OLAF AND PROTECTION OF THE FINANCIAL SECURITY AND INTERESTS OF THE EUROPEAN UNION

Boyko PETEV*

ОЛАФ И ЗАЩИТАТА НА ФИНАНСОВАТА СИГУРНОСТ И ИНТЕРЕСИТЕ НА ЕВРОПЕЙСКИЯ СЪЮЗ

Бойко ПЕТЕВ*

Резюме: *В статията се разглежда Европейската служба за борба с измамите (ОЛАФ) в рамките на профилите на вътрешно управление, организация и дейности за борба с престъпленията с трансгранично измерение, чрез сътрудничество с институции, европейски агенции и държави-членки. Европейската служба е орган, отговарящ за координирането и разследването на административни въпроси както за нередности, така и за реални измами и други престъпления, причиняващи вреда на финансовите интереси на Европейския съюз.*

Ключови думи: *ОЛАФ, защита, финансова сигурност, интереси, ЕС*

PRESENTATION OF OLAF

The present research work examines the European Anti-Fraud Office (OLAF) under the profiles of internal governance, organization and counter-crimes activities with cross-border dimension, through cooperation with institutions, European Agencies and Member States. The question that arises is that an organ, in charge of coordinating and investigating administrative matters, can efficiently represent a bank for both irregularities and real frauds and other offenses causing detriment to financial interests of European Union. Although the annual reports show that the various transnational illicit raised by the Office represent about

* The author is a doctor of economics.
* Авторът е доктор по икономика.

10% of the investigations carried out, they have a disadvantage of almost 40% of the complex damages to the Union's financial interests.

It should also by noted that the effective implementation of the objectives set out in the Lisbon Treaty on criminal cooperation is also based on mutual recognition of judicial decisions, the first of which has affected, on the one hand, the traditional mechanisms of judicial cooperation, and on the other hand, have led to a tendency to legalize the procedures of assistance and the consequent increase in direct relations between the judicial authorities of different countries, with obvious tensions with competitors' requirements regarding the respect of defensive guarantees and fundamental rights.

The building of this mutual trust relationship between the authorities of the various Member States, a true proportion of the principle of mutual recognition, can only be based on the creation of common supranational networks, structures and organs capable of marking the transition towards the identification of coordinated and effective forms of transnational crime (both judicial and police) and at the same time to prepare for the full realization of a common judicial area, based on the principles of European territoriality and the free movement of judicial decisions. Eurojust and the European Judicial Network, OLAF and Europol, are more concrete examples of an effort put in place by European institutions since the Tampere European Council of 15-16 October 1999, which has brought important results in the short run of few years, albeit unfortunately still insufficient to deal with the new challenges of organized crime and international terrorism.

The European project, „wounded“ by the recent events of Brexit, can no longer do without legal institutions and „common“ police bodies, which can increase the „specific weight“ of a political state, still latent. This resulted in an evolutionary process aimed at transforming the traditional mechanisms of cooperation between states and jurisdictions, towards a direction which can be defined as transnational justice or, according to some, progressive „integration between jurisdictions“.

This a „centripetal movement“ that contrasts the „centrifugal“ tensions that are likely to upset the construction of the institutional architecture of the Union and therefore find a new balance between the European dimension of cooperation and investigative coordination and the widespread sovereigns' resistances, while maintaining the need to protect the fundamental rights of European citizens. Within this perspective, the different modes of intervention of the new supranational bodies are set, whose functional attributes, such as those of OLAF, have an administrative nature, but seem to be essentially inspired by those exercised by the investigative bodies of the Member States, which in turn facilitated and supported when the object of the investigation assumes a transnational value. The „verticality“ character, which, with the exception of the European Judicial Network, identifies the various types of collaboration modules developed by the three major Euro-Unit Agencies, and in particular the European Anti-Fraud Office, in the relationship with the authorities of different Member States does not in any way imply the exercise of authoritative powers vis-à-vis national investigative bodies.

