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EU Fraud: institutional and legal competence

Brendan J Quirke

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Abstract This paper will focus on frauds committed against the budget of the European Union. It will consider the role of OLAF (the European Fraud Prevention Office) which is the lead agency in the fight against fraud. It will consider its powers and its capacity to co-ordinate the activities of anti-fraud agencies in twenty seven member states and the constraints which prevent it from operating in a more effective manner. The paper will also consider the role of other transnational bodies such as Eurojust and Europol and will seek to highlight the degree of fragmentation which exists with a multiplicity of actors involved in policing fraud, a fragmented legal approach and the difficulties this presents in policing sophisticated transnational frauds. The effect of EU expansion on this situation will also be examined and the EU anti-fraud efforts of the Czech Republic will be considered in some detail. The paper concludes that the legal system and the institutions are not yet in place to enable such frauds to be adequately policed.

Introduction

This paper will focus on a particular aspect of financial crime, namely fraud against the budget of the European Union. The European Budget attracts both organised economic criminals, or opportunistic entrepreneurs who resort to fraud a means of supporting a failing enterprise or helping a company or organisation in financial difficulties.

The research question to be considered here is whether a fragmented approach to fighting EU fraud is an effective approach. Also, does OLAF, the European Fraud Prevention Office, have the resources to co-ordinate the efforts of the many agencies involved? The paper will also consider whether enlargement has complicated the response to fraud and will look at the experience of the Czech Republic. Another question to be considered, is whether there is a need for a form of legal code to deal

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with crimes against the budget. The methodology adopted for this study was to undertake a review of secondary materials such as reports of the European Commission, reports from the European Court of Auditors, reports from the UK Parliament as well as academic articles. This was supplemented by a number of semi-structured interviews undertaken with officials from the Supreme Prosecutors Office in the Czech Republic—which is the body tasked with co-ordinating anti-fraud efforts, as well as interviews with Czech academic experts.

An important point to note at the outset is that in the area of expenditure, Member States carry out 80% of the budget outlay, both in the Common Agricultural Policy and the Structural Funds. This puts an enormous amount of onus on Member States to expend the same amount of effort on countering fraud against the Union's financial interests as they would against their own financial interests. Yet they have no common definitions of what they regard as fraud. There is even a widespread disparity in reporting practices concerning EU frauds between Member States [15]. There is a long held suspicion in Brussels that Member States fight fraud against their own national budgets with more alacrity than fraud against the European budget.¹ It could be that Member states regard fraud as part of the membership fee of belonging to this exclusive club. In cost benefit terms, it is a relatively minor cost which is more than outweighed by the economic and political benefits of membership. If this is the case then the fight against fraud is hampered from the very start. This is despite the fact that national taxpayers contribute to this budget and it is their money which is being stolen.

Under Article 280 of the Treaty on European Union, Member States are required to take EU fraud as seriously as fraud against their own budgets and are required to coordinate their action aimed at protecting the financial interests of the Union against fraud and to organise with the help of the European Commission, close and regular cooperation between the competent departments of their administrations. However, this “co-operation is seriously weakened from the start, due to the aforementioned differences in defining frauds and reporting them to the Brussels authorities.

The true extent of fraud has been considered by a number of authors such as Sherlock & Harding [21], Passas & Nelkin [17], White [29], [30]; Sieber [22], [23]; Tutt [26] who all comment on the lack of reliable information. Ruimschotel [20] makes the observation that policymakers and politicians are likely to have mixed feelings about the possibility of knowing more about the real extent of fraud. If figures revealed by ‘dark number’ research are higher than the existing figures, it could look that there has been a boom in fraud, also, there is a bigger ‘target’ figure to claw back for the taxpayer. This could show how efficient or otherwise a legal system is in terms of recovering defrauded funds. This last point is recognised by OLAF officials²

In terms of the extent of fraud against the budget, this is very difficult to estimate, given that fraudsters attempt to keep their activities secret as presumably, they do not wish to be caught. In 2007, there were just over 6,000 irregularities reported to OLAF by member state agencies. The financial impact of these irregularities is estimated at just over one billion euros [7]. Irregularities in the structural and

