Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Final Report
EUROPEAN COMMISSION
European Anti-Fraud Office (OLAF)
Directorate D – Policy
Unit D.1 – Policy Development & Hercule
Contact: Irene Sacristan-Sanchez
E-mail: Irene.SACRISTAN-SANCHEZ@ec.europa.eu
European Commission
B-1049 Brussels
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Final Report
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Abstract

In support of the European Commission’s evaluation report, ICF, an independent consultancy, was contracted to conduct an Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). This is ICF’s Final Report.

Regulation 883/2013 was adopted with the objective to improve the effectiveness, efficiency and accountability of OLAF while safeguarding its independence.

The purpose of the evaluation was threefold:

- to assess the application of the key elements of Regulation 883/2013;
- to assess the extent to which the objectives have been met and remain relevant; and
- to assess the operation of the Regulation in the context of an evolving anti-fraud landscape and whether there is a need to amend it.

The evaluation focused on five areas – effectiveness and efficiency in the application of key elements of the Regulation, coherence and relevance of the Regulation to accomplish its task and in the context of anti-fraud policies, and the future outlook of the Regulation considering its application and current policy proposals.

This Final Report presents the findings and conclusions of the evaluation against the objectives set-out above.
Résumé

Le cabinet-conseil indépendant ICF a été chargé de réaliser une évaluation de l'application du règlement n° 883/2013 relatif aux enquêtes effectuées par l'Office européen de lutte antifraude (OLAF), à l'appui du rapport d'évaluation de la Commission européenne. Voici le rapport final d'ICF.

Le règlement n° 883/2013 a été adopté dans l'objectif d'améliorer l'efficacité, l'efficience et les compétences de l'OLAF tout en préservant son indépendance.

L'objectif de l'évaluation se déclinait en trois volets :

- évaluer l'application des principaux éléments du règlement n° 883/2013 ;
- évaluer le degré de réalisation des objectifs, et leur pertinence actuelle ; et
- évaluer le fonctionnement du règlement dans le paysage en mutation de la lutte contre la fraude, et déterminer s'il est nécessaire de le modifier.

L'évaluation s'est concentrée sur cinq domaines : efficience et efficacité dans l'application des principaux éléments du règlement, cohérence et pertinence du règlement pour la réalisation de son objectif dans le cadre des politiques antifraudes, et perspectives d'avenir du règlement au vu de son application et des propositions politiques actuelles.

Ce rapport final présente les résultats et les conclusions de l'évaluation à l'aune des objectifs définis ci-dessus.
Kurzübersicht

Das unabhängige Beratungsunternehmen ICF wurde damit beauftragt, die Anwendung der Verordnung Nr. 883/2013 über die Untersuchungen des Europäischen Amtes für Betrugsbekämpfung (OLAF) zu evaluieren, um die Europäische Kommission bei der Erstellung ihres Bewertungsberichts zu unterstützen. Dies ist der Abschlussbericht des ICF.

Der Erlass der Verordnung Nr. 883/2013 zielte darauf ab, die Wirksamkeit, Effizienz und Rechenschaftspflicht des Europäischen Amtes für Betrugsbekämpfung unter Wahrung seiner Unabhängigkeit zu verbessern.

Die Evaluierung verfolgte drei Ziele:

- Bewertung der Anwendung der zentralen Bestandteile der Verordnung Nr. 883/2013
- Bewertung, inwieweit die Ziele der Verordnung verwirklicht wurden und weiterhin relevant sind
- Bewertung der Durchführung der Verordnung in einem sich wandelnden Betrugsbekämpfungsumfeld und Prüfung, ob Änderungsbedarf besteht

Die Evaluierung war auf fünf Bereiche konzentriert: die Wirksamkeit und Effizienz der Anwendung zentraler Bestandteile der Verordnung, die Kohärenz und Relevanz der Verordnung bei der Erfüllung ihrer Aufgaben im Kontext der Betrugsbekämpfung und den Ausblick auf die Zukunft der Verordnung unter Berücksichtigung ihrer Anwendung sowie aktueller Politikvorschläge.

Der vorliegende Abschlussbericht enthält die Ergebnisse und Schlussfolgerungen der Evaluierung in Bezug auf die oben genannten Ziele.
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Abbreviations

ACA  Administrative Cooperation Arrangement
AFCOS  Anti-Fraud Coordination Service
AML  Anti-Money Laundering
CJEU  Court of Justice of the European Union
CMS  Case Management System
COCOLAF  Advisory Committee for the Coordination of Fraud Prevention
DG  Director General
EDES  Early Detection and Exclusion System
EDPS  European Data Protection Supervisor
EEAS  European External Action Service
EPPO  European Public Prosecutor’s Office
FPDNet  Fraud Protection and Detection Network
GIP  Guidelines on Investigation Procedures
IBOA  Institutions, Bodies, Offices and Agencies
IPP  Investigation Policy Priority
ISIP  Instructions to Staff on Investigation Procedures
ISRU  Investigation Selection and Review Unit
JIT  Joint Investigation Team
LEA  Law Enforcement Authority
MAA  Mutual Administrative Assistance
SC  Supervisory Committee
TFEU  Treaty on the Functioning of the European Union
VAT  Value Added Tax
Glossary

**Abuse of public procurement procedures:** The collusion in national tender procedures involving EU money; e.g.:

- where a person acts contrary to procurement rules;
- where a person tries to influence/create unjustified preferential conditions /negotiate more favourable condition; and
- where a person gains unlawful benefit or causes detriment to others.

**Abuse of powers:** All activities resulting in the obtaining of undue advantages through favouritism or abuse of powers, which may create reputational damage.

**Active corruption:** The deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the Union’s financial interests shall constitute active corruption.

**Administrative arrangements:** Arrangements of a technical and/or operational nature concluded by the Office, which may in particular aim at facilitating the cooperation and the exchange of information between the parties thereto, and which do not create additional legal obligations.

**Administrative investigation:** Any inspection, check or other measure undertaken by OLAF in relation to internal or external investigations, with a view to fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union and to establish, where necessary, the irregular nature of the activities under investigation; those investigations shall not affect the powers of the competent authorities of the Member States to initiate criminal proceedings.

**Administrative penalty:** Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

- payment of an administrative fine;
- payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;
- total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

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2 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests
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- exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;
- temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme;
- the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released; and/or
- other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council.

OLAF is an administrative and investigative service. It cannot impose penalties when it identifies misconducts and can only recommend what action should be taken by EU or national authorities following its investigations:

**AFCOS**: The anti-fraud coordination service designated by each Member State to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office.

**Anti-Fraud Information System (AFIS)**: The Anti-Fraud Information System (AFIS) is an umbrella term for a set of anti-fraud applications operated by OLAF's policy Directorate under a common technical infrastructure aiming at: (1) the timely and secure exchange of fraud-related information between the competent national and EU administrations; (2) storage and analysis of relevant data. The AFIS Project encompasses two major areas: • mutual assistance in customs matters; (3) irregularities management.

**Amounts to be recovered according to OLAF's estimation**: EU expenditure identified during an investigation or coordination case as having been unduly spent which is to be retrieved from beneficiaries, national managing authorities or paying agencies.

**Amounts prevented from being unduly spent**: EU expenditure identified during investigation or coordination cases which were prevented from being unduly spent

**Authorisation**: The authorisation is the permission granted by the Director-General to members of the investigation unit or other member of OLAF staff or expert to allow them to carry out or assist in the investigative activities.

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Case: Framework within which information of possible investigative interest is treated by OLAF; including the selection and investigation of such information, and the monitoring of implementation of recommendations concerning such information

Coordination (of investigative activities): Operational activities undertaken jointly between OLAF and its partners relating to administrative investigations.

Cooperation (around Fight Against Fraud): Partnership codified into an agreement and or an arrangement setting out the framework for specific activities to be undertaken jointly in specific areas encompassing but not necessarily related to the coordination of investigative activities.

Embezzlement: the stealing or inappropriate channelling of money/assets, e.g.:
- involves property belonging to another;
- entrusted to them due to position or otherwise (i.e. not just restricted to public officials); and
- converted to their own use or otherwise embezzled/misappropriated.

External investigations: Administrative investigations carried out by OLAF in the Member States and, in accordance with the cooperation and mutual assistance agreements and any other legal instrument in force, in third-countries and on the premises of international organisations with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union.

Favouritism/abuse of power: the procurement of contracts to family members, friends, business partners, political contacts etc. in the light of business proceeding, e.g.:
- use of a certain position held;
- person secures benefit for him/herself or another through this position held; and
- failure to disclose favouritism

Fraud: In respect of expenditure, any intentional act or omission relating to:
- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Union or budgets managed by, or on behalf of, the Union;
- non-disclosure of information in violation of a specific obligation, with the same effect

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4 Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities’ financial interests
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- the misapplication of such funds for purposes other than those for which they were originally granted.

In respect of revenue, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Union or budgets managed by, or on behalf of, the European Union;

- non-disclosure of information in violation of a specific obligation, with the same effect;

- misapplication of a legally obtained benefit, with the same effect.

**IBOAs:** EU institutions, bodies, offices and agencies

**Illegal activity:** see irregularity, fraud, money laundering, active/passive corruption, embezzlement, favouritism /abuse of power; abuse of public procurement procedures.

**Investigative Policy Priorities:** Investigative Policy Priorities (IPP) are adopted on an annual basis by the OLAF’s Director General within the context of the Annual Management Plan and set out the policy criteria for the opening of investigations or coordination cases.

**Internal investigations:** Administrative investigations carried out by OLAF within the EU institutions, bodies, offices and agencies for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union.

**Irregularity**\(^5\): infringement of a provision of EU law resulting from an act or omission by natural or legal entities, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the EU, or by an unjustified item of expenditure.

**Irregularity Management System (IMS)**\(^6\): it is a system which receives communications on irregularities from Member States and candidate countries.

**Financial interests of the Union**\(^7\): this include revenues (e.g. agricultural levies, sugar contributions, customs duties), expenditures ((e.g. staff costs, subsidies, aid,

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\(^5\) Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests


\(^7\) Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing
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direct payment) and assets (e.g. movables, immovables, EIB bonds) covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them.

**Legal entity concerned:** Legal or natural person suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by the Office.

**Money laundering:** Conduct that consists of:

- The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity; and
- The participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

**Opinion:** advice on case-related matters provided by the Investigation Selection and Review Unit to the Director-General, or by the Supervisory Committee.

**Passive corruption:** the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the Union financial interests.

**Procedural guarantees:** necessary measures to ensure that the right of all persons involved in an investigation are respected and afforded to the legal entity concerned (i.e. right to information on rights, presumption of innocence in the communication on legal entities, right to avoid self-incrimination, access to interview records, opportunity to comment on facts concerning the legal entity concerned, confidentiality of the investigations conducted, data protection rules).
Recommendation: proposals made by the Director-General for action to be taken by relevant EU institutions, bodies, offices, agencies or competent authority of Member States, on the basis of the findings of the OLAF investigation case.

Supervisory Committee: Governance body that regularly monitors the implementation by the Office of its investigative function, in order to reinforce the Office’s independence in the proper exercise of the competences conferred upon it by the Regulation (e.g. monitor developments concerning the application of procedural guarantees and the duration of investigations; address to the Director General opinions, provide recommendations on recommendations the resources needed to carry out the investigative function of the Office, on the investigative priorities of the Office and on the duration of investigations.

Suspicion of fraud: Investigations may be opened when there is a sufficient suspicion of fraud (see definition above), which may be based on information provided by any third party or anonymous information, that there has been fraud, corruption, or any other illegal activity affecting the financial interests of the Union.
Executive summary

In support of the European Commission’s evaluation report, ICF, an independent consultancy, was contracted to conduct an Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). This is ICF’s Final Report.

Regulation 883/2013 was adopted with the objectives to: improve the effectiveness, efficiency and accountability of OLAF while safeguarding its independence; to strengthen the procedural guarantees and fundamental rights of persons subject to investigation; to strengthen cooperation with Member States, EU institutions, bodies, offices and agencies (IBOAs), third countries and international organisations; and to reinforce the governance of OLAF.

Purpose of the evaluation

The purpose of the evaluation is to assess: the application of the key elements of Regulation 883/2013; the extent to which the objectives have been met and remain relevant; and the operation of the Regulation in the context of an evolving anti-fraud landscape and whether there is a need to amend it. The evaluation assesses the application of Regulation 883/2013 – it does not evaluate OLAF and its performance.

The evaluation is required by Article 19 of Regulation 883/2013, which provides that, by 2 October 2017, the European Commission shall submit to the European Parliament and the Council an evaluation report on the application of this Regulation. The Commission’s report shall be accompanied by an opinion of the Supervisory Committee which shall state whether there is a need to amend the Regulation. This report was prepared by an external contractor in support of the Commission’s report.

Methodology

The evaluation focuses on five areas – effectiveness and efficiency in the application of key elements of the Regulation, coherence and relevance of the Regulation to accomplish its task and in the context of anti-fraud policies and subsequent developments, and the future outlook of the Regulation considering the application of the Regulation and current policy proposals.

While the criterion of EU added value is considered as addressed given the European nature of OLAF’s mandate, it is assessed in the light of future policy and legal developments in the field of the protection of the EU’s financial interests under the “Future outlook” evaluation questions.

An evaluation framework was developed to operationalise the evaluation criteria and questions by using judgement criteria, indicators and means of verification. The following research tasks were deployed to gather the evidence necessary to answer the evaluation questions: desk research to collect, structure and analyse all relevant documentation and data; stakeholder consultations (interviews; survey; workshops; conferences); and case studies to further deepen the insights into key findings.

The evidence collected was used to run the following analytical exercises: descriptive qualitative/quantitative analysis involving data and secondary sources of evidence; legal analysis of provisions of the Regulation and relevant legal instruments; contribution case studies to form the basis for the contribution analysis; and stakeholder consultation analysis (interview topic guides and survey data).

A number of challenges arose through the course of the evaluation which impacted the nature and extent of the analysis that could be undertaken and the strength of the conclusions drawn. First, the lack of disaggregated case-level data prevented benchmarking and advanced quantitative analysis from being undertaken as originally planned (with a greater emphasis on qualitative data and analysis). Second, it proved challenging to limit the length/detail of the stakeholder consultation tools (interview topic guides and survey questionnaire) which had the following impacts: (a) the
launch of the stakeholder consultation activities (online survey and stakeholder interviews) was delayed; (b) the duration of the stakeholder consultation activities was longer than originally planned; and (c) triangulation and synthesis of results in some areas was based on a small number of responses. Despite this, all planned interviews were completed and the response rate to the online survey was positive. Third, the results of the survey analysis may suffer from a slight positive bias given around one-third of respondents were OLAF staff. To mitigate this risk, results are reported by stakeholder type throughout the report. In summary, a combination of the mitigating actions taken and the diversity of the evidence gathered and analysis undertaken (not overly reliant on one approach over another) helped to ensure sound evaluation conclusions.

**Evaluation findings**

The evaluation findings presented below are structured according to the evaluation questions from the Terms of Reference (ToR) for this evaluation study.

**Effectiveness**

**Extent to which the specific objectives of Regulation 883/2013 have been met so far**

The following evaluation findings on effectiveness are structured around the specific objectives of Regulation 883/2013 as set out in the ToR for this evaluation study.

**Enhancing the effectiveness and efficiency of OLAF’s investigative activity, including by introducing criteria for the opening and conduct of OLAF’s investigations**

OLAF’s case selection activity (as measured by data on selection results – number of cases opened and the number of cases dismissed) has increased since the introduction of Regulation 883/2013 and the stakeholders consulted for this evaluation suggested that OLAF’s Investigation Selection and Review Unit (ISRU) helped to drive efficiencies through the reduced time taken to reach case selection decisions.

Despite some suggestions from stakeholders (and a 2014 Supervisory Committee opinion) that the ISRU lacked the necessary expertise and specialisation for making case selection decisions, this evaluation finds no evidence that the experience and expertise of case selectors, and/or the model of engagement between selectors and investigators, needs improving.

The case selection criteria introduced by Regulation 883/2013 were used to guide selection decisions, although the Regulation could provide further clarity as to whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions, whether the selection criteria should be weighted equally/differently and the extent of the OLAF Director-General’s discretion vis-à-vis the selection criteria. Further, the basis on which case selection criteria had been applied in reaching case selection decisions was not always clear to external stakeholders. Regarding the role of the Investigation Policy Priorities (IPPs) in case selection decisions, the lack of specificity in Regulation 883/2013 regarding how the IPPs should be applied to case selection decisions in practice may enhance the effectiveness of the Regulation if it provides the ISRU with additional flexibility to convert a potential dismissal decision (based on an assessment of incoming information against the other selection criteria) into an opening decision if, in doing so, this promotes the financial interests of the EU. In this context, there may be a case for leaving the Regulation unchanged and not specifying more clearly how the IPPs should be applied to case selection decisions.

**Investigative tools and practices** are at the core of OLAF’s investigative activity but have the potential to further enhance the effectiveness and efficiency of OLAF’s investigative activity if current shortcomings are addressed, including:
• References to national rules and practices in the context of OLAF’s use of on-the-spot checks – this can hinder OLAF’s ability to use on-the-spot checks as an investigative tool consistently across Member States.

• Ambiguity surrounding digital forensic operations under different scenarios involving a mix of private devices (laptops, phones, etc.) and organisational data – this can hinder OLAF’s ability to gather digital forensic evidence as part of its investigations.

• Practical difficulties, that could create potential inefficiencies in the investigative process, to interview a person concerned or a witness identified during an on-the-spot check and/or inspection of premises given the GIP provisions and internal rules requiring prior authorisation for an interview and the procedural guarantees provided in the Regulation, in particular as regards the prior notice for an interview. In addition, there is a lack of clarity surrounding the difference between an interview and a statement.

• Ambiguity surrounding the legal status of precautionary measures – this may deter relevant authorities from taking precautionary measures.

• Ambiguity surrounding the process and procedures associated with coordination cases – this may create inefficiency in terms of OLAF’s role in such cases.

• Lack of clarity regarding MEPs’ immunity, as well as the process by which the lifting of this immunity could be requested. Further, a lack of clarity regarding OLAF’s powers concerning Accredited Parliamentary Assistants.

Finally, in terms of recommendations and follow-up, evidence on the quality and comprehensiveness of OLAF’s final reports is mixed. Despite this, in principle at least, a combination of the additional detail provided by Regulation 883/2013 (both directly and indirectly via the GIPs) on the required scope/content of OLAF reports and the introduction of the legality checks is likely to have had a positive impact on the overall quality of OLAF reports and recommendations. Stakeholders suggested that the sometimes disproportionately high levels of recoveries recommended by OLAF is a factor that has a negative influence on the nature and extent of follow-up to financial recommendations. OLAF recently introduced adopted a set of ‘Instructions on drafting Financial Recommendations and related sections of the Final Report’, which are expected to make a difference. These Instructions also make provision for OLAF to collaborate with stakeholders in relation to improving the quality of financial recommendations. In relation to follow-up to judicial recommendations, a common issue raised via the stakeholder consultation relates to the admissibility of OLAF’s investigation evidence, for which stakeholders noted that the quality and admissibility of an OLAF report depends on the degree to which OLAF respects Regulation 883/2013 and the national legislation of Member States.

Strengthening the procedural guarantees of individuals subject to investigation

Provisions on procedural guarantees introduced by Regulation 883/2013 have clearly strengthened the procedural guarantees of individuals subject to investigation.

In general, the procedural guarantees introduced by Article 9 of Regulation 883/2013 reflect (and codify/clarify) to a large extent existing rights and guarantees under EU law. Given the role of OLAF reports in criminal proceedings, the rights/guarantees under existing EU law which are reflected in Article 9 are considered proportionate.

However, a number of aspects of Regulation 883/2013 and the GIPs related to procedural guarantees are unclear and/or inconsistent with one another and would benefit from revision. These relate primarily to the opportunity to comment under the Regulation and how this – and its deferral – should work in practice.

Further, aspects of Article 9 specific to Regulation 883/2013 (such as the period of prior notice to be given to persons concerned in advance of an interview) are arguably
disproportionate in relation to their intended objective (and the consequent impact on investigative procedures/durations) and could benefit from revision.

**Improving cooperation and information exchange with Member States**

Provisions introduced by Regulation 883/2013 (especially in relation to the AFCOS) have helped to improve the nature and extent of cooperation between OLAF and Member States. Stakeholders and survey respondents cited a number of benefits arising from this improved cooperation and exchange of information, including reduced investigation duration, increased criminal investigations and prosecutions, increased recovery of misused public funds and increased deterrence.

Despite this, there is scope for further improvements in the legal framework, in particular by specifying minimum standards in terms of the role and profile of the AFCOS in facilitating cooperation and the exchange of information with OLAF. The lack of specificity in Regulation 883/2013 means that there is little to no consistency in the size, profile and powers of the AFCOS, meaning that OLAF does not receive the same level and nature of support in each Member State. In addition, there is scope for the Regulation to specify clearly the relevance of the AFCOS’ role in facilitating effective cooperation and exchange of information in the context of internal investigations.

More broadly, Regulation 883/2013 appears to have impacted positively on the nature and extent of cooperation with national authorities (especially judicial authorities) given there is evidence to suggest that cooperation has improved and the reason cited by a number of stakeholders is the existence of Regulation 883/2013 (as it places a legal obligation on national authorities to cooperate).

**Strengthening cooperation with EU institutions, bodies, offices and agencies**

Regulation 883/2013 appears to have helped strengthen cooperation and information exchange between OLAF and EU IBOAs, including via administrative arrangements. However, this impact could have been felt more evenly had these administrative arrangements been in place with all EU IBOAs and had there been greater consistency among the administrative arrangements already in place. However, there is little evidence to conclude whether the Regulation helped to strengthen cooperation with Europol and Eurojust (especially in the case of Europol given new administrative arrangements are still being developed and this appears to have had a temporal impact on cooperation).

**Strengthening cooperation with third countries and international organisations**

Provisions introduced by Regulation 883/2013 (especially in relation to administrative arrangements with third country authorities and international organisations) have helped to improve the nature and extent of cooperation between OLAF and third countries / international organisations. However, there is scope for further improvements in the legal framework, specifically by clarifying that administrative arrangements are not a prerequisite for cooperation and the exchange of information between OLAF and third countries / international organisations.

**Reinforcing the governance of OLAF**

There is little evidence to suggest that Regulation 883/2013 has reinforced the governance of OLAF in relation to the Supervisory Committee. Regulation 883/2013 has left open to interpretation the Supervisory Committee’s mandate/role and this, in turn, has generated a degree of confusion given the different interpretations and perceptions (by almost all stakeholders, including the Supervisory Committee and OLAF) of the Supervisory Committee’s role.
Extent to which different components of the Regulation have contributed to achieving the specific objectives of Regulation 883/2013 and to improved protection of EU financial interests

The contribution of the different components of Regulation 883/2013 to its specific objectives is summarised above to a large extent, at least in a qualitative sense (as it is not possible to quantify the impact of different components of Regulation 883/2013 on particular outcomes, such as recoveries, indictments, etc.). The lack of disaggregated/granular data means it is not possible to link outcomes (such as recoveries, indictments, etc.) to specific investigations or specific provisions under the Regulation, although the findings from the contribution analysis provide some evidence of the links between provisions of the Regulation and outcomes, while data on recoveries, prosecution, etc. provide some additional contextual evidence.

External factors beyond the influence of OLAF (including the follow-up responsibilities) that have contributed to or influenced achievement of Regulation 883/2013 objectives

Two significant factors which OLAF can directly influence but not control that have influenced the achievement of the Regulation’s objectives are: (i) the ability and willingness of relevant parties to follow-up on OLAF’s recommendations; and (ii) the ability and willingness of relevant parties to take precautionary measures during the course of an investigation.

For each of these factors, OLAF is able to influence the ability of relevant parties to follow-up and act upon OLAF’s recommendations (including recommendations to take precautionary measures) based on the quality, accuracy, completeness, proportionality and feasibility of its final reports and recommendations. However, OLAF is not able to control the willingness of relevant parties to act.

Extent to which the legal instruments contained in Regulation 883/2013 provide OLAF with sufficient tools to accomplish its mandate

OLAF’s investigative powers and tools under Regulation 883/2013 are largely unchanged from those established by Regulation 1073/1999. In principle, they provide OLAF with sufficient tools to accomplish its mandate, subject to the shortcomings identified above being addressed.

Efficiency

Extent to which implementation of Regulation 883/2013 impacted on OLAF’s resources, the use of those resources and the resources of other actors

The operational efficiency of the selection phase and of the investigation process has greatly increased under Regulation 883/2003 compared to the period prior to its implementation. The volume of cases selected, opened and closed increased without leading to significant increases in the number of investigative staff and or in the budgetary allocation of the Office. The higher productivity might have been achieved at the expense of the expected impacts of the Regulation in a context where the amounts of the monies recommended for recovery increased slightly although a definitive assessment of the efficiency of the Regulation in generating the intended impacts could not be made. Factors limiting the efficiency of the Regulation included the level of cooperation and information exchange between OLAF and its partners, with a particular mention for IBOAs. Factors limiting the efficiency of the Regulation included the resource implications of complying with the procedural guarantees set-out in the Regulation as well as the lack of resources, capacity and willingness of some Member States to cooperate with the Office. In addition, the mandate of the Supervisory Committee as defined by Regulation 883/2013 was seen as not conducive to its efficiency because of its ambiguous interpretation.
Extent to which Regulation 883/2013 tools for conducting investigations, their follow-up and the successful cooperation with other entities are efficient

OLAF powers and tools are generally considered to be clear and sufficient. Inefficiencies mainly stem from references to national rules in case of on-the-spot checks and inspections in Member States (resulting from Regulation 883/2013's reference to Regulation 2185/96 which subsequently refers to the legislation of the Member States rather than defining/providing its own procedure for on-the-spot checks and inspections) and from the time taken in obtaining the authorisation from national authorities to exercise these powers. This is especially the case for on-the-spot checks which are deemed by the vast majority of interviewees as too long to organise due to the notification of national authorities and OLAF’s internal approval procedures (which may be reflective of OLAF’s approach to the implementation of Regulation 883/2013 rather than the Regulation itself).

