

MONDAY 7 APRIL 2014

Members present

Baroness Corston (Chairman)
Lord Blair of Broughton
Viscount Eccles
Lord Hodgson of Astley Abbotts
Baroness Liddell of Coatdyke
Baroness O'Loan
Lord Rowlands

Examination of Witnesses

Mr Giovanni Kessler, Director-General, OLAF

Q34 The Chairman: Mr Kessler, thank you very much for giving your time to help this European Union sub-committee on its inquiry into the proposed EPPO. We are very grateful to you both.

I will, if I may, ask you the first question. You will be aware that the Commission's proposal is that the EPPO will have exclusive competence for crimes against the financial interests of the Union, whereas the Greek presidency's proposal is that this competence should be shared between the prosecutor and the member states. What advantages do you see with each of those proposals?

Mr Giovanni Kessler: Thank you for the opportunity you are giving me to explain our position, and for these questions. The advantages that I see of the exclusive competence proposal are most of all that it would avoid the danger and the waste of resources of parallel investigations, and ensure consistency in the prosecution policy. Secondly, the proposal for exclusive competence would avoid possible conflicts between national and European jurisdictions. We also see from the experience of OLAF that in many cases it is rather difficult, if not impossible, to establish at the very outset of a case the exact value of the fraud and some parameters used in the proposal for shared competence. At the outset of a

case, it is very difficult to understand whether the competence is national or European, and this could give rise to possible conflicts.

On the other hand, a possible advantage of shared competence would probably be political: that is, it could make greater acceptance by the member states more possible.

The Chairman: What would be the nature of that acceptance? Why do you say that it is a political question and that it might have more acceptance?

Mr Giovanni Kessler: I understand that some member states would prefer the shared competence option because they feel more comfortable being part of the competence for smaller frauds and leaving the bigger frauds to the European Public Prosecutor's Office. As a matter of fact, a rather political issue might mean better acceptance.

Q35 Lord Hodgson of Astley Abbotts: Could I move on to two lots of evidence that we have had previously. One was from Professor Mitsilegas, who told us, "In practice, if there is a European Public Prosecutor who uses the resources of OLAF, I am not really sure how prioritised the British needs would be with regard to the operation of OLAF". That is to say, if we were not participating, would we have any leverage on the situation at all?

Secondly, on the question of what the EPPO is going to deal with, the evidence that we had from Eurojust about the PIFs and how very wide they could become was, at least to me, slightly surprising. In its evidence, it talks about swindling and fraud, corruption, forgery of administrative documents, trafficking therein, illegal money-laundering, forgery of money and means of payments, not all of which are going to involve the Commission, but they appear, as currently defined, to fall within the EPPO arrangements.

Could you comment on those two?

Mr Giovanni Kessler: First of all, you mentioned a professor who asked how OLAF will deal with the UK after the establishment of the EPPO, given that, we understand, the UK will not be participating in the EPPO, at least not in the first stage. At the moment, answering these questions is a rather theoretical exercise for me. Of course, a good share of OLAF's resources will be used to set up the central office of the European Public Prosecutor's Office. Nevertheless, I am pretty sure that there will be sufficient resources at least to maintain OLAF's present attention to the UK, if not to improve it. Actually, today, OLAF's investigative resources are used for only a small number of member states' focused investigations. Roughly 20% of OLAF investigators, let us say, are doing investigations in all 28 member states, while the others are dealing with general fraud, which in any case will be for the EPPO. So there are not so many theoretical posts for investigators today who deal with the UK, so for sure we will be able to maintain the same resources and the same ratio of investigators for the UK in the future. We might even be able to dedicate a few more resources to the UK after the establishment of the EPPO. It also depends on how many member states join the EPPO. We do not know that at the moment. I hope this answers to some extent the first question you put to me.

