

OLAF – a view from inside: A typology of investigative cultures

by Julia Levi

The European Anti-Fraud Office (OLAF) is an administrative investigatory institution, with no criminal powers. In order to strengthen fraud prevention, OLAF was established by the European Commission via the European Commission, ECSC Decision 1999/352 of April 28, 1999 (see http://ec.europa.eu/anti_fraud/index_en.html for further details). The office was given a special independent status to conduct administrative anti-fraud investigations. OLAF has the power to carry out limited checks and inspections, including “on the spot” checks in Member States and in non-Member States, provided cooperation agreements exist (regulation no 2185/96). There has been an ambition to develop a European Public Prosecutor (see Green paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, Commission of the European Communities, 2001) which would potentially grant OLAF criminal investigatory power. For the moment OLAF relies on Member States to prosecute cases, and it is the Member States which bear the financial burden.

In the following paper I will discuss the following conceptualisation of investigative cultures based on experience at OLAF and general policing culture. This is inspired from a combination of five months as a trainee at OLAF, where I conducted interviews with all 17 investigators in my unit, and the literature on the organisation of policing, plus work done at the Universities Police Science Institute in Cardiff University’s School of Social Sciences.

LITERATURE REVIEW

Why does OLAF as an administrative body fight so hard for criminal sanctions? It is both costly and results are proportionately few (32% of cases in 2009 received judicial follow up- though we cannot be sure what “following and assisting the progress of cases with the competent national authorities” entails – see OLAF annual report 2010). If we expand on an example from the UK, HMRC staff conduct their financial investigations with the supposed aim of maximising revenue to the state; pragmatically, compliance

and settlement are more important than investigation and prosecution. Shapiro described prosecutions by the Securities and Exchange Commission in the US as “the road not taken” in typical insider dealing or market abuse cases (see Shapiro, S, “The road not taken: the elusive path to criminal prosecution for white-collar offenders”, (1985) *The Law and Society Review*, 9(2): 179-218). Why does OLAF orient itself to march down this road? At the time of Shapiro’s writing, six in every 100 parties investigated stood judgment before a criminal court and the remaining 94 were dealt with by civil sanctions, administratively or not at all. As OLAF does not have prosecution powers, why not simply work on regulatory sanctions rather than criminal justice? A key question which follows is: what impact does the fight for criminal sanctions have on OLAF investigators and on their targets?

OLAF lies in a regulation versus crime control middle ground, akin to Gill’s discussion of the blurring between regulation and policing (see Gill, P, “Policing and regulation: what is the difference?” (2002) *Social Legal Studies*, 11(4) 523-46): and between an overwhelmingly regulatory body such as the Health and Safety Executive (HSE) and a crime control body such as the Serious Fraud Office (SFO), part of the UK criminal justice system. Of course there is no relationship between crime seriousness and actual prosecution risks (Tombs, S, “Violence’, safety crimes and criminology”, (2007) *British Journal of Criminology*, 47: 4 531-50). Braithwaite (1984) related Roosevelt’s phrase “walking softly while carrying a big stick” to compliance strategies and regulation. The size of the OLAF stick is unknown, and is one which they have to ask permission to use, as they have to convince Member States to proceed with criminal prosecution, modifying the tough image OLAF would like to have. Though the impact of the threat of prosecution versus civil sanctions on deterrence is under researched in this area (see Levi, M “Serious tax fraud and non-compliance; a review of evidence on the differential impact of criminal and non-criminal proceedings”, *Criminology and Public Policy*, (2010), 9(3): 493-513 for a review in the tax context), general literature suggests that criminals usually overestimate the likelihood of detec-

tion and sanction. If this applies to the crime OLAF investigates, then surely its existence would be enough to deter, unless the criminals decide to ignore the risks and consequences as they think they are smarter and don't care about the sanctions. The OLAF case load reveals that this is not the case: more could be done if we are to go down this route of deterrence.