Coherence

Extent to which Regulation 883/2013 provides OLAF with a coherent legal framework to accomplish its tasks

The key elements of the Regulation provide, overall, a coherent framework for OLAF investigative tasks. However, inconsistencies may stem from the combined application of the Regulation, the Guidelines on Investigation Procedures (GIPs) and references in the Regulation to national laws/practices.

A majority of stakeholders consulted for his evaluation noted there is scope to improve the coherence between:

- Regulation 883/2013 and the more practical guidance provided in the GIPs: stakeholders noted instances where the GIPs are more precise on certain procedures than the Regulation, which may lead to an inconsistent application of the Regulation in practice.

- Regulation 883/2013, Regulation 2185/96 and Regulation 2988/95: the lack of harmonised terminology and concepts in Regulation 2185/96 and Regulation 2988/95, as well as references in Regulation 883/2013 to national rules and practices, may lead to incoherent practices and divergent interpretations of OLAF’s investigative tools in external investigations.

- The procedural guarantees under Article 9 of Regulation 883/2013 and the administrative nature of OLAF’s investigations. While the introduction of provisions on procedural rights within the Regulation may have improved the credibility, transparency, accountability and quality/admissibility of OLAF’s investigations, the majority of stakeholders suggested that Article 9 introduced a set of rights and safeguards that are disproportionate to the administrative nature of OLAF’s investigations. Given the role of OLAF reports in criminal proceedings, the rights/guarantees under existing EU law which are reflected in Article 9 are considered by ICF to be proportionate, although they may not be seen as coherent if viewed purely through the lens of an administrative investigation (without due regard to the potential role of OLAF’s investigations in criminal proceedings).

- External controls and complaint mechanisms: the number of external controls (for example by the EDPS, the EU Ombudsman and the CJEU) and the internal complaint mechanisms creates overlaps and duplications in the scope of their control and lack coordination. Stakeholders suggested finding a mechanism to ensure a hierarchy and better consistency between the scope of each of these control mechanisms.
Extent to which Regulation 883/2013 fits into wider EU policies and policy developments

Evidence related to the key elements of the Regulation indicate that potential overlaps may appear between the mandate of the Supervisory Committee and the proposal on the establishment of a Controller of Procedural Guarantees. The future relationship between EPPO and OLAF is in part governed by wording of Article 101 of the proposed EPPO Regulation to avoid any overlaps between the mandates of the two Offices.

Relevance

Extent to which the specific objectives of Regulation 883/2013 proved to be relevant

Evidence related to the relevance of Regulation 883/2013’s specific objectives of effective and efficient OLAF investigations, strong procedural guarantees, improved cooperation with Member States, EU IBOAS and third countries and reinforcing OLAF governance shows that they remain relevant for the fight against fraud and protecting the financial interests of the EU.

Extent to which the tools and control mechanisms introduced by Regulation 883/2013 proved to be relevant to achieve the specific objectives

Overall, the evidence and analysis indicates that Regulation 883/2013 tools and control mechanisms have proven relevant to achieve the Regulation’s specific objectives, with some exceptions. Specifically, provisions in the Regulation on the cooperation and exchange of information with Member States (for example, via the AFCOS) and on certain investigative tools (for example, forensic collection of data) could be adapted to the changing landscape of cross border crime and technical progress to ensure they remain relevant. The provisions in the Regulation regarding the procedural rights and safeguards surrounding persons concerned remain relevant; a number of stakeholders suggested that a Controller of Procedural Guarantees would be an unnecessary additional layer of control and not relevant in view of the existing control mechanisms.

Extent to which the specific objectives of Regulation 883/2013 are relevant in the context of wider EU policies and current policy developments

OLAF’s investigative tools and powers will remain relevant and complementary to the actions of a future EPPO in the EU anti-fraud landscape.

Future outlook

In the current institutional and legal framework, and in the light of current policy developments, if shortcomings regarding the protection of the financial interests of the Union are identified in Regulation 883/2013 or its application, how could they be addressed?

When it comes to OLAF’s role in fraud prevention, most of the elements informing the authorising officer in order for them to initiate a procedure under the Early Detection and Exclusion System (EDES) are communicated by OLAF once the investigation is closed, in order to preserve the confidentiality of investigations. This may lead to important but largely inevitable delays in identifying and taking appropriate measures against unreliable economic operators.

The creation of a Controller of Procedural Guarantees attracts contradicting opinions. On the one hand, some stakeholders argue that the creation of an independent review authority would lead to a better protection of procedural guarantees of persons concerned in OLAF investigations. On the other hand, several review mechanisms are already in place and creating an additional one may lead to confusion and contradicting solutions.
In an evolving anti-fraud policy landscape, questions may be raised as to whether OLAF’s mandate should evolve too. Currently, OLAF’s investigative mandate is limited to fraud, corruption and other illegal activities affecting the financial interests of the Union. However, OLAF investigative staff considered that OLAF’s experience, network and expertise could also be used in other areas (possibly including other types of fraud that do not concern the PIF, such as counterfeit goods violating health and safety regulations).

**Extent to which Regulation 883/2013 should be reviewed in the new institutional context emerging from the negotiations on the EPPO Regulation**

While the provisions of the draft EPPO Regulation allow to envisage the main modalities of the cooperation between the EPPO and OLAF, some areas remain unclear and may require further clarification, for instance via amendments to Regulation 883/2013. OLAF will remain relevant in the field of PIF due to its substantive mandate, which completes the EPPO’s mandate; its place in the future institutional setting where not all Member States will participate in the EPPO; and the procedural rules applicable to EPPO investigations, which enable the EPPO to rely on OLAF’s experience and expertise in the field of PIF. In principle, the adoption of the PIF Directive will have little impact over OLAF’s mandate. However, since the PIF Directive will define the competence of the EPPO, a combined assessment of the two bodies’ material competence enables to identify the domains in which OLAF’s and the EPPO’s actions may be complementary. One of the EPPO’s expected consequences is to avoid the duplication of investigations (at criminal and administrative level) in PIF cases. For this reason, OLAF will not be able to conduct a parallel administrative investigation on the same facts as an EPPO investigation. The EPPO will also be able to refer a case back to OLAF in case it is not competent or dismisses the case. Article 101 of the draft EPPO Regulation only foresees cases where all the Member States involved participate in the EPPO. However, even in such cases, debates remain regarding the role to be played by OLAF in EPPO investigations. Article 101 of the draft EPPO Regulation defines OLAF’s role as supportive of EPPO’s investigations. However, some stakeholders have argued in favour of a more substantial role to be played by OLAF in criminal investigations. However, this could only be achieved by aligning procedural guarantees with guarantees offered in criminal investigations. Questions also remain regarding the admissibility of evidence collected by OLAF before the EPPO, which may need to be clarified via amendments to Regulation 883/2013.

**Recommendations**

The principles guiding the recommendations that follow are that Regulation 883/2013 should provide:

- Clear and sufficient administrative investigative powers and tools that can be applied consistently regardless of whether the investigation is internal or external.
- Clear obligations on EU IBOAs, Member State authorities, third country authorities and international organisations to assist the Office in the conduct of investigations and cooperate effectively.
- An appropriate balance between the rights of persons concerned and witnesses and the administrative investigative competences of OLAF in accordance with the Charter of Fundamental Rights.
- Clear roles and responsibilities for the Supervisory Committee in safeguarding the independence of OLAF and monitoring the Office’s investigative activities.

The evaluation recommends the following improvements to overcome the shortcomings evidenced within this report.
Opening investigations

**Recommended changes to Regulation 883/2013**

- **Recommendation 1** – Revise Article 5 (Opening of investigations) to clarify: (a) whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions; (b) whether the selection criteria should be weighted equally or differently; and (c) the extent of discretion of the OLAF Director-General vis-à-vis the selection criteria.

**Recommended non-regulatory changes**

- **Recommendation 2** – Revise Article 7 of the GIPs to ensure consistency with the language in Regulation 883/2013 regarding communicating case selection decisions to those involved in requesting the investigation and those who provided incoming information.

- **Recommendation 3** – Revise Article 5 of the GIPs to confirm that OLAF only use the Investigative Policy Priorities (IPP) where the case selection criteria set out in Regulation 883/2013 would suggest a dismissal of the case.

- **Recommendation 4** – The duration of the case selection process (alongside the duration of investigations) should be systematically monitored on a case-by-case basis (using anonymised meta data) to measure the effect of the case selection process on the duration of investigations. This will empower the Supervisory Committee to better respond to its monitoring obligations under the Regulation, notably on the duration of the investigations and allocation of resources.

Investigative tools and powers

**Recommended changes to Regulation 883/2013**

- **Recommendation 5** – Revise Article 3 (External investigations) to enable OLAF to conduct on-the-spot checks and inspections in a similar manner across all EU Member States, regardless of differences in national law and practices. This extends to OLAF’s power to undertake digital forensic operations in a similar manner across all EU Member States.

- **Recommendation 6** – Revise Article 3 (External investigations), Article 4 (Internal investigations), Article 6 (Access to information in databases prior to the opening of an investigation) and ‘Whereas clause 14’ to confirm OLAF’s powers to undertake digital forensic operations where organisational information/data is stored on private devices/accounts (clarifying whether and how this interferes with the right to privacy).

- **Recommendation 7** – Revise Article 4 (Internal investigations) to clarify OLAF’s powers with respect to Accredited Parliamentary Assistants (APAs).

- **Recommendation 8** – Revise Article 6 (Access to information in databases prior to the opening of an investigation) to ensure equivalence of access to information in databases of EU IBOAs and Member States. In addition, Article 6(1) should be amended to remove reference to the ‘indispensable’ nature of the relevant information in databases to which OLAF shall have the right of access given this may be overly restrictive in practice and, in any case, is arguably redundant and/or inconsistent with the reference within Article 6(1) to the Office respecting ‘the principles of necessity and proportionality’ in exercising the right of access.
Cooperation and information exchange

**Recommended changes to Regulation 883/2013**

- **Recommendation 9** – Revise Article 3 (External investigations) to specify a minimum requirement for the competencies and responsibilities of the anti-fraud coordination services (AFCOS) in all Member States. Similarly, Article 4 (Internal investigations) should be revised to include a reference to the AFCOS (of a comparable/similar nature to the reference within Article 3(4)) to denote the relevance of the AFCOS role in facilitating effective cooperation and exchange of information in the context of internal investigations.

- **Recommendation 10** – Revise Article 14 (Cooperation with third countries and international organisations) to confirm that the exchange of operational, strategic or technical information can take place in the absence of an administrative arrangement.

**Recommended non-regulatory changes**

- **Recommendation 11** – At least six factors conducive to efficiency in cooperating with OLAF partners were identified (see chapter on efficiency). Such factors should be codified in existing and future cooperation arrangements which were found, in themselves, to enhance the effectiveness and efficiency of the cooperation between OLAF and its partners.

Procedural rights and safeguards

**Recommended changes to Regulation 883/2013**

- **Recommendation 12** – Revise Article 9 (Procedural guarantees) to:
  - Enable OLAF to conduct an on-the-spot check and/or inspection of premises and interview a person concerned or witness identified during an on-the-spot check and/or inspection (in the absence of prior notice being provided).
  - Clarify whether a person concerned can agree to reduce the notice period for an interview to less than 24 hours.
  - Reflect/capture the additional detail and clarity on procedural guarantees as specified within the GIPs (and as clarified according to the non-regulatory recommendations set-out below).

- **Recommendation 13** – Revise Article 2 (Definitions) and/or Article 9 (Procedural guarantees) to ensure consistency in the basis on which a person concerned is defined (i.e. ‘evidence’, or ‘suspicion’).

**Recommended non-regulatory changes**

- **Recommendation 14** – Revise Article 16 of the GIPs to ensure the language in the GIPs is consistent with the language in Regulation 883/2013 regarding the use of past statements where a person concerned was previously interviewed as a witness.

- **Recommendation 15** – Clarify within the GIPs the following issues related to Article 9 of Regulation 883/2013:
  - Where comments on the facts are received by OLAF from a person concerned, whether additional investigative acts could/should be undertaken as necessary. [NOTE: to the extent that this would suggest a continuation of an existing investigation, an alternative recommendation would be to amend Article 9(4) so that it does not specify that the opportunity to comment is only provided once the investigation is closed]. Where these additional investigative acts reveal new findings relating to the person concerned, that
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person should be given the opportunity to comment on the new findings before conclusions are reached.

- Whether a person concerned should be given the opportunity to comment in cases that are closed where no evidence has been found against the person concerned indicating the existence of a fraud, corruption or other illegal activity.

- What form the ‘summary of the facts’ should take.

- How to define/classify ‘duly justified cases’.

- Whether ‘deferral’ (in the context of the deferral of the opportunity to comment) should be interpreted as ‘cancellation’ or ‘avoidance’ and, if not, how the obligation should eventually be discharged.

- **Recommendation 16** – Regular monitoring of the procedural rights afforded using anonymised case level data is recommended in order to assess their impact on the efficiency of the investigative function. Indicators linking the type of safeguards put in place and the length of the case, the follow-up actions at national level or the admissibility of the evidence of an OLAF case in judicial processes at national level would help OLAF in its reporting duties and in making decisions on the best use of OLAF resources at case selection stage. This would also allow to better respond to monitoring obligations concerning the application of procedural guarantees under the Regulation.

**Supervisory Committee**

**Recommended changes to Regulation 883/2013**

- **Recommendation 17** – Revise Article 15 (Supervisory Committee) to
  - Clarify whether the main role and mandate of the Supervisory Committee is to monitor and supervise OLAF’s investigative function (to ensure its compliance with Regulation 883/2013) or to support and safeguard the independence of OLAF.
  - Confirm that the Supervisory Committee has no mandate/role in monitoring individual cases (provided for under Article 17(7) as discharged ex-ante by the ISRU (legal review) and ex-post by the Legal Advice Unit (complaints)).

**Recommended non-regulatory changes**

- **Recommendation 18** – Implement a monitoring system relying on the analysis of anonymised case data to allow the Supervisory Committee to better monitor the duration of investigations and the drivers of investigation durations.

- **Recommendation 19** – A regular monitoring function and system based on core indicators (e.g. duration of investigations, use of resources, safeguard afforded) could help the Supervisory Committee in performing their monitoring duties more efficiently, i.e. saving time and efforts to the Supervisory Committee secretariat and Members of the Supervisory Committee.

**Future Outlook**

**Recommended changes to Regulation 883/2013**

- **Recommendation 20** – Revise Regulation 883/2013 to facilitate a synergetic and complementary relationship between OLAF and the future EPPO, covering:
  - the procedure to be followed in cases where an ongoing OLAF investigation uncovers indications that the facts may fall under the EPPO’s mandate;
  - modalities of exchanges of information between EPPO and OLAF;
OLAF’s duties and procedure in situations where the EPPO needs to transfer information to OLAF as defined in Recital 105;

- the procedure for judicial follow-up by the EPPO to such investigations could be included in Regulation 883/2013; and

- the conditions under which the EPPO may integrate evidence collected by OLAF in its case so that it is admissible before national criminal courts.

**Recommendation 21** – Revise Regulation 883/2013 to facilitate OLAF’s cooperation with the EPPO on VAT-related cases, by extending OLAF’s access to VAT-related information (e.g. by granting it access to databases such as Eurofisc and VIES).

**Recommendation 22** – OLAF’s mandate could be redefined to include auxiliary judicial services on behalf of the EPPO. This amendment would need to be accompanied by a revision of Article 9 of Regulation 883/2013 to align procedural guarantees with those applicable in criminal proceedings for such investigative acts.

**Recommendation 23** – Revise Regulation 883/2013 to extend the application of the investigation mandate of OLAF to customs matters and possibly other types of fraud that do not concern the PIF, such as counterfeit goods violating health and safety regulations.

**Recommendation 24** – Revise Regulation 883/2013 to align the provisions on cooperation with Eurojust and Europol with the provisions featured in the two agencies’ respective legal frameworks (once the negotiations on the Eurojust Regulation have resumed).

**Recommended non-regulatory changes**

**Recommendation 25** – A working arrangement between the EPPO and OLAF (Article 99 of the EPPO Regulation) should clarify:

- the criteria to be applied by OLAF to determine whether allegations should be transferred to the EPPO; and

- the case selection process within the EPPO.

**Recommendation 26** – A specific OLAF unit dealing with EPPO relations, either at policy or investigative level, could be created to maintain close contacts with EPPO and carry out its requests.

**Recommendation 27** – The EPPO should sign the Inter-institutional Agreement of 25 May 1999 concerning OLAF internal investigations, which would confer OLAF with investigative powers concerning staff of the EPPO when there are indications that irregularities or offences may have been committed.
Résumé analytique

Le cabinet-conseil indépendant ICF a été chargé de réaliser une évaluation de l'application du règlement n° 883/2013 relatif aux enquêtes effectuées par l'Office européen de lutte antifraude (OLAF), à l'appui du rapport d'évaluation de la Commission européenne. Voici le rapport final d'ICF.

Le règlement n°883/2013 a été adopté avec les objectifs suivants : améliorer l'efficacité, l'efficience et la responsabilité de l'OLAF tout en préservant son indépendance ; renforcer les garanties de procédure et les droits fondamentaux des personnes faisant l'objet d'une enquête ; renforcer la coopération avec les États membres, les institutions, organes et organismes de l'UE, les pays tiers et les organisations internationales ; et renforcer la gouvernance de l'OLAF.

Objectif de l'évaluation

L'objectif de l'évaluation consiste à étudier : l'application des principaux éléments du règlement n° 883/2013 ; le degré de réalisation des objectifs et leur pertinence actuelle ; le fonctionnement du règlement dans le paysage en mutation de la lutte contre la fraude, et s'il est nécessaire de le modifier. L'étude évalue l'application du règlement n° 883/2013 : elle n'évalue pas l'OLAF et ses performances.

Cette évaluation est imposée par l'article 19 du règlement n° 883/2013, qui stipule que la Commission soumettra au Parlement européen et au Conseil un rapport d'évaluation sur l'application de ce règlement avant le 2 octobre 2017. Ce rapport doit être accompagné d'un avis du comité de surveillance qui indique s'il est nécessaire ou non de modifier le règlement. Ce rapport a été élaboré par un prestataire extérieur, à l'appui du rapport de la Commission.

Méthodologie

L'évaluation se concentre sur cinq domaines : efficience et efficacité dans l'application des principaux éléments du règlement, cohérence et pertinence du règlement pour la réalisation de son objectif dans le cadre des politiques antifraudes et de leurs évolutions ultérieures, et perspectives d'avenir du règlement au vu de son application et des propositions politiques actuelles.

Bien que le critère de la valeur ajoutée de l'UE soit considéré comme satisfait, eu égard à la nature européenne du mandat de l'OLAF, il est tout de même évalué à la lumière des politiques et des évolutions juridiques à venir dans le domaine de la protection des intérêts financiers de l'UE, à la section des questions de l'évaluation intitulée « perspectives d'avenir ».

Un cadre d'évaluation a été élaboré afin de rendre pleinement opérationnels les questions et les critères de l'évaluation : il fait appel à des critères de jugement, à des indicateurs et à des moyens de vérification. Les travaux de recherche suivants ont été entrepris en vue de collecter suffisamment de données pour répondre aux questions de l'évaluation : recherches documentaires afin de recueillir, d'organiser et d'analyser l'ensemble des données et des documents pertinents ; consultations des parties prenantes (entretiens, enquêtes, ateliers, conférences) ; et études de cas pour approfondir les constats établis et tirer les conclusions qui s'imposent.

Les données collectées ont été utilisées afin de se livrer aux exercices d'analyse suivants : analyse descriptive qualitative et quantitative faisant appel à des données et à des sources d'information secondaires ; analyse juridique des dispositions du règlement et des instruments juridiques associés ; études de cas sur les contributions afin d'informer l'analyse des contributions ; et analyse de la consultation des parties prenantes (retranscription des entretiens et données issues des enquêtes).

Un certain nombre d'obstacles se sont présentés au cours de l'évaluation, qui ont influencé la nature et la profondeur de l'analyse menée, ainsi que la portée des conclusions tirées. Tout d'abord, le manque de données ventilées à l'échelle des
dossiers a empêché la réalisation des études comparatives et des analyses quantitatives approfondies initialement prévues (l'analyse et les données qualitatives ont par conséquent été privilégiées). Deuxièmement, il s'est avéré délicat de limiter la longueur ou le degré de détail des outils de consultation des parties prenantes (guides thématiques d'entretien et questionnaire d’enquête), ce qui provoqua les retombées suivantes : (a) le lancement des activités de consultation des parties prenantes (enquête en ligne et entretiens des acteurs) a été retardé ; (b) la durée des activités de consultation des parties prenantes fut plus longue que ce qui était initialement prévu ; et (c) la triangulation et la synthèse des résultats se sont dans certains domaines appuyées sur un nombre réduit de réponses. Tous les entretiens prévus furent malgré assurés, et le taux de réponse à l’enquête en ligne a été positif. Troisièmement, les résultats de l'analyse de l'enquête sont susceptibles de trahir une certaine partialité positive, étant donné qu'un tiers des personnes interrogées environ sont des membres du personnel de l'OLAF. Les résultats sont présentés par type d'acteur tout au long du rapport afin d’atténuer ce risque. En résumé, l'association des mesures de précaution adoptées d’une part, et de la diversité des informations collectées et des analyses conduites d’autre part (avec des approches qui ne dépendent pas excessivement les unes des autres) a participé à garantir la validité des conclusions de l'évaluation.

Résultats de l'évaluation
Les résultats de l'évaluation présentés ci-après sont organisés conformément aux questions d'évaluation qui figurent dans le mandat de cette étude.

Efficacité
Dans quelle mesure les objectifs spécifiques du règlement n° 883/2013 ont-ils été atteints à ce jour ?

Les résultats de l'évaluation relatifs à l'efficacité sont organisés ci-dessous autour des objectifs spécifiques du règlement n° 883/2013, tel que stipulé dans le mandat de cette étude d'évaluation.

Améliorer l'efficacité et l'efficience des activités d'enquête de l'OLAF, notamment par l'introduction de critères pour l'ouverture et le déroulement des enquêtes
L'activité de sélection des dossiers de l'OLAF (mesurée grâce aux données relatives aux résultats des sélections : nombre d'affaires ouvertes et nombre d'affaires classées) a augmenté depuis l'introduction du règlement n° 883/2013, et les parties prenantes consultées dans le cadre de cette évaluation estiment que l'unité « Enquête - Sélection & Révision » de l'OLAF a concouru à générer des gains d'efficacité par la réduction du temps consacré à la prise de décision en matière de sélection des dossiers.

Bien que selon certains acteurs (et selon un avis de 2014 du comité de surveillance) l'unité Sélection et révision ait manqué de l'expertise et de la spécialisation nécessaires pour prendre des décisions sur la sélection des dossiers, cette évaluation n'a pas permis d'affirmer que l'expérience et les compétences des agents qui sélectionnent des dossiers ou que le modèle de coopération entre ces agents et les enquêteurs demandent à être améliorés.

Les critères de sélection des dossiers établis par le règlement n° 883/2013 ont été utilisés pour orienter le choix des sélections, même si le règlement pourrait déterminer plus clairement si les critères de sélection forment une liste exhaustive de facteurs à prendre en compte lors des décisions d'ouverture de dossier, s'ils ont un poids égal ou non, ou encore la marge d'appréciation du directeur général de l'OLAF en ce qui concerne ces critères de sélection. Les critères de sélection sur lesquels se sont fondées les décisions relatives à la sélection d'un dossier n'étaient en outre pas toujours bien connus des acteurs extérieurs. En ce qui concerne le rôle des priorités de la politique de l’Office en matière d’enquêtes dans les décisions de sélection des
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dossiers, le manque de spécificité du règlement n° 883/2013 quant à la manière dont ces priorités doivent être en pratique appliquées aux décisions de sélection de dossiers se traduirait par une meilleure efficacité du règlement, dans la mesure où celui-ci accorde plus de flexibilité à l‘unité Sélection et révision, lui permettant de transformer une éventuelle décision de non-lieu (qui repose sur une évaluation de l‘information reçue au regard des autres critères de sélection) en une décision d‘ouverture, sous réserve qu‘une telle démarche soit favorable aux intérêts financiers de l‘UE. Dans ce contexte, il conviendrait peut-être de maintenir le règlement en l‘état, et de ne pas préciser davantage la manière dont les priorités de la politique de l‘Office en matière d‘enquêtes doivent s‘appliquer aux décisions de sélection de dossiers.

Les outils et les pratiques d‘enquête sont au cœur des activités d‘enquête de l‘OLAF, mais seraient susceptibles de gagner et efficacité et en efficacité à condition de combler les lacunes actuelles, notamment :


- L‘ambiguïté qui entoure les opérations technico-légales numériques, pratiquées dans différents scénarios, qui associent des appareils relevant du domaine privé (ordinateurs portables, téléphones, etc.) et des données d‘organisation : cela peut nuire à la capacité de l‘OLAF de collecter des éléments de preuves technico-légales numériques dans le cadre de ses enquêtes.

Des problèmes d‘ordre pratique, susceptibles de générer des pertes d‘efficacité pendant le déroulement de l‘enquête, au moment de mener un entretien avec une personne impliquée ou un témoin identifié lors d‘un contrôle sur place ou d‘une inspection de locaux, problèmes qui découlent du fait que les dispositions des lignes directrices sur les procédures d‘enquête et les réglementations internes imposent une autorisation préalable pour un entretien, mais aussi en raison des garanties de procédure stipulées dans le règlement, liées en particulier à la notification préalable des entretiens. Il existe également une zone de flou au niveau de la différence entre un entretien et une déclaration.

L‘ambiguïté présente autour du statut juridique des mesures conservatoires : cela peut empêcher les autorités compétentes de prendre des mesures conservatoires.

L‘ambiguïté présente autour du processus et des procédures qui touchent aux dossiers de coordination : cela peut générer des pertes d‘efficacité pour ce qui relève du rôle de l‘OLAF dans de tels dossiers.

Manque de clarté au sujet de l‘immunité des députés européens, et du processus au moyen duquel la levée de cette immunité peut être imposée. Manque de clarté également au niveau des pouvoirs de l‘OLAF en ce qui concerne les assistants parlementaires accrédités.

ailleurs que l'OLAF collaborera avec les parties prenantes à l'amélioration de la qualité des recommandations financières. En ce qui concerne le suivi des recommandations judiciaires, un problème souvent mentionné dans les consultations des parties prenantes a trait à l'admissibilité des éléments de preuve issus des enquêtes de l'OLAF. Les parties prenantes ont indiqué que la qualité et l'admissibilité d'un rapport de l'OLAF dépendaient de son plus ou moins grand respect du règlement n°883/2013, ainsi que de la législation nationale des États membres.

