

# Relationship between OLAF, the future EPPO, the other European Bodies and the national judicial authorities

*Check against delivery*

**John A. E. Vervaele**

*Economic and European Criminal Law Professor, University of Utrecht*

*After having highlighted the heterogeneity still present in the various national legal systems in the field of criminal procedure, the author focuses on the relationship between OLAF, the future European Public Prosecutor's Office (EPPO), other European offices (Eurojust, Europol) and national judicial authorities, taking into account the pertinent articles of the Treaty of Lisbon.*

When we deal with the European Public Prosecutor whatever the model might be and whatever the design might be - and there are still many in the air- we have to deal with main aspects, core aspects of criminal procedure. And criminal procedure dealing with use of powers that means definition of investigative acts and thresholds for the use of these acts; dealing with what in continental language is called "judicial authorities". So the agents that are empowered to use these acts and, directly related, the applicable safeguards; because there is no criminal procedure and there are no powers without safeguards. Otherwise, we're not in the rule of law, that's evident.

If we have a look at this field, even outside of the EPPO and with my experience already in the first Corpus Juris study - but also the last experience in the elaboration of what has been referred to as the Luxembourg model rules- the experience shows that still today in the legal order of the member States when it comes to the definition of investigative acts in national criminal procedure; when it comes to the design of the judicial authorities that might use them; and also when it comes to applicable safeguards, the situation in the member States is very different all over the Union. Some say the influence of the European Convention of Human Rights has been huge: and of course that's true, but not that much in this field. A lot on the trial; much less on the pretrial situation. So we have some approximation, but we cannot say that we have similar systems of criminal procedure, like in the United States. And you would even expect that, under the influence of some international public law (the Palermo Convention, the Cyber-crime Convention), all member States would have put in place very intrusive investigative acts, like infiltration, covered agents, interception of all type of telecommunications, the so-called new generation special investigation acts (SIT's). Also that is not the case: some Member States don't have them at all; other Mem-

ber States have some of them; the thresholds to use them are very different; and some Member States - that's even more astonishing- are using them in practice, based on general clauses, so without a clear and precise legal ground in the Code of Criminal Procedure or special statutes or acts. t. And I'm using this example because coercive investigative acts will, of course, be very important for the European Public Prosecutor. Because the idea is that the European Public Prosecutor has to deal with an area of serious offences. If he does not have coercive measures at his disposal, how should he deal with serious offences? So that's the picture we have, unfortunately. And we have to take that into account. And that's a general picture.

If we go now to the Lisbon Treaty, there are duties, there are "musts" and "mays": the EPPO is a "may", it's not a must. So we must not establish it: we may establish it as the legal basis for it. But there are also "musts" in the Treaty. Article 3 of the Treaty on the Union is laying down not only the legal basis and one of the main objectives of the Treaty of the Area Freedom, Security and Justice, but is imposing duties upon member States and upon European Institutions. The aim of realizing the Freedom, Security and Justice Area is a duty, it's a mandatory duty. Including SAP aims: security for the citizens and justice for the citizens. And then it comes to the instruments to realize that and the EPPO might be one. But we have to read it within the frame of the duties of article 3: so we cannot read it separately.

What else have we on criminal procedure, investigative acts and procedural safeguards? We have several options in the Treaty.

We have, of course, the basic option of article 82 of the Treaty on the Functioning of the EU, based on the codification of the mutual recognition scheme. In that article 82 TFEU we have also new legal bases for harmonization in the Area of Criminal procedure; harmonization of procedure legal safeguards, included. And, in my opinion, it's a little bit hidden, also harmonization of investigative acts. Why in my opinion? Because the Treaty gives a legal base to harmonize evidence, the use of the results of these investigative acts. So if you harmonize aspects of admissibility of evidence, it is very difficult to do so without harmonizing or approximating the gathering of the evidence: they are very much related. So Article 2 gives us a basis to approximate or harmonize the legal regimes in the Member States and to make them more equivalent also in the light of strengthening the co-operation under a mutual recognition scheme. Until now, we have adopted directives on the harmonization of certain procedural safeguards, but limited the Sweden Roadmap. That's already a lot, but that is not covering all the problems of applicable legal safeguards during the pre-trial investigation and prosecution. There are much more legal safeguards during pre-trial proceedings and investigative acts than the ones mentioned in the Swedish roadmap, that does not include procedural safeguards when gathering evidence through coercive investigative acts for instance and neither when it comes to admissibility of evidence. Neither the Commission, neither the Member States have submitted proposals to deal with procedural safeguards beyond the Swedish Roadmap.