¹ Interview with OLAF Official 2005

² Interview with OLAF Officials 2005

cohesion funds amounted to just under 50% of the number reported overall, but over 80% of the estimated financial impact, some 828 million euros. Whereas agricultural irregularities in the EAGGF Guarantee part of the budget, whilst consisting of a similar number to the structural funds ones, have a far lower financial impact, some 155 million euros. In one sense this is no great surprise. The system for payments to farmers has been heavily reformed and this appears to be bearing fruit. Structural Funds is a growing area of the budget—towards 40%—one would expect the number of reported irregularities to be a significant proportion of all irregularities communicated to Brussels. Herein lies a problem, the reporting system identifies irregularities not frauds. Some irregularities may be as simple as a farmer not filling in a claim form properly, others could be major transnational frauds. Structural Funds frauds such as over-invoicing, submitting claims for expenditure which is disallowed under the regulations, corruptly administering the tendering process for contracts, not completing the work that funding is claimed for, all feature in the frauds and irregularities reported. Despite the declarations about the priority of combating fraud, the fact that most of the budget is administered/managed at national level and very often EU money is not seen as “our money”, there appears to be an unwillingness to take the necessary initiatives to deal specifically with fraud involving EU funds [14]. Murawska [14] goes on to make the point that: ‘The whole EC anti-fraud system is branded by inefficiency, lax scrutiny, lack of transparency and flood of complicated and complex legal norms which stimulate and encourage the perpetrators to commit fraud. Fraudsters often avoid criminal responsibility, they are well organised, use modern technologies and misuse the greatest achievement of the EU—the Common Market and its freedoms’ [14].

The question now can be asked as to who has legal competence to investigate and prosecute these types of fraud?

The European Fraud Prevention Office (OLAF)

OLAF (The European Fraud Prevention Office), is the lead transnational institution in the fight against EU fraud. OLAF came into being as a result of a recommendation from the then European Commission President, Jacques Santer, in 1998. This recommendation was prompted by a critical report from the European Court of Auditors [2] on the performance of UCLAF—the European Commission’s Anti-Fraud unit and the predecessor to OLAF. The Court of Auditors Report whilst commending UCLAF for the good work it had achieved, did make some serious criticisms of the way it handled intelligence, managed case files and maintained security. Levy [13], did make the point that giving UCLAF ‘hands-on’ powers, could prove counter-productive from the point of view of partnership with Member States—duplication of effort, lack of detailed procedural knowledge and so on. These criticisms were bolstered by a report from the European Parliament (the Bosch Report), which called for an independent fraud prevention office. Damning evidence had been gathered of the complete inability of the Commission to adequately perform its duties which led to the employment of external contractors which were subject to hardly any financial or management control, inevitably frauds resulted [27].

The Commission's proposal was for an anti-fraud office that would be based outside of the Commission and would have complete independence from it. It was presented to the Vienna European Council in December 1998. In response to the reactions of the European Parliament and the Council, an amended proposal for a Regulation: 'concerning investigations conducted by the Fraud Prevention Office', was adopted by the Commission in March 1999. The new body took over certain functions that had previously been exercised by UCLAF. The proposal did not involve the creation of any new powers for the Commission. Nor did it involve the creation of a body with its own legal personality, although the Office was given, in theory at least, operational independence and was also given its own budget. The mission of OLAF is to protect the financial interests of the European Union and to fight fraud, corruption and other illegal activity having financial consequences for the Union or its funds. OLAF carries out investigations into allegations of fraud and other illegality both within the Union's institutions (internal investigations) and within individual Member States (external investigations). It passes on its findings to the institution in question or to the national prosecution authority of the Member State, in question, or to both as the case may be. OLAF has no power to prosecute [11].

The Powers of OLAF

Much of OLAF's powers are based upon a decision adopted in July 1998 on the conduct of its predecessor UCLAF's enquiries, by the European Commission. This decision, as noted by the Committee of Experts [1] who were appointed by the European Parliament to conduct an enquiry into fraud and corruption within the Commission after the resignation of the Santer Commission in 1999, is essentially concerned with regulating the conduct of inquiries within the Commission and/or the mutual obligations of UCLAF and other Commission services in relation to investigations.

The principal powers and competences of OLAF are as follows:

- OLAF is empowered to carry out administrative enquiries, without notice, within all the institutions and other bodies of the European Union. These are known as internal investigations. Inquiries may involve members and staff of the institutions
- All institutions and other bodies are placed under a corresponding obligation fully to co-operate in OLAF enquiries and to communicate to OLAF any information concerning possible fraud.
- OLAF also has the right under Regulation 2185/96 to undertake "on the spot" investigations in member states, where OLAF has the right to arrive in a member state—unannounced if need be and request the assistance of member state authorities in any investigation.