Renforcer les garanties de procédure pour les personnes physiques faisant l'objet d'une enquête

Les dispositions relatives aux garanties de procédure instaurées par le règlement n° 883/2013 ont manifestement renforcé les garanties de procédures pour les personnes physiques faisant l'objet d'une enquête.

Dans l'ensemble, les garanties de procédure visées à l'article 9 du règlement n° 883/2013 reflètent (et codifient ou clarifient) dans une large mesure les droits et garanties existants en vertu du droit de l'UE. Considérant le rôle des rapports de l'OLAF dans les procédures pénales, les droits et les garanties en vigueur dans le droit de l'UE qui sont reflétés dans l'article 9 sont considérés comme proportionnés.

Un certain nombre d'aspects du règlement n° 883/2013 et des lignes directrices sur les procédures d'enquête qui ont trait aux garanties de procédure restent cependant flous ou incohérents les uns par rapport aux autres, et leur révision serait utile. Ces aspects sont principalement liés à la possibilité de formuler des observations dans le cadre du règlement, et à la manière dont cette opportunité (et son report) est censée se dérouler en pratique.

En outre, certains aspects de l'article 9 liés au règlement n° 883/2013 (notamment le délai de préavis à communiquer aux personnes concernées en amont d'un entretien) sont visiblement disproportionnés par rapport à leur objectif affiché (avec les effets induits sur les procédures et les durées des enquêtes) ; leur révision serait profitable.

Améliorer la coopération et l'échange d'informations avec les États membres

Les dispositions introduites par le règlement n° 883/2013 (en particulier celles liées aux services de coordination antifraude, AFCOS) ont concouru à l'amélioration de la nature et de l'intensité de la coopération entre l'OLAF et les États membres. Les parties prenantes et les personnes interrogées dans le cadre de l'étude ont signalé un certain nombre d'avantages qui découleront de l'amélioration de cette coopération et de cet échange d'informations, notamment une durée d'enquête réduite, une augmentation du nombre d'enquêtes et de poursuites pénales, un recouvrement accru de fonds publics utilisés abusivement, et une plus grande capacité de dissuasion.

Il existe cependant une marge d'amélioration du cadre juridique, en particulier par l'édition de normes minimales en ce qui concerne le rôle et la posture des AFCOS en matière de facilitation de la coopération et de l'échange d'informations avec l'OLAF. Du fait du manque de spécificité du règlement n° 883/2013, il n'y a aucune cohérence (ou peu) dans la taille, la place et les pouvoirs des AFCOS, ce qui signifie que l'OLAF ne bénéficie pas du même niveau et du même type de soutien dans tous les États membres. Il serait de surcroît envisageable que le règlement souligne plus clairement l'importance du rôle des AFCOS en matière de facilitation d’une coopération et d’un échange d’informations efficaces dans le cadre des enquêtes internes.

D'une manière plus générale, le règlement n° 883/2013 semble avoir eu une incidence positive sur la nature et la portée de la coopération avec les autorités nationales (en particulier les autorités judiciaires). Certaines données indiquent en effet que cette coopération s'est renforcée, ce qui, aux yeux de nombreuses parties prenantes, est dû à l'existence du règlement n° 883/2013 (en ceci qu'il fait de la coopération une obligation juridique pour les autorités nationales).

Renforcer la coopération avec les institutions, organes et organismes de l'UE
Le règlement n° 883/2013 semble avoir participé au renforcement de la coopération et de l'échange d'information entre l'OLAF et les institutions, organes et organismes de l'UE, notamment grâce à des arrangements administratifs. Cette incidence se serait toutefois fait sentir de façon plus homogène si ces arrangements administratifs avaient été mis en place avec l'ensemble des institutions, organes et organismes de l'UE, et s'il avait existé une plus grande uniformité parmi les arrangements administratifs déjà en place. Au regard des données disponibles, il est cependant difficile de déterminer si le règlement a favorisé le renforcement de la coopération avec Europol et Eurojust (surtout dans le cas d'Europol, étant donné que de nouveaux arrangements administratifs sont encore en cours de négociation, et que cela a manifestement eu une répercussion sur la coopération en termes de durées).

Renforcer la coopération avec les pays tiers et les organisations internationales

Les dispositions instituées par le règlement n° 883/2013 (en particulier celles liées aux arrangements administratifs conclus avec les autorités de pays tiers et les organisations internationales) ont participé à l'amélioration de la nature et de l'ampleur de la coopération entre l'OLAF et les pays tiers ou les organisations internationales. Il reste néanmoins une marge d'amélioration du cadre juridique, notamment en clarifiant le fait que les arrangements administratifs ne constituent aucunement une condition nécessaire à la coopération et à l'échange d'informations entre l'OLAF et des pays tiers ou des organisations internationales.

Renforcer la gouvernance de l'OLAF

Peu d'éléments suggèrent que le règlement n° 883/2013 a renforcé la gouvernance de l'OLAF en liaison avec le comité de surveillance. Le règlement n° 883/2013 a laissé ouverte à l'interprétation la question du rôle et du mandat du comité de surveillance, ce qui a généré en retour une certaine confusion en raison des interprétations et perceptions divergentes de son rôle (et ce pour pratiquement toutes les parties prenantes, y compris le comité de surveillance lui-même et l'OLAF).

Dans quelle mesure les différents éléments du règlement ont-ils contribué à atteindre les objectifs spécifiques du règlement n° 883/2013 et à améliorer la protection des intérêts financiers de l'UE?

La contribution des différentes composantes du règlement n° 883/2013 à la réalisation de ses objectifs spécifiques est dans une large mesure résumée plus haut, tout au moins d'un point de vue qualitatif (car il n'est pas possible de quantifier l'impact des différentes composantes du règlement n°883/2013 sur des résultats particuliers de type recouvrements, mises en examen, etc.). Le manque de données ventilées ou granulaires empêche de relier les résultats (par exemple recouvrements, mises en examen, etc.) à des enquêtes spécifiques ou à des dispositions spécifiques du règlement. Les conclusions tirées de l'analyse des contributions indiquent néanmoins l'existence de liens entre les dispositions du règlement et les résultats, tandis que les données relatives aux recouvrements, aux poursuites, etc., fournissent des éléments de preuve contextuels supplémentaires.

Facteurs externes hors de portée de l'OLAF (notamment les responsabilités en matière de suivi) qui ont participé à la réalisation des objectifs du règlement n° 883/2013, ou qui ont influencé la poursuite de cet objectif.

Deux facteurs de taille que l'OLAF peut directement influencer, mais non contrôler et qui ont participé à la réalisation des objectifs du règlement sont les suivants : (i) la capacité et la volonté des parties prenantes à entreprendre des mesures de suivi sur recommandation de l'OLAF ; et (ii) la capacité et la volonté des parties prenantes à adopter des mesures conservatoires au cours d'une enquête.

Pour ces deux facteurs, l'OLAF est capable d'influencer la capacité des acteurs concernés à prendre des mesures de suivi et à agir conformément à ses recommandations (notamment d'adopter des mesures conservatoires) grâce à la
Dans quelle mesure les instruments juridiques prévus par le règlement n° 883/2013 dotent-ils l'OLAF des outils suffisants pour l'exécution de son mandat ?

Les outils et pouvoirs d’enquête de l'OLAF qui figurent dans le règlement n° 883/2013 sont globalement similaires à ceux qui avaient été établis par le règlement 1073/1999. Ils confèrent en principe à l'OLAF les moyens suffisants pour l'exécution de son mandat, sous réserve de pallier les carences identifiées plus haut.

Efficience

Dans quelle mesure la mise en œuvre du règlement n° 883/2013 a-t-elle eu une incidence sur les ressources de l'OLAF, sur l'utilisation de ces ressources et sur les ressources d’autres acteurs ?

L'efficience opérationnelle de la phase de sélection et du processus d'enquête s'est nettement améliorée avec le règlement n°883/2003, en comparaison de la période qui a précédé sa mise en œuvre. Le volume de dossiers sélectionnés, ouverts et clos a augmenté sans que ceci entraîne un accroissement significatif du nombre de membres du personnel chargés des enquêtes, ou de l'affectation budgétaire de l'Office. Cette plus grande productivité a peut-être été atteinte aux dépens des effets attendus du règlement, dans un contexte où les montants de recouvrements recommandés avaient légèrement augmenté. Une évaluation définitive de l'efficience du règlement quant à sa capacité à entraîner les répercussions attendues n'a cependant pu être réalisée. Les facteurs de restriction de l'efficience comprenaient le niveau de coopération et d'échange d'informations entre l'OLAF et ses partenaires (tout particulièrement les institutions, organes et organismes de l'UE), les implications financières liées au respect des garanties de procédure fixées par le règlement, ainsi que le manque de ressources, de capacité et de volonté de certains États membres en matière de coopération avec l'Office. En outre, le mandat du comité de surveillance tel que défini par le règlement n°883/2013 n'a pas été jugé propice à favoriser son efficience, en raison de son interprétation ambiguë.

Dans quelle mesure les outils du règlement n° 883/2013 pour la conduite d'enquêtes, leur suivi et la coopération fructueuse avec d'autres entités sont-ils efficaces ?

Les pouvoirs et outils de l'OLAF sont dans l'ensemble jugés clairs et suffisants. Les insuffisances découlent en premier lieu des références à des réglementations nationales dans le cas de contrôles et d'inspections sur place menés dans des États membres (cela fait suite à la référence au règlement n° 2185/96 figurant dans le règlement n° 883/2013, qui renvoie depuis à la législation des États membres plutôt que de définir ou de fournir sa propre procédure en matière de contrôles et d'inspections sur place), mais également du temps consacré à l'obtention d'une autorisation de la part des autorités nationales afin d'exercer ces pouvoirs. Ceci est particulièrement vrai pour les contrôles sur place, jugés trop longs à organiser par une vaste majorité des personnes interrogées, en raison de la notification des autorités nationales ainsi que des procédures internes de validation de l'OLAF (qui reflètent peut-être l'approche de la mise en œuvre du règlement n°883/2013 adoptée par l'OLAF plutôt que le règlement en lui-même).

Cohérence

Dans quelle mesure le règlement n° 883/2013 offre-t-il à l'OLAF un cadre juridique cohérent pour la réalisation de ses missions ?
Les principaux éléments du règlement forment globalement un cadre cohérent pour les travaux d'enquête de l'OLAF. Des insuffisances sont cependant susceptibles de découler de l'application combinée du règlement, des lignes directrices sur les procédures d’enquête et des mentions aux lois et aux pratiques nationales qui sont faites dans le règlement.

La plupart des acteurs consultés dans le cadre de cette évaluation ont estimé qu'il existait une marge d'amélioration possible de la cohérence entre les éléments suivants :

- Le règlement n° 883/2013 et les orientations plus pratiques offertes par les lignes directrices sur les procédures d’enquête. Les parties prenantes ont présenté des cas dans lesquels ces lignes directrices sont plus précises que le règlement pour certaines procédures, ce qui peut conduire à une application inégale du règlement sur le terrain.

- Le règlement n° 883/2013, le règlement n° 2185/96 et le règlement n° 2988/95. L'absence d'harmonisation de la terminologie et des concepts utilisés dans les règlements n° 2185/96 et n° 2988/95, ainsi que les références aux réglementations et aux pratiques nationales qui figurent dans le règlement n° 883/2013, pourraient conduire à un emploi fluctuant et à des interprétations divergentes des outils d'enquête de l'OLAF lors des enquêtes externes.

- Les garanties de procédure visées à l'article 9 du règlement n° 883/2013 et la nature administrative des enquêtes de l'OLAF. Si l'introduction de dispositions relatives aux droits de procédure dans le règlement a potentiellement amélioré la crédibilité, la transparence, la responsabilité et la qualité ou l'admissibilité des enquêtes de l'OLAF, la majorité des parties prenantes a estimé que l'article 9 instaurait un ensemble de droits et de mesures de protection disproportionnées par rapport à la nature administrative des enquêtes de l'OLAF. Considérant le rôle des rapports de l'OLAF dans des procédures pénales, les droits et garanties accordés par le droit européen et visés à l'article 9 sont jugés adéquats par l'ICF, bien qu'ils puissent être considérés comme étant incohérents du seul point de vue d'une enquête administrative (sans prendre véritablement en compte le rôle potentiel des enquêtes de l'OLAF dans des procédures pénales).

- Contrôles externes et mécanismes de réclamation. Les multiples contrôles externes, effectués notamment par le Contrôleur européen de la protection des données (CEPD), par le Médiateur européen ou par la Cour de justice de l'Union européenne (CJUE), et les mécanismes internes de réclamations provoquent chevauchements et doubles emplois dans le champ d'application de leur contrôle, et souffrent d’un manque de coordination. Les parties prenantes ont suggéré de trouver un mécanisme permettant d’assurer une hiérarchie et une cohérence accrue en termes de portée de ces différents mécanismes de contrôle.

Dans quelle mesure le règlement n° 883/2013 s'inscrit-il dans les politiques et dans l'évolution de la politique de l'UE au sens large ?

Les données qui figurent dans les principaux éléments du règlement signalent que des chevauchements peuvent apparaître entre le mandat du comité de surveillance et la proposition de mise en place d’un contrôleur des garanties de procédure. La future relation entre le Parquet européen (EPPO) et l'OLAF est partiellement déterminée par la formulation de l'article 101 du règlement EPPO proposé, qui vise à éviter tout chevauchement entre les mandats des deux entités.

Pertinence

Dans quelle mesure les objectifs spécifiques du règlement n° 883/2013 ont-ils démontré leur pertinence ?
Les données relatives à la pertinence des objectifs spécifiques du règlement n° 883/2013, à savoir des enquêtes efficaces et efficientes de l’OLAF, des garanties de procédure solides, une meilleure coopération avec les États membres, les institutions, organes et organismes de l'UE et les pays tiers, et le renforcement de la gouvernance de l’OLAF indiquent que ces objectifs restent adaptés à la lutte contre la fraude et à la protection des intérêts financiers de l'UE.

Dans quelle mesure les outils et les mécanismes de contrôle institués par le règlement n° 883/2013 ont-ils démontré leur pertinence pour la réalisation des objectifs spécifiques ?

Dans l'ensemble, les données et leur analyse signalent que les outils et les mécanismes de contrôle du règlement n° 883/2013 ont prouvé leur pertinence pour la réalisation des objectifs spécifiques du règlement, à quelques exceptions près. Plus précisément, les dispositions du règlement qui ont trait à la coopération et à l'échange d'informations avec les États membres (par exemple à travers les AFCOS), ainsi qu'à certains outils d'enquête (par exemple la collecte de données technico-légales) pourraient être adaptées au paysage de la criminalité transfrontalière en mutation et des progrès techniques, de façon à s'assurer qu'elles restent pertinentes. Les dispositions du règlement relatives aux droits de procédure et aux protections dont bénéficient les personnes concernées restent adaptées. Certaines parties prenanentes ont estimé qu'un contrôleur des garanties de procédure représenterait une couche supplémentaire de contrôle superflue, qui n'aurait pas de raison d'être au vu des mécanismes de contrôle existants.

Dans quelle mesure les objectifs spécifiques du règlement n° 883/2013 sont-ils pertinents dans le contexte plus large des politiques et des évolutions politiques actuelles de l'UE ?

Les pouvoirs et outils d'enquête de l'OLAF resteront adaptés et complémentaires aux mesures d'un futur Parquet européen dans le paysage de la lutte antifraude de l'UE.

Perspectives d'avenir

Dans le cadre juridique et institutionnel actuel, et à la lumière des évolutions politiques actuelles, comment les éventuelles lacunes identifiées dans le règlement n° 883/2013 concernant la protection des intérêts financiers de l'Union seraient-elles abordées ?

Pour ce qui a trait au rôle de l'OLAF en matière de prévention des fraudes, la plupart des éléments d'information transmis à l'ordonnateur afin que celui-ci puisse entamer une procédure dans le cadre du système de détection rapide et d'exclusion (EDES) sont communiqués par l'OLAF une fois l'enquête close, de manière à préserver le caractère confidentiel des enquêtes. Ceci peut conduire à des délais considérables – mais en grande partie inévitables – pour l'identification et l'adoption de mesures appropriées à l'encontre d'opérateurs économiques jugés non fiables.

La mise en place d'un contrôleur des garanties de procédure suscite des avis contradictoires. D'un côté, certaines parties prennantes affirment que l'établissement d'une autorité de révision indépendante conduira à une meilleure protection des garanties de procédure pour les personnes visées par les enquêtes de l'OLAF. De l'autre, plusieurs mécanismes de révision existent d'ores et déjà, et la création d'un outil de plus pourrait entraîner confusion et solutions discordantes.

Dans un contexte de politique antifraude en évolution, d'aucuns se demandent si le mandat de l'OLAF ne devrait pas lui aussi évoluer. Le mandat de l'OLAF en matière d'enquêtes se limite actuellement à la fraude, à la corruption et à autres activités illégales qui portent préjudice aux intérêts financiers de l'Union. Le personnel de l'OLAF chargé des enquêtes estime cependant que l'expérience, le réseau et l'expertise de l'OLAF pourraient également être mis à profit dans d'autres domaines (par exemple les questions douanières, ou d'autres types de fraudes qui ne concernent pas la
Dans quelle mesure le règlement n° 883/2013 devrait-il être révisé au vu du nouveau contexte institutionnel qui émerge des négociations portant sur le règlement EPPO ?

Si les dispositions du projet de règlement EPPO permettent d'envisager les principales modalités de la coopération entre l'EPPO et l'OLAF, certains domaines restent flous et demanderont d'éventuelles clarifications, par exemple au moyen d'amendements au règlement n° 883/2013. L'OLAF restera pertinent dans le domaine de la PIF du fait de l'importance de son mandat, qui complète le mandat de l'EPPO ; de sa place dans le futur cadre institutionnel, dans lequel tous les États membres ne participeront pas à l'EPPO ; et des règles de procédure applicables aux enquêtes de l'EPPO, qui permettent à ce dernier de s'appuyer sur l'expérience et l'expertise de l'OLAF dans le domaine de la PIF. L'adoption de la directive PIF devrait en principe avoir une faible incidence sur le mandat de l'OLAF. Étant donné que la directive PIF va définir les compétences de l'EPPO, l'évaluation combinée de la compétence matérielle des deux organes permet tout de même d'identifier les domaines dans lesquels les mesures de l'OLAF et de l'EPPO sont potentiellement complémentaires. L'un des effets attendus de l'EPPO est d'éviter la duplication des enquêtes (au niveau pénal et administratif) dans les dossiers de PIF. L'OLAF ne sera par conséquent pas à même de mener une enquête administrative parallèle sur les mêmes faits qu'une enquête de l'EPPO. L'EPPO sera par ailleurs en mesure de renvoyer une affaire à l'OLAF s'il n'est pas compétent ou s'il rejette le dossier. L'article 101 du projet de règlement EPPO ne prévoit que les cas dans lesquels tous les États membres impliqués participent à l'EPPO. Même dans de tels cas, le débat reste néanmoins ouvert au sujet du rôle assigné à l'OLAF dans le cadre des enquêtes de l'EPPO. Si la formulation actuelle du projet de règlement porte à croire que l'OLAF se verra attribué un rôle de soutien auprès de l'EPPO, certaines parties prenantes plaident pour que l'OLAF assume un rôle plus déterminant dans les enquêtes pénales. Ceci ne se concrétisera toutefois qu'à condition d'ajuster les garanties de procédure avec les garanties offertes dans le cadre d'enquêtes pénales. Certaines questions restent également en suspens en ce qui concerne l'admissibilité des éléments de preuve recueillis par l'OLAF avant l'EPPO.

Recommandations

Les recommandations suivantes sont orientées par un certain nombre de principes, selon lesquels le règlement n° 883/2013 doit fournir :

- Des pouvoirs et des outils d'enquête administrative clairs et suffisants, applicables de façon uniforme indépendamment du caractère interne ou externe de l'enquête.
- Des obligations bien définies pour les institutions, organes et organismes de l'UE, les autorités des États membres, les autorités de pays tiers et les organisations internationales, qui devront seconder l'Office dans la réalisation de ses enquêtes, et coopérer efficacement.
- Un bon équilibre entre les droits des témoins et des personnes concernées et les compétences d'enquête administrative de l'OLAF, conformément à la Charte des droits fondamentaux.
- Des rôles et responsabilités clairs pour le comité de surveillance en matière de préservation de l'indépendance de l'OLAF et de suivi des activités d'enquête de l'Office.

L'évaluation recommande les améliorations suivantes afin de remédier aux insuffisances présentées dans ce rapport.

Ouverture des enquêtes
Modifications du règlement n° 883/2013 recommandées

- **Recommandation 1.** Réviser l’article 5 (Ouverture des enquêtes) afin de clarifier : (a) si les critères de sélection constituent une liste exhaustive de facteurs à prendre en compte dans les décisions d’ouverture de dossiers ; (b) si les critères de sélection sont censés avoir ou non le même poids ; et (c) la marge d’appréciation du directeur général de l’OLAF en ce qui concerne les critères de sélection.

Modifications non réglementaires recommandées

- **Recommandation 2.** Réviser l’article 7 des lignes directrices sur les procédures d’enquête afin qu’il concorde avec la formulation du règlement n° 883/2013 concernant la communication des décisions de sélection des dossiers aux personnes impliquées dans la demande de l’enquête, et à celles qui ont fourni les informations reçues.

- **Recommandation 3.** Réviser l’article 5 des lignes directrices sur les procédures d’enquête afin de confirmer que l’OLAF n’a recours aux priorités de la politique de l’Office en matière d’enquêtes que dans les cas où les critères de sélection des dossiers établis dans le règlement n° 883/2013 laissent deviner que le cas sera rejeté.

- **Recommandation 4.** La durée du processus de sélection des dossiers devrait être systématiquement contrôlée (parallèlement à la durée des enquêtes), au cas par cas (en utilisant des métadonnées rendues anonymes), afin de mesurer l’effet du processus de sélection des dossiers sur la durée des enquêtes. Cela permettra au comité de surveillance de mieux répondre à ses obligations de contrôle prévues par le règlement, en particulier sur la durée des enquêtes et l’attribution des ressources.

Outils et pouvoirs d’enquête

Modifications du règlement n° 883/2013 recommandées

- **Recommandation 5.** Réviser l'article 3 (Enquêtes externes) de manière à permettre à l'OLAF de réaliser des contrôles et des inspections sur place avec uniformité dans les différents États membres de l'UE, indépendamment des nuances qui distinguent les législations et les pratiques nationales. Cela renforcera la capacité de l'OLAF à réaliser des opérations technico-légales numériques de façon homogène à travers tous les États membres de l'UE.

- **Recommandation 6.** Réviser l'article 3 (Enquêtes externes), l'article 4 (Enquêtes internes), l'article 6 (Accès aux informations figurant dans des bases de données avant l’ouverture d’une enquête) et le « considérant 14 » afin d’asseoir la capacité de l’OLAF à réaliser des opérations technico-légales numériques lorsque les données ou les informations organisationnelles sont stockées dans des comptes ou des appareils relevant du domaine privé (en clarifiant si cela contrevient au droit à la vie privée, et en quoi).

- **Recommandation 7.** Réviser l'article 4 (Enquêtes internes) afin de clarifier les pouvoirs de l’OLAF en ce qui concerne les assistants parlementaires accrédités.

- **Recommandation 8.** Réviser l'article 6 (Accès aux informations figurant dans des bases de données avant l’ouverture d’une enquête) afin de garantir un accès équivalent aux informations contenues dans les bases de données des États membres et des institutions, organes et organismes de l’UE. Le premier paragraphe de l'article 6 devrait en outre être modifié de façon à retirer la référence à la nature « indispensable » des informations pertinentes dans les bases de données pour lesquelles l’OLAF dispose d’un droit d’accès, car cela peut s’avérer excessivement restrictif en pratique ; cela semble de toute façon redondant ou incohérent puisque le même paragraphe stipule que l'Office
« respecte les principes de nécessité et de proportionnalité » dans l’exercice de ce droit d’accès.

**Coopération et échange d’informations**

**Modifications du règlement n° 883/2013 recommandées**

- **Recommandation 9.** Réviser l'article 3 (Enquêtes externes) afin de préciser les exigences minimales en matière de compétences et de responsabilités des services de coordination antifraude (AFCOS) dans tous les États membres. De même, l'article 4 (Enquêtes internes) devrait être modifié de manière à faire référence aux AFCOS (référence comparable ou d'une nature similaire à celle qui figure dans le paragraphe 4 de l'article 3), pour souligner la pertinence du rôle des AFCOS dans la facilitation d'une coopération et d'un échange d'informations efficaces au cours des enquêtes internes.

- **Recommandation 10.** Réviser l'article 14 (Coopération avec des pays tiers et des organisations internationales) afin de confirmer que l'échange d'informations opérationnelles, stratégiques ou techniques peut avoir lieu en l'absence d'un arrangement administratif.

**Modifications non règlementaires recommandées**

- **Recommandation 11.** Au moins six facteurs favorisant l'efficience de la coopération avec les partenaires de l'OLAF ont été identifiés (se reporter au chapitre sur l'efficience). De tels facteurs devraient être codifiés dans les arrangements de coopération présents et à venir, arrangements qui semblent de nature à améliorer l'efficacité et l'efficience de la coopération entre l'OLAF et ses partenaires.

**Droits et garanties de procédure**

**Modifications du règlement n° 883/2013 recommandées**

- **Recommandation 12.** Réviser l'article 9 (Garanties de procédure) afin de :
  - Permettre à l'OLAF de mener des contrôles sur place ou des inspections de locaux, et d'interroger dans le même temps une personne concernée ou un témoin (identifié en tant que tel au cours de ce contrôle sur place ou de cette inspection), si cette personne n'a pas reçu de préavis.
  - Clarifier si une personne concernée peut convenir de ramener le délai de préavis d'un entretien à moins de 24 heures.
  - Refléter ou intégrer les précisions et les détails supplémentaires liés aux garanties de procédure qui figurent dans les lignes directrices sur les procédures d'enquête (et les clarifier tel que les réglementations non règlementaires ci-dessous le préconisent).

