parliament and the Council (COM(2005) 583 final/2), penal legislation against counterfeiting is among the domains affected by the ECJ judgment. Within the framework of the Court's general statement, it may be considered whether the fight against counterfeiting is an independent criminal issue and not related to a policy of the European Community. For a critical analysis of this judgment, see *Roland Hefendehl, Europäischer Umweltschutz: Demokratiespritze für Europa oder Brüsseler Putsch?*, in: *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)* 2006, p. 161. Whatever the case, when the Lisbon Treaty comes into force, this discussion will no longer be relevant, since there is a specific legal basis for criminal provisions against counterfeiting (Art. 83 TFEU).

9 Commission Communication to the Council, the European Parliament and the European Central Bank – Protection of the Euro, COM(1998) 474 final.

10 The theory of *Rechtsgut* or *bene giuridico* (protected interest) is a concept formulated mostly within German, Spanish, Italian and Greek criminal law literature.

11 For an extensive presentation of the theories concerning legal interests, see *Ciro Grandi, The Protection of the Euro against counterfeiting*, in: *European Journal of Crime, Criminal Law and Criminal Justice* 2/2004, p. 89.

12 *Bitzilekis/Kaifa-Gbandi/Symeonidou-Kastanidou, Theorie der genuinen europäischen Rechtsgüter*, in: Schönemann (Hrsg.), *Ein Gesamtkonzept für die europäische Strafrechtspflege*, 2006, p. 222.

13 *Rosaria Sicurella, Diritto penale e competenze dell'Unione Europea*, 2005, p. 331.

14 Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (2000/383/JHA), OJ L 140, 14.6.2000, p. 1.

15 No. 2623, p. 372. League of Nations Treaty Series 1931.

16 Cf. Art. 3 of the FD.

17 Cf. Art. 4 of the FD.

18 Cf. Art. 8, 9 of the FD.

19 Cf. Art. 9a of the FD as amended by FD 2001/888/JHA of 6 December 2001.

20 First report: COM(2001) 771 final; second report: COM(2003) 532 final; third report: COM(2007) 524 final.

21 OJ 2001 L 181, p. 6. The effects of this Regulation were extended to the Member States that had not adopted the euro by Regulation 1339/2001 of 28 June 2001, OJ 2001 L 181, p. 11.

22 *Xenakis, La protection des billets et pieces en euro contre le faux monnayage*, in: *Revue du Marché commun et de l'Union Européenne* 2002, p. 443.

23 See the framework for the detection of counterfeits and fitness sorting by credit institutions and other professional cash handlers, available on the ECB website at: <http://www.ecb.europa.eu/pub/pdf/other/recyclingeurobanknotes2005.en.pdf>

24 OJ 2005 L 184, p. 60.

25 Council Regulation (EC) No. 44/2009 of 18 December 2008 amending Regulation (EC) No. 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting, OJ 2009 L 17, p. 1.

26 The obligation to check for authenticity under Art. 6 of Regulation 1338/2001 (as amended) must not be confused with the penal liability of legal persons in the field of counterfeiting under Art. 8 of the Framework Decision of 29 March 2000.

27 Council Decision 2003/861/EC of 8 December 2003 concerning analysis and cooperation with regard to counterfeit euro coins, OJ 2003 L 325, p. 44.

28 Commission Decision 2005/37/EC of 29 October 2004 establishing the European Technical and Scientific Centre (ETSC) and providing for the coordination of technical actions to protect euro coins against counterfeiting, OJ 2005 L 19, p. 73.

29 Commission Decision 94/140/EC (OJ 1994 L 61, p. 27).

30 Commission Recommendation of 13 January 1999 concerning collector coins, medals and tokens, OJ 1999 L 20, p. 61.

31 Commission Recommendation of 19 August 2002 concerning medals and tokens similar to euro coins, OJ 2002 L 225, p. 34.

32 Council Regulation (EC) No. 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins, OJ 2004 L 373, p. 1, and Council Regulation (EC) 2183/2004 of 6 December 2004 extending to the non-participating Member States the application of Regulation (EC) No. 2182/2004 concerning medals and tokens similar to euro coins, OJ 2004 L 373, p. 7.

33 Council Regulation (EC) No. 46/2009 of 18 December 2008 amending Regulation (EC) No. 2182/2004 concerning medals and tokens similar to euro coins, OJ 2009 L 17, p. 5, and Council Regulation (EC) No. 47/2009 of 18 December 2008 amending Regulation (EC) 2183/2004 of 6 December 2004 extending to the non-participating Member States the application of Regulation (EC) No. 2182/2004 concerning medals and tokens similar to euro coins, OJ 2009 L 17, p. 7.

# Beiträge des OLAF zur Bekämpfung der Korruption

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The article deals with a particular area of activity of the European Anti-Fraud Office (OLAF), namely the fight against corruption – one of the oldest and most efficient techniques to influence social, economic and political self-organisation and long time without much awareness in society, as the article stresses. In the introductory remarks, the article gives an overview of the contributions made by the European Commission and OLAF in the fight against corruption. The Office's activities have an effect in numerous areas: OLAF advises the Commission, national authorities within and outside the EU as well as civil stakeholders and other interested parties in order to provide effective means to tackle the prevention of corruption. However, OLAF is facing various problems in its work. One of these problems (highlighted in part two) is that, up to present, a uniform legal definition of "corruption" does not exist. The different understanding of the notion leads not only to many differences as regards national legislations, but also has practical consequences – as further described in part three – such as the difficulty to elaborate a realistic, complete and useful assessment of the situation of corruption. In this context, the article outlines the three different models of international evaluation mechanisms regarding the implementation of the international requirements for the fight against corruption. In conclusion, the article identifies that a particular focus of the future work to combat corruption should lie on prevention strategies and the extension of Europe-wide networks. OLAF faces the challenge to make more efforts in the establishment of global links, especially with reputable partners outside of the European Union.

## I. Einleitung

Die Wirksamkeit des Schutzes der finanziellen Interessen der Europäischen Union (EU) hängt auch davon ab, ob das Europäische Amt für Betrugsbekämpfung (OLAF) geeignete Beiträge zur Verhinderung und Verfolgung von Vorteilsannahme und Vorteilsgewährung, Bestechlichkeit und Bestechung leisten kann. Sowohl die Höhe als auch die Zielsetzungen des Haushaltes der EU verlocken immer wieder dazu, sich auch mit korruptiven Mitteln unlautere Vorteile zu verschaffen. Es war daher seit der Gründung des OLAF im Jahre 1999 von Anfang an ein wichtiges Anliegen, nicht nur der Gefahr einer Schädigung der europäischen Steuerzahler zu begegnen, die durch betrügerische Handlungen entsteht, sondern auch Korruption auf der Grundlage einer „Null Toleranz Strategie“ zu bekämpfen. Dieser Aufgabe kommt nicht zuletzt wegen der Erweiterung der EU in den vergangenen Jahren um insgesamt zwölf neue Mitgliedstaaten eine anhaltend große Bedeutung zu. Ihre Erfüllung ist für den Fortgang und die politische Akzeptanz des Projekts der europäischen Integration unverzichtbar. Die Europäische Kommission hat sich in den Beitrittsverhandlungen mit großem Nachdruck für die Einrichtung effektiver Strukturen und für konkrete Maßnahmen zur Eindämmung der Korruption auf allen Ebenen eingesetzt. Sie überzeugt sich in einem anhaltenden Prozess vom Fortschritt der eingeleiteten Veränderungen in den neuen Mitgliedstaaten (*Cooperation and Verification Mechanism*).

Die Kommission hatte schon im Jahre 2003 eine Mitteilung über eine umfassende Politik gegen Korruption veröffentlicht.<sup>3</sup> Darin bekräftigte sie ihre feste Absicht, ein entsprechendes deliktisches Verhalten auf allen Ebenen innerhalb der

Institutionen der EU, aber auch in den Mitgliedstaaten selbst und außerhalb der EU zu erschweren und zu verringern. Gegenstände einer kohärenten Strategie sind nicht nur korrupte Verhältnisse im politischen Bereich, sondern auch ebensolche Aktivitäten ausgehend von Gruppen der Organisierten Kriminalität oder zwischen einzelnen privaten Teilnehmern am Rechts- und Wirtschaftsverkehr. Selbst kleinere Fälle „alltäglicher“ korruptiver Verstrickung auf Verwaltungsebene sind nicht ausgenommen.

Auf der Grundlage der bisherigen Erfahrungen ist offensichtlich geworden, dass die Sicherung einer sachgerechten und guten Verwaltung Maßnahmen erfordert, die weit über die Korruptionsbekämpfung hinausgehen. Gleichwohl ist es nicht nur sinnvoll, sondern dringend geboten, in diesem Bereich mit ersten wirkungsvollen Schritten zu beginnen, da Korruption regelmäßig ein Zeichen für ungenügende administrative Verhältnisse ist und auf einen Mangel an Transparenz und Verantwortlichkeit sowie auf das Versagen von Kontrollsystemen hindeutet. Auch aus diesen Gründen verfolgt die Kommission in ihrem Bemühen um Eindämmung korruptiver Praktiken einen möglichst breiten Ansatz, der sich sowohl auf die politischen, die wirtschaftlichen und die gesellschaftlichen Bereiche erstreckt. Hierbei stützt sie sich auf innerhalb der EU gemeinsam verabredete Grundsätze, die sowohl für das Handeln von Regierungen aber auch für die Beziehungen zwischen öffentlichen Einrichtungen und den Bürgern der Mitgliedstaaten gelten. Darüber hinaus hat die Kommission seit 1999 eine ganze Reihe konkreter neuer Maßnahmen ergriffen, um betrügerischen Handlungen und korrupten Akten innerhalb der europäischen Einrichtungen entgegenzuwirken.<sup>4</sup> Dazu gehören die Reform und die Modernisierung der internen Verwaltungs-

strukturen, eine neue Ordnung der Kontrollsysteme, die Einrichtung eines neuen Buchführungssystems, die Entwicklung eines Informationssystems über Betrugsverdachtsfälle und die Einrichtung eines Büros für Disziplinarangelegenheiten (IDOC).

Von besonderer Bedeutung ist die Schaffung des OLAF, dessen Beiträge zur Korruptionsbekämpfung sich in einer Vielzahl von Bereichen auswirken. Das Amt berät die Kommission, Behörden der Mitgliedstaaten sowie Verwaltungen in Staaten außerhalb der EU, die Zivilgesellschaft und alle anderen Interessierten, um dem gemeinsamen Anliegen der Korruptionsverhinderung durch eine möglichst effektive Methodologie gerecht zu werden. Das Amt stellt hierfür im Rahmen des Möglichen und Zulässigen die Erfahrungen zur Verfügung, die es in einschlägigen Ermittlungsverfahren gewinnen konnte. Auf dieser Grundlage kann auch geprüft werden, ob etwa Standardverträge oder größere Gesetzgebungsprojekte für betrügerische Handlungen oder korruptive Einwirkungen anfällig sind. Mit der Verwaltung und Durchführung bestimmter Programme (z.B. „Hercule“) leistet OLAF wichtige Beiträge zur Unterstützung, die sowohl Forschungsarbeiten als auch Ausbildung und technische Ausstattung betrifft. Mit Hilfe eines von OLAF etablierten Netzwerkes (OLAF Anti-Fraud Communicators' Network – OAFCN) werden europaweit Informationen übermittelt, die für die Verhinderung von Korruption nützlich sind. Darüber hinaus sind die Mitarbeiter des Amtes fortlaufend bemüht, die Verfügbarkeit, die Qualität sowie die Vergleichbarkeit allgemeiner Daten zur Bekämpfung von Korruption und Betrug zu verbessern. Dies schließt die Verbesserung und den Austausch von Daten ein, welche sich auf unzuverlässige Wirtschaftsbeteiligte als Empfänger europäischer Finanzmittel beziehen. Angesichts der Tatsache, dass die EU weltweit der größte Geber von Mitteln zur Entwicklungshilfe ist, wirkt OLAF selbstverständlich auch an der Errichtung und dem Management eines nachhaltig leistungsfähigen Netzwerkes mit, das für einen höheren Wirkungsgrad und eine verbesserte Kontrolle bei der Verteilung der jeweiligen Mittel sorgen soll.

Im Rahmen einer eigenen Projektorganisation („Fraud Notification System – FNS“) wird gegenwärtig der Einsatz eines Instruments vorbereitet, das erheblich zu einer Ausweitung des bisher ungenügenden Informationsaufkommens über Korruptions- und Betrugsverdachtsfälle beitragen kann. Das eigens von OLAF entwickelte elektronische System gehört weltweit zu den technologisch fortgeschrittensten Modellen und gewährleistet die zum Schutz von Hinweisgebern („whistleblower“) notwendige Anonymität.

Diese und zahlreiche andere Maßnahmen haben bereits sichtbare Erfolge bewirkt, wie sich den detaillierten Daten in den

Tätigkeitsberichten des OLAF entnehmen lässt. Unterdessen ist nicht zu verkennen, dass zahlreiche Probleme noch zu lösen sind, die nicht zuletzt wegen ihres grundsätzlichen Charakters die Arbeit des OLAF erschweren und die Möglichkeiten zur Erzielung noch besserer Ergebnisse einschränken. Die folgenden Bemerkungen können die Problematik bestenfalls andeuten. Sie mögen gleichwohl erkennbar machen, welche Anstrengungen die Kommission und OLAF in Zusammenarbeit mit den Behörden der Mitgliedstaaten und anderen zu interessierenden Dritten noch unternehmen müssen, um sich dem gemeinsamen Ziel einer Minimierung der durch Korruption verursachten Gefahren und Schäden weiter zu nähern.

## II. Begriffe und Barrieren

Es gibt nach wie vor keine eindeutige *und* allgemein anerkannte gesetzliche Bestimmung des Begriffs „Korruption“. Selbst die Konvention der Vereinten Nationen zur Bekämpfung der Korruption enthält keine Legaldefinition. Man findet eine große Vielzahl von Ansätzen zur Beschreibung und Definition des komplexen Phänomens korruptiver Delinquenz. Das Spektrum enthält moralische, ethische, kriminologische, politische, ökonomische und normativ wertende Versuche. Nach einem weiten Verständnis umfasst Korruption alle Formen des Missbrauchs von Macht zur Verschaffung unzulässiger Vorteile. Dies ist jedoch zu unspezifisch, da so z.B. auch Unterschlagung und Untreue erfasst sind und die Grenze zu den Eigentums- und Vermögensdelikten unscharf wird. In der polizeilichen Wahrnehmung hat Korruption folgende Merkmale:

- Missbrauch eines öffentlichen Amtes, einer Funktion in der Wirtschaft oder eines politischen Mandats,
- zugunsten eines anderen,
- auf dessen Veranlassung oder aus Eigeninitiative,
- zur Erlangung eines Vorteils für sich oder einen Dritten,
- mit Eintritt oder in Erwartung des Eintritts eines Schadens oder Nachteils,
- für die Allgemeinheit (in amtlicher oder politischer Funktion) oder
- für ein Unternehmen (in wirtschaftlicher Funktion).

Im Kern geht es darum, dass eine Person, die bestimmte Aufgaben wahrzunehmen hat, für ein Handeln oder Unterlassen im Rahmen der Aufgabenerfüllung unzulässige oder „unbillige“ Vorteile erhält. Damit werden der Unrechtskern und die Gefährlichkeit der Korruption erkennbar: Die Aufgabenerfüllung des Vorteilsnehmers orientiert sich nicht mehr an den hierfür geltenden Regeln, sondern an Vorteilen, die ihm nicht zustehen. Das bringt die Gefahr mit sich, dass der Vorteilsnehmer seine Aufgaben nicht mehr sachgerecht erfüllt und er die Organisation, für die er tätig ist, schädigt. Korruption ist also ein Angriff auf die sachgerechte Aufgabenerfüllung

durch eine regelwidrige Austauschbeziehung zwischen Geber und Nehmer.

Auch im europäischen Rechtsraum findet man keine durchgehend akzeptierte Definition korrupten Verhaltens. Hierunter fällt eine Vielzahl von Tatbeständen. Das Problem ist u. a. dadurch begründet, dass sich traditionelle, von Sprache zu Sprache unterschiedliche, Bezeichnungen und Begriffe nicht immer zusammenbringen lassen. So wurde zum Beispiel in den EU-Verträgen und Dokumenten der englische Begriff „*corruption*“ beim Transfer in die deutsche Sprache als „Bestechung“ übersetzt, obwohl dies (englisch: „*bribery*“) keineswegs alle Aspekte des Phänomens Korruption beinhaltet, sondern allenfalls ein Aspekt des englischen Begriffs „*corruption*“ ist. „Corruption“ umfasst u.a. Bestechung, Patronage, Nepotismus, Veruntreuung von Allgemeingut und illegale Parteien- oder Wahlkampffinanzierung.

Die unterschiedlichen Begrifflichkeiten und Rechtssysteme führen sowohl zu Differenzen in der Gesetzgebung zur Abgeordnetenbestechung, Parteienfinanzierung, der Unterscheidung zwischen Korruption im öffentlichen und privaten Sektor als auch in der Höhe und Art der Sanktionen. In einem Sonderbereich (Schutz der finanziellen Interessen der Europäischen Gemeinschaften) gibt es dagegen Ansätze für eine Legaldefinition. Danach ist der Tatbestand der Bestechlichkeit dann gegeben, wenn ein Beamter vorsätzlich unmittelbar oder über eine Mittelsperson für sich oder einen Dritten Vorteile jedweder Art als Gegenleistung dafür fordert, annimmt oder sich versprechen lässt, dass er unter Verletzung seiner Dienstpflichten eine Diensthandlung oder eine Handlung bei der Ausübung seines Dienstes vornimmt oder unterlässt, wodurch die finanziellen Interessen der Europäischen Gemeinschaften geschädigt werden oder geschädigt werden können. Jeder Mitgliedstaat muss sicherstellen, dass die genannten Handlungen Straftaten sind.<sup>5</sup> Eine einheitliche Bekämpfung der Korruption in der Privatwirtschaft innerhalb der EU soll dementsprechend durch den Rahmenbeschluss zur Bekämpfung der Bestechung im privaten Sektor vom 22. Juli 2003 sichergestellt werden.<sup>6</sup>

Verständlichkeit und Anwendungsnutzen solcher und anderer Definitionen können hier dahingestellt bleiben. Schon seit einiger Zeit geht es nicht mehr nur um die „klassischen“ Korruptionsdelikte im Zusammenhang mit Amtsträgern, sondern – mit zunehmender Tendenz – um rechtswidrige Handlungen im privat-wirtschaftlichen Bereich. Insoweit hat die *Wirtschaftskorruption* an Bedeutung gewonnen. Sie soll dann vorliegen, wenn ein privater Wirtschaftsteilnehmer für ein wirtschaftliches Verhalten von einem anderen privaten Wirtschaftsteilnehmer für sich oder einen anderen Vorteile erhält oder fordert oder dem anderen gewährt oder anbietet und dies gegen allgemein anerkannte Standards verstößt und nachteilig

ge Folgen für Einzelne oder die Allgemeinheit hat und geheim gehalten und verschleiert wird. Es handelt sich also um eine Form unerwünschten Nichtleistungswettbewerbs. In jedem Fall ist der Amtsträger- und der Wirtschaftskorruption der regelwidrige Tausch von Vorteilen gemeinsam.

### III. Erfahrungen und Erkenntnisse

Die Definitionsproblematik ist nicht nur theoretischer Natur. Sie hat auch praktische Konsequenzen. Die quantitativ-statistische Dimension der deliktischen Realität im Bereich der Korruption wird natürlich von dem jeweiligen begrifflichen Vorverständnis beeinflusst. Der tatsächliche Umfang strafbarer korruptiver Verhaltensweisen ist in keinem der gegenwärtig 27 Mitgliedstaaten der EU mit der wünschenswerten Genauigkeit zu beschreiben. Folgt man z.B. einem Standardkommentar zum deutschen Strafgesetzbuch, spielen Korruptionsdelikte in der Strafverfolgung in diesem Land keine bedeutende Rolle. Die Fallzahlen seien niedrig und nur ein geringer Anteil der bekannt gewordenen Fälle gelange zu Anklage. Die Dunkelziffer sei sehr hoch, weil auf beiden Seiten korruptiver Verhältnisse Tatbeteiligte stünden. Die durch Korruption entstehenden Schäden gelten gleichwohl „unzweifelhaft“ als sehr groß.<sup>7</sup>

Eine europaweite halbwegs realistische, vollständige und brauchbare Lagebeurteilung ist noch schwieriger. Sie sollte sinnvollerweise durch aussagekräftige Monitoringverfahren im Hinblick auf die Normdurchsetzung vorbereitet werden. Das ist zurzeit leider nur ein frommer Wunsch. Der Beitrag internationaler Organisationen zur Umsetzung der von ihnen entwickelten Normen in souveränen Staaten ist im Übrigen naturgemäß begrenzt.<sup>8</sup> Immerhin lassen sich Anreize zur Regelbefolgung schaffen. Dies kann durch zwischenstaatliche Evaluierung der Umsetzung internationaler Vorgaben geschehen. Drei Modelle sind etabliert:

- Monitoring durch das Exekutivorgan der betreffenden internationalen Organisation
- Evaluierung durch eine spezielle Expertengruppe
- Monitoring durch einige oder alle Mitgliedstaaten des entsprechenden Regimes („peer review“).

Die Umsetzung internationaler Evaluierungsempfehlungen führt aber nicht zwangsläufig zu einer Reduzierung der realen Korruption. Entsprechende Feststellungen sind kaum möglich, weil Korruption in der Praxis nicht einmal annäherungsweise messbar ist. Das gilt ungeachtet diverser Fallstatistiken und Korruptionswahrnehmungsindices. Es kann dahingestellt bleiben, ob dies auch daran liegt, dass Bestechung (angeblich) ein „opferloses“ Delikt ist, bei dem in der Regel kein Tatbeteiligter ein Interesse an einer Aufdeckung hat.<sup>9</sup> Hier nur so viel: Die Behauptung der „Opferlosigkeit“ ist schlichter, aber be-



währter Unsinn, weil wir alle unmittelbar oder mittelbar Opfer von Korruption sind oder werden. Wie auch immer: Die EU hat im Unterschied zu Europarat und OECD auf die Einrichtung eines spezifischen Monitoringgremiums für ihre Antikorruptionsnormen verzichtet. Es findet auch kein intensives Monitoring in Bezug auf die Normen statt, die – wie insbesondere im Bereich der Korruption im privaten Sektor – über die zwingenden Vorgaben von Europarat und OECD hinausgehen. Auch das EU-Bestechungsübereinkommen enthält keinerlei Bestimmungen für eine Überprüfung der Umsetzung. Das Erste Protokoll zum Übereinkommen über den Schutz der finanziellen Interessen der EG verpflichtet die Mitgliedstaaten immerhin, ihr Umsetzungsrecht der Kommission zu übermitteln.

Vor diesem Hintergrund hatte die Kommission am 24. Oktober 2004 ihren ersten Bericht über die Umsetzung des Übereinkommens über den Schutz der finanziellen Interessen der EG und seiner Protokolle durch die Mitgliedstaaten angenommen.<sup>10</sup> Schon seinerzeit wurden verschiedene Defizite bei der Implementation der Bestechungsvorschriften des Ersten Protokolls gerügt. Dazu gehört auch die Tatsache, dass die Mitgliedstaaten das Übereinkommen und seine Protokolle sehr zögerlich ratifizierten und seit Jahren keinerlei Interesse zeigen, sich mit dem Vorschlag der Kommission für eine Richtlinie über den strafrechtlichen Schutz der finanziellen Interessen der EG zu befassen. Die Richtlinie würde die wesentlichen Bestimmungen des Übereinkommens und der Protokolle in die erste Säule der Unionsarchitektur überführen und es der Kommission ermöglichen, säumige Mitgliedstaaten wegen Nichtumsetzung vor dem EuGH zu verklagen, ein Argument, das angesichts des Vertrages von Lissabon vielleicht discussionsbedürftig geworden ist.

In ihrem zweiten Bericht kommt die Kommission zu dem Ergebnis, dass die mit den Rechtsakten zum Schutz der finanziellen Interessen der Gemeinschaften angestrebte Angleichung der Rechtsvorschriften aller 27 Mitgliedstaaten bisher weder formell noch materiellrechtlich in vollem Umfang erreicht worden ist.<sup>11</sup> Sie bedauert, dass das Zweite Protokoll wegen der (bis vor kurzem) fehlenden Ratifizierung durch Italien noch immer nicht in Kraft treten konnte und auch die Ratifizierung durch die am 1.5.2004 der EU beigetretenen Mitgliedstaaten noch nicht abgeschlossen ist.<sup>12</sup> Das derzeitige, auf Übereinkünften fußende System für den Schutz der finanziellen Interessen der Gemeinschaften führt *de facto* zu unterschiedlich schnellen Fortschritten in den einzelnen Ländern. In Bezug auf die bindende Wirkung, die die Rechtsakte zum Schutz der finanziellen Interessen der Gemeinschaften im Rahmen der Rechtsordnungen der einzelnen Mitgliedstaaten entfalten können, lässt dies wiederum eine Mischung unterschiedlicher Rechtssituationen entstehen. So wird weder die gewünschte Wirkung noch ein abschreckender strafrechtlicher Schutz erreicht.

#### IV. Schlussbemerkungen

Bei der Erfüllung seines Auftrages sieht sich das OLAF vor besondere und manchmal unüberwindlich erscheinende Schwierigkeiten gestellt. Das ist angesichts der Breite der Herausforderungen kaum überraschend. Korruption zählt in der Tat zu den ältesten und wirkungsvollsten Techniken gesellschaftlicher, wirtschaftlicher und staatlicher Selbstorganisation.<sup>13</sup> In der politischen Diskussion ist „Korruption“ inzwischen sogar einer der meistbenutzten Begriffe geworden. Geraume Zeit hatte es den Anschein, als ob sich die europäischen Gesellschaften langsam eines Phänomens bewusst werden, das zwar sehr alt ist, aber lange heruntergespielt wurde. Bis vor kurzem war jedoch das Gegenteil richtig. Von ein paar Fachleuten abgesehen, haben die Verantwortlichen das Problem nicht nur in Deutschland bis in die Gegenwart hinein gelehnet.<sup>14</sup> Die Zeiten scheinen sich zu ändern. Inzwischen wird das Porträt einer „Wachstumsbranche“ gezeichnet.<sup>15</sup> Die Vorstellung, dass sich schon deshalb in ganz Europa ein Gefühl dafür entwickeln müsste, was anständig und was unanständig ist, was unser Zusammenleben erleichtert oder bedroht, ist jedoch im Schnittpunkt von Naivität und Verzweiflung angesiedelt, letztlich also paradox. Korruptive Verflechtungen in Gesellschaft, Wirtschaft und Politik reflektieren möglicherweise einen dramatischen Bewusstseinswandel, der mit dem groben Raster von Strafgesetzen überhaupt nicht erfassbar ist.

Dies gilt auch im Hinblick auf objektive Strukturen. Gesellschaftliche Einrichtungen, politische Parteien, demokratische wie undemokratische Regierungen, Justiz, Verwaltung, aber auch Polizei und Armee sowie Wirtschaftsunternehmen haben in etlichen Ländern der Welt Verknüpfungen gebildet. Sie können die Leistungskraft konventioneller krimineller Vereinigungen leicht überschreiten. Es ist nicht mehr zu übersehen, dass sich die Gewinnabsichten von Wirtschaftsobjekten, die Ambitionen von Politikern, die Finanzierungsbedürfnisse von Parteien und die Geldgier von Amtsträgern immer häufiger kreuzen. Daraus entsteht eine besonders „anspruchsvolle“ Korruption, an der die vergleichsweise einfachen Begriffe des Strafrechts zerschellen müssen.<sup>16</sup> Wenn aber Käuflichkeit den inneren Charakter eines Gemeinwesens prägt, degeneriert Rechtsgehorsam zur lächerlichen Attitüde. Justizielle Bewältigungsversuche werden zur leeren Geste. Die mit der Korruption einhergehende Entkopplung von Arbeit und Erfolg, Leistung und Einkommen destabilisiert früher oder später jedes gesellschaftliche System. Polizei und Justiz können die Verklammerungen durch Lebenslügen nicht lösen.<sup>17</sup>

Die öffentliche Debatte über Umfang und Risiken korruptiven Verhaltens leidet in allen Mitgliedstaaten der EU unter dem Mangel flächendeckender verlässlicher quantitativer und statistischer Daten sowie unter einer oft verzerrenden Bericht-

erstattung über spektakuläre Einzelfälle. Eine genaue und allgemein gültige empirische Bestandsaufnahme korruptiver Delinquenz scheitert u.a. immer noch an den vielfältigen und unterschiedlichen Definitionen dieser Art von Kriminalität. Begriffliche Unsicherheiten führen auch zu Missverständnissen in der Wahrnehmung der Korruption und erschweren eine einheitliche europäische Strategie zur Verhinderung und Verfolgung einschlägiger Delikte.

Die Glaubwürdigkeit des Projekts „Europäische Integration“ hängt insbesondere im Hinblick auf die Erweiterung der EU in besonderer Weise von einer wirksamen Korruptionsbekämpfung in allen Mitgliedstaaten ab. Das Sanktionsrepertoire muss im Interesse einer angemessenen Eindämmung der Korruption in allen Mitgliedstaaten ungeachtet der unterschiedlichen Rechtsordnungen in gleicher Weise wirksam sein und gemeinschaftsweit entsprechend fortentwickelt werden (z.B. Unternehmensstrafe und Gewinnabschöpfung).

In der Priorisierung strafrechtlicher Instrumente liegt aber auch zukünftig nicht das Heil.<sup>18</sup> Korruption ist nämlich ein Phänomen, das nicht nur strafrechtlich zu beschreiben und zu ahnden ist. Korruptierbarkeit ist die latente Bereitschaft zu gemeinschaftsschädigender Selbstbereicherung, es handelt sich also um eine Haltung, eine Mentalität, die sich insbesondere in Zeiten gesellschaftlichen Verfalls immer mehr verbreitet und deshalb sogar eine kulturelle und soziale Herausforderung ist

– in Europa und weltweit. Korruption signalisiert immer auch Führungsversagen, wie sich in all denjenigen Mitgliedstaaten der EU zeigen lässt, wo es zu bestimmten Verknüpfungen zwischen wirtschaftlichen Interessen, persönlichen Ambitionen und politischen Zielen kommt.

Die Arbeit des OLAF muss deshalb fortgesetzt und intensiviert werden. Dabei ist ein besonderes Augenmerk auf die Entwicklung tiefgreifender und umfassender präventiver Strategien zu richten. Der weitere Ausbau eines europaweiten Netzwerkes ist für eine wirksamere Bekämpfung der Korruption gleichfalls unentbehrlich. Das OLAF wird sich noch mehr um globale Verknüpfungen bemühen müssen. Hier gibt es schon beeindruckende Erfolge in der Zusammenarbeit mit namhaften Partnern (v.a. Weltbank und Vereinte Nationen) zu verzeichnen. Mit seiner breiten Palette an Trainingsmöglichkeiten und Fortbildungsveranstaltungen leistet das OLAF wertvolle und konkrete Hilfe zur Vertiefung und Ausweitung der internationalen Korruptionsbekämpfung, die sich dadurch zunehmend an dem jeweiligen besten verfügbaren praktischen Standard orientieren kann. Durch den weiteren Ausbau leistungsfähiger Institutionen und durch eine partnerschaftliche Zusammenarbeit zwischen den zuständigen Behörden innerhalb und außerhalb der Europäischen Union wird das OLAF sich mit zunehmender Intensität maßgeblich an der Effizienzsteigerung der Korruptionsbekämpfung in präventiver und repressiver Hinsicht beteiligen.