In terms of how it exercised its powers of internal investigation within the institutions of the EU, OLAF has been criticised as a result of what is known as the Eurostat case. Here, there were irregularities which took place in the European Statistical Office involving the payment of receipts from the sale of Eurostat

publications into a suspect bank account. OLAF has been criticised for the amount of time taken by it to investigate the case and the Commission's lack of knowledge of the alleged irregularities that were under investigation. In response to these criticisms, the Commission proposed a number of amendments to Regulation 1073/99 which is one of the Regulations governing OLAF. The Commission's proposals have four objectives:

- to strengthen OLAF's operational efficiency
- to improve the information flow between OLAF and EU institutions and bodies
- to ensure fully the rights of the individuals under investigation
- to enhance the role of the Supervisory Committee

In order to achieve these objectives, the proposed Regulation:

- prevents EU institutions and bodies from conducting their own internal administrative investigations on matters under investigation by OLAF (amended Article 1(3));
- clarifies OLAF's powers to conduct external investigations (amended Article 3 (2));
- enables OLAF in the conduct of external investigations to have direct access to information held by institutions, bodies, offices and agencies relevant to those investigations (amended Article 3(3));
- requires OLAF, on undertaking an investigation involving a member of an EU institution, immediately to inform the EU institution of the investigation (new Article 6 (5a));
- establishes procedures to ensure the fundamental rights ("procedural guarantees") of individuals being investigated (new Article 7a)
- strengthens the role of the Supervisory Committee by increasing its membership from five to seven (one of whom would monitor the observance by OLAF of the rights of individuals) and entrusting it with the task of delivering opinions concerning procedural guarantees (amended Article 11) [12].

The original reform has been further amended by the Commission tabling a new proposal which takes into account proposals from the European Parliament and the Council of Ministers to further evaluate the performance of OLAF (EuCrim [4], p.6). The new proposal includes two major changes to the original one which reflects the view of Commission Vice-President Kallas that OLAF's investigations need political governance as well as an independent review of proceedings while ensuring the confidentiality of investigations (EuCrim [4], 1/2). The major changes are:

- The Supervisory Committee is to get more political functions. It is proposed that there should be regular meetings between the Supervisory Committee and representatives of the European Parliament, the Council of Ministers and the Commission. The main aim is to exercise political control over OLAF's investigations and its efficiency, by discussing the definition of the Office's strategic priorities as well as the reports on its work programme and activities.
- The establishment of an independent 'Review Adviser' is also suggested. The rationale behind the creation of such a post is that the Review Adviser would have an oversight function in respect of procedural rights. He/she would receive

and scrutinise complaints from persons under investigation at all stages of an inquiry. He/she would also have the function of giving opinions, for example, if the OLAF Director wished to extend an investigation beyond twelve months or if the Director wished to postpone the obligation to hear the person under investigation (EuCrim [4], 1/2).

These proposals have been subjected to a number of observations and criticisms.:

The length of time taken to amend OLAF's powers

The attempt to amend OLAF's powers has been going on since 2003. This has led to great uncertainty and is not conducive to promoting good morale amongst the staff of the Office. It is urgently required that such uncertainty be removed as quickly as possible. Five years is far too long a period for this to continue and for the Office and its staff to endure.

OLAF's requirement to inform Institutions it is investigating them

Professor Levi and Dr Dorn in their evidence to the House of Lords European Committee, argued that the requirement to inform the institution that it was under investigation could well lead to the investigation being compromised [11]. This could lead to the investigation being blocked and obstructed and of course evidence could be covered up or even destroyed. Levi and Dorn (2004) argue that: 'The Commission will argue that it (and other Institutions) need to know at the earliest opportunity that the integrity of an individual and project may be compromised, so that it can take remedial steps. Yet those steps are precisely what would undermine the secrecy needed to initiate cases, investigate and gain evidence of wrong-doing' [12], p.6). Raymond Kendall of OLAF's Supervisory Board, took the view that rules could not be made about an issue like this- it should be at the discretion of the investigator. It appears that the Commission is not prepared to give OLAF full discretion to decide whether or not to inform the Commission [11]. This compromises the independence of OLAF and is ill-advised. OLAF when it was established, was in theory given full operational independence, even though it remained part of the Commission, this has been badly dented by the proposals advanced by the Commission. OLAF will have 'one arm tied behind its back', in the fight against fraud.

Powers of Inspection

There were concerns expressed by the UK Government that the amendments proposed in Articles 3 (2) and three might have the effect of extending the investigative powers of OLAF. They proposed to seek assurances that Article 3 does not imply that the ability and right of national agencies to conduct investigations within a Member State could be impaired by OLAF wielding their powers under the Article. The House of Lords agreed with this view and stressed the importance of

both OLAF and national agencies being able to work in harmony without frustrating the efforts of each other [12]. This is an important point, because liaison between agencies investigating the same case is crucial as evidence gathering could be compromised if national rules and regulations are not followed, also there could be duplication of effort and resources and there could also be credibility problems if representatives from different agencies visit the same locations, question the same people asking the same questions. This is illustrated by the competition which existed between the then anti-fraud office of the Commission — UCLAF and another Commission department DGXX- the Financial Control Directorate, in the late 1990's and the harm that was done to the investigation of fraud within the Commission itself. Rivalry and competition ensues, resources and effort was duplicated, files were 'lost'- fragmentation occurred. If this can happen within the Commission, then the scope for fragmentation is all the greater with a European Union of twenty seven members and all the different agencies inherent in such an organisation. Even now officials from the Czech Republic have commented that they get asked for exactly the same information by both OLAF and the European Commission which leads to an obvious duplication of effort³.

