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EU fraud enforcement: overcoming obstacles

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Contents

Abstract/summary

Purpose

This paper analyses to what extent the (changing) EU constitutional context impacts on the investigation of fraud affecting the EU budget, with a focus on fraud affecting expenditure. First of all, the author argues that cooperation between EU bodies such as Europol, Eurojust, the European Judicial Network and OLAF is not yet optimal. Nor is the legal framework for OLAF's work. Internal blockages exist. This is illustrated in relation to a number of operational issues.

[1] The author works in OLAF but the views expressed below are her own and do not represent the views of the European Commission, her employer.

Design/methodology/approach: This paper is based on legal issues perceived by a European law specialist working within OLAF, the European Anti-Fraud Office. The legal framework and several cases are used to illustrate various difficulties in operational work.

Findings: The author argues that much has been achieved through secondary legislation in the criminal law sphere under the Treaty of Nice but real difficulties continue at the operational level. As far as operational cooperation, effectiveness and defence rights are concerned, some of the legal problems and internal blockages identified in this paper could be removed regardless of the eventual situation in relation to the establishment of a European Public Prosecutor.

Research limitations/implications: The paper focuses on legal problems and blockages experienced by OLAF investigators in the present legal framework.

Practical implications: This paper should be of interest to anyone engaging in the study of anti-fraud enforcement and to investigators and prosecutors.

Originality/value: This paper provides an insight into EC anti-fraud enforcement

Keywords: EU, OLAF, anti-fraud, informant, whistleblower, rights of the defence, right to be heard, access to the file, European Public Prosecutor, investigation, administrative law

Paper type: research paper

A focus on practicalities

The European Union's Treaty of Nice frames its anti-fraud activities. Article 280 EC lays down the general conditions for the protection of the financial interests of the community. Both the Commission and the Member States have roles to play – close and regular cooperation is envisaged.

> *1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community 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. 2. Member states shall take the same measures to counter fraud affecting the financial interests of the community as they take to*

counter fraud affecting their own financial interests. 3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise together the Commission, close and regular cooperation between the competent authorities. […].

Anti-fraud activities are the joint responsibility of the Commission and of the EU Member States. Effective cooperation is a key factor in the investigation and prosecution of related offences.

One characteristic of the legal space concerning the fight against fraud is that a large number of related criminal law instruments[2] have been adopted at EU level, which place new obligations on the Member States. These instruments were adopted by unanimity – so adoption has tended to take several years. The European Arrest Warrant[3] and the European Evidence Warrant[4] form part of this group. The use of the European Arrest Warrant has been closely monitored but there is little evidence of use in cases of fraud or corruption to the detriment of the EU budget.[5] However the clear division between first (EC) and third pillar (EU) has however started to erode and the European Court of Justice ruled that criminal law measures could be adopted under the first pillar.[6] This was a strong signal that perhaps it was high time to review the legal framework and to 'do away' with the division between third pillar EU matters and first pillar EC matters,[7] as envisaged in the Lisbon Treaty. That treaty also envisages a European Public Prosecutor (EPP, to be discussed at end of this paper).

[2] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union OJ C [1997] 195/2; 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 OJ C [1996] 313/2; Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, 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 [1997] 151/2. 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 OJ C [1997] 221/12.Council Framework 2001/413 combating fraud and counterfeiting on non-cash means of payment OJ L [2001] 149/1; Council Framework Decision 2001/500 on money laundering, the identification tracing freezing seizing and confiscation of instrumentalities and the proceeds of crime OJ L [2001] 182/1, etc.

[3] Framework Decision 2002/584/JAI OJ [2002] L109/1.

[4] Framework Decision 2008/978/JHA OJ [2008] L350/72. See also S; White (2009) Le mandate d'obtention de preuves et l'avenir de la protection des intérêts financiers de l'Union européenne, Revue du Marché Commun et de l'Union européenne, no 530, pp 472-475.

[5] See for example: Council of the European Union (2009) Final report on the fourth round of mutual evaluations – The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, public document 8302/409; Council of the European Union (2009) Working Party on Cooperation in Criminal Matters (experts on the European Arrest Warrant) replies to questionnaire on quantitative information on the practical operation of the European arrest Warrant – Year 2008, public document 9734/1/09; also R; Davidson (2009) A sledgehammer to crack a nut? Should there be a bar of triviality in European Arrest Warrant cases? Criminal Law review, 31-36.

[6] White, S (2006) Harmonisation of criminal law in the first pillar, European Law Review, 31, pages 81 to 92.

[7] White, S (2008) The judgment of the Court of First Instance in the case Franchet and Byk v European Commission, Eucrim, the European Criminal Law Association's Forum, 3-4, pp 146-147.

Some practical issues are now highlighted, which illustrate lacunae in the legal framework, lack of cooperation or blockages. It is a moot point whether any of the problems identified here could be resolved by the creation of new EU bodies only. The European Union will need to ensure that discussions about new bodies do not divert attention away from the reforms needed to make existing bodies work (separately and together) better. Thus, regardless of the eventual situation regarding an EPP, the following operational issues need to be addressed.

Some problems frustrating investigations

Europol, Eurojust, EJN, OLAF: data protection asymmetry

Bodies like Europol and Eurojust, set up under the third pillar, have an important role to play in creating a climate of cooperation, making cross-border investigation and prosecution possible. Europol,[8] based in The Hague, has been processing Member States' data on crimes, which include crimes to the detriment of the EU budget, like fraud or corruption. Eurojust,[9] also based in The Hague, has been coordinating Members States' judicial authorities in the investigation and prosecution of similar crimes.