However, it is certain that, following the entry into force of the Treaty of Lisbon, there has been a change of perspective, in which the area of Freedom, Security and Justice, under the foreseen provision in art. 3 TEU has somewhat „scaled down“ the internal market from the apex of the EU's priorities, thus becoming the center of the next steps in the integration process. To this end, the Court of Justice has „imposed“ some general principles of Community law (e.g. loyal cooperation, the principle of non-discrimination, protection of rights of defense and privacy) not only to the specific area of criminal judicial cooperation but also for administrative inquiries. Then, OLAF is certainly an important example to examine in concrete terms whether and how a European administrative body can perform its functions in correlation with various transnational offenses and whether the regulatory, organizational and resources prepared are sufficient to ensure effective cooperation with various organizations, national and European, involved. In other words, this is a significant „test bench“ for all European and transnational administrative law and cooperation, whose construction has often offered alternate results.

THE PROTECTION OF THE EU’S FINANCIAL INTEREST

The realization of an adequate protection of public body’s economic integrity (such as public entities, or even States) is a goal that can be, in theory, pursued by different paths. However, it’s a common and dating use of each national entity to adopt a mixed and interconnected system of criminal laws with the purpose of contrast the more serious offenses affecting the financial interests of the Public economy, supported by a system of administrative sanction for less serious cases or mere irregularities, and the presence of public low enforcement and monitoring. At the beginning of the future European Union, however, it prevailed the idea to exclude criminal law from the single market [1: 45], and was favoured the harmonization in private enterprise sectors. According to the traditional approach, competence has been allocated entirely for the

Member States, only holders of the power to act against suspected perpetrators of criminal offenses affecting the Community's financial interests.

The Community institutions (in particular the Commission) was the only public body recognized to perform administrative investigations, which may eventually lead to a request to the Member State to undertake criminal prosecution. Over time, however, many things have changed and, by contrary, the fight against frauds to the EU budget has become the fields in which most, in the last twenty years, a core group of European criminal law has been, although imperfectly, developed; this is an affirmation in which everyone can be broadly agree. In fact, the European Union, since the Maastricht Treaty of 1992 and followed by that of Amsterdam of 1997, provides among its objectives the creation of a common area of Justice [2: 112], to pursue, at least initially, through harmonization of existing criminal offense under the laws of States, the protection of EU financial interests, the so-called „PFI sector". It was evident, following the modifications to the financing system of the years 70s, the need for specific protection to that priority community interest. Since Copenhagen European Council of 1993, member states admitted their inadequate management of Community funds, and concluded to address Community fraud in the way that they dealt with the problem of domestic fraud.

This project was formalized in an agreement during the 1994 Corfu European Council and started with the preparation of a typical act of the, at that time, „newly" born Third Pillar (art. K.3.2 Treaty of Maastricht), and in particular a convention, defined, in fact, the „Convention on protection of the financial interests of the European Communities", in July 1995, followed by three protocols between 1996 and 1997. The Convention entered into force on 17 October 2002 and has been ratified by all of the older and most of the new EU Member. The Convention and the protocols were intended to harmonize definitions of criminal cases, especially those relating to the conduct which were seen as more contrary to the interests of the Community budget, and in particular those of fraud, corruption and money laundering. Being the PFI Convention an instrument of the so-called „third Pillar" of the Union, the same was not born as a self-executing legislative instrument, unlike, for example, Regulations, acts instead of the typical so-called first pillar which that, however, did not involve criminal law. The purpose of harmonization was also to facilitate judicial cooperation between the authorities of the various Member States, mindful of the frequent transnational nature of fraud Community.

It was originally the previous article 209A of the Treaty of Maastricht to establish that, for the purpose to fight frauds against financial interest of the Community, member states shall adopt the same provisions used to fight frauds against their own financial interests and, at the same time, a normative base for coordination of their action with the support of the Commission. The article 209A was, in turn, a reception of the „assimilation principle“ for the protection of national and communitarian interest, affirmed few years before by the Court of Justice in the „Greek maize“ case [3]. By judging Greece for failing to effectively pursued a case of fraud concerning maize imports from Yugoslavia, the Court, laying down the general obligation of Member States to crack down on violations of Community Law by effective, proportionate and dissuasive sanctions, it had also specified the content of this obligation.