Given the inherent risks outlined above, the question can be asked: should OLAF be involved in external investigative work? Stefanou & Xanthaki [24] emphasise the investigative function of OLAF and observe that the results from OLAF investigations can be used in criminal proceedings and can serve as the preparatory phase for prosecutions in national courts. In order to promote and carry out this function at the national level, OLAF has sought to establish co-operation agreements with national investigative bodies such as with police bodies and also in the framework of the OLAF Anti-Fraud Communication network for exchange of information on EU-related fraud. According to Stefanou & Xanthaki [24], the main objective of OLAF's involvement in the investigations which take place at the national level, is to increase their effectiveness and efficiency and to enhance the level of protection of the EU's financial interests. They observe that this is achieved by:

- involvement of OLAF in the investigation;
- provision by OLAF of training and methodological support;
- OLAF's contribution in promoting co-operation between various investigative and legal authorities in different Member States. This is extremely important as EU fraud often has a transnational dimension and can fall under the jurisdiction of two or more Member States.

OLAF has a European wide view which no national agency could have. If a transnational approach is deemed to be not viable, how could national agencies assume this role? How could they have the multinational expertise, knowledge of culture and national procedures, linguistic ability and so on. It is not to overstate the case to say that strengthening OLAF and the tools it has at its disposal is the only game in town! OLAF collects data on irregularities with a value of more than 10,000 euros (this has been raised from 4,000) and liaises with national agencies across twenty seven member states. Its staff have a wide range of expertise from police

³ Interview with Czech Officials 2006

backgrounds, judicial, audit and accountancy, agricultural inspection, customs and so on.

Yet, OLAF's involvement in external investigations has been questioned. The UK House of Lords takes the view that OLAF's external investigative work has been limited, yet they offer no evidence to support this particular assertion. They do quote from a 2003 Report by OLAF's Supervisory Committee which makes the point that OLAF's intervention tends to occur long after the event and that there have been problems with national courts accepting evidence collected by OLAF. '*National courts have wanted evidence to be collected in accordance with their own national procedures*' [11], p.8). This has led to the suggestion made by Professor Levi and Dr Dorn in their evidence to the House of Lords European Committee, that external investigations should be carried by the Commission through its Directorates-General working with Member States. They argue that if OLAF were to give up external cases (except those having an internal aspect — relevant to the EU institutions), then all of OLAF's resources could be brought to bear against internal fraud and corruption. There is a clear logic to this, yet in order to achieve this aim, it would be necessary to re-establish anti-fraud units in relevant DG's (they were taken out of DG's and combined with UCLAF in the 1990's), might this not lead to a duplication of resources? Also, many external cases could have internal dimensions or could force internal investigations which OLAF would undertake anyway.

A variation on the above proposal would be to rely on Member States to carry out investigations on their territories leaving OLAF free to concentrate on purely internal cases. Stefanou & Xanthaki [24] believe that following the principle of subsidiarity. Member States in their view, had primary responsibility for external investigations and should take responsibility for opening cases. The fact is that 80% of expenditure occurs at Member State level, therefore fraud is likely to be more prevalent at Member State level, so inevitably Member State agencies are going to be heavily involved in investigation. Yet, as many frauds do have a cross-border or transnational dimension, it would not be possible for Member State agencies to have the European wide view which OLAF has, and the ability to facilitate co-operation and co-ordination across national boundaries.

Independence of OLAF

Other issues to be considered include: the independence of OLAF which inevitably impacts upon its operational capability. OLAF despite the concerns expressed about its predecessor, UCLAF, is still like UCLAF, part of the Commission. The greater part of its work is still attributed to the Commission. Its Director is appointed by the Council and Parliament, but from a shortlist which is drawn up by the Commission. This therefore, gives the Commission a great deal of potential influence over: 'who gets the job'. Where is the oversight to ensure that the shortlist has been drawn fairly? Which agency has this role? The position does not appear to be very clear.