Article 31 EU includes in its list of common action on judicial cooperation in criminal matters the following: 'promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking into account, in particular, of analyses carried out by Europol'. In 2008, Eurojust recorded some progress in both operational and strategic cooperation with Europol, after the installation of a secure information link between the two agencies.[10]The European Judicial Network (EJN),[11] with magistrates based in the Member States, has also had a role to play in facilitating judicial cooperation within the EU. The EJN secretariat forms parts of the Eurojust staff, thus these organisations have already partly merged and share information. The European Commission has a Directorate-General especially dedicated to fraud affecting the EC budget:[12] OLAF carries out administrative

[8] Europol Convention OJ C [1995] 315/1. For the impact of the Europol decision see Dorn, N, 2009, 'The End of Organised Crime in the European Union', Crime, Law and Social Change, volume 51, number 2, March, pp 283-295.
[9] Council Decision establishing Eurojust, OJ L [2002] 63/5.
[10] See Eurojust Annual Report for 2008, page 41.
[11] Joint Action 98/428/JHA OJ L [1998] 191/4; Council Decision 2008/976/JHA on the European Judicial Network OJ [2008] L 348/130.
[12] http://ec.europa.eu/anti_fraud/index_en.html

investigations within the EU and beyond.[13] This is because a proportion of the EU budget is spent in third countries through external aids.

OLAF carries out internal investigations[14] within the institutions, bodies, offices and agencies of the European Union. It investigates serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies that are not subject to the Staff Regulations. A policy of zero tolerance has been in operation since 1999. OLAF also carries out external investigations,[15] when economic operators are suspected and when action is subsidiary to the Member States'. External investigations touch on the income side of the budget (Customs, agriculture) and on the expenditure side (for example subsidies and structural funds within the EU, subsidies, external aids, aids to enlargement through grants and contracts). The OLAF legal framework for carrying out administrative investigations is incomplete. Regulation 1073/99 contains 16 articles covering all OLAF's activities and Regulation 2185/96[16] concerning on the spot checks was adopted before the creation of OLAF and relates to external investigations.

How do Europol, Eurojust, the European Judicial Network and OLAF coordinate their efforts? Initially, the legislator gave much thought to the relationship with the Member States in the case of Europol and Eurojust and much attention to data protection in the case of Europol. Less attention seems to have been paid at the outset to how these agencies would fit with one another or how they would work together in order to achieve common goals. Nevertheless, *rapprochements* have been attempted and there are agreements in operation such as an administrative agreement on cooperation between the European Commission and the European Police Office, an MOU between the European Judicial Cooperation and OLAF signed in 2003 and a subsequent agreement between Eurojust and Europol. In 2008 an agreement on cooperation between Eurojust and OLAF was also signed. These agreements aim to encourage joint

[13] The mission of the European Anti-Fraud Office (OLAF) is to protect the financial interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions See http://ec.europa.eu/anti_fraud/index_fr.html.

[14] Internal investigations are defined in Article 4 of Regulation 1073/99 OJ [1999] L136/1 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

[15] Article 3 of Regulation 1073/99 OJ [1999] L136/1 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

[16] Council Regulation 2185/96 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 [1996] 292/2.

investigation teams[17] and some exchange of information, although the exchange of personal data between Eurojust, Europol and OLAF has historically been limited and somewhat hampered by data protection asymmetry between first and third pillars. This adds a layer of difficulty to the familiar reluctance to share information (it is not unusual for enforcement agencies to guard 'their' information).

OLAF's on-the spot checks: 'neutralised'?

The 1995 regulation granting the Commission the right to carry out on the spot checks – now the exclusive competence of OLAF – lays down rules for the conduct of these checks. On the spot checks are carried out with the cooperation of national authorities. OLAF has no power of compulsion and whenever an economic operator refuses access to premises or to information/data, OLAF must rely on a Member State authority to use its coercive powers. The same applies in relation to measures to preserve evidence. The quality of cooperation during on the spot checks has a direct impact on the admissibility of evidence. OLAF must ensure that the reports it draws and sends to prosecuting agencies constitute admissible evidence in administrative or judicial proceedings in the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by the national administrative inspectors do.[18]

However, this cooperation is not always forthcoming. *Vervaele* has commented: 'Some Member States are trying to neutralise the autonomous character of the investigative character of the investigative powers and their reach, particularly when it comes to administrative acts in their own domestic legal orders.'[19]

OLAF may carry out on the spot checks in third countries, in accordance with Article 3(1) of Regulation 1073/99, which states that a cooperation agreement must be in force. However, data protection rules preclude OLAF from exchanging personal data with third countries who cannot guarantee the same level of protection of personal data as that enjoyed within the EU.[20] OLAF has recently managed to enter a small number of agreements with African countries, but has met with refusals in other key countries. This state of affairs considerably narrows the possibility of exchanging information with third countries where EU funds have been spent.

[17] Council Framework Decision on Joint Investigation Teams OJ L [2002] 162/1.
[18] Article 9(2) of Regulation 1073/99.
[19] J. Vervaele (2008) EUCRIM ¾, pp 180-186.
[20] See Article 9 of Regulation 45/2001 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] l8/1.

Whistleblowers: lack of anonymity

Articles 22a and 22b of the Staff Regulation were introduced in 2004, at the time when (previous EC official, subsequently MEP) Paul van Buitenen and Marta Andreasen[21] (previous chief accountant of the Commission) were blowing the whistle. Article 22a says that provided that he has acted reasonably and honestly, any official will not suffer any prejudicial effects on the part of the institution as a result of having communicated facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of the conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities.

