

EVIDENCE IN EU FRAUD CASES

Edited by
Celina Nowak

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Abbreviations

CAP	Code of Administrative Procedure
CCP	Code of Criminal Procedure
Cf.	compare
CzPKiNP	Czasopismo Prawa Karnego i Nauk Penalnych
EAW	European Arrest Warrant
EEW	European Evidence Warrant
EIO	European Investigation Order
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed./eds	editor/editors
EJN	European Judicial Network
EPP	European Public Prosecutor
EPPO	European Public Prosecutor's Office
EU	European Union
f.	following
ibid.	ibidem
JIT	joint investigation team
MLA	mutual legal assistance in criminal matters
MLR	Modern Law Review
MR	mutual recognition
OJ	Official Journal
OLAF	European Anti-Fraud Office
p./pp.	page/pages
PIF	protection of the EU financial interests
PIF Convention	Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests

Abbreviations

TAA	Tax Audit Act
TFUE	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
Vol.	volume

Preface and acknowledgements

This publication is the most recent volume devoted to the protection of the financial interests of the European Union, issued by the European Law Research Association. This time the Association has decided to address a very practical issue of collection and admissibility of evidence in cases of PIF offences from the perspective of administrative as well as criminal law. We had an opportunity to reflect on this important question during a conference entitled “Evidence in EU fraud cases” which took place on 18–19 October 2012 in Warsaw and was the seventh international conference organized by the Association. It gathered many internationally and domestically recognized experts in the field of protection of the EU financial interests, as well as many legal practitioners – especially public officials who are on the front line in the fight against fraudulent acts affecting the budget of the European Union. We were particularly honored by the presence of Dr Giovanni Kessler, Director General of OLAF.

The choice of the theme of this book, and earlier – of the conference, was a consequence of our previous experiences. The collection of evidence and especially its admissibility is a major practical challenge, particularly when it comes to the interaction between administrative and criminal proceedings. We therefore hope that this book will help clarify at least some of the problems related thereto.

This publication would not have been possible without the support of the European Commission through OLAF and the Kozminski University in Warsaw, and we express our deepest gratitude to both.

Warsaw, March 2013
Prof. Lech K. Paprzycki
President of the European Law Research Association in Poland

Introduction

The European Law Research Association in Poland has focused on the protection of the financial interests of the European Union since it was established. We have analyzed the provisions of Corpus Juris, the process of harmonization of Polish law with *acquis communautaire* with regard to the protection of the financial interests of the EU, cooperation between national and European institutions in this respect – especially after the establishment of the European Public Prosecutors’ Office – as well as a wider issue of development of the European Union criminal law and interactions between administrative and criminal proceedings.¹

In this volume we have examined issues related to evidence in cases of offences affecting the financial interests of the European Union (hereinafter referred to as “PIF offences”). Our focus was on both administrative and criminal proceedings; we wanted to address the issue of collection and admissibility of evidence in national and transnational proceedings. The results of the analysis clearly indicate that there are differences of standards related to evidence in administrative proceedings conducted by OLAF on the one hand and by national authorities in criminal proceedings on the other. In my view these differences are due to the intrinsically administrative nature of OLAF’s investigations, which may not easily be

¹ Other books published by the Association are as follows: M. Hudzik, C. Nowak (eds), *Instytucje i instrumenty prawne w walce z przestępczością przeciwko interesom finansowym Unii Europejskiej – prawo krajowe i perspektywa europejska. Materiały z konferencji, Warszawa, 4–7 grudnia 2003*, Warszawa 2005; C. Nowak (ed.), *Ochrona interesów finansowych rozszerzonej Unii Europejskiej: nowe wyzwania, stare problemy. Materiały z konferencji, Sopot, 16–19 marca 2006*, Warszawa 2007; C. Nowak (ed.), *Organy ścigania i wymiaru sprawiedliwości a ochrona interesów finansowych Wspólnoty Europejskiej. Materiały z konferencji, Warszawa, 15–17 listopada 2007*, Warszawa 2008; C. Nowak (ed.), *Ochrona interesów finansowych Wspólnoty Europejskiej a przemiany instytucjonalne Unii Europejskiej*, Warszawa 2009; C. Nowak (ed.), *Fight against EU fraud – administrative and criminal law issues*, Warszawa 2011.

reconciled with criminal procedure. Both the EU and the Member States should therefore pursue solutions to this problem. To some extent it seems that the answer can be found in criminal law and institutions dealing with criminal law, such as the European Public Prosecutor's Office.

Chapters in this volume can be divided into three groups. The first group analyzes general problems.

In his introductory chapter Giovanni Kessler gives a brief account of the state of affairs in the field of protection of the financial interests of the European Union as of the end of 2012. He points out the main deficiencies of the current system of protection, and analyzes new initiatives aimed at addressing these problems. The new ideas and mechanisms of improvement he refers to include two new legislative proposals: for a directive on the protection of the financial interests of the EU by criminal law and for a directive on the harmonization of procedural criminal law in the Member States. Legislative changes will also be required in order to establish the European Public Prosecutor's Office. In addition, there is a need to revise Regulation 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), in order to better align these investigations with human rights standards.