The Committee of Experts [1], took the view that it was useful for OLAF to be 'inside' the Commission, both for the purpose of its enquiries as well as for the contribution it could make to the shaping of legislation where there is a fraud interest or dimension. The fact that OLAF is still part of the Commission gives it an

opportunity to play a part in ‘fraud proofing’ legislation at the early draft stages. However, where OLAF investigates allegations of fraud inside the Commission - so called ‘internal investigations’, it is surely a case of the Commission investigating itself. This cannot be right. It has the potential to compromise independence. If OLAF had been placed outside the Commission, then it could still have had an “arms-length” input into the process of formulating legislation, through some kind of advisory committee for example.

It is true to say that there has been a genuine attempt to secure and strengthen the independence of OLAF by giving it a separate budget apart from that of the Commission as a whole and by trying to ensure that the appointment of a Director is achieved without undue influence by any of the interested parties such as the Commission, Parliament or the Council of Ministers. This has been undermined to some extent by allowing the Commission a role in drawing up the shortlist of suitable candidates. There has been an attempt to establish legal guarantees to safeguard OLAF’s independence which can be found in Articles 11 and 12 of Regulation (EC) No. 1073/99 which declare the independence of the Director and establish a Supervisory Committee which endeavours to oversee OLAF’s investigations without interfering in them.

Notwithstanding these attempts to safeguard OLAF’s independence, its current hybrid status where it is part of the Commission yet independent of it does mean as Stefanou & Xanthaki [24] recognise that its activities are still subject to evaluation by the Commission, it is unable to report to the European Parliament on its own legal grounds but as part of the executive (the Commission), does mean that its independence could be seen to be compromised.

Pujas [18] believes that OLAF’s legitimacy is regularly questioned by national and European institutions because of its semi-autonomous state and the lack of guarantees regarding the objectivity and transparency of its investigations.

Another area where OLAF’s independence could be seen to be compromised and which bears directly on its ability to investigate fraud is in the area of staff recruitment. Given the diversity of functions which OLAF is required to perform: its investigations can be administrative, disciplinary, financial, tax, customs based then this can make recruitment a difficult problem. A balance must be struck between the different categories of investigators such as those who deal with EAGGF frauds, frauds against the structural funds, frauds upon income such as own resources and functions which are ‘up-stream’ of investigations such as intelligence or administration. In order to recruit staff to meet all these diverse needs, then this could be quite difficult. The preoccupation with nationality balance in recruitment and maintenance of the staff establishment can potentially mean that good staff are lost and less able staff are appointed. With each enlargement of the European Union, priority is given to nationals from new member states in the recruitment process. Given that the Union has very recently expanded from fifteen to twenty seven members, then this is likely to have a huge impact on recruitment and selection. New staff, by definition, lack experience in transnational work, and also perhaps lack detailed knowledge of complex programme areas such as the Common Agricultural Policy and Structural Funds.

The European Court of Auditors in their recent report evaluating the performance of OLAF [3] made this very point. The Court found that over 55% of staff in categories A & B—over 130 posts were employed on temporary contracts. Most of

these temporary contracts will come to an end between 2007 and 2009 when the staff concerned will have to leave the Office [3]. There is a high risk that all this accumulated knowledge and experience will disappear when staff are required to leave. This problem is exacerbated when, with each enlargement of the EU, priority in recruitment and selection has to be given to staff from new Member States, who because of their inexperience in transnational work, will face a steep learning curve. The net effect of this is to provide the potential for disruption to quite complex investigations. There is a need for OLAF to be given more freedom for manoeuvre in its recruitment and selection procedures so that it can provide its investigators with more stable employment and career opportunities which will impact upon the quality of its investigative function. There is the potential for significant harm to be done to OLAF's reputation by having high staff turnover and a significant proportion of staff being inexperienced. These are self-inflicted wounds and need to be addressed.

Role of Eurojust and Europol

The role of Eurojust according to the constitutional treaty is to 'support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States, or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol' (Article III-273 (1)). Eurojust is made up of national prosecutors and by 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. Eurojust operates within the third pillar of the European Union. This is reflected in its membership which consists of one national member seconded from each Member State. Eurojust is directly accountable to the Council of Ministers to which it reports on a regular basis. The Commission has no influence on Eurojust's operations and decisions. In a formal sense, yet it does propose its budget and in 2004, did not meet Eurojust's request for an increased budget of 11.5 million euros—the Commission reduced it to 9.3 million euros [12], p.14). This of course could well have impacted on Eurojust's operations.