The prospective whistleblower must disclose his information to his hierarchy or to OLAF. However, according to Article 22b of the EC Staff Regulations, the whistleblower will not suffer prejudicial effects for disclosing the information to another body such as the Court of Auditors or the European Parliament, if he can prove that he had already disclosed to OLAF or to his own institution, but after a period of time set by the institution or OLAF, no appropriate action had been taken. The whistleblower must be told within 60 days of the period of time that will be required. The legislator makes it clear that contacts with the European, the ombudsman or with the press[22] are not welcomed.

Statistics show that since 2004, very few whistleblowers have come forward. The legal framework is very scant and does not make it possible for whistleblowers to give information anonymously through an intermediary. By contrast, a 'prescribed regulator' is provided by the Public Interest Disclosure Act (PIDA)[23] in the United Kingdom. This has proved successful: PIDA applications rose from 157 in 1999/2000 to 1356 in 2006/2007. The corresponding of applications disposed rose from 35 to 1015 in the same period. Perhaps this example could be emulated at EC level.

Furthermore, 'prejudicial effects' are not defined in the Staff Regulations and it is clearly up to the institution to decide whether the whistleblower has acted reasonably and honestly (this is tantamount to a 'good faith' test). As Murawska[24] pointed out, the legislation at present does not provide for a

[21] See case F-40/05 Marta Andreasen v Commission, arrêt du tribunal de la Fonction Publique de l'Union Européenne (deuxième chambre) 8.1..2007

[22] The press is not mentioned in Articles 22a and 22b of the EC Staff Regulations, indicating that contacts with the press can never be associated with the status of whistleblower and a protection from prejudicial effects.

[23] http://www.pcaw.co.uk:law:pida:htm

[24] Murawska, A (2008) Administrative anti fraud measures within the European Union, pp 139 to 152, NOMOS.

procedure to decide whether an official has acted in good faith and should therefore attract protection; nor does it provide any protection for officials who may have suffered retaliation.[25] More forcefully, it has also been pointed out that it was unhelpful and unreliable to condition protection on motivation and that there was a need to set out provisions for compensation for officials who had suffered retaliation.[26]

However, some progress has been made. In two decisions, the European Ombudsman has clarified the whistleblower's right to be informed about the outcome of the investigation[27] and his right to be informed about the duration of the investigation.[28]

Looking at it from the point of view of the institution receiving the information, the rules are also unsatisfactory, since there is no clarity about what sort of information the whistleblower should produce in order to attract protection. There is no notion of 'qualifying disclosure'. It might be useful to clarify that the information must be new and not of a type that has already appeared in an audit report, for example. A whistleblower's report should not be a compilation of publicly available reports that the institution has been aware of and has already acted upon. However, if the information is new, it should be made clear how far the whistleblower should go in proving that the allegations are true, least they launch into a full-blown investigation of their own.

Some progress has been made in clarifying the existing rules. The European Court of First Instance ruled on two aspects. Firstly, the whistleblower cannot force OLAF to open an investigation, on the basis of information provided.[29] Secondly, a whistleblower continues to enjoy statutory protection even if OLAF decides to close an investigation initially opened on the basis of information provided by the whistleblower.[30] This is because the decision to close an investigation in itself does not make it possible to judge whether the whistleblower reasonably and honestly believed that the information he gave OLAF was true and had thus acted in good faith.[31]

The amendment to the Staff Regulations and subsequent clarification by the Court and the European Ombudsman have done little to increase the information received from identified whistleblowers by OLAF; in 2006 OLAF received no

[25] A Commission Communication however states that a whistleblower may request to be moved to another service, in order to be protected from hostile reactions from colleagues (SEC (2004) 15112 of 6.2.2004).
[26] See Drew, K (2003) Whistleblowing and corruption an initial and comparative review, Public Services International Research Unit (PSIRU); http://www.psiru.org
[27] Decision 1625/2002/IJH against the European Anti Fraud Office of 3.7. 2003.
[28] Decision 140/2004/(BB) PB against the European Anti Fraud Office of 6.6. 2005.
[29] Case T 4/05 Strack v Commission, paragraph 39.
[30] Case T 4/05 Strack v Commission, paragraph 44.
[31] Case T 4/05 Strack v Commission, paragraph 48.

information from whistleblowers[32] and in 2008 OLAF received four pieces of information, although a steady flow of anonymous information continues to be received. Anonymous information may have weak or no evidential value in court.[33] It cannot stand on its own and has to be fully corroborated in order to lead to the opening of a case.

The legislation needs to be consolidated in order to take into account good practice in the Member State, relevant opinions of the European Ombudsman and rulings of the European Courts of Justice.

Informants: disclosure problems

Informants, like whistleblowers may bring in valuable information to OLAF. The case law of the European Courts of Justice does not offer a definition of 'informant', although they are usually understood to be natural persons who volunteer information concerning wrong doing, in order to trigger action from an agency with powers of enforcement. In the EC context, informants may be disgruntled tenderers, competitors, members of the public or ex-employees who wish to pass information to the European Commission. Their motives may vary. EC jurisprudence has evolved in this area, mostly in relation to the competition field.