\* Der Beitrag enthält nur persönliche Auffassungen des Autors. Die Europäische Kommission wird hierdurch in keiner Weise verpflichtet.

1 Zu den neuesten Erkenntnissen: Commission of the European Communities: Interim Report from the Commission to the European Parliament and the Council – On Progress in Romania under the Co-operation and Verification Mechanism – COM(2009) 70 final (12.2.2009).

2 Zu den neuesten Erkenntnissen: Commission of the European Communities: Interim Report from the Commission to the European Communities: Interim Report from the Commission to the European Parliament and the Council – On Progress in Bulgaria under the Co-operation and Verification Mechanism – COM(2009) 69 final (12.2.2009).

3 KOM(2003) 317 endg. (28.5.2003).

4 Vgl. auch die Übersicht bei *Hetzer*, NJW 2004, 3746 ff.

5 Art. 2 Abs. 1 und 2 des Protokolls zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, ABl. C 313 vom 23.10.1996, S. 2.

6 Rahmenbeschluss 2003/568/JI des Rates vom 22. Juli 2003 zur Bekämpfung der Bestechung im privaten Sektor, ABl. L 192 vom 31.7.2003, S. 54.

7 *Fischer*, Strafgesetzbuch, 55. Aufl. 2008, Vor § 298, Rz. 4.

8 Zutreffend: *Wolf*, Der Beitrag internationaler und supranationaler Organisationen zur Korruptionsbekämpfung in den Mitgliedstaaten, Speyerer Forschungsberichte 253, 2007, S. 31.

9 So *Wolf*, a.a.O., S. 31, 32.

10 KOM (2004) 709 endg. (25.10.2004).

11 Zweiter Bericht der Kommission über die Umsetzung des Übereinkommens über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften

und seiner Protokolle – Artikel 10 des Übereinkommens – KOM(2008) 77 endg. (14.2.2008), S. 5.

12 Mittlerweile ist die Ratifizierung durch Italien am 19. Februar 2009 erfolgt.

13 *Claussen / Ostendorf*, Korruption im öffentlichen Dienst, 2. Aufl. 2002, S. 3: „Korruption gibt es seit Menschengedenken“.

14 *Scholz*, Korruption in Deutschland, 1995, S. 9.

15 *Bannenberg / Schaupensteiner*, Korruption in Deutschland – Porträt einer Wachstumsbranche, 2004.

16 Vgl. aber: *Rzeszut*, in: *Kreutner* (Hrsg.), The Corruption Monster – Ethik, Politik und Korruption, 2006, S. 345 ff.

17 *Hetzer*, Kriminalistik 2004, 86.

18 *Hetzer*, in: Friedrich-Ebert-Stiftung (Hrsg.), Korruption in Deutschland – Ursachen, Erscheinungsformen, Bekämpfungsstrategien, 1995, S. 123 ff.

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# The Developments in the Case Law of the Community Courts with Regard to OLAF Investigations

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During the ten years of its existence, OLAF investigations have also been the subject of several court cases which dealt with and influenced different aspects of the investigative activities. The principle of effective judicial control has been confirmed by the European Court of Justice and the Court of First Instance in various cases. In institutional terms, Community case law in many respects confirms the effectiveness of the legal framework put in place ten years ago. As early as in 1999, in the case **Commission v Council**<sup>1</sup> the Court of Justice recognised the protection of the Communities' financial interests as an autonomous objective of the Treaties. As such, this objective is central to the provisions introduced by the Community legislator and legitimates the body created for this purpose – OLAF, which is integrated in the Commission's administrative and budgetary structures and independently exercises autonomous investigative functions.

## I. Institutional and Legal Framework of OLAF Investigations

The first cases after the establishment of OLAF confirmed and clarified its status and function and stipulated that the requirement of independence is closely related to strict observance of the Community law. In the **Rothley**<sup>2</sup> case, the European courts agreed that the European Parliament Decision concerning the terms and conditions for internal investigations<sup>3</sup> applies to objectively defined situations and has legal effects with respect to categories of persons envisaged generally and in the abstract, i.e. present or future Members of the European Parliament (MEPs), but also all the Parliament's staff members, whether or not they are covered by the Staff Regulations. This measure does not, on the one hand, constitute a decision of individual concern to the group of MEPs who lodged the application in this case before the Court of First Instance. On the other hand, the court also said that the possibility cannot be ruled out a priori that OLAF, in the course of an investigation, might take action prejudicial to the immunity enjoyed by every Member of the Parliament. If that were to occur, any Member of the Parliament faced with such an act could, if he considered it

damaging to him, avail himself of the judicial protection and the legal remedies provided for by the Treaty. Thus the Court of First Instance clearly said there must be a judicial review at least afterwards. This was confirmed by the Court of Justice in appeal proceedings.

The **Commission v European Central Bank**<sup>4</sup> and **Commission v European Investment Bank**<sup>5</sup> cases confirm that the OLAF regulations express the Community legislator's determination to subject the powers conferred on OLAF, first, to guarantees intended to ensure OLAF's complete independence, in particular from the Commission, and second, to strict observance of the rules of Community law, including, in particular the Protocol on the privileges and immunities of the European Communities, human rights and fundamental freedoms and the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities. Neither the fact that OLAF was established by the Commission and is integrated in its administrative and budgetary structures, nor the fact that the Community legislation has conferred investigative powers on this body, external to the other EC institutions and bodies such as ECB, can as such undermine the independence of the EC institutions and bodies. OLAF's Director General cannot decide to launch an investigation if there are no sufficiently serious suspicions; the authorisation in writing which must be carried by OLAF investigators must state the subject-matter of the investigation. The OLAF investigation system is specifically designed to allow suspicions of fraud, corruption or other illegal activity affecting the Communities' financial interests to be checked. It is in no way related to systematic forms of monitoring such as financial control. OLAF's investigative function differs in its nature and its objectives from general control tasks such as those of the Court of Auditors and the ECB external auditors.

## II. OLAF Investigative Acts under Court Scrutiny

The aforementioned specific investigative function is what distinguishes the anti-fraud system from general monitoring

activities. From the moment when its Director General decides to launch an investigation and throughout the ensuing proceedings, OLAF's investigative function focuses on checking serious suspicions of fraud, corruption or other illegal activities affecting the Communities' financial interests. Such investigations must comply with general and specific rules, defined by Community case law. The European courts confirmed that OLAF investigations are under the obligation to respect of human rights and fundamental freedoms. For both internal and external investigations, case law places fundamental emphasis on honouring the guarantees attached to the exercise of OLAF's powers of investigation. The standards highlighted in the jurisprudence are the presumption of innocence, the principle of loyal cooperation, impartiality in the conduct of the investigation as well as the principle that all conclusions should be based on objective evidence. The courts consider that procedural guarantees for persons subject to internal or external investigation are an essential procedural requirement for investigations and the failure to honour them undermines the legality of the final decision. In the *Gómez-Reino*<sup>6</sup> case, the Court of First Instance held that failure to take account of the rights of defence of an official under investigation, as guaranteed by Article 4 of the inter-institutional agreement between the European Parliament, the Council and the Commission<sup>7</sup> constitutes a violation of the substantial formal requirements applicable to the investigation procedure and thereby affects the legality of the final decision of the appointing authority – in the present case the Commission as the competent authority for the disciplinary proceedings.

In this context, it should be emphasised that only acts of a final character which infringe the right of an individual can be challenged by means of action for annulment under Article 230 EC. Since acts of OLAF, such as final case reports, are non binding preparatory acts and are only recommendations to national and Community authorities without a mandatory character affecting the rights of an individual, they cannot be challenged in an action for annulment. Similarly, the Court of First Instance confirmed in the case *Andalucía*<sup>8</sup> related to an external investigation that the letter from OLAF informing an economic operator that no action could be taken on his complaint about the final report can not be deemed a decision against which an action for annulment may be brought. The final report drawn up by OLAF at the end of the external investigation and sent to the competent authorities of the Member States is only a set of recommendations and opinions which have no mandatory legal effects that could impinge on the economic operator's economic interests by altering his legal situation. It is for the competent national authorities to decide what action should be taken on completed investigations on the basis of the final case report drawn up by OLAF.

These national authorities are therefore the ones which may take decisions capable of affecting the legal position of the person concerned within their scope of discretion.

In the *Tillack*<sup>9</sup> case it was stated the duty of the Member States to cooperate in good faith implies that when OLAF forwards them information pursuant to Article 10(2) of Regulation No. 1073/1999, the national judicial authorities have to examine this information carefully and on that basis take the appropriate action to comply with Community law, if necessary by initiating legal proceedings. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information has binding effect. Therefore, an act by which OLAF forwards information relating to situations liable to lead to criminal proceedings to national judicial authorities is not capable of being challenged in an action for annulment under Article 230 EC. Again, national judicial authorities are the ones responsible for subsequent possible legal acts. In this case the applicant also claimed the damages, but according to the court the principle of sound administration does not, in itself, confer rights upon individuals, except where it constitutes the expression of specific rights such as the right to be heard or the right to have affairs handled impartially. Moreover, the classification of the conduct of a Community institution as an "act of maladministration" by the European Ombudsman does not mean, in itself, that the conduct constitutes a sufficiently serious breach of a rule of law. The institution of the Ombudsman offers an alternative non-judicial remedy to the court proceedings and does not necessarily have the same objective as judicial proceedings.

### III. Extra-Contractual Liability of the Commission

After the delivery of these judgments, it may have seemed that OLAF's investigative acts are non-attackable and exempt from effective judicial review, the reason being that they do not produce legal effects vis-à-vis the individual. It may have seemed that implicit reviews by the Community (disciplinary proceedings) or national courts (criminal proceedings) *a posteriori* are the only option. This was refuted by the subsequent judgments where the court held that OLAF's acts indeed may give rise to liability and the persons concerned may claim before the Court of First Instance under certain conditions for damages through non-contractual liability under Article 288 second paragraph EC in connection with Article 235 EC. The court held that action for damages is an independent type of action which is subject to different conditions with a view to its specific purpose. Thus the inadmissibility of an action for annulment does not automatically entail the inadmissibility of an action for damages. For dam-



ages to be granted several conditions have to be met: first, the rule of law infringed must be interpreted as conferring rights on individuals; second, there must be a sufficiently serious breach; third, there must be a damage and fourth, there must be a direct causal link between the breach of that rule of law and the damage sustained by the person concerned. In the existing case law the non-contractual liability of the Commission towards a person concerned by an OLAF investigation arose as a consequence of a violation of legal principles and statutory rules protecting the rights of an individual, such as the presumption of innocence, obligations of impartiality and confidentiality, due care when transmitting information to third parties and communicating with the public or the defence rights. Damages can even be awarded for immaterial prejudice. Thus liability under Article 288 second paragraph EC has led to an “indirect review” where the Community courts have highlighted the above mentioned guarantees. Individuals who cannot contest directly certain OLAF’s investigative acts or measures by way of an action for annulment under Article 230 EC, have the opportunity of challenging conduct lacking the features of a decision having legal effect upon them, by bringing an action for damages via non-contractual liability of the Community.

The **Camós Grau**<sup>10</sup> case concerns the presumption of innocence and conflict of interest. The investigation had initially been conducted by a possibly partial investigator. Even though he was later taken out of the investigation, all evidence in the file had not been re-evaluated. The mere presence of this evidence made it for the tribunal a breach of impartiality. This is a fault which is capable of giving rise to non-contractual liability on the part of the Community. Moreover, the undue accusations made by OLAF against the official in its final report on the investigation, attributing to him wrongful acts that would have rendered him liable to criminal and disciplinary action, seriously impairing his honour and reputation, constitute non-pecuniary damage justifying pecuniary compensation.

The concept of the presumption of innocence is further developed in the **Giraudy**<sup>11</sup> case where the European Union Civil Service Tribunal ordered the Commission to pay damages for the compensation of non-material harm consisting in prejudice to the applicant’s reputation and honour caused by the publicity which followed the opening of OLAF’s investigation and suggested that he was suspected of involvement in the irregularities and fraud which were to be investigated. Article 8(2) of Regulation No. 1073/1999 defines in a broad way a confidentiality rule applicable to OLAF investigations. This rule must be interpreted as not only aiming to protect the confidentiality of information for gathering the facts, but also to safeguard the presumption

of innocence, and therefore the reputation of the officials or servants concerned with these investigations. The successful performance of an investigation may require keeping it secret towards those persons concerned by the investigation.

The case **Nikolaou**<sup>12</sup> concerns the respect of defence rights, which must be guaranteed in administrative investigations. The subject of the investigation must be communicated at an early stage and before drawing conclusions in an internal investigation OLAF must invite the persons concerned to express their views about the facts. For this principle there is the exception of imperative requirements of secrecy – it may be deferred only exceptionally in cases requiring absolute secrecy for the purposes of the investigation and requiring the use of means of investigation falling within the competence of a judicial authority. Furthermore, OLAF must take measures to ensure that no information concerning OLAF investigations is leaked, given that such a leak constitutes a violation of the personal data protection rules. In presence of serious allegations affecting the good reputation of an official, the administration must avoid the publication of any allegations which are not strictly necessary. On the one hand, the administration must avoid giving to the press information which could damage the official and, on the other hand, take all the necessary steps to prevent, within the institution, any form of divulgation of the information which could have a defamatory effect. OLAF violates the rights of defence, in particular the presumption of innocence, when confirming the veracity of certain facts which had already been exposed in the press. Even indirect information which does not refer explicitly to a specific person by name, but makes it easy to identify that person, can cause non-material damage entitling for compensation.

The trend of awarding damages for extra-contractual liability of the Community was followed by the court also in the most recent case related to OLAF – **Franchet & Byk**.<sup>13</sup> It concerned an internal investigation involving two officials who were suspected of being involved in certain irregularities in financial management. The Court of First Instance stressed that the case did not concern the question whether the facts alleged were proven or not, but the way in which OLAF conducted and concluded an investigation which referred to these officials by name and possibly attributed to them responsibility for the irregularities in public well before a final decision of the competent authority was taken. The fact that OLAF referred to them publicly as guilty of criminal offences, including through leaks to the press, is in breach of the principle of presumption of innocence, the obligation of confidentiality in investigations and the principle of sound administration. Moreover, not informing the persons concerned and the Supervisory Committee of the

handing over of the files to the national judicial authorities while at the same time not satisfying the conditions for the exception for cases requiring absolute secrecy to be maintained for the purposes of the investigation, constitutes an infringement of the rights of defence. As a result, the court held that the officials were confronted with feelings of injustice and frustration and suffered damage to their honour and professional reputation. OLAF's (and Commission's) conduct resulting in such non-pecuniary damage was capable of rendering the Community liable.

#### IV. Conclusion

As can be seen from the above mentioned judgments, OLAF investigations are subject to effective judicial control. The case law and its influence on OLAF's investigative procedures are still evolving. New questions are emerging. Is it possible to anticipate further developments? Is there a clear direction? Can we set any limits? What should be the reaction of OLAF, if any? The responses to these and similar questions perhaps might be found in the future judgments of pending cases or legislative initiatives to reform OLAF. The Commission proposal to amend Regulation (EC)

No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office aims at improving the operation of OLAF in the existing framework which proved satisfactory and functioning.<sup>14</sup> As confirmed by the European Court of Justice in the judgment in case **Commission v ECB**,<sup>15</sup> Regulation (EC) No. 1073/1999 in its original form already reflects the firm determination of the legislative authority to make any powers granted to OLAF subject to full respect for human rights and fundamental freedoms. Therefore it seems appropriate for the procedural guarantees to apply to all investigations conducted by OLAF, both internal and external. These guarantees respect the fundamental rights recognised in particular by the Charter of Fundamental Rights of the European Union, or even exceed the minimum level of protection required by the Charter. The planned new Review Adviser's function would be an additional measure which, far from being a substitute for judicial review by the Community courts, is designed to reinforce upstream control measures. However, enhanced governance, combined with the establishment of the Review Adviser, further procedural guarantees and the provisions on the flow of information between OLAF and the institutions, bodies, offices and agencies concerned, should help to strike the right balance between independence and control.

\* Opinions expressed in this article are made in a personal capacity. They do not commit the institution.

1 Judgment of the Court of 18 November 1999 in Case C-209/97 *Commission v Council* [1999] ECR I-8067.

2 Judgment of the Court of First Instance of 26 February 2002 in Case T-17/00 *Rothley and Others v European Parliament* [2002] ECR II-579 and judgment of the Court of 30 March 2004 in Case C-167/02 *Rothley and Others v Parliament* [2002] ECR I-3149.

3 Decision on the amendments to the Rules of Procedure following the Inter-institutional Agreement of 25 May 1999 on the internal investigations conducted by the European Anti-Fraud Office (OLAF), OJ C 189, 7. 7. 2000, p. 209.

4 Judgment of the Court of 10 July 2003 in Case C-11/00 *Commission v ECB* [2003] ECR I-7147.

5 Judgment of the Court of 10 July 2003 in Case C-15/00 *Commission v EIB* [2003] ECR I-7281.

6 Order of the Court of First Instance of 18 December 2003 in Case T-215/02 *Santiago Gómez-Reino v Commission* [2003] ECR II-1685.

7 Inter-institutional agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999, pp. 15–19.

8 Order of the Court of First Instance of 13 July 2004 in Case T-29/03 *Comunidad Autónoma de Andalucía v Commission* [2004] ECR II-2923.

9 Judgment of the Court of First Instance of 4 October 2006 in Case T-193/04 *Tillack v Commission* [2006] ECR II-3995.

10 Judgment of the Court of 6 April 2006 in case T-309/03 *Camós Grau v Commission* [2006] ECR II-1173.

11 Judgment of the Civil Service Tribunal of 2 May 2007 in Case F-23/05 *Jean-Louis Giraudy v Commission* not yet published in the ECR.

12 Judgment of the Court of First Instance of 12 September 2007 in Case T-259/03 *Nikolaou v Commission*, not yet published in the ECR.

13 Judgment of the Court of First Instance of 8 July 2008 in case T-48/05 *Franchet & Byk v Commission*, not yet published in the ECR. See for the judgment also the article of *White*, in this issue.

14 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), COM(2006) 244 final. Cf. the article of *Staicu*, in this issue.

15 Cf. footnote 4.

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# The Judgment of the Court of First Instance in the Case *Franchet and Byk v European Commission*

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In case T-48/05, the European Court of First Instance (CFI) ruled on an application for compensation for material and non-material damage sustained as a consequence of errors alleged to have been committed by the European Commission and OLAF in investigating the “Eurostat” case. The CFI ordered the European Commission to pay Mr. *Yves Franchet* and Mr. *Daniel Byk* the sum of 56,000 Euros and ordered the Commission to pay the costs.<sup>1</sup> The Commission decided not to appeal.

Three aspects of the ruling that are highlighted in this article relate to the presumption of innocence (I below), the right of the interested party to be informed and heard (II), and the role of the Supervisory Committee of OLAF (III).

## I. Presumption of Innocence

Respect for the presumption of innocence requires that no one will be described or treated as guilty of an offence before his guilt has been established by a court.<sup>2</sup> This principle requires that no representative of the State declares that a person is guilty of an offence before his guilt has been established by a court.<sup>3</sup> The applicants claimed that they had been named publicly as guilty of a number of criminal offences, which encouraged the belief in their guilt and prejudiced the assessment of the facts by the French court which examined the allegations, thus breaching the presumption of innocence.

The CFI noted that the ECtHR has emphasised the importance of the choice of words by agents of the State in any statement that they make before a person has been tried and found guilty of an offence.<sup>4</sup> The ECtHR has recognised that, in the light of Article 10 ECHR, which guarantees freedom of expression, Article 6(2) ECHR does not prevent the authorities from informing the public about criminal investigations in progress, but it requires that this should be done with all the discretion and circumspection necessary if the presumption of innocence is to be respected.<sup>5</sup> The principle has a corollary in the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation 1073/99.<sup>6</sup>

The CFI held that the Institutions cannot be prevented from informing the public about investigations in progress. However,

in this case, the Commission could not be regarded as having done so with the necessary discretion and reserve, striking a proper balance between the applicants’ interests and those of the institution.<sup>7</sup> In particular, the Commission breached the principle of the presumption of innocence by issuing a press release on 9 July 2003. By contrast, the CFI found that, although the Director General of OLAF had expressly referred to the applicants when he appeared before the European Parliament’s Committee on Budgetary Control (COCOBU), he cannot be considered to have breached the principle of the presumption of innocence on that occasion.<sup>8</sup> This indicates that giving information to a committee concerning an investigation is not held to breach the presumption of innocence, whilst untimely press releases might do so if they contain information that implies guilt.

## II. Right to be Informed and Heard

The applicants claimed that OLAF had breached the principle of sound administration, the *inter partes* principle, the rights of the defence and the requirement that investigations of incrimination and exonerating evidence must conform with the ECHR and the EU Charter of Fundamental Rights. The applicants also referred to Article 4 of Decision 1999/396. This article requires that an official must be informed rapidly that he may be personally implicated in an irregularity, as long as this would not be harmful to the investigation. In any event, conclusions referring by name to an official of the European Commission may not be drawn once the investigation has been completed without the interested party having been allowed to express his views on all facts which concern him.<sup>9</sup>

The CFI found that OLAF had committed a sufficiently serious breach of a rule of law<sup>10</sup> conferring rights on individuals by failing to fulfil its obligation to inform the official under investigation. The CFI also ruled that, before information is sent to a judicial authority containing conclusions referring to the concerned person by name, the applicants are entitled to be informed and heard. It does not matter whether the information takes the form of a final report or not: as long as it contains conclusions, the rule applies. OLAF has some discretion in deciding whether to defer informing the person concerned, but

no discretion with respect to the procedure to be followed once a decision to defer has been taken. This means that the agreement of the Secretary-General of the Commission should be sought before deferring.<sup>11</sup>

### III. Role of the Supervisory Committee

In accordance with Article 11(7) of Regulation 1073/99, the Director of OLAF must inform the Supervisory Committee of cases requiring information to be forwarded to the judicial authorities of a Member State. The applicants argued that this obligation was breached because the Supervisory Committee had not been informed before OLAF transmitted the information to the Luxembourg and French authorities with the consequence being an infringement of Article 11(7) of Regulation 1073/99 by OLAF. The CFI found that, by infringing Article 11(7) of Regulation 1073/99, OLAF infringed a rule of law conferring rights on individuals.<sup>12</sup> The obligation to inform the Supervisory Committee is unconditional and leaves no margin for discretion. Furthermore, the infringement is sufficiently serious.<sup>13</sup>

The CFI reasoned that the Supervisory Committee's task is to protect the rights of persons who are the subjects of OLAF investigations. The requirement to consult that Committee before forwarding information to the national judicial authorities is intended to confer rights on the persons concerned.<sup>14</sup>

The CFI has therefore interpreted the last sentence in Article 11(7) to go beyond what had it had hitherto been understood to entail in practice. In the future, the Supervisory Committee will have to be consulted before information is transmitted to

a judicial authority, rather than simply being informed at the time of the transmission. Presumably, the Supervisory Committee will be able to ask for changes to the wording of the transmission or to veto it. This gives the Supervisory Committee a review role which appears to go beyond a literal interpretation of Article 11(7) of Regulation 1073/99.

### IV. Conclusion

There is no doubt that, for OLAF in particular, this case touches a nerve. The three aspects of Case T-48/05 briefly outlined above deal with procedural safeguards, media policy, and supervision of OLAF's activities. On these three fronts, shortcomings were identified by the CFI.

Whether a claim for damages is the most appropriate context for tackling such issues is a question that can only be posed within the broader debate about the adequacy of the present legal framework and the present relationship of the European Courts of Justice with the ECHR. At present, however, a claim for damages appears to be the only way to bring EC investigation procedure issues to the fore.<sup>15</sup>

Case T-48/05 is a provocative case, in the sense that it will lead to changes of procedure and possibly to a change in the role of the OLAF Supervisory Committee in order to protect the rights of EC officials under investigation. The CFI understandably calls for clarification and codification of the investigation procedure, as the CFI and ECJ have done in the competition law field for the past forty years or more. OLAF's investigation procedure will continue to evolve, as is fitting for a body of only ten years of age.

\* Opinions expressed in this article are made in a personal capacity. They do not commit the institution.

1 Judgment of the Court of First Instance of 8 July 2008, Case T-48/05. See also eucrim 1-2/2008, p. 11.

2 Paragraph 210 of the judgment.

3 Paragraph 211.

4 Ibid.

5 Paragraph 212, citing *Alenet de Ribemont v France*, judgment of 10 February 1995, Series A no. 308, paragraphs 35 and 36.

6 Paragraph 213.

7 Paragraph 311.

8 Paragraph 229.

9 Paragraph 128, citing Order of the President of the Court of Justice in Case C-471/02 P(R) *Gomez-Reino v Commission* 2003 ECR I-3207, para 63.

10 Paragraph 95. The case-law requires that there was a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 42). As regards the determination of the requirement that the breach be sufficiently serious, the decisive test is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even exercised no discretion, the mere infringement

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of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission v Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafica and Dole Fresh Fruit Europe v Commission* [2001] ECR II-1975, paragraph 134).

11 Paragraph 146.

12 Paragraph 169.

13 Paragraph 170.

14 Paragraph 168.

15 See also *Balogová* in this issue.



# Communicating OLAF: A Major Legal Challenge

Dr. Jörg Wojahn and Dr. Alessandro Buttice\*

## I. General Framework

### 1. Introduction

The European Anti-Fraud Office (OLAF) is merely an administrative investigative service but its work extends into a particularly sensitive area: criminal justice. OLAF is to forward to the judicial authorities of the Member State concerned information obtained by the Office during internal investigations into matters liable to result in criminal proceedings.<sup>1</sup> Reports drawn up by OLAF on the basis of its investigations constitute admissible evidence in judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.<sup>2</sup>

Under these circumstances, it is obvious that OLAF's communication with the media and with the general public must be strictly based on respect for the rule of law, for the confidentiality of investigations, and for individual rights, in particular, the presumption of innocence of those persons – natural and legal – under investigation. However, any communication strategy for OLAF must also take into consideration that, as is the case with any other public institution, it has the obligation to inform the citizens on how public funds are being spent, including when these funds are assigned to an investigative service.<sup>3</sup> Striking the balance between the public's right to know and the legal obligations that restrict this right is the main legal issue for the communication strategy of any investigative body like OLAF. It is, however, even more challenging within the transnational legal context in which the Office operates.

### 2. Duty to Inform and Administrative Discretion

#### Principle of openness

OLAF is first and foremost an administrative body within the institutional framework of the European Union. The concept of openness for the European Union's administration is enshrined in the Treaty on European Union.<sup>4</sup> Openness guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.<sup>5</sup> The European

legislator has laid down concrete rules for one specific aspect of public access to information – the access to documents – in Regulation (EC) 1049/2001. From the specific perspective of OLAF's remit, the European Court of Justice puts particular emphasis on the objective of guaranteeing public access to documents relating to any irregularities in the management of financial interests, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers.<sup>6</sup>

#### Duty to inform in response to direct requests for information

On this basis, all further considerations involve distinguishing between situations where there is a direct request for information by citizens and situations where there is not. Any citizen may seek access to documents held by OLAF, including investigative reports, on the basis of Regulation (EC) 1049/2001. When there is a request for information that is not contained in documents, the *Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public*<sup>7</sup> establishes similar but less far-reaching rules of conduct for the administration.

#### Administrative discretion in the absence of direct information requests

A need to inform the public may also arise if there is no direct request for access to information. Beyond the general stipulations of openness, the Community Courts have defined a framework for OLAF's communication activities. The Civil Service Tribunal recognises that “a culture of accountability has grown up within the Community institutions, responding in particular to the concern of the public to be informed and assured that malfunctions and frauds are identified and, as appropriate, duly eliminated and punished. The consequence of that requirement is that officials and other servants who hold posts of responsibility within an administration such as the Commission must take into account the possible existence of a justified need to communicate a degree of information to the public”.<sup>8</sup>

The European Anti-Fraud Office, in particular, is called upon to respond to this “concern of the public”: unlike the situation for other parts of EU administration, for OLAF, the identification of malfunctions and frauds is its principal activity; within

all institutions, bodies, offices, and agencies established by, or on the basis of, the Treaties, OLAF is the entity responsible for administrative investigations fighting fraud, corruption, and any other illegal activity affecting the financial interests of the European Community. It is also responsible for investigating, to this end, serious matters relating to the discharge of professional duties, such as the constitution of a dereliction of the obligations of officials and other servants of the Communities.<sup>9</sup>

In spite of that, OLAF's power to communicate has been put into question by several complaints before the European Court of Justice. The Court, however, has held that OLAF indeed has the power to communicate with the public about its work as informing the public about its activities is an accessory activity to an administration's principal activity.<sup>10</sup> In view of the autonomy granted to OLAF by Regulation 1073/1999 and in view of the general objective of press releases providing information to the public, OLAF enjoys discretion as regards the appropriateness and content of its communication activities in respect of its investigatory activities.<sup>11</sup> In the context of the review of an OLAF investigation, the European Court of First Instance also recognises that, in principle, public authorities may inform the public about ongoing *criminal* investigations.<sup>12</sup> This must – *a fortiori* – be equally valid for OLAF's merely administrative investigations.

### 3. Legal Constraints on Public Information

Regardless of whether public information has to be given following a legal obligation or is imparted within the limits of administrative discretion, it is subject to legal constraints. Written legal bases explicitly take account of these constraints (e.g. Article 4 of Regulation 1049/2001). Specific constraints for OLAF's discretion in its public information activities are the following: (1) the confidentiality of its investigations, (2) the duty to protect its investigators,<sup>13</sup> (3) the presumption of innocence, (4) the respect for privacy and personal data,<sup>14</sup> and (5) the right to a good reputation and protection of legitimate commercial interests.

#### Confidentiality and professional secrecy

According to Article 287 of the Treaty establishing the European Community (TEC), the officials and other servants of the Community are required not to disclose information of the kind covered by the obligation of professional secrecy, even after their duties have ceased. More specifically, the OLAF Regulation lays down the principles of confidentiality governing the work of the Office.<sup>15</sup> The European Court of First Instance defined the limits of professional secrecy – in contrast to the public interest – such that the activities of the Community institutions take place as openly as possible.<sup>16</sup>

#### Protection of investigators

As the employing authority, OLAF has a statutory obligation to protect its staff.<sup>17</sup> The scope of this duty has been defined by the Community Courts (duty of care/*solicitude*). This encompasses the protection of OLAF's investigators from external influences and from exposure to the media.