It would appear that there is ample opportunity for OLAF and Eurojust to co-operate. OLAF on the investigation side, where it conducts administrative investigations and Eurojust providing the link with national prosecutors. However, there have been difficulties. Eurojust in its evidence to the House of Lords believed that OLAF saw it as a 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 competition with Eurojust [11]. In defence of OLAF it can be said that its Magistrates Unit is totally dedicated to fighting EU fraud whereas for Eurojust, fraud is just another issue and may not rank as highly as terrorism and organised crime.⁴ There was a feeling of resentment — OLAF

⁴ Interview with OLAF Officials 2005

considered Eurojust responsible for there not being a European Prosecutor on fraud [12], p.27). Eurojust took the view that OLAF believed it had no role to play in fraud investigation unless other serious crimes were linked to fraud. Such ‘territoriality’ is not conducive to fighting fraud effectively and could inevitably lead to duplication and waste of resources. The two bodies have now signed a Memorandum of Understanding which specifies in which they undertake to cooperate in areas of mutual concern/benefit. There is potential here to develop the relationship and also to give OLAF some judicial authority which it has not had so far Stefanou & Xanthaki [24]. Eurojust believes that it is ideally placed to co-operate with OLAF in addressing its concerns that its investigations are not followed up by prosecutions in Member States [11].

In terms of Europol, its role in the fight against EU fraud has not really been developed. In its 2004 report, there is barely a mention of the role it believes it can play. The report does mention OLAF and the agreement between both parties, but does not include any practical examples of co-operation between the two bodies [8]. OLAF takes the view that Europol is far more interested in Customs issues than wider EU Fraud matters⁵ In the late 1990’s there was a view in the Commission that ‘Europol is not really interested in fraud. It is more interested in drugs and terrorism’⁶. Europol does not have the investigative powers that OLAF has, it is more of an intelligence gathering organisation. Its powers are not those of OLAF. Yet its role in intelligence gathering and police cooperation would strengthen OLAF’s investigative function if the two bodies could liaise closely

Impact of the expansion of the EU on the fight against fraud

The fight against fraud has been dogged by the fragmented response from fifteen member states. Now that EU membership has increased to twenty seven, this problem can only be exacerbated. For example, community institutions will have to cope with twelve new legal systems — this is not likely to improve the current situation. Efforts have been made to prepare the then candidate countries for their responsibilities in the fight against fraud. The newly acceded countries have received financial aid—about three billion euros per year between 2000 and 2004 and before accession the candidate countries were required to ‘*create an efficient anti-fraud protection system with respect to funds provided in the framework of the Accession Partnership*’ [14]. The accessing countries were obliged to comply their legal systems with the *acquis communautaire* as part of their preparation for accession. EC Regulations such as the Convention on the Protection of the European Communities Financial Interests and Regulation 2185/96 which covers on the spot checks and inspections and Regulation No.1073/1999 concerning investigations conducted by OLAF [16].

OLAF has sought to reinforce its support to Acceding and Candidate countries in their institutional preparation towards combating fraud against the financial interests of an enlarged European Union. It has sought to ensure good administrative co-

⁵ Interview with UCLAF official 1998

⁶ Interview with Czech Officials 2006

operation and to encourage and support the capacity of anti-fraud institutions to prevent and detect fraud and irregularities. By early 2003 twelve countries had nominated a central (AFCOS) anti-fraud co-ordination structure to act as co-ordinator for the implementation of legislative, administrative and operational preparation [5]. Particular attention has been given to training public prosecutors who will take on responsibility for anti-fraud work and to technical training in the use of the anti-fraud Information System (AFIS).

The Czech Republic offers an interesting example of the establishment and operation of the AFCOS structures. Prior to the year 2000, there was no dedicated structure committed to fighting EU fraud. The aim of the government of the time was to create a system which not only permitted communication with OLAF regarding irregularities notification, but also made possible the timely detection of potentially fraudulent activities and to conduct a thorough investigation through both criminal and administrative proceedings⁷. The Supreme Prosecutor's Office was appointed to be the single contact point for OLAF in terms of co-operation concerning the fight against fraud and other illegal activities detrimental to the EU's financial interests. The Prosecutor's Office established contact points for AFCOS matters in other ministries and institutions such as the Ministries of Agriculture, Transport, Regional Development and the Police services. Despite the Supreme Prosecutor's office being officially the only contact point for OLAF, the individual ministries responsible for the implementation of EU spending programmes sent their reports of irregularities directly to OLAF, and the Supreme Prosecutor's Office was only provided with information about the nature and timing of the irregularities. There is scope here for differences in interpretation of what is an irregularity and in reporting practice. It would be preferable if reporting to OLAF came through the designated contact point namely, the Supreme Prosecutor's Office. Yet despite this, irregularities are reported on time and in the correct formats, this has specifically been mentioned in OLAF reports [6]. However, fragmentation between member states and agencies is a major problem for the EU, this can only be exacerbated if it occurs within new member states like the Czech Republic. There have also been problems with the attitude of the present Czech Government which "does not favour co-operation with Brussels"⁸ This attitude stems from the view of President Klaus of the Civic Democratic party and cascades downwards through the government, even to the ordinary person on the street. The question appears to be asked "What real benefits have we gained from joining the EU?"