One main concern relates – as with whistleblowers – to anonymity. Informants often wish to remain anonymous. In 1985, the European Court of Justice ruled that in the case of information supplied on a purely voluntary basis, but accompanied by a request for confidentiality in order to protect the informant's anonymity, an institution which accepts such information is bound to comply with such a condition.[34] The Commission's ability to guarantee the anonymity of certain of it sources of information is crucial in order to ensure the effective prevention of prohibited anti-competitive practices.[35]

In the context of OLAF investigations, the European Data Protection Supervisor has recently issued a decision which requires OLAF to ensure that informants' personal data should not be divulged to the rest of the European Commission

[32] OLAF's seventh Activity Report, page 33.
[33] See Nuutila A-M (2003) Whistle blowing, exchange of information and legal protection in Enlarging the fight against fraud in the European Union; penal and administrative sanctions, settlement, whistle blowing and Corpus Juris in the candidate countries, ed P. Cullen ERA vol 36, Bundesanzeiger, p 266.
[34] Case 145/83 *Adams v Commission* [1985] ECR 3539, paragraph 34.
[35] Case C-94/00 *Roquette Freres* [2002] ECR I-9011, para 64; Case T-53/03 BPB plc v Commission, judgment of the Court of First Instance of 8 July 2008, para 36.

during investigations.[36] This further underlines the need to put in place a procedure ensuring anonymity.

With respect to the evaluation of the information obtained through informants, the principle that prevails in Community law is that of the unfettered evaluation of evidence and that it is only the reliability of the evidence that is decisive when it comes to its evaluation.[37] Proceedings initiated on the basis of information from an undisclosed source are lawful, provided that this does not affect the opportunity for the person concerned to make known his views on the truth or implication of the facts or documents communicated or on the conclusions drawn by the Commission from them.[38] According to the case law, an infringement of the rights of the defence cannot be founded on a general argument but must be examined in relation to the specific circumstances of each particular case.[39]

The Court has scrutinized decision making procedures to ensure that, as far a possible, the procedure complied with the requirements to provide equality of arms and incorporated adequate safeguards to protect the rights of the accused. In Jasper v UK, the Court found that the trial judge who carried out the balancing exercise (in an *ex parte* hearing) between the public interest in maintaining the confidentiality of the evidence and the public interest in maintaining the confidentiality of the evidence and the need of the defendant to have it revealed, was sufficient to comply with Article 6(1) ECHR.
It may also be necessary for the Commission to protect the anonymity of informants (Adams v Commission) and that circumstance cannot suffice to require the Commission to disregard evidence in its possession.

Article 6(1) ECHR requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused. However, the entitlement to disclosure of relevant evidence is not an absolute

[36] European Data Protection Supervisor (2009) Avis concernant une notification relative à un contrôle préalable reçue du délégué à la protection des données de la Commission européenne à propos de la gestion des informations transmises par l'OLAF dans le cadre du Memorandum of Understanding, 23 March 2009, no 2009-011.
[37] Opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 Rhône-Poulenc v Commission [1991] ECR II-867 at II-869, II-954; see also, to that effect, judgments in Joined Cases C-310/98 and C-406/98 Met-Trans and Sagpol [2000] ECR I-1797, paragraph 29, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 Vela and Tecnagrind v Commission [2002] ECR II-4547, paragraph 223; Mannesman para 84.
[38] Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, paragraph 14; case T-53/03 BPB plc v Commission, judgment of the Court of First Instance of 8 July 2008, para 37.
[39] Joined cases T-191/98, T-212/98 to T-214/98 Atlantic Container Line and Others v Commission [2003] ECR II-3275, paras 353 and 354 and case Case T-53/03 BPB plc v Commission, judgment of the Court of First Instance of 8 July 2008, para 33.

right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). In order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[40]

The European Commission is not obliged to produce documents, be they originals or copies, of an evidentiary nature or to disclose the identity of any informants to the national court. However, the review by the national court must not become an empty shell for lack, for example, of any specific information regarding the basis for the Commission's suspicions. In practice, this means that evidence initially put forward by an informant must be sufficiently corroborated before being transmitted to a national court.

Defence rights: uneven

So far we have discussed some aspects of cooperation in investigations. We now turn to the other side: defence rights.

Attempts to add explicit rules of procedure for the conduct of investigations to Regulation 1073/99 have been made. Since 2004, proposals made by the Commission and amended by the European Parliament have not been taken up by the Council.[41] The proposals would have added to Regulation 1073/99 explicit references to the rights of the defence and would have addressed various requirements of the Commission in relation to internal investigations.

The 1999 OLAF legal framework offers some rules of procedure for the conduct of internal investigations. For example 'conclusions referring by name to a member, official or servant of the Commission may not be drawn once the

[40] *Jasper v UK; Edward and Lewis v UK.*

[41] COM(2004) 103 Final, Proposal for a Regulation of the European Parliament and of the Council amending Regulation 1073/99 concerning investigations conducted by the European Anti-Fraud Office; see also COM(2006)244 Final. Subsequently: COM (2006) 244 Final ; PE Projet de rapport sur la proposition de règlement du Parlement européen et du Conseil modifiant le règlement 1073/99 relatif aux enquêtes effectuées par l'Office européen de la lutte antifraude (OLAF) Commission du Contrôle Budgétaire, rapporteur Ingeborg Grässle, 2006/0084 COD 22 8 2008.

investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.'[42]

This focus on internal investigations is in a way not surprising, since Regulation 1073/99 was conceived following the *Santer* debacle in 1999, in order to clarify a competence to carry out internal investigations. It is clear from Regulation 1073/99 itself and from recent case law that officials or agents of the Communities enjoy more rights than non-officials, as far as OLAF procedure is concerned.[43] What is less clear is whether this is compatible with a uniform application of Article 6 ECHR (or with Article 48 of the Charter of fundamental Rights of the European Union[44]).

One specific aspect of the rights of the defence which is being contested is access to the file.