#### Presumption of innocence

The presumption of innocence is a fundamental right laid down in Article 6 paragraph 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and Article 48 paragraph 1 of the EU Charter of Fundamental Rights. The European Court of Justice clarified that this right protects natural and legal persons affected by an OLAF investigation.<sup>18</sup>

#### Privacy and data protection

Another fundamental right to be taken into account when communicating is the right to privacy, as protected by Article 8 ECHR and Article 7 of the Charter of Fundamental Rights. Its most concrete implementation is the legislation on the protection of personal data in Regulation (EC) 45/2001. Unlike the presumption of innocence, its provisions protect only individuals but not legal persons. As far as requests for access to documents containing personal data are concerned, the Court clarified that they are not to be scrutinised under Regulation 45/2001, but under Regulation 1049/2001.<sup>19</sup>

#### Right to a good reputation and protection of legitimate commercial interests

The right to a good reputation protects natural and legal persons, regardless of whether or not they exercise a commercial activity and are damaged therein.<sup>20</sup> It also needs to be taken into account when deciding about any public communication activity.

## II. Direct Requests for Information

### 1. Requests for Access to Documents and to Information Contained therein

#### Right of access

The right of access to documents held by the administration is laid down in the Treaty establishing the European Community, whereby any citizen of the Union, and any natural or legal person residing or having their registered office in a Member State, shall have a right of access to the Institutions' documents.<sup>21</sup> Therefore, journalists seeking information from OLAF can request access to documents. They are not

required to justify their request and therefore do not have to demonstrate any interest in having access to the documents requested.<sup>22</sup> Even access to documents containing personal data falls under this Regulation, according to which, in principle, all documents of the institutions should be accessible to the public.<sup>23</sup> In terms of Article 3 of Regulation 1049/2001, “document” means any content, whatever its medium. For OLAF, this includes, in particular, all case-related content as stored in the Case Management System (CMS) and other databases.

The concept of a “document” must be distinguished from that of “information”. The public’s right of access covers only documents and not information in the wider sense of the word and therefore does not imply a duty on the part of the institutions to reply to any request for information.<sup>24</sup> Nevertheless, the right to access not only covers documents held by the institutions as such, but also information contained in these documents.<sup>25</sup> The information may only be contained within documents, which presupposes that such documents already exist.<sup>26</sup> Consequently, if anybody can ask for an entire document and obtain it, a journalist enquiring about only one specific element of information contained in an OLAF Final Case Report (e.g., the suggested follow-up) may not be treated differently (i.e., more restrictively) than a journalist seeking access to the *full* Final Case Report.

### Legal constraints

Whenever such a request for documents or information contained therein would lead to the revelation of information concerning natural or legal persons, Article 4 (1) lit. b) of Regulation 1049/2001 applies: OLAF shall refuse access to the information where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. This restriction constitutes an exception to the principle of the right to information.

The European Court of Justice, however, clarified that exceptions to that right must be interpreted and applied restrictively so as not to defeat the general principle enshrined in this Regulation.<sup>27</sup> This is particularly true for the institutions’ own staff and, consequently, for internal investigations, as the European Data Protection Supervisor emphasises:<sup>28</sup> according to him, employees in a public administration must be aware that – for several reasons – their personal data would be of public interest to a different degree to if he or she were working in the private sector. Two such interests are accountability and transparency. For these reasons, certain personal data can, in general, be disclosed without consent, provided that the disclosure is appropriate and motivated by the activities of the institution. The higher the grade of the civil servant, the more relevant this will be.<sup>29</sup>

Furthermore, OLAF will always have to take into account the exceptions of Article 4 (2) of Regulation 1049/2001, according to which it shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings, and legal advice, or for the purpose of inspections, investigations, and audits, unless there is an overriding public interest in disclosure.

## 2. Requests for information not contained in existing documents

OLAF has no obligations under Regulation 1049/2001 concerning information that is not contained in any document.<sup>30</sup> The handling of such requests follows the *Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public*,<sup>31</sup> according to which the Commission undertakes to answer enquiries in the most appropriate manner and as quickly as possible. In these cases, the general rules apply. In particular, the principle of openness and the possible need to communicate have to be taken into consideration, as openness guarantees that the administration is more accountable to the citizen in a democratic system.

OLAF first checks whether the information has already been made public before giving it out. If this is not the case, OLAF may consider that it is not in the Community interest for the information to be disclosed. In this case, OLAF should explain why it is unable to disclose the information and refer, as appropriate, to the obligation to exercise discretion as laid down in Article 17 of the Staff Regulations. The legal constraints mentioned above apply accordingly.

## III. No Direct Requests for Information

As explained above, in the absence of direct information requests, OLAF decides about the imparting of public information on the basis of its administrative discretion. OLAF has to exercise its discretion as regards the appropriateness and the content of its public information activities according to generally accepted criteria: (1) it has to act in pursuit of a clearly defined objective; (2) the action must be appropriate in order to achieve this objective; (3) the action must be proportionate.

### 1. Objectives of Public Information

In line with the existing legal framework, any communication by OLAF needs to pursue one of the following objectives:<sup>32</sup> (a) satisfaction of the citizens’ right to know (openness); (b) fraud

prevention; (c) protection of investigations, investigators, confidentiality, personal data, and other rights; (d) safeguarding the statutory operational independence of OLAF. These objectives respond as much to the rights of the citizen as to the interest of the service and to the duty of care towards staff.

### Satisfaction of the citizens' right to know (openness)

As elaborated above, OLAF, in its communication activities, must endeavour to satisfy the citizens' right to know. In a democratic society, citizens have a right to be informed and assured that malfunctions and frauds are identified. Therefore, there exists a justified need to communicate a certain degree of information to the public. Openness guarantees that the administration is more accountable to the citizen in a democratic system.<sup>33</sup>

### Fraud prevention

Successful anti-fraud activities are built not only on detection and prosecution, but also on prevention and education.<sup>34</sup> Communication about the fight against fraud and corruption contributes, firstly, to deterring possible future perpetrators, as they are shown that illegal acts do not remain without consequences. Secondly, communication raises the awareness of all citizens and makes them more vigilant towards possible illegal acts. It also encourages them to come forward with concrete information in the event of them becoming aware of an irregularity, thus facilitating the work of OLAF.

### Protection of rights

The protection of investigations, investigators, confidentiality, privacy and personal data, and other rights such as the presumption of innocence not only puts a constraint on OLAF's public communication (as discussed above), but also constitutes objectives for OLAF's public information activities.

The reason for this approach is that, in relations with the media, nothing is more harmful than silence.<sup>35</sup> It is fallacious to believe that the more restrictively official communication is handled, the better investigations, investigators, confidentiality, and personal data are protected. Anti-fraud and anti-corruption topics at the EU level are too much in the limelight of public interest<sup>36</sup> to aspire to reduce media coverage by reducing official communication. Lack of official communication instead leads to illegitimate unofficial information flows, also known as "leaks". A determined journalist will always be able to find information about OLAF's activities: sources may be the initial informant, a witness, a national law enforcement authority operating under less restrictive communication rules, or even disloyal staff who, for different reasons, objectives, or interests, may be willing to leak information (or, even worse,

confidential documents) that could damage the outcome of investigations, individual rights, and the credibility of the investigative service.

Furthermore, the scarcity of official information from OLAF promotes the spread of rumours and leaves the door open to spin and misinformation from interested parties. At this point, at the latest, OLAF will often be obliged to undertake some official communication activities in order to prevent further damage to its investigations, its investigators, or to the Office as such, as well as to protect the individuals affected by an investigation.

### Safeguarding OLAF's statutory operational independence

In its communication activities, OLAF has to safeguard its statutory operational independence.<sup>37</sup> In view of the extraordinary media interest in EU anti-fraud and anti-corruption topics, it is clear that, if OLAF does not speak for itself, others will do so instead or even on its behalf, thus putting the Office's independence in danger. Furthermore, if an investigative body such as OLAF has no possibility to publicly rectify or clarify allegations and speculation that threaten to compromise it, this would damage not only its image, but its credibility and thereby, ultimately, its independence. Finally, by raising the general awareness of OLAF's work, public communication also fosters the Office's operational effectiveness: when OLAF is widely known, the contacts of its investigators with operational partners, witnesses, and concerned persons are facilitated.

## 2. Appropriate Actions of Public Information

In general, there are two basic types of communication actions that can be undertaken: bilateral communication and public communication. Such communication can take place in writing or orally. In principle, OLAF may use bilateral as well as public communication instruments<sup>38</sup> within the limits of its discretion. However, the strain on the affected persons (natural and legal) is naturally less when the information is only given to one counterpart.<sup>39</sup> Written and oral information are equally authorised means of communication. The European Court of Justice even allows more latitude for oral communication, holding that oral statements cannot be expected to be as detailed and nuanced as written statements.<sup>40</sup>

## 3. Proportionality of Public Information

When exercising its discretion, OLAF must respect proportionality as regards the objectives pursued by the publication.<sup>41</sup> This requires, in particular, a balancing of the rights of the natural or legal person affected (as outlined above) with



countervailing public interests such as the interest in transparency about the use of community funds or that of deterring fraud by enhanced publicity. As a general rule, OLAF, like any other public authority, may inform the public about the outcome of its administrative investigations and even about ongoing investigations with all the discretion and circumspection necessary if the presumption of innocence<sup>42</sup> and other legal restrictions (confidentiality, data protection) are respected.

One of the key questions is whether OLAF is allowed to publish information that would allow the identification of a person concerned by an investigation. It is obvious that OLAF may publish information that is anonymous. For information to be considered anonymous, it is sufficient that the individual concerned cannot be identified by the ordinary public. The publication does not constitute a violation of OLAF's discretion if only some expert observers with knowledge of the case are able to identify the individual.<sup>43</sup> If information is duly made anonymous in the way described above, no issue of data protection or violation of other subjective rights such as privacy can possibly arise.

In exceptional cases, however, the person in question may also be identified: the European Court of Justice<sup>44</sup> holds that “*exceptionally, and in particular where there is a serious malfunction affecting the lawfulness and regularity of revenue and expenditure or sound financial management*”, the “*matters found*” may be “*fully*” reported, “*thereby giving the names of third parties directly involved.*” According to the Court “[i]t must be accepted [...] that there may be specific circumstances, which may be due to the seriousness of the facts or the risk of confusion liable to harm the interests of third parties”, where it “*is allowed to mention by name in its reports persons [...], subject to the condition that such persons are entitled to a right to a hearing*”.

In several typical situations, the names of persons concerned by an OLAF investigation are already in the public domain: When the names of persons concerned by an OLAF case appear in the published rulings of the Community courts, OLAF may publicly quote these names in the same context. The same goes for names appearing in documents published by the European Ombudsman and names appearing in documents published by the European Data Protection Supervisor. Furthermore, OLAF may publicly quote names appearing in decisions, reports, legislative acts, or other documents published by the other institutions when they are related to an OLAF case.

As mentioned above, OLAF may not, in principle, publicly quote any personal data contained in rulings delivered by national courts. However, when an action is brought against an OLAF activity as such before non-Community courts or where

such an action is brought that implicitly requires the scrutiny of an OLAF activity, OLAF may publicly refer to this action and to the decisions delivered in its course.<sup>45</sup>

The question of how to deal with information that allows the identification of natural persons is particularly delicate when this information is already in the public domain.<sup>46</sup>

- If there is correct information in the public domain, the European Court of First Instance holds that OLAF should not make any declaration on this information, as any such declaration would confirm the information and thereby change its nature from “unconfirmed” to “confirmed”.

- If there is erroneous or false information in the public sphere concerning a person affected by an investigation, OLAF is, in principle, barred from publishing any correction if the correction could, in any way, lead to the identification of that person. The European Court of First Instance argues that any correction of wrong information implicitly contains the confirmation of the remaining information.

- If there is erroneous or false information in the public sphere, in particular in the media, connecting a person to an OLAF case whilst, in reality, that person is not affected by an OLAF case, OLAF is, according to the Court, barred from publishing any correction if the correction could, in any way, lead to the identification of that person. The reason is that such corrections would create the justified expectation by the public that OLAF always corrects false information in circulation. This would imply that whenever OLAF does *not* publish any correction, the information is correct: thus, OLAF, by remaining silent, would implicitly identify persons concerned by investigations. In consequence, OLAF may not publicly clear anybody's name on its own initiative.

#### IV. Conclusion

As can be seen from this analysis, OLAF's public information activities are subject to a broad range of constraints that go well beyond the normal legal constraints on the EU institutions' communication activities. However, OLAF is subject to a duty to inform the public and must weigh this obligation against the existing restrictions.

Whilst this article has concentrated on the legal scope for legitimate official communication by OLAF, it has not discussed any aspects of illegitimate communication.<sup>47</sup> Even in a service such as OLAF, determined third parties can find disloyal individuals who are willing to leak information. Such leaks can severely damage the outcome of investigations, individual rights, and the credibility of the investigative service itself. It is for these reasons that the leaking of documents and other information can never be a tool of communication.<sup>48</sup>

\* Opinions expressed in this article are made in a personal capacity. They do not commit the institution.

1 Article 10 (2) Regulation (EC) 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999, L 136, p. 1.

2 Article 9 (2) Regulation 1073/1999.

3 See also *Alessandro Butticié*, "What anti-fraud information and communication policy for OLAF?" in: OLAF (ed.), *Deterring Fraud by Informing the Public*, 2nd edition, Luxembourg 2006, pp. 35-51.

4 Article 1, 2nd subparagraph TEU.

5 Recital 2 of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145, p. 43.

6 European Court of First Instance (CFI), joined cases T-391/03 and T-70/04 (Franchet & Byk), paragraph 112. For the judgment see also the articles of White and Balogova, in this issue.

7 Commission Decision of 17 October 2000 amending its Rules of Procedure (2000/633/EC, ECSC, Euratom), OJ 2000, L 267, p. 63.

8 Civil Service Tribunal, case F-23/05 (Giraudy), paragraph 165; see also eucrim 1-2/2007, p. 13.

9 Article 1 paragraph 3 Regulation 1073/1999.

10 CFI, case T-259/03 (Nikolaou), paragraph 218.

11 CFI, case T-193/04 (Tillack), paragraph 129.

12 CFI T-48/05 (Franchet & Byk), paragraph 212, with reference to the judgement of the European Court of Human Rights in *Allenet de Ribémont v. France*, 10.2.1995, Application no. 15175/89, paragraph 38: "*Article 6 paragraph. 2 ECHR cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.*"

13 Article 24 Regulation no. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 1962, P 45, p. 1385 (as amended by Regulation (EEC, Euratom, ECSC) No. 259/68 of the Council of 29 February 1968, OJ 1968, L 56, p. 1)

14 Article 1 Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001, L 8, p. 1.

15 Article 8 Regulation 1073/1999.

16 CFI, Case T-198/03 (Bank Austria Creditanstalt), paragraph 71.

17 Article 24 Regulation no. 31 (EEC), 11 (EAEC), *op. cit.*

18 CFI T-48/05 (Franchet & Byk), paragraph 210; T-193/04 (Tillack), paragraph 121; for legal persons under competition law see: Court of First Instance Case T-279/02 (Degussa AG), paragraph 115.

19 CFI T-194/04 (Bavarian Lager), paragraph 100.

20 CFI T-15/02 (BASF) paragraph 604.

21 Article 255(1) TEC; Article 2(1) Regulation 1049/2001.

22 Article 6(1) of Regulation 1049/2001: CFI, joined cases T-391/03 and T-70/04 (Franchet & Byk), paragraph 82; case T-194/04 (Bavarian Lager), paragraph 92.

23 CFI T-194/04 (Bavarian Lager), paragraphs 100 and 107.

24 CFI, case T-264/04 (WWF), paragraph 76.

25 European Court of Justice (ECJ), case C-353/99P (Hautala), paragraph 23.

26 CFI, case T-264704 (WWF), paragraph 76.

27 ECJ, case C-353/99P (Hautala), paragraphs 25-31; Joined Cases C-174/98 P and C-189/98 P (Netherlands and van der Wal), paragraph 27; CFI case T-194/04 (Bavarian Lager) paragraph 94; T-211/00 (Kuije) paragraph 55; Joined Cases T-391/03 and T-70/04 (Franchet & Byk), paragraph 84.

28 European Data Protection Supervisor (EDPS): "Public access to documents and data protection", Background Paper Series, July 2005, no.1, chapter 4.3.3, see: [http://edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07\\_BP\\_accesstodocuments\\_EN.pdf](http://edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07_BP_accesstodocuments_EN.pdf).

29 EDPS, *op. cit.*, p. 37

30 CFI, case T-264704 (WWF), paragraph 76.

31 Commission Decision of 17 October 2000 amending its Rules of Procedure (2000/633/EC, ECSC, Euratom), OJ 2000, L 267, p. 63.

32 see also *Alessandro Butticié*, *op. cit.*

33 See Civil Service Tribunal, case F-23/05 (Giraudy), paragraph 165, and Recital 2 of Regulation 1049/2001.

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34 On the importance of involving "civil society" in the fight against corruption and fraud, see Article 13 of the UN Convention against Corruption to which the European Commission is a party; for a broader overview on this issue, see OLAF (ed.), *Deterring Fraud by Informing the Public*, 2nd edition, Luxembourg 2006.

35 see also *Alessandro Butticié*, *op. cit.*, p. 42.

36 The collective resignation of the Santer Commission in 1999 has been the ultimate starting point for continuous and intensive world-wide media coverage of all topics related to irregularities at EU level.

37 See Article 3 of Commission Decision establishing (OLAF), OJ 1999, L 136, p. 20; recital 17 of Regulation 1073/1999. See also CFI, case T-193/04 (Tillack), paragraph 129.

38 The European Court of Justice does not differentiate between these instruments when scrutinising communication activities, see case T-193/04 (Tillack), paragraphs 130-136.

39 See European Data Protection Supervisor (EDPS), "Public access to documents and data protection", *op. cit.*, chapter 6, p. 57.

40 In case F-23/05 (Giraudy), paragraph 181, the Civil Service Tribunal makes no differentiation as to the legality of oral statements in contrast to written ones. By applying more "lenient" criteria to oral communication than to written communication, the Court implicitly clarifies that oral and written communication are equally acceptable.

41 See ECJ, case C-315/99 P (Ismeri v. Court of Auditors), paragraphs 28-29.

42 ee CFI, case T-48/05 (Franchet & Byk), paragraphs 212 and 311

43 CFI, case T-193/04 (Tillack), paragraph 131: "*Even supposing that those with knowledge of the case could make the connection with the applicant, those allegations, formulated in a hypothetical way, without indicating the applicant's name or the name of the magazine for which he worked, do not constitute a manifest and grave disregard, by OLAF, of the limits of its discretion.*"

44 ECJ, case C-315/99 P (Ismeri v. Court of Auditors), paragraphs 39-41, where the Court lays down these standards for the European Court of Auditors. These considerations must – *a fortiori* – be valid for an administrative investigative body such as the European Anti-Fraud Office.

45 This follows from the judgement of the CFI in case T-193/04 (Tillack), paragraph 80, according to which, under certain circumstances, scrutiny of OLAF activities has to be sought first with the national judiciary.

46 For the following, see Court of First Instance, case T-259/03 (Nikolaou), paragraphs 187 and 183.

47 Some of the Court rulings quoted in this article also address this aspect, see: T-48/05 (Franchet & Byk), paragraph 181 et seqq; T-259/03 (Nikolaou), paragraph 140 et seqq.

48 See also *Alessandro Butticié*, "Building mutual trust between anti-fraud services and journalists", in: OLAF (ed.), *Deterring Fraud by Informing the Public*, 2nd edition, Luxembourg 2006, pp. 52-59.

# Réussites et Défis de l'Office Européen de Lutte Antifraude

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The article addresses the successes and deficiencies of OLAF. The European Commission created OLAF in 1999. In ten years, the Office was able to establish itself as a truly independent investigation service at the disposal of the European Institutions and the Member States with the objective of protecting the financial interests of the European Union. The challenge of creating an efficient, independent investigation service was taken up. At every moment, it has been a fight which has to continue in the future by improving the functioning of the Office and by unceasingly adapting it to the new realities of the European integration.

## I. Propos introductif

Par décision du 28 avril 1999,<sup>1</sup> la Commission européenne a créé l'Office Européen de Lutte Antifraude (OLAF) qui a remplacé la task-force «Coordination de la lutte antifraude» (ci-après la task-force). L'OLAF a conservé les attributions exercées jusque-là par la task-force, à savoir conduire des enquêtes administratives. L'Office s'est vu confier des missions nouvelles: conduire des enquêtes en toute indépendance, effectuer des enquêtes relatives au comportement des fonctionnaires ou agents des Institutions, organes ou organismes communautaires susceptibles de poursuites disciplinaires ou pénales, et être l'interlocuteur direct des autorités judiciaires. La Commission européenne a ainsi esquissé les contours nouveaux du service d'enquête des Institutions. Si la Commission a pris la décision de couper – au moins partiellement – le cordon ombilical avec son service d'enquête, cela s'est fait dans l'urgence liée aux nécessités de l'époque. Il manquait en effet à la task-force l'indépendance, une véritable compétence en matière d'enquête interne, et enfin la liaison directe avec les autorités judiciaires des Etats membres. En se focalisant volontairement sur certains aspects du travail de l'Office, cet article laissera dans l'ombre une partie de l'activité de l'OLAF notamment dans les secteurs traditionnels (douanes, agriculture etc.).

Il convient d'analyser tout d'abord ce qu'est l'OLAF aujourd'hui, afin de savoir si le saut qualitatif a été réel et effectif. D'autre part, au bout de dix années de fonctionnement, il convient de s'interroger sur les défis à venir. L'OLAF n'est pas un aboutissement en soi mais un service toujours en devenir.

## II. Qu'est-ce que l'OLAF aujourd'hui?

C'est tout d'abord un service chargé d'effectuer au sein des Institutions européennes, organes ou organismes financés par le budget communautaire, des enquêtes administratives dites

externes relatives à des opérateurs économiques bénéficiaires de fonds européens.<sup>2</sup> En cela l'Office a conservé les compétences de la task-force qui avait elle-même succédé à l'Unité de Coordination de la Lutte Antifraude (UCLAF).

C'est aussi un service chargé d'effectuer des enquêtes administratives dites internes au sein des Institutions, organes ou organismes de l'Union.<sup>3</sup> Chaque Institution, organe ou organisme a expressément confié à OLAF le soin de conduire des enquêtes internes en son sein sur la base de l'accord interinstitutionnel du 25/05/1999.<sup>4</sup>

Toutes les enquêtes sont conduites par l'Office en toute indépendance. Le Directeur<sup>5</sup> dans l'exercice de ses compétences ne sollicite ni n'accepte d'instructions de la Commission, d'aucun gouvernement ni d'aucune autre Institution, organe ou organisme.<sup>6</sup> Le Directeur exerce, à l'égard du personnel de l'Office, les pouvoirs dévolus par le statut des fonctionnaires des Communautés européennes à l'autorité investie du pouvoir de nomination (AIPN) et par le régime applicable aux autres agents de ces communautés à l'autorité habilitée à conclure des contrats d'engagements.<sup>7</sup> Le Directeur de l'OLAF choisit et recrute son personnel.

L'OLAF dispose pour conduire ses enquêtes d'un personnel composé de fonctionnaires des Institutions, d'agents temporaires ou d'experts nationaux détachés. Ce personnel tire son indépendance dans la conduite des enquêtes de la propre indépendance du Directeur et du lien hiérarchique qu'il a avec lui. Le Directeur ouvre, conduit et clôture en toute indépendance les enquêtes dans les domaines de compétence de l'Office. Cette notion d'indépendance dans la fonction d'enquête est essentielle. Elle est «confortée» par un Comité de Surveillance composé de cinq personnes extérieures aux Institutions, indépendantes et qualifiées. Ce Comité assure un contrôle régulier de l'exécution de la fonction d'enquête de l'Office en vue de conforter l'indépendance de l'OLAF. Il s'agit d'éviter de

la part des Institutions toute atteinte à la liberté de décision du Directeur. Si la crise de 2003 liée à la gestion de l'affaire Eurostat<sup>8</sup> a pu exacerber les tensions entre la Commission européenne et l'Office, jamais cependant la Commission n'a voulu rayer d'un trait de plume ce qu'elle avait décidé en 1999 et mettre ainsi à mal l'indépendance de l'OLAF dans sa fonction d'enquête.

Sans doute est-il difficile de créer un service d'enquête performant et efficace au sein des Institutions et des Etats membres compte tenu des différentes normes juridiques applicables dans les vingt-sept pays, mais aussi en raison de la diversité des cultures d'enquêtes ou encore de la barrière des langues. Il ne fait pourtant aucun doute que l'OLAF est aujourd'hui un véritable service d'enquête indépendant avec des finalités administratives (en vue d'améliorer l'étanchéité à la fraude), financières (en vue de permettre aux Institutions de récupérer les sommes indument payées ou détournées), disciplinaires ou pénales.

Si les finalités administratives, financières et disciplinaires se conçoivent aisément, une finalité pénale pour un organe chargé d'effectuer des enquêtes administratives peut surprendre. Et pourtant le législateur communautaire l'a expressément prévue au Règlement n° 1073/99.<sup>9</sup> D'autre part l'OLAF est l'interlocuteur direct des autorités policières et judiciaires<sup>10</sup> dans les Etats membres.

Si à l'époque de l'UCLAF, les transmissions destinées aux autorités judiciaires des Etats membres devaient se faire par le canal du Secrétariat Général de la Commission européenne, depuis le 1er juin 1999, le Directeur de l'Office peut transmettre de sa propre autorité des informations sur des faits susceptibles de recevoir une qualification pénale à une autorité judiciaire nationale, que ce soit dans le cadre des enquêtes internes ou externes. D'autre part, après la rédaction du rapport final d'enquête externe, l'OLAF transmet ce rapport à l'autorité compétente de l'Etat membre concerné. Quand il s'agit d'une enquête interne, l'Office adresse le rapport final à l'Institution avec ses recommandations de suivi disciplinaire et/ou pénal.

Au fil du temps, l'OLAF est devenu un véritable interlocuteur des autorités judiciaires nationales. Compte tenu de la faiblesse de ses moyens d'enquête (l'Office ne dispose d'aucun pouvoir de coercition), l'OLAF a eu naturellement recours à ces autorités nationales, sans pour autant perdre sa compétence propre qui est de lutter contre la fraude aux intérêts financiers de la Communauté. L'Office en s'adressant à une autorité judiciaire nationale en vue de conduire une enquête en vertu des règles légales nationales ne se dessaisit jamais de sa propre compétence qui est de conduire et de conclure son enquête avec une finalité administrative et surtout financière. Pour mener à bien

le suivi pénal, l'Office a su s'entourer de collaborateurs qui ont une excellente connaissance des rouages judiciaires des Etats membres et qui assurent la liaison entre ces autorités judiciaires et les enquêteurs de l'Office. Cette expertise doit être conservée et sans cesse approfondie.

À ce jour, l'OLAF est réellement un service d'enquête indépendant qui conduit de sa propre initiative des enquêtes internes aux Institutions, organes ou organismes mais aussi externes, et qui peut aussi transmettre des informations aux autorités judiciaires nationales. L'OLAF a su réellement mettre en œuvre les compétences nouvelles qui lui avaient été confiées par le législateur communautaire en 1999.

### III. Les défis de l'avenir

Il convient maintenant de s'attacher à explorer quels pourraient être les défis de l'OLAF dans le futur. En effet, si l'OLAF a su prouver qu'il était un service d'enquête indépendant indispensable, force est de reconnaître qu'il ne dispose que de moyens limités qui doivent donc être utilisés à bon escient.

La question des moyens consacrés à l'activité d'enquête est un défi permanent posé à l'OLAF depuis sa création. Un peu moins de deux cents enquêteurs sont affectés aux objectifs d'enquête dévolus à l'Office. Compte tenu de la rigueur budgétaire actuelle, il y a peu de renforts à attendre dans les années à venir. De ce fait, l'Office ne pourra compter que sur ses propres forces vives et sa direction devra s'attacher à définir des politiques d'ouvertures d'enquêtes qui soient réellement compatibles avec ses moyens humains. Sans doute faudra-t-il essayer de définir – de manière empirique mais sans dogmatisme – des seuils et des critères d'ouvertures qui devront permettre à l'Office de se concentrer sur les enquêtes (internes et externes) les plus complexes et sur celles dans lesquelles l'OLAF est seul susceptible d'apporter la plus grande valeur ajoutée.

Un autre défi que l'Office devra affronter est la formation de son personnel. En effet, si l'OLAF veut être et rester un grand service d'enquête dans lequel son personnel partage les valeurs communes que sont le professionnalisme, l'éthique et l'intégrité, il lui appartient d'offrir à toutes les personnes recrutées, une formation qui permette à ces nouveaux agents de «se fondre dans le moule» et d'acquérir ainsi une culture de service unique. Une intégration «assistée» en douceur des nouveaux arrivants paraît indispensable.

L'Office devrait aussi être amené à lancer, dans un avenir proche, une réflexion sur la création d'un corps de règles de procédure. En effet, le cadre légal qui sous-tend le travail des en-



quêteurs est relativement ténue. Si un Manuel permet de guider les enquêteurs dans les différentes phases des investigations, il apparaît de plus en plus clair que ce document devrait être basé sur un véritable code de procédure. C'est d'ailleurs ce que le Parlement européen a appelé récemment de ses vœux en adoptant une proposition de réforme du Règlement n° 1073/99<sup>11</sup> – réforme toujours en débat entre les Institutions.

Si l'indépendance de la fonction d'enquête de l'Office n'a pas été mise en danger au cours de ses dix premières années d'existence, il s'agit d'un défi permanent et il faudra s'assurer que cette situation perdure. Un point clef de cette indépendance se trouve dans la transmission d'informations aux autorités judiciaires des Etats membres et le suivi donné par ces autorités nationales. Certes, chaque pays membre dispose de son propre cadre légal (code pénal et code de procédure), mais chaque pays membre doit offrir une protection équivalente aux intérêts financiers des Communautés à celle qu'il accorde à la protection de ses propres intérêts financiers. Si cette affirmation existe,<sup>12</sup> il convient néanmoins de la rappeler sans cesse aux autorités nationales. Les politiques pénales des Etats membres ont malheureusement souvent des objectifs qui n'englobent pas forcément ni naturellement la protection des intérêts financiers des Communautés. Il appartient donc à l'OLAF d'être présent sur le terrain, au contact de ces autorités nationales et notamment judiciaires afin de leur rappeler leurs obligations et d'offrir, si nécessaire, la collaboration des services de la Commission.

Un autre défi, plus lointain peut-être, viendra en cas de ratification du Traité de Lisbonne, de la possible création d'un Parquet européen pour la protection des intérêts financiers communau-

taires.<sup>13</sup> Cette création qui est envisagée par le Traité pourra se faire – en cas d'absence d'unanimité – si au moins neuf Etats membres le décident ainsi, à partir d'Eurojust. OLAF entretient déjà des rapports réguliers avec Eurojust. Certes les objectifs des deux services ne sont pas identiques, les compétences d'Eurojust étant plus larges que celles de l'OLAF. Mais si le Parquet européen voit le jour, il conviendra de ne pas perdre de vue les compétences spécifiques engrangées par l'OLAF pendant de longues années. Dans tous les cas de figure, il sera toujours nécessaire de faire appel à des spécialistes rompus aux techniques d'enquête au sein des Institutions communautaires. Dans ce contexte l'Office – sans doute redessiné, peut-être fusionné avec Europol – sera un interlocuteur incontournable car disposant seul d'une véritable expertise.