- **Recommandation 13.** Réviser l'article 2 (Définitions) ou l'article 9 (Garanties de procédure) afin de veiller à la cohérence en ce qui concerne les éléments sur lesquels se fonde la définition d'une personne concernée (à savoir « éléments de preuve »), ou « suspicion »).

**Modifications non règlementaires recommandées**

- **Recommandation 14.** Réviser l'article 16 des lignes directrices sur les procédures d’enquête afin de s’assurer que leur formulation concorde avec celle du règlement n° 883/2013, en ce qui concerne l'utilisation d'anciennes déclarations lorsqu'une personne concernée a été préalablement entendue en tant que témoin.

- **Recommandation 15.** Dans les lignes directrices sur les procédures d’enquête, clarifier les points suivants liés à l'article 9 du règlement n° 883/2013:
- Lorsqu'une personne transmet à l'OLAF des observations sur les faits qui la concernent, si des actes d'enquête supplémentaires peuvent ou doivent être entrepris au besoin. [Remarque : dans la mesure où cela impliquerait la poursuite d'une enquête existante, une recommandation alternative consisterait à modifier le paragraphe 4 de l'article 9 de façon à ce qu'il ne spécifie pas qu'il est uniquement possible pour la personne concernée de présenter ses observations une fois l'enquête achevée.] Lorsque ces actes d'enquête supplémentaires dévoilent de nouveaux éléments liés à la personne concernée, celle-ci devrait avoir la possibilité de présenter ses observations sur ces nouveaux éléments avant que des conclusions ne soient tirées.

- Si une personne concernée doit ou non avoir la possibilité de présenter ses observations dans des affaires closes, pour lesquelles aucun élément de preuve indiquant l'existence de fraude, de corruption ou d'une autre activité illégale n'a été trouvé contre elle.

- Quelle forme devrait prendre le « résumé des faits ».

- De quelle manière définir ou classer les « cas dûment justifiés ».

- Si le « report » (dans le cas où la possibilité de présenter des observations est différée) doit être interprété comme une « annulation » ou un « manquement », et dans le cas contraire, de quelle manière l'obligation doit finalement être respectée.

• **Recommandation 16.** Un contrôle régulier des droits de procédures accordés, par l'utilisation des données rendues anonymes des dossiers, est recommandé afin d'évaluer leur incidence sur l'efficacité de la fonction d'enquête. Des indicateurs reliant le type de garanties mises en place et la durée de l'affaire, les mesures de suivi au niveau national ou l'admissibilité des éléments de preuve d'une affaire de l'OLAF au cours des procédures judiciaires à l'échelon national aideraient l'OLAF à respecter ses obligations en matière de rapport et à prendre des décisions quant à la meilleure utilisation de ses ressources pendant la phase de sélection des dossiers. Ceci lui permettrait en outre de mieux s'acquitter de ses obligations liées à l'application des garanties de procédure du règlement.

**Comité de surveillance**

** Modifications du règlement n° 883/2013 recommandées**

• **Recommandation 17.** Réviser l'article 15 (Comité de surveillance) afin de:
  - Déterminer si le rôle et le mandat principal du comité de surveillance consistent à contrôler et à superviser la fonction d'enquête de l'OLAF (en vue de garantir son respect du règlement n° 883/2013), ou à soutenir et à préserver l'indépendance de l'OLAF.
  - Confirmer que le comité de surveillance n'a pas pour mandat ou pour rôle de contrôler les cas individuels, le paragraphe 7 de l'article 17 stipulant que cela est accompli ex-ante par l'unité Sélection et révision (révision juridique), et ex-post par l'unité « Conseil judiciaire et juridique » (réclamations).

** Modifications non règlementaires recommandées**

• **Recommandation 18.** Mettre en place un système de contrôle basé sur l'analyse de données des affaires rendues anonymes, afin de permettre au comité de surveillance de mieux contrôler la durée des enquêtes et les facteurs qui influent sur la longueur des enquêtes.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

- **Recommandation 19.** Un système et une fonction de contrôle réguliers qui s'appuient sur des indicateurs clés (par exemple durée des enquêtes, utilisation des ressources, garanties accordées) pourraient aider le comité de surveillance à remplir ses obligations de contrôle plus efficacement, notamment en faisant économiser du temps et des efforts à son secrétariat et à ses membres.

**Perspectives d’avenir**

**Modifications du règlement n° 883/2013 recommandées**

- **Recommandation 20.** Réviser le règlement n° 883/2013 afin de favoriser une relation complémentaire et productive entre l'OLAF et le futur EPPO, sur les points suivants :
  - la procédure à suivre dans les cas où une enquête en cours de l'OLAF met au jour des indications selon lesquelles les faits relèveraient du mandat de l'EPPO ;
  - les modalités des échanges d'informations entre l'EPPO et l'OLAF ;
  - les obligations et la procédure de l'OLAF dans les situations où l'EPPO doit transférer des informations à l'OLAF, tel que stipulé dans le considérant 105 ;
  - la procédure pour un suivi judiciaire par l'EPPO de telles enquêtes pourrait être incluse dans le règlement n° 883/2013 ; et
  - les conditions dans lesquelles l'EPPO peut intégrer des éléments de preuve collectés par l'OLAF au cours de ses affaires, de façon à ce que ces données soient admissibles aux yeux des juridictions pénales nationales.

- **Recommandation 21.** Réviser le règlement n° 883/2013 afin de faciliter la coopération de l'OLAF avec l'EPPO sur les cas liés à la TVA, en améliorant l'accès par l'OLAF aux informations relatives à la TVA (par exemple en lui autorisant un accès aux bases de données de type Eurofisc et VIES).

- **Recommandation 22.** Le mandat de l'OLAF pourrait être redéfini pour inclure des services judiciaux auxiliaires au nom de l'EPPO. Cette modification devrait le cas échéant être assortie d'une révision de l'article 9 du règlement n° 883/2013 de façon à faire correspondre les garanties de procédure avec celles applicables dans les procédures pénales pour de tels actes d'enquête.

- **Recommandation 23.** Réviser le règlement n° 883/2013 afin d'étendre l'application du mandat d'enquête de l'OLAF aux questions douanières, et éventuellement à d'autres types de fraudes non liées à la PIF, par exemple les marchandises de contrefaçon qui violent les réglementations en matière de santé et de sécurité.

- **Recommandation 24.** Réviser le règlement n° 883/2013 afin faire correspondre les dispositions sur la coopération avec Eurojust et Europol aux dispositions qui figurent dans les cadres juridiques respectifs de ces deux agences (une fois que les négociations relatives au règlement Eurojust auront repris).

**Modifications non réglementaires recommandées**

- **Recommandation 25.** Un arrangement de travail entre l'EPPO et l'OLAF (article 99 du règlement EPPO) devrait clarifier :
  - les critères à appliquer par l'OLAF afin de déterminer si des allégations doivent être transmises à l'EPPO ; et
  - le processus de sélection des dossiers au sein de l'EPPO.
• **Recommandation 26.** Une unité spécifique de l'OLAF qui traite des relations avec l'EPPO, tant au niveau politique que dans le cadre des enquêtes, pourrait être créée en vue de maintenir une relation étroite avec l'EPPO, et de donner suite à ses demandes.

• **Recommandation 27.** L'EPPO devrait signer l'accord interinstitutionnel du 25 mai 1999 relatif aux enquêtes internes de l'OLAF, ce qui octroierait à l'OLAF des pouvoirs d'enquête sur les membres du personnel de l'EPPO, dans le cas où des indices d'irrégularités ou d'infractions commises seraient décelés.
Zusammenfassung

Das unabhängige Beratungsunternehmen ICF wurde damit beauftragt, die Anwendung der Verordnung Nr. 883/2013 über die Untersuchungen des Europäischen Amtes für Betrugsbekämpfung (OLAF) zu evaluieren, um die Europäische Kommission bei der Erstellung ihres Bewertungsberichts zu unterstützen. Dies ist der Abschlussbericht des ICF.

Der Erlass der Verordnung Nr. 883/2013 zielte darauf ab, die Wirksamkeit, Effizienz und Rechengeltspflicht des Europäischen Amtes für Betrugsbekämpfung unter Wahrung seiner Unabhängigkeit zu verbessern, die Verfahrensgarantien und Grundrechte von Personen, die Gegenstand einer Untersuchung sind, zu untermauern, die Zusammenarbeit mit den Mitgliedstaaten, den Organen, Einrichtungen und sonstigen Stellen der EU sowie mit Drittstaaten und internationalen Organisationen zu verbessern und die Leitung des Europäischen Amtes für Betrugsbekämpfung zu stärken.

Zweck der Evaluierung


Methodik

Die Evaluierung konzentriert sich auf fünf Bereiche: die Wirksamkeit und Effizienz der Anwendung zentraler Bestandteile der Verordnung, die Kohärenz und Relevanz der Verordnung bei der Erfüllung ihrer Aufgaben im Kontext der Betrugsbekämpfung und den Ausblick auf die Zukunft der Verordnung unter Berücksichtigung ihrer Anwendung sowie aktueller Politikvorschläge.


Zur Operationalisierung der Evaluierungskriterien und -fragen wurde unter Verwendung von Beurteilungskriterien, Indikatoren und Nachweismöglichkeiten ein Bewertungsrahmen erstellt. Folgende Forschungsaufgaben wurden durchgeführt, um die für die Beantwortung der Evaluierungsfragen notwendigen Belege zu erheben: Quellenstudium zur Sammlung, Strukturierung und Analyse aller sachdienlichen Unterlagen und Daten, Konsultation von Interessenträgern (Befragungen, Erhebungen, Workshops, Konferenzen) sowie Fallstudien zur weiteren Vertiefung der Einsichten zu den wichtigsten Ergebnissen.

Die erhobenen Belege dienten als Grundlage für folgende Analysen: eine qualitative/quantitative deskriptive Analyse anhand von Daten und Sekundärnachweisen, eine rechtliche Prüfung der in der Verordnung enthaltenen...
Bestimmungen und zugehörigen Rechtsinstrumente, Beitragsfallstudien als Grundlage für die Beitragsanalyse sowie eine Analyse der Konsultation der Interessenträger (Befragungsprotokolle und Erhebungsdaten).

Im Verlauf der Evaluierung tauchten mehrere Probleme auf, die Art und Umfang der Analysen, die unternommen werden konnten, und die Belastbarkeit der gezogenen Schlussfolgerungen beeinflussten. Erstens verhinderte das Fehlen aufgeschlüsselter Falldaten, dass die vergleichende Bewertung und erweiterte quantitative Analyse wie ursprünglich geplant (mit stärkerem Augenmerk auf qualitativen Daten und Analysen) durchgeführt werden konnten. Zweitens erwies sich die Begrenzung der Dauer und Details der Instrumente für die Konsultation der Interessenträger (thematische Leitfäden für die Befragung sowie Fragebogen) als problematisch, was folgende Auswirkungen hatte: a) Die Konsultation der Interessenträger (Online-Umfrage und Befragung von Interessenträgern) wurde verspätet auf den Weg gebracht, b) die Konsultation der Interessenträger dauerte länger als ursprünglich geplant, c) die Triangulation und Synthese der Ergebnisse stützte sich in einigen Bereichen auf nur wenige Beiträge. Dennoch wurden alle geplanten Befragungen durchgeführt, und es war eine positive Rücklaufquote auf die Online-Umfrage zu verzeichnen. Drittens kann es sein, dass die Analyse der Umfragergebnisse positive Verzerrungen aufweist, da rund ein Drittel der Teilnehmer OLAF-Bedienstete waren. Um dieses Risiko einzudämmen, wird zu den Ergebnissen im gesamten Bericht angegeben, auf welche Interessenträger sie sich beziehen. Abschließend ist zu sagen, dass die Evaluierung aufgrund der Kombination aus ergriffenen Korrekturmaßnahmen und der Bandbreite der gesammelten Belege und durchgeführten Analysen (ohne Bevorzugung eines Ansatzes auf Kosten eines anderen) fundierte Schlussfolgerungen zuließ.

**Ergebnisse der Evaluierung**

Die unten dargestellten Evaluierungsauflagen folgen den in der Aufgabenbeschreibung zu dieser Evaluierungsstudie aufgeführten Evaluierungsfragen.

**Wirksamkeit**

Inwieweit wurden die spezifischen Ziele der Verordnung Nr. 883/2013 bislang erfüllt?

Die Darstellung der nachfolgenden Evaluierungsauflagen zur Wirksamkeit orientiert sich an den in der Aufgabenbeschreibung zu dieser Evaluierungsstudie aufgeführten spezifischen Zielen der Verordnung Nr. 883/2013.

Steigerung der Wirksamkeit und Effizienz der Untersuchungstätigkeit des OLAF, etwa durch die Einführung von Kriterien für die Einleitung und Durchführung von OLAF-Untersuchungen


Obwohl einige Interessenträger der Meinung waren (die auch in einer Stellungnahme des Überwachungsausschusses aus dem Jahr 2014 zu finden ist), dass es dem Referat „Fallauswahl und Überprüfung“ an der erforderlichen Sachkenntnis und Spezialisierung für die Fallauswahl mangelt, erbrachte die Evaluierung keine Hinweise darauf, dass die Erfahrung und Sachkenntnis der für die Fallauswahl zuständigen Bediensteten und/oder das Modell der Interaktion zwischen Fallauswahl- und Untersuchungsbeauftragten einer Verbesserung bedürfen.

Die mit der Verordnung Nr. 883/2013 eingeführten Fallauswahlkriterien dienten als Richtschnur für Entscheidungen über die Fallauswahl, auch wenn die Verordnung deutlicher machen könnte, ob die Auswahlkriterien als vollständige Liste der Faktoren
anzusehen sind, die bei Entscheidungen zur Einleitung von Untersuchungen berücksichtigt werden müssen, ob die Auswahlkriterien unterschiedlich oder gleich gewichtet werden sollten und welchen Ermessensspielraum der Generaldirektor des OLAF bei der Anwendung der Auswahlkriterien hat. Den externen Interessenträgern war zudem nicht immer klar, auf welcher Grundlage die Kriterien für die Fallauswahl bei Entscheidungen angewendet worden waren. Was die Rolle der vorrangigen Ziele der Untersuchungspolitik bei Fallauswahlentscheidungen angeht, könnte es sein, dass die in der Verordnung Nr. 883/2013 fehlende Spezifizierung hinsichtlich der Anwendung dieser Ziele bei der Fallauswahl die Wirksamkeit der Verordnung erhöht, wenn das Referat „Fallauswahl und Überprüfung“ praktisch mehr Flexibilität dabei hat, eine potenzielle Entscheidung über eine Nichtverfolgung (anhand der Bewertung eintreffender Informationen anderen Auswahlkriterien gegenüber) in eine Entscheidung zur Einleitung einer Untersuchung umzumünzen, wenn dadurch die finanziellen Interessen der EU geschützt werden. Folglich könnte man dafür plädieren, die Verordnung hier unverändert zu belassen, also nicht genauer auszuführen, wie die vorrangigen Ziele der Untersuchungspolitik bei Entscheidungen über die Fallauswahl angewendet werden sollten.

**Untersuchungsinstrumente und -verfahren** bilden den Kern der Untersuchungstätigkeit des OLAF. Sie besitzen das Potenzial, die Wirksamkeit und Effizienz der Untersuchungstätigkeit des Amtes zu verbessern, wenn bestehende Mängel beseitigt werden. Dabei geht es etwa um

- die Verweise auf nationale Vorschriften und Gepflogenheiten im Zusammenhang mit den **Kontrollen** des OLAF **vor Ort** – sie können das Amt in seiner Fähigkeit behindern, Kontrollen vor Ort in allen Mitgliedstaaten als einheitliches Untersuchungsinstrument zu verwenden,
- die Unklarheiten in Bezug auf **digitalforensische Maßnahmen** in verschiedenen Szenarien, die eine Kombination aus Privatgeräten (Laptops, Telefone usw.) und Organisationsdaten aufweisen – sie können das Amt in seiner Fähigkeit behindern, bei Untersuchungen digitalforensische Beweismittel zu sammeln,
- die praktischen Probleme, die beim Untersuchungsprozess zu Ineffizienzen führen können, etwa bei Gesprächen mit Betroffenen oder Zeugen, die bei einer **Kontrolle vor Ort und/oder einer Durchsuchung von Räumlichkeiten** identifiziert wurden, da die entsprechenden Bestimmungen in den Leitlinien zu den Untersuchungsverfahren und die internen Vorschriften über die Vorabgenehmigung von Gesprächen sowie die in der Verordnung enthaltenen Verfahrensgarantien, insbesondere zur Vorankündigung von Gesprächen, effizienzhemmend sind; überdies ist der Unterschied zwischen einem Gespräch und einer Erklärung unklar,
- die Unklarheiten in Bezug auf die Rechtmäßigkeit von **Sicherungsmaßnahmen** – dies kann die zuständigen Behörden davon abhalten, derartige Maßnahmen zu ergreifen,
- die Unklarheiten über die Abläufe und Verfahren im Zusammenhang mit **Koordinierungsfällen** – dies kann Ineffizienzen bei der Funktion des OLAF in derartigen Fällen auslösen,
- die Unklarheiten in Bezug auf die **Immunität** von Europaabgeordneten und den Antragsprozess zur Aufhebung ihrer Immunität sowie die mangelnde Klarheit über die Befugnisse des OLAF in Bezug auf akkreditierte parlamentarische Assistenten.

Was die **Empfehlungen und Folgemaßnahmen** angeht, so sind die Belege zur Qualität und Vollständigkeit der OLAF-Abschlussberichte sehr gemischt. Allerdings dürfte sich die Gesamtqualität der Berichte und Empfehlungen des OLAF aufgrund der zusätzlichen Einzelheiten in der Verordnung Nr. 883/2013 über den erforderlichen

Stärkung der Verfahrensgarantien für Personen, die Gegenstand einer Untersuchung sind

Die mit der Verordnung Nr. 883/2013 eingeführten Verfahrensgarantien haben die Verfahrensgarantien für Personen, die Gegenstand einer Untersuchung sind, eindeutig gestärkt.

Im Großen und Ganzen entsprechen die in Artikel 9 der Verordnung Nr. 883/2013 enthaltenen Verfahrensgarantien (kodifiziert und präzisiert) weitgehend den im EU-Recht verankerten Rechten und Garantien. Angesichts der Rolle, die die OLAF-Berichte in Strafverfahren spielen, werden die aus geltendem EU-Recht in Artikel 9 übernommenen Rechte und Garantien als verhältnismäßig angesehen.


Darüber hinaus können einige Aspekte von Artikel 9, die allein in der Verordnung Nr. 883/2013 vorkommen (etwa die Zeitspanne der Vorankündigung eines Gesprächs mit einem Betroffenen gegenüber), als unverhältnismäßig gelten, wenn man ihr angestrebtes Ziel (und ihre Wirkung auf Untersuchungsverfahren und Untersuchungsdauer) betrachtet, weshalb eine Überarbeitung anzuraten wäre.

Verbesserung der Zusammenarbeit und des Informationsaustauschs mit den Mitgliedstaaten


Der Rechtsrahmen kann jedoch noch weiter verbessert werden, vor allem durch die Einführung von Mindeststandards, was die Rolle und das Profil der Koordinierungsstellen angeht, die Zusammenarbeit und den Informationsaustausch mit dem OLAF zu erleichtern. Da in der Verordnung Nr. 883/2013 entsprechende Einzelheiten fehlen, sind die Größe, das Profil und die Befugnisse der Koordinierungsstellen nicht besonders einheitlich, so dass das OLAF nicht in jedem Mitgliedstaat auf die gleiche Weise und im selben Umfang unterstützt wird. Zudem
könnte die Verordnung klar auf die wichtige Rolle der Koordinierungsstellen hinweisen, bei internen Untersuchungen eine wirksame Zusammenarbeit und einen wirksamen Informationsaustausch zu ermöglichen.

Insgesamt scheint sich die Verordnung Nr. 883/2013 positiv auf Art und Umfang der Zusammenarbeit mit den nationalen Behörden (insbesondere den Justizbehörden) ausgewirkt zu haben, da es Hinweise auf eine bessere Zusammenarbeit gibt, die mehrere Interessenträger mit der Existenz der Verordnung Nr. 883/2013 begründet haben (die die nationalen Behörden rechtlich zur Zusammenarbeit verpflichtet).

Verbesserung der Zusammenarbeit mit den Organen, Einrichtungen und sonstigen Stellen der EU

Durch die Verordnung Nr. 883/2013 wurden offenbar die Zusammenarbeit und der Informationsaustausch zwischen dem OLAF und den Organen, Einrichtungen und sonstigen Stellen der EU verbessert, etwa im Wege von Verwaltungsvereinbarungen. Allerdings wäre dieser Effekt noch stärker fühlbar, wenn es mit allen Organen, Einrichtungen und sonstigen Stellen der EU solche Verwaltungsvereinbarungen gäbe und die bereits bestehenden Verwaltungsvereinbarungen einheitlicher wären. Außerdem lässt sich aufgrund des Fehlens hinreichender Belege kein abschließendes Urteil darüber bilden, ob die Verordnung eine engere Zusammenarbeit mit Europol und Eurojust gefördert hat. (Dies gilt insbesondere für Europol, da die Arbeit an neuen Verwaltungsvereinbarungen noch nicht abgeschlossen ist, was sich zumindest temporär auf die Zusammenarbeit ausgewirkt zu haben scheint.)

Verbesserung der Zusammenarbeit mit Drittstaaten und internationalen Organisationen


Stärkung der Leitung des OLAF

Es gibt kaum Belege dafür, dass die Verordnung Nr. 883/2013 die Leitung des OLAF im Verhältnis zum Überwachungsausschuss gestärkt hat. Die Verordnung Nr. 883/2013 enthält keine genauen Angaben zum Mandat und zur Rolle des Überwachungsausschusses, was zu einer gewissen Verwirrung geführt hat, die an den unterschiedlichen Auslegungen und Wahrnehmungen (bei fast allen Interessenträgern, auch beim Überwachungsausschuss und beim OLAF selbst) bezüglich der Rolle des Überwachungsausschusses abzulesen ist.

Inwieweit haben die verschiedenen Teile der Verordnung zum Erreichen der spezifischen Ziele der Verordnung Nr. 883/2013 und zu einem besseren Schutz der finanziellen Interessen der Union beigetragen?

Der Beitrag, den die verschiedenen Teile der Verordnung Nr. 883/2013 zur Erfüllung der spezifischen Ziele der Verordnung geleistet haben, wurde bereits weitgehend geschildert, zumindest was die qualitative Wirkung angeht (da sich die Auswirkungen der verschiedenen Teile der Verordnung Nr. 883/2013 auf bestimmte Ergebnisse wie Einziehungen, Anklageerhebungen usw. nicht quantifizieren lassen). Da keine aufgeschlüsselten/granularen Daten vorliegen, können die Ergebnisse (wie Einziehungen, Anklageerhebungen usw.) nicht mit bestimmten Untersuchungen oder Bestimmungen der Verordnung in Beziehung gesetzt werden. Allerdings finden sich in den Resultaten der Beitragsanalyse Anhaltspunkte für Verbindungen zwischen den
Bestimmungen der Verordnung und den Ergebnissen, während die Daten zu Einziehungen, Strafverfolgungen usw. zusätzliche kontextbezogene Hinweise liefern.

**Externe Faktoren jenseits des Einflussbereichs des OLAF (einschließlich der Verantwortung für Folgemaßnahmen), die die Erfüllung der Ziele der Verordnung Nr. 883/2013 mit bewirkt oder beeinflusst haben**

Zwei wichtige Faktoren, die das OLAF zwar direkt beeinflussen, aber nicht kontrollieren kann, und die sich auf die Erfüllung der in der Verordnung dargelegten Ziele ausgewirkt haben, sind zum einen die Fähigkeit und Bereitschaft der betreffenden Akteure zur Ergreifung von Folgemaßnahmen aufgrund der vom OLAF ausgesprochenen Empfehlungen und zum anderen ihre Fähigkeit und Bereitschaft zur Ergreifung von Sicherungsmaßnahmen im Verlauf einer Untersuchung.

In beiden Fällen ist es dem OLAF möglich, die Fähigkeit der betreffenden Akteure zur Ergreifung von Folgemaßnahmen und zur Umsetzung der OLAF-Empfehlungen (etwa bezüglich der Ergreifung von Sicherungsmaßnahmen) zu beeinflussen, und zwar durch die Qualität, Genauigkeit, Vollständigkeit, Verhältnismäßigkeit und Umsetzbarkeit der Abschlussberichte und Empfehlungen des Amtes. Was das OLAF nicht beeinflussen kann, ist die Handlungsbereitschaft der betreffenden Akteure.

**Inwieweit geben die in der Verordnung Nr. 883/2013 enthaltenen Rechtsinstrumente dem OLAF ein hinreichendes Instrumentarium zur Ausübung seines Mandats an die Hand?**


**Effizienz**

**Welchen Einfluss hatte die Durchführung der Verordnung Nr. 883/2013 auf die OLAF-Ressourcen, die Nutzung dieser Ressourcen sowie die Ressourcen anderer Akteure?**


**Wie effizient sind die in der Verordnung Nr. 883/2013 enthaltenen Instrumente zur Durchführung von Untersuchungen, zur Einleitung von Folgemaßnahmen und zur Gestattung einer erfolgreichen Zusammenarbeit mit anderen Einrichtungen?**

Kohärenz

Inwieweit bietet die Verordnung Nr. 883/2013 dem OLAF einen kohärenten Rechtsrahmen für die Wahrnehmung seiner Aufgaben?

Die zentralen Bestandteile der Verordnung bilden insgesamt einen kohärenten Rahmen für die Untersuchungstätigkeit des OLAF. Allerdings kann die kombinierte Anwendung der Verordnung und der Leitlinien zu den Untersuchungsverfahren zusammen mit den in der Verordnung enthaltenen Verweisen auf nationale Gesetze und Gepflogenheiten zu Widersprüchen führen. Eine Mehrheit der im Rahmen dieser Evaluierung konsultierten Interessenträger gab an, dass die Kohärenz zwischen folgenden Elementen verbessert werden könnte:

- **Verordnung Nr. 883/2013 / Leitlinien zu den Untersuchungsverfahren mit ihren praxisbezogenen Hinweisen**: Die Interessenträger merkten an, dass die Leitlinien zu bestimmten Verfahren präzisere Angaben enthalten als die Verordnung, was dazu führen kann, dass die Verordnung in der Praxis unterschiedlich angewendet wird.