Rights of access to file and to a hearing

The right of access to the file (of investigation) is closely linked to the right to be heard. In the EC competition field, access to the file has been codified and that the *Statement of Objection* acts as a trigger for this access. In internal investigation carried out by the European Anti-Fraud Office, the interested party (or his lawyer or other representative) has no right of access to the OLAF investigation file.[45] This right is provided at a later stage, either during the disciplinary proceeding, when he has a right to 'all documents directly related to allegations made against him' (Article 2 of Annex IX of the Staff Regulations) or during national judicial proceedings.[46] Officials (and others targeted in external investigations) are therefore not acquainted with the contents of an OLAF case file until it is in the hands of a national authority.

Jansen and Langbroek have argued that the right to be heard does not apply to OLAF investigations, because of their preliminary nature: 'It is not certain that a person under investigation should be heard under the OLAF investigation, especially because OLAF cannot impose sanctions. The moment of hearing is up

[42] Article 4 of Commission Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, OJ L [1999] 149/57.
[43] See case T48/05 Yves Franchet and DanielByk v Commission, arrêt du tribunal (troisième chambre), 8 July 2008, NYR ; Case F-505 and F-7/05 Antonello Violetti and Nadine Schmit v Commission, arrêt du Tribunal de la Fonction Publique, 28 April 2009, NYR.
[44] OJ [2000] C 364/1.
[45] S. White (2009) Rights of the defence in Administrative Investigations: Access to the file in EC investigations, Review of European Administrative Law, vol 2, no1, 55-67.
[46] OLAF Manual, version of 25 February 2005, page 121.

to the decision-making authority if OLAF did not hear the person that will be charged eventually'.[47]

Their comments may be correct with respect to the external investigations[48] carried out by OLAF, where EC legislation does not expressly provide for a right to be heard. However, with respect to internal investigations, they would appear to overlook Article 4 of Commission Decision 1999/396,[49] which states as follows.

> *Where the possible implication of a Member, official or servant of the Commission emerges, the interested party[50] shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him. In cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member, official or servant of the Commission to give his views may be deferred in agreement with the President of the Commission or its Secretary-General respectively.*

This rule extends to all institutions, bodies offices and agencies of the EC, through the Inter-institutional Agreement of 25 May 1999.[51] But does this constitute sufficient protection for the rights of the defence?

In *Nikolaou*,[52] the applicant argued that in its internal investigation, OLAF should have given access to the file, in accordance with competition jurisprudence on the right of access to the file, in particular *Hercules Chemicals*.[53] However the Court ruled that this rule did not extend to OLAF investigations.[54] The CFI stated in *Nikolaou* that Article 4 of Commission

[47] O. Jansen and P. Lanbroek (eds), pp 30-31, see note 7.
[48] Article 3 of Regulation 1073/99 OJ L [1999] 136/1. OLAF carries out on-the-spot checks in the EU Member States and in third countries, in accordance with the relevant third country agreements in force.
[49] Commission Decision 1999/396 OJ [1999] L149/57 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests.
[50] This refers to the person under investigation.
[51] OJ [1999] L136/15. Inter-institutional Agreement 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).
[52] Case T-259/03 *Kalliopi Nikolaou v Commission*, see note 38, paragraph 246.
[53] Case T-7/89 *Hercules Chemicals v Commission*, ECR II 1711, paragraph 56.
[54] Case T-259/03 *Kalliopi Nikolaou v Commission*, Arrêt du Tribunal,(deuxième chambre) 12.9.2007, paragraph 267, NYR .

Decision 1999/396 offered sufficient protection for the rights of the defence.[55] Inasmuch as an investigation procedure does not lead to an act with binding legal effects, a failure to follow a contradictory procedure at this stage does not harm the interested party.[56]

The European Courts of Justice also ruled in *Gomez Reino*[57] and *Nikolaou* that the conclusions of an OLAF (internal) investigation contained in a final report had no binding legal effects.[58] Only a measure which produces binding legal effects, such as to affect the interests of an applicant by bringing a distinct change in his legal position is an act or decision which may be the subject of an action for annulment.[59]

The letter informing the interested party (i.e. a person under investigation) must contain a summary of the allegations.[60] Interested parties should normally be given the opportunity to express their views on all the facts which concern them. In this, it appears that interviews are considered by OLAF to have a key role: 'presenting the facts to an interested party during an interview does not usually require disclosure of evidence.'[61]

In *Franchet and Byk*, the Court of First Instance took a dim view of the failure to inform an interested party.[62] It also took the view that the OLAF Supervisory Committee should be consulted (rather than just informed) before investigation information or reports were to be sent to national authorities.[63] According to the Court, the procedure in Article 11(7) of Regulation 1073/99[64] is intended to ensure a protection of the rights of persons investigated by OLAF.[65] The CFI therefore showed that it placed some importance on mechanisms needed to ensure the respect for fundamental rights, even if it did not consider access to