#### IV. Conclusion

L'OLAF créé il y a dix ans n'est pas encore un service d'enquête aussi «abouti» que ceux qui existent dans les Etats membres, et, à l'image de la construction européenne, il doit encore s'adapter, se transformer. C'est une exigence de tous les jours.

Si la création d'un Parquet européen n'est ni pour demain, ni pour après demain, en attendant il ne faut pas perdre de vue cette perspective et d'ores et déjà permettre à l'OLAF d'être prêt. Qualitativement, ce dernier défi sera sans aucun doute le plus complexe à relever, mais il ne pourra se réaliser que si l'OLAF est en mesure de conserver son indépendance et de gagner la confiance des autorités judiciaires des Etats membres avec l'aide d'un personnel à la hauteur des enjeux.



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\* Les opinions exprimées sont personnelles à l'auteur et n'engagent pas l'institution pour laquelle il travaille.

1 JOCE L 136 du 31/05/1999.

2 Règlement n° 1073/99 du 25/05/1999 – JOCE L 136 du 31/05/1999 art. 1.1.

3 Règlement n° 1073/99 du 25/05/1999 – JOCE L 136 du 31/05/1999 art. 1.3.

4 JOCE L 136 du 31/05/1999.

5 Le mot «directeur» est le terme consacré par le Règlement n°1073/99 pour

désigner le responsable de l'Office. Il a en réalité rang de Directeur Général au même titre que les autres responsables des Directions Générales de la Commission européenne.

6 Règlement n° 1073/99 du 25/05/1999 – JOCE L 136 du 31/05/1999 art. 12.3.

7 Décision de la Commission n° 1999/352/CE du 28/04/1999 art. 6.1.

8 Entre 2000 et 2003, OLAF a conduit plusieurs enquêtes internes et externes concernant la gestion de fonds communautaires par la DG ESTAT à Luxembourg. Certains aspects confidentiels relatifs à ces enquêtes ont été divulgués par la presse courant 2003 et ont entraîné une importante pression des Parlementaires européens sur la Commission. L'OLAF s'est de ce fait également trouvé en difficulté en raison de cette situation.

9 Règlement n° 1073/99 du 25/05/1999 – JOCE L 136 du 31/05/1999 art. 9 et art. 10.

10 Décision de la Commission n° 1999/352/CE du 28/04/1999 art. 2.6.

11 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0394+0+DOC+PDF+V0//FR&language=FR>. Voir article 15 bis page 68.

12 Article 280 al. 2 du Traité instituant la Communauté Européenne.

13 Voir si ratification article 86 du TFUE.

# The Possible Legal Position of OLAF with Regard to the Polish Criminal Procedure

Dr. Małgorzata Wąsek-Wiaderek

## I. Introductory Remarks

The protection of the European Union's financial interests by means of criminal law requires close cooperation and the exchange of information between European institutions and national authorities. As transpires from Article 280 para. 2 of the EC Treaty, Member States are responsible for combating fraud and other offences against the financial interests of the Community. The national investigating authorities and criminal courts are to ensure that EU funds are protected in the same way as national public finances. While executing this task, they should take advantage of any support provided by OLAF, in particular in the form of credible evidence gathered in the course of OLAF's investigating activities. So far, OLAF does not have the right to conduct criminal investigations. Pursuant to the provisions of Regulation (EC) No. 1073/1999,<sup>1</sup> internal and external investigations conducted by OLAF are of an administrative character.<sup>2</sup> Also, other laws regulating OLAF's investigative powers do not contain rules on its position in criminal proceedings. The only provisions concerning the interaction between OLAF and national authorities conducting criminal investigations are as follows:

Pursuant to recital 6 of the Commission's Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF),<sup>3</sup> the "responsibility of the Office should involve, over and above the protection of financial interests, all the activities linked with the protection of Community interests from irregular acts likely to lead to administrative or penal proceedings".

Article 6 para. 6 of Regulation 1073/1999 constitutes that national authorities, in conformity with their national provisions, shall give the necessary support to enable OLAF's employees to fulfil their task. Furthermore, Article 9 para. 2 of the aforementioned Regulation provides that investigation reports "shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules

as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports".<sup>4</sup>

The proposal for a reform of Regulation 1073/1999 contains provisions strengthening the cooperation of OLAF with the Member States' judicial authorities with respect to actions taken upon OLAF's reports. It provides, *inter alia*, that the "competent authorities of the Member States concerned shall, in so far as is not incompatible with national law, inform the Director General of the Office of the action taken as a result of the investigation reports sent to them".<sup>5</sup> However, the reform also will not change the current position of OLAF in national criminal proceedings.

## II. The Role of OLAF in the Initiation of Criminal Proceedings

In Poland, institutions provided with investigative powers are bound by the principle of legality, which requires the police and other investigating authorities to initiate the investigation *ex officio* once there is an initial suspicion of a crime. All investigations are undertaken in concert with or under the supervision of the State Prosecution Authority. Regarding offences against the EU's financial interests, various investigating authorities are empowered to initiate criminal proceedings, depending on the respective area of crime. In case of EU fraud, this power lies within the competence of the police. In the field of combating corruption in state and local self-government institutions, investigating powers are located within the Central Anticorruption Bureau established in 2006 (hereinafter "CBA").<sup>6</sup> The CBA is a specialised State service with police powers. It is supervised by the Prime Minister who appoints the head of the CBA. The CBA is competent to carry out investigations against various groups of offences<sup>7</sup> if committed in connection with any form of corruption or causing considerable damage to entities, both governmental or non-governmental, administering public finances. Pursuant to Article 5 para. 1(2) of the Act on public finances, EU funds are recognised as public

finances. Thus, the Bureau has investigating powers with reference to offences causing considerable damage<sup>8</sup> to all entities governing EU funds.

In other areas of financial irregularities, several offences against the EU's financial interests are regulated in the Code of Fiscal Offences.<sup>9</sup> An important role of law enforcement in this regard is played by the fiscal investigating agencies. This was also the reason behind the idea of locating the Polish partner of OLAF, i.e., the Polish AFCOS (Anti-Fraud Coordination Service) within the Ministry of Finance, i.e., the Ministry supervising fiscal agencies. Until the end of 2005, the role of AFCOS was carried out by the Bureau for International Treasury Relations in the Ministry of Finance. In January 2006, the competence of AFCOS was transferred to the Fiscal Control Department I. Currently the role of AFCOS is fulfilled by the Department for Protection of EU Financial Interests.<sup>10</sup>

Reports of OLAF concerning irregularities in spending of EU funds or on other offences constitute sufficient information to allow for the initiation of criminal investigations. As practice shows, reports prepared by OLAF usually prompt the initiation of criminal investigations.<sup>11</sup> If there is doubt as to the level of "suspicion", investigating authorities may initiate the so-called "explanatory proceedings" under Article 307 of the Code of Criminal Procedure (hereinafter "CCP"). Explanatory proceedings are conducted prior to the official initiation of investigations, and their aim is to verify the existence of the suspected offence. They should last no longer than 30 days from the date of obtaining information about an offence. Within this time limit, investigation authorities should initiate the investigations or take a decision not to initiate them.

There are no specific provisions existing either in the CCP or in the Code of Fiscal Offences regulating the legal position of OLAF in the criminal proceedings initiated upon OLAF's report. However, within the present legal framework, one can argue that, in such cases, OLAF may be considered as "an institution which submitted information about an offence" within the meaning of Article 305 para. 4 of the CCP. This provision indicates only state, local self-government and non-governmental institutions to be entities which – in case notice about an offence is submitted – should be informed about the initiation of criminal proceedings or a refusal to initiate them. However, taking into consideration the fact that, as a rule, all persons and entities (domestic or foreign) are allowed to notify investigating authorities of an offence, OLAF should also be considered to be an institution exercising the rights provided for in the CCP, which are conferred to institutions notifying an offence. Thus, within 6 weeks of submitting the information, OLAF is to be informed about the initiation of criminal investigations or about a decision not to initiate them. If no informa-

tion is submitted by the investigating authority, OLAF may appeal to the superior public prosecutor on the grounds of a lack of activity. Moreover, as an institution notifying an offence, OLAF should have the right to appeal against the decision not to initiate investigations, as provided for by Article 306 para. 1 of the CCP. In practice, the above-mentioned procedural rights are not used directly by OLAF since it acts through its Polish partners – AFCOS,<sup>12</sup> GAFU<sup>13</sup> or the Polish member of Eurojust.<sup>14</sup> In the majority of criminal cases concerning offences against the EU's financial interests, criminal proceedings are initiated upon information submitted by national agencies administering EU structural funds.<sup>15</sup>

### III. OLAF Officials as Witnesses in Criminal Proceedings

OLAF's report may be attached to the case file in the pre-trial stage of the proceedings. If the report has not been prepared in the Polish language, it must be translated into Polish (pursuant to Article 204 para. 2 of the CCP). Another question is whether OLAF's officials are entitled to be called as witnesses in the proceedings. According to Article 196 of the CCP, a person who is directly involved or is a witness in the case cannot be appointed as an expert witness. Therefore, in proceedings initiated upon OLAF's report, its officials cannot be appointed as expert witnesses. However, there are no procedural obstacles to allowing the hearing of OLAF officials as witnesses in criminal cases in general.<sup>16</sup>

Pursuant to Article 12 of the Protocol on the privileges and immunities of the European Communities, OLAF officials are immune from legal proceedings in respect of acts performed by them in their official capacity, including both the spoken and written word.<sup>17</sup> Thus, OLAF officials are treated as persons who are not obliged to testify as witnesses but may testify voluntarily. As prescribed in Article 581 para. 1 of the CCP, persons protected by immunities may be heard as witnesses in criminal proceedings only upon their consent. No procedural measures aimed at forcing a witness to testify (such as imposition of a fine or arrest) can be applied to them. Because of immunity from legal proceedings, OLAF's officials appointed as witnesses in criminal cases cannot be prosecuted for submitting false testimony without prior waiver of such immunity by OLAF. In practice, such a waiver should be granted in each case in which the Communities' interests require it.<sup>18</sup>

### IV. OLAF's Report as Admissible Evidence in Criminal Cases

OLAF's report may be read out during the hearing pursuant to Article 393 para. 1 of the CCP. In accordance with this Article,

the court may read out records of various procedural activities (such as inspections, searches, retaining objects) as well as “all official documents gathered during the pre-trial proceedings, judicial proceedings or other proceedings conducted in accordance with the law” at the hearing. The CCP does not contain a definition of the term “official document”.<sup>19</sup> However, it is a commonly accepted view that the court may read out all documents gathered in judicial proceedings (criminal, civil, or administrative), collected during the pre-trial stage of the proceedings (both in the respective case or in other cases), or obtained in the course of other legal proceedings (e.g. in taxation proceedings or administrative proceedings).<sup>20</sup> There is no doubt that a report submitted by OLAF is an official document obtained in the course of legal proceedings (although not on the basis of a national legislative act [“ustawa”], but pursuant to the directly applicable Regulation 1073/1999). The conditions for the admissibility of these reports are that they must be drawn up taking into account the “procedural requirements laid down in the national law of the Member State concerned”, as required by Article 9 para. 2 of Regulation 1073/1999, and that they must be a result of investigations conducted in accordance with the rules regulating OLAF’s investigating activities.<sup>21</sup>

There is only one obstacle regarding the reading out of a report submitted by OLAF at the hearing. Pursuant to Article 174 of the CCP, the statements of the accused or the testimony of the witnesses are not to be substituted in criminal proceedings by means of the content of documents and notes. Because of this procedural ban, these parts of OLAF’s reports, which refer directly to information obtained from witnesses, cannot be used as evidence at the hearing because priority should be given to the direct hearing of these witnesses by the Polish criminal court. However, in the majority of cases, OLAF’s reports contain economic analyses of the issue, based on written documents. After reading them out at the hearing, there are no obstacles to considering them as evidence. Consequently,

OLAF’s reports, disclosed as evidence at the main trial, may form the basis for the court’s judgment.<sup>22</sup> Like other pieces of evidence, OLAF’s reports shall be assessed by the criminal court in accordance with the principle of free evaluation of evidence (Article 7 of the CCP).

## V. Conclusions

In conclusion, the Polish Code of Criminal Procedure provides OLAF with certain, but limited, opportunities to influence the conduct of criminal proceedings concerning offences against the EU’s financial interests. In particular, as required by Article 9 para. 2 of Regulation 1073/1999, OLAF’s reports may constitute admissible evidence in criminal proceedings in Poland in the same way and under the same conditions as administrative reports drawn up by national administrative authorities.

*De lege lata* even in criminal cases concerning offences against the EU’s financial interests, OLAF does not have the status of an injured party. As the institution notifying an offence, it may only contest a decision not to initiate criminal proceedings or take action due to a lack of response of the investigating authorities concerning the information about an offence (see above). Consequently, it cannot make use of extensive procedural rights provided for parties during the entire course of criminal proceedings. *De lege ferenda*, it would be reasonable to provide OLAF with the same procedural competences as are currently granted to the agencies of state control under Article 49 para. 4 of the CCP. Pursuant to this provision, in cases concerning offences that have caused damage to the property of a public, local self-government or a social institution and in which the injured institution fails to act, the rights of the injured party may be exercised by those agencies of state control that, within the framework of their activities, have brought the offence to light or have requested the initiation of criminal proceedings.

1 Regulation No. 1073/1999 of the European Parliament and the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999, p. 1.

2 See S. Gleß, Das Europäische Amt für Betrugsbekämpfung (OLAF), Europäische Zeitschrift für Wirtschaftsrecht 1999, p. 620; H. Satzger, Internationales und Europäisches Strafrecht, Baden-Baden 2005, p. 136; B. Hecker, Europäisches Strafrecht, Berlin, Heidelberg 2007, p. 131; A. Gruszczak, A. Grzelak, OLAF i ochrona interesów finansowych Wspólnot Europejskich, in: Obszar wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Geneza, stan i perspektywy rozwoju, ed. F. Jasiński, K. Smoter, Warszawa 2005, pp. 288-289; A. Górski, B. Srebro, A. Sakowicz, Ochrona interesów finansowych Unii Europejskiej, in: Zwalczanie przestępczości w Unii Europejskiej. Współpraca sądowa i policyjna w sprawach karnych, ed. A. Górski, A. Sakowicz, Warszawa 2006, pp. 65-66; S. Żółtek, Prawo karne gospodarcze w aspekcie regulacji unijnych, Studia Iuridica XLVI/2006, pp. 354-355; M. Wróblewska, Realizacja ochrony interesów finan-

sowych Unii Europejskiej na przykładzie działalności Europejskiego Urzędu do Spraw Zwalczania Nadużyć Finansowych (OLAF), Gdańskie Studia Prawnicze, Issue XIX, 2008, pp. 405-419.

3 OJ L 136, 31.5.1999, pp. 20-22.

4 See the similar wording of Article 8 para. 3 of 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, pp. 2-5.

5 See Article 9 para. 3 and Article 10 para. 3 of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1073/1999, SEC(2006)638. For more information about the Proposal and its latest amendments, see: M. Niestedt, H. Boeckmann, Verteidigungsrechte bei internen Untersuchungen des OLAF – das Urteil Franchet und Byk des Gerichts erster Instanz und die Reform der Verordnung (EG) Nr. 1073/1999, Europäische Zeitschrift für Wirtschaftsrecht, Issue 3/2009, pp. 70-74; A. Staicu, in this issue.





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6 The acronym "CBA" stands for the Polish name of the body: "Centralne Biuro Antykorupcyjne".

7 For example, crimes against the activity of institutions of the state and local self-government, the judiciary, offences against elections and referendums, offences related to privatization, financial support, etc.

8 The term "considerable damage" is defined in the Polish Criminal Code as a sum exceeding 200 times the lowest monthly salary (at present the sum exceeding 255 200 PLN (about 56 211 Euro).

9 Such as, for example, misapplication of public funds for purposes other than those for which they were originally granted (Art. 82 of the Code of Fiscal Offences); customs offences (Articles 85-96 of the Code of Fiscal Offences).

10 See P. Szyfter, *Działalność Wydziału Ochrony Interesów Finansowych Unii Europejskiej Departamentu Kontroli Skarbowej Ministerstwa Finansów*, in: *Ochrona interesów finansowych rozszerzonej Unii Europejskiej: nowe wyzwania, stare problemy*. Materiały z międzynarodowej konferencji naukowej Sopot, 16-19 marca 2006, ed. C. Nowak, Warszawa 2007, pp. 53-57.

11 See M. Florkiewicz, *Możliwości praktyczne i prawne współpracy OLAF z jednostkami Prokuratury w zakresie wykorzystania materiałów zebranych przez OLAF do wszczęcia postępowania karnego i wykorzystania w ramach procedury karnej*, in: *Institucje i instrumenty prawne w walce z przestępczością przeciwko interesom*

finansowym Unii Europejskiej – prawo krajowe i perspektywa europejska, ed. M. Hudzik, C. Nowak, Warszawa 2004, p. 187.

12 Anti-Fraud Coordination Service. See also Fn. 10.

13 Interdepartmental Unit for combating Fraud against the Republic of Poland and the European Union (General Anti-Fraud Unit – GAFU).

14 See Art. 26 para. 4 of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. OJ L 63, 6.3.2002, p. 1.

15 For example, the Agency for Restructuring and Modernisation of Agriculture. See J. Bilewicz, *Polska prokuratura a ochrona interesów finansowych WE – doświadczenia praktyczne*, in: *Ochrona interesów finansowych...*, *op. cit.*, pp. 51-52.

16 M. Florkiewicz, *op. cit.*, p. 188.

17 OJ C 321 E, 29.12.2006, p. 318-324. Protocol No. 36 has the status of primary Community law.

18 Pursuant to Article 18 of Protocol No. 36, each institution of the Communities shall be required to waive the immunity accorded to an official or other civil servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Communities. For more information about this in practice, see: *Christian de Beaufort*, in: *Institucje i instrumenty prawne ...*, *op. cit.*, pp. 199-200; 203-204.

19 L.K. Paprzycki, in: J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz*. tom II, ed. J. Grajewski, Warszawa 2006, p. 1089.

20 See P. Hofmański, E. Sadzik, K. Zgrzyzek, *Kodeks postępowania karnego. Komentarz*, tom II, ed. P. Hofmański, Warszawa 2007, pp. 468-469.

21 Certain problems with the admissibility of OLAF's reports in national criminal proceedings may occur if OLAF's investigations are considered to be contrary to fundamental rights guaranteed by the European Community. See, for instance, the judgment of the Court of First Instance in the case T-48/05 *Franchet and Byk v Commission*, presented in *eucri*, Issue 1-2/2008, p. 11. See also S. Gleß, *op. cit.*, p. 621; W. Hetzer, *Fight against Fraud and Protection of Fundamental Rights in the European Union*, *European Journal of Crime, Criminal Law and Criminal Justice*, Issue 1/2006, pp. 20-45.

22 According to Article 410 of the CCP, the court shall give its judgment solely based upon facts and evidence disclosed at the main trial.

## The Principle of Specialisation

### The Enforcement of PFI Instruments in Romania

Corina Badea / Karoly Benke

#### I. Introduction

The establishment of the legal and institutional framework for the protection of the EC's financial interests (PFI) in Romania followed, in many respects, the same path as that of the other eleven new EU Member States. During negotiations, all the candidate countries committed to adopt and implement the relevant *acquis* by the time of accession.

In terms of enforcement capacity, the Commission's Action Plan<sup>1</sup> for the application of the Strategy for the protection of the financial interests of the Community adopted in June 2000<sup>2</sup> mentioned the need for a *strengthened cooperation with the applicant*

*countries*. One of the measures was the "creation of 'antifraud' structures inside the candidate countries and the reinforcement of controls". Consequently, the "new EU-12" established, as an institution-building measure, an Anti-Fraud Coordination Service (AFCOS) to act as an OLAF contact point and develop, in close cooperation with OLAF, all the legislative and administrative measures needed to effectively prevent and combat illegal acts affecting the EC budget. Many countries established the AFCOS structure within the Ministry of Finance (Estonia, Latvia, Poland, Slovenia, Cyprus, Hungary), some in the Ministry of Interior (Lithuania, Bulgaria), others in the Public Prosecutor's Office (Czech Republic), while yet others did so at the level of the central government (Malta, Slovakia, Romania).

In Romania, AFCOS was initially embedded within a control authority at the top of the central administration – the Government’s Control Department. While maintaining its position at the top of the central administration, the Romanian AFCOS gradually evolved and became an institution of its own, dealing exclusively with PFI: the Fight against Fraud Department – DLAF.

The following article deals with the protection of the EC’s financial interests in Romania through criminal law and is divided into two main parts: PFI substantive criminal law (offences against the EC’s financial interests) and the PFI enforcement system (specialised administrative investigation unit – Fight against Fraud Department – DLAF; specialised prosecution service – National Anticorruption Directorate – DNA).

## II. Substantive Criminal Law – Transposition of PFI Instruments into Romanian Law

The Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded<sup>3</sup> provides that the two countries will accede to a number of conventions and protocols listed in Annex I,<sup>4</sup> which includes the PFI instruments<sup>5</sup> (Article 3(3)). The date of entry into force would be set later on by the Council.

A fast-track accession procedure to third pillar instruments was established: consent to be bound to them was given through the ratification of the Accession Treaty, while the date of entry into force would be decided by the Council. Council Decision 2008/40/JHA<sup>6</sup> provided that the PFI Convention, the first Protocol, and the ECJ Protocol enter into force for Bulgaria and Romania on the first day of the first month following the date of adoption of the Decision, that is 1 January 2008. Entry into force of the second Protocol was conditioned by its ratification by all the EU-15.<sup>7</sup>

Although formal entry into force of the PFI instruments occurred after accession to the EU, compliance with the PFI *acquis* was seen as a *sine qua non* condition for joining the Union. Progress in adopting and implementing the relevant legal framework was regularly monitored by the Commission, which published annual reports. To comply with the PFI instruments, the Romanian Parliament amended in 2003 *Law 78/2000 on preventing, discovering and sanctioning of corruption acts*.<sup>8</sup>

Law 161/2003 introduced a new section in Law 78/2000 called “Criminal offences against the European Communities’ financial interests” (Section 4<sup>1</sup>).<sup>9</sup> The Romanian legislator chose to

establish a special criminal protection of the EC’s financial interests and not to extend the scope of existing offences regarding the protection of similar national interests.<sup>10</sup> Law 78/2000, as *lex specialis*, is completed by and should be read together with the Criminal Code (*lex generalis*).

The following amendment, Law 78/2000, sanctions four categories of offences: corruption offences, offences assimilated to corruption, offences in direct relation to corruption offences, and offences against the European Communities’ financial interests. Law 78/2000 is a complex legal framework addressing all forms of criminal behaviour that constitute, cause, or facilitate acts of corruption in public and private spheres, and it targets vulnerable decision-making positions in both public and private areas. It is a “basket” of new offences (such as EC fraud) and offences already provided for in the Criminal Code (i.e., blackmail, forgery, abuse of power), all entailing a harsher legal regime due to the quality of the active subject (public official in a broad meaning) or degree of social danger (public resources). This translates into higher maximum penalties (for example, “regular blackmail” is sanctioned with a maximum of 7 years imprisonment by the Criminal Code, while blackmail “according to Law 78” entails an addition of 2 more years, leading to 9 years of imprisonment), additional aggravating circumstances (i.e., an offence committed in order to influence international commercial transactions, which adds another 5 years to the regular maximum penalty).

Considering that corruption and money laundering are sanctioned irrespective of the interests adversely affected (public/private, national, or EC), the following analysis focuses on fraud against the EC’s financial interests as a specific offence.

### 1. Fraud against the EC’s Financial Interests: Elements of Crime

Fraud against the EC’s financial interests is criminalised by Section 4<sup>1</sup> of Law 78/2000 (Art. 18<sup>1</sup>–Art. 18<sup>5</sup>), following the definitions and the structure provided by Art. 1 (1) of the PFI Convention.

In relation to expenditure, the following acts are criminalised:

- Use or presentation of false, inexact, or incomplete documents or declarations, which results in the wrongful obtainment of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities (Art. 18<sup>1</sup> (1));
- Omission of disclosure of data requested in accordance with the law for the obtainment of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities (Art. 18<sup>1</sup> (3));

■ Change, in breach of legal provisions, of the destination of funds obtained from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities (Art. 18<sup>2</sup> (1)).

In relation to revenue, the following acts are criminalised:

■ Use or presentation of false, inexact, or incomplete documents or declarations, which results in the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities (Art. 18<sup>3</sup> (1));

■ Omission of disclosure of data requested in accordance with the law which results in the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities (Art. 18<sup>3</sup> (3));

■ Change, in breach of legal provisions, of the destination of a legally obtained benefit if the act results in the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities (18<sup>2</sup> (3)).

With regard to the objective element, the offences can be committed either through an action or an omission.

*Action:* The use or presentation of false, inexact, or incomplete statements or documents involves an action that creates a misrepresentation of reality. Under Romanian law, a statement or document is considered to be false when its true content has been altered or modified or if it has been counterfeited. An inexact document is one that contains, in its substance, correct data or facts, but they are intentionally placed out of context in order to change the legal effect of the specific facts/data (i.e., expenses which are registered in a temporary account that is reserved for another type of expenses in order to create the impression that the economic operator is profitable). A statement or a document is considered incomplete if it does not contain all the data required, thus causing a different legal effect than if the hidden data were known. The missing data/facts have to be relevant and of a certain importance (i.e., a technical implementation report that does not contain a scientific water analysis certifying that the water was unfit for consumption, but containing a different type of water analysis that is accurate yet irrelevant in a project whose main objective is the construction of an infrastructure for drinkable water; the report itself is thus not false, but incomplete).

*Omission:* The non-disclosure of information in violation of a specific legal obligation is a passive conduct that is able to produce legal consequences. Articles 18<sup>1</sup>(2), 18<sup>3</sup> (2), 18<sup>2</sup> (1) and (3) refer to “information requested in accordance with the law”. The information requested regards the economic capacity as well as fiscal, professional, and criminal record of the

beneficiary and is stipulated in the legal acts, guides, or procedures which regulate the granting of EC funds.

As regards the subjective element, the action or omission has to be committed with direct intention within the meaning of Art. 19 (1) let. a) of the Romanian Criminal Code: the perpetrator foresees the result of his/her conduct, and he/she aims to achieve this result through his/her actions.

Recently, the constitutionality of Art. 18<sup>1</sup> and Art. 18<sup>2</sup> was challenged by questioning whether they are sufficiently precise and clear.<sup>11</sup> The Romanian Constitutional Court stated in two decisions that these Articles respect the constitutional exigencies of predictability and the precision of a legal norm. The Court found that the texts can be interpreted in an unequivocal manner and that they are not arbitrary. The Court invoked a decision of the European Court of Human Rights regarding the degree of precision that a law necessarily has to meet (ECtHR, *Wingrove against Great Britain*, 1996).

The offences regulated by Art. 18<sup>1</sup> or Art. 18<sup>3</sup> must always cause damage to the EC budget (expense or revenue). If there is no damage, a criminal offence according to Law 78/2000 cannot be considered. If the act of using false documents has no financial impact on the EC budget and affects only the national interests protected by criminal law, the perpetrator is prosecuted for forgery instead, an offence defined in different forms by Arts. 288–292 of the Criminal Code.

Art. 184 of Law 78/2000 specifies that the attempt to commit fraud against the EC’s financial interests is sanctioned. Attempts are sanctioned irrespective of the existence of damages to the EC budget.

## 2. Fraud against the EC’s Financial Interests: Criminal Responsibility

### Natural persons

Article 23 of the Romanian Criminal Code distinguishes between perpetrators, instigators, and accomplices. As a general rule, in cases of expenditure from the EC budget, the perpetrator of fraud against the EC’s financial interests is the direct beneficiary of the European funds. However, there are situations in which the beneficiary unknowingly uses false, inexact, or incomplete documents: i.e., a county council, as a body of the local administration, is the beneficiary of European funds for road building; the company that is awarded the works contract (the contractor) supplies false documents, which are used later on by the beneficiary as supporting documents to claim payments from the contracting authority, the national agency implementing the European funds. Under such circumstances,

the criminal responsibility falls on the contractor, by virtue of the principle of “indirect perpetration”, provided by Art. 31 (2) of the Criminal Code: “Any deliberate determination, facilitation or assistance by any means in the perpetration of a crime provided by the criminal law and committed by a person who is not guilty, is sanctioned with the penalty provided by the law for that crime”.

The instigator or accomplice of a criminal act committed with intention is sanctioned with the penalty applicable to the author (Art. 27 of the Romanian Criminal Code), a principle that is also applicable to offences provided for by Law 78/2000.

Art. 8<sup>1</sup> of Law 78/2000 sanctions corruption offences committed by or against civil servants or assimilated personnel of international intergovernmental organisations of which Romania is a part of; members of the parliamentary assemblies of these organisations; civil servants or assimilated personnel working for the European Communities; persons exercising functions within international courts, tribunals, or the registry thereof; civil servants of a foreign state or members of parliamentary/administrative assemblies of a foreign state.

Art. 18<sup>5</sup> of Law 78/2000 provides that heads of businesses, within the meaning of Art. 3 of the PFI Convention, are criminally liable for breach of service duties due to negligence, which results in the perpetration by their subordinates of any of the following offences: fraud against the EC’s financial interests, corruption offences, money laundering in direct relation to corruption.

### Legal persons

The criminal responsibility of legal persons was introduced into Romanian law in 2006 and is regulated by Art. 19 of the Criminal Code. The article states that the legal person can be held criminally accountable for illegal acts committed within the exercise of its object of activity, on its behalf, or in its interest, although, in accordance with general principles of criminal law, it is not the author of the offence. Thus, the legal person bears criminal responsibility for acts committed by natural persons.

The law does not expressly mention the quality of the natural person. In our opinion, such a reference is not necessary; in order to hold the legal person accountable, the author/authors of the offence (as well as instigators or accomplices) need to have a reasonable degree of influence, direct or indirect, over the actions of the respective legal person, which is not the case for a simple employee.

Consequently, the authors are always natural persons, acting individually or as members of a body of the legal person, hav-

ing powers of decision and/or representation and/or control over the legal person.

The criminal liability of legal persons does not exclude a criminal liability of the natural persons involved in the perpetration of the offence. Criminal liability of legal persons may be triggered for any criminal offence, as long as the general conditions for criminal liability are fulfilled. All legal persons are subject to this principle, except for the State and public authorities carrying out an activity that cannot be carried out in the private field.

## 3. Fraud against the EC’s Financial Interests: Penalties

### Natural persons

The use of false, inexact, or incomplete documents and the non-disclosure of information are sanctioned with imprisonment ranging from 3 to 15 years and the prohibition of certain rights. If these offences cause very serious consequences, imprisonment is increased from 10 to 20 years and the prohibition of certain rights. As defined by Art. 146 of the Criminal Code, “very serious consequence” means a material damage higher than 200,000 lei (approximately 50,000 €) or a very serious disorder in the activity performed by a public authority or by another legal or natural person.