- **Verordnung Nr. 883/2013, Verordnung Nr. 2185/96 und Verordnung Nr. 2988/95**: Das Fehlen einheitlicher Begriffe und Konzepte in den Verordnungen Nr. 2185/96 und Nr. 2988/95 und die in der Verordnung Nr. 883/2013 enthaltenen Verweise auf nationale Vorschriften und Gepflogenheiten können dazu führen, dass die Untersuchungsinstrumente des OLAF in externen Untersuchungen unterschiedlich angewandt und ausgelegt werden.


- **Externe Kontrollen / Beschwerdeverfahren**: Die Zahl der externen Kontrollen (etwa durch den Europäischen Datenschutzbeauftragten, den Europäischen

Inwieweit ist die Verordnung Nr. 883/2013 in umfassendere EU-Strategien und -Strategieentwicklungen eingebettet?


Relevanz

Inwieweit haben sich die spezifischen Ziele der Verordnung Nr. 883/2013 als relevant erwiesen?


Inwieweit haben sich die mit der Verordnung Nr. 883/2013 eingeführten Instrumente und Kontrollverfahren für die Erfüllung der spezifischen Ziele als relevant erwiesen?

Im Großen und Ganzen zeigen die Belege und Analysen, dass sich die Instrumente und Kontrollverfahren der Verordnung Nr. 883/2013 für die Erfüllung der spezifischen Ziele der Verordnung als relevant erwiesen haben – es gibt jedoch ein paar Ausnahmen. Beispielsweise könnten die Bestimmungen zur Zusammenarbeit und zum Informationsaustausch mit den Mitgliedstaaten (etwa mittels der Koordinierungsstellen für die Betrugsbekämpfung) und zu bestimmten Untersuchungsinstrumenten (etwa der forensischen Datenerhebung) an die sich wandelnde Landschaft grenzüberschreitender Straftaten und den technischen Fortschritt angepasst werden, damit sie ihre Relevanz behalten. Die in der Verordnung enthaltenen Bestimmungen zu Verfahrensrechten und Schutzmaßnahmen für Betroffene sind auch weiterhin relevant. Mehrere Interessenträger gaben an, dass ein Beauftragter für die Kontrolle der Verfahrensgarantien angesichts der bestehenden Kontrollverfahren irrelevant wäre und nur eine unnötige zusätzliche Kontrollebene darstellen würde.

Welche Relevanz besitzen die spezifischen Ziele der Verordnung Nr. 883/2013 im Kontext umfassenderer EU-Strategien und aktueller Strategieentwicklungen?

Die Untersuchungsinstrumente und Befugnisse des OLAF werden ihre Relevanz behalten und die Maßnahmen der künftigen Europäischen Staatsanwaltschaft zur Betrugsbekämpfung in der EU ergänzen.

Blick in die Zukunft

Wie könnten etwaige in der Verordnung Nr. 883/2013 oder bei ihrer Durchführung festgestellte Mängel in Bezug auf den Schutz der finanziellen
Interessen der Union angesichts der derzeitigen institutionellen und rechtlichen Rahmenbedingungen und aktuellen Strategieentwicklungen behoben werden?

Ein Blick auf die Rolle des OLAF bei der Betrugsverhütung zeigt, dass das OLAF den Großteil der Angaben zur Einleitung eines Verfahrens im Rahmen des Frühwarn- und Ausschlussystems (EDES) erst nach Abschluss einer Untersuchung an den zuständigen Anweisungsbefugten weitergibt, um die Vertraulichkeit der Untersuchung zu wahren. Dies kann zu wichtigen, aber weitgehend unvermeidlichen Verzögerungen bei der Ermittlung und Ergreifung geeigneter Maßnahmen gegen unzuverlässige Marktteilnehmer führen.

Zur Einsetzung eines Beauftragten für die Kontrolle der Verfahrensgarantien gibt es gegensätzliche Ansichten. Auf der einen Seite glauben einige Interessenträger, dass die Einrichtung einer unabhängigen Prüfstelle den Schutz der Verfahrensgarantien für Betroffene, die einer OLAF-Untersuchung unterliegen, verbessern würde. Andererseits existieren bereits mehrere Prüfverfahren, so dass die Schaffung eines neuen Mechanismus Verwirrung stiften und zu widersprüchlichen Lösungen führen könnte.

In einem sich wandelnden Betrugsbekämpfungsumfeld stellt sich die Frage, ob nicht auch das Mandat des OLAF weiterentwickelt werden sollte. Das derzeitige Untersuchungsmandat des OLAF ist auf Betrug, Korruption und sonstige rechtswidrige Handlungen zum Nachteil der finanziellen Interessen der Union beschränkt. Die Untersuchungsbeauftragten des OLAF waren allerdings der Meinung, dass die Erfahrung sowie die Vernetzung und das Fachwissen des Amtes auch in anderen Bereichen nützlich sein könnten (etwa bei Zollangelegenheiten und möglicherweise anderen Arten von Betrug, nicht die finanziellen Interessen der Union betreffen, wie Produktausgaben, die gegen Arbeitsschutzbestimmungen verstoßen).

Inwieweit sollte die Verordnung Nr. 883/2013 angesichts des neuen institutionellen Rahmens, der sich aus den Verhandlungen über die Verordnung über die Europäische Staatsanwaltschaft ergibt, überarbeitet werden?


Empfehlungen
Die nachstehend aufgeführten Empfehlungen folgen dem Grundsatz, dass die Verordnung Nr. 883/2013 Folgendes enthalten sollte:

- klare und hinreichende Befugnisse und Instrumente für administrative Untersuchungen, die bei internen und externen Untersuchungen einheitlich angewendet werden können
- klare Vorgaben für die Organe, Einrichtungen und sonstigen Stellen der EU, für Mitgliedstaats- und Drittstaatsbehörden sowie für internationale Organisationen, die diese zur Unterstützung des OLAF bei der Durchführung von Untersuchungen und zu einer wirksamen Zusammenarbeit mit dem Amt verpflichten
- ein angemessenes Gleichgewicht zwischen den Rechten von Betroffenen und Zeugen und den Befugnissen des OLAF zur Durchführung administrativer Untersuchungen im Einklang mit der Grundrechtecharta
- klar definierte Aufgaben und Zuständigkeiten des Überwachungsausschusses hinsichtlich der Wahrung der Unabhängigkeit des OLAF und der Überwachung seiner Untersuchungstätigkeit

Es werden folgende Verbesserungen empfohlen, um die in diesem Bericht dargelegten Mängel zu beheben.

Einleitung von Untersuchungen
Empfohlene Änderungen der Verordnung Nr. 883/2013

- Empfehlung 1: Überarbeitung von Artikel 5 (Einleitung der Untersuchungen), um zu klären, a) ob die Auswahlkriterien eine vollständige Liste der Faktoren darstellen, die bei der Entscheidung zur Einleitung einer Untersuchung zu berücksichtigen sind, b) ob die Auswahlkriterien gleich oder unterschiedlich gewichtet werden sollten und c) welchen Ermessensspielraum der Generaldirektor des OLAF bei den Auswahlkriterien hat.

Empfohlene nicht regulatorische Änderungen

- Empfehlung 2: Überarbeitung von Artikel 7 der Leitlinien zu den Untersuchungsverfahren, um die in der Verordnung Nr. 883/2013 verwendete Ausdrucksweise in Bezug auf die Benachrichtigung von Personen, die an der Beantragung einer Untersuchung beteiligt waren, von Personen, die Informationen beigetragen haben, über getroffene Fallauswahlsentscheidungen zu vereinheitlichen.
- Empfehlung 3: Überarbeitung von Artikel 5 der Leitlinien zu den Untersuchungsverfahren, um zu bestätigen, dass sich das OLAF ausschließlich an den vorrangigen Zielen der Untersuchungspolitik orientiert, wenn die in der

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Verordnung Nr. 883/2013 enthaltenen Fallauswahlkriterien die Nichtverfolgung eines Falles zur Folge hätten.

- **Empfehlung 4:** Die Dauer des Fallauswahlverfahrens sollte (neben der Dauer der Untersuchungen) fallweise mit Hilfe anonymisierter Metadaten systematisch überwacht werden, um herauszufinden, wie sich das Fallauswahlverfahren auf die Untersuchungsdauer auswirkt. Dies wird dem Überwachungsausschuss helfen, seinen in der Verordnung genannten Kontrollaufgaben besser nachzukommen, insbesondere mit Blick auf die Dauer der Untersuchungen und die Ressourcenzuteilung.

**Untersuchungsinstrumente und -befugnisse**

**Empfohlene Änderungen der Verordnung Nr. 883/2013**

- **Empfehlung 5:** Überarbeitung von Artikel 3 (Externe Untersuchungen), damit das OLAF in allen EU-Mitgliedstaaten Kontrollen und Überprüfungen vor Ort auf die gleiche Weise durchführen kann, unabhängig von Unterschieden bei den nationalen Vorschriften und Gepflogenheiten. Das Gleiche gilt für die Befugnisse des OLAF, digitalforensische Maßnahmen in sämtlichen EU-Mitgliedstaaten auf die gleiche Weise durchzuführen.

- **Empfehlung 6:** Überarbeitung von Artikel 3 (Externe Untersuchungen), Artikel 4 (Interne Untersuchungen), Artikel 6 (Zugang zu Informationen in Datenbanken vor Einleitung einer Untersuchung) sowie Erwägungsgrund 14, um die Befugnisse des OLAF zur Durchführung digitalforensischer Maßnahmen zu bekräftigen, falls Organisationsdaten auf Privatgeräten oder in Privatkonten gespeichert sind (unter Angabe, ob und auf welche Weise dies einen Eingriff in das Recht auf Privatsphäre bedeutet).

- **Empfehlung 7:** Überarbeitung von Artikel 4 (Interne Untersuchungen), um die Befugnisse des OLAF in Bezug auf akkreditierte parlamentarische Assistenten zu klären.

- **Empfehlung 8:** Überarbeitung von Artikel 6 (Zugang zu Informationen in Datenbanken vor Einleitung einer Untersuchung), um gleichwertigen Zugang zu Informationen in Datenbanken der Organe, Einrichtungen und sonstigen Stellen der EU sowie der Mitgliedstaaten zu gewährleisten. Des Weiteren sollte der Hinweis auf die „Unverzichtbarkeit“ der betreffenden Informationen in Datenbanken, zu denen das OLAF ein Zugangsrecht besitzt, aus Artikel 6 Absatz 1 gelöscht werden, da dies in der Praxis eine zu starke Einschränkung darstellen kann und angesichts des Hinweises in Artikel 6 Absatz 1, dass das Amt bei der Ausübung seines Zugangsrechts „die Grundsätze der Erforderlichkeit und der Verhältnismäßigkeit“ zu wahren hat, redundant bzw. damit unvereinbar sein dürfte.

**Zusammenarbeit und Informationsaustausch**

**Empfohlene Änderungen der Verordnung Nr. 883/2013**

- **Empfehlung 9:** Überarbeitung von Artikel 3 (Externe Untersuchungen), um Mindestanforderungen an die Kompetenzen und Zuständigkeiten der Koordinierungsstellen für die Betrugsbekämpfung in allen Mitgliedstaaten festzulegen. Desgleichen sollte in Artikel 4 (Interne Untersuchungen) ein Hinweis auf die Koordinierungsstellen für die Betrugsbekämpfung (vergleichbarer/ähnlicher Art wie in Artikel 3 Absatz 4) aufgenommen werden, um die Bedeutung der Aufgabe der Koordinierungsstellen zur Erleichterung einer wirksamen Zusammenarbeit und eines wirksamen Informationsaustauschs bei internen Untersuchungen hervorzuheben.

- **Empfehlung 10:** Überarbeitung von Artikel 14 (Zusammenarbeit mit Drittstaaten und internationalen Organisationen), um zu bestätigen, dass der
Empfohlene nicht regulatorische Änderungen

- **Empfehlung 11:** Es wurden mindestens sechs Faktoren ausgemacht, die die Effizienz der Zusammenarbeit mit den OLAF-Partnern verbessern können (nachzulesen im Abschnitt „Effizienz“). Solche Faktoren sollten in bestehenden und künftigen Kooperationsvereinbarungen kodifiziert werden, die, wie sich gezeigt hat, die Wirksamkeit und Effizienz der Zusammenarbeit zwischen dem OLAF und seinen Partnern schon an sich verbessern.

Verfahrensrechte und Schutzmaßnahmen

Empfohlene Änderungen der Verordnung Nr. 883/2013

- **Empfehlung 12:** Überarbeitung von Artikel 9 (Verfahrensgarantien) mit dem Ziel,
  - dem OLAF die Durchführung von Kontrollen vor Ort und/oder Überprüfungen von Räumlichkeiten und gleichzeitig Gespräche mit Betroffenen oder Zeugen (die während der Kontrolle bzw. Überprüfung vor Ort als Betroffene oder Zeugen identifiziert wurden) (auch ohne Vorankündigung) zu ermöglichen,
  - zu klären, ob Betroffene einer Verkürzung der Einladungsfrist für ein Gespräch auf weniger als 24 Stunden zustimmen können, und
  - die zusätzlichen Details und die Klarheit der Leitlinien zu den Untersuchungsverfahren bezüglich der Verfahrensgarantien (wie in den nicht regulatorischen Empfehlungen unten präzisiert) widerzuspiegeln/aufzunehmen.

- **Empfehlung 13:** Überarbeitung von Artikel 2 (Begriffsbestimmungen) und/oder Artikel 9 (Verfahrensgarantien), um Einheitlichkeit bezüglich der Grundlage der Definition eines Betroffenen (d. h. „Hinweise“ oder „Verdacht“) herzustellen.

Empfohlene nicht regulatorische Änderungen

- **Empfehlung 14:** Überarbeitung von Artikel 16 der Leitlinien zu den Untersuchungsverfahren, um die Ausdrucksweise in den Leitlinien an die Ausdrucksweise der Verordnung Nr. 883/2013 hinsichtlich der Verwendung früherer Erklärungen von Betroffenen, die zuvor als Zeugen befragt wurden, anzupassen.

- **Empfehlung 15:** Klärung folgender Punkte in den Leitlinien zu den Untersuchungsverfahren mit Blick auf Artikel 9 der Verordnung Nr. 883/2013:
  - Wenn ein Betroffener dem OLAF Stellungnahmen zum Sachverhalt übermittelt, ist zu klären, ob erforderlichenfalls zusätzliche Untersuchungsmaßnahmen durchgeführt werden könnten/sollten. [ANMERKUNG: Falls dies die Fortführung einer bestehenden Untersuchung bedeuten würde, könnte alternativ dazu Artikel 9 Absatz 4 dahingehend geändert werden, dass die Gelegenheit zur Stellungnahme nicht nur nach Abschluss einer Untersuchung besteht.] Sollten bei den zusätzlichen Untersuchungsmaßnahmen neue Erkenntnisse über den Betroffenen gewonnen werden, sollte dieser, bevor Schlussfolgerungen gezogen werden, die Gelegenheit zur Stellungnahme zu diesen neuen Erkenntnissen erhalten.
  - Es ist zu klären, ob ein Betroffener in abgeschlossenen Fällen, in denen keine Beweise gegen ihn gefunden wurden, die auf das Vorliegen von Betrug, Korruption oder einer sonstigen rechtswidrigen Handlung hindeuten, Gelegenheit zur Stellungnahme haben sollte.
- Welche Form sollte die „Zusammenfassung des Sachverhalts“ annehmen?
- Wie sind „hinreichend begründete Fälle“ zu definieren/kategorisieren?
- Es ist zu klären, ob die Verschiebung der Gelegenheit zur Stellungnahme „auf einen späteren Zeitpunkt“ als „Aussetzung“ oder „Aufhebung“ gedeutet werden sollte und wie dieser Verpflichtung letztlich nachzukommen ist.

**Empfehlung 16:** Die gewährten Verfahrensrechte sollten mittels anonymisierter Falldaten regelmäßig überwacht werden, um bewerten zu können, wie sie sich auf die Effizienz der Untersuchungstätigkeit auswirken. Indikatoren, die eine Verbindung zwischen der Art der Schutzmaßnahmen und der Falldauer, den Folgemaßnahmen auf nationaler Ebene oder der Zulässigkeit von Beweismitteln des OLAF in Gerichtsverfahren auf nationaler Ebene anzeigen können, würden dem OLAF seine Berichtspflichten und seine Entscheidungen über den bestmöglichen Ressourceneinsatz in der Fallauswahlphase erleichtern. Außerdem würde es die Kontrollaufgaben mit Blick auf die Anwendung der Verfahrensgarantien im Rahmen der Verordnung vereinfachen.

**Überwachungsausschuss**

**Empfohlene Änderungen der Verordnung Nr. 883/2013**

- **Empfehlung 17:** Überarbeitung von Artikel 15 (Überwachungsausschuss), um
  - zu klären, ob die Hauptaufgabe und das Mandat des Überwachungsausschusses darin bestehen, die Untersuchungstätigkeit des OLAF zu kontrollieren und zu überwachen (um die Einhaltung der Verordnung Nr. 883/2013 zu gewährleisten) oder die Unabhängigkeit des OLAF zu unterstützen und zu sichern,

**Empfohlene nicht regulatorische Änderungen**

- **Empfehlung 18:** Einführung eines auf die Analyse anonymisierter Falldaten gestützten Überwachungssystems, damit der Überwachungsausschuss die Untersuchungsdauer und die Faktoren, die die Untersuchungsdauer beeinflussen, besser überwachen kann.

- **Empfehlung 19:** Eine Funktion/ein System für die regelmäßige Überwachung, das auf Schlüsselindikatoren (z. B. Untersuchungsdauer, Ressourceneinsatz, gewährte Schutzmaßnahmen) beruht, könnte dem Überwachungsausschuss helfen, seine Kontrollaufgaben effizienter wahrzunehmen und so den Zeit- und Arbeitsaufwand des Sekretariats und der Ausschussmitglieder verringern.

**Blick in die Zukunft**

**Empfohlene Änderungen der Verordnung Nr. 883/2013**

- **Empfehlung 20:** Überarbeitung der Verordnung Nr. 883/2013, um eine synergetische Beziehung und gegenseitige Ergänzung zwischen dem OLAF und der künftigen Europäischen Staatsanwaltschaft herzustellen. Dabei behandelt werden sollten
  - das Verfahren, das in Fällen zum Tragen kommt, in denen bei einer laufenden OLAF-Untersuchung Anhaltspunkte dafür auftauchen, dass der Sachverhalt unter das Mandat der Europäischen Staatsanwaltschaft fallen könnte,
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- die Modalitäten des Informationsaustauschs zwischen der Europäischen Staatsanwaltschaft und dem OLAF,
- die Aufgaben und das Vorgehen des OLAF in Fällen, in denen die Europäische Staatsanwaltschaft Informationen an das OLAF übermitteln muss, wie in Erwägungsgrund 105 angegeben,
- die Aufnahme des Verfahrens für justizielle Folgemaßnahmen der Europäischen Staatsanwaltschaft zu solchen Untersuchungen in die Verordnung Nr. 883/2013 und
- die Bedingungen, unter denen die Europäische Staatsanwaltschaft vom OLAF erhobene Beweismittel in ihre Fälle integrieren könnte, um deren Zulässigkeit vor nationalen Strafgerichten zu gewährleisten.

**Empfehlung 21:** Überarbeitung der Verordnung Nr. 883/2013, um die Zusammenarbeit zwischen dem OLAF und der Europäischen Staatsanwaltschaft in Mehrwertsteuer-Fällen dadurch zu erleichtern, dass das OLAF besseren Zugang zu mehrwertsteuerrelevanten Informationen erhält (z. B. durch eine Zugangsgewähr zu Datenbanken wie Eurofisc und MIAS).

**Empfehlung 22:** Das Mandat des OLAF könnte durch juristische Unterstützungsdienste für die Europäische Staatsanwaltschaft erweitert werden. Zusätzlich zu dieser Änderung müsste Artikel 9 der Verordnung Nr. 883/2013 überarbeitet werden, um die Verfahrensgarantien an die Garantien in Strafverfahren anzulegen, die für derartige Untersuchungstätigkeiten gelten.

**Empfehlung 23:** Überarbeitung der Verordnung Nr. 883/2013, um die Geltung des OLAF-Untersuchungsmandats auf Zollangelegenheiten und gegebenenfalls weitere Arten von Betrug jenseits des Schutzes der finanziellen Interessen der Union auszuweiten, etwa auf Produktfälschungen, die gegen Arbeitsschutzbestimmungen verstoßen.

**Empfehlung 24:** Überarbeitung der Verordnung Nr. 883/2013, um die Bestimmungen über die Zusammenarbeit mit Eurojust und Europol an die Vorschriften in den Rechtsrahmen der beiden Einrichtungen anzulegen (nachdem die Verhandlungen über die Eurojust-Verordnung wiederaufgenommen wurden).

**Empfohlene nicht regulatorische Änderungen**

**Empfehlung 25:** In einer Arbeitsvereinbarung zwischen der Europäischen Staatsanwaltschaft und dem OLAF (Artikel 99 der Verordnung über die Europäische Staatsanwaltschaft) sollte Folgendes geklärt werden:
- die Kriterien, die das OLAF bei der Entscheidung anzuwenden hat, ob Anschuldigungen an die Europäische Staatsanwaltschaft zu übergeben sind
- das Fallauswahlverfahren der Europäischen Staatsanwaltschaft

**Empfehlung 26:** Es könnte entweder auf Strategie- oder Untersuchungsebene ein besonderes OLAF-Referat eingerichtet werden, das sich mit der Beziehung zur Europäischen Staatsanwaltschaft befasst, um eng mit der Staatsanwaltschaft Kontakt zu halten und deren Anträge zu bearbeiten.

**Empfehlung 27:** Die Europäische Staatsanwaltschaft sollte die Interinstitutionelle Vereinbarung vom 25. Mai 1999 über die internen Untersuchungen des Europäischen Amtes für Betrugsbekämpfung unterzeichnen, damit das OLAF im Fall von Hinweisen auf mögliche Unregelmäßigkeiten oder Straftaten Bedienstete der Europäischen Staatsanwaltschaft untersuchen kann.

September, 2017
Introduction

In support of the European Commission’s evaluation report, ICF, an independent consultancy, was contracted to conduct an Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). This is ICF's Final Report. This chapter introduces the evaluation study by describing the purpose and scope of the evaluation before presenting the structure of this report.

1.1 Purpose of the evaluation

The purpose of the evaluation is threefold:

- to assess the application of the key elements of Regulation 883/2013;
- to assess the extent to which the objectives have been met and remain relevant; and
- to assess the operation of the Regulation in the context of an evolving anti-fraud landscape and whether there is a need to amend it.

The evaluation is required by Article 19 of Regulation 883/2013, which provides that, by 2 October 2017, the European Commission shall submit to the European Parliament and the Council an evaluation report on the application of this Regulation. The Commission’s report shall be accompanied by an opinion of the Supervisory Committee which shall state whether there is a need to amend the Regulation.

1.2 Scope of the evaluation

Table 1 summarises the scope of the evaluation by highlighting the elements inside and outside the scope of the study.

Table 1. Overview of the scope of the study

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Maximum scope</th>
<th>Out of scope</th>
</tr>
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<tbody>
<tr>
<td>Geographical scope</td>
<td>EU Member States</td>
<td>EU institutions, bodies, offices and agencies (IBOAs)</td>
</tr>
<tr>
<td></td>
<td>Third countries, insofar as they were involved in collaboration with OLAF since the introduction of Regulation 883/2013</td>
<td></td>
</tr>
<tr>
<td></td>
<td>International organisations, insofar as they were involved in collaboration with OLAF since the introduction of Regulation 883/2013</td>
<td></td>
</tr>
<tr>
<td>Articles of Regulation 883/2013</td>
<td>Preamble and articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and annexes</td>
<td></td>
</tr>
<tr>
<td>Key elements of Regulation</td>
<td>The key elements of the Regulation to be covered by the evaluation will be those described in Section 3 of this report</td>
<td></td>
</tr>
<tr>
<td>Linked legal instruments</td>
<td>Council Regulation 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests</td>
<td>Regulation (EC) No 1073/1999</td>
</tr>
<tr>
<td></td>
<td>Council Regulation 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities</td>
<td>Council Regulation (Euratom) No 1074/1999</td>
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<td>Decision 1999/352/EC establishing the European</td>
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Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Maximum scope</th>
<th>Out of scope</th>
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<tbody>
<tr>
<td></td>
<td>Anti-fraud Office (last amendment Com Dec (EU)2015/512)</td>
<td>Commission Decision 1999/396/EC concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests</td>
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<tr>
<td></td>
<td>Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the EU and the Commission concerning internal investigations by OLAF</td>
<td>Council Regulation (EC) 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters</td>
</tr>
<tr>
<td>Timeframe</td>
<td>The period covered by the evaluation was 1 October 2013 to December 2016</td>
<td></td>
</tr>
<tr>
<td>Stakeholder types</td>
<td>OLAF staff in investigative functions</td>
<td></td>
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<tr>
<td></td>
<td>OLAF staff in policy-related functions</td>
<td></td>
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<tr>
<td></td>
<td>OLAF’s Supervisory Committee</td>
<td></td>
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<tr>
<td></td>
<td>Other EU control and supervision bodies (EDPS, EU Ombudsman, CJEU, ECA)</td>
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<td></td>
<td>Commission services</td>
<td>EU institutions, bodies, offices and agencies (IBOAs) including the Member State stakeholders</td>
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<td></td>
<td></td>
<td>Third countries</td>
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<td></td>
<td></td>
<td>International organisations</td>
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<tr>
<td></td>
<td>Membership organisations, EU &amp; national associations of lawyers and prosecutors</td>
<td></td>
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</tbody>
</table>

9 For example, those involved in: controlling the management of the EU budget; cooperating with OLAF during investigations related to (protection of the) revenue or expenditures side of the EU budget; following up on OLAF recommendations; and implementing the Commission’s anti-fraud strategies.