[55] Ibid, *Nikolaou v Commission*, paragraph 245.
[56] Case T-259/03 *Kalliopi Nikolaou v Commission*, see note 38, paragraph 246.
[57] Case T-215/02 *Santiago Gomez Reino v Commission*, Odonnance du Tribunal (deuxième chambre), 18.12.2003, paragraph 50 *et seq*.
[58] See also case T-29/03 ECR II-2923, paragraph 32 et seq; T-193/04 *Tillack v Commission* ECR II-3575, paragraphs 38 to 47, confirmed in appeal C-521/04 PR ECR I-3103, paragraphs 28 to 34; case T-193/04 *Tillack v Commission*, paragraphs 66 to 82, NYR.
[59] Cases C-476/93 P *Nutral v Commission* [1995] ECR I-4125, paragraphs 28 and 30 ; T-54/96 *Oleifici Italiani and Fratelli Rubino v Commission* [1998] ECR II-3377, paragraph 48; joined cases T-127/97 *Coca Cola v Commission* [2000] ECR II-1733, paragraph 77; T-193/04 R *Tillack v Commission*, Order of the President of the Court of First Instance, 15 October 2004, paragraph 38.
[60] Ibid, page 120.
[61] OLAF Manual, see note 51 above, pages 96 and 97.
[62] Case T-48/05 *Franchet and Byk v Commission*, paragraphs 156-176.
[63] Case T-48/05 *Franchet and Byk v Commission*, paragraphs 168-170.
[64] 'The Director shall inform the Committee of cases requiring information to be forwarded to the judicial authorities of a Member State.' OLAF has given a wide interpretation of this requirement by informing the Supervisory Committee of all cases (not just investigation cases) to be transmitted either to national authorities or institutions.
[65] Ibid, 168.

documents to be an integral part of the rights of the defence in internal investigations carried out by OLAF.

The lack of formal accusation or charge means that there is no access to the file at any stage during an OLAF investigation. Within the context of internal investigations, the legislator has made provision for a person under investigation to be informed that he is being investigated and for him to be heard before OLAF reaches conclusions. This must be contrasted with the situation under EC competition law (Regulation 1/2003)[66] where access to the file is granted. This means that the European Commission does not have a uniform approach to defence rights. Although sectoral differences in EC law are understandable, is it questionable whether this is desirable in the area of fundamental rights.

The present application of the principle of access to the file in EC law raises a number of issues. It would appear that access to the file during EC investigations is contingent on a number of factors: a close relationship between investigation and sanctioning, the extent to which acts undertaken during the investigation are binding, the powers relied upon and the presence of a legally binding act such as a statement of objection in competition procedure. One possibility would be for OLAF to align itself with competition law in respect of any information sent to a national authority, which may lead to a criminal investigation and a prosecution.

Relation between disciplinary and judicial proceedings

In internal investigations, it is understood that whenever a report has been sent to a judicial authority, disciplinary proceedings must be stayed.[67]
However, in practice, this means that in internal investigations disciplinary proceedings may be stayed for years. An official may be removed from his duties, pending the outcome of criminal and of disciplinary proceedings. It is argued in this context that, according to article 10(2) of Regulation 1073/99, OLAF has no discretion and must forward to a judicial authority any information it obtained during internal investigations into matters liable to result in criminal proceedings.

As most internal investigations are carried out within the Commission, this raises the issue of the sharing of competence between OLAF and the disciplinary unit of the Commission (IDOC). It must be remembered that under

[66] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L [200] 1/1.

[67] Article 25 of Annex IX of the EC Staff Regulations.

a disciplinary procedure, there is access to the file whilst during an OLAF investigation there is none and the information may be transmitted to a judicial authority, so the choice is not free of consequences for the official under investigation or a 'person concerned' as Regulation 1073/99 prefers to call him or her.

The sharing of competence between OLAF and IDOC is set out in a Memorandum of Understanding.[68] In its internal investigations, OLAF deals with serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Communities liable to result in disciplinary or, as the case may be, criminal proceedings. IDOC deals with matters liable to result in disciplinary proceedings, so there is clearly potential for some overlap. OLAF and IDOC meet regularly to facilitate the sharing of competences and the follow up of disciplinary procedures.

Is sending information to a judicial authority a legally binding act?

In *Tillack*,[69] the applicant argued that he should have a right to an effective judicial protection against OLAF's decision to request assistance from the Belgian authorities in order to identify his source of information and he applied for OLAF's decision to be annulled. He argued that the actions of the Belgian authorities flowed directly from the decision of OLAF to 'file a complaint against him'. He observed that OLAF was a most important organ whose activities enjoy the firm support of the Member States. Not to have given effect to a request by OLAF to seize 'evidence' could therefore have seemed to be a breach by the Kingdom of Belgium of the duty of loyal cooperation set forth in Article 10 EC. The Court confirmed the ruling of the CFI[70] and the application for annulment was found to be inadmissible. Investigation reports drawn up by OLAF do not produce binding legal effects. They are only recommendations and it is entirely up the national authorities, or to the institution, to decide whether a judicial procedure or a disciplinary procedure should be opened.

However, some learned commentators have argued that the wide latitude ascribed by the ECJ to national authorities in deciding whether to act on information received by OLAF perhaps overstates the capacity for independent

[68] Memorandum d'entente OLAF/IDOC–ADMIN of 22 July 2003, SEC(2003) 885/2.
[69] Case T-193/04 R *Tillack v Commission*, Order of the President of the Court of First Instance of 15 October 2004, paragraph 35.
[70] Case C-521/04 PR *Tillack v Commission* ECR I-3103, paragraph 32.

action actually available to them.[71] Cases F-5/05 and F-7/05, *Violetti and Schmit v Commission*,[72] if confirmed on appeal, may well herald a change. The EC Tribunal annulled a decision by OLAF to send information to the Italian judicial authorities, following a breach of Article 4 of Decision 1999/396, recognising its binding legal effects. The presence of a legally binding act in turn attracts specific rights of the defence, such as access to the file.

