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“The revision of the OLAF Regulation in light of the future cooperation with EPPO”

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WORKSHOP ORGANIZED BY THE POLICY DEPARTMENT ON BUDGETARY AFFAIRS

THE REVISION OF OLAF REGULATION IN LIGHT OF THE FUTURE COOPERATION WITH EPPO

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Introduction

- Initial in-depth analysis for the CONT Committee, “The future cooperation between OLAF and the EPPO”, June 2017 (oral intervention in May 2017). Purpose was to reflect on the essential elements for ensuring
 - an effective and efficient EPPO-OLAF cooperation
 - and an effective and efficient protection of the Union’s financial interests
- Since then, important evolution towards a more settled/predictable situation:
 - EPPO Regulation – adopted in October 2017, to be established with – as of August 2018, 22 participating Member States.
 - OLAF Regulation 883/2013 – Evaluated (publication in October 2017) and proposal for Regulation amending Regulation 883/2013 presented in May 2018.



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Introduction

- Objective of this presentation: assessing the proposed amendments and confronting them with the main results of our in-depth analysis, with a focus on the mutual cooperation between OLAF and EPPO
- Outline:
 1. Preliminary remark about the general approach of the OLAF-EPPO relationship
 2. Basic principle : complementarity between administrative and criminal proceedings in protecting the Union's financial interests
 3. OLAF-EPPO cooperation - three dimensions :
 - Avoiding duplication of efforts
 - Exchange of information
 - OLAF's support of and complement to EPPO's activities



1. Vision of the OLAF-EPPO relationship in the draft proposal

In our previous analysis, two different theoretical visions of EPPO-OLAF relationship:

- According to a first vision, OLAF would be the first operational support of EPPO
- According to a second vision, the EPPO's main support comes from national authorities and the relation between EPPO and OLAF is envisaged as a relation between two more autonomous bodies

=> Under the EPPO Regulation, the second vision seemed to prevail but, now, even clearer with the draft OLAF proposal

=> Need for clarification has been answered, but still open questions (two equal partners ? Or one having precedence over the other? See infra)



2. Basic principle

Specific provision in EPPO Regulation (Art. 101) (almost copy pasted in draft OLAF proposal, Art. 1 (4a)):

- Close relationship based on mutual cooperation within their respective mandates and on information exchange;
- With the aim to ensure that all available means are used to protect the Union financial interests through the **complementarity** and support by OLAF to the EPPO.

□ Both EPPO Regulation and draft OLAF proposal provide for the conclusion of OLAF - EPPO working arrangements further detailing the modalities of their cooperation (Art. 99 (3) EPPO Regulation and Art. 12g (1) draft OLAF proposal).

⇒ Consistency has been ensured between both instruments

⇒ But reminder about the limits of relying on working arrangements (lack of transparency and democratic deficit) => Need to provide for more detailed provisions in the legislative instruments

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3. Three dimensions in the OLAF-EPPO cooperation

More detailed provisions on OLAF-EPPO cooperation in the EPPO regulation and the draft OLAF proposal

Three main dimensions foreseen:

- Avoiding duplication of efforts
- Exchange of information
- OLAF's support of and complement to EPPO's activities



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A first dimension aiming at avoiding the duplication of efforts

- OLAF shall not open any parallel administrative investigations into the same facts when the EPPO conducts a criminal investigation → Priority for the EPPO (Art. 101 (2) and see also Rec. 98).
- Expressly foreseen in Art. 12d of draft OLAF proposal: non-duplication of investigations → Prior to opening an investigation, OLAF shall verify in the EPPO's case management system. OLAF may also request further information from the EPPO, which shall then reply within 10 working days.
- **However** possibility for OLAF in duly justified cases to open complementary investigations (Art. 12f – see also rec. 9 for examples). **BUT** narrowly framed, see especially EPPO's right to object to such opening...

⇒ Consistency ensured

⇒ More details provided for, including time limits and insistence on importance of dialogue between both bodies

⇒ Priority given to the EPPO ?