The Czech Republic also did not ratify the PFI Convention and its associated protocols in time for accession to the EU. The reason for this as detailed by Fenyk [9] was that neither the Convention or its protocols had been published in the Official Journal of the EU in the Czech language and the Ministry of Justice was only engaged in 2004 to draft the official translation of the text of the Convention and with time taken for both comments by officials of the Czech Supreme Prosecutors Office as well as external experts, neither the Convention nor the Protocols were delivered to the Czech Parliament with the proposal for accession to the EU. The Convention has still not been ratified and the Czech criminal code has

⁷ Interview with Czech Officials 2006

⁸ Interview with Czech Officials 2006

not been amended to ensure full compatibility with the PFI Convention as well as Article 280 of the EU treaty whereby member states are required to take the same measures to counter fraud against the Community's financial interests as they would to counter fraud against their own financial interests. So, not all member states have incorporated crimes against the European budget into their legal framework and so in that sense, we do not have a level playing field. Prospective member states should look to the example of the Czech Republic in this area and ensure that a fully translated and reviewed PFI Convention together with its associated protocols is delivered to their national parliament with the proposal for accession in order that the ratification process for the Convention can be completed at the earliest possible opportunity. The importance of the PFI Convention and its Protocols cannot be overstated because they are important elements of a common basis for criminal law protection of the Union's financial interests, as they deal with aspects of substantive criminal law and judicial co-operation, and ratification and implementation is a step towards reducing the fragmentary nature of the legal approaches to fighting fraud against the EU.

New Member States, like the Czech Republic, are being asked to bring their anti-fraud structures up to the level and standard of established EU members within a very short period of time. Their structures are not as developed as those in the existing member states. They are not as economically developed as existing members and may not have sufficient financial resources to employ to fund anti-fraud institutions and structures. The level and pace of economic development may create incentives to engage in fraud and irregularities. If these difficulties are coupled with a lack of domestic support and a lack of support from Brussels, the situation becomes even more problematic.

Why has the EU allowed this situation and state of affairs to continue? There were strict conditions laid down for amendments to legal systems and for structures such as AFCOS to be established, yet there have been problems with co-operation and ratification of the PFI Convention and countries like the Czech Republic were allowed to accede without such fundamentals being in place. The political imperative of eastern enlargement was more important than the so-called conditionalities. The desire to secure access to new markets in Eastern Europe and of generating stability and growth as well as promoting reform in post-Communist Europe appear to have outweighed the concerns of anti-fraud officials and academic experts.

Therefore, an enlarged EU can only increase the amount of fragmentation which already exists. Without a coherent legal space and a fraud squad that has the power to cross-borders, question suspects, seize documents, search premises and present evidence according to standardised rules and procedures, then the fight against fraud will be hampered by legal lacunae which the determined fraudster can exploit. Tupman [25] believes that citizens of the EU will have to come to accept such institutions if the threat posed by organised criminality is to be tackled effectively.

Lack of a unified legal space

One of the most fundamental problems facing the European Union's central authorities and its member states, is having to fight fraud across twenty seven

different legal systems within the union itself as well as across many more lying outside its boundaries. This is so, because fraudsters do not just base themselves within the European Union [19]. The whole legal process is bedevilled with difficulties and differences in procedure as well as tradition and jurisprudence. *'Applicable penalties vary substantially, with Member States only obligated to ensure that penalties have a deterrent effect'* [28], p.255). An obvious difference between legal systems, is that which lies between the accusatorial system and the inquisitorial system. However, systems which superficially look quite similar, can mask significant variations. However, systems which superficially look quite similar can mask significant variations: as with many of the inquisitorial systems operating on mainland Europe. Law enforcement bodies on the whole, have to comply with procedure and go through 'the proper channels': whereas criminals face no such difficulties. They operate in 'real time' and exploit differences in procedure, protocol, and consequent time delays to their advantage. The fact that the single market has removed commercial borders but left legal frontiers intact has provided 'safe havens' for criminals. Passas & Nelkin [17] reveal how the courts in Italy, one in the North and one in the South, had great difficulty in co-operating with each other in a case involving European Union funds.

The response to the lack of a unified legal space has been on an ad hoc basis. There have been efforts to protect the financial interests of the EU through the criminal law process, the Convention on the protection of the European Communities' financial interests (PFI Convention) has been ratified by member states although this has taken some years to achieve. It requires that national criminal definitions should be changed if necessary to ensure compliance with the PFI convention. Member states are also required to ensure that offences against the European budget are punished by effective and proportionate penalties which would allow heads of businesses or people who have the power to take decisions within business, to be declared liable under the criminal law of the member state in cases affecting the EU's financial interests (Official Journal C316, 27.11.1995).