10 That is, coordination bodies involved in OLAF investigations, i.e. AFCOS; Bodies involved in the shared management and implementation of EU funds, known as Managing / Certifying Authorities, and any intermediate bodies, where relevant; Bodies involved in the control of EU funds, i.e. audit authorities, and which can also participate in OLAF investigations; Bodies involved in investigations at a national level, e.g. police forces, customs; Judiciary bodies involved in sanctioning harm to the EU’s financial interests following an OLAF investigation, e.g. prosecutors, lawyers; Any other bodies involved in promoting policies and practices in favour of the protection of the EU’s financial interests, i.e. COCOLAF members.

11 Of the third countries contacted for interviews as part of this evaluation, Serbia and Senegal were interviewed. Of the third countries invited to complete the online survey, Bosnia and Herzegovina, the Occupied Palestinian Territories and six additional (unspecified) countries responded.

12 Of the international organisations contacted for interviews as part of this evaluation, the African Union, Council of Europe, EBRD, Global fund to Fight Aids, Tuberculosis & Malaria, the United Nations Headquarters, United Nations Development Programme and the World Bank were interviewed. Of the international organisations invited to complete the online survey, the African Union Commission and one additional (unspecified) international organisation responded.
### Dimension	| Maximum scope	| Out of scope
---|---|---
Policy proposals and new Acts	| Negotiations on the EPPO Regulation
COM proposal to establish a Controller of procedural guarantees
Amendment of the Regulation, as regards the secretariat of the Supervisory Committee (application from January 2017)
Recently created Early Detection and Exclusion System (EDES), operational since January 2016
Proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law
Discussions on stepping up the fight against VAT fraud (including by granting new competences and tools to OLAF to investigate intra-Community VAT fraud)
Developments in the area of non-financial fraud

### 1.3 Structure of this report

The remainder of this report is structured as follows:

- Chapter 2 provides a summary description of the evaluation method of approach;
- Chapter 3 sets out the context for the evaluation and its findings;
- Chapter 4 presents evaluation findings on the effectiveness of Regulation 883/2013;
- Chapter 5 presents evaluation findings on the efficiency of Regulation 883/2013;
- Chapter 6 presents evaluation findings on the coherence of Regulation 883/2013;
- Chapter 7 presents evaluation findings on the relevance of Regulation 883/2013;
- Chapter 8 presents evaluation findings on the future outlook of Regulation 883/2013; and
- Chapter 9 draws together conclusions and recommendations for possible future amendments to Regulation 883/2013.

The report is supported by a number of annexes which present a more detailed description of the evaluation methodology, the evaluation research tools, a list of sources/documents reviewed as part of the evaluation, the stakeholder consultation report, the evaluation case studies and detailed evaluation evidence supporting the findings and conclusions in the main body of the report.


2 Methodology

This section details the method of approach of the evaluation.

2.1 Evaluation criteria and questions

This section describes the evaluation criteria and questions from the ToR. The evaluation focuses on five key areas – effectiveness and efficiency in the application of key elements of the Regulation, coherence and relevance of the Regulation to accomplish its task and in the context of anti-fraud policies and subsequent developments, and the future outlook of the Regulation considering the application of the Regulation and current policy proposals. These criteria are summarised below in Figure 1.

Figure 1. Evaluation criteria

While the criterion of EU added value is considered as addressed given the European nature of OLAF’s mandate, it is assessed in the light of future policy and legal developments in the field of the protection of the EU’s financial interests under the “Future Outlook” evaluation questions. The evaluation questions corresponding to evaluation criteria are presented in Annex 12.

In assessing and evaluating Regulation 883/2013, the objectives of the Regulation were considered to determine the extent to which the Regulation has met its objectives. These are (as articulated in the evaluation study ToR):

- Enhancing the effectiveness and efficiency of OLAF’s investigative activity, including by introducing criteria for the opening and conduct of OLAF’s investigations.
- Strengthening the procedural guarantees of individuals subject to investigation.

13 As noted in the ToR for this study. “The further criterion of EU added value is considered as addressed (and will not be covered by the evaluation), given that OLAF carries out a specifically European task - the protection of the EU’s financial interests in the framework of Articles 317 and 325 TFEU which cannot, in the same way, be carried out at national level. This is also acknowledged by the current work on the establishment of a European Public Prosecutor’s Office.”
• Improving cooperation and information exchange with Member States.
• Strengthening cooperation with EU institutions, bodies, offices and agencies.
• Strengthening cooperation with third countries and international organisations.
• Reinforcing the governance of OLAF.

2.2 Methodological approach
This section summarises the main methodological elements, including the intervention logic of the Regulation, the evaluation framework, data collection and analytical exercises. It cross-references the more detailed methodological annex and other relevant annexes.

2.2.1 Logic of intervention
The logic of intervention retraces the cause and effects chains through which the provisions of the Regulation generates their intended results. It is depicted in Figure 2. The provisions of the Regulation have been broken down into four key operational elements:

• Investigative function (Articles 3, 4, 5, 7, 11);
• Safeguards (Articles 8, 9, 10 and 17);
• Cooperation and coordination (Articles 1, 3, 4, 5, 7, 11, 12, 13, 14); and,
• Governance and control mechanisms (Articles 15, 16, 17).

These key elements generate outputs related to investigation cases (i.e. the selection, opening, closure and follow-up thereof), the coordination of investigations with OLAF partners and support to those as well as outputs related to the internal and external controls.

Expected results are an increased deterrence through improved cooperation and the better enforcement of laws designed to combat fraud or other illegal activities affecting the Union's financial interests while recovering a greater proportion of misused EU public money. These results should also be achieved while affording the necessary procedural guarantees to persons concerned as well as by respecting the independence of OLAF.

Ultimately, the Regulation is expected to directly or indirectly contribute to the effective protection and enforcement of the EU’s financial interests across EU Member States and beyond, and enhance the credibility of the Union’s budgetary responsibility.
2.2.2 Evaluation Framework

The evaluation framework operationalised the evaluation criteria by using judgement criteria, indicators and means of verification. Judgment criteria, expressed in the form of statements, are used to answer the various evaluation questions. They can be then confirmed and or rejected by the research. A comprehensive set of indicators were developed against these judgment criteria and were populated by the evidence generated by the evaluation. The evaluation Framework also included means of verification, that is the research methods and tools that were used to collect data and to run the analytical exercises to inform the indicators put forward.

2.2.3 Data collection and analytical exercises

The evaluation built on the following research exercises to generate the intended array of evidence.

- Desk research was used to collect, structure and analyse all relevant documentation related to the Regulation 883/2013 and its implementation. A bibliography has been annexed to this report (see Annex 3).
- Stakeholder consultations were organised by way of a survey reaching out to 168 respondents and 160 interviews of representative and knowledgeable key informants. In addition, the evaluation team attended three high level consultations.
conferences and expert meetings as well as organised two internal validation workshops of evaluation findings (see Annex 4).

- Five case studies were used to further deepen the insights into key findings using evidence from the stakeholder interviews and the online survey.

The evidence collected was used to run the following analytical exercises:

- Descriptive qualitative analysis consisted in extracting from and structuring the evidence contained in key documents in order to validate or reject specific judgment criteria

- Descriptive quantitative analysis of monitoring and administrative data informed the quantitative indicators related to effectiveness and efficiency in the evaluation framework

- A comprehensive legal analysis of key provisions of the Regulation and key relevant legal instruments in the area of anti-fraud assessed the clarity of key provisions, internal and external coherence and potential impact on the functioning of the Regulation.

- Four contribution case studies formed the basis for the contribution analysis. The method involved defining the link between variables as well as the influence of explanatory variables on impact variables relating to specific cause and effect chains of the Regulation.

- The stakeholder consultation analyses involved analysing inputs from stakeholders interviewed and stakeholders surveyed via the online survey.

The detail method of approach implemented is fully described in Annex 1.

2.3 Evaluation challenges and limitations

This section describes the main challenges encountered and the associated limitations of the evaluation results and mitigation measures put in place. In doing so it provides an overall assessment of the robustness of the methodology applied and the reliability of the available data.

- Desk research (qualitative information) – the evidence base gathered through desk research informed the qualitative indicators of all evaluation questions. Desk research generated evidence supporting findings for all evaluation criteria although evidence from desk research was quite limited on the relevance criteria. This limitation had little bearing on the findings on relevance as other research tools were used to generate evidence on the needs and issues faced by stakeholders.

- Desk research (quantitative information) – the quantitative research designed initially intended to rely on case level data. Provided the fact that the evaluators were provided with aggregated information benchmarking and advanced statistical analysis proved not feasible. This had a bearing on the robustness of quantitative assessments e.g. correlation, cost-effectiveness and contribution analyses. The consequence was that although these exercises were performed on aggregated data some of the intended analyses could not be undertaken limited the potential reach of such exercises. This affected the granularity of the evidence generated and the findings. For instance, in-depth findings on the effectiveness and efficiency of OLAF investigations by sector or geography are limited as a result.

- Consultations with stakeholders were delayed for a number of reasons (e.g. identification of key informants, approval to interview them, linguistic issues) all of which were successfully mitigated against. Due to the length of the evaluation questions, the questionnaires proved to be too long and this led to partial coverage of the interview questions in some cases. The consequence
was that at times the triangulation of evidence was limited to a couple of sources (e.g. desk research and survey) because some of the questions were left unanswered by the majority of interviewed stakeholders. Whenever this took place, contradictory evidence on the basis of a few sources was not always reported and evidence pointing in the same direction was reported with the necessary caveats.

- The online surveys covered all stakeholder groups as intended. The results of the survey analysis may suffer from a slight positive bias in the responses provided due to the fact that more than one third of the respondents were OLAF staff. This means that respondents may have tended to favour positive statements on the effectiveness and efficiency of the Regulation. The sensitivity analysis performed on a number of key questions demonstrated that weighting the responses of this stakeholder group would not have changed the overall direction of the results.

- Case studies were mainly focused on gathering evidence of good practices. At times, interviewers found it difficult to obtain illustrative examples of “bad” practices because stakeholders were reluctant to name other stakeholders that have not adopted best practices. This limited the extent to which the case studies could inform recommendations on effective and efficient working practices.

- Analysis and triangulation of evidence throughout the revised Final Report sought to provide greater explanation and analysis of stakeholders’ views collected through interviews and the survey, and to ensure evidence-based links to all conclusions and recommendations drawn in the report.

- The length of the draft final report has been shortened to reduce the length of the overall report without being able to fully conform to the page limitation of 100 pages set in the ToR. Where necessary, information from the draft final report has been moved to annexes. In addition, case studies have been shortened.

Overall, the planned data collection and analytical exercises could be implemented as planned. Most of the challenges were overcome and/or mitigated against. The robustness of the evidence base gathered was judged satisfactory by the evaluators.
3 Context for the evaluation

This section provides an overview of the application of the key elements of Regulation 883/2013 based on desk research of relevant documentation (see Annex 3) and scoping interviews with selected stakeholders (see Annex 4). It also highlights current legislative and political developments in the EU anti-fraud landscape that could have an impact on the application of Regulation 883/2013.

3.1 Overview of Regulation 883/2013

Regulation 883/2013 was adopted with the objective to improve the effectiveness, efficiency and accountability of OLAF while safeguarding its independence; to strengthen the procedural guarantees and fundamental rights of persons subject to investigation; to strengthen cooperation with Member States, EU institutions, bodies, offices and agencies (IBOAs), third countries and international organisations; and to reinforce the governance of OLAF.

Article 1(1) of Regulation 883/2013 provides OLAF with the legal basis to conduct independent administrative investigations into fraud, corruption and other illegal activities affecting the financial interests of the EU and EAEC. More specifically, Article 1(2) allows OLAF to conduct external\textsuperscript{14} and internal\textsuperscript{15} investigations as well as to engage in policy and investigation-related cooperation\textsuperscript{16}.

The provisions of the Regulation are completed by Guidelines on Investigation Procedures (GIP), adopted on 1 October 2013, which intend to clarify for OLAF’s staff how the Regulation should be applied in practice. A number of other documents are also relevant for the purpose of this evaluation\textsuperscript{18}.

3.2 Key elements of Regulation 883/2013 and related implementing rules

This section aims to delimitate the scope of the evaluation and analyse the elements of the Regulation that will be the subject of the present evaluation.

3.2.1 Investigative functions (Art. 3, 4, 5, 6, 7, 11)

3.2.1.1 Investigative powers

OLAF’s investigative powers were initially defined under Regulations 1073/99 and 1074/99, which were replaced by Regulation 883/2013. Investigations are defined as “any inspection, check or other measures undertaken by the Office [...] with the view to achieving [its] objectives and establishing, where necessary, the irregular nature of the activities under investigation”.\textsuperscript{19} Regulation 883/2013 further defines OLAF’s powers during external and internal investigations in its Articles 3 and 4 respectively.

\textsuperscript{14} By exercising the powers of investigation conferred on the Commission by the relevant Union acts and by the relevant cooperation and mutual assistance agreements concluded by the Union with third countries and internal organisations

\textsuperscript{15} By conducting administrative investigations within EU institutions, bodies, offices and agencies (IBOAs) for the purpose of fighting fraud, corruption and other illegal activities affecting the financial interests of the EU

\textsuperscript{16} By assisting Member States with organising close and regular cooperation between their competent authorities; contributing to the design and development of methods; promoting and coordinating with and amongst Member States, the sharing of operational experience and best practices; and supporting joint anti-fraud actions, in order to prevent and combat fraud, corruption and other illegal activities affecting the financial interests of the EU.

\textsuperscript{17} Available at http://ec.europa.eu/anti_fraud/documents/gip/gip_18092013_en.pdf

\textsuperscript{18} e.g. instructions on data protection, the Ethics and Conduct Guide for OLAF Staff (June 2014) and training

\textsuperscript{19} Article 2(4) of Regulation 883/2013
As part of **external investigations** OLAF can carry out on-the-spots checks and inspections\(^{20}\) in Member States and third countries, and on the premises of international organisations.\(^{21}\) In addition, it may conduct such checks and inspections on economic operators in cases where there is a need to establish whether the EU’s financial interests have been affected in connection with a grant agreement or decision, or a contract concerning EU funding.\(^{22}\) OLAF may interview persons concerned or witnesses for the purpose of the investigation.\(^{23}\) In such investigations, the Office has the obligation to act in compliance with national law and practices, and with procedural guarantees defined in the Regulation, subject to the Union law applicable. In turn, national authorities must assist the Office with its investigative tasks and ensure that OLAF investigators are allowed access to information and documents relating to the subject of the investigation under the same conditions as equivalent national authorities.\(^{24}\)

As part of **internal investigations within IBOAs**, OLAF carries out administrative investigations in accordance with the provisions of Regulation 883/2013 and with decisions adopted by the relevant IBOA, which lay down the terms and conditions for internal investigations concerning them.\(^{25}\) OLAF’s powers include the right to:

- immediate and unannounced access to relevant information (including in databases) and to the IBOA’s premises and accounts, \((\text{Art. } 4(4))\);
- request oral information, including through interviews, and written information\(^{26}\); and
- carry out on-the-spot checks and inspections at the premises of economic operators in order to obtain access to relevant information.\(^{27}\)

Finally, Article 11(2) of the GIPs further specifies which investigative activities can be performed in the context of an investigation but **do not distinguish between external and internal cases**.

### 3.2.1.2 Selection of investigations

The decision to open an investigation is taken by OLAF’s Director General (DG) on the grounds that there is a sufficient suspicion that there has been fraud, corruption or other illegal activities affecting the EU’s financial interests based on information provided by third parties or anonymous sources. As part of the internal reorganisation of OLAF in 2012, a new **Investigation Selection and Review Unit (ISRU)** was created. It is an independent unit supervised directly by OLAF’s DG, which advises him on whether an investigation or coordination case (see Section 3.2.3.1) should be opened, or whether the case should be dismissed.

The criteria as well as the general principles of the procedure to open an investigation are defined in Article 5 of Regulation 883/2013, while the GIPs define the practical

\(^{20}\) The definition of the checks and inspections is found in Article 9(1) of Regulation 2988/95.

\(^{21}\) In accordance with relevant cooperation and mutual assistance agreements and any other legal instruments in force.

\(^{22}\) The relevant procedures for such checks and inspections are defined in Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities.

\(^{23}\) Article 9(1) of Regulation 883/2013 and Article 11 of the GIPs.

\(^{24}\) Article 3(3) of Regulation 883/2013

\(^{25}\) Article 4(1) of Regulation 883/2013

\(^{26}\) Article 4(2)(b) of Regulation 883/2013

\(^{27}\) Article 4(3) of Regulation 883/2013
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

criteria and the different steps of the procedure. The introduction of selection criteria is one of the innovations of Regulation 883/2013. OLAF’s DG can open an external or internal investigation on his own initiative, or upon request of a Member State concerned or any IBOA, and from the IBOA concerned or any Member State. Such a decision needs to be taken within two months from receiving the information.

3.2.1.3 Investigation procedure

The main rules applicable to the investigation procedure are defined in Article 7 of the Regulation. Investigations are conducted by staff designated by OLAF’s DG, acting under his direction via instructions and written authorisations. Investigators receive a written authorisation featuring their identity and capacity, the subject and purpose of the investigation, its legal bases, and its related powers.

The context of an investigation can justify the adoption of administrative precautionary measures to protect the financial interests of the Union. On the basis of information provided by the Office, IBOAs and/or EU Member States decide whether to take such measures in accordance with national/EU law. In cases where external investigations involve third-countries or international organisations, the modalities of their cooperation during investigations are defined in administrative arrangements concluded with OLAF’s partner countries/organisations.

3.2.1.4 Reporting and monitoring

Once an investigation is completed, a Final Report on the investigation is drafted under the authority of the DG. This report may be accompanied by Recommendations as to actions that should be taken following the investigation, which include the amounts to be recovered and the preliminary legal classification of the facts established. Recommendations may be judicial, disciplinary, financial, or administrative.

- OLAF reports must constitute admissible evidence before national courts under the same conditions as equivalent national reports. The report is sent to the competent authorities of the Member State(s) and/or the IBOA concerned Member States and IBOAs shall report when they have taken action following a recommendation on their own initiative or if requested by OLAF.

According to the GIPs, the ISRU (Review) reviews the Final Report and the Recommendations including the accompanying draft notes and letters in order to provide an opinion to the DG. It analyses whether the investigation unit complied with rights and procedural guarantees, data protection requirements, and the legality, necessity and proportionality of the investigation, as well as whether the preliminary qualification of the facts under national criminal law is correct.

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28 Those are also completed by internal guidelines on selection, which constitute a ‘checklist’ ensuring the consistency of practices amongst staff
29 Article 7(1) of the Regulation
30 Article 7(2) of the Regulation
31 Article 7(6) of the Regulation
32 Article 7(7) of the Regulation
33 Article 11(1) of the Regulation
34 Article 11(2) of the Regulation and Article 19 of the GIPs
35 Article 11(2) of the Regulation
36 Art 12 (3) of the Regulation
37 Article 20 GIP
38 Article 21 GIP
In the event no evidence is found against the person concerned in the course of an investigation, the investigation is closed by OLAF’s DG, and the person concerned is informed of the decision within 10 working days.\(^{39}\)

### 3.2.2 Safeguards (Art. 4, 9, 10, 12)

#### 3.2.2.1 Procedural guarantees

External and internal investigations must be conducted in compliance with the procedural guarantees defined in Article 9 of the Regulation and Article 8.6 of the GIP.\(^{40}\) The introduction of this article constitutes one of the main innovations of Regulation 883/2013. The guarantees offered include the right to an objective and impartial investigation, the right to avoid self-incrimination, the right to be interviewed/heard (once prior notice has been provided), including the right to be assisted by a person of the individual’s choice, and the right for the person concerned to comment on the facts of the case.

In relation to procedural guarantees, the ISRU (Review) reviews and verifies the legality, proportionality and necessity of the proposed investigative measures. All ISRU opinions are submitted to OLAF’s DG for him to make a decision or to authorise an investigative act.

In addition, any person affected by an investigation may address a complaint directly to OLAF\(^ {41}\) or to external and independent institutions or bodies (European Ombudsman, European Data Protection Supervisor) or lodge an action before, the Court of Justice of the European Union).

#### 3.2.2.2 Confidentiality and data protection

Article 10 of the Regulation defines general rules on confidentiality of information and data protection applicable to the Office, while IBOAs have an obligation to establish internal procedures to ensure the confidentiality of internal investigations at all stages.\(^ {42}\) As a service of the Commission, OLAF is also subject to Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies\(^ {43}\) and is under the supervision of the EDPS. Data protection rules also apply to exchanges with third countries.

In 2002, a Data Protection Officer was appointed by a Decision of OLAF’s DG.

#### 3.2.3 Cooperation and coordination (Art. 1, 8, 12, 13, 14)

##### 3.2.3.1 Cooperation and coordination with Member States

**Investigation-related cooperation**

Member States have an obligation to assist OLAF in the context of internal and external investigations. Member States must assist OLAF’s staff as necessary for them to carry out their tasks effectively, and to ensure they have access to all relevant information and documents relating to the investigated matter under the

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\(^{39}\) Article 11(7) of the Regulation  
\(^{40}\) Recital 23 of Regulation 883/2013  
\(^{41}\) The Legal Advice Unit deals with all complaints according to the procedure available on OLAF’s website: http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en (Part A).  
\(^{42}\) Article 4(5) and 10(3) of Regulation 883/2013  
\(^{43}\) Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.
same conditions as national authorities.\textsuperscript{44} In addition, they are required by Article 3(4) of the Regulation to set up an Anti-Fraud Coordination Service (AFCOS) to facilitate cooperation and the exchange of information.

By virtue of Article 1(5) of the Regulation, there are 14 Administrative Cooperation Arrangements (ACAs) in force between OLAF and Member States’ authorities establishing some practicalities for the exchange of information with the partner authorities of 8 Member States and the conduct of (internal and external) investigations.\textsuperscript{45} ACAs do not constitute a prerequisite for conducting investigations in Member States, but provide some practical modalities for cooperation in this context where there is an identified need.

\textit{Selection and safeguard of evidence}

\textbf{Before a decision is taken on whether to open an external investigation}, OLAF may inform the authorities of the Member States concerned, who shall ensure that appropriate action is taken.\textsuperscript{46} In \textit{internal investigations}, the authority will inform OLAF of any action taken pursuant to the receipt of the information.\textsuperscript{47}

\textbf{When an investigation is opened} and if so requested by OLAF, it is the responsibility of national competent authorities to decide on appropriate precautionary measures to protect the financial interests of the Union, including measures for the safeguarding of evidence.\textsuperscript{48} In cases where OLAF’s DG decides \textbf{not to open an external investigation}, he may send any relevant information to the Member State concerned for the competent authorities to take appropriate action.\textsuperscript{49}

\textit{Follow-up and monitoring}

According to Article 12 of the Regulation, OLAF may provide the competent authorities with the information obtained in the course of \textit{external investigations} in due time, so that they can take appropriate action in application of their national law, following the investigation. Such information must also be transmitted by OLAF’s DG to any IBOA concerned. In addition, OLAF’s DG has an obligation to transmit information obtained in the course of an \textit{internal investigation} on facts falling under the jurisdiction of a Member State to its judicial authorities. OLAF can provide evidence in national proceedings, in accordance with national law and its staff regulations.\textsuperscript{50}

In addition, Regulation 883/2013 requires OLAF’s partners to provide information on follow-up actions at the Office’s request in accordance with national law and Regulation 883/2013.\textsuperscript{51}

\begin{flushleft}
\textsuperscript{44} Articles 3(3) and 7(3) of Regulation 883/2013
\textsuperscript{45} See Annex 5.
\textsuperscript{46} Article 3(6) of Regulation 883/2013
\textsuperscript{47} Article 4(8) second paragraph of Regulation 883/2013
\textsuperscript{48} Article 7(7) of Regulation 883/2013. OLAF cooperates with the authorities of the Member State concerned following the modalities defined under Article 3 of the Regulation and described under Section 3.2.3.1
\textsuperscript{49} Article 5(6) of Regulation 883/2013.
\textsuperscript{50} Article 12(4) of Regulation 883/2013
\textsuperscript{51} Article 11 of Regulation 883/2013
\end{flushleft}
**Coordination cases**

In addition to investigation cases, OLAF can open coordination cases to provide assistance and contribute to investigations carried out by competent national authorities.\(^{52}\) Such cases may be opened on the basis of relevant information or of a request from the competent national authorities. However, OLAF cannot conduct investigative activities and its role is limited to supporting Member States’ competent authorities. Coordination cases can be reclassified as investigation cases upon request by OLAF’s DG (upon request of the investigation unit and a positive opinion from the ISRU).

**Policy-related cooperation**

In addition to bilateral cooperation between OLAF and the AFCOS in Member States, OLAF and the Member States’ authorities cooperate as a network in the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF).

3.2.3.2 Cooperation and coordination with EU IBOAs

**Investigation-related cooperation**

Article 4 of the Regulation regulates the exchanges of information between OLAF and IBOAs targeted by an (envisaged or ongoing) investigation, as well as the modalities of their cooperation, OLAF’s powers and obligations and the IBOAs’ duty to cooperate.

In addition, Article 1(5) of the Regulation provides that IBOAs may conclude administrative arrangements with OLAF. A number of administrative arrangements are in force between OLAF and IBOAs, which have an impact on the implementation of the Regulation’s provisions relating to the cooperation between OLAF and IBOAs.\(^{53}\) The latest arrangements were concluded with the Council of the European Union (February 2017) and the Committee of the Regions (May 2017). Another arrangement is currently being negotiated with the Court of Auditors.

**Selection**

Before a decision to open an investigation is taken, and when OLAF handles information suggesting that fraud, corruption or any other illegal activity affecting the financial interests of the Union has taken place within an IBOA, OLAF has the option to inform the IBOA. If OLAF chooses to do so, the IBOA must inform it of any action taken internally on the basis of the information communicated.\(^{54}\)

During the time when OLAF’s DG considers whether to open an investigation following a request by the IBOA concerned or a Member State, and while the investigation is conducted, the IBOA shall not open parallel inquiries on the same facts without OLAF’s consent.\(^{55}\) In cases where OLAF’s DG chooses not to open an internal

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\(^{52}\) Article 1(2) of Regulation 883/2013 and Article 10 of the GIPs.