To make sure you have the threat of a *big stick* in this context, you need to secure a clear knowledge that your investigations can and will lead to prosecution when "needed." In OLAF's case, prosecution is not clear cut, takes many years and often single offenders are not fined or prosecuted. OLAF's limited case law reflects little use of criminal sanctions big enough to "symbolically signify acts which are unacceptable" (Tombs, 2007). Even when this does happen, this is not presented to insiders or outsiders in a digestible format. In failing to make its successes clear, OLAF fails to show whatever size stick it has, which does not sit well with investigator morale. On the other hand, in not publicising the size and direction of its stick, OLAF is able to continue to keep undercover the fact that it may not be very big.

Whichever side of the coin is the "reality", on speaking with OLAF investigators this has a great impact on the way they see their work. There is no space to go into this in detail, but further influences on investigator morale include likening OLAF to a machine, where the outside decision making parts (the council, parliament, and the commission) are moving slower and at times in a different direction to its internal components or cogs. The slow pace and direction of change, the administrative burden which follows and the uncertainty of the size of OLAF's stick effects its internal components (ie the investigators) differently. The "administrative burden" I refer to is the four different systems used on a daily basis (time management system, case management system, core business information system and data protection) which leaves investigators tied down to paper work they consider unnecessary, including a heavily internally debated system of "data protection."

The nature of the complex frauds, including those investigated by OLAF, determines that regulation is often the only method of sanction available. The most successful cases are where a "mixed economy" of sanctions is deployed. By "successful" I mean those cases which recover money and have a "moral and symbolic quality" (Croall, H, "Combating financial crime: regulatory versus crime control approaches, (2003) *Journal of Financial Crime*, 11(1): 45-55), with the use administrative as well as criminal sanctions: this is positive for the public and investigators. Such outcomes arise where many resources are devoted, regulatory sanctions are imposed immediately (during the investigation) and evidence is then gathered for a criminal case file. This is rare, and takes the immediate and extremely close cooperation of the Directorate General (DG) involved. As with many OLAF cases, they

depend on relationships between individuals; the investigator's ability to "sell" the case not only to the DG but to the Member States (and also to non-Member States when relevant). Without this close cooperation, the case fails to progress even when jumping through the relevant hoops (such as the 9-monthly case reviews). OLAF depends on their counterparts in the DGs passing information on and helping them understand contracts. This contributes to mounting pressure on the investigators if they want to be successful; investigators react to this in different ways. From this I now turn to the conceptual framework of the investigative cultures typology I have developed.

RESEARCH METHODOLOGY

My research was conducted over a five month period. This involved semi-structured interviews with all members of the unit I worked in, as well as three other heads of unit in my directorate. I also had informal conversations with approximately 30 other members of staff, including the heads of most units throughout the organisation. I was granted access to conduct semi-structured interviews with my own unit by the unit head. Access for interviewing the other heads of unit was granted by the head of the Directorate. These interviews were granted in order for me to gather basic unit information for in-house purposes. However, it meant that I was able to ask some of my own questions. A key limitation to my research and data analysis was that the confidential data could not leave the institution, and no software was available for computer qualitative analysis. Broad themes were extracted and analysed similarly to the process within narrative analysis (see Gubrium, J F, and Holstein, J A, *Analyzing Narrative Reality*, Sage Publications (2009)). Previous literature on the themes which came out of the data discussed had resonance with *The Politics of the Police* (Reiner, R, 3rd ed, Oxford University Press, 2000). Therefore the following fourfold typology was constructed which could be used as a tool for future research.

INVESTIGATIVE CULTURES

This fourfold typology has titles I have adapted from Reiner's writing on "cop culture" within the organisation of policing to fit my observations of OLAF staff:

1. Police missionaries
2. Pessimistic investigators
3. Pragmatist administrators
4. The withdrawers

Police missionaries

These are the most positive group, who are constantly striving to fight, punish and deter fraudsters, and prison sentences are held as their ideal outcome. They are hard-working enthusiasts self-described as aiming to be dutiful to their public service role, are from policing backgrounds and so are used to having criminal investigation powers.