Changing the destination of funds or a legally obtained benefit is sanctioned with imprisonment between 6 months and 5 years. If these offences cause very serious consequences, the sanction is imprisonment between 5 and 15 years and the prohibition of certain rights.

The complementary penalty of prohibition of certain rights is regulated by Art. 64 of the Criminal Code and refers to: the right to vote and be elected; the right to hold a function involving the exercise of public authority; the right to hold a function or exercise a profession involved in the commission of the offence; parental rights; the right to be tutor or curator.

### Legal persons

Art. 531 and Art. 711-7 of the Criminal Code provide that the principal sanction for legal persons is the fine; the limits vary between approximately 1150 € and 140,000 €, depending on the severity of the criminal offence. There are also six complementary sanctions: dissolution; general suspension of the activity from 3 months to 1 year or specific suspension of one of the activities related to the offence from 3 months to 3 years; a ban on participation in public procurement procedures for a period ranging from 1 to 3 years; closure of local offices from 3 months to 3 years; publication or dissemination of the



judgment rendering the criminal conviction decision. In addition, several administrative law norms restrict access to public funding in case of a criminal record.

The category of complementary sanctions is widened by the new Criminal Code<sup>12</sup> not yet in force. With respect to legal persons, a new complementary sanction is being introduced: placement under judicial surveillance.

#### 4. Concluding Remarks

The above analysis deals only with the substantive criminal law elements of PFI instruments. In our view, Romanian law has fully transposed the following obligations: criminalisation of fraud, corruption, money laundering; criminal responsibility of heads of businesses; criminal responsibility of legal persons.

The only aspect that could be further improved is the assimilation of EC officials, as provided for by Art. 4 of the PFI first Protocol. Currently, foreign officials are assimilated only for corruption offences (active/passive bribery, active/passive trade in influence, receipt of undue benefits), not for fraud affecting the EC's financial interests.

As regards the sanctions applicable to natural and legal persons, we consider that Romanian law provides for effective, proportional, and dissuasive penalties, both for natural and legal persons. The offences are sanctioned irrespective of the amount of damage, as Romanian law does not distinguish between minor and serious fraud.

It is interesting to note that the new Criminal Code (see footnote 12) took over all the offences provided in Law 78/2000, without any substantial amendments regarding the elements of the offence. However, the sanctioning regime was significantly loosened, the maximum penalties being lowered and the aggravating forms being eliminated. For example, for fraud against the EC's financial interests, the maximum penalty is 7 years, whereas it is 15 years under the law in force, and, in an aggravated form, 20 years of imprisonment.

Following the position taken by the General Prosecutor of Romania,<sup>13</sup> the Minister of Justice announced the intention to maintain the criminalisation of corruption and fraud affecting the EC's financial interests in the *lex specialia*, Law 78/2000.

## II. PFI Enforcement System: Principle of Specialisation

The Accession Treaty further required Romania and Bulgaria to introduce all necessary measures, administrative or other-

wise, in order to give effect to third pillar instruments and facilitate international cooperation in this field (Art 3(5)).

With the pre-accession support that was offered by the European Commission (technical assistance, pre-accession advisors, twinning), Romania has put in place an anti-fraud system based on the principle of specialisation.

The Romanian anti-fraud system rests on two pillars: a specialised administrative investigation authority – DLAF (Fight against Fraud Department), which coordinates the national institutions with competences in the area of PFI, and a specialised prosecutor's office having exclusive jurisdiction over PFI offences – DNA (the National Anticorruption Directorate). Both institutions are presented in the following.

### 1. Specialised Administrative Investigation Unit: DLA

#### Development of the Romanian AFCOS (2001–2004)

The Romanian AFCOS has always been placed at the highest level of the central administration in view of its coordination prerogatives, which required it to be at a higher administrative level than the institutions being coordinated. However, its functions and powers have undergone substantial changes.

In 2002, the AFCOS structure was embedded in the Prime Minister's Control Body,<sup>14</sup> which became the Government's Control Body in 2003 and, in 2004, the Prime Minister's Inspection Department – PMID,<sup>15</sup> part of the working apparatus of a *minister delegate*. The minister delegate was responsible for the following activities:<sup>16</sup>

- Control over central and local public administration, at the request of the Prime Minister;
- Protection of the EC's financial interests; in this respect, PMID carried out checks into irregularities affecting EC funded programmes, having the power to request documents from public/private bodies, and provided operational support to OLAF.

In addition, as AFCOS, the PMID was mandated to organise and implement antifraud training programmes in cooperation with OLAF.

The European Commission noted in the 2004 monitoring report that “further attention should be paid to developing effective mechanisms for the conduct of anti-fraud investigations and their possible judicial follow-up”.<sup>17</sup> The Commission concluded that for Romania to be considered ready for membership, particular attention should be paid, inter alia, “to further developing the legislative framework and administrative capacity in the area of external audit and protection of the Communities' financial interests”.

Further efforts from public authorities were also expected by the general public. As shown by an opinion poll carried out in August 2004 at the request of the European Commission Delegation in Bucharest,<sup>18</sup> 9 of 10 Romanians considered the allocation of funds to have been carried out in a fraudulent manner.

### The Fight against Fraud Department – DLAF (2005)

In view of the above-mentioned issues, a reorganisation of central administration was carried out in 2005. A new institution, having a clear mandate and strong investigative powers, was created – the Fight against Fraud Department – DLAF,<sup>19</sup> which took over the quality of Romanian AFCOS from PMID.

DLAF has three main tasks: to control the obtainment and use of European funds in order to detect irregularities and suspected fraud, to coordinate national institutions involved in the fight against fraud, and to ensure cooperation with OLAF and its European counterparts.

The Department was given the power of legislative initiative and review. Also, an intelligence unit was developed in order to provide operational support in the exercise of the control function.

The 2005 reform of the PMID had two main objectives.<sup>20</sup> First of all, separation of control on the use of EC funds, on the one hand, and control over the functioning of public administration institutions requested by the Prime Minister, on the other hand.

In addition to the clarification of the mandate, which increased operational independence, stronger investigation powers were needed. In the case of PMID, investigative powers were limited to the request for documents. DLAF was granted the power to carry out on-the-spot controls. Any private or public legal person is obliged to allow DLAF staff unconditional access to headquarters, means of transport, or any other spaces used for economic purposes. Law enforcement authorities and other agents of the public service are obliged to provide operational support to DLAF upon the latter's request. DLAF can open investigations *ex officio* or upon external notification from public/private persons or from open sources (e.g., the press). The Department was granted the legal status of "ascertaining body" for PFI offences, within the meaning of Art. 214 of the Romanian Criminal Procedure Code. In accordance with this Article, prior to the opening of a criminal investigation, administrative investigation services/inspections authorities have the power to take statements from the offender and witnesses, to seize *corpus delicti*, and to evaluate damages. The control reports drawn up by these authorities can be used as

evidence in the criminal trial, should the prosecution consider it necessary.

Coordination of the fight against fraud was one of the main objectives of the National Antifraud Strategy adopted by the Romanian Government in July 2005.<sup>21</sup> An integrated approach to the fight against fraud was developed through cooperation agreements concluded with administrative and judicial authorities. The coordination system is structured on the following three levels:

- At the *first level*, the relevant data is collected and analysed. The most important tool is the Irregularities Reporting Network coordinated by DLAF, which brings together the authorities managing<sup>22</sup> and implementing European funds, the first to detect possible cases of fraud. Relevant initial information can also be received from other intelligence or control authorities: the Financial Guard, the Police, the Audit Authority, or the Romanian Intelligence Service.

- At the *second level*, administrative investigations – very often these are conducted in cooperation with other inspection/control/law enforcement agencies. Procedures for mutual technical assistance and joint operations have been established through cooperation protocols concluded by DLAF with the Financial Guard (July 2005), the National Fiscal Administration (December 2005), and the General Inspectorate of the Romanian Police (October 2005).

- The *third level* involves close cooperation with the competent prosecutor's office: the National Anticorruption Prosecutor's Office (now the National Anticorruption Directorate – DNA). A cooperation protocol was concluded in July 2005. It provides for the exchange of information regarding investigations and communication of the status of judicial proceedings.

As regards cooperation with OLAF, the legal framework setting up DLAF provides for mutual notifications (i.e., OLAF notifies DLAF of possible cases of fraud, which are investigated by the Department; DLAF informs OLAF of the results of the investigation and provides all requested data and documents as well as the control reports). Furthermore, OLAF representatives can participate in investigations carried out by DLAF and have access to all relevant documents. Both institutions provide or facilitate technical assistance.

DLAF does not have any sanctioning powers of its own. The legal effect of DLAF's control report depends on the nature of the facts ascertained. In the case of irregularities, DLAF's control report is binding on authorities granting the EC financial assistance to the beneficiaries, which have the obligation to start recovery procedures. In the case of suspected fraud, DLAF's control report and supporting documents are forwarded to the National Anticorruption Directorate (DNA).

## 2. Specialised Prosecution Service: DNA

In many respects, the development of the specialised prosecution service is similar to that of the specialised investigation unit – DLAF. Both are of a multi-disciplinary nature and were created in the context of EU accession, with significant technical and financial support from the EU. Both passed through two distinct stages of development, one from 2002-2004, the other from 2005 onwards.

### The National Anticorruption Prosecutor's Office (2002–2004)

Romania set up a specialised Anticorruption Prosecutor's Office (PNA) in 2002, as an independent prosecution unit.<sup>23</sup> PNA was set up as a multi-disciplinary organisation, consisting not only of prosecutors, but also of police officers and financial experts. It had 15 regional branches organised at the level of each Court of Appeal (territorial services). PNA was competent for the prosecution of offences established by Law 78/2000, determined by the material damage caused by the offence (above a certain threshold)<sup>24</sup> or by the status of the alleged offender (high-level public officials and dignitaries, magistrates, etc).

On the grounds of decision 235/2005,<sup>25</sup> the Romanian Constitutional Court declared that the legal text establishing PNA's competence over Members of Parliament infringed Art. 72 of the Romanian Constitution, which, in the case of the Parliament Members, provides exclusive criminal jurisdiction to the General Prosecutor's Office attached to the High Court of Cassation and Justice.

### The National Anticorruption Directorate – DNA (2005)

The reorganisation of the PNA was carried out through the adoption of Government Emergency Ordinance 134/2005, which remedied the elements of unconstitutionality ascertained in 2004. The PNA became the National Anticorruption Directorate (DNA), an autonomous service within the General Prosecutor's Office attached to the High Court of Cassation and Justice.

With respect to the substantive competence, the 2005 reorganisation introduced an important change. The DNA was granted exclusive jurisdiction to prosecute fraud against the EC's financial interests, irrespective of the amount of damage or the official status of the alleged offender. A structured cooperation between the DLAF and the DNA, as well as between the two and OLAF was established in accordance with the updated Action Plan of the National Anti-Fraud Strategy (i.e., quarterly operational meetings, quarterly notification of OLAF on the judicial follow-up of DLAF cases).

## 3. Results of the Specialised PFI Enforcement System

The reforms of 2005, most notably the increase of investigative powers and operational independence in the case of DLAF as well as the grant of exclusive jurisdiction to DNA, led to the establishment of proactive investigation and prosecution of fraud affecting the EC's financial interests. From 2005 to 2008 DLAF completed 315 investigations. From 2006 to 2008 DNA drew up 69 indictments on EC fraud. Approximately half of the DNA's indictments from 2007 to 2008 were based on DLAF's investigations: 14 out of 26 in 2007 and 16 out of 32 indictments in 2008.<sup>26</sup>

So far, Romanian Courts have pronounced 10 final decisions in cases of fraud against the EC's financial interests, convicting 12 persons. Nine decisions concerned the changing of the destination of funds granted by the EC, one the use of false documents. The highest penalty was 3 years imprisonment, for the use of false documents. All decisions have suspended execution. Art. 81 of the Romanian Criminal Code allows the judge to decide on the suspension of the execution, without probation, if certain conditions are met: the penalty applied is a maximum of 3 years of imprisonment or a fine; the person has not been previously imprisoned for more than 6 months; the purpose of the sentence can be achieved even without its execution.

## IV. Conclusion

Notwithstanding the importance of fully and correctly transposing the PFI instruments, which, in our view, Romania has done to a large extent,<sup>27</sup> the set-up of the enforcement system has had an important impact on the effectiveness of the legal norms. From the Romanian experience, applying the specialisation principle increases the visibility and accountability of the fight against EC fraud, and raises the level of awareness among national practitioners regarding the specific PFI instruments. The proactive approach of the Romanian anti-fraud investigation unit – DLAF, and of the anti-fraud prosecution service – DNA, and their openness to direct cooperation with OLAF, are a case in point.

However, as seen from the evolution of the Romanian institutional framework, an additional condition for the system's functioning is the provision of adequate investigative tools and operational independence. Although the first final criminal convictions have started to appear, and more are expected to come given the volume of indictments drawn up in recent years, in the long term, the deterrence of fraud through the application of dissuasive criminal penalties by the courts requires institutional sustainability of the specialised PFI enforcement system.

- 1 COM(2001) 254 final.
- 2 COM(2000) 358 final.
- 3 OJ L 157, 21.06.2005, p. 203.
- 4 Annex I: List of conventions and protocols to which Bulgaria and Romania accede upon accession (referred to in Article 3(3) of the Act of Accession), OJ L 157, 21.06.2005, p. 221.
- 5 Convention of 26 July 1995, drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49) and its additional protocols.
- 6 Council Decision 2008/40/JHA concerning the accession of Bulgaria and Romania to the PFI instruments, OJ L 9, 12.01.2008, p. 23.
- 7 Italy was the last to notify ratification in February 2009. Consequently, the second Protocol shall enter into force on 19 May 2009.
- 8 Law 78/2000 on the prevention, detection and sanctioning of corruption acts, Romanian Official Journal no 219 of 18.05.2000.
- 9 The Romanian criminal law only refers to the EC budget (however, DLAF is mandated to take action for the protection of the EU's financial interests and to cooperate with OLAF in any investigation it carries out for this purpose).
- 10 Other states such as Belgium, France, Portugal, and the Czech Republic chose to assimilate the EC's financial interests to national ones and have not created special incriminating texts for the frauds that affects the EC budget – G. Antoniu, *Reflecții asupra conceptului de incriminare* [Reflections upon the concept of incrimination] in: *Revista de Drept Penal* (Criminal Law Review) no. 3/2008, p. 9-31.
- 11 Decisions 552/2008, Romanian Official Journal 434 of 10.07.2008 and 211/2009, Romanian Official Journal 133 of 03.03.2009.
- 12 On 25.02.2009, the Government approved the projects of new Criminal Code, Criminal Procedure Code, and Civil Procedure Code, in view of compliance with obligations of judicial reform (Decision 928/2006, establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 354, 14.12.2006).
- 13 On 25.03.2009, the General Prosecutor's Office made public its observations on the Code [http://www.mpublic.ro/Cp/observatii\\_piccj\\_cp.pdf](http://www.mpublic.ro/Cp/observatii_piccj_cp.pdf).
- 14 Government Decision 521/2002, Romanian Official Journal 373 of 03.06.2002.
- 15 Government Decision 1348/2004, Romanian Official Journal 811 of 02.09.2004.
- 16 Art. 3 of Government Emergency Ordinance 11/2004, Romanian Official Journal 266 of 25.03.2004
- 17 2004 Regular Report on Romania's progress towards accession, COM(2004) 657 final, p. 140.
- 18 <http://www.euractiv.ro/www/storage/analize/95.pdf>, p. 7.
- 19 Government Emergency Ordinance 49/2005, Romanian Official Journal 515 of 17.06.2005, with subsequent amendments and completions; in February 2009, this act was repealed by Government Emergency Ordinance 3/2009, which

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moved DLAF from the Prime Minister's Chancellery to the Government General Secretariat, under the responsibility of the Deputy Prime Minister, but preserving all its competences.

- 20 Tudor Chiuariu, Romania's policy to tackle fraud affecting EU funds, in: "Sigma's Newsletter Update", no. 9/2005 "Audit and control", published by SIGMA – OECD (Support for Improvement in Governance and Management).
- 21 Government Decision 793/2005, Romanian Official Journal 743 of 16.08.2005.
- 22 Within the meaning of Art. 59-60 of Council Regulation (EC) No. 1083/2006.
- 23 Government Emergency Ordinance 43/2002 regarding the National Anticorruption Prosecutor's Office, Romanian Official Journal 244 of 04.04.2002.
- 24 Higher than 100,000 € (at present 200,000 €) or if the offence causes very serious consequences (a material damage higher than 200,000 lei, or a very serious disorder in the activity performed by a public authority or another legal or natural person) or the value of the bribe exceeds 10,000 €.
- 25 Romanian Official Journal 462 of 31.05.2005.
- 26 According to annual activity reports, available at [www.pna.ro](http://www.antifrauda.gov.ro).
- 27 See also Annex to the Second Report from The Commission on the Implementation of the Convention on the protection of the European Communities' financial interests and its protocols, COM(2008) 77 final.

## Experiences with the Protection of the Financial Interests in the Czech Republic

Prof. Dr. Jaroslav Fenyk / Ing. Petr Sedláček

The Czech Republic became a Member State of the European Union on 1 May 2004. The date of accession to the European Union was the same moment as that of the obligation to implement the Convention on the Protection of the European Communities' Financial Interests and the duty to introduce

other legal instruments to protect the financial interests of the Community on the same level as the old Member States of the European Union. The progress of the implementation of legal regulations and the ensuing obstacles are described in this article.



## I. Legal Framework

### 1. Convention on the Protection of the European Communities' Financial Interests and the Area of Criminal Law

To this date, the Czech Republic has neither ratified the Convention on the protection of the European Communities' financial interests of 26 July 1995, nor the related protocols.<sup>1</sup> Nevertheless, probably due to the obligations arising out of the country's EU membership, the Czech Penal Code was amended in 2008 in order to include into Sec. 129a an offence penalizing the harming of financial interests of the European Communities.<sup>2</sup>

This offence definition applies in the following cases: (1) a person draws up, uses, or submits false, incorrect, or incomplete documents related to expenditures or incomes of the general budget of the European Communities or budgets managed by or on behalf of the European Communities; (2) a person fails to disclose the aforementioned documents and thus causes misappropriation or wrongful retention of financial resources (payments) from any of the listed types of budgets; (3) a person who diminishes funds of any of the listed types of budgets; and (4) a person misuses financial expenditures or revenues of the general budget of the European Communities or budgets managed by or on behalf of the European Communities, or reduces financial resources for any such budget. The offender shall be sentenced to imprisonment for a term of up to 2 years or to a pecuniary penalty (within the range from CZK 2,000 to CZK 5,000,000)<sup>3</sup> or forfeiture of proceeds of crime.

Offenders are faced with stricter punishments which are based on the damages caused and which follow the gradual approach:

- damages amounting to CZK 25,000<sup>4</sup> – imprisonment for a term of 6 months up to 3 years or pecuniary penalty – see above,
- damages amounting to CZK 500,000<sup>5</sup> – imprisonment for a term of 2 years up to 8 years,
- damages amounting to CZK 5,000,000<sup>6</sup> – imprisonment for a term of 5 years up to 12 years.

Stricter punishment will also be faced by persons who commit this offence as a member of an organised group of offenders<sup>7</sup> or in the capacity of persons whose official duty is to protect the interests of the European Communities (imprisonment for a term of 2 years up to 8 years or a pecuniary penalty within the above-mentioned range).

As of 1 January 2010, the new Czech Penal Code will become effective. It will include the aforementioned criminal offence within the provisions of Sec. 260. However, the legislator fur-

ther specified the definition of this criminal offence: beside the use or presentation of false, incorrect, or incomplete documents, a person can also be subject to criminal prosecution for mentioning false or largely misleading data in these documents.<sup>8</sup>

### 2. Guideline of the Finance Ministry

With effect from 1 January 2007, the Czech Finance Ministry adopted an internal regulation entitled "Methodology of financial flows and the control of programmes co-financed by the Structural Funds, the Cohesion Fund and the European Fisheries Fund for the 2007–2013 fiscal period".<sup>9</sup> This guideline not only includes an explanatory report as well as the European and Czech legal provisions with respect to the protection of the ECs' financial interests, but also provides for definitions of financial flows of resources<sup>10</sup> from the EU budget and specification of the system of financial control. Public administration control, an internal audit system, public administration audits and inspections are to be carried out by the Supreme Audit Office of the Czech Republic, and auditing activities should be carried out by bodies of the European Commission and the European Court of Auditors. The guideline is an internal directive to be used by the respective ministries and other authorities that are in charge of the protection of financial resources from the budgets of the European Communities.

## II. Communication with the European Anti-Fraud Office

The communication with OLAF usually consists of reporting irregularities in two categories, i.e.:

- reporting irregularities detected within the process of implementing instruments for structural policies for pre-accession (ISPA),
- reporting irregularities detected within the process of the use of the Structural Funds, the Cohesion Fund and the European Fisheries Fund.

### 1. Reporting of Irregularities Regarding Pre-Accession Funds

Reporting these irregularities is the responsibility of the central contact point of the AFCOS network (Anti-Fraud Co-ordination Service), a function which was initially fulfilled by the Supreme Public Prosecutor's Office from the beginning of cooperation between the Czech Republic and OLAF. Pursuant to the Resolution of the Czech government<sup>11</sup> on the change of the status of the AFCOS central contact point in the Czech Republic, this authority has been transferred to the Ministry of Finance, namely to the Central Harmonization Unit for Finan-

cial Control. The restructuring became effective on 1 January 2008. However, as of the same day, this unit in the Ministry of Finance was split into two separate departments (Department 17 – Control and Department 52 – Audit), meaning that the functions of the AFCOS network central contact point are now exercised by Department 17 (Control).

Irregularities are reported to OLAF on a quarterly basis in the form of a written report within two months of the last day of the respective quarter. The report is to include both information on newly discovered irregularities and information on investigations regarding irregularities reported earlier. Currently, two cases are subject to investigation within the PHARE pre-accession structural programme supporting small business, and one person has been sentenced to imprisonment in criminal proceedings. Two further cases concerning the use of financial resources of the EU budget in contradiction with the conditions of the particular project are still pending.

## 2. Reporting of Irregularities Regarding Structural Funds, the Cohesion Fund and the European Fisheries Fund

The process of reporting irregularities in these fields of EU funding consists of external as well as internal steps. The *internal level of reporting* includes internal detection of newly discovered irregularities and internal investigation of irregularities reported earlier (internal audit results). It encompasses all subjects involved in the process of the implementation of funding projects. The main element of this level is represented by regulatory authorities that collect complete information on irregularities, based on which internal audit units draw up form-oriented monthly (operative) and recapitulatory (quarterly) reports. These forms are then submitted to the AFCOS contact points of the external network (see below), and to the above-mentioned Department 17 (Control) in the Finance Ministry as the central contact point for the AFCOS network, to the Finance Ministry's Department 52 (Audit), and also to the Finance Ministry's Department 55 MF (National Fund), as this fund fulfils the function of the Payment and Certification Authority within the process of implementation of Structural Funds, the Cohesion Fund and the European Fisheries Fund.

The *external level of reporting* consists of local contact points of the AFCOS network at the following ministries: the Ministry for Regional Development, the Ministry of Labour and Social Affairs, the Ministry of the Environment, the Ministry of Agriculture, the Ministry of Industry and Trade, and the Ministry of Transport. The external level provides more effective (cross-) control than the internal level. Within the fiscal period 2007–2013, the local contact points of the AFCOS network are being updated to include the Ministry of Education, Youth

and Sports, the Municipality of the City of Prague and the Regional Councils of the Cohesion Regions of Central Moravia, Southeast, Moravia-Silesia, Central Bohemia, Southwest, Northwest, and Northeast.

Based on forms used to report irregularities (monthly and recapitulatory) that are sent out by the central control authorities, the aforementioned local contact points of the AFCOS network elaborate regular quarterly reports, which they then forward via the AFIS (Anti Fraud Information System) to OLAF within two months of the last day of the respective quarter. A copy of this report is provided to the Supreme Public Prosecutor's Office, to the Finance Ministry's Department 17 (Control), to the Finance Ministry Department 52 MF (Audit), and to the Finance Ministry Department 55 (National Fund) as the Payment and Certification Authority.

Problems exist regarding non-conformance of internal-level reporting forms (especially monthly reporting forms) and the form in the OLAF-AFIS information system that is used by the AFCOS local contact points for their external-level reporting. There are differences with respect to individual monthly-reporting form items, since every form of irregularity has its own code. Moreover, problems exist with code lists used by OLAF. They result in inquiries by OLAF being addressed to the AFCOS local contact points that sent the reports. These problems could be eliminated by introducing an adjusted version of the AFIS information system.

Communication between representatives of the AFCOS network and OLAF also takes place within the activities that are organised by OLAF – the COCOLAF Meeting, the Group Article 280 Meeting, and the Risk Analysis Meeting – where issues concerning the protection of the European Communities' financial interests are discussed. These activities target the exchange of general information, information on new EC/EU legislation and specific information on experience and best practice.

Representatives of the Czech AFCOS take part in AFCOS roundtable meetings organised by OLAF. A representative of the Czech central contact point (see above) also fulfils the tasks arising from the status of being an OAFCN member (OLAF Anti-Fraud Communicator's Network). These activities target the exchange of information, information on new EC/EU legislation, experience and best practice, problems and obstacles, or new developments in the protection of the financial interests of the Community at a national level, and, last but not least, on the practice of dissemination of information on the protection of the financial interests and results of the fight against fraud detrimental to the financial interests of EC at the EU and the national level.



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1 Cf. Fenyk, eucrim 1-2/2007, p. 51.

2 The annex to the Second Report from the Commission – Implementation of the Convention on the protection of the European Communities' financial interests and its protocols, SEC(2008) 188, 14 February 2008, did not take this matter into consideration at that time. The amendment came into force on 1 July 2008.

3 Corresponds to a range from €74 euro to €184,000.

### III. Conclusions

On the one hand, the Czech Republic as a Member State of the European Union formally has not ratified international obligations on the protection of the ECs' financial interests. On the other hand, under the indirect influence of the other Member States and as a result of the need to be a recipient of EC funds, new internal legislation regulates criminal and administrative preventive and repressive legal tools for the protection of the EU budget.

4 Corresponds to €920.

5 Corresponding to €18,400.

6 Corresponding to €184,000.

7 Organised group of offenders means a group of at least three persons if such a group has its own internal division of criminal tasks and roles (among individual persons) aimed at committing a crime (jurisprudence of the Czech Supreme Court).

8 The explanatory report does not specify the new expressions "false" and "largely misleading".

9 Reference number MF01/2007.

10 Structural Funds, Cohesion Fund, etc.

11 Number 1010 of 5 September 2007.

## OLAFs österreichische Partner

Mag. Severin Glaser

**This article addresses the important topic of the involvement of national authorities in the fight against fraud and other acts detrimental to the EC's financial interests. It gives an overview of the Austrian authorities competent in the field of the protection of the EC's financial interests. Although all three state powers – the judiciary, the legislature, represented for instance by the Court of Auditors, and the executive branch – are involved in the fight against fraud, the executive branch (at the federal level) plays a very prominent role as regards the Austrian partners of OLAF. The article focuses on the involvement of these administrative authorities, in particular federal ministries, which are equipped with varying competences. The article describes the legal basis of their activities and analyses their missions. The cooperation of these authorities with OLAF is also subject of the analysis which not only covers an overview on the effective legal provisions but also on practical aspects. The article divides the involved Austrian authorities into different groups according to their individual degree of commitment to the protection of the EC's financial interests. It concludes that the cooperation between Austrian authorities among each other works better than the cooperation between Austrian authorities and OLAF in the described sector.**

Vor zehn Jahren hat der Kampf um den Schutz der finanziellen Interessen der EG mit der Errichtung des Europäischen Amtes für Betrugsbekämpfung seinen bisherigen legislativen Höhepunkt erlebt. Das OLAF agiert jedoch nicht allein, sondern in Kooperation mit anderen europäischen und mitgliedstaatlichen Institutionen. Der vorliegende Artikel widmet sich der Frage, welche österreichischen Behörden für den Schutz

der finanziellen Interessen der EG zuständig sind und wie ihre Zusammenarbeit mit OLAF funktioniert.<sup>1</sup>

Art. 280 Abs. 1 EGV verpflichtet neben der Gemeinschaft selbst auch die Mitgliedstaaten, die finanziellen Interessen der EG zu schützen. In Österreich fallen auch im Bereich der Vollziehung die den Schutz der finanziellen Interessen der EG

abdeckenden Sachmaterien zum größten Teil in die Kompetenz des Bundes.<sup>2</sup> Gemäß Art. 280 Abs. 2 EGV haben die Mitgliedstaaten zum Schutz der finanziellen Interessen der EG die gleichen Maßnahmen zu treffen, die sie auch zur Bekämpfung von Betrügereien ergreifen, die sich gegen ihre eigenen finanziellen Interessen richten. Die Zuständigkeit des Bundes zum Schutz der finanziellen Interessen der EG umfasst dementsprechend beide im Bereich der Vollziehung bestehenden Staatsgewalten, nämlich Gerichtsbarkeit und Verwaltung. Hinzu tritt der der Legislative zuzurechnende Rechnungshof (RH).

## I. Gerichtsbarkeit

Handlungen zum Schaden der finanziellen Interessen der EG können viele verschiedene Straftatbestände nach österreichischem Recht erfüllen.<sup>3</sup> Abhängig von der jeweiligen Strafdrohung bestimmt sich die sachliche Zuständigkeit der *Strafgerichte*. Seit der tief greifenden Strafprozessreform, welche am 01.01.2008 in Kraft getreten ist, haben sich die Zuständigkeiten im Strafprozess teilweise geändert. Die relevanten Straftatbestände fallen in erster Instanz in die Zuständigkeit der Bezirksgerichte, des Landesgerichtes als Einzelrichter oder des Landesgerichtes als Schöffengericht. Geschworenengerichten kommt im Bereich des Schutzes der finanziellen Interessen der EG hingegen keine Bedeutung zu.

Im Rechtsmittelverfahren gegen ein Urteil bzw. einen Beschluss eines Bezirksgerichtes entscheidet über die so genannte „volle Berufung“ bzw. über die Beschwerde das Landesgericht und zwar in Form eines Senats aus drei Richtern. Ebenfalls in Form eines Senats bestehend aus drei Richtern entscheidet das Oberlandesgericht über alle Rechtsmittel gegen Urteile und Beschlüsse des Einzelrichters und über Berufungen gegen Urteile des Schöffengerichts. Der Oberste Gerichtshof (OGH) entscheidet über Nichtigkeitsbeschwerden gegen Urteile des Schöffengerichts, sowie über Berufungen gegen Urteile des Schöffengerichts, die mit Nichtigkeitsbeschwerden verbunden sind.