More ambitiously, perhaps, there was an attempt to draft a legal code—the Corpus Juris proposals which attempted to construct a unified body of rules to deal with crimes against the European Budget. The proposals included the establishment of the post of European Public Prosecutor. There was strong opposition, in particular from the British Government, which regarded the proposals as a surrender of national sovereignty. Yet, the investigation into the proposals undertaken by the UK House of Lords European Select Committee, recognised that substantial difficulties exist in terms of prosecuting frauds on EU funds in national courts. National criminal laws are essentially territorial in scope; few Member States have laws specially directed at prosecuting such frauds [10], para.25). Given such difficulties, then there can be little surprise that more drastic or radical proposals for legal harmonisation have been considered. The Corpus Juris proposals were however seen as too radical and different. Perhaps they were too idealistic, however, there is still a need for some kind of legal "umbrella" to provide a consistency to defining, investigating and prosecuting fraud.

The response that has been made so far to the lack of a coherent legal framework was given impetus by the Tampere European Council of October 1999 which enshrined the principle of mutual recognition as the 'cornerstone' of judicial

cooperation. There have been attempts to establish common definitions for a range of offences including fraud. There have been attempts to co-ordinate judicial proceedings—the creation of Eurojust is an example of this. The European Arrest Warrant which establishes a procedure based on automatic recognition of judicial orders for arrest made in another Member State, thus replacing the present extradition arrangements. In dealing with fraudsters who seek to try to exploit differences in legal systems, then there is obvious potential here to speed up the judicial process. It is not obvious from OLAF reports as to how much use has been made of this instrument.

There has also been a proposal made by the Commission in its Green paper on criminal law protection of the financial interests of the Community to establish the post of European Public Prosecutor. This would be an independent judicial authority empowered to conduct investigations and prosecutions anywhere in the European Union into offences against the Union's financial interests. The House of Lords makes the point that sensing the strong reactions to these proposals, the Commission stressed that trial and judgement would remain in the hands of the national courts [11].

The Constitutional Treaty, now of course abandoned, envisaged the EPP being established from Eurojust which could then be transformed into a prosecution body. In its evidence to the House of Lords, OLAF believed that it could be envisaged that it could have criminal investigative powers to assist the European Public Prosecutor. This could then of course bring OLAF's relationship with Europol into question. The House of Lords wondered whether the two bodies could be merged—the EPP would be in control of the merged body.

These proposals are still undermined by the lack of a unified legal space. If the law is to have the support of the citizen, it has to be seen to be fair. There would still be scope in national courts for offences to be treated differently and different punishments to be handed out. If a centralised body is to have legal competence to fight fraud against the budget, then this needs to be underpinned by a legal code. The *Corpus Juris* was a step forward in terms of adopting a more effective and consistent approach to tackling EU fraud.

Conclusions

The main conclusions that can be drawn from this discussion are that the fight against fraud is hampered by the degree of fragmentation which exists. Fragmentation exists at different levels. On one level there is the degree of legal fragmentation. There is no one legal code or system which exists to protect the European Budget. At present there are twenty seven separate legal systems. Law enforcement methods differ from country to country. There are difficulties in obtaining evidence in one jurisdiction and trying to present it before the courts in another jurisdiction. Criminals take advantage of the legal loopholes which exist, and some may base themselves outside of the European Union which complicates the situation even further. The expansion of the Union has made a difficult situation somewhat worse.

A second level where fragmentation exists is in the approach to investigation and control. There are multiple actors involved in the monitoring and investigation of

fraud across twenty seven Member States: to co-ordinate the activities of these agencies which face territorial, linguistic, legal and cultural barriers is a mammoth task. OLAF, the European Fraud Prevention Agency has faced problems in trying to co-ordinate its activities with a sister agency Eurojust, this does not bode well for a more widespread co-ordination with multiple Member state agencies.

There is no one agency which owns fraud. OLAF, may be the lead agency, but is highly dependent on Member State agencies and is also hampered by having a large number of staff employed on temporary contracts which can lead to a lack of continuity and new staff facing a steep learning curve in the middle of complex investigations.

Even in a relatively small and homogeneous country like the Czech Republic, the problems of fragmentation with a number of agencies involved in the fight against fraud and difficulties with amending the legal system are seen in microcosm.

Until there is a coherent legal code which supports the activities of a fraud squad which has the powers of surveillance, arrest and interrogation across the European Union, which would reduce the degree of fragmentation, then the policing of the European Union and its budget will be less than effective.

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