On the second question, several of the PIF crimes that you mentioned in relation to Eurojust are not, at least for the time being, in the Commission's proposal, so they are not in the scope of the EPPO's competence. Most of the crimes you mentioned, such as money-laundering and the forgery of documents, are not considered by the EU convention on PIF crimes or by the directive on PIF crimes, which has not been adopted yet.

Mr Giovanni Kessler: Money-laundering will be, but none of the others are among the scope of competence of the EPPO. The EPPO will have 95% the same competence as today's OLAF.

Q36 Lord Rowlands: Is it not true that about 85% of all European Union expenditure is spent at the national authority or national agency level? Therefore, should the emphasis be on the national scene rather than on this European scene? Secondly, I do not see in any of the Commission's documents we have seen any emphasis on prevention as opposed to detection. Surely we should be spending much more time on prevention rather than detection.

Mr Giovanni Kessler: I agree with your second sentence about the importance of prevention. The Commission agrees. Actually, when we talk about OLAF investigations or the EPPO, investigations happen after facts have happened. The same applies to the EPPO, so the proposal on the EPPO focuses on prosecution. The investigative activity of OLAF is by definition investigation not prevention, but on the prevention point OLAF also has a policy-making capacity, and the Commission is very much involved in that; it has issued several communications. We are very active with the member states, because prevention, I would say, starts with them. We, as the Commission and as OLAF, are supporting the member states, especially the most problematic ones, in enhancing their prevention capacity.

Mr Giovanni Kessler: Eighty per cent of expenditure is by the member states. Maybe that is not the figure, but I can tell you that OLAF has had eight investigative units for many years that are more or less equivalent, and out of eight, two presently deal with member states' expenditure on agriculture, structural and social funds. Two out of eight is 25%, so we can say that roughly 25% of OLAF's investigative capacity is dedicated to these kinds of fraud, and this has been the same for many years. This is for many reasons, and we think it is sufficient, because in this field member states have the responsibility to spend, but they also, for the same reason, have the responsibility to prevent, to control, to detect and to take action. In other fields, such as direct expenditure by the Commission, internal investigations or third countries' development funds, if OLAF does not investigate no one else investigates. We also have customs fraud, and so on. It might be true that a greater part of the Commission's expenditure is managed by the member states, but it is also true that it now accounts for 25% of OLAF's investigative capacity.

Q37 Baroness O'Loan: Your written evidence to this inquiry said that the EPPO will consist of a broad central structure. We have heard concerns articulated by other witnesses, particularly in the legal profession, who have warned that an EPPO that has exclusive jurisdiction would struggle to cope with the significant workload from the outset, and that this would have very adverse effects on its performance. Could you comment, please?

Mr Giovanni Kessler: The answer to this understandable concern is in the structure that is envisaged by the Commission's proposal for the EPPO. We have proposed a structure that we call a decentralised structure, which means in a nutshell that the EPPO will be composed of a central office and a head prosecutor, and of national offices that will be composed of national prosecutors chosen from among the national prosecutors of member states, which will act as European prosecutors under a double-headed system—a system with a double function—for all these so-called small cases, but not only the small cases: in principle, the EPPO will work with the national prosecutors of member states acting as European prosecutors. This will enable us not to be invasive and not to deprive the member states of

their own national competences. On the contrary, it will enable the national prosecutors acting as European prosecutors to do more and to do better than they are already doing.

On the other hand, it will enable us to keep the central office rather small—not a monster office that manages everything but an office that manages the co-ordination, the consistency, the links and the co-operation between the national decentralised offices of the EPPO. The EPPO will have a rather lean central office and will work with well connected national decentralised offices.

Baroness O'Loan: Could I just ask a supplementary question? Do you envisage the EPPO having its own prosecutors, or do you envisage all the prosecution being conducted in the member states by national prosecutors?