Zivilrechtliche Streitigkeiten mit der EG bzw. ihren Institutionen im vertraglichen oder außervertraglichen Bereich fallen, soweit österreichische Gerichtsbarkeit gegeben ist, in die Zuständigkeit der ordentlichen Gerichte (§ 1 Jurisdiktionsnorm – JN). In einer im Einzelnen kompliziert verlaufenden Abgrenzung sind in erster Instanz die Bezirksgerichte, Landesgerichte und Handelsgerichte zur Durchführung des Zivilprozesses berufen (§ 2 JN). Je nach Erstgericht findet das zweitinstanzliche Verfahren vor dem Landesgericht/Handelsgericht (§ 3 Abs. 1 JN) oder dem Oberlandesgericht (§ 4 JN) statt, das drittinstanzliche Verfahren findet vor dem OGH statt (§ 3 Abs. 2 bzw. § 4 JN).

Der Einsatz der Zivilgerichte zum Schutz der finanziellen Interessen der EG in Bezug auf Geldansprüche ist aber schon dadurch beschränkt, dass im Fall einer gleichzeitigen strafgerichtlichen Verfolgung ohnehin der aus der strafbaren Handlung stammende Vermögensvorteil im Wege der Abschöpfung der Bereicherung herausverlangt wird (§ 20 Abs. 1 StGB).

Art. 4 Abs. 1 VO 2988/95 enthält die ausschlaggebenden gemeinschaftsrechtlichen Bestimmungen über vermögensrechtliche Maßnahmen, wie vor allem die Verpflichtung zur Zahlung des geschuldeten oder zur Rückerstattung des rechtswidrig erhaltenen Betrages. Beides hat auf dem verwaltungsrechtlichen Wege zu geschehen.<sup>4</sup> Für Österreich ist in diesem Zusammenhang die Bestimmung des § 3 Verwaltungsvollstreckungsgesetz (VVG)<sup>5</sup> von Bedeutung, gemäß der Verpflichtungen zu Geldleistungen i.d.R. nicht durch die Vollstreckungsbehörde selbst eingetrieben werden, sondern in der Weise vollstreckt werden, dass die Vollstreckungsbehörden die Exekution durch das zuständige Gericht veranlassen.<sup>6</sup> Bescheide und Rückstandsausweise gelten bei diesen als Exekutionstitel (§ 3 Abs. 2 VVG). Sachlich zuständig sind die Bezirksgerichte (§ 17 Abs. 1 Exekutionsordnung – EO).

Die Zivilgerichtsbarkeit ist im Hinblick auf den Schutz der finanziellen Interessen der Union ferner wichtig im Falle der Insolvenz einer mit Strafe oder Geldforderungen wegen Handlungen zu Lasten der finanziellen Interessen der Union konfrontierten Person. Die sachliche Zuständigkeit liegt beim Konkurs von Unternehmen ebenso wie bei deren Ausgleich beim Gerichtshof erster Instanz (§ 63 Konkursordnung [KO] ggf. i.V.m. § 1 Abs. 1 Ausgleichsordnung). Betreibt der Schuldner kein Unternehmen, ist für das so genannte Schuldenregulierungsverfahren – den Privatkonkurs – das Bezirksgericht zuständig (§ 182 KO).

## II. Verwaltungsbehörden

Auf dem Gebiet der Verwaltung fällt der Bereich des Schutzes der finanziellen Interessen der EG auf Bundesebene in die Zuständigkeit mehrerer Bundesministerien. Da den Ländern gemäß der innerstaatlichen Kompetenzverteilung wie dargestellt im Bereich der Vollziehung des Schutzes der finanziellen Interessen der EG kaum Kompetenzen zukommen, braucht die Tätigkeit der Landesbehörden<sup>7</sup> nicht weiter erörtert werden.

### 1. Justizministerium (BMJ)

Angelegenheiten des gerichtlichen Strafrechts und der staatsanwaltschaftlichen Behörden fallen in die Zuständigkeit des BMJ (Anlage 2F Ziff. 2 und 5 Bundesministeriengesetz –



BMG). Der jeweils örtlich zuständigen Staatsanwaltschaft (StA)<sup>8</sup> kommt die Aufgabe der Anklageerhebung und -vertretung vor den Gerichten zu. Die sachliche Zuständigkeit liegt in der ersten Instanz jedenfalls bei den bei den Landesgerichten eingerichteten Staatsanwaltschaften, die sowohl im Strafverfahren vor den Gerichtshöfen erster Instanz als auch den Bezirksgerichten die Anklage vertreten. Vor Bezirksgerichten kann die Staatsanwaltschaft auch von Bezirksanwälten vertreten werden.

Für den Bereich der Korruption und anderer für den Schutz der finanziellen Interessen der EG relevanter Tatbestände hat die Aufsplitterung der örtlichen Zuständigkeit mehrerer StA am 01.01.2009 geendet, als die bundesweit zuständige Korruptionsstaatsanwaltschaft (KStA) ihre Arbeit aufgenommen hat. Der zweite im Ministerialentwurf vorgesehene markante Unterschied zur StA – nämlich die verfassungsgesetzlich abgesicherte Unabhängigkeit der KStA, die nur einer Aufsicht des Justizministers unterläge – ist nicht Gesetz geworden.<sup>9</sup> In ihren sachlichen Zuständigkeitsbereich fallen u.a. strafbare Verletzungen der Amtspflicht und verwandte strafbare Handlungen gemäß dem 22. Abschnitt des StGB,<sup>10</sup> Untreue unter Ausnutzung einer Amtsstellung (§ 153 i.V.m. § 313 StGB), Förderungsmisbrauch (§ 153b StGB), wettbewerbsbeschränkende Absprachen bei Vergabeverfahren (§ 168b StGB) und Geldwäsche (§ 165 StGB) in Bezug auf eines dieser Delikte (§ 20a Abs. 1 StPO). Die Einrichtung der KStA dient der Spezialisierung in diesem Bereich, die bisher eine Lücke der StA dargestellt hat. Die KStA soll eng mit dem Büro für interne Angelegenheiten (BIA) im Innenministerium zusammenarbeiten.<sup>11</sup> In ihrem sachlichen Aufgabenbereich ist die KStA zuständig für Rechtshilfe und strafrechtliche Zusammenarbeit mit anderen mitgliedstaatlichen Justizbehörden und EU-Institutionen. Ebenso ist sie im Bereich ihrer sachlichen Zuständigkeit auch die nationale Verbindungsstelle Österreichs zu OLAF und Eurojust (§ 20a Abs. 3 StPO).

Ansprechpartner des OLAF im BMJ ist im von der KStA nicht abgedeckten Bereich die Abteilung II/2 der Sektion II (Straflegistiksektion), in deren Aufgabenbereich allgemeine Angelegenheiten der europäischen Integration im strafrechtlichen Bereich ebenso fallen wie Auslieferungs- und Rechtshilfesachen im Rahmen des Auslieferungs- und Rechtshilfegesetzes (ARHG)<sup>12</sup> und des Bundesgesetzes über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG)<sup>13</sup> sowie Geldwäschebekämpfung.<sup>14</sup>

Die Zusammenarbeit der Justizbehörden mit OLAF ist sehr unterschiedlich ausgestaltet, je nach der Aufgabe, die das OLAF im betreffenden Fall wahrnimmt. Wenn OLAF – wie oft im Fall von Finanzstrafverfahren – im Rahmen seiner Koordinierungsaufgabe aktiv wird, sind die Kontaktaufnahme und die Zusammenarbeit mit dem BMJ meist sehr informell.

OLAF unterstützt das BMJ, die Staatsanwälte bzw. die Richter bei Rechtshilfeersuchen und koordiniert die Zusammenarbeit mit Justiz- und Zollbehörden anderer Mitgliedstaaten. Führt OLAF hingegen selbst eine Untersuchung durch, nimmt es mit dem BMJ bei Auftreten eines strafrechtlichen Verdachts formell mittels eines Ermittlungsberichtes Kontakt auf. Abhängig vom Einzelfall gibt OLAF dann den Fall entweder ganz an die StA ab, oder führt parallel zu deren Erhebungen seine Ermittlungen weiter. Nicht immer gelingt es jedoch, dass diese parallelen Untersuchungen auf österreichischer und europäischer Ebene sich perfekt ergänzen. Das BMJ unterstützt OLAF bei dessen Untersuchungstätigkeit etwa durch Beischaffung von Dokumenten, Befragung von Zeugen bzw. betroffenen Personen und die Unterstützung bei der Aufhebung von Immunitäten.

Auch die Abteilung IV/1 der Sektion IV (Straf- und Gnadensachen) des BMJ hat internationale strafrechtliche Anknüpfungspunkte in ihrem Aufgabengebiet, wie etwa Angelegenheiten der Strafbarkeit österreichischer Staatsbürger im Ausland.<sup>15</sup> Daneben ist diese Abteilung jedoch auch die Zentrale Kontaktstelle des EJM in Österreich und im von der KStA nicht abgedeckten Bereich die nationale Anlaufstelle für Eurojust.

## 2. Innenministerium (BMI)

Das Innenministerium ist in verschiedener Weise tätig beim Schutz der finanziellen Interessen der EG. Der dem Innenministerium unterstehenden „Kriminalpolizei“ (§ 18 StPO) kommen Aufgaben für die Strafrechtspflege zu, wie im Strafprozessrecht vorgesehen. Diese bestehen im Allgemeinen in der Aufklärung und Verfolgung von Straftaten, und umfassen sowohl ermittelnde als auch rein physische, durchsetzende Aufgaben.

Gemäß § 1 Bundesgesetz, mit dem das Sicherheitspolizeigesetz geändert und ein Bundesgesetz über die Einrichtung und Organisation des Bundeskriminalamtes erlassen wurde (BKAG)<sup>16</sup> fallen die wirksame bundesweite Bekämpfung gerichtlich strafbarer Handlungen und die internationale polizeiliche Kooperation in die Zuständigkeit des der Generaldirektion für die öffentliche Sicherheit unterstehenden Bundeskriminalamtes (BKA). Das BKA führt selbst keine Kontrollen bei verdächtigen Wirtschaftsteilnehmern durch. Dies erfolgt durch das jeweilige Fachministerium, welches das BKA ebenso wie die StA erst bei Vorliegen des Verdachts einer gerichtlich strafbaren Handlung einbindet.

Anders verhält es sich bei Korruption, wo das BKA selbständig beginnt, Ermittlungen durchzuführen, nachdem ihm meist anonyme Anzeigen aus der Bevölkerung zukommen. In diesem Fall verständigt das BKA die StA möglichst rasch, um eine gemeinsame Ermittlungslinie festzulegen. Das BKA

arbeitet in allen Fällen, in denen die finanziellen Interessen der EG betroffen sind, mit dem OLAF zusammen. So wird das BKA etwa bei Ermittlungen gegen korrupte Gemeinschaftsbeamte unterstützend tätig. Das BKA kooperiert in Fällen organisierter Kriminalität zudem eng mit Europol und Eurojust, wobei auch in diese Kooperation OLAF gegebenenfalls mit eingebunden ist. OLAF wird dann in die Ermittlungen vollständig einbezogen.

Für Korruption innerhalb der Polizei ist das eigens dafür eingerichtete BIA zuständig.<sup>17</sup> Dieses soll in ein Bundesamt zur Korruptionsbekämpfung und Korruptionsprävention umgewandelt werden und als solches über den polizeiinternen Bereich hinaus in allen Fällen bestimmter Straftaten anstatt des BKA für die sicherheits- und kriminalpolizeilichen Angelegenheiten zuständig sein.<sup>18</sup> Die sachliche Zuständigkeit des Bundesamtes soll der KStA nachgebildet werden. Das Bundesamt soll mit der KStA zusammenarbeiten und für die Amtshilfe mit Einrichtungen der EU sowie Ermittlungsbehörden anderer Mitgliedstaaten zuständig sein. Ebenso wird es die zentrale nationale Verbindungsstelle zu OLAF und Eurojust in Ermittlungsverfahren in ihrem Kompetenzbereich werden. Weisungen des Innenministers an den Direktor des Bundesamtes sollen nur schriftlich und begründet zulässig sein. Das Personal des Bundesamtes soll ausschließlich an Weisungen des Direktors und interner Vorgesetzter gebunden sein.

### 3. Finanzministerium (BMF)

Das Finanzministerium ist in mehrfacher Hinsicht von entscheidender Bedeutung für den Schutz der finanziellen Interessen der EG in Österreich: zum einen in der Verfolgung von Finanzvergehen und Finanzordnungswidrigkeiten (§§ 49 ff. Finanzstrafgesetz – FinStrG) in den Bereichen Zoll und Umsatzsteuer,<sup>19</sup> zum anderen in der Bestrafung von Finanzordnungswidrigkeiten und gewissen Finanzvergehen in beiden Bereichen. In Österreich wird mehr Umsatzsteuer als Zoll hinterzogen,<sup>20</sup> da jedoch Zolleinnahmen im Gegensatz zu den Umsatzsteuereinnahmen in voller Höhe dem Gemeinschaftshaushalt zukommen, lässt sich mangels genauer Zahlen nicht sagen, in welchem Bereich die finanziellen Interessen der EG in Österreich mehr geschädigt werden.

Die Abgrenzung der finanzstrafbehördlichen Zuständigkeit zur Bestrafung von Finanzvergehen und Finanzordnungswidrigkeiten vollzieht sich nach verschiedenen Wertgrenzen des strafbestimmenden Wertbetrages gemäß § 53 FinStrG. Demnach sind von Finanzstrafbehörden alle Finanzordnungswidrigkeiten zu ahnden (§ 53 Abs. 5 FinStrG) sowie all jene Finanzvergehen, die nicht in die strafgerichtliche Zuständigkeit fallen (§ 53 Abs. 6 FinStrG). Sachlich zuständig in erster Ins-

tanz sind für Finanzvergehen im Zusammenhang mit der Ein-, Aus- und Durchfuhr von Waren die Zollämter (§ 58 Abs. 1 lit. a FinStrG), sonst die jeweils zur Einhebung der Abgaben zuständigen Finanzämter (§ 58 Abs. 1 lit. f FinStrG).

Den Finanzämtern steht bei ihrer finanzstrafrechtlichen Tätigkeit die Steuerfahndung zur Seite, die keine eigene Behörde, sondern eine Unterstützungseinrichtung ist, die im Namen des Finanzamtes als Finanzstrafbehörde erster Instanz auftritt. Ihr obliegen nicht nur Maßnahmen des Vollzugs von Akten der Befehls- und Zwangsgewalt, sondern auch die Durchführung von ersten Eigenermittlungen noch vor der Beauftragung durch die Finanzstrafbehörde, Koordination von Betrugsbekämpfungsmaßnahmen, Betrugsprävention und internationale Amtshilfe.

Nicht nur bei finanzbehördlicher Strafzuständigkeit, auch bei gerichtlicher Zuständigkeit können die Finanzstrafbehörden nach der von ihnen gegebenenfalls an die StA (§ 54 Abs. 3 FinStrG) zu erstattenden Anzeige bei der Verfolgung von Finanzstrafvergehen tätig werden, soweit ihre Hilfe von StA oder Gericht in Anspruch genommen wird (§ 197 Abs. 1 FinStrG). Große Bedeutung sowohl bei der Aufklärung als auch der Bestrafung von Finanzvergehen zum Schaden der finanziellen Interessen der EG kommen den Hauptzollämtern (HZA) Wien und Innsbruck zu. Besonders wichtig für Ermittlungen im Bereich der finanziellen Interessen der EG ist die Abteilung IV/3 (Zentrale Betrugsbekämpfung für Steuern und Zoll) des BMF, deren Aufgabe der Schutz der österreichischen und europäischen finanziellen Interessen ist.

Ein bedeutendes, stark durch sektorbezogenes Gemeinschaftsrecht geprägtes Aufgabengebiet beim ausgabenseitigen Schutz der finanziellen Interessen der EG stellt der Bereich der Ausfuhrerstattungen für landwirtschaftliche Produkte dar. Das BMF hat großen Anteil daran durch die Ausfuhrzollstellen, welche die Angaben auf der Ausfuhranmeldung auf ihre Richtigkeit überprüfen. Für die Koordinierung dieser Überprüfungen war Österreich wie alle anderen Mitgliedstaaten der EU durch Art. 11 VO 4045/89 verpflichtet, einen Sonderdienst einzurichten. In diesem Sonderdienst sind auch Bedienstete des Landwirtschaftsministeriums (BMLFUW), und zwar aus der Abteilung EU-Finanzkontrolle und interne Revision, vertreten. Zum besseren Funktionieren dieser Zusammenarbeit zwischen BMF und BMLFUW besteht auch eine von deren Mitarbeitern gegründete Arbeitsgruppe, die der informellen Koordinierung dient.

Im Zollbereich finden Überprüfungen auf vielerlei Indikation statt. In Betracht kommen zum einen Hinweise aus der Bevölkerung, anderen Ministerien<sup>21</sup> und des OLAF. Das BMF führt aber zum anderen auch ganz ohne Hinweise von außen Kontrollen durch, und zwar auf Basis von Risikoanalysen.

Die näheren Selektionskriterien für Kontrollen des BMF sind vertraulich. OLAF wird informiert, wenn bei der nationalen Ermittlung der Verdacht besteht, dass die konkrete Betrugsmethode auch in anderen Mitgliedstaaten zur Anwendung kommen könnte. Vor-Ort-Kontrollen finden sowohl gemeinsam mit als auch auf Initiative des OLAF statt. Die Polizei ist hingegen bei Kontrollen des BMF nicht vor Ort, da die Zollverwaltung selbst in Form der Zollfahndung über bewaffnete Einheiten verfügt.<sup>22</sup>

Der Kontakt zwischen dem BMF und OLAF vollzieht sich sowohl über die Zentrale Betrugsbekämpfung als auch direkt über die Finanzstrafbehörden erster Instanz, vor allem die HZA Wien und Innsbruck. Das BMF erstellt nach jeder Untersuchung selbst einen Ermittlungsbericht, unabhängig davon, ob OLAF auch einen solchen erstellt.

#### 4. Finanzmarktaufsicht (FMA)

Die Finanzmarktaufsicht ist eine Anstalt des öffentlichen Rechts, die weisungsfrei die Aufgaben der Banken-, Versicherungs-, Wertpapier- und Pensionskassenaufsicht wahrnimmt (§ 1 Abs. 1 Finanzmarktaufsichtsbehördengesetz – FMABG). Beim Schutz der finanziellen Interessen der Union kommt ihr nur in einem Randbereich eine Zuständigkeit zu. So hat sie Banken unter anderem daraufhin zu überwachen, ob diese ihren besonderen Sorgfaltspflichten zur Bekämpfung der Geldwäscherei (§ 41 Bankwesengesetz – BWG) nachkommen. Bei Verletzung dieser Sorgfaltspflichten hat die FMA den Verantwortlichen des Kreditinstitutes zu bestrafen (§ 98 Abs. 2 BWG).

#### 5. Agrarmarkt Austria (AMA)

Die Agrarmarkt Austria ist eine juristische Person öffentlichen Rechts (§ 2 Abs. 1 Agrarmarkt Austria-Gesetz – AMAG), der als Bundesbehörde verschiedene Aufgaben auf dem Gebiet der landwirtschaftlichen Marktordnung zukommen, u.a. auch hinsichtlich der Förderungsverwaltung im Bereich der GAP (§ 3 Abs. 2 Z 3 AMAG). Die Mitgliedstaaten sind auf Grund von sektorbezogenem Gemeinschaftsrecht zur Errichtung eines Integrierten Verwaltungs- und Kontrollsystems (InVeKoS) im Bereich der landwirtschaftlichen Förderungen verpflichtet (Art. 14 VO 73/2009). Die AMA übernimmt im Rahmen des InVeKoS für Österreich die Bewilligung der entsprechenden Anträge sowie Verbuchung und Auszahlung der Förderungen. Im Zuge dieser Tätigkeiten, also jeweils vor Auszahlung der Förderung, führt die AMA vor Ort Kontrollen durch. Dabei aufgedeckte Unregelmäßigkeiten werden an das BMLFUW weitergeleitet. Zu Unrecht ausbezahlte Förderungen werden von der AMA selbst wieder rückgefordert.

#### 6. Landwirtschaftsministerium (BMLFUW)

Im Landwirtschaftsministerium ist die im Generalsekretariat angesiedelte Abteilung „EU-Finanzkontrolle und interne Revision“ mit der Betrugsbekämpfung zum Schutz der finanziellen Interessen der EG beauftragt. Es kommen ihr dabei mehrere Aufgaben zu. Zum einen hat sie jene Meldungen über Unregelmäßigkeiten, die sie von der AMA erhält, und bei denen eine Schadenssumme von mindestens 10.000,- Euro zu Lasten des Gemeinschaftshaushalts vorliegt (Art. 6 VO 1848/2006), an OLAF zu melden (Art. 3, 4 VO 1848/2006). Zum anderen führt die Abteilung EU-Finanzkontrolle und interne Revision auch selbst Kontrollen durch, und zwar wie die bereits erwähnten Ausfuhrzollstellen. Im Unterschied zu diesen prüft das BMLFUW jedoch nicht an der Grenze, sondern vor Ort bei den Betrieben. Diese Kontrollen erfolgen im Nachhinein, nicht wie die Vor-Ort-Kontrollen der AMA vor Ausbezahlung der Fördermittel. Dabei wird sowohl die ordnungsgemäße als auch die tatsächliche Durchführung der geförderten Maßnahme überprüft.

Die Überprüfungen durch das BMLFUW erfolgen fast ausschließlich aufgrund computergestützter Risikoanalysen. Anzeigen aus der Bevölkerung sind hingegen äußerst rar. Bei den Kontrollen kommt den Ermittlern des BMLFUW keinerlei Zwangsbefugnis zu. Sie können Beschlagnahme nur durch die Polizei begehren. In entsprechenden Situationen bzw. in Erwartung derselben erfolgt daher eine Information an das BKA. Bei begründetem Tatverdacht einer gerichtlich strafbaren Handlung wird die StA eingeschaltet, die von diesem Zeitpunkt an die Prüfungsleitung übernimmt. Unter deren Aufsicht können die Ermittler des BMLFUW jedoch weiter prüfen. Wie die von der AMA erhaltenen Meldungen über Unregelmäßigkeiten, so leitet das BMLFUW auch die selbst aufgedeckten Unregelmäßigkeitsfälle an OLAF weiter. Dazu genügt das Vorliegen eines ersten amtlichen Prüfberichts, der der jeweiligen Fachabteilung des BMLFUW und der Zahlstelle zu Begutachtung zugeführt und durch die Rechtsabteilung einer rechtlichen Abklärung unterzogen wurde. Der endgültige Prüfbericht zum Abschluss einer Untersuchung des BMLFUW wird OLAF nicht übermittelt, sondern nur eine Abschlussmeldung.

Abgesehen von diesen Meldungen des BMLFUW an OLAF sind die Kontakte zwischen den beiden Institutionen eher spärlich. So macht die Abteilung EU-Finanzkontrolle und interne Revision kaum Gebrauch von der Möglichkeit einer Hilfestellung bei der Kontaktherstellung und Koordinierung der Zusammenarbeit mit Behörden anderer Mitgliedstaaten durch das OLAF. Auch OLAF hat erst sehr selten im Zuge seiner eigenen Untersuchungen wegen einer Vor-Ort-Kontrolle den Kontakt zum BMLFUW gesucht. In diesen wenigen Fällen haben Ermittler der Abteilung „EU-Finanzkontrolle und interne Revision“ die OLAF-Kontrollreue gemäß Art. 4 VO 2185/96 begleitet.

Das BMLFUW ist durch Beamte der Abteilung „EU-Finanzkontrolle und interne Revision“ im bereits erwähnten Sonderdienst gemäß VO 4045/89 und der dazugehörigen, gemeinsam mit dem BMF eingerichteten Arbeitsgruppe vertreten. Zudem beschickt diese Abteilung den CoCoLaF mit Experten zum Thema „Unregelmäßigkeiten landwirtschaftlicher Produkte“.

## 7. Wirtschaftsministerium (BMWA)

Auch das Wirtschaftsministerium ist für Betrugsbekämpfung im Interesse des Schutzes der finanziellen Interessen der EG zuständig, und zwar ausgabenseitig im Bereich der Strukturfonds. Für die aus dem Europäischen Sozialfonds (ESF) kofinanzierten Programme ist die Fachabteilung II/9 (Europäischer Sozialfonds) zuständig. Die Fachabteilung C1/2 (Standortpolitik und Binnenmarkt) ist für Finanzkontrolle in den Bereichen des Europäischen Fonds für Regionale Entwicklung (EFRE) und des EU-Programmes Leader+ zuständig. Im Bereich des EFRE teilt sich das BMWA die Zuständigkeit mit dem Bundeskanzleramt. Innerhalb des Zuständigkeitsbereiches des BMWA läuft die operative Umsetzung der Abwicklung des EFRE über den damit betrauten European Recovery Programm Fonds und die für diesen zuständigen Austria Wirtschaftsservice GmbH.

## 8. Bundeskanzleramt

Für die aus dem Europäischen Fonds für Regionale Entwicklung (EFRE) kofinanzierten Regionalprogramme ist die Abteilung IV/4 im Bundeskanzleramt zuständig. Die damit im Zusammenhang stehende Betrugsbekämpfung fällt hingegen in den Aufgabenbereich der Abteilung IV/3 (EFRE-Finanzkontrolle) des Bundeskanzleramtes. Dem Bundeskanzleramt kommt auch die strukturfondsübergreifende Koordinierung der Finanzkontrolle zu.<sup>23</sup> Daneben ist das Bundeskanzleramt auch zuständig für das Dienstrecht der Bundesbeamten. Derzeit laufen Bemühungen, einen Verhaltenskodex für Bundesbeamte im Sinne der Korruptionsprävention zu erstellen.<sup>24</sup>

## III. Rechnungshof (RH)

Der RH ist wie alle „einzelstaatlichen Rechnungsprüfungsorgane“ gemäß Art. 248 Abs. 3 EGV verpflichtet, mit dem Europäischen Rechnungshof (ERH) bei dessen Kontrolltätigkeit zusammen zu arbeiten, was auch gemeinsame Prüfungen mit einschließen kann. Als Forum der Zusammenarbeit besteht der einmal jährlich tagende so genannte Kontaktausschuss der Obersten Rechnungskontrollbehörden der EU-Mitgliedstaaten, in dem die Präsidenten der mitgliedstaatlichen RH und des

ERH sowie der Ausschuss der Verbindungsbeamten und die zu spezifischen Prüfungsthemen eingesetzten Arbeitsgruppen vertreten sind. Die Zusammenarbeit besteht insbesondere auf dem Gebiet des Schutzes der finanziellen Interessen der EG.<sup>25</sup> Der RH beteiligt sich i.d.R. an den Prüfungen des ERH in Österreich. Dabei prüft er u.a. die Gebarung mit jenen Mitteln aus dem Gemeinschaftshaushalt, die über die Haushalte von Bund, Ländern und Gemeinden fließen.

## IV. Ergebnis und Ausblick

Zum Schutz der finanziellen Interessen der EG sind nicht nur auf europäischer, sondern auch auf österreichischer Ebene zahlreiche, äußerst verschiedenartige Akteure berufen. Dies erklärt sich aus der Vielschichtigkeit der Materie, die auf verschiedensten Rechtsgrundlagen basiert, aber auch aus der Vielfalt der Aufgaben, die es zu bewältigen gilt, um den Schutz der finanziellen Interessen der EG sicher zu stellen.

Die Akteure lassen sich in Gruppen gliedern, je nachdem worin ihre Aufgaben in Bezug auf den Schutz der finanziellen Interessen der EG bestehen. Kontrollen zum Schutz der finanziellen Interessen der EG führen auf österreichischer Seite vor allem Verwaltungsbehörden auf Bundesebene durch, wie BMJ, BMI, BMF, BMLFUW, AMA, BMWA und Bundeskanzleramt. Unterstützung dabei erhalten diese Akteure durch die Kommission und OLAF, Europol, Eurojust, das EJM sowie den österreichischen Rechnungshof. Strafen, Sanktionen und Maßnahmen zum Schutz der finanziellen Interessen der EG werden von Straf- und Zivilgerichten sowie dem BMF und den Fachministerien verhängt. Österreichischen (und generell mitgliedstaatlichen) Behörden kommt somit eine große Rolle beim Schutz der finanziellen Interessen der EG zu, besonders im Sanktionsbereich, aber auch im Bereich der Kontrollen.

Die Zusammenarbeit zwischen den einzelnen Behörden funktioniert nicht gleichmäßig gut. Während innerösterreichisch die Kooperation anstandslos funktioniert, arbeiten nicht alle österreichischen Behörden mit der Kommission bzw. OLAF intensiv zusammen. Auch die „Serviceangebote“ verschiedener Gemeinschaftsinstitutionen, die Arbeit zwischen zuständigen mitgliedstaatlichen Behörden zu koordinieren, werden nicht immer angenommen. Dazu passt auch die bisher ablehnende Haltung des BMJ gegenüber einer Europäischen Staatsanwaltschaft.<sup>26</sup> Im Gegensatz zur Zusammenarbeit mit europäischen Institutionen ist die Zusammenarbeit zwischen den zuständigen Behörden verschiedener Mitgliedstaaten problemlos und häufig. Einrichtungen wie das EJM, bei denen mitgliedstaatliche Behörden direkt miteinander in Kontakt treten, werden von österreichischer Seite folglich gerne in Anspruch genommen.