\(^{53}\) Practical Arrangements between the European Parliament and the European Anti-Fraud Office (2013 – the arrangement was signed before the entry into force of Regulation 883/2013); administrative arrangements between OLAF and the European Commission (2015); administrative arrangements with the European External Action Service (EEAS) (2015)); administrative arrangements with the European Investment Bank and the European Investment Fund (2016); administrative arrangements with the Economic and Social Committee (2016) and the European investment Bank (2016); administrative arrangements with the European Central Bank (2016); administrative arrangements with the Council of the European Union (February 2017) and administrative arrangement with the Committee of the Regions (May 2017).

\(^{54}\) Article 4(8) of Regulation 883/2013

\(^{55}\) Article 5(3) of Regulation 883/2013
Investigation

OLAF has an obligation to inform the IBOA concerned when an investigation is conducted at their premises and when OLAF consults documents or information held by them. In addition, OLAF must inform IBOAs when an investigation reveals that one of their officials, other servants of offices or agencies, members, heads, or staff members may be concerned. IBOA’s members and staff have a duty to cooperate with and supply information to OLAF in the context of internal investigations. During external investigations, OLAF also may have access to any relevant information held by IBOAs, including information on databases. In cooperation with OLAF, the IBOA concerned may decide to take appropriate precautionary measures to protect the financial interests of the Union, including measures for the safeguarding of evidence.

Cooperation with Eurojust and Europol

A specific provision foresees the practicalities of cooperation with Eurojust and Europol, which sets an obligation for OLAF, where necessary to facilitate such cooperation, to conclude administrative arrangements with them to regulate exchanges of operational, technical and strategic information, including personal data and classified information, and progress reports.

In practice, an administrative arrangement was concluded with Europol in 2004, but a new arrangement is currently under discussion. On 24 September 2008, Eurojust and OLAF signed a Practical Agreement on Arrangements of Cooperation.

3.2.3.3 Cooperation and coordination with third countries and international organisations

Article 1(1)(b) of the Regulation states that in order to achieve its objectives, OLAF must exercise its power of investigation conferred on the Commission by relevant EU acts as well as cooperation and mutual assistance agreements with third countries and international organisations. In addition, Article 14 provides that administrative arrangements may be concluded with relevant third country authorities and international organisations concerning operational, strategic, or technical information.

In addition, Article 17 of the GIPs specifies that investigative missions can be conducted by investigation units in cases where the evidence needed to establish the existence of fraud, corruption or other illegal activities is not available in the Member States. Such missions can relate to illegal activities in the fields of customs, traditional own resources, expenditure of EU funds, including through international organisations or financial institutions, or other bodies funded by the EU.

56 Article 5(5) of Regulation 883/2013
57 Article 4(4) of Regulation 883/2013
58 Article 4(7) of Regulation 883/2013. The modalities of cooperation between IBOAs and OLAF as well as the extent of OLAF’s powers are described under Section 3.2.1.1.
59 Article 7(6) of Regulation 883/2013
60 Article 13(1) of Regulation 883/2013
62 Available at http://www.eurojust.europa.eu/about/Partners/Pages/eu-institutions-agencies-and-bodies.aspx#olaf
OLAF has ACAs in force with 27 third country authorities and with 12 international/regional organisations. ACAs are considered by OLAF as particularly important to facilitate international cooperation. Error! Reference source not found. presents an overview of the ACAs currently in force between OLAF and competent authorities in third countries or international organisations.

3.2.4 Governance and control mechanisms (Art. 15, 16, 17)

3.2.4.1 Director General

The mandate and powers of OLAF’s DG are defined under Article 17 of Regulation 883/2013.

He acts independently in the performance of his duties, which include:\1

- opening external and internal investigations;
- carrying out external and internal investigations;
- drafting reports following investigations;
- reporting findings of investigations to the European Parliament, the Council, the Commission and the Court of Auditors;
- determining the IPPs each year and communicating them to the SC;
- informing the SC about cases where his recommendations were not followed, cases where information was transmitted to Member States authorities, and about the duration of cases; and
- adopting guidelines on investigation procedures.

OLAF’s DG is appointed by the European Commission for seven years, after consultation with the Council and the European Parliament, non-renewable. He acts independently in the performance of his duties.63

3.2.4.2 Supervisory Committee

The Supervisory Committee (SC) is a body composed of external experts, created to reinforce and guarantee OLAF’s independence.64 Working Arrangements between the SC and OLAF were adopted on 14 January 2014, replacing earlier arrangements adopted in September 2012. In March 2017, the working arrangements were discontinued at the request of the Supervisory Committee.

Mandate

Article 15(1) of Regulation 883/2013 provides that the SC should “monitor the implementation by OLAF of its investigative function”, and in particular “developments concerning the application of procedural guarantees and the duration of investigations”.

In practice, SC’s mandate is three-fold:

1. Advisory role: The SC addresses opinions to OLAF’s DG on its own initiative or at the request of the DG or of any IBOA.65 In its opinions, the SC issues a number of recommendations, which are then discussed between the Office and the SC. It also delivers a yearly opinion on the draft budget submitted by OLAF.

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63 Articles 17(3), 17(4), 17(5), 17(8) of Regulation 883/2013
64 OLAF Annual Report 2015, p. 40
65 Article 15(1) of Regulation 883/2013
2. **Supervisory role:** The SC is regularly informed by OLAF’s DG of the Office’s activities\(^\text{66}\), especially concerning its investigative function and follow-up actions. It protects the independence of OLAF’s DG and is informed in cases where the latter decides to bring an action before the CJEU after identifying a suspected breach of his independence by the Commission.\(^\text{67}\)

3. **Reporting role:** Finally, the SC reports on its activities once a year to the European Parliament, the Council, the Commission and the Court of Auditors, where it assesses the Office’s independence, the application of procedural guarantees and the duration of investigations.

**Secretariat**

The SC is supported by a secretariat in its work. When the new Regulation entered into force, the secretariat was meant to be provided by OLAF in application of Article 15(8) of the Regulation, and its budget featured within the budget line of OLAF according to article 18 of the Regulation.

However, after the SC raised concerns on potential conflicts of interest\(^\text{68}\), new rules were adopted and apply as of 1 January 2017. The amended Article 15(8) now states that the SC Secretariat will be provided by the Commission, independently from the Office, whereas the amended Article 18 provides that the budget for SC and its secretariat will be included in the budget line of the Commission.

**3.2.4.3 Institutional exchange of views**

Article 16 of Regulation 883/2013 foresees the organisation of an exchange of views between OLAF’s DG (and SC) and EU institutions once a year, involving the European Parliament, the Commission, and the Council, as well as the Court of Auditors, Eurojust and Europol on an ad hoc basis.

**3.3 Current political and legislative developments**

This section highlights current legislative and political developments in the EU anti-fraud landscape that could have an impact on the application of Regulation 883/2013. The first two initiatives presented below propose amendments to Regulation 883/2013, while the others may affect the application of the Regulation due to their scope and subject matter.

**3.3.1 Proposal to amend Regulation 883/2013**

**3.3.1.1 Controller of procedural guarantees**

Together with the proposal for a European Public Prosecutor’s Office (EPPO) presented in Section 3.3.2.1, the European Commission adopted in 2013 a Communication on improving the governance of OLAF.\(^\text{69}\) In this context, the Commission proposed in 2014 to amend Regulation 883/2013 with the view to establish a Controller of

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\(^{66}\) DG is obliged to communicate information about cases lasting more than 12 months (see Section 3.2.4.1).

\(^{67}\) Article 17(3) of Regulation 883/2013


procedural guarantees.\textsuperscript{70} The Controller is envisaged as a new complaint procedure in addition to the other existing complaint mechanisms available in relation to specific aspects of OLAF's investigations.\textsuperscript{71}

According to the proposal, not only the Controller would review complaints lodged by persons under investigation about violations of Article 9 of Regulation 883/2013, but OLAF's DG would have to first request the Controller's authorisation in cases where OLAF intends to carry out an inspection of the professional office of members of EU institutions\textsuperscript{72} at the premises of an EU institution or to collect data stored in this office during an internal investigation.\textsuperscript{73}

Since 2014, discussions in the Council about this proposal have been stopped given the ongoing negotiations on the EPPO proposal and the current evaluation of Regulation 883/2013.\textsuperscript{74} An assessment of possible policy developments linked to the Controller is presented under Section 8.3.1.

3.3.2 Other proposals affecting the EU Anti-Fraud landscape

3.3.2.1 European Public Prosecutor's Office (EPPO)

A proposal for the establishment of a EPPO based on Article 86 TFEU was put forward by the European Commission in 2013. The EPPO will be an independent EU judicial body with the authority to investigate and prosecute EU-fraud and other crimes affecting the Union's financial interests. Its adoption will enable European and national, law-enforcement and judicial efforts to better counter crimes affecting the EU’s financial interests.

The general approach on the draft EPPO Regulation was accepted in June 2017.\textsuperscript{75} In March 2017, the European Council acknowledged the absence of unanimity in the Council,\textsuperscript{76} and thus opened the way to start an enhanced cooperation.\textsuperscript{77} A final text is likely to be adopted in the course of 2017, nevertheless the revised version of the Regulation published on 4 April 2017\textsuperscript{78} may still be amended.\textsuperscript{79} 20 Member States are expected to join the enhanced cooperation procedure, thanks to certain amendments


\textsuperscript{71} These include: the European Ombudsman (e.g. access to documents, lack of timely response to questions), the European Data Protection Supervisor, the DG of OLAF for breaches of fundamental rights,\textsuperscript{71} and the Court of Justice of the European Union (CJEU).

\textsuperscript{72} A distinction is made between EU staff members and members of EU institutions. In details: http://ec.europa.eu/anti-fraud/investigations/investigations-relating-eu-staff_en.

\textsuperscript{73} Article 9(b) of the Proposal for a Regulation amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees.


\textsuperscript{75} Council, Proposal for a Regulation on the establishment of the European Public Prosecutor's Office - General approach, 30 June 2017, Council doc. 9941/17.

\textsuperscript{76} European Council, Conclusions by the President of the European Council, 9 March 2017.

\textsuperscript{77} At the time of writing the number of Member States participating in this enhanced cooperation is not finalised, but the minimum of nine Member States has been met.

\textsuperscript{78} There are other versions of the draft Regulation, but they are not publicly available.

\textsuperscript{79} Council, Draft Regulation implementing enhanced cooperation on the establishment of the EPPO – Presidency text, 3 April 2017, Council doc. 7761/17.
to the initial text.\textsuperscript{80} The latest amendments will not lead to a new design concerning the EPPO’s fundamental aspects such as its governance structure, competence, powers, or applicable law.

Finally, the Council agreement under the enhanced cooperation procedure will need the approval of the European Parliament. The EP has indicated its priorities in three resolutions.\textsuperscript{81} It has also entrusted external experts with scientific analysis\textsuperscript{82}. Although the final text will not be adopted under the co-decision procedure, the EP could make its approval conditional to certain requirements. This could also include the relationship between EPPO and OLAF. The expectations are however that the EP will not impose requirements that change substantially the design of the EPPO. This section thus provides preliminary considerations on the impact the establishment of the EPPO may have on OLAF’s functioning.

An assessment of the cooperation scenarios between EPPO and OLAF is presented in Chapter 8.

### 3.3.2.2 Proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law and fight against VAT fraud at EU level (PIF Directive)

Member States tend to have diverging approaches to protect EU funds. Indeed, definitions of what constitutes the criminal offence of fraud to the EU budget differ from one Member State to another, as do the applicable penalties. In this context, the proposed PIF Directive, submitted by the European Commission in 2012, proposes approximated definitions and penalties for fraud affecting the Union’s financial interests and other financial crimes.\textsuperscript{83} The proposal will likely have an indirect impact on OLAF’s competence, as it will define EPPO’s mandate, and, as a consequence, the Office’s scope of cooperation with the future EPPO.\textsuperscript{84} Following a long deadlock in negotiations\textsuperscript{85}, discussions on the PIF Directive proposal revived after the Court of Justice’s ruling in Taricco\textsuperscript{86}, which provided an extensive interpretation of both the PIF Convention and article 325(1) TFEU. In December 2016, the Council and the EP provisionally agreed on including cross-border VAT fraud in the scope of the Directive, granted that its value is at least EUR 10 million.\textsuperscript{87} In addition, a new case concerning the interpretation of article 352(1) TFEU as well as the Taricco judgement is now

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\textsuperscript{80} The general approach was agreed in the Council between Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain and Slovenia.

\textsuperscript{81} Resolution of 29 April 2015; Resolution of 5 October 2016


\textsuperscript{84} See Section 3.3.2.1.

\textsuperscript{85} It was mainly due to a disagreement between the European Commission and the European Parliament on one side and the Council on the other on whether Value Added Tax (VAT)-related offences should be within the scope of the Directive, see Council of the EU, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law - Progress report / Policy debate, 9804/16, Brussels, 3 June 2016, information available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSL:ST_9804_2016_INIT&from=EN.

\textsuperscript{86} CJEU, C-105/14, Ivo Taricco and Others, 8 September 2015. The Court ruled that VAT fraud is part of the definition of fraud against the EU’s financial interests and that the PIF Convention binds the Member States to criminalise VAT fraud. In addition, it ruled that Article 325(1) TFEU may also require the criminalisation of serious cases of VAT fraud.

pending before the EC\textsuperscript{88}. The Council Directive was adopted in July 2017. An analysis of the possible impact of the adoption of the PIF Directive in the future PIF landscape is presented under Section 8.1.2.

\subsection{Mutual administrative assistance (MAA)}

In the 2011 Communication on the protection of the financial interests of the EU\textsuperscript{89}, the European Commission announced that it would replace its 2004 proposal for a Regulation on mutual administrative assistance for the protection of financial interests, which aimed at reinforcing the mechanisms for cooperation and the exchange of information\textsuperscript{90}, with another proposal. However, due to lack of support by the Council\textsuperscript{91}, the Commission withdrew the proposal in 2015.\textsuperscript{92}

Currently, legal instruments exist for MAA in several sectors, such as VAT, customs and agricultural matters, but not in all areas where the protection of the EU’s financial interests is at stake e.g. structural and investment funds.

\subsection{Non-financial fraud}

OLAF’s competence includes actions in the non-financial fraud area\textsuperscript{93}. It does so through administrative cooperation by virtue of Regulation 515/97\textsuperscript{94} and Regulation 608/2013,\textsuperscript{95} therefore outside of the scope of Regulation 883/2013. However, Section 8.3.2 will also examine the extent to which OLAF’s competence under Regulation 883/2013 will be affected by developments in the field of non-financial fraud.

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\textsuperscript{88} C-42/17, M.A.S. and M.B. (hearing on 29/05/2017) The opinion of AG Bot was delivered on 28/07/2017.

\textsuperscript{89} European Commission, Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers’ money, COM(2011) 293 final, Brussels, 26 May 2011.


\textsuperscript{91} European Parliament, Parliamentary questions, P-004452/2015, 5 May 2015.

\textsuperscript{92} European Commission, Withdrawals of Commission proposals, 7.3.2015, OJ C 80/17, information available at: http://ec.europa.eu/dorie/fileDo

\textsuperscript{93} For instance, counterfeiting goods violating health, safety and food regulations, and substandard goods violating sectoral regulations (such as intellectual property rights).


4 Evaluation findings – effectiveness

This section presents the evaluation findings regarding the effectiveness of Regulation 883/2013. The findings concern the extent to which Regulation 883/2013 has achieved its objectives through the powers and tools it confers. The findings are structured around seven key areas of Regulation 883/2013, within which the evaluation questions from the Terms of Reference (ToR) are addressed:

- the impact of the changes in the procedure for case selection;
- the sufficiency and clarity of powers and tools available to OLAF;
- available mechanisms for cooperation and information exchange;
- investigation final reports/recommendations and their follow-up;
- appropriateness of provisions on procedural rights and safeguards;
- appropriateness of governance arrangements; and
- the scope and organisation of the annual exchange of views with the institutions.

Summary of evaluation findings – effectiveness

The extent to which the specific objectives of Regulation 883/2013 have been met so far is summarised below:

- **Enhancing the effectiveness and efficiency of OLAF’s investigative activity, including by introducing criteria for the opening and conduct of OLAF’s investigations**
  - In terms of opening investigation:
    - There has been an increase in case selection activity and stakeholders submitted that the ISRU expedited the case selection process, helping to drive efficiencies through the reduced time taken to reach case selection decisions.
    - Despite earlier criticism of the staffing and specialisation of the ISRU, there is no clear and objective evidence to suggest that shortcomings exist/persist in relation to the staffing of the ISRU which impacts upon the effectiveness of Regulation 883/2013.
    - Regarding the case selection criteria, Regulation 883/2013 does not specify whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions, whether the selection criteria should be weighted equally/differently, the extent of discretion of the OLAF Director-General vis-à-vis the selection criteria, or the relative weight to be given to the Investigation Policy Priorities (IPPs) which, in practice, play a marginal role only in case selection decisions.
    - There is a perceived lack of clarity as to how the criteria are applied in practice. This may reflect, at least in part, the relatively narrow range of situations in which OLAF communicates its case selection decisions to external stakeholders. This is because Regulation 883/2013 only requires that OLAF communicate case selection decisions to those involved in requesting the investigation and those who provided incoming information, with the reasons for these decisions only communicated when a case is not opened. This narrows both the
number of instances when OLAF should be communicating case selection decisions, as well as the audience to whom it is communicated, which may impact on the extent to which stakeholders are clear as to how the criteria are applied. Even then, the wording of the Regulation and the GIPs are not consistent in relation to this issue which may undermine the extent to which case selection decisions are communicated by OLAF.

- In terms of investigative tools and practices, these are at the core of OLAF’s investigative activity. These tools and powers could further enhance the effectiveness and efficiency of OLAF’s investigative activity if current shortcomings were addressed (discussed further below).

- In terms of investigative recommendations and follow-up, the additional detail provided by Regulation 883/2013 (and the GIPs) on the required scope/content of OLAF reports, combined with the introduction of the legality checks, may have had a positive impact on the overall quality of OLAF reports and recommendations and the propensity to follow-up. However, the mixed feedback among stakeholders on the perceived quality and comprehensiveness of OLAF reports and recommendations suggests that there may be room for further improvement.

- Strengthening the procedural guarantees of individuals subject to investigation
  - Provisions on procedural guarantees introduced by Regulation 883/2013 have clearly strengthened the procedural guarantees of individuals subject to investigation.
  - In general, the procedural guarantees introduced by Article 9 of Regulation 883/2013 reflect (and codify/clarify) to a large extent existing rights and guarantees under EU law. Given the role of OLAF reports in criminal proceedings, the rights/guarantees under existing EU law which are reflected in Article 9 are considered proportionate.
  - However, a number of aspects of Regulation 883/2013 and the GIPs related to procedural guarantees are unclear and/or inconsistent.
  - Further, aspects of Article 9 specific to Regulation 883/2013 (such as the period of prior notice to be given to persons concerned in advance of an interview) are arguably disproportionate in relation to their intended objective (and the consequent impact on investigative procedures/durations).

- Improving cooperation and information exchange with Member States
  - Provisions introduced by Regulation 883/2013 (especially in relation to the AFCOS) have helped to improve the nature and extent of cooperation between OLAF and Member States.
  - However, the lack of specificity in Regulation 883/2013 means that there is little-to-no consistency in the size, profile and powers of the AFCOS, meaning that OLAF does not receive the same level and nature of support in each Member State. In addition, there is scope for the Regulation to specify clearly the relevance of the AFCOS’ role in facilitating effective cooperation and exchange of information in the context of internal investigations.

- Strengthening cooperation with EU institutions, bodies, offices and agencies
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

- Regulation 883/2013 appears to have helped strengthen cooperation and information exchange between OLAF and EU IBOAs, including via administrative arrangements. However, this impact could have been felt more evenly had these administrative arrangements been in place with all EU IBOAs and had there been greater consistency among the administrative arrangements already in place.

- There is little evidence to conclude whether Regulation 883/2013 has helped to strengthen cooperation with Europol and Eurojust (especially in the case of Europol given new administrative arrangements are still being developed and this appears to have had a temporal impact on cooperation between the parties).

- **Strengthening cooperation with third countries and international organisations**
  - Provisions introduced by Regulation 883/2013 (especially in relation to administrative arrangements with third country authorities and international organisations) have helped to improve the nature and extent of cooperation between OLAF and third countries / international organisations.
  - However, although the Regulation (Article 14) introduces the possibility to develop close cooperation (including via administrative arrangements) with third countries and international organisations, it is somewhat ambiguous as to whether an administrative arrangement is required before information can be exchanged.

- **Reinforcing the governance of OLAF**
  - There is little evidence to suggest that Regulation 883/2013 has reinforced the governance of OLAF in relation to the Supervisory Committee.
  - Regulation 883/2013 has left open to interpretation the Supervisory Committee’s mandate/role and this, in turn, has generated a degree of confusion given the different interpretations and perceptions (by almost all stakeholders, including the Supervisory Committee and OLAF) of the Supervisory Committee’s role.

The extent to which the different components of the Regulation have contributed to achieving the specific objectives of Regulation 883/2013 and to an improved protection of EU financial interests (recovery/financial corrections, prosecution, indictment and deterrence) is summarised below:

- The contribution of the different components of Regulation 883/2013 to its specific objectives is summarised above to a large extent, at least in a qualitative sense (as it is not possible to quantify the impact of different components of Regulation 883/2013 on particular outcomes, such as recoveries, indictments, etc.).

- The lack of disaggregated/granular data means it is not possible to link outcomes (such as recoveries, indictments, etc.) to specific investigations or specific provisions under the Regulation, although the findings from the contribution analysis presented in this chapter provide some evidence of the links (including as measured via statistical correlation analysis to test hypotheses regarding the links) between provisions of the Regulation and outcomes, while data on recoveries, prosecution, etc. provide some additional contextual evidence.

The external factors beyond the influence of OLAF (including the follow-up
responsibilities) that have contributed to or influenced the achievement of the objectives of Regulation 883/2013 are summarised below:

- Two significant factors for which OLAF can directly influence but not control that have influenced the achievement of the Regulation’s objectives are: (i) the ability and willingness of relevant parties to follow-up on OLAF’s recommendations (discussed further herein); and (ii) the ability and willingness of relevant parties to take precautionary measures during the course of an investigation.

- For each of these factors, OLAF is able to influence the ability of relevant parties to follow-up and act upon OLAF’s recommendations (including recommendations to take precautionary measures) based on the quality, accuracy, completeness, proportionality and feasibility of its final reports and recommendations. However, OLAF is not able to control the willingness of relevant parties to act.

The extent to which the legal instruments contained in Regulation 883/2013 provide OLAF with sufficient tools to accomplish its mandate is summarised below:

- OLAF’s investigative powers and tools under Regulation 883/2013 are largely unchanged from those established by Regulation 1073/1999.

- In principle, they provide OLAF with sufficient tools to accomplish its mandate, subject to the shortcomings identified below being addressed.

The shortcomings that can be identified in the different components of Regulation 883/2013 or in their implementation, which negatively affect the achievement of the Regulation’s objectives, are summarised below:

- The shortcomings which negatively affect the achievement of the Regulation’s objectives are:
  
  o References to national rules and practices in the context of OLAF’s use of on-the-spot checks – this can hinder OLAF’s ability to use on-the-spot checks as an investigative tool consistently across Member States

  o Ambiguity surrounding digital forensic operations under different scenarios involving a mix of private devices (laptops, phones, etc.) and organisational data – this can hinder OLAF’s ability to gather digital forensic evidence as part of its investigations

  o Practical difficulties, that could create potential inefficiencies in the investigative process, to interview a person concerned or a witness identified during an on-the-spot check and/or inspection of premises and interview a person given the GIP provisions and internal rules requiring prior authorisation for an interview and the procedural guarantees provided in the Regulation, in particular as regards the prior notice for an interview. In addition, there is a lack of clarity surrounding the difference between an interview and a statement.

  o Ambiguity surrounding the legal status of precautionary measures – this may deter relevant authorities from taking precautionary measures

  o Ambiguity surrounding the process and procedures associated with coordination cases – this may create inefficiency in terms of OLAF’s role in such cases

  o Lack of clarity regarding MEPs’ immunity, as well as the process by which the lifting of this immunity could be requested. Further, a lack of clarity regarding OLAF’s powers concerning Accredited Parliamentary...
Assistants.

- Lack of specificity in the (minimum) **roles/profiles of the AFCOS** – levels of support and coordination in OLAF investigations can vary considerably by Member State
- Ambiguity surrounding the **legal standing of an ACA** in relation to cooperation and information exchange with third countries – this gives rise to alternative interpretations of Article 14, including one interpretation suggesting cooperation and information exchange cannot take place absent an ACA
- Lack of clarity in the **role/mandate of the Supervisory Committee** – this gives rise to confusion and different interpretations of the Supervisory Committee’s role

### 4.1 Opening investigations

One objective of Regulation 883/2013 is to enhance the effectiveness and efficiency of OLAF’s investigative activity, by introducing criteria for the opening of OLAF’s investigations\(^\text{96}\). The evaluation has sought to measure the impact of the changes in the procedure for case selection following: the application of the case selection criteria; the definition of investigation policy priorities; and, the establishment of a central selection function within OLAF.

Changes in the procedure for case selection introduced by Regulation 883/2013 may have been expected to result in an increase in case selection activity (through improved efficiency – discussed further in Chapter 5), and/or more effective/appropriate decisions in relation to which cases to open (as investigations or coordination cases) and which to dismiss. This would be driven by the clear, consistent and transparent case selection criteria provided for under the Regulation, combined with a dedicated unit of case selectors established to apply those criteria in practice, which might be expected to drive a more consistent set of effective case selection decisions over time.

#### 4.1.1 Case selection criteria

##### 4.1.1.1 Background

The introduction of case selection criteria for opening an investigation is one of the innovations introduced by Regulation 883/2013. The criteria are defined in Regulation 883/2013, while the Guidelines on Investigation Procedures (GIPs) define the practical criteria to be considered (Table 2).