A later application by Mr Tillack to the ECtHR against Belgium[73] led to Belgium being found to have breached Article 10 ECHR, after Mr Tillack's home was searched by the Belgian authorities, who also asked him to identify his sources in respect of the afore mentioned OLAF matter. The ECtHR held that the right of a journalist to protect his or her sources falls under Article 10 of the European Convention on Human Rights on freedom of expression. According to the Court, the right to protect sources is not a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources. Rather the right to protect sources is part and parcel of the right to information - which should have been treated with the utmost caution in the case of *Tillack*, who had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged.[74] One interesting aspect of this case is that the applicant managed to get redress from the ECtHR against Belgium.

Early Warning System: damage to economic operators

To prevent economic operators who are suspected of fraud or who have been convicted of fraud from continuing to enjoy EU funds, the European Commission runs an 'Early Warning System', which can be consulted by all parts of the Commission when contemplating a contract with a particular economic operator.[75] OLAF may request that economic operators be registered in this system under particular types of alert. A 'W1' warning is used in cases of serious administrative errors or suspected frauds and leads to reinforced monitoring by the Commission. A 'W2' warning in cases of findings of serious administrative errors or fraud lead to warning and a suspension of payment

[71] See for example J. Wakefield (2008) Case T 193/04 Hans Martin Tillack v Commission, judgment of the Court of First Instance (Fourth Chamber) of 4 October 2006, (2006) ECR II 3995, and CMLR 45: 199-121, 2008.
[72] Case F-5/05 and F-7/05 Antonello Viletti qnd Nadine Schmitt v Commission, Arrêt du Tribunal de la Fonction Publique de l'Union Européenne (Première chambre), 28.4.2008. See http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=FR&Submit=Rechercher$docrequire=alldocs&numaff=F-5/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100
[73] European Court of Human Rights: Tillack v Belgium application 20477/05, judgment of 27 November 2007.
[74] Ibid.
[75] Commission Decision on the Early Warning System for the use of authorising officers of the Commission and the executive agencies OJ [2008] L 344/125; see also Early Warning System, OLAF Guidelines of June 2009

orders by the commission. A ‘W5a’ warning in cases which merit exclusion under the Financial Regulation[76] leads to suspension of payment orders and to a bar to ne commitments being made by the Commission.[77] Statistics show that between the end of 2005 and the end of 2008, 32 ‘W1’ warnings were registered, whilst 43 ‘W2’ warnings and 130 ‘W5a’ warnings were activated during the same period. The registration of economic operators into the Early Warning System raises legal issues and the European Ombudsman has launched a public enquiry into its use.[78]

The Appeal Court of Luxembourg[79] recently ruled against the European Commission, in a case where the contractor was under criminal investigation and the Commission had stopped payments for non-execution of a contract. The liquidators recovered monies due from the European Commission. Faced with the possibility of suits by liquidators, will the Commission continue to stop payments through the Early Warning System in cases of suspected fraud?

Generally, it is not clear whether the Commission is in a position to make an equally aggressive use of the civil law when recovering debt. Whenever the Commission is a creditor in a bankruptcy, it is not ranked on par with national tax authorities and finds it hard to recover sums due.

Looking at it now from the point of view of an economic operator facing bankruptcy if the Commission stops payment, should a formal contradictory dialogue be part of the Early Warning System procedure, so that contractors may be heard and if necessary their EWS status revised? Such procedures are in operation in other international debarment systems.

The Treaty of Lisbon: working together?

It is not possible here to give a fuller account of the legal and practical issues related to the conduct of investigations, however the author has tried to give a flavour of some of the issues encountered on a day to day basis. The question now arises, what operational advances could be made as a result of the Treaty of

[76] This warning is requested where a legal entity is in one of the situations mentioned in Article 93(1) of the Financial regulation and cases where an exclusion penalty is imposed on the basis of Article 96 and 114(4) of the Financial Regulation.

[77] See Articles 93 to 96 of Council Regulation 1605/2002 Financial Regulation applicable to the general budget of the European Communities and Article 133 of Commission Regulation 2342/2002, Implementing rules. http://europa.eu.int/comm/budget/infos/publilcations_en.htm. Proposals for a new EU debarment policy have also been discussed, see Transparency International's Recommendations for the Development and Implementation of an effective Debarment System in the EU, 28.3.2006, Transparency international Secretariat, Berlin.

[78] Case 01/3/2008/FOR – The European Ombudsman opened a public consultation on 29 February 2009.

[79] Arrêt civil no 32858 entre Communauté Européenne et curateurs de la faillite de la société anonyme Groupe Perry, 16.6.2009.

Lisbon? In that text, Article 280 EC becomes Article 325.[80] It constitutes chapter 6 on 'combatting fraud'.

> *1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union [text continues here in a broadly similar manner to Nice] 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. […]*

There is a new reference to the 'ordinary legislative procedure', which indicates that co-decision and qualified majority have now become the norm in the single legal framework[81] of the Treaty on the functioning of the European Union. At first view, first and third pillars seem to have disappeared, although unanimity remains for some matters, including the adoption of a European Public Prosecutor (Article 86); operational cooperation between enforcement agencies (Article 87); the extent to which national enforcement agencies can operate on the territory of another Member State (Article 89).

National parliaments

National parliaments will also be consulted - after a fashion:[82] ' National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiary, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality'. However as a recent House of Lords report outlined, it might prove difficult for a national parliament to keep abreast of negotiations during the co-decision procedure.[83] The German Constitutional Court has obliged the Federal Parliament to revise its text ratifying the Lisbon Treaty in order to safeguard the position of parliament.[84]

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[80] Consolidated version of the Treaty on the functioning of the European Union OJ C [2008] 115/47.
[81] This means that the same legal instruments will apply for first and third pillar:
[82] Protocol no 1 on the role of National Parliaments in the European Union.
[83] House of Lords (2009) European Union Committee , 17th Session 2008-9, Co-decision and national parliamentary scrutiny report with evidence , published 21 July 2009.
[84] Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.. The Court's press release is at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html. For early commentaries see German Law Journal No. 8 (1 August 2009) at http://www.germanlawjournal.com.