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- 1 Der vorliegende Artikel basiert auf Teilen der Dissertation des Autors „Der Schutz der finanziellen Interessen der Union“ (2009) an der Wirtschaftsuniversität Wien.
- 2 Die betroffenen Gebiete fallen unter Art. 10 B-VG, der Materien der Gesetzgebung und Vollziehung durch den Bund enthält.
- 3 Vor allem Veruntreuung (§ 133 StGB), Betrug und qualifizierter Betrug (§§ 146-148 StGB), Untreue (§ 153 StGB), Förderungsmisbrauch (§ 153b StGB), Geldwäscherei (§ 165 StGB), Wettbewerbsbeschränkende Absprachen bei Vergabeverfahren (§ 168b StGB), Missbrauch der Amtsgewalt (§ 302 StGB), Geschenkannahme durch Amtsträger oder Schiedsrichter (§ 304 StGB), Bestechung (§ 307 StGB), Abgabenhinterziehung (§ 33 FinStrG, § 7 AusfuhrerstattungsG) und Schmuggel und Hinterziehung von Eingangs- oder Ausgangsabgaben (§ 35 FinStrG).
- 4 Art. 1 Abs. 1 VO 2988/95. Diese Bestimmung ist somit eines der „besonderen Gesetze“ gemäß § 1 JN, die eine Zuständigkeit für bürgerliche Rechtssachen vor anderen Behörden begründet.
- 5 BGBl 53/1991.
- 6 Nur wenn es im Interesse der Raschheit und Kostenersparnis liegt, kann die Vollstreckungsbehörde die Eintreibung selbst vornehmen, vgl § 3 Abs. 1 3. Satz VVG.
- 7 Interne Revisionen, Kontrollämter etc.
- 8 Staatsanwälte sind keine Verwaltungsorgane mehr, sondern mit Wirkung vom 1.1.2008 Organe der Gerichtsbarkeit, vgl Art. 90a B-VG sowie § 19 Abs. 2 StPO. Dennoch werden die Staatsanwaltschaften und die Korruptionsstaatsanwaltschaft aus systematischen Gründen an dieser Stelle im Kontext mit anderen ermittelnden Behörden, und nicht unter dem Titel der Strafrichterbarkeit besprochen.
- 9 Vgl dazu Entwurf Bundesgesetz, mit dem das Strafgesetzbuch geändert und eine Staatsanwaltschaft zur Korruptionsbekämpfung errichtet wird, einsehbar unter: [http://www.bmj.gv.at/\\_cms\\_upload/\\_docs/Entwurf\\_StrAEG2008.pdf](http://www.bmj.gv.at/_cms_upload/_docs/Entwurf_StrAEG2008.pdf) [26.07.2007].
- 10 Also etwa Missbrauch der Amtsgewalt (§ 302 StGB), Geschenkannahme durch Amtsträger oder Schiedsrichter (§ 304 StGB) oder Bestechung (§ 307 StGB).
- 11 Erläuterungen StRÄG 2008, Zu Artikel II (Sonderstaatsanwaltschaft zur Korruptionsbekämpfung), Zu § 1 (Staatsanwaltschaft zur Korruptionsbekämpfung).
- 12 Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen (Auslieferungs- und Rechtshilfegesetz – ARHG), BGBl 1979/529.
- 13 BGBl I 2004/36.
- 14 Republik Österreich Bundesministerium für Justiz, Geschäfts- und Personaleinteilung des Bundesministeriums für Justiz, Stand Dezember 2007, 31, einsehbar unter: [http://www.justiz.gv.at/\\_cms\\_upload/\\_docs/gesch2007\\_12\\_bmj.pdf](http://www.justiz.gv.at/_cms_upload/_docs/gesch2007_12_bmj.pdf) [09.12.2007].
- 15 Geschäftsverteilung BMJ 40 f.
- 16 BGBl I 2002/22.
- 17 Das BIA ist Mitglied der European Partners Against Corruption (EPAC), einem EU-weiten Netzwerk von Antikorruptionsbehörden, und führt darin derzeit den Vorsitz. Neben teilweise mehreren Behörden aus allen Mitgliedstaaten der EU außer Schweden ist auch OLAF Mitglied der EPAC. Vgl dazu [www.epac.at](http://www.epac.at) [26.05.2008].
- 18 Entwurf Bundesgesetz, mit dem das Bundes-Verfassungsgesetz und das Sicherheitspolizeigesetz geändert und ein Bundesgesetz über ein Bundesamt zur Korruptionsbekämpfung und Korruptionsprävention erlassen wird, einsehbar unter [http://www.bmi.gv.at/begutachtungdownload/Korruptionsbek\\_Entwurf.pdf](http://www.bmi.gv.at/begutachtungdownload/Korruptionsbek_Entwurf.pdf) [26.05.2008].
- 19 Das BMF zählt im Gegensatz zur Kommission die Umsatzsteuer nicht zu den einnahmenseitigen „Mitteln“ der EU i.S.d. Finanzschutzübereinkommens. Doch auch wenn man diesem Standpunkt der hM folgt, steht außer Frage, dass die österreichischen USt-Einnahmen über den Umweg des Bundeshaushalts auch für die finanziellen Interessen der EG von Bedeutung sind. Darum muss auch die Bekämpfung der Umsatzsteuerkriminalität an dieser Stelle genannt werden.
- 20 Die Hinterziehungsquote der USt liegt in Österreich bei 5 %, in anderen Mitgliedstaaten der EU bei bis zu 35 %, vgl. *Leitner/Toifl/Brandl*, Österreichisches Finanzstrafrecht, 3. Aufl. 2008, Rz. 1024.
- 21 So wird seitens des BMF etwa die gute Zusammenarbeit der Zentralen Betrugsbekämpfung mit dem BKA gelobt.
- 22 Seit 1. März 2007 verfügt jedes Zollamt über eine Zollfahndungseinheit. Die Zollfahndung konzentriert ihre Arbeit u.a. auf zwei für den Schutz der finanziellen Interessen der EG wesentliche Gebiete, nämlich die Bekämpfung des organisierten Zigarettenschmuggels und die Kontrolle der Ausfuhrerstattungen, *Leitner/Toifl/Brandl*, Rz. 1603.
- 23 *Fleckenstein*, Schutz der finanziellen Interessen der Europäischen Gemeinschaft. Externe Kontrollen des Europäischen Amtes für Betrugsbekämpfung (OLAF) unter spezieller Berücksichtigung relevanter österreichischer Rechtsnormen (2004), S. 174 f.
- 24 Der Verhaltenskodex soll die Bereiche Geschenkannahme, Sponsoring, Nebenbeschäftigung, Amtsverschwiegenheit sowie Führungs- und Organisationsverhalten behandeln.
- 25 <http://eca.europa.eu/portal/page/portal/cooperation/eucontactcommitteeother-coopstruct/EUContactCommitteecooperationinpractice> [30.10.2007].
- 26 Stellungnahme des Bundesministeriums für Justiz der Republik Österreich zum Grünbuch der Europäischen Kommission zum strafrechtlichen Schutz der finanziellen Interessen der Europäischen Gemeinschaften und zur Schaffung einer Europäischen Staatsanwaltschaft, 13.08.2002.

# The Reform of OLAF

## Legal Framework and the Proposal for a Regulation Amending the OLAF Regulation

Andreea Staicu\*

### I. Introduction

The European Anti-Fraud Office's mission and functioning is governed by Commission Decision 1999/352/EC, ECSC, Euroatom of 28 April 1999,<sup>1</sup> European Parliament and Council Regulation (EC) No. 1073/1999,<sup>2</sup> and Council Regulation (Euratom) No. 1074/1999 of 25 May 1999.<sup>3</sup> Although established as a Commission Directorate in 1999, the Office enjoys operational independence at the same time. The Office is headed by a Director nominated by the Commission for a term of five years, which may be renewed once. The above-mentioned regulations lay down the rules for the opening, carrying out and closure of internal and external investigations conducted by OLAF. They also create an obligation for the Communities' bodies, offices and agencies to forward any information relating to possible cases of fraud or corruption or any other illegal activity to the Office without delay. The regulations contain provisions on forwarding information by the Office to the competent authorities of the Member States and on the role of the Supervisory Committee. It is the responsibility of the Supervisory Committee, which is composed of five independent personalities, to reinforce the Office's independence through regular monitoring of the implementation of the investigative function.

While the first evaluation<sup>4</sup> of the Office's activities, approved by the Commission in April 2003, concluded that the institutional arrangement of the Office was functional, it also featured a set of recommendations aimed at further strengthening the Office's operations. The recommendations derived from the need to improve the efficiency of the Office's activities and the cooperation with the competent authorities of the Member States.

### II. The Reform of OLAF: Commission Proposal for a Regulation Amending Regulation (EC) 1073/1999

#### 1. The Reasons for a Reform of OLAF

The first evaluation of the Office in 2003 showed that there was room for improvement concerning the operational efficiency of the Office. The Commission took the initiative of preparing

legislative proposals that would enhance the procedural rights of persons concerned by investigations, ensure better control over the duration of investigations and improve the exchange of information between the Office and the institutions concerned, as well as the Member States. Thus, it was deemed the overall efficiency of operational activities would increase.

The first legislative proposals<sup>5</sup> amending Regulations (EC) No. 1073/1999 and (EURATOM) No. 1074/1999 were adopted by the Prodi Commission in February 2004. In 2005, however, a second evaluation of the Office was performed by the European Court of Auditors, at the request of the European Parliament, before the Parliament entered into the first reading of the 2004 proposals. The Court of Auditor's report<sup>6</sup> on the management of OLAF was followed by a public hearing organised by the Committee on Budgetary Control at the European Parliament on the reinforcement of OLAF in July 2005. The conclusion was that the Office's current institutional structure did not inhibit its independence, however, that the rights of persons concerned by investigations needed to be enhanced.

#### 2. The Objectives of the 2006 Reform Proposal

In order to make the best use of the conclusions of both the Court of Auditor's special report and the public hearing at the European Parliament, the 2004 proposal was withdrawn and a new proposal was presented by the Commission on 24 May 2006.<sup>7</sup> This proposal builds on the February 2004 initiative and extends it. Its objectives are to achieve higher control standards, better governance setup, as well as greater efficiency and better information exchange on OLAF investigations. These objectives may be grouped under five main topics:

##### Governance, cooperation between the institutions and the Supervisory Committee

In order to clarify the relations between the Office on the one hand and the Supervisory Committee and the institutions and other bodies, offices and agencies on the other hand and to establish a closer cooperation between them, the new Art. 11 (a)

of the Proposal sets out that the Supervisory Committee meet, periodically or upon request, with representatives of the European Parliament, the Council and the Commission as part of a “structured dialogue”, without interfering with the course of investigations. The aim of this “structured dialogue” is to exercise a political control function on the investigative activities and efficiency of the Office and to ensure that sound relations are maintained between the Office and the EC institutions and other bodies, offices and agencies, in particular with regard to the flow of information. The proposal also provides for a seven-year non-renewable term for the position with a view to reinforcing Director General’s independence.

#### Clarification of the rights of persons concerned by investigations

The new Art. 7(a) lays out the procedural guarantees to be respected during both internal and external investigations: More precisely, it deals with the information to be given by OLAF prior to an interview to the person concerned by the investigation and the establishment of minutes of the interview, the right to be assisted by a person of one’s choice at an interview and the right not to incriminate oneself. These guarantees must be respected not only before the final report is drawn up but also before information is transmitted to the national authorities. Incorporating these procedural rights in the Regulation itself makes it possible to constitute a uniform body of basic guarantees applicable to all OLAF investigations, be they internal or external.

#### Introduction of a Review Adviser

In order to ensure real time control over operational activities conducted by the Office, an independent Review Adviser will be appointed for a five year term by the Director General, acting on a proposal made by the Supervisory Committee. He/she would be required to formulate opinions on the:

- Procedural guarantees set out in Articles 6(5) (reasonable period of investigation) and 7(a) of the amended Regulation; the opinions can be drawn up either out of his own initiative or at the request of any EC official or servant or any economic operator personally concerned by an investigation in progress. This opinion may be sought at any stage of the investigation.
- Duration of the investigation, where it exceeds twelve months automatically or in the event of successive extension beyond eighteen months at the request of the Director General of the Office; the opinion is notified to the institution, body or agency concerned by the investigation and to the Supervisory Committee.
- Deferment (where necessary) of the implementation of the obligation to call on the person implicated to make his views known on all the facts concerning him.

- Control of investigations; intervention is possible at any time during the investigation, whenever the Director General of the Office so requests.

#### Strengthening OLAF’s operational efficiency

Several provisions aim at improving the Office’s operational efficiency. In that sense, the proposal provides for better access for the Office to information held by the European institutions and bodies, as well as access to information held by economic operators in the context of external investigations. To allow OLAF to concentrate on its priority actions, the Office has discretion over whether or not to initiate investigations, and to ask the appropriate authorities to follow up cases that are of minor significance or lie outside OLAF’s investigative priorities, inviting them to inform OLAF of the action taken on its requests. As long as an OLAF internal investigation is in progress, institutions, bodies, offices and agencies must not initiate parallel investigations.

#### Improving the flow of information

The proposal aims at reinforcing the flow of information on three levels:

- Between OLAF and the European institutions and bodies: OLAF is required to inform the institution or body concerned, in cases which involve suspected wrongdoings of their officials. In addition, the institution or body concerned is to be informed if OLAF transmits information to the judicial authorities.
- Between OLAF and the Member States: For the purposes of all its investigations the Office will be informed of actions taken by national judicial authorities in response to information transmitted during or after the completion of an OLAF investigation.
- Between OLAF and informers: Anybody in an institution, body, office or agency who transmits information relating to fraud or irregularity cases to the Office will be informed whether an investigation has been opened on the basis of the information.

### 3. The State of Affairs

After generally receiving supportive opinions from the Court of Auditors<sup>8</sup> and the European Data Protection Supervisor,<sup>9</sup> the proposal for a Regulation amending (EC) Regulation No. 1073/1999 moved through the legislative procedure in 2007 and 2008. In the Council, the Commission proposal was discussed under the German Presidency, in February 2007 and March 2007. On this latter occasion, the Council Working Party on the Fight against Fraud adopted a working document inviting the Commission to simplify and consolidate the

present anti-fraud legislation and rectify existing weaknesses and overlapping contents. Concerning the Commission proposal, the Working Party proposed replacing the Review Adviser with a panel of OLAF's directors and did not take on board the creation of a structured dialogue.

More recently, the European Parliament completed its first reading on the Commission proposal on 20 November 2008, with the adoption of a report (rapporteur MEP *Ingeborg Gräßle*) in the plenary session.<sup>10</sup> The report comprises no less than 92 amendments to the Commission proposal.<sup>11</sup> The amendments adopted by the European Parliament cover all aspects already present in the Commission proposal. Many of the amendments build on the Commission proposal, yet others are entirely new, such as the possibility for the Director General to intervene independently *before* the European Court of Justice and the national courts in cases regarding the operations of the Office.

A first set of amendments proposes the introduction of enhanced procedural/legal controls before the initiation and after the completion of an investigation, which could be carried out by OLAF's legal experts. The amendments concerning the Review Adviser maintain the main features of the Commission proposal: the independence, the increased credibility, as well as the speed of the review procedure. A new amendment provides for the introduction of complaints, which would not be made directly to the Review Advisor, but which the Supervisory Committee would then forward to the Review Advisor. This could result in a supplementary delay in the review procedure.

In the same vein, the introduction of the new *Art. 15 bis* would allow OLAF to adopt a "code of procedure" specifying the modalities for applying the principles of investigations, the procedural rights of the persons concerned by investigations, data protection issues connected to the communication of information, legality control provisions etc. Such rules would indeed be helpful to OLAF. However, taking into consideration that the Office has no legislative power of its own it would be more accurate to qualify this code as "operational instructions".

Regarding the institutional framework of the Office, the European Parliament proposes a "concertation procedure" (*procédure de concertation*) as an alternative to the "structured dialogue". The "concertation procedure" is quite a complex and general instrument of horizontal follow-up of the efficiency of the fight against fraud. The number of stakeholders also increases (representatives of the Court of Auditors, Europol and Eurojust may be invited to the meetings of the "concertation procedure"). As a consequence, there is a certain danger that the purpose of the "structured dialogue" may be lost in a more bureaucratic structure, which is to exercise a political control

function on the investigative activities and the efficiency of the Office, and to ensure that sound relations are maintained between the Office and the EC institutions and other bodies, offices and agencies.

The Parliament also brought amendments to the appointment procedure of the Director General: it has been suggested that the Director should be appointed together by the Parliament and the Council, on the basis of a list of six candidates proposed by the Commission. Such a change is not possible in the current institutional set-up of the Office as a Commission Directorate-General.

Finally, an important number of amendments aim at improving cooperation (including follow-up to the OLAF cases) between OLAF and the other European institutions, bodies and agencies, as well as with the Member States and Europol and Eurojust. This includes the possibility for OLAF to conclude cooperation agreements with Europol, Eurojust and other international organisations – in contrast to the current legal framework, where such agreements could only be concluded by the Commission.

### III. The Way Forward

Although the Parliament gave a favourable opinion on the Commission proposal, the number of amendments is important and, as stressed at the Plenary session of 20 November 2008, some of them have not been accepted by the Commission in the current situation, the main reason being that OLAF's statute as a Commission Directorate-General does not allow the proposed changes.

The Commission will, at the request of the Czech Presidency, present a reflection paper during the first half of 2009, with a view to continue negotiations in the Council aimed at achieving a common position. The document will take into consideration both the existing legal set-up governing OLAF and the current elements of discussion regarding the reform. Moreover, on 18 December 2008, the European Parliament's resolution<sup>12</sup> invited the Council to present a schedule for the negotiations with the Parliament.

In the current state of affairs, the joint examination of the proposal by the Council, the Parliament and the Commission on the basis of a reflection paper prepared by the Commission must find a solution in order to determine the positions of the three institutions with regard to the main issues of the reform: (1) The effectiveness, (2) the reinforced accountability and oversight of OLAF's operations, and (3) the institutional and governance set-up of the Office. The reform must enable fur-



ther progress towards an efficient protection of the Communities' financial interests, with OLAF's ten-year experience serving as guidance on that path. It is essential that the on-going co-decision procedure be carried out without delay, in order to achieve greater efficiency in OLAF's operations. Once the current legislative procedure is accomplished, further efforts for improving OLAF's legal framework could be envisaged in the perspective of the implementation of the Lisbon Treaty.



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\* Opinions expressed in this article are made in a personal capacity. They do not commit the institution.

1 OJ L 136 of 31 May 1999, p. 20.

2 OJ L 136 of 31 May 1999, p. 1.

3 OJ L 136 of 31 May 1999, p. 8.

4 COM(2003) 154 final.

5 COM(2004) 103 and 104.

6 Special report No. 1/2005 (OJ C 202 of 18 August 2005, p. 1), approved by Council Conclusions no. 13678 of 8 November 2005, pp. 25-27.

7 COM (2006) 244 final. Cf. also eucrim 1-2/2006, pp. 6-7.

8 Opinion No. 7/2006 on a proposal for a Regulation of the European Parliament and Council regulation amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ C 8 of 12 January 2007, p. 1).

9 Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ C 91 of 26 April 2007, p. 1).

10 European Parliament legislative resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), P6\_TA-PROV(2008) 553. For the preparing report (Rapporteur MEP *Ingeborg Gräßle*) see A6-0394/2008.

11 Cf. also *Wahl/Staats*, eucrim 1-2/2008, p. 12.

12 P6\_TA-PROV(2008)0632.

## The Shaping and Reshaping of Eurojust and OLAF

### Investigative Judicial Powers in the European Judicial Area

Prof. Dr. John A.E. Vervaele

#### I. Introduction

Despite the extension and strengthening of the European integration process, the creation of an *espace judiciaire européen*, and especially the shaping of the European law enforcement agencies has been cumbersome. Their design has been subject to great differences among the Member States, including whether or not we need them and, if so, whether or not they can become investigative agencies. On some substantial points, the Member States have been unanimous: there is no need for a redefinition of national territoriality and jurisdiction when it comes to criminal law enforcement and coercive powers, which can exclusively be executed by national judicial powers. However, it remains to be seen if this *national sovereignty clause* is compatible in the middle term with the objectives and instruments of the European integration process itself and thus with the principles of effectiveness and due process of criminal law enforcement.

This background explains the difficult institutional setting of both UCLAF-OLAF<sup>1</sup> and Eurojust. Despite the non-judicial character of the investigative powers of OLAF, there is a continuous struggle regarding the legal character of the investigative powers of OLAF, and some Member States are trying to neutralise the autonomous character of the investigative powers and their reach, particularly when it comes to administrative investigative acts in their own domestic legal orders. Within the European institutions themselves, we are seeing the same tendency when it comes to autonomous internal investigations. Some Member States indeed also have great difficulty with the coordination by OLAF of the follow-up of their investigative reports in the area of domestic criminal law enforcement. Concerning Eurojust,<sup>2</sup> despite the support of the Member States, it was set up as a coordination unit with no investigative or operational powers at all. On the one hand, the

Member States were not always sufficiently aware of the impact of integration on justice and on criminal law enforcement and, on the other hand, the Member States, when aware of the fact, maintained defensive resistance in order to preserve their sovereignty in criminal matters. This is the reason why the aim of Eurojust is to make judicial cooperation more effective by means of enhanced coordination, without changing the rules of territoriality or jurisdiction, and by limiting the competence to *transnational* serious crimes.

In reality, we cannot yet speak of a European judicial area in criminal justice. The competencies of the police, the public prosecutor, and the courts are determined on a national scale and, in principle, they are limited to the national territory. The European dimension of criminal law enforcement is very weak and limited to transnational enforcement, as if the quality of criminal justice “at home” (in each Member State) does not have any relationship with European integration. In fact, this attitude still is based more on the free-trade approach among states (intergovernmental cooperation) than on the concept of integration policy and law in an integrated legal order. The third pillar is part of the Union, but the political players act as if it was a “home pillar” of the Member States’ sovereignty.

## II. Challenges and European Agenda-Setting: The Nation-States under Pressure

However, the political game does not always match the game of the key players of the criminal justice system itself. Domestic police and judicial authorities were conscious of the need for a stronger European dimension and pushed for it bottom-up. The Schengen agreements (1985 and 1990) represent a milestone in this development. Practice and past performance of judicial cooperation are agenda setters. It became clear from practice that the idea of improving the traditional instruments of judicial cooperation by streamlining coordination is excellent but insufficient by far. The instruments as such became oldtimers in the actual setting of the European integration process since they were completely based on pre-EU concepts of national sovereignty, cooperation among states, and limited judicial protection. This is the reason why first of all the conventional concept of international public law in criminal matters (extradition, letters rogatory, etc.) was replaced by new EU-instruments of mutual recognition. However, the instruments of mutual recognition were based upon a blind trust in the equivalence between the procedural systems of the Member States without imposing minimum common standards of criminal procedure, evidence, and procedural safeguards. Secondly, cautious experiments were developed with liaison magistrates and joint investigation teams – cautious because the rules on territoriality and jurisdiction were not changed at all.

## III. European Enforcement Agencies under Construction

The push for agenda-setting was certainly stronger than the capacity to deal substantially with the need for further criminal justice integration in the common judicial area. The protection of the EC’s financial interests and the criminal response to EC fraud turned into a battlefield for several reasons. Besides being the EC Competition Authority, UCLAF, replaced by OLAF, became the first European law enforcement agency. Both the European Commission, including OLAF, and the European Parliament were of the opinion that the EC’s financial interests were insufficiently protected by the Member States and needed an effective criminal law protection.

Owing to the difficult establishment of the third pillar and the slowness and low-level inclination of Member States to ratify the agreements adopted in the third pillar, the European Parliament asked the European Commission to carry out a study on the possibilities of harmonising criminal law and criminal procedures in view of an effective protection of the EC’s interests. The result – the *Corpus Juris* 1997<sup>3</sup> – was finalised, after an implementation study, in the *Corpus Juris* 2000.<sup>4</sup> Even when the matter refers to specialised areas such as EC fraud, it is clear that the most revolutionary parts of the *Corpus Juris* are undoubtedly those on the establishment of a European Public Prosecutor (EPP) and on the harmonisation of criminal procedure, based on three governing principles: European territoriality, due process in criminal proceedings, and adversarial proceedings.

In the area of criminal procedure, owing to the substantial differences in the Union (i.e., the differences between the tradition of common law and the continental tradition), a symbiosis was sought between the legal traditions. The *Corpus Juris*, although limited to the area of EC fraud, opened the debate on the legal interests to be enforced beyond the concept of the typical nation-state and thus on the reconceptualisation of criminal justice in European integration. The *Corpus Juris*<sup>5</sup> with a view to introducing *Art. 280 bis* into the EC treaty in order to provide for the EPP. The proposal was not accepted but the result was that Eurojust – provided for in the Tampere Programme of 1999 and set up as Pro-Eurojust in March 2001 – was given a legal basis in the Treaty of Nice and replaced Pro-Eurojust in 2002. Eurojust’s objectives include the following:

- (1) Promotion and improvement of coordination between the competent authorities of the Member States, investigations, and judicial actions in the Member States;
- (2) Improvement of cooperation between the competent authorities of the Member States, in particular, enabling the execution of international judicial assistance and extradition requests;

(3) Provision of general support for the competent authorities in the Member States to increase the effectiveness of their investigations.<sup>6</sup>

Eurojust, acting as a College or through its national members, is able to ask for the following from the competent authorities of the Member States concerned, giving its reasons:

- i) Carrying out of an investigation or judicial action of specific acts;
- ii) Accepting that one of the competent authorities of the Member States concerned may be in a better position to undertake an investigation or to prosecute specific acts;
- iii) Coordination among the competent authorities of the Member States concerned;
- iv) Creation of a joint investigation team in accordance with the corresponding cooperation instruments;
- v) Provision of whatever information may be necessary for Eurojust to carry out its functions.<sup>7</sup>

Eurojust did not obtain operational powers. Moreover, Eurojust did not even become a requesting judicial authority. The competence was limited to coordination without binding compelling powers – not even necessarily binding between the national member of Eurojust and its own Member State. It is obvious that the powers of Eurojust, even acting as a College, do contrast substantially with the idea of full operational and coercive powers of the EPP, which should be based on European territoriality.

The European Commission, including OLAF, and the European Parliament remained convinced that there was a need for a European judicial area, with an EPP and judges of freedoms in the Member States to guarantee due process. Thus, and in accordance with its action plan 2001-2003 for the protection of the Communities' financial interests,<sup>8</sup> the European Commission published a Green Paper in December 2001 on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.<sup>9</sup> In 2003, the Commission published a detailed follow-up report, taking into account the results of the extensive public consultation and public hearing.<sup>10</sup> The Commission concluded that the matter of the European Public Prosecutor was now part of the Union's political agenda and was successful in paving the way for the insertion of the EPP in the draft Constitutional Treaty and in the Lisbon Treaty, which has been signed and is under the ratification process.

#### IV. From Eurojust to the EPP: The Design of the Lisbon Treaty

As regards Eurojust, Art. III-273 of the Constitutional Treaty has been literally copied in Art. 85 TFEU by the Lisbon Treaty:

Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes affecting to or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

Regarding the EPP, Art. III-274 of the Constitutional Treaty was also copied in Art. 86 TFEU, but a paragraph was added, creating an explicit legal basis for introduction through the enhanced cooperation procedures among at least nine Member States.

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament (...)
2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions (...)

There is no doubt that the two articles represent a significant step forward. First of all, Eurojust's competence has been increased. Eurojust obtained a legal foundation for solving conflicts of jurisdiction and may, *inter alia*, initiate criminal investigations, thus becoming a requesting authority. However, formal acts of judicial procedure must be carried out by the competent national authorities (Art. 85 (2) TFEU). It is clear that the Member States did not want Eurojust to become a supranational body with operational powers in a common area. This has been reserved for the future European Public Prosecutor.

Furthermore, these articles on Eurojust and the EPP must be read in conjunction with Art. 82 (2) of the Lisbon Treaty, which lays down for the first time an explicit legal basis for harmonisation in the area of criminal procedure and evidence:

- To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:
- (a) mutual admissibility of evidence between Member States;
  - (b) the rights of individuals in criminal procedure;
  - (c) the rights of victims of crime;
  - (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision (...)

## V. The pro tempore Reform of Eurojust

It is important, while waiting for the full ratification of the Lisbon Treaty and, once in force, for the first legislative initiatives to elaborate Eurojust and reshape the European law enforcement agencies, which should be an important part of the third policy programme of the area of freedom, security and justice (the follow-up of The Hague Programme),<sup>11</sup> to analyse the existing situation, learn from past performance, and plan possible reforms under the actual Treaty framework. With regard to Eurojust, there were sufficient signs that it did not have the necessary competency and infrastructure to accomplish its mission in the European judicial area. The result was that the information flow to Eurojust was weak and that Eurojust's capacities were underused. The problems mentioned by Eurojust, practitioners, and academics are as follows:<sup>12</sup>

1. The implementation of the Decision setting up Eurojust in the national legislation of the Member States is rather insufficient. There are many States without specific regulations for regulating the competency of Eurojust or for regulating the competencies of its national members. There are national members that lose all their competencies as prosecutors or examining magistrates when they are appointed at Eurojust. The result is that the national members of Eurojust have no system of equivalent competencies.
2. The involvement of the national member in the national structure is strictly limited, especially in relation to operative actions (initiation of criminal investigations, carrying out judicial proceedings). In some States, the national member also encounters difficulties when trying to access police and judicial information in databases.
3. The proactive competencies of Eurojust are very limited. Eurojust encounters difficulties when accessing information during the proactive phase in the Member States and to generate important cases in time. As an authority that requires information, it is in a very weak position. The national authorities' obligation to inform Eurojust and transfer cases to Eurojust is not at all clear. Furthermore, Eurojust is unable to open working files at Europol and does not have access to OLAF's files. There are also problems with the exchange of information in the "Europol-Eurojust-OLAF" triangle.

This analysis contrasts sharply with the result of a recent survey<sup>13</sup> carried out by Eurojust on the implementation of the Decision setting up Eurojust in national law and on the Member States' willingness to amend the decision. Basically, most of the political actors in the Member States prefer the status quo. In view of this disappointing attitude, the European Commission had openly considered a possible own legislative initiative to amend the Eurojust decision,<sup>14</sup> which resulted in a recent legislative initiative taken by 14 Member States.<sup>15</sup> The main ideas in the initiative were as follows:

1. Responses from Eurojust in cases of urgency (e.g., controlled delivery);
2. Strengthening of coordination in cases of conflicts of jurisdiction or the rejection of the execution of a request for judicial assistance;
3. Need for equivalent competencies of national members, especially in relation to urgent cases;
4. Improvement of the information flow to Eurojust in order to enable it to accomplish its mission;
5. Strengthening of cooperation between Eurojust, Member States, and third-party states.

The key article in the reform is undoubtedly Art. 9a of the initiative, which provides national members with delegated Eurojust competencies in their domestic laws for the following:

1. Requesting judicial assistance (including applications for mutual recognition);
2. Ordering searches and seizures;
3. Authorising and coordinating controlled deliveries.

The amendments include an urgency coordination unit,<sup>16</sup> which presupposes the daily presence of a national member around-the-clock (24/7), i.e., permanently occupied with urgent cases, applying the competencies laid down in Art. 9a. For example, the members of the unit transmit their requests for judicial assistance in criminal matters and, in the case of non-identification of a national execution authority (or identification in time), they execute the request themselves.<sup>17</sup> It might be surprising, but many Member States are opposed to the idea of delegated competencies for national members, despite it being in accordance with the competent national authority, or demanded thereby and having a case-by-case focus, or even limited to urgencies. Many Member States are afraid of an extra-national body with supranational competencies and put forward constitutional reservations during the negotiations.

Considering the differences of view among the Member States on the powers of Eurojust, even within the Member States that took the legislative initiative, it is no surprise that the content of the final approved text<sup>18</sup> has been substantially weakened. Anyway, the concept of equivalent powers among the national members is upheld, but laid down in a complex way. The powers of the national member domestically (Art. 9a) are further elaborated in Articles 9 lit. b- d, in which a distinction is made between ordinary powers, powers at request of the national authorities, and powers in urgent cases. The ordinary powers of Art. 9b are limited to the exchange of information. In addition, but subject to an agreement with a competent national authority, or at its request and on a case-by-case basis, the national member can issue mutual legal assistance or mutual recognition requests and execute them (Art. 9c). Also, the idea of an urgency coordination unit is upheld (called an On-Call Coord-



dination unit in Art. 5a). In urgent cases, Art. 9d gives to the national member the power to authorise controlled deliveries and to execute MLA and MR requests.

## VI. Analyses

The aforementioned analysis of the statute and functioning of Eurojust and the reform agenda is very important for the design of the European judicial enforcement agencies in the EU.<sup>19</sup> The reform of Eurojust certainly does not address all the problems. First, the result remains very much dominated by the national agenda of every Member State. It is astonishing to see that the majority of the Member States are very much afraid of their own representative at Eurojust becoming a supranational actor in their domestic jurisdiction. Member States still wrongly believe that Eurojust is only an interface between national authorities, limited to horizontal cooperation. They deny the vertical cooperation dimension of Eurojust.

