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The protection of the EU's financial interests

From the *Greek Maize* ruling to the EPPO

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Article 4

Tasks

The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, **criminal offences affecting the financial interests of the Union** which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the EPPO shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.



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The protection of the EU's financial interests

Three phases

1970s – 1990s → until the Maastricht Treaty

1990s – 2000s → until the Lisbon Treaty

2000s – today → since the Lisbon Treaty



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FIRST phase

NO Community law provision devoted to EC's financial interests



1987/88: establishment of the Commission's anti-fraud Task Force "Anti-Fraud Coordination Unit" (**UCLAF**)



21 Sept. 1989: ECJ's judgment in C-68/88, *Commission v Greece* (**Greek Maize**)



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the *Greek Maize* judgment

facts: infringement proceedings → Maize exported from Greece to Belgium → declared as Greek but of Yugoslavian (i.e. non-EC) origin → levy for import of maize not paid → damage to EC's own resources → **Commission's 4th claim:** Greek officials committing and concealing the fraud should have been punished as if they had infringed national law

judgment: "24. For that purpose, whilst the choice of penalties remains within their discretion, [MSs] must ensure in particular that infringements of Community law are penalized under **conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law** of a similar nature and importance and which, *in any event*, make the penalty **effective, proportionate and dissuasive**.

25. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the **same diligence** as that which they bring to bear in implementing corresponding national laws" → **so-called equivalence clause, based on the principle of sincere cooperation**



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SECOND phase

1993: Maastricht Treaty → JHA Pillar + Arts 209A and K.3



1995: PIF Convention ([link](#)) and Regulation ([link](#))



1997: *Corpus Juris*

1999: establishment of the EU's Anti-Fraud Office (OLAF**)**



the Maastricht Treaty – Art. 209A ...

“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. → **“equivalence clause” becomes primary-law**

Without prejudice to other provisions of this Treaty, Member States shall **coordinate their action** aimed at protecting the financial interests of the Community against fraud. To this end they shall **organize, with the help of the Commission, close and regular cooperation** between the competent departments of their administrations”



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... became Art. 280 – Amsterdam reform (1999)

“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.

[text of Art. 209A]

4. The **Council**, acting in accordance with the procedure referred to in Article 251, 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 Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.

5. The **Commission**, in cooperation with Member States, shall each year submit **to the European Parliament and to the Council a report** on the measures taken for the implementation of this Article”



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the PIF Convention (I)

Notion of fraud, Art. 1

concerning both **expenditure and revenue**

intentional act or omission relating to:

- the use or presentation of **false, incorrect or incomplete statements or documents** or the **non-disclosure of information** in violation of a specific obligation; **misapplication of a legally obtained benefit** → if the **effect** is the **misappropriation or wrongful retention** of funds / the **illegal diminution** of the resources
- **misapplication of funds** for purposes other than those for which they were originally granted

the PIF Convention (II)

Protected Community resources, Art. 1: “the **general budget** of the European Communities or **budgets managed by, or on behalf of**, the European Communities”

Punishable persons, Arts 2–3:

those who **commit, instigate, attempt heads of business** for fraud committed by persons under their authority

Penalties, Art. 2:

criminal + effective, dissuasive and proportionate (*Greek Maize criteria*)
for fraud above a certain threshold **deprivation of liberty + extradition**

Jurisdiction, Art. 4:

- committed on the **territory / benefit** obtained in the territory
- a person on the territory **assists or induces**
- **nationality** of the offender

the PIF Regulation

Complementary to the PIF Convention → *administrative checks, measures and penalties:*

- **wider scope: “any irregularity”** affecting the Community budget(s)
- withdrawal of any advantage
- fines and economic **penalties, non-criminal** in nature
- coordination administrative + criminal proceedings
- **checks and inspections** by national authorities and by the Commission

Establishment of the OLAF

Commission unit established after so-called Santer scandal ('99)

administrative investigations both *within and outside* EU institutions, bodies, agencies

reports and possible follow-up by national authorities





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THIRD phase

2009: Lisbon Treaty → Arts 83, 86, 325 TFEU



2013: OLAF Regulation ([link](#)) → full independence

2017: PIF Directive ([link](#)) & **EPPO Regulation** ([link](#))

1st June **2021: EPPO starts** its operations



CJEU's cases effective protection of financial interests vs fundamental rights



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Primary law

Art. 83 TFEU → (1) minimum harmonisation of criminal law concerning certain serious cross-border crimes (2) “If the approximation of criminal laws [...] proves **essential to ensure the effective implementation of a Union policy** in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned [...]” → **legal basis of the PIF Directive**

Art. 86 TFEU → legal basis for the establishment of an **EPPO** (*infra*)

Art. 325 TFEU → essentially reproduces Art. 280 EC



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Art. 86 TFEU (I)

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**. → **special legislative procedure**

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. → **emergency brake**

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.



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Art. 86 TFEU (II)

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.

3. The regulations referred to in paragraph 1 shall determine the **general rules** applicable to the European Public Prosecutor's Office, the **conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures** taken by it in the performance of its functions.

4. Possibility for the European Council to extend to other serious cross-border offences (unanimity + PE)



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The PIF Directive

Broader notion of fraud:

- fraud concerning **procurement or non-procurement related** expenditure
- fraud concerning **non-VAT related revenue**
- fraud concerning **VAT revenue**

Additional offences: **money laundering**, active and passive **corruption**, **misappropriation** by public officials

Higher degree of harmonisation of penalties:

- for natural persons: maximum shall always entail imprisonment; maximum of at least 4 years if considerable damage
- criminal or non-criminal penalties for legal persons: fines and/or additional sanctions



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The CJEU's case-law a few hints (I)

direct effect of Art. 325 TFEU

“52. The provisions of Article 325(1) and (2) TFEU therefore have the **effect**, in accordance with the principle of the precedence of EU law, in their relationship with the domestic law of the Member States, **of rendering automatically inapplicable, merely by their entering into force, any conflicting provision of national law**” (C-105/14, *Taricco*)



obligation to disapply national provisions which **risk** leading to **systemic impunity of serious fraud** in a **large number** of cases ↷



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The CJEU's case-law a few hints (II)

but those provisions can be of constitutional nature, or the expression of a right enshrined in the national constitutional →

→ CJEU called to **strike a balance**

Member States' obligation to **counter offences against the EU's financial interests**

VS

the protection of **fundamental rights as enshrined in national constitutions**

→ oscillations in the CJEU's case-law and evolution still ongoing



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“the road to EPPO” (I)

1997: the Corpus Juris → doctrinal study requested by the Commission to Profs Delmas-Marty and Vervaele: proposed the adoption of a (sort of) EU criminal code, with substantive and procedural norms and the proposal to establish a European Public Prosecutor

2000: first follow-up study → analyses the actual feasibility of the proposal contained in the CJ & Commission Proposal at the Nice Intergovernmental Conference

2001: Commission Green Paper, COM(2001) 715 final → consultation of stakeholders



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“the road to EPPO” (II)

2013: Commission Proposal for a Regulation establishing an EPPO

→ emergency brake & enhanced cooperation

12 Oct 2017: adoption of the Regulation → published in the OJ on Oct 31 **20 Nov 2017: entry into force**

→ **1 June 2021: EPPO starts its operations**

2024: Poland & Sweden join *

* only Denmark, Ireland & Hungary remain outside

The EPPO does not work alone → the EU's Anti-Fraud Architecture





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Thank you for your attention!

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