Although it was still left to the States the choice of penalties, they must ensure that the repression of breaches of Community law has to happen with the same „iron fist“ used for violations of domestic law and still be able to give to the penalty an effective character, proportionate and dissuasive. In another subsequent judgment, the Court confirmed and clarified that the Treaty requires Member States to take all effective measures to sanction conduct prejudicial to the Community's financial interests, including criminal penalties, equivalent to those imposed for violations of the same severity by the national law, and always effective, proportionate and dissuasive. However, unlike the first decisions of the European Court, the principle of assimilation in the art. 209A of Maastricht Treaty was not only limited for whom concern the relation of equivalence between sanctions to adopt at a national and Communitarian level, but extended to „all the measures“, that means the provisions of legal, administrative or regulatory nature, administrative organization and, of course, sanction system.

With regard to expenditure, fraud is the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities; the non-disclosure of information in violation of a specific obligation, with the same effect and the misapplication of such funds for purposes other than those for which they were originally granted. With regard to revenue, fraud is the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect 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; the non-disclosure of information in violation of a specific obligation, with the same effect; and the misapplication of a legally obtained benefit, with the same effect. In other words, the basic elements of EU fraud are an intentional act or omission by natural or legal persons constituting and irregularity defined as a fraud and therefore punishable by Court proceedings [4: 139].

An irregularity, on the other hand, is a violation of rules and/or procedures that do not necessarily involve a gain or illicit intent, not a criminal matter but an administrative one: it is therefore lends itself to the possibility of administrative rather than criminal sanctions. Then, it made a distinction between the sphere of criminal law and that of administrative law. This is a fundamental but unambiguous distinction, for though an irregularity is not a criminal offense in the legal sense, it could be that behind the irregularity a fraud is hidden, which instead is a criminal offense. In view of the above, the discussion of irregularities is central to the discussion of fraud. The irregularities are fields where fraud thrives. Consequently, taking a step back, the tolerance for lax administrative practices, inadequate regulations, hyper-complicated payment mechanisms, excessive exceptions and derogations, lack of transparency, etc., which results in a huge amount of irregularities and errors, is equivalent to a tolerance against a relatively high-level fraud [5: 77].

The principle has been stated repeatedly and consistently by the Court, even in cases where the issue was not the specific object of the dispute, such as Fransson case and more recently, the well-known Taricco case. However, the question could be definitely closed with the adoption of the PFI directive, and a clear definition of the meaning „financial interest", inclusive of VAT and his relevance for EU budget. Considering that VAT fraud threatens EU's financial interests could increase cooperation and improve the fight against this fraud, allowing in particular the future EPPO to be competent and to help prosecuting VAT frauds. For whom concern expenditure items, structural and cohesion funds on the one hand, and agriculture and rural development on the other, each account for about 38% (€54 billion in 2014) of total EU spending (€142 billion in 2014).

OLAF'S RELATIONSHIP WITH SISTER TRANSNATIONAL AGENCIES AND THE FUTURE EPPO. COOPERATION BETWEEN EUROJUST, EUROPOL AND OLAF

The protection of the EU's financial interests (PIF) recalls, at Art. 325 para. 1 TFEU, the multiple levels of cooperation required to counter and combat fraud and other illegal activities affecting the financial interests of the Union. While the vertical cooperation between the EU and national actors has been analyzed several times by doctrine, the horizontal cooperation between EU actors holding specific PIF responsibilities has been generally neglected. Therefore, the implications of a trilateral relationship between OLAF, Europol and Eurojust should be deeper studied; the existence of different supranational bodies, with coordination powers strictly limited to their specific functional competence, in a sector substantially common, it is not only a potential waste of human and economic resources, because the inefficient coordination among those actors, but can cause the biggest failures in the fight against fraud and other illegal activities affecting the financial interests for the European Union [7: 55]. Unfortunately, OLAF has always had troubled relationships with sister transnational agencies, particularly with Eurojust.