Mr Giovanni Kessler: We envisage the central office having a head prosecutor, of course, plus a number of prosecutors—let us say 20—in order to have experience and knowledge from different member states and different national systems. So there will be a central office with roughly 20 prosecutors—just to give an idea—who will be European officials. They will come from the ranks of the national prosecution services, but once they are in the central office they will act as Europeans, tout court, as we in OLAF are today. Plus, member state participating in the EPPO will have the obligation to identify among its ranks a sufficient number of prosecutors—it has to decide what a sufficient number is—who are specialised in dealing with EU fraud. They will do most of the work. They will open and conclude the investigations. In our proposal it will, in practical terms, be exceptional for the central office to open and carry out its own investigation. Only in the case of inactivity or other particular cases will the central office do this work. The central office will mainly co-ordinate and share information, and will guarantee the consistency of the work of the national prosecutors acting as European prosecutors. So most of the work will be done at the national level.

Q38 Lord Hodgson of Astley Abbotts: Perhaps I may follow up on the question of that small central structure. Obviously we have noted here that it is not just the UK that has some concerns about the way in which this will affect the operation of national judicial systems. There have been a number of reasoned opinions and a yellow card has been served. If, at the end of the day, it proved not to be possible to get EU member states to agree to the EPPO, what powers would you as director-general of OLAF like to have to make OLAF more effective in the future?

Mr Giovanni Kessler: I am not sure that I have completely understood your question.

Lord Hodgson of Astley Abbotts: If the EPPO idea fails because there is insufficient agreement and we therefore go back to the present structure, what new powers would you, as director-general of OLAF, like to have—if we gave you a clean sheet of paper to write them down—to make it an effective, fraud-fighting force?

Mr Giovanni Kessler: It is a dangerous question and potentially there is an even more dangerous answer, but I understand. If I can be open and frank—I may be exaggerating a bit for the sake of discussion—the model for OLAF dates back to 1999. A new regulation entered into force last year, which has not changed anything in the main setting of OLAF and its powers. These administrative investigations, which are conducted with very limited investigative powers on criminal matters, are followed by a criminal investigation and a prosecution. That happens today, because at the end of our investigation, when we are

successful and following our recommendation, is a national criminal investigation and national prosecution.

This system is outdated. We make the best of it. We can still improve it but not by much. I think that we are doing quite a good job. Nevertheless, you can imagine that doing investigations into fraud and corruption without even the power to look into bank accounts, for instance—not to mention powers to search houses or civilians, or whatever—is rather inadequate. So I think that the EPPO model would be ideal, because from day one we will be able to have fully fledged criminal investigations carried out in a judicial structure and with all the judicial controls that are needed.

If this fails, we should think about giving OLAF more ability to carry out investigations—with all due authorisations, of course, and if necessary judicial authorisations. Otherwise, we risk losing time. Time running out when are carrying out an administrative investigation of a crime might in some cases result in preventing a fully fledged criminal investigation from starting. Then we pass the case immediately to the national judiciary. This we do increasingly, because we worry that our activity, which is limited, might take time before a fully fledged criminal investigation can start. I do not know whether that answers your question, but I hope that I have given you a picture.

Q39 Lord Blair of Boughton: If the EPPO is established, I just want to look at how the UK, which is opting out of that process, will be helped by whatever remains of OLAF. The real difficulty for the United Kingdom is the EPPO is prosecutor-led, whereas all investigations in the United Kingdom are police-led and the prosecutors arrive later. My sense is that, apart from that of Malta, that is a unique position. I just wonder, if and when the EPPO is established, whether OLAF will be in any position to assist the United Kingdom.

Mr Giovanni Kessler: I agree with you. You pointed out exactly the main point about the compatibility between the EPPO and the UK and Malta. It is true that the prosecution model is, to some extent, not the UK or Anglo-Saxon model, so you might have some compatibility issues, even if they could be overcome or solved with some adaption. I understand that for whatever reason the UK will not be part of the EPPO, at least at the very first stage.