Therefore these investigators often feel frustrated in their new role, and try not to begrudge obstacles they face to completing their work, holding great regard for their service vocation. OLAF's limited powers, the high administrative burden (especially that on the few powers OLAF does have at its disposal), and the investigative/ working cultures of others in the office weigh heavily on this group, pushing down morale.

Pessimistic investigators

These are investigators who are a stage further into accepting their new role. However instead of keeping the enthusiasm up, seem somewhat resigned to the constraints they now face. They are prone to gossip or, conversely, silence as coping mechanisms in the office environment, and are often nostalgic about investigatory work they would rather be doing and express their fondness for previous exploits.

Pragmatist administrators

These are those who are comfortable with the work and its administrative capacity, are typically from accounting or auditing backgrounds, used to conducting work with a high level of bureaucracy with limited criminal investigation powers if any. They do not see any need for there to be less paper work, and feel they are able to be successful in their investigations with the tools at hand. They are comfortable with the administrative sanctions and regulation as investigation outcomes, and are the most successful in coping with the OLAF environment.

Withdrawers who practise easing behaviour

This investigative culture (see Cain, M, *Society and the Policeman's Role*, Routledge and Keegan, (1973)) is the smallest number of investigators and least popular with others. These are the people ticking boxes and/or avoiding work, unwilling to take authority when in positions of power and are the most problematic for OLAF. Staff are seldom questioned in OLAF regarding their work; there are few checks, and justifications reportedly are always accepted. This kind of "easing behaviour" seems to come from personal temperament and/or a way of adapting to the frustrations inherent in OLAF's environment. This group are not all malicious, and this section is mostly taken up with those who are trying to make life easier, when faced with a tough administrative burden to delve through, with modest outputs even when they work hard.

CONCLUSION

What I would like to make clear is my interest in the way OLAF is developing and what this will mean internally.

What impact would OLAF prosecution powers have on investigations if granted by a European Public Prosecutor? Would they then become more effective for prevention and deterrence as the police missionaries hope? If prosecution powers were at its disposal, maybe this would increase the morale of the police background investigators, but leave the "pragmatist administrators" more uncomfortable (even though the extra burden of developing cases for prosecution might limit the *number* of cases investigated). Currently, OLAF has some investigators keenly focused on criminal sanctions they rarely achieve, and thus frustrated workers alongside contented ones.

The European Public Prosecutor will be based at Eurojust and would still not enable OLAF to prosecute cases themselves. OLAF would still have to pass on the case to another body, even if more direct as it is on a European level (instead of on a national level). OLAF's mind set is directed towards a prosecution role; and criminal prosecution may remain the road not taken, like tax or social security frauds. Without a huge transformation, these cases are often too expensive and labour intensive to get them to a prosecution standard. Perhaps cultural aspects of investigator morale and decision making should receive a higher priority in recruitment and management of this important body which seeks diligently to control a vast EU budget.

Finally, the following questions are posed in the hope of future research:

- What would happen if OLAF lost the threat of criminal sanctions; what if it was just regulatory? Would this mean they should employ fewer investigators with policing backgrounds if they want to keep up staff morale?
- How much impact do criminal sanctions have, and could there not be parallel criminal investigations run elsewhere, perhaps in collaboration with OLAF?
- What is the real cost of having staff with low morale? For now it seems to me that OLAF has valuable resources which it could utilise more effectively with an eye focused solely on regulation. This has been a discussion of investigator morale; what requires further analysis is what works in preventing "police missionaries" from turning into "pessimistic investigators." 
- The views expressed in this paper do not reflect those of the European Anti-Fraud Office.

Julia Levi

MSc Criminology and Criminal Justice, University of Oxford, Centre for Criminology, Green Templeton Colleges.