The legal framework of Eurojust is known; briefly, its role is to offer support, coordination and assistance to national authorities in cases which have a cross-border dimension and to assist in liaising between national prosecution and legal authorities in relation to serious crimes affecting two or more member states, in accord to the determinations expressed by Member States in Tampere Council of 1999.

Eurojust headquarters is composed of national prosecutors and magistrates or police officers from each member state and its objective is to facilitate co-operation between the national prosecuting authorities and to improve the co-ordination of criminal investigations and information exchange, and directly accountable to the Council of Ministers to which it reports on a regular basis. During the coordination meetings, national, judicial and police authorities are in a position to exchange information and strategies, supported by Europol's analysis, and discuss issues related to judicial cooperation, with a symmetrical range of action to Europol. Article 85 par. 1 TFEU confirmed that in relation to offences against the financial interests of the EU, Eurojust grants a power to start investigations or prosecutions, and the further amending Decision 2009/426/JHA strengthened the judicial powers attributed to the national member. Therefore, at first light, it might appear that the natural consequence for OLAF and Eurojust is to cooperate: OLAF on the investigation side, where it conducts administrative investigations, and Eurojust providing the link with national prosecutors. In other terms, the Lisbon reforms were expected to transform them in true partners with the common mission of an effective criminal law enforcement in an espace judiciaire européen with due respect to the rule of law; the space of freedom, security and justice, by virtue of the dictated prediction art. 3 TEU, seemed to „exaggerate the internal market at the forefront of EU prioritization, thus becoming the fulcrum of the next stages of the integration process". This is partially true, but the relationship between the two bodies remained troubled. Such condition already surfaced in the original Recital 5 of Council Decision 2002/187/JHA establishing Eurojust*: „[The College] should take full account of the sensitive work carried out by Eurojust in the context of investigations and prosecutions. In this connection, OLAF should be denied access to documents, evidence, reports, notes or information, in whatever form, which are held or created in the course of these activities, whether under way or already concluded, and the transmission of such documents, evidence, reports, notes and information to OLAF should be prohibited".*

This recital was removed only by the 2008 amendment of the Eurojust Decision. It was evident that, from the beginning, Eurojust believed that OLAF saw it as an institutional competitor. There were instances of OLAF liaising directly with national judicial authorities and not informing Eurojust and also setting up a magistrates unit within OLAF, in potential rivalry with the Agency, although its Magistrates Unit is totally dedicated to fighting EU fraud, whereas for Eurojust, fraud is just another issue and not as priority as terrorism and organized crime. At the same time, there was a feeling of resentment as OLAF considered Eurojust 'responsible for there not being a European Prosecutor responsible for fraud'. Eurojust took the view that OLAF believed it had no role to play in fraud investigation unless other serious crimes were linked to EU fraud, such as using money fraudulently obtained from the European Budget to help fund drug trafficking or arms dealing for example. This view of Eurojust cannot readily be blamed, as OLAF officials believe that its own Magistrates Unit is more than capable of liaising with national judicial authorities without the assistance of Eurojust.

Of course, such 'mentality' is not conducive to fighting fraud effectively. In addition, they not seems to „speak the same language"; indeed, although the link between financial offences to the EU budget and organized crime is notorious, OLAF effort to adopt a common working definition of organized crime with other agencies.

The „misunderstanding" between bodies may be due to the previous, more general, problematic configuration of the inter-governmental and communitarian dimension, of the old first and third pillars, as different models of European integration in the field of criminal law. In terms of Europol [8: 17] its role in the fight against EU fraud has not really been developed. Its activity consists mostly in collecting, storing, and processing intelligence Europe-wide in order to facilitate the exchange of information between competent authorities of the Member States. OLAF took the view that Europol is far more interested in customs issues than wider EU fraud matters.