The Commission's intention is that the member states that do not join the EPPO—probably not only the UK, even if we do not know exactly which states—will not be left without any support/control. Otherwise, to be blunt, some member states—not the UK—may be tempted not to join the EPPO so that neither it nor OLAF can control them. It would be a way of obtaining competitive advantage compared with other member states.

To come back to more serious issues, OLAF will continue to do the work that it is doing now—administrative investigations in relation to member states that are not going to join the EPPO—but it will no longer do administrative investigations followed by criminal investigations in the member states that join the EPPO, because in those member states the work will be done from day one by the EPPO itself.

Lord Rowlands: Is there not another problem in terms of UK participation? The Director of Public Prosecutions here is the sole arbiter of decisions whether to bring prosecutions. Do you appreciate and understand that it would be utterly incompatible to have a European prosecutor overriding the view of our own Director of Public Prosecutions?

Mr Giovanni Kessler: I think that an arrangement would be possible, because again we have to focus on the model that we have chosen. The European prosecutor, as such, is composed

of national prosecutors. I understand that in the UK you have a partial prosecutor system, because you also have police officials and so on. For instance, if the UK would like in effect to discuss joining the EPPO, we could suggest that the final decision in the UK on whether to indict or go to court is made by the Director of Public Prosecutions acting as a European prosecutor. That is because what we actually do is give the function of the European prosecutors to the prosecutors identified among their national ranks by the member states. So this issue could be solved.

It is true that in the Commission's proposal the central prosecution service, or the chief prosecutors in the central office, can overcome the decision taken by the national European prosecutor at the end of an investigation, but this can be done by the chief European prosecutor in exceptional cases, which normally happens only in order to give consistency, avoid inactivity and so on. However, I understand that this might be a sensitive point for the UK. It is also different from other continental countries such as my country, Italy, in which the prosecutor has no power to choose—in, say, the national interest or on the opportunity principle—whether to start the prosecution or not. I understand that in the UK the opportunity principle and the national interest play important roles, if I am not wrong. These might conflict with the situation all over Europe in which PIF crimes—crimes of fraud and corruption affecting the financial interests of the European Union—are prosecuted equally in a consistent manner throughout the member states. These might well conflict theoretically in a few cases with the concepts of opportunity and national interest, which I understand are enshrined in your legal and judicial system.

Q40 Baroness O'Loan: Perhaps I may ask you again, in the context of Lord Blair's question, about the separation of investigation and prosecutorial functions, and the difference and impact of that. I am trying to work out what the real benefit is of an EPPO if the work is done nationally, if it is using national resources, and if you have only 20 or so prosecutors in Brussels, or wherever, and they are working to a separate set legal order. You talk about consistency and things like that, but will all these national prosecutors be reporting to the European prosecutor or—as would be the case here—to their national prosecution process, so that the national courts take care of the issue? I do not quite understand what the real advantage is and where the benefit would be.

Mr Giovanni Kessler: Thank you for the question. First of all, you mentioned the courts. The competence of national courts will definitely not be affected in any way and will remain as it is. But the prosecution services will work in a network and in the same office, as they work in the same office in 28 member states. Being in a network gives a lot of benefits. I will give an example to make things easier to explain. A national European prosecutor will start a case as they do now, but if tomorrow it is done as a European prosecution it will not report to the European prosecutor but will be put into a European register. So in the central office there is immediate information and awareness of an investigation being opened in this case by, say, the French European prosecutor. This will allow the central office to be aware of possible links, co-operation possibilities, overlapping and so on, which we now badly lack.

What happens today is that these kinds of financial crimes, including corruption, affect the interests of European institutions, and the most important of these cases have a transnational nature. Normally, important bribes are not paid in the same country or paid directly; they are paid abroad by a company in another country to another company in another country. What we miss today by having a purely national, investigative approach is

the full picture of these kinds of crimes. We have is a fragmented, national approach to investigations and prosecutions in Europe. It is a system that started in the 19th century, and we go on like this. This seriously hampers the detection, effective investigation and prosecution of transnational cases.