John Vervaele's chapter gives a thorough and insightful perspective on gathering evidence in EU fraud cases, with a special focus on one of the links in the enforcement chain, that is on the control phase. The author analyzes EU competences to control the Member States with a view to protecting the European Union's budget. He very rightly points out some deficiencies of the controlling system related to the interactions between the EU and Member States competences and emphasizes that creation of new institutions such as EPPO will not solve the problems of the investigative powers of EU institutions or the evidentiary status of their findings in national criminal proceedings. These issues certainly require further attention and regulation.

The two chapters that follow are devoted to administrative law. The first chapter, by Jacek Skonieczny, offers a practitioner's perspective on collecting information and evidence on EU fraud in national administrative proceedings. Due to his own professional experience, the author focuses on proceedings relating to VAT in intra-Community transactions, but his considerations are applicable universally, to other inspection procedures relating to the inspection or audit of the management of funds originating from the EU.

The chapter by Mateusz Błachucki offers a very interesting analysis of procedural safeguards at the evidence stage of administrative proceedings in the light of the legal standards of the European Convention on Human Rights. This issue is of great practical importance, for if one wants to think

about the exchange of evidence between administrative and criminal proceedings, it seems clear that the ECHR standards must be taken into account. The conclusions of this chapter are optimistic to the extent that Polish law seems to be generally in line with the conventional requirements.

Several subsequent chapters deal with criminal law and add a comparative perspective to the analyzed issues. The first chapter in this section of the book presents the Polish perspective on the role of Police in combating EU fraud. The chapter deals with several issues, such as the types of offences criminalizing fraud detrimental to the EU financial interests, Police tasks in collecting evidence, cooperation with other entities involved in combating crime against EU financial interests and general rules on admission of evidence.

The following two chapters are devoted to the Italian experience in respect to fighting EU fraud. In his chapter Bernardo Cartoni first gives a brief outline of the rules of the Italian criminal procedure and then addresses the issue of evidence collected by OLAF in Italian criminal proceedings. His analysis is extremely interesting as it is based on examples of cases dealt with by Italian courts in recent years. He notes “a great dichotomy” in the status of OLAF produced evidence between administrative (tax) proceedings and criminal proceedings. In tax proceedings judges recognized the full value of the OLAF final report, whereas in criminal proceedings no conviction has been based on OLAF produced evidence. This finding encourages Cartoni to put forward a proposition to regulate the value of OLAF produced evidence in criminal proceedings at EU level.

The value of OLAF produced evidence in Italian criminal procedure is also considered by Riccardo Nodari and Vania Cirese in their interesting chapter. Their contribution contains more details on the rules of admissibility of evidence in Italy and the Italian system of prosecuting tax fraud. They point out that evidence collected by OLAF is of limited value in criminal proceedings.

The chapter by Laszlo Kis discusses the status of OLAF produced evidence in Hungarian criminal procedure. The author starts by giving a brief outline of criminal procedure in Hungary. He then analyzes the rules on the admissibility of evidence obtained outside the criminal procedure, including the principles relevant to the possible use of OLAF produced evidence in both the investigation and trial phase of criminal proceedings in Hungary. Kis concludes by saying that in fact OLAF’s reports “usually serve as a starting point” for criminal proceedings, of informative value.

In their chapter Stefano Filletti and Stephanie Shaw give record of the Maltese experience with OLAF produced evidence. They start with an

overview of Maltese criminal proceedings and then focus on rules relating to evidence. When considering the role of OLAF evidence in criminal proceedings the authors establish that it may be quite limited due to the specificity of the Maltese system. Yet it may be too soon to tell as the only Maltese case of EU fraud is still pending.

Grażyna Stronikowska in her chapter offers a Polish take on OLAF produced evidence. Her chapter is based on the analysis of four criminal cases in which in recent years OLAF supplied the Polish Public Prosecutor's Office with final case reports of administrative proceedings which indicated that according to OLAF an offence might have been committed. The examination indicates discrepancies between standards related to evidence in proceedings conducted by OLAF on the one hand and by Polish prosecutors and courts on the other.

The chapter by Celina Nowak is intended to present the legislative and statistical perspective on PIF offences in Poland. The author analyzes the level of implementation of three main PIF offences in Polish law: fraud, corruption and money laundering. She also proposes that the fight against PIF offences should be carried out with the use of targeted measures and the analysis of accessible statistical data will be helpful in preparing such measures. The results of the analysis indicate that the number of PIF offences in Poland is low, and the conviction rates even lower.

The last article in the volume, by Barbara Nita, addresses the possible future developments in the field of mutual legal assistance in criminal matters, particularly mutual admissibility of evidence. The author presents the evolution of mechanisms of cooperation in criminal matters between the EU Member States in this area, and pays special attention to the European Evidence Warrant. Finally, the author analyzes the premises of the European Investigation Order which is to replace or rather supplement the European Evidence Warrant.