There is some consistency to this view, in particular for drugs and terrorism related crimes, shared also, since the late 1990s, by part of the Commission. Europol does not have the investigative powers that OLAF has, because it is more of an intelligence gathering and analysis organization. Its powers differ from those of OLAF. Yet, its role in intelligence gathering and police co-operation would strengthen OLAF's investigative function if the two bodies could liaise more closely, as shown by operations like „Diabolo II".

The 'agreement on arrangements of cooperation' signed between OLAF and Eurojust on 24 September 2008 covers arrangements for regular contact and cooperation with joint teams which will meet on a quarterly basis and exchange case summaries and provide feedback on progress made in investigations, strategic information and also operational cooperation as well. The two bodies shall inform each other on any case of common interest, exchange all necessary information within the limits of confidentiality and data protection rules, and coordinate the assistance activities they offer to national judicial authorities.

This is a major step forward and hopefully will enable a more productive and harmonious relationship to develop which will ease the concerns about a fragmented approach taken by transnational bodies. Moreover, operational synergies between the three main EU actors has been increased by their involvement in Joint Investigation Teams (JIT). They represents an efficient international cooperation item between two or more States, to create a temporary synergy in transnational criminal investigation (disciplined by ad hoc agreements) that permit a faster collection and exchange of information and evidences, without recourse to traditional judicial cooperation instruments. OLAF, Europol and Eurojust can jointly or separately promotes a JIT to the national authorities when the information they possess indicates its usefulness, and their respective agreements obliged them to communicate each other when they suggested or joint in a JIT relating to fraud, corruption, or any criminal offence affecting the Union's financial interests, giving opportunity to participate.

However, although the Stockholm Program of 2009 wished for Eurojust and Europol to be systematically involved in the major cross-border and informed operations of the creation of joint investigative teams between member States, this decision has been remitted to States'evaluation, on a „case by case" criteria, and often the exclusion of EU actors is the result, albeit formally to maintain the secrecy of the investigation (but this is obviously an unreasonable argument to use against Europol or Eurojust participation). Not surprisingly, from the other side, Eurojust Decision of 2009 posed the condition for OLAF to cooperate in the same JIT (within the limits of OLAF legislation) to the non-opposition of the national authorities, despite OLAF's usefulness, due to its experience and knowledge in the prosecution of a case.

OLAF's role within the entire construction of the European criminal law area remains therefore unanswered, and further progress are strictly bound to the future, uncertain scenario emerging by the establishment of the European Public Prosecutor's Office 'from Eurojust', according to the first paragraph of Article 86 TFEU.

In conclusion, this general overview of the European Anti-Fraud Office, which undoubtedly deserves further and far-reaching insights, has made possible to highlight how, once again, the Office's hybrid status has been the main source of many fortunes, but also „miseries", for OLAF. The overall picture of the area of Freedom, Security and Justice still has a high level of fragmentation, accompanied by current political and financial instability. This has undoubtedly weakened the potential of the European Public Prosecutor's Office and of the Directive on the Protection of Financial Interests in a field of criminal law harmonization in Europe, which has always been the subject of nationalist „jealousies". More generally, for the moment, it is lost the opportunity to strengthening the existing instruments and make order among the operating agencies, in various ways, in the PIF context: unfortunately, the EP, with the currently envisaged structure and powers, probably could not improve the fight against PIF offences.

Although the overlapping tasks allocated to the three bodies leads OLAF, Eurojust, and Europol to work together, instead there seems to be an absence of political will for a more organic view on the repartition of function to each of them in those cases where the competences tend to overlap, considering the event as a „contingency", justifying a minimal, occasional cooperation, more than an ordinary circumstance. In other terms, the three actors were made in a piecemeal fashion, where the main concern was to ensure cooperation with national authorities, without attention to the relationship between the EU bodies. Moreover, main OLAF's activity should find a better classification as „police investigations" and evidently linked to prosecution activities, even if it is repeatedly claimed that they are in fact administrative in nature.

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