The first benefit of the EPPO will be that each time we will have a comprehensive picture that will greatly enhance our capacity to detect these transnational cases. Secondly, we will have an international European prosecutor who is able to carry out fully fledged European investigations, which means that if an investigation is needed involving a house search or telephone tapping in another country, because it is related to the investigation, they will, in a nutshell, work in all European Union territory as if it were one country. Today, we have boundaries working only, or almost only, for the investigative authorities. Money and goods can move freely within Europe but not the prosecution services. Tomorrow, at least the EPPO countries will be able, because they will belong to the same European office, to carry out Europe-wide investigations without using the current system of mutual legal assistance, the same 19th century system, following requests for co-operation. That is the major limit and block that hampers investigations of these kinds of crimes.

Baroness O'Loan: I just wonder whether that takes into account the extent of cross-national investigations that occur at present, but I will leave it at that.

Q41 Lord Blair of Boughton: I think I am asking the same question as Baroness O'Loan. You are describing the problems among prosecutors, but surely there is an organisation called Europol, which must be the organisation that deals with the collection of criminal intelligence. I do not understand why we need a prosecutorial system that actually mirrors a Europol that is doing the job of criminal investigation. I do not see the advantage of having two systems dealing with this, rather than just one.

Mr Giovanni Kessler: This might have something to do with the fact that I have grown up in the continental system of investigation, while you have a different system. Let me say something concrete. Europol does not do what you have just described. You might say that ideally you would like Europol to do it, but it does not do any criminal investigation at all. It is not even meant to do it. One could argue that it would be better to have Europol doing it in future, but that is another issue. Europol is doing purely intelligence, which is member states giving information when they want to give it. When they do not want to give any information, they do not. As far as I understand, the best information is not provided to Europol, but that is another problem. Anyway it is, in the best-case scenario, collecting information given to it by the member states that it puts together and analyses. It provides a service, which might be valuable, to the national police forces by providing them with an analysis of intelligence, warning of possible dangers, difficult situations and so on, regarding criminal matters. However, Europol does not carry out any criminal investigation. A criminal investigation is carried out about a specific fact carried out by a specific person or company. This work is not done by Europol; it does not target any single fact. It does valuable work, but it is not investigative work.

The second part of the answer is that the European public prosecutor will, by definition, work with the police. We do not create any police force in this proposal—it is only a prosecution service—but our proposal is for a European prosecutor, as national prosecutors do on the continental mainland, working closely during investigation and prosecution with

national police forces. The EPPO will continue to do so and will therefore carry out its investigations together with the national police forces.

I am sure, as is the case in our proposal, that the EPPO will also use the support of Europol. As today, Europol supports the member states, tomorrow it will also provide support to the EPPO with its analysis and work. However, it is complementary work.

Q42 Baroness Liddell of Coatdyke: I hesitate to add even more complexity to these structures, but twice in your written evidence you refer to the fact that because the UK has not opted into the EPPO our judicial system will be unaffected. Yet we took evidence just a few days ago from Mike Kennedy, the former president of Eurojust, who said that the UK courts will be faced with requests for mutual legal assistance, individuals under the European arrest warrant, and evidence under the European investigation order, and, as a consequence, our national law will have to be amended. Do you still have the view that our judicial systems will not be affected by the establishment of the EPPO?

Mr Giovanni Kessler: I will try to be more articulate, given your question and your good point. First, as I see it, your judicial system will not be affected at all, taking into account the fact that you will not join. I do not see how your judicial system will change; there is no need for that. Secondly, you mentioned that you would be faced with requests for mutual legal assistance and European arrest warrants. For sure, as now, the UK receives several requests for mutual legal assistance, European arrest warrants and European investigation orders. These tools already exist and apply to the UK, to an extent that I am probably not as fully aware of as you, but this will absolutely not be affected by the EPPO. The Commission's proposal does not and could not have this option; it will not affect the scope of mutual legal assistance or tools such as the European arrest warrant. These will be completely unaffected.