⇒ Still open questions



A second dimension aiming at exchanging information

➤ In the EPPO Regulation : exchange of information OLAF → EPPO :

- General obligation for national authorities and EU institutions, bodies, organs and agencies, including OLAF, to inform the EPPO without undue delay of any criminal conduct in respect of which the EPPO could exercise its competence (Art. 24 (1) & Preamble, rec. 49 transmission of information to the EPPO)
- The duty to exchange information with the EPPO as one of the modalities of OLAF's support (Art. 101 (3) a))
- Indirect access of the EPPO to information stored in OLAF's case management system on the basis of a hit/no hit system (if match, communicated to both OLAF and the EPPO (Art. 101 (5))



A second dimension aiming at exchanging information

➤ In the EPPO Regulation, exchange of information EPPO → OLAF

- In cases the EPPO has decided not to conduct an investigation, it shall provide relevant information to OLAF, with a view to enabling OLAF to consider appropriate administrative action in accordance with its mandate (Art. 39 (4) & 101 (4)).
- In cases the EPPO has dismissed a case and considers that a referral to OLAF is desirable for administrative follow-up or recovery (Art. 39 (4) & 101 (4)).



A second dimension aiming at exchanging information

➤ In the draft OLAF proposal, complementary provisions relating to the information flows in both directions:

- OLAF → EPPO: Reporting to the EPPO of any criminal misconduct on which it could exercise its competence → report to be sent at any stage before or during an investigation by OLAF (Art. 12c (1)) and when OLAF receives information, it may conduct a preliminary evaluation of the allegations to be carried expeditiously and within 2 months of receipt of information (Art. 12c (3)).
- EPPO → OLAF
 - The EPPO may inform OLAF whenever it subsequently open an investigation into the same facts for which OLAF submitted a request for information (Art. 12f (2)).
 - Indirect access of OLAF to the information in the EPPO's case management system on the basis of a hit/no-hit system (Art. 12g (2))



A second dimension aiming at exchanging information

- ⇒ Consistency ensured (including in terms of indirect access to the respective CMS)
- ⇒ More details provided for, including time limits and insistence on importance of dialogue between both bodies.
- ⇒ However some points still unclear, especially the IBOAs' duties to report to the EPPO and/or OLAF



A third dimension aiming at ensuring OLAF's support to and complement of the EPPO's activities

In the course of an investigation, the EPPO may request OLAF to support or complement its activity, in accordance with OLAF's mandate, in particular by:

- Providing information, analyses (including forensic analyses), expertise and operational support
 - Facilitating coordination of specific actions of the competent national administrative authorities and EU bodies
 - Conducting administrative investigations (e.g. conducting investigations for administrative recovery)
- ⇒ Consistency: Art. 12e (1) draft OLAF Regulation mirrors Art. 101 (3) EPPO Regulation.
- ⇒ Further clarifications:
- Additional details on the content of the EPPO's request (Art. 12e (2))
 - Specific provision in draft OLAF proposal on coordination (Art. 12b)



Conclusions

- Proposal to be welcomed → it answers most of the needs identified in our previous analysis and gives flesh to the future OLAF – EPPO cooperation
 - Clearer vision on the OLAF - EPPO relationship : two independent bodies with complementary competences
 - Consistency in their respective legal frameworks
 - Emphasis placed on the dialogue and exchanges between them, particularly with obligations to inform each other whenever relevant and with time-limits.
 - Reinforcement of OLAF's legal framework = a positive development, especially considering the important role of OLAF for cases in which the EPPO is not competent or in which it decides not to investigate



Conclusions

- However, still some open questions
 - OLAF – EPPO cooperation in cases involving States **not participating in the EPPO**
 - Limited provision in the EPPO Regulation → additional instrument to organise the judicial cooperation between the EPPO & non-participating MSs
 - Silence of the draft OLAF proposal on this issue → OLAF - EPPO cooperation will vary depending whether the cases involve only participating MSs, only non-participating MSs or a mix.
 - Remaining uncertainty regarding EPPO's cooperation with non-participating MSs → need to ensure consistency when developing working arrangements not only between the EPPO and non-participating MSs, but also between OLAF and the EPPO.



Conclusions

→ Other open questions

- Some could be addressed by working arrangements (e.g. IBOAs' duty);
- But others should be addressed by the EU legislator, such as the exact nature of the OLAF EPPO relationship (two equal partners ? Or one having precedence over the other?)

➤ Factors of uncertainty that may impact the assessment of the future OLAF-EPPO

- Negotiations for the draft OLAF proposal still at a very early stage → the provisions relevant for OLAF-EPPO cooperation can still be substantially modified.
- Importance of building up mutual trust and developing a culture of openness and dialogue → only possible once the EPPO is operational and OLAF's future legal framework is implemented.



Thank you!

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