This is the second book prepared by the Association published entirely in English, at the suggestion of OLAF. We hope that the results of our work and research will therefore be accessible to a much wider range of readers.

Dr Celina Nowak
Secretary General of the European Law Research Association

State of affairs in the field of protection of EU financial interests

We are currently at a crucial point in the development of the initiatives for the protection of the Union's financial interests. Indeed we open a new chapter of institutional, procedural and substantive law measures to protect the EU budget.

OLAF was reorganised in 2012. New internal investigative procedures are in place. They bear fruit. We are becoming more efficient, work time oriented, focus on priorities and better communication with partners. Since I arrived in OLAF, this has been my first objective. I hope that we will continue to increase the value added of OLAF as an investigation service addressing recommendations to the national (judicial) authorities and as a support to the competent authorities to help them better prevent and detect fraud in the implementation of the Commission Anti-Fraud Strategy.

I would like to present the initiatives in the PIF area that the Commission has recently adopted and those which it plans to adopt in the coming months.

1. A proposal for a directive on the protection of the financial interests of the EU by criminal law (adopted by the Commission in July 2012)

The substantive criminal-law initiative against EU-fraud is the first of 3 legal initiatives for the criminal-law protection of the EU's financial interests which the Commission intends to adopt by 2013 and which will also include a proposal for the setting up of a European Public Prosecutor's Office (EPPO) and a proposal for a directive on the harmonisation of

* Director General of OLAF.

procedural criminal law in the Member States. A proposal for the reform of Eurojust completes this legislative package.

The substantive criminal-law initiative aims to clarify, harmonise and strengthen Member States' criminal law as regards offences related to the EU budget.

Why is this Directive necessary? There are considerable differences in the level of protection of the EU budget across Member States. To give an example of what we mean by that, since 2000, 281 out of a total of 647 cases transferred by OLAF to national judicial authorities were dismissed. Conviction rates for these cases range from 14% to 80% across Member States, with an EU average of 41%. The differences are largely due to a patchy and not fully equivalent legal framework.

First of all, the Directive provides a definition of fraud and specific fraud-related offences. The harmonised concepts cover other illegal behaviour such as dishonest or obstructive conduct of tenders in public procurement, corruption, misappropriation and also contains a reference to anti-money laundering legislation.

Secondly, it provides for minimum sanctions for these offences. The sanctions would be proportionate to the damage caused. The proposal includes a three-step approach with thresholds of damage (or advantage obtained by the offender) defined in financial terms to determine the seriousness of the crime.

For fraud cases involving damage of more than €100,000 the proposed minimum sanction would be 6 months' imprisonment. The maximum sanction would be at least 5 or 10 years' imprisonment, depending on whether or not the offence was committed by an organised group.

2. A proposal for the establishment of a European Public Prosecutor's Office (EPPO)

In June 2013, the Commission foresees putting forward a proposal for the establishment of a European Public Prosecutor's Office (EPPO) for the protection of financial interests. The possibility to establish an EPPO "from Eurojust" has been enshrined in the Treaty (Article 86), and preparatory research, both at academic and practitioner level has been conducted for several years now, starting from the Green Paper consultation in 2001.

The Commission's proposal takes into account all the groundwork undertaken in the last years on this topic.

Experience has shown that criminality affecting the financial interests of the EU requires measures throughout the Union. National territoriality and jurisdiction do not provide the appropriate framework to combat complex cases which by their nature are European and go beyond the national context.

Whereas OLAF may currently conduct administrative anti-fraud investigations, the EPPO will contribute in a decisive manner to the criminal investigation and prosecution of the offences against the EU budget. This is in line with the objectives of the Treaty to provide for dissuasive means in the fight against fraud. It is also necessary and expected by the European taxpayer, especially at a time when the economic and fiscal crisis in Europe requires spending resources in such a way as to support growth of the licit economy.

The EPPO proposal will address specific needs which have been identified in the criminal law protection of EU financial interests, such as making the investigation, prosecution and bringing to justice of such offences more effective. The EPPO could without difficulty gather evidence in all MS and would possess the necessary expertise to investigate complex PIF cases.

The new body will be designed in such a way as to require no significant new financial resources at EU level, as existing bodies such as OLAF and Eurojust could be used to facilitate this work. We can envisage that OLAF's experienced investigative staff and its resources – at least partly – could be used by the EPPO.

The legal instrument on the establishment of the EPPO will comprise general rules on its statute, functional principles and organisation. It needs a procedural reference framework to specify the rules for its investigations. To support the work of the Commission, a study has been conducted by the University of Luxembourg on model rules.

With respect to the institutional framework in which the EPPO will operate, different options are being examined, including a more centralised and more decentralised model with delegated prosecutors in the Member States.

3. A proposal for a directive on the harmonisation of procedural criminal law in the Member States

Together with the initiative for the establishment of the EPPO, the Commission intends to put forward a legal instrument on the strengthening of administrative and criminal law procedural rules for the protection of EU financial interests.