What will change from the UK's perspective is that instead of having requests, as you do now, only from, say, 28 member states' judiciaries, you might face the same requests by 28 member states and the EPPO. However, the nature or scope of these instruments will not change. By the way, in addition, you might have the EPPO making the same requests, but that is instead of the member states.

Another point of view is that it is not a duplication but a simplification because, with PIF crimes, instead of having requests from actually 27 member states, you will have requests from a few member states that are not in the EPPO, and, for the member states that are in the EPPO there will be requests only from the national prosecutors acting as the EPPO. So in a way, it is a simplification. In order to deal with, say, a request for mutual legal assistance from the EPPO instead of from the Austrian prosecutor, you would need to change your legislation in order to recognise such requests by way of an agreement. This could be done perhaps by taking note in a legal way that, in addition to recognising the authority of 28 member states, you also having the EPPO. This would require probably not changes to the legislation, and for sure not to the judiciary, but maybe an agreement. At this very moment I am not able to say exactly because I am not an expert in your national legislation. In the worst-case scenario, you might have to make an agreement with the European Union that recognises that the EPPO has the same scope or type of competence or the same ability to make a request to the UK that you have already recognised can be made to other member states—no more than that.

Q43 Lord Rowlands: My question comes back to your first answer as to whether exclusive competence or shared competence is the best way forward. Is there not an obligation on both the Commission and member states under the treaty to fight fraud and that, therefore, rather than go down the exclusive route I hear you might allow participating members to shrug their shoulders and say, “We have no responsibility and will hand it over to the European prosecutor.”? How is this EPPO going to encourage non-participating members to deal with the issue of fraud? In other words, is not a shared model better?

Mr Giovanni Kessler: I doubt that they share competence, because they already see that we have this shared competence, although OLAF says that there is no exclusive competence. We see that the role of OLAF, apart from its lack of powers, is very limited and not very significant, mainly because the member states can do better than us, given that they are on the spot. We intervene when they are not doing enough, or not doing anything, and this we can do with very limited powers.

The issue that you have raised, if I have understood it, is whether the setting up of the EPPO would remove member states’ responsibility from their political, if not moral and legal, obligations to take care of these kinds of fraud. I do not think so for two reasons. The first is that the EPPO as we have conceived of it and put in our proposal is composed of a central office and the national prosecutors, so there is still full participation by member states in the EPPO. They are not expropriated or deprived of their energies. On the contrary, they are a fully integral part of the EPPO, so they are not out of it or disinterested.

Secondly, we are talking only about a prosecution service, but as we have already said in this conversation today, the responsibility for fighting fraud starts with prevention and remains, as now, with member states and the Commission. This shared responsibility, however, will not be affected by the proposal for the EPPO. Fighting fraud encompasses the investigations and controls that have to be done at a national level, including auditing, controls and good management of funds. This still involves prevention and control, which will remain as they are now and will not be affected by the setting up of the EPPO. Full responsibility in court cases remains with the member states. Let us call it repression—I do not know if that is an appropriate English word, but you understand what I want to say.

In the end, this proposal focuses only on one important sector of the larger response to fraud that there has to be, which starts with the good management of funds, administrative controls and police investigations and ends up with court cases. Prosecution is not an exclusive competence. In our proposal there is exclusive competence, legally speaking, but it is dealt with by an office that has a mixed composition of national and European officials. I think that the member states will be kept very well under these obligations and will be able to meet these obligations even better than in the past.

The Chairman: Thank you very much Mr Kessler. I think we are about to lose our link to you in the not too distant future. I want to thank you and your colleagues very much for assisting us today. Can I also say a personal thank you for your competence in our language? Your English is a million times better than my Italian.

Mr Giovanni Kessler: Thank you very much for this wonderful opportunity to have these discussions with you and your colleagues. I hope to interact with you even more in the future.

The Chairman: Thank you. Goodbye.