Second, it is obvious that the shift from mutual legal assistance (MLA) towards mutual recognition has run into problems. The recent negotiated instruments on mutual recognition (MR), including the European evidence warrant, are in fact halfway constructs between MLA and MR. The result is that there is, because of increased grounds for refusal and increased use of double criminality conditions, less mutual recognition for the exchange of already existing evidence than for arrest and surrender, which is of course completely absurd. Neither MLA nor MR was able to overcome the problems of fragmentation of the European judicial area. The MR programme can only be successful if combined with sufficient harmonisation of criminal procedure (including evidence and due law aspects) and it is not limited to cross-border cases.

The protection of national sovereignty concerning criminal investigation and prosecution is not only based on nationalism, but also on a lack of equivalent standards in the area of criminal procedure and on distrust in the capacity or quality of criminal law enforcement systems of other Member States. As long as Member States do not consider their laws and practices as being equivalent, they will mistrust each other and hide behind the so-called common standards of the European Convention on Human Rights to disguise their lack of comity with regard to European integration, and they will reject the idea of operational law enforcement agencies.

The Lisbon Treaty contains a sufficient legal basis to break the vicious circle and to establish comity concerning the EU project in criminal matters. In my opinion, we can learn a lot from the past performance of the EC Competition Authority, OLAF, Europol, and Eurojust in order to shape the judicial

branch in criminal matters at EU level, taking into account the three dimensions of it: (1) the exchange of information between administrative agencies, police, and judicial authorities, (2) judicial investigation, and (3) prosecution. The EC Competition Authority and OLAF both have the advantage of experience with (administrative) investigative powers in a multi-level setting.

## VII. Remedies

To be successful, three projects should be combined.

### 1. Elaboration of Equivalent Standards in Law and in Practice

This must be done by means of legal steering (harmonisation of criminal procedure), financial steering (of judicial organisation and capacities), and through vocational training of judicial authorities. Equivalent standards in law and in practice can only be reached if the domestic regulatory framework and judicial organisation of all Member States are brought in line. Defining minimum standards for only cross-border cases or mutual recognition decisions is insufficient, as the domestic and transnational elements are very much intertwined in judicial cases. The European model is not based on a separate track for transnational judicial cases. Moreover, the equivalence must be compatible with high human rights standards and standards of due law in the EU. OLAF has pleaded in the past for harmonisation and even codification of the applicable law on EC fraud in the Member States, in order to have a European corpus of equivalent rules to work with. However, even with the implementation of the EC fraud regulations and conventions, we still have a regulatory framework that resembles a patchwork. In the competition law area, things went much better, and we saw a strong influence of the EC law enforcement regulation on the national enforcement regimes. Thanks to equivalent standards in law and in practice, the division of power could be resettled recently; the EC only deals with the very serious transnational cases and the domestic competition authorities have a true European dimension.

### 2. Embedding of European Law Enforcement Agencies in the Domestic Legal Order

The shift from horizontal cooperation, including mutual recognition, to supranational investigation is not a shift from national authorities to European authorities. The national judicial authorities and the European law enforcement authorities have an integrated function to be sure; they are not working for different legal orders, but for one legal order, namely the

area of freedom, security and justice. This means that we have to combine the European dimension of the national authorities with the domestic dimension of the European authorities. OLAF, Europol, Eurojust, and, in the future, the EPP and the national judicial authorities must become natural partners for the exchange of law enforcement information and for judicial investigation and prosecution. This presupposes a strong embedding of the European law enforcement agencies in domestic structures. It is not sufficient to have a national Europol desk or a Eurojust member from every Member State in the College or an OLAF unit with national delegated magistrates for the judicial follow-up.

In the Member States themselves, it is important to have delegated units of the European enforcement agencies, embedded in the national structure and with competence for the exchange of information and investigative action. The members of the national unit can, in my opinion, combine national and European functions, under the condition that the European primacy rule applies. OLAF has interesting experience with this model in the new Member States and has been able to forge strong partnerships with the competent national enforcement agencies. This model will also be necessary for the development of Eurojust in conjunction with the EPP and for the EPP itself. The model must be largely based on the existing players and the justice administration systems in the Member States. An EPP does not mean that the role of the national public prosecutor has been eliminated, but rather that the European dimension of the national public prosecutor has been strengthened. The overwhelming majority of cases will be dealt with at the national level using MR instruments. For transnational cases, we will need binding rules on the choice of jurisdiction, not only for prosecution and punishment, but also for the investigation.

### 3. Supranational Judicial Investigations, *lex loci* and Applicable Law

From the EC Competition Authority or OLAF experience or even federal judicial investigation in Switzerland, we know that for serious transnational cases we need a reference system of applicable law or a proper set of minimum rules on investigative powers and judicial safeguards. The experiences with the joint investigation teams (JITs), sticking to the *lex locus* rule, by which the JIT investigation has to apply the domestic law in each Member State involved, is not really a workable model. The result is that the combination of different domestic legal regimes might conflict with the law of the forum, the Member State that finally will judge the case and might lead to inadmissibility of evidence because of conflicting procedural guarantees and or conflicting law on applicability of certain investigative measures. Both the EC Competition Authority

and OLAF dispose of a minimum set of common proper rules applicable in a common area (the internal market), supplemented by national law in cases of domestic assistance. The Swiss shifted from the model of choice of applicable law in the whole of Switzerland (by which the law of one canton was used for inter-cantonal judicial investigation) towards a federal model of criminal procedure for serious crimes. From these experiences, we can see that sticking to the *lex loci* rule and the applicable law of every Member State means converting EU law enforcement into a prisoner of nation-state sovereignty.

### VIII. Quo vadis?

If Eurojust is converted into an investigative body and becomes the embryo of an EPP or if the EPP is established, then this will of course also have consequences for Europol and for OLAF. In the Green Paper on the EPP, the European Commission did not want to make any preliminary judgments on the exact future role of Europol or of OLAF. However, the Commission underlined two interesting points in relation to OLAF. First of all, consideration must be given to the possibility of assigning judicial investigative powers to OLAF within the institutions, bodies, and organisations of Europe, since the creation of a EPP with the guarantee of a national judge of freedoms or a special chamber of the Court of Justice will enable judicial control of the EPP Office. In this context, it will be necessary to examine whether or not the functional duality of OLAF (which is today a service of the Commission that is independent with regard to its investigative function) should be maintained or whether or not it would be better to make one part of the Office completely independent from the Commission.<sup>20</sup> It is very clear, however, that an operational EPP would not only need a strong embedding in the domestic judicial structure, but would also need operational judicial authorities at the European level for successful autonomous transnational investigation in serious crime. This would affect both Europol and OLAF. The former could widen its tasks from intelligence towards judicial operational tasks under the lead of the EPP. The latter could become a specialised body with judicial powers in the area of protection of the financial interests of the EU, also under the lead of the EPP. And of course all these European enforcement agencies would be under the scrutiny of the Court of Justice. Both the EC Competition Authority and OLAF have substantial experience with the role of the Court.

In the past, OLAF and Eurojust have played key roles in the shaping of the European judicial area, from different perspectives and with different experiences. After the Lisbon reforms, they should become true partners with a common goal: effective criminal law enforcement in an *espace judiciaire européen* with due respect to the rule of law.



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15 OJ C 54 of 27 February 2002, p. 4; cf. *Wahl*, eucrim 3-4/2007, p. 84f.

16 "Emergency Coordination Cell (ECC)", cf. Art. 5a of the initiative.

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# The Future of the European Union's Financial Interests

## Financial Criminal Law Investigations under the Lead of a European Prosecutor's Office

Dr. Lothar Kuhl\*

### I. Introduction

Over the past ten years the OLAF operational function has confirmed its potential as an effective administrative investigative mechanism stimulated and assisted by a European Commission service, which is independent with respect to the exercise of its inquiries. Designed to facilitate cooperation with national law enforcement and criminal justice partners, it follows an approach aimed at empowering Member States authorities to operate better within their respective national legal systems to protect the interests of the European Union (EU) against financial offences. This approach has been a considerable step forward in the effort to achieve more efficient crime prevention and sanctioning as can be seen from the statistics on the follow-up to investigations.<sup>1</sup>

Administrative investigations may be opened independently on the initiative of OLAF and evidence may be collected on economic operators on the spot in the Member States. The in-

formation collected is destined to serve in national criminal investigations and proceedings. But this mechanism, reliant upon action conducted consecutively by different European and national lead services in accordance with their respective mandate and legal competence, also has certain limits and handicaps. Published statistics show that while there are of course excellent achievements there are still too many judicial follow-up recommendations in case reports by OLAF, which are unsuccessfully implemented by national authorities. This is sometimes due to the excessive length of the judicial procedures causing time limitation, difficulties for the administration of the evidence or national practices which tend to identify priorities in a way which is different from the perception at a European level. Frequently, retention of information occurs or there simply is a lack of specific feedback by Member States authorities on the motives of their inaction.<sup>2</sup> Notwithstanding the direct applicability of Community law in the Member States and its European-wide uniform character, the national practices on the legal protection of financial interests condition

the effective follow-up to OLAF investigations. Their practices diverge widely and their efficiency varies greatly.

Moving on from this introductory assessment it is necessary that a reflection on the future of financial criminal law investigations of the EU depart from the experts studies conducted which have developed the Corpus Juris Model (II.), and recall the historic development of the subsequent institutional debate (III.) up to the Reform Treaty (IV.). The reform on OLAF's functional independence and accountability (V.) needs to be put into the context of a possible work plan to complete the reflections (VI.). This may ultimately open a way ahead (VII.) which possibly enables financial criminal investigations of the EU to be conducted under the lead of a European Public Prosecutor's Office.

## II. The Corpus Juris Model

For this reason more ambitious and determined answers to the challenges of fraud and corruption at a European level have been considered since the first experiences with the three pillar structure of the EU Treaty in the early nineties of the last century. In fact the origins of the project for a European Prosecutor's Office to protect the vital financial interests of the European Union go back to 1997 and even precede the creation of OLAF. The Corpus Juris study dealt with the introduction of penal provisions for the purpose of protecting the financial interests of the European Union and suggested "a radically new response to the absurdity, widely condemned but still tolerated, which consists in opening up borders to criminals whilst closing them to law enforcement agencies." Thirty-five rules based on seven principles were suggested in this study departing from the analysis that the objectives of the EC Treaty regarding "assimilation", "cooperation" and "harmonisation" were not up to the challenges of a "fairer, simpler and more efficient system of repression" in a relatively new area dealing with the protection of supranational interests. The qualities of justice, simplicity and efficiency in this area could only be joined by way of "unification". The seven lead principles enshrined in the Corpus Juris project for unification of certain elements of a European criminal law consist not only of (1) the legality of crimes and of penalties, (2) the principle of fault as a basis of criminal liability, and (3) the proportionality of penalties. They comprised also and more particularly (4) European territoriality, (5) the principle of judicial control, (6) proceedings which are "*contradictoire*", and (7) the subsidiary application of national law.<sup>3</sup>

Those principles, illustrated by a set of 35 revised rules also governed a more comprehensive and developed comparative law study to give follow-up to the Corpus Juris in the years

1999/2000.<sup>4</sup> Its main objective was an in-depth analysis of the need and feasibility for a unified system of criminal law protection of the EU's financial interests through a European Financial Prosecutor's Office.

## III. Historic Development of the Institutional Debate

Notwithstanding the circumstances of fraud and mismanagement, which had shaken the European institutions and led in 1999 to the creation of OLAF,<sup>5</sup> the proposal made by the European Commission at the intergovernmental conference for the Nice-Treaty in 2000 to insert the basic features of the Corpus Juris for a genuinely European prosecution body into an article of the Treaty (*Art. 280 bis*)<sup>6</sup> was not adopted. Instead, an article on Eurojust was inserted. In accordance with the third pillar Council Decision setting up Eurojust,<sup>7</sup> the latter is described as a coordinating body at European level between national services without, however, any unified criminal investigative and prosecuting functions enabling it to bring cases of financial crime against the interests of the EU to justice.

With its 2001 Green paper on criminal-law protection of the European financial interests,<sup>8</sup> however, the European Commission provided a public opportunity for debate. In 2002, an open discussion took place on the possibility of a European Public Prosecutor's Office. The invitation to submit opinions and statements was widely followed by the national authorities, the European institutions, professional legal associations, and experts working in the area of criminal justice. In the follow-up report in 2003, the European Commission drew up an agenda for further activities on the topic.<sup>9</sup> It included a detailed examination of the relationship between the European Prosecutor and existing European authorities, the defence rights and the administration of evidence, as well as the connection of the Prosecutor with the national criminal law systems.

A European Financial Prosecutor's Office has continuously remained on the institutional agenda for a new Treaty since starting in 2003 with the work of the Convention, followed by the 2004 Constitutional Treaty<sup>10</sup> and later confirmed by the Lisbon Reform Treaty of 2007.<sup>11</sup> Notwithstanding this, the horizontal political strategy concept papers for a single European judicial area have remained silent on this institution. The Tampere conclusions of 1999<sup>12</sup> and The Hague agenda of 2004<sup>13</sup> indeed ignored the topic, which national departments of justice by their vast majority may consider a highly *avant-garde* challenge. But it is fair to say, that a European Public Prosecutor's Office for a more effective fight against fraud and corruption is in accordance with the citizens' and tax payers' expectations who consider the current responses insufficient to achieve a satisfactory degree of law enforcement and sanctions.<sup>14</sup>



## IV. The Legal Framework of the Reform Treaty

### 1. The Relevant Reform Treaty Provisions

The Lisbon Treaty provides the legal basis for the establishment of a European public financial prosecutor's office in Art. 86 (1) TFEU:<sup>15</sup>

In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

It allows for this body to be created in accordance with Treaty principles on performance of its functions which provide the investigation, the prosecution and judgments of cases of fraud to be brought (Art. 86 (2) TFEU):

The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

It will lay the ground in Art. 86 (3) TFEU for the development of the general rules applicable including rules on statutory accountability and independence and rules of procedure on preliminary criminal investigations such as on evidence taking and judicial review:

The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

The Lisbon Reform Treaty eventually sets out a consolidation of powers in criminal law matters in Art. 325 TFEU. The last sentence in the current Art. 280 paragraph 4 TEC<sup>16</sup> shall be deleted.

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.
2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.
3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.
4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of

Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

### 2. The Possible Legal Basis for Administrative Penal Law Investigations on Anti-Fraud Matters

OLAF draws its powers from those of the Commission. A consolidated anti-fraud reform package would need to be structured and organised using Arts. 325 and 86 TFEU in a coordinated and complementary way. It would be necessary to identify which aspects are covered under which legal basis. The legal basis under the Treaty currently allowing OLAF to operate in the area of administrative investigations is Art. 280 TEC and will in future be Art. 325 TFEU after the Lisbon Treaty comes into force.

However, the question of whether a possible extension of OLAF investigative powers into the criminal law field would be covered equally under Art 325 TFEU is more challenging. At first glance, this article could serve as a basis for the legal reform of this aspect of OLAF investigations. The second sentence of current paragraph 4 of Art. 280 TEC on the exception of measures which concern the administration of justice and the application of national criminal law has been removed from Art. 325. However, it can be argued that, for matters regarding criminal procedural law concerning the protection of the financial interests of the Union, Art. 86 TFEU constitutes a more specific legal basis and applies under a different procedure which includes a unanimity requirement and opt-out possibilities for certain Member States.

A regulation based on Art. 86 may indeed specify the allocation of the European Public Prosecutor as a judicial body including its working relationship with investigative bodies such as national and European police and investigative services. However, as this provision is situated in the chapter on judicial cooperation in criminal matters of the TFEU, *administrative* penal procedural rules would fall under Art. 325 TFEU. Art. 325 in its turn allows for the adoption of all *necessary* measures in the field of the fight against fraud. The decisive element is the question of what will be required for the achievement of an effective implementation of the EU's objectives in this policy area. Legislation under this article might be needed precisely to allow the Commission (OLAF) to cooperate with and investigate on behalf of a European Public Prosecutor's Office. Art. 325 accordingly includes the basis for measures necessary in order to complete the framework put in place by Art. 86.

## V. The Future Debate on the Reform of OLAF's Functional Independence and Accountability

After ten years of existence, OLAF is still a young service. However, its experience is a sufficient basis for clarification of reform objectives. The Lisbon Reform Treaty is silent on OLAF's future role. OLAF is clearly distinct from a European financial prosecutor and will be external to it. But its functions will need to be redefined within the new institutional framework.

The current OLAF reform proposal of 2006<sup>17</sup> focuses on an increased efficiency and information exchange in administrative investigations, and more cooperation in the follow-up to operational matters. This is acceptable, but it is likely to create much additional red tape. The outcome of the reform will hopefully achieve a more efficient OLAF. However, OLAF will continue conducting investigations under the authority of its Director General. Neither a review advisor, nor the Supervisory Committee nor the political guidance exercised by the institutions may replace him in the exercise of this responsibility.

The Lisbon Reform Treaty offers new perspectives. A future "EU Prosecutor's office" would not be primarily a control body. But by its judicial nature it may be a more adequate response to reconcile functional independence with the necessary degree of accountability of the investigative action. Investigations conducted under the authority of a European Financial Prosecutor would be at least subject to a specific reporting duty and could only be carried out with the instructions of the prosecutor. This creates conditions where a great deal of reliability and uniformity of the investigative action can be achieved. A better interface between preventive administrative investigations and the criminal law follow-up could also be expected. The judicial advice function currently already exercised by lawyers with a background as prosecutors and "magistrates" and embedded into the organisation of OLAF would become the bridge between administrative investigations and criminal investigations conducted on the request of a European Financial Prosecutor. Looking beyond individual cases, a permanent dialogue and working relationship between OLAF and the European Financial Prosecutor would provide strong possibilities to establish a high degree of mutual understanding on policy objectives and practical priorities. The chances of an effective, proportionate and dissuasive criminal law follow-up to OLAF investigations could be further increased. OLAF operational practices would be further developed in accordance with judicial guarantees.

In the current situation OLAF has already made great progress. A strong presence of operational staff with a background as criminal lawyers and the existence of the previously mentioned judicial advice function which has been in place in OLAF for

several years have contributed to this effect. Increasingly, this practice has allowed an internal judicial ethics to be developed and an output oriented priority setting to be achieved. OLAF is not an intelligence service but is bound to produce evidence which can be used in judicial proceedings.

An EU Prosecutor's Office would bring additional changes in that it would create conditions for a functionally hierarchical working relationship which enables instructions on any issues necessary and suitable for the steering of penal investigations. This objective cannot be achieved in a partnership with national judicial authorities or even with Eurojust as long as its powers are not clearly distinguished from the exercise of national prerogatives.

The question therefore ultimately arises as to how OLAF should serve as an officer of justice under the authority of the European Public Prosecutor's Office. The future relationship of OLAF with an financial prosecutor's office of the EU would not only be a logical continuation of the criminal law oriented anti-fraud approach chosen in 1999. It would also create conditions under which a legitimate decision maker may select cases which require a judicial response as opposed to irregularities which require an administrative, disciplinary or purely financial follow-up. OLAF judicial follow-up recommendations could be prepared together with and approved by a Prosecutor's Office. This creates better chances for OLAF recommendations to be followed more systematically if not in every case.

## VI. Reflections to be Completed

It is of course also necessary to address the more critical questions. A smaller "EU code" of preliminary criminal investigations conducted by the prosecutor of the EU is a necessary instrument to complement the principle of mutual recognition and to bring the risks of fundamental rights being disregarded down to a very acceptable and low level.<sup>18</sup> Only if properly integrated into the emerging structures for the EU's administration of criminal justice, an EU Prosecutor could be considered a proportionate answer on how to complement the national justice systems. The restriction of the scope of activities of a European Financial Prosecutor's office to only one specific area of material competence defined in relation with a specific Union interest has been criticised.<sup>19</sup> But it might contribute to preventing additional bureaucracy and conflicts of authority with national prosecution services. In certain areas, the system might be better coordinated through the mechanisms set up by Eurojust and the European Judicial Network. If it is shown that the European Public Prosecutor can start its work based on a proportionate and limited additional effort which does not re-

quire the establishment of a huge new administration it would be even more evident that it is a justified and proportionate solution to the problem of the effective and dissuasive protection of specific European interests against fraud and other offences.

OLAF's experience and proper involvement can decisively contribute to demonstrate that it would not simply add complexity to the system of divided competences between the EU and the Member States but that it would mainly have a guaranteed added value. However, in order to respond to all the objectives of the EU's policy on better regulation a solid and realistic work plan needs first to be established:

- A European financial prosecutor's office can only be envisaged with a solid impact assessment and intensive consultations with all institutional partners. The follow-up agenda to the Green paper includes continued analyses, consultations and specific institutional initiatives.<sup>20</sup>

- A comparative study on criminal justice systems should analyse national experiences on the development of criminal investigative competences. It will emerge from this study whether national systems may equally have developed parallel and complementary regional and federal competences on matters of criminal justice and how they work.

- A further study should take stock of the current situation in an empirical way with respect to the follow-up of OLAF investigations and the effective protection of the EU's financial interests. It is necessary to identify clearly the problems regarding the current cooperation mechanisms between OLAF and the national judicial authorities. The study should help to further identify the types of cases and the areas of offences with serious consequences for the European tax payer for which the current cooperation model does not offer a satisfactory approach to achieve better protection.

- For the preparation of a future white paper of the Commission a comparative law research might be needed to identify a number of component elements on the establishment and functioning of a European Public Prosecutor's office for a possible set of rules on preliminary criminal investigations in financial matters. It should give a strategic answer to the question which is the necessary degree of harmonisation and unification of rules and under which conditions mutual recognition may be accepted.

## VII. The Way Ahead

Even if the Lisbon Treaty has not created a perspective for the development of general European criminal investigative powers the Treaty does contain a possibility to develop, in so far as necessary, penal investigative powers in the restrictive field of the protection of the financial interests in Arts. 86 and 325 TFEU.

### 1. The Role of the European Partner Agencies in the Context of an EU Prosecutor's Office

All the European bodies competent for combating fraud, cooperating in criminal matters or in matters of police cooperation are called upon to contribute to the exercise of the prosecution function within the limits of their respective attributions as developed under the Lisbon Treaty. Coordination and support functions for criminal investigations may be entrusted to Eurojust (Art. 85 TFEU) and Europol (Art. 88 TFEU). The provision on a European Public Prosecutor's Office in Art. 86 TFEU explicitly establishes the link with both bodies in the setting up of the office and in the possible liaison for purposes of investigations (see IV). However, their own mandate is respectively circumscribed in Arts. 85 and 88.

Under these provisions, their tasks extend to the coordination, cooperation and liaison with national law enforcement and judicial authorities in the implementation of their national investigative and operational action. This would for instance include judicial, administrative and intelligence support and could in the case of Eurojust in the future include "the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities". But it does not extend to the actual conduct of criminal investigations. The formula in Art. 86 TFEU whereby the EU Public Prosecutor's Office is established "from Eurojust" aims at the exploitation of the administrative and, in so far as possible, judicial framework of Eurojust for the purpose of setting up the EU Prosecutor's Office.<sup>21</sup> Eurojust would however remain a distinct body. A complete institutional and functional merger whereby Eurojust would fully participate in the powers of a European Public Prosecutor's Office to include EU-wide criminal investigations and prosecutions into its mandate is not foreseen under Art. 85 TFEU.

As compared to Eurojust and Europol, OLAF is not expressly mentioned but Art. 325 TFEU refers to the key role of the Union and of the Commission for the protection of its financial interests and the combat against fraud. The current anti-fraud experience of OLAF would support the idea of a need for an attribution of genuine investigative powers to a European body to achieve better and speedier criminal investigations and prosecutions in cases of EU fraud and corruption.<sup>22</sup> The most evident need potentially exists in the area of internal investigations within the EU institutions and for cases which relate to fraud in the area of direct expenditure. Member States' administrative authorities are here in general not operationally present. The added value would become particularly apparent in these areas without regard to whether all of them involve transnational organised crime and affect two or more Member States. From the perspective of the establishment of a moder-

ately sized European Public Prosecutor's Office the EU's judicial authority would in practice need to rely on administrative investigations conducted under its instructions by a service of the EU.

## 2. OLAF as an Administrative Host Structure of a Criminal Investigative Function of the EU

The functions of OLAF would need to be re-organised, clearly distinguishing administrative and criminal law investigations. But its current mandate would seem to make it an ideal host structure for the additional criminal investigative function. Under an organisational and administrative perspective, this function would need to be exercised by OLAF on behalf of the Commission as mentioned in Art. 325 (3) TFEU. This approach is the most realistic in accordance with the principle of limited transfer of powers. An executive administrative anti-fraud agency with investigative powers is not mentioned by the Treaty and therefore not an option in a sensitive area of responsibilities with great impact on human rights and where a great deal of discretion therefore needs to be exercised in the conduct of the operations.

Investigative procedures might – as is currently the case – continue to be exercised by OLAF as a Commission service which is functionally independent and not subject to instructions from the outside. However, regarding criminal investigations it might be advisable to use the same administrative structure headed by a Director, while abolishing the Supervisory Committee.<sup>23</sup> Criminal investigations would need to be carried out under the judicial control and under the instructions of the European financial prosecutor's office. The administrative service (like the financial police or customs) would carry out its criminal investigations on behalf or under the lead of the EU Prosecutor outside the judicial structure of the EU Prosecutor's Office. Considerable additional manpower and expenditure creating possible duplication with existing administrative structures must be avoided. The judicial control would be exercised by the European Courts of Justice based on the instructions OLAF would receive from the Prosecutor.

Criminal investigative functions would need to be based on a set of specific rules. The further development of the investigative anti-fraud function could possibly follow relevant examples of the national administrative systems. Administrative services have been vested with customs, fiscal and financial police investigative powers. Within the organisational structures of OLAF, a different set of administrative units should be responsible for administrative and penal investigations respectively. The judicial advice function would be developed to establish a permanent liaison with the European Public Pros-

ecutor's Office as is currently already the case in relation with Eurojust. Criminal investigative assistance would need to be exercised as an officer (auxiliary) under the authority of a European public prosecutor.

## VIII. Conclusion

These possibilities should be duly analysed. The next ten years of OLAF will be decisive to confirm whether the EU is committed to meet the challenges of an effective, proportionate and dissuasive protection of the EU's financial interests. Nobody can currently fully predict the future. But the Reform Treaty potentially offers specific opportunities to modernise the European anti-fraud policies. It would allow for an increase in the efficiency and the operational accountability of OLAF in cooperation with a European Prosecutor's Office. The efficient protection of the EU's financial interests through criminal law remains a vital challenge following the latest enlargement to Romania and Bulgaria. The European Union already faces – especially under a post Reform Treaty scenario – the perspective of new accessions by Western Balkan countries. This further enlargement would call for even more effective anti-fraud and corruption policies to be enacted, including the option of a penal administrative investigative function at the European level.

All initiatives in this field must be accompanied by a degree of pragmatism and flexibility. Should unanimity requirements impede concrete and tangible progress for the foreseeable future, an EU Prosecutor's Office can be envisaged at a first stage on the basis of the mechanisms of enhanced cooperation. In accordance with Art. 86 (1) of the Reform Treaty it may be created if nine Member States so agree. However, to develop its full potential, an EU Public Prosecutor's Office will crucially need to rely on the assistance of existing national and European bodies including OLAF. The pilot area of the protection of the financial interests has in the past served as a model for the development of standards on penal law approximation in the EU.<sup>24</sup> There is some likelihood that it will become a test case for the determination to adapt the EU's criminal law protection and its framework to the challenges of the next decade.

\* Opinions expressed in this article are made in a personal capacity. They do not commit the institution.

1 Report of the European Anti-Fraud Office, Eighth Activity Report for the Period 1 January to 31 December 2007, Point 3.4, which shows a considerable number of cases (584) concluded since the creation of OLAF with recommendations of judicial follow-up.

2 Ibid, point 3.4.2.1. Judicial follow up.

3 M. Delmas-Marty (ed.), *Corpus Juris* introducing penal provisions for the purpose of the financial interests of the European Union, Economica, Paris, 1997.

4 The European Parliament in its resolutions of 12 June and 22 October 1997,





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asked the Commission to carry out a study on the feasibility of the Corpus Juris.

The publication of the follow-up study consists of four volumes: *M. Delmas-Marty*, and *J.A.E. Vervaele* (eds.), *The Implementation of the Corpus Juris in the Member States*. Vol. I-IV, Intersentia, Antwerp, 2000-2001.

5 Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999.

6 Cf. *Vervaele*, in this issue.

7 OJ L 63 of 6 March 2002, p. 1.

8 Commission Green Paper on criminal-law protection of the financial interests of the Community and the establishment of the European Prosecutor, COM (2001) 715, 11 December 2001.

9 Follow-Up report on the Green Paper COM (2003) 128, 19 March 2003. See: [http://ec.europa.eu/anti\\_fraud/green\\_paper/index\\_en.html](http://ec.europa.eu/anti_fraud/green_paper/index_en.html).

10 Treaty establishing a Constitution for Europe, Official Journal, C 310 of 16 December 2004. See <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:en:HTML>.

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13 Council of the European Union, The Hague Programme: strengthening freedom, security and justice in the European Union, 16054/04 JAI 559, December 2004, OJ C 53 of 3 March 2005, p. 1; see also Council and Commission Action Plan, OJ C 198 of 12 August 2005, p. 1. See [http://ec.europa.eu/justice\\_home/doc\\_centre/doc/hague\\_programme\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf).

14 Cf. Special Eurobarometer Survey No. 291 on corruption perception, published in April 2008, [http://ec.europa.eu/public\\_opinion/archives/ebs\\_291\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs_291_en.pdf), which reflects at question QB 1.6. that the vast majority of the EU citizens do not consider that there are enough prosecutions in their country to deter people from giving or taking bribes.

15 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115 of 9 May 2008 (<http://eur-lex.europa.eu/JOIndex.do?year=2008&serie=C&textfield2=115&Submit=Search&ihmlang=en>).

16 "These measures shall not concern the application of national criminal law or the national administration of justice."

17 Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1073/1999 concerning investigation conducted by the European Anti-Fraud Office (OLAF), COM (2006) 244. Cf. *Staicu*, in this issue and *eucri* 1-2/2006, pp. 6-7. For the European Parliament report see *eucri* 1-2/2008, p. 12 with further reference.

18 Follow-Up Report, COM (2003) 128, point 3.2.2., Law of criminal procedure.

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20 See points 3 and 4 of the Follow-Up Report.

21 See *Lopes da Mota*, Eurojust – The Heart of the Future European Public Prosecutor's Office, *eucri* 1-2/2008, p.62 (63).

22 See *Kuhl*, OLAF, the Protection of the Community's Financial Interests and the Outcome of the IGC, in: *Vervaele*, *European Evidence Warrant* (2005), p. 167 (172).

23 See Arts. 11 and 12, Regulation (EC) 1073/99, OJ L 136 of 31 May 1999, p.1.

24 See contribution by *Salazar* in this issue.

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