The second option we have is of course Article 85 that says it's a coordination model, it's not the national model; we can strengthen that, the legal basis is there. Peter Csonka has said that there will be a proposal on the reform of Eurojust: however, I haven't heard much about it today concerning the substance. So I'm not so

sure if this will be a strengthening in the sense that it could be in line with the ambitions of the Treaty. This is not a full supranational model, because it's about coordination of prosecutor authorities between the States. So I see Article 86, of course, not the same as Article 82: it's not about harmonizing investigative acts at all. That's not the aim: therefore we have Article 82. It's not about harmonizing admissibility of evidence: therefore we have Article 82. It is not about strengthening coordination: therefore we have Article 85. It must be something else; otherwise, it wouldn't be there. Moreover, seen the demanding procedure to establish an EPPO under Article 86 (unanimity, approval of the parliament), it must be something exclusive with added value to Article 82 and Article 85; otherwise, it has no sense. So the philosophy of Article 86, in my eyes, is a philosophy (the word has been used, I don't have to invent it) of "direct enforcement". The opposite is, of course, indirect enforcement; that's the enforcement by the Member States, being it at a coordination model under Article 85 of the Eurojust or alone between them. Direct enforcement, in other words, contains supranational enforcement; and I think that's the main feature of article 86 and also the main distinction.

Does that mean, when you set up a European Public Prosecutor under a direct enforcement model being a supranational body dealing with investigation and prosecution, that it has nothing to do with the national level? That it is only supranational? No, not at all. Because I think it would be very unwise, seeing the experiences we have, not to insert, not to embed the European Public Prosecutor in the national legal regimes. So there must be – also the experience with OLAF - an interconnection. However, in my eyes, Article 86 excludes a model that would be fully national. As I said, it would be very strange to fit that in the Treaty. That's my first general point.

My second one is: when we go to classic Criminal Justice, classic Criminal Procedure, it's a chain of decisions opening a judicial investigation, investigating a case, gathering evidence, certain pre-trial decisions by prosecutors, by police authorities and by judges of course also; elaborating the charges, defining the indictment, go to Court, bring to judgment. All these separate acts form a chain and form a system: every Member State, as I said, have a system on that; they are very different, but they form a system. This system of building up a case and going through the chain of Criminal Justice must be in line with the human rights standards; and must be in line with the Rule of Law.

And I'm insisting on this chain because the European Court of Human Rights is imposing fair trial standards *inter alia*. To what? To the proceedings as a "whole" (the wordings of the Court). And the proceedings as a whole do not start at the trial Court. They start when the case is opened. That means that the applicable fair trial standards from the European Court of Human Rights do apply from the opening of the case (mostly be a police interrogation) until the final decision .

Second: I think any system of criminal procedure needs certainty and clarity; needs *lex certa*: not only a substantive law, but also a procedural law. In some countries, including mine, we speak about procedure legality in criminal matters; and we have it written in a Criminal Code and a Code of Criminal Procedure. But even if we don't have it, it can be a general principle of course. Why is this so important? It's important for the investigative and prosecutor authorities: that they

know, on a preset legal base, which powers they can use under which are conditions. It's very important for the Rule of Law, but also for the applicable procedure safeguards that the criminal procedure must be preset. So at least a suspect must know on beforehand; and in which situation he has which rights.

Why am I insisting on that? The Treaty in the Article 86 imposes a hybrid system; in the sense that the trial phase would be national; and the pre-trial phase (in my eyes direct enforcement) would be supranational, but, as I said, also embedded in a national system. That's something we have to take as it is, it is a choice of the legislator: a lot of people have criticized it, but that's a legislative job. Of course it's important that the link between the two is also settled by law, previously and clearly. And the link is the choice of the forum: when the prosecutor is bringing to judgment, he has to choose a forum that means a jurisdiction of another Member State's. This must be clear and preset: there must be rules for that and there must be a legal remedy, but I will not deal with that.

The problem with some of proposals that I have heard is that the complexity of the applicable law during the pre-trial phase can be quite big. The opening of an investigation would be a European decision. Most of the investigative acts – at least what I've heard this afternoon, coercive investigative acts- would apply under national law. In some complex cases that might be many national laws. Then the decision to charge, a decision to write an indictment, if understood it well, would be European again; and also a decision to bring to the Court; and then the trial would be national again. At a first view, this is extremely complex and can put under pressure what I said "procedural legality": a clear regime that is necessary in order to have a clear view on the investigative acts that can be applied and also the requirements, the thresholds, and the applicable procedural safeguards.

Why am I insisting on that? Because we have experience, already today, with the mutual recognition regime, with the MLA regime, with the Joint Investigation Teams that, putting together pieces of evidence that have been gathered in different legal regimes, lead to problems at courts; and lead to inadmissibility of gathered evidence. And you can say, of course, that's very nice: we are living under the Rule of Law and under the Convention of the Human Rights and so illegal the evidence is declared inadmissible. It's not nice at all! Because that means that we are not able to establish a system; or we have not been able to establish a system in which we can guarantee applicability of legal safeguards and efficiency. And that's the two things that we have to put together in order to deal with Article 3 of the Treaty.