On the one hand, co-decision should speed up the legislative procedure, whilst the intervention of national parliaments may well act as a break. It is therefore not easy to predict whether at the level of secondary legislation, it will become easier or more difficult to enhance anti-fraud measures.

Can we expect some improvements in the way EU bodies engaged in the fight against fraud work together? With a single legal framework, one would expect common data protection rules to improve matters and the ability to exchange personal data/ share operational work to increase. There is evidence of 'joined-up' policy in relation to Eurojust and Europol. Article 85(1) of the TFEU states that Eurojust must act on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

An EPP?

Since the 1990s much has been written about the possibility of adopting a European Public Prosecutor with a responsibility for fighting fraud affecting the EU budget. This approach should not surprise, given that it is a feature of institutionalism in EU policy-making that institution-making is a valued problem-resolution mechanism. It seems that, once a problem is identified, an institution is conceived. The institutions thus created do not always start off with well defined tasks or sufficient powers or adequate coordination mechanisms with other related institutions. This can lead to a superimposition of structures.

The possibility of appointing a European Public Prosecutor is provided for in Article 86 of the Treaty on the functioning of the European Union.

> *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. In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in*

> *Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply. 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. […] 4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.*

Article 82(2) of Lisbon lays down a legal basis for harmonisation in the area of criminal procedure and evidence. Such harmonisation was not foreseen in the Treaty of Nice.

> *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 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 (…).*

How would this work? The extent to which Eurojust and an EPP could be fused has been much discussed. It has been suggested that Eurojust and the potential Public Prosecutor are 'two completely distinct things; the creation of Eurojust and the possible creation of a European Public Prosecutor are the response to two absolutely distinct penal policies.'[85] It has even been argued that 'the project to create the European Public Prosecutor, depending in principle on an unanimous decision by the Council, and currently limited to the fight against

[85] See José Luis da Mota (2008) The future European Public Prosecutor's Office, proceeds of international seminar held in Madrid on 24 and 25 January 2008, unpublished.

crime involving the financial interests of the Union, is relegated to second place as a means of creating a strengthened Eurojust.'[86]

Few are the legal commentators who feel able to describe how the EPP would work within Eurojust, in practice. Brezigar hazards the guess that

> *[I]t is likely that the European Public Prosecutor will become a kind of 28th National Member (of Eurojust) and will sit in the College (of Eurojust) when the protection of the financial interests of the EU is discussed of maybe the College itself will act as the European Public Prosecutor and the prosecutors within the national offices of Eurojust will act as deputies of the European Public Prosecutor at national levels.'*[87]

Vervaele moots that

> *[I]f Eurojust is converted into an investigative body and becomes the embryo of an EPP or if the EPP is established, this will of course have consequences for Europol and for 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 … In this context, it will be necessary to examine whether 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 it would be better to make one part of OLAF completely independent from the Commission'.*[88]

On 7 September 2009, the President of the Commission published his "Political Guidelines for the next Commission". On page 37 of this document, he made the following statement:

> *The Commission can only be strong if it rests on high ethical standards and if it maintains a high degree of professionalism. I am proud of the progress made over the last years, but I would like to see further steps, for instance in the area of financial management: now that it is well established, OLAF should be given full independence outside the Commission.*

[86] Régis de Gouttes (2008) The future European Public Prosecutor's Office, proceeds of international seminar held in Madrid on 24 and 25 January 2008, unpublished.
[87] Barbara Brezigar (2008) The future European Public Prosecutor's Office, proceeds of international seminar held in Madrid on 24 and 25 January 2008, unpublished. See also White, S (2002) The European Prosecutor: extension of Eurojust or 'prolongation' of the *Corpus Juris* proposals?, pages 47-54, in L'espace pénal européen: enjeux et perspectives, édité par Gilles de Kerchove et Anne Weyembergh, Editions de l'Université de Bruxelles.
[88] J. Vervaele (2008) EUCRIM 3/4 The shaping and re-shaping of Eurojust and OLAF, pp 180-186.

It is not clear at the time of writing what status an independent OLAF would have or what it could mean in operational terms. Perhaps the proposed fully independent OLAF is conceived not only in terms of operational efficiency but also as an alternative route to the European Public Prosecutor. As events unfold there will be keen interest in the implications for all the operational partners, including Member States.

Conclusion

Historically, there has been an emphasis on the criminal law in order to address the protection of the financial interests of the EU. This is evident in Nice and set continues with Lisbon. There is some evidence in the latter text of ‘joined-up thinking’, so that the EU bodies involved in the protection of the financial interests can cooperate better – although it is as yet not clear how the EPP would function within Eurojust, nor is it clear how the role of OLAF or of Europol might evolve with the establishment of an EPP.

That said, it is clear that, as far as operational cooperation, effectiveness and defence rights are concerned, some of the legal problems and internal blockages identified in this paper could have been removed before now, given political will on all sides. In short the legal framework for OLAF's activities could be improved prior to the establishment of a European Public Prosecutor. That this has not occurred may suggest to some that institution-building is at least as much fun as operational effectiveness in protection of the financial interests of the European Union. In the view of the writer, a firm believer in the European project, one can have both but it may be a mistake to try to make one conditional on the other.