The Law Enforcement Community at a European and a national level: I think they're all in the empowerment of the national law enforcement community; and the European law enforcement community depends a lot on the design of the EPPO itself: the more you make it national - in the sense that you do apply national applicable law- the less this European Law Enforcement Community can play an autonomous role. Of course they can play the role they have today; but nor the less they can play an autonomous role. The more you give to the European Public Prosecutor Office an autonomous supranational empowerment with applicable European Law, the more evident it becomes that this existing European Law Enforcement Community - and I am referring to Europol, to Eurojust and to OLAF- can have a substantive role within that: auxiliary agents, police judiciaire, whatever you might

label it, but we know what it means. So there it depends a lot on the design, I think.

The national law enforcement community: there we have several problems because of the very different designs of criminal investigation in the member States. And it starts already with the delegate EPP. In some of the EU Member States, the prosecutors are not investigating; they are only prosecuting. So who's your delegate? Is that a prosecutor that did not exist and just as a new agent in the national order? Or you're saying "no, we make a high police officer, the delegate"? That's a choice. Because he was dealing and he is dealing with criminal investigation; he is empowered under the national regime to do so. That's a decision that has to be made.

But then also the enchainment to the rest of the national law enforcement community; and the rest of the national law enforcement community here – I'm using the word "law enforcement community"- is very big and very specialized in this area. It's not only prosecutors and police authorities; and we're dealing in many countries with tax authorities having judicial powers; with customs having judicial powers or even other administrative bodies having judicial powers and playing a key role in this area. That means they must be in and connected to the system, whatever design might be. If they are not connected to the system of EPPO, forget about it. But the strongholds are there. Does it mean because of the fact that the strongholds are there? That you must apply and can apply only national law? I don't think so: it's perfectly thinkable that they apply in these cases European Law as a long arm of this Delegate EPP. That's possible. It's a choice; that's a political choice that has to be made.

Final remark: the judicial authorities and the judicial control. That's a very difficult one and also in this study of the Luxembourg Group that you can find the results on Internet. We had also quite a lot of problems with this one. Why is it a difficult one? Because there are constraints under the Lisbon Treaty. We, both academics and legislators are not completely free: they have to elaborate something in the frame of the Treaty. And there are also some doubts about some articles of the Treaty. But I think it's quite sure that some decisions – that might be decisions to use certain investigative acts (coercive ones); might be decisions to go to courts; that might be decisions about the choice of the forum (and we have of course parallels to certain decisions of OLAF; parallels to certain decisions of the competition authorities and so on), and based on *acquis* in the case law of the European Court of Justice- are challengeable and must be challengeable before the European judiciary. We cannot put away everything to the national level. Otherwise, we would undermine existing competences of the European Court. Which ones and which ones not? There starts a debate. That's problem number one.

Problem number two is that we are not dealing, as have been said rightly, only with *ex post* control (so judicial review): we are dealing also with *ex ante* authorization. And this area is extremely important. And is mandatory only already by the case law of European Court of Human Rights. Ideal would be, as Fritz Zeder has said, to put all that in a pre-trial Chamber and so on. That's of course a very nice design; it would be very good for the coherence, but I'm afraid that this Chamber would be very far away from daily reality. If you see the possible competence of the EPPO and the decisions that must be taken by a judge or a court in the pre-trial setting, could be quite a lot of decisions; and they must mostly be taken in a very

short period of time because it has to deal with civil liberties, but it can also be an arrest; but can be also freezing orders so there are many things that are really under a time of setting.

Second, you must know the field, you must not be too far away from reality. So I think that there it would be better in my eyes to impose a system of *ex ante* authorization at a national level; a system that does exist already for certain decisions in the competition area. It can be searches or site inspections of corporate bodies in the member States; or searches of homes of CEO's in competition cases: there a national judge is authorizing the competition authorities, to get in and to use the coercive powers. It's not the European Court of Justice. The difference with the competition area would be at least in the design that we have elaborated in the Luxembourg Group: that this national decision of the judge (judge of liberties if you want), authorizing *ex ante* a coercive measure of a European Public Prosecutor, would have value European wide: so it would be a warrant with EU wide reach and validity. You can compare it to the mutual recognition scheme without using it; we you don't use it here because there are competences for the whole European territoriality.

I don't believe that it is possible to realize – but that's of course my personal opinion- the objectives and the obligations in the Article 3 of the Treaty of Lisbon so related to the area of Freedom and Security and Justice without a model that relates to European territoriality. The word is not used in the Treaty, it uses "common territory of the member States"; but we all know that behind this is also a notion, it's an old historical notion of *espace judiciaire*. So this European territoriality must be in (in one or in another way) plus national, plus national, plus national is not enough in my eyes to realize the objectives of Article 3. Second: we need direct enforcement powers, not only in competition, but also in other areas and PIF is only one. I do fully agree with some of the speakers saying that there might be a need. It's a need in other areas of serious transnational crimes in this common area. The choice of the legislator has been other one but I think it is a very unfortunate choice. Third and last: European territoriality: direct enforcement, but including powers at a supranational level. So when I hear that the coercive powers, that should be used in these cases, depend only and lonely on national Law, I'm afraid then there is a threshold that is not met to realize Article 3.