**Table 2. Criteria for opening an investigation**

<table>
<thead>
<tr>
<th><strong>Art. 5(1) of Regulation 883/2013</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sufficient suspicion, which may be based on information provided by any third party or anonymous information, that there has been fraud, corruption or any other illegal activity affecting the EU’s financial interests</td>
</tr>
<tr>
<td>Investigation policy priorities (IPP), which were included in OLAF’s Management Plans since 2014 in replacement of a prior practice consisting of using financial indicators as guiding principles for the selection of cases</td>
</tr>
</tbody>
</table>

**Art. 5(1) of Regulation 883/2013**

- Annual management plan of OLAF
- Efficient use of the Office’s resources
- Proportionality of the means employed
- Subsidiarity of the means employed for internal investigations, to enable OLAF to use its resources on other priorities.

**Regulation 883/2013**

**Art. 5.3 and Art. 5.4 of the GIPs**

- Whether the information falls within OLAF’s competence to act
- Whether the information is sufficient to justify the opening of an investigation or coordination case
- Reliability of the source
- Credibility of the allegations

**GIPs**

**4.1.1.2 Purpose of the evaluation**

This evaluation has gathered and analysed evidence on the clarity and impact of these selection criteria. It considers evidence on the practical application of the criteria to case selection decisions and whether there is a need to improve the criteria.

**4.1.1.3 Findings**

Amongst the stakeholders interviewed for this evaluation, OLAF investigative staff were more likely than non-OLAF stakeholders to say that the selection criteria are clear and helpful in guiding the selection of cases. Comments raised by OLAF investigators included:

- the criteria had proved effective in regulating the flow of cases (helping to manage the resource implications for OLAF) and promoting operational effectiveness; and
- the criteria had impacted positively on the legal clarity/certainty of case selection decisions.

An interviewee from the OLAF Investigation Selection and Review Unit (ISRU) – the unit with responsibility for supporting the OLAF Director-General in reaching case selection decisions – noted that the selection criteria work reasonably well in practice, but there are some issues, including:

- determining the extent of analysis (of incoming information) that should be undertaken by selectors against the criteria (particularly in light of the two-month deadline under Article 5(4) of Regulation 883/2013 for taking a decision on whether to open an investigation); and
- the potential duplication of effort between selectors and investigators in undertaking tasks related to the assessment of incoming information against the criteria (the interviewee suggested that the tasks of selectors and investigators may overlap in practice). For example, the GIPs indicate that the ISRU may collect additional information (including taking statements, carrying-out fact-finding missions in Member States and consulting information in EU IBOA databases) where it is necessary to support the selection process. These information-gathering activities may overlap with the activities of investigators where an investigation is opened and investigators collect information via one or more of these routes.
Among non-OLAF stakeholders (AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations), a common view was that it is unclear as to how the case selection criteria, in particular their application, impacts the selection of cases in practice. This perceived lack of clarity may be because Regulation 883/2013 only requires that OLAF communicate case selection decisions to those involved in requesting the investigation and those who provided incoming information, with reasons given only when a case is not opened. This is discussed further in section 4.1.2 below.

The clarity of case selection criteria was also discussed at the OLAF conference on the evaluation of Regulation 883/2013. A representative from the ISRU noted that, in practice, the selection criteria lack clarity. This may create some challenges and potential inconsistencies in application. The representative highlighted that Regulation 883/2013 is unclear as to:

- whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions;
- whether the selection criteria should be weighted equally or differently;
- the extent of discretion of the OLAF Director-General vis-à-vis the selection criteria;
- the relative weight to be given to the Investigation Policy Priorities (IPPs) vis-à-vis the selection criteria.

Additional evidence on the clarity of the case selection criteria was gathered from non-OLAF stakeholders (European Commission, other EU IBOAs, Member States and third countries) via the online survey. Detailed findings are presented in Annex 11. In summary, half of survey respondents (n=29) agreed that the case selection criteria and their application are transparent while almost 30 per cent (n=16) disagreed. The proportion of respondents that agreed was broadly consistent across different stakeholder types with the exception of European Commission respondents which were less likely to agree.

4.1.1.4 Concluding remarks

There has been an increase in the case selection activity of OLAF in terms of the number of cases opened and the number of cases dismissed. The number of cases selected in recent years is significantly higher than it was pre-2012.

There were mixed views from stakeholders as to whether the case selection criteria and their application is transparent (i.e. the extent to which it is clear to stakeholders what the criteria are and how they have been applied in practice). The perceived lack of clarity of the case selection criteria may be because Regulation 883/2013 does not specify:

- whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions;
- whether the selection criteria should be weighted equally or differently;
- the extent of discretion of the OLAF Director-General vis-à-vis the selection criteria;
- the relative weight to be given to the Investigation Policy Priorities (IPPs) vis-à-vis the selection criteria.

4.1.2 Communicating case selection decisions

4.1.2.1 Background

An issue related to the clarity of the case selection under Regulation 883/2103 and their application is the extent to which stakeholders receive clear and comprehensive
information on case selection decisions and how they relate to the case selection criteria.

As mentioned above, within two months of the Office receiving a request from an EU IBOA or Member State to open an investigation, Article 5(4) of Regulation 883/2013 requires OLAF to reach a case selection decision which it shall communicate without delay to the Member State, institution, body, office or agency which made the request. Article 5(4) also requires OLAF to communicate case selection decisions to the stakeholder that provided information to the Office relating to a suspected fraud or irregularity. However, it only specifies that ‘reasons shall be given for a decision not to open an investigation’, and it makes no explicit mention of linking reasons to case selection criteria. OLAF’s ‘Guidelines on Selection & Review’ describes what should be included within the letter that is sent to a source informing them of OLAF’s decision to dismiss a case, making reference to providing more information about the decision (linked to the appropriate legal item), but it is unclear whether and how this appropriate legal item relates to the case selection criteria. The GIPs (Article 7) only mention information being provided on dismissed cases. In addition, an OLAF 2014 internal document (‘Instructions on the transmission of information concerning the opening of investigations’) confirms that although in relation to internal investigations the investigation unit has to inform the relevant IBOA concerning the opening of internal investigations (under Article 4(6) of Regulation 883/2013), in external investigations there is no obligation to systematically inform the responsible IBOA of a decision to open an investigation – it will only do so if required by the legislation (under Article 7(6) related to precautionary measures), if it is necessary to obtain relevant information from the responsible IBOA and/or where there is a need specific to the investigation.

ICF understands that there are differences in responsibilities within OLAF for communicating case selection decisions insofar as information on dismissed cases is communicated by the ISRU whereas information on investigations opened is the responsibility of OLAF’s investigative units (at their discretion on a case-by-case experience, accounting for the confidentiality and scope of the investigation, amongst other things).

4.1.2.2 Purpose of the evaluation

This evaluation has gathered and analysed evidence on the extent to which OLAF communicates case selection decisions (in accordance with Regulation 883/2013). It considers evidence on the provisions of the Regulation (and the guidance within the GIPs) surrounding the communication of case selection decisions and whether this has had an impact on the nature and extent of OLAF’s communications surrounding case selection decisions.

4.1.2.3 Findings

There was a general view expressed among non-OLAF stakeholders (AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations) that:

- they do not always receive from OLAF information on case selection decisions (which would be the case if they had not requested an investigation be opened or provided information related to a case selection decision, given the requirements of Article 5(4));
- where information on case selection decisions is provided by OLAF, it is often unclear as to the basis on which OLAF had reached decisions, including how the criteria had been applied in practice; and
- in situations where a decision is taken not to open an investigation, the reasons communicated by OLAF can often be somewhat generic and lacking in specificity.
In relation to this last point above, some stakeholders considered the information provided by OLAF as somewhat opaque. One interviewee from the European Commission noted that, in general, when a decision is taken by OLAF not to open an investigation, the Directorate-General receives from OLAF a one-page document outlining the reasons, but the reasons are often quite general in nature. Another interviewee from the European Commission made the same point, describing the information they receive from OLAF on case selection decisions as superficial, with no link to the specific allegations or information evaluated. A respondent from an executive agency of the European Commission described such information as ‘short’.

It is possible that these views reflect – at least in part – the fact that Regulation 883/2013 only requires OLAF to communicate case selection decisions in specific circumstances. Article 5(4) of Regulation 883/2013 states that a case selection decision (which has been taken following a request from a Member State concerned or an institution, body, office or agency of the Union under Article 5(2) of the Regulation) “shall be communicated without delay to the Member State, institution, body, office or agency which made the request. Reasons shall be given for a decision not to open an investigation”. As such, case selection decisions taken following a request from a Member State or EU IBOA are only to be communicated to that Member State or EU IBOA, and the Regulation does not require OLAF to provide the reasoning behind the decision when an investigation is opened (only when it is not opened). As noted earlier, it is ICF’s understanding that communicating decisions on investigations opened is discretionary and the responsibility of OLAF’s investigative units rather than the ISRU, which is likely to lead to different degrees of disclosure depending on the characteristics of the investigation opened. Article 5(4) further states that “where an official, other servant, member of an institution or body, head of office or agency, or staff member, acting in accordance with Article 22a of the Staff Regulations, provides information to the Office relating to a suspected fraud or irregularity, the Office shall inform that person of the decision whether or not to open an investigation in relation to the facts in question”.

The GIPs provide guidance on communicating information on dismissed cases only, but this is expressed in non-binding terms. Article 7 of the GIPs states that “The Investigation Selection and Review Unit may inform the source of the Director-General’s decision to dismiss a case. The Investigation Selection and Review Unit shall inform the EU institution, body, office, agency or national authority of the Director-General’s decision to dismiss a case, where necessary.” Thus the GIPs suggest that OLAF is not required nor obliged to communicate the basis for case selection decisions if this is not deemed to be ‘necessary’. This is likely to have impacted on the nature and extent of information on case selection decisions communicated by OLAF.

A Supervisory Committee opinion published in 2014 examined the flow of information during the case selection process and found that OLAF generally provided information on dismissed cases to other EU or national authorities, although it did not systematically inform sources of information of OLAF’s decisions. The Supervisory Committee concluded that OLAF should ‘give better feedback to the source of information on the action (not) taken by OLAF following the information provided by the source’.

Non-OLAF stakeholders (European Commission, other EU IBOAs, Member States and third countries) that responded to the online survey were asked about the

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97 The underlying in this extract has been added by ICF.
99 Ibid.
transparency and completeness of the information provided by OLAF on the reasons for opening an investigation. Detailed findings are presented in Annex 11. In summary, 41 per cent (n=24) of survey respondents agreed that the information provided was comprehensive and 45 per cent (n=26) agreed it was transparent. Respondents from the European Commission and other EU IBOAs were more likely to disagree that the information provided by OLAF was comprehensive and transparent. It is not clear why the survey results differed in this manner given the Regulation (and the GIPs) do not differentiate between these stakeholder types when it comes to communicating case selection decisions.

4.1.2.4 Concluding remarks

Among non-OLAF stakeholders (AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations), a common view was it is unclear how the case selection criteria and their application impact the selection of cases. A number of non-OLAF stakeholders suggested that they do not always receive from OLAF information on case selection decisions and, when they do, it was often generic and lacking in specific detail.

The perceived lack of clarity as to how the criteria are applied may reflect that Regulation 883/2013 only requires that OLAF communicate case selection decisions to those involved in requesting the investigation and those who provided incoming information, with reasons when a case is not opened. This reduces both the number of instances when OLAF should be communicating case selection decisions, and the audience to whom it communicates. The Supervisory Committee concluded in 2014 that OLAF does not systematically inform sources of information of OLAF’s decisions. It is not clear whether and to what extent that situation has changed since.

Further, the GIPs provide guidance on communicating information on dismissed cases only. Even then, the GIPs use non-binding terminology (‘may’ and ‘where necessary’) which may have reduced further the nature and extent of information on case selection decisions communicated by OLAF in practice.

Finally, communicating decisions on investigations opened is understood by ICF to be at the discretion of OLAF’s investigative units and dependent upon the characteristics of the investigation opened, which is likely to have led to different degrees of disclosure.

4.1.3 Investigative policy priorities (IPPs)

4.1.3.1 Background

Investigation Policy Priorities (IPPs) are defined on a yearly basis in the context of the Management Plan preparations by the OLAF Director-General following a consultation process involving directors of the investigative Directorates, the ISRU, FPDNet, participants in the inter-institutional exchange of views and the Supervisory Committee. OLAF’s Director-General has discretion to decide whether to amend the IPPs in the light of the results of the consultation.

4.1.3.2 Purpose of the evaluation

This evaluation has gathered and analysed evidence on the role of the IPPs in case selection decisions vis-à-vis the other case selection criteria.

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100 Article 17(5) of Regulation 883/2013
4.1.3.3 Findings

The IPPs defined between 2014 and 2016 did not change substantially from one year to another, though their wording was adjusted slightly. The IPPs for the last three years prioritised:

- cases with indications of fraud and/or corruption in relation to public procurement for transport (2015, 2016) and infrastructure networks (2014, 2015, 2016);
- cases of fraud concerning specific projects (co)financed by EU funds in which actions by the Member States or candidate countries may be insufficient. While any such cases fell under the scope of the 2014 IPP, the scope of the 2015 and 2016 IPPs was changed to cover cases of significant impact or of a structural nature;
- cases of fraud indicating possible abuses of rules of origin and tariff classification in both preferential and non-preferential trade regimes, as well as valuation-related fraud in 2015 and 2016, in order to evade payment of conventional customs duty and anti-dumping duties; and
- cases of fraud involving cigarette and tobacco smuggling into the EU. Smuggling of counterfeit medicines was added to the 2016 IPP.

Data published by OLAF in 2015\(^\text{101}\) indicates that 26 per cent of opened cases in 2014 ‘fell under the IPPs’ and that it was difficult to estimate to what extent the IPPs had a decisive effect on OLAF’s case-opening decisions. There were no cases where an investigation was not opened for the reason that it was not within the scope of the IPPs. However, the IPPs led to the opening of at least two cases which otherwise would not have been pursued. Consequently, although in practice the IPPs are used to prioritise the opening of certain investigations, cases are not necessarily excluded because they do not fall under the scope of the IPPs. Evidence shows that in a very small number of cases, they have been used to convert a potential dismissal decision into an opening decision because of the priority nature of the case.

An opinion published by the Supervisory Committee in February 2016\(^\text{102}\) noted that Article 5(1) of Regulation 883/2013 presents the selection criteria in an order which is different from the order in which they appear in ‘guidelines issued by OLAF to orientate the case selection process’. The differences in order are shown in Table 3. This may suggest a ‘downgrading’ in importance of the IPPs in case selection decisions in the guidance compared to Regulation 883/2013. In this regard, the Supervisory Committee’s published opinion quotes the OLAF Director-General in confirming that OLAF “only uses the IPPs where the criteria set out in the Regulation would suggest a dismissal of the case”\(^\text{103}\).

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\(^\text{103}\) Ibid.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Table 3. Supervisory Committee published opinion on the ordering of selection criteria in Regulation 883/2013 and OLAF guidance

<table>
<thead>
<tr>
<th>Art. 5(1) of Regulation 883/2013</th>
<th>OLAF guidelines (the ‘Starter Kit’)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sufficient suspicion</td>
<td>Sufficient suspicion (↔)</td>
</tr>
<tr>
<td>IPPs</td>
<td>Efficient use of the Office’s resources (↑)</td>
</tr>
<tr>
<td>Efficient use of the Office’s resources</td>
<td>Proportionality (↑)</td>
</tr>
<tr>
<td>Proportionality</td>
<td>Subsidiarity (↑)</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>IPPs (↓↓↓↓)</td>
</tr>
</tbody>
</table>

Stakeholders interviewed in this evaluation were in general agreement that the IPPs do not work well in practice and are largely irrelevant other than for presentational/political purposes. A common view among most stakeholders (primarily OLAF investigative and non-investigative staff) was that case selection is largely dependent upon the other selection criteria used by the ISRU such that if the selection criteria in Article 5 of the Regulation are met, an investigation will be opened irrespective of whether that investigation is consistent with the IPPs. This is consistent with the published OLAF analysis referred to above. Two members of the Supervisory Committee interviewed for this evaluation agreed with these sentiments, noting that they perceived the IPPs to be of very little influence on case selection decisions in practice.

Staff within the ISRU were surveyed on whether they felt that the IPPs are clearly defined and can be easily used for the selection of cases. None of the ISRU staff disagreed, with five of eight respondents agreeing or strongly agreeing that this was the case. This is not necessarily inconsistent with the evidence described above – that the IPPs are of secondary importance (to the other criteria) in relation to case selection decisions – but, rather, it suggests that the ISRU believes the IPPs are clear and can be easily used (regardless of whether they are used in practice).

4.1.3.4 Concluding remarks

It is clear from the evidence (data published by OLAF as well as the views of interviewees) that the IPPs have had a negligible impact on case selection decisions. The lack of specificity in Regulation 883/2013 regarding how the IPPs should be applied to case selection decisions in practice provides the ISRU with additional flexibility to convert a potential dismissal decision (based on an assessment of incoming information against the other selection criteria) into an open investigation. As such, this lack of specificity may enhance the effectiveness of the Regulation and, consequently, there may be a case for leaving the Regulation unchanged and not specifying more clearly how the IPPs should be applied to case selection decisions. However, it may be beneficial from a transparency perspective to revise the GIPs such that they accurately reflect the reality as to how the IPPs are used in practice. That is, while the GIPs currently state that ‘the opinion on the opening of an investigation or coordination case shall be based on whether the information falls within OLAF’s competency to act, the information is sufficient to justify the opening of an investigation or coordination case and falls within the Investigative Policy Priorities (IPP) established by the Director-General’, they could make clear that OLAF ‘only use the IPPs where the criteria set out in the Regulation would suggest a dismissal of the case’.
4.1.4 Investigation Selection and Review Unit (ISRU)

4.1.4.1 Background

As part of the internal reorganisation of OLAF in 2012, a new Investigation Selection and Review Unit (ISRU) was created. It is an independent unit supervised directly by OLAF’s Director-General to support him in selecting cases. It is also involved in monitoring the legality and coherence of the Office’s practices, as well as monitoring whether procedural rights have been safeguarded.

The ISRU analyses information that presents a possible investigative interest and provides an opinion to OLAF’s Director-General on whether an investigation or coordination case should be opened, or whether the case should be dismissed.

4.1.4.2 Purpose of the evaluation

This evaluation has considered evidence on the impact of the ISRU on case selection decisions.

4.1.4.3 Findings

Semi-structured interviews held with stakeholders (predominantly from OLAF staff working across a mix of investigative and non-investigative functions, but also AFCOS representatives, international organisations, spending DGs and other EU IBOAs) generated a range of responses regarding the impact of the ISRU. Some stakeholders noted that the creation of the ISRU helped to generate greater transparency and clarity surrounding case selection processes. However, a number of other stakeholders (an AFCOS representative, a representative from the European Commission, a member of the Supervisory Committee and an MEP) suggested that there is further room for improvement within the ISRU, particularly in relation to how the ISRU is staffed. There was some questioning of the experience and/or knowledge of those selecting cases in relation to investigative procedures, suggesting that this may impact adversely on the effectiveness of some investigations. The stakeholders who raised questions about the knowledge and experience of the ISRU staff did not describe what, if any, challenges this raised.

The issue of staffing of the ISRU was also raised by the Supervisory Committee in 2014104. The Supervisory Committee noted that it had examined the allocation of resources to and within the ISRU, concluding that, generally, ISRU selectors cover a range of specialisations, although sector specialisms are lacking which may have impacted the quality of the assessment carried out. The Supervisory Committee also argued that legal knowledge and language specialisms were sometimes lacking. Amongst other things, the Supervisory Committee recommended that OLAF increase the number of selectors with investigative experience, apply the principle of specialisation among selectors and ensure that selectors have appropriate legal, linguistic and sectoral expertise105.

ICF’s expert panel discussed the staffing of the ISRU at a workshop, emphasising the importance of ISRU staff having investigative experience. In response, a number of OLAF stakeholders noted that there are frequent discussions that take place between the ISRU and investigative staff. It was suggested that these have taken place for the past 2-3 years and, although informal, they are regular and provide the views of investigative staff on incoming information.

105 Ibid.
Despite the 2014 Supervisory Committee opinion, and the problems perceived by selected stakeholders consulted for this evaluation, there is no clear evidence to suggest that shortcomings exist in relation to the staffing of the ISRU which impacts upon the effectiveness of Regulation 883/2013. This evaluation found no evidence to suggest that the experience and expertise of case selectors, and/or the model of engagement between selectors and investigators, needs improving.

4.1.4.4 Concluding remarks

A number of stakeholders interviewed considered that the ISRU expedited the case selection process, helping to drive efficiencies, but suggested scope for improving the knowledge/experience of ISRU staff. Similarly, in 2014, the Supervisory Committee recommended that OLAF increase the number of selectors with investigative experience, apply the principle of specialisation among selectors and ensure that selectors have appropriate legal, linguistic and sectoral expertise. OLAF stakeholders interviewed indicated that ISRU staff regularly engage with investigative units to seek their views on incoming information prior to case selection, and that this has been the case for the past 2-3 years.

Despite the 2014 Supervisory Committee opinion on the staffing of the ISRU, and the problems perceived by selected stakeholders consulted, there is no clear evidence to suggest that shortcomings exist/persist in relation to the staffing of the ISRU which impact upon the effectiveness of Regulation 883/2013. The evaluation found no evidence that the experience and expertise of case selectors, and/or the model of engagement between selectors and investigators, needs improving.

4.1.5 Contribution of case selection processes to the protection of EU financial interests

4.1.5.1 Background

This evaluation study sought to gather and analyse evidence on the extent to which changes to case selection processes impacted upon the overarching objective of Regulation 883/2013 (as set-out in Article 1 of the Regulation) to ‘step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union’.

4.1.5.2 Findings

Contribution analysis (explained further in Annex 1) and statistical analyses were undertaken to consider hypotheses regarding the links between inputs/activities, outputs, outcomes and impacts.

Data were analysed to assess whether the case selection process introduced by Regulation 883/2013 strongly influences the performance/effectiveness of the investigative function.

The main finding from the contribution analysis was that the selection process does not appear to have had a positive impact on the outcomes of investigations. Specifically:

- the selection process does not appear to have led to a higher proportion of closed cases resulting in recommendations to Member States and opinions to third countries; and
- it was not possible to establish a correlation between the selection process and the amount of misused EU public money recovered.

Stakeholders interviewed were also asked to describe the outcomes they believe to be linked to Regulation 883/2013’s provisions surrounding case opening. Some of those interviewed described an improvement in efficiency (discussed further in Chapter 5). A small number of stakeholders also mentioned the improved consistency in the cases selected for investigation as a result of the Regulation’s provisions.
The online survey was also used to gather evidence on the outcomes that stakeholders attribute to Regulation 883/2013’s provisions surrounding case opening. As noted earlier, Article 1 of Regulation 883/2013 refers to stepping-up ‘the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union’ and so in this context evidence was sought on the links between case selection and outcomes related to the protection of the EU’s financial interests. Most survey respondents did not know whether there was a link, although 18 per cent (n=29, including 15 Member State respondents (representing 25 per cent of all Member State respondents) and 7 OLAF respondents (representing 12 per cent of OLAF respondents) agreed/strongly agreed that new competences for the selection and opening of investigations introduced by Regulation 883/2013 triggered an increase in criminal investigations and prosecutions of financial fraud by enforcement and prosecutorial organisations. The same proportion (18 per cent, n=29, including 18 Member State respondents (representing 30 per cent of all Member State respondents), 4 European Commission respondents (representing 15 per cent of all European Commission respondents) and 4 OLAF respondents (representing 7 per cent of OLAF respondents) felt these competences regarding case selection/opening led to the increased recovery of misused EU public money while one-fifth (n=32, including 21 Member State respondents (representing 34 per cent of all Member State respondents), 4 European Commission respondents (representing 15 per cent of all European Commission respondents) and 5 OLAF respondents (representing 9 per cent of OLAF respondents) agreed that these competences increased the deterrence associated with fraud (Figure 3).

Figure 3. Extent to which survey respondents agreed with the following statements concerning the links between the opening of investigations and final outcomes

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 161-164.

Finally, seven survey respondents from OLAF (representing one-quarter of OLAF respondents), all of which were from investigative units, perceived obstacles or shortcomings surrounding the role and tasks of the ISRU. Respondents were asked how these obstacles or shortcomings could be addressed, for which a number of
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

respondents mentioned training (including better training of ISRU staff), learning (best practice, guidance, coaching/mentoring of new ISRU staff) and improved coordination (better coordination between ISRU and investigative units and a suggestion to create an operational coordination unit to assist the ISRU). No suggestions were made regarding changes to Regulation 883/2013 in relation to case selection and opening.

4.2 Investigative tools and powers

OLAF has the power to conduct external and internal administrative investigations. OLAF’s investigative powers were initially defined under Regulations 1073/1999 and 1074/99, and their modalities were further specified by Regulation 883/2013. Investigations are defined as “any inspection, check or other measures undertaken by the Office […] with the view to achieving [its] objectives and establishing, where necessary, the irregular nature of the activities under investigation”.\(^\text{106}\)

Regulation 883/2013 further defines OLAF’s powers during external and internal investigations in its Articles 3 and 4 respectively (discussed in further detail in the sections that follow).

Finally, the GIPs also indicates which investigative activities can be performed in the context of an investigation but do not distinguish between external and internal cases.\(^\text{107}\) These are:

- interviews with persons concerned and witnesses;
- inspections of premises;
- on-the-spot checks;
- digital forensic operations; and
- undertaking investigative missions in third countries.

In practice, investigations can combine external and internal elements.\(^\text{108}\) In such cases, Articles 3 and 4 apply respectively.\(^\text{109}\)

When it comes to external investigations, a number of OLAF’s investigative tools and powers under Regulation 883/2013 oblige the Office to act in compliance with national law and practices. The impact on external investigative activities of this dependency on national rules and practices is difficult to establish. However, to provide context for the sections that follow below, the following box presents evidence and analysis surrounding the potential impact of OLAF’s dependency on national rules and practices.

**Potential impacts on investigative procedures of references to national law**

**Delays in investigative processes**

During the course of the stakeholder consultation, it was suggested that the reliance on national laws can unduly delay the investigative process, especially where it is necessary to request assistance from a national competent authority to accompany OLAF investigators when conducting on-the-spot checks on the premises of an economic operator. The need to navigate national rules/practices and engage with national authorities has the potential to create delays in investigative processes compared to a situation where OLAF acts independently using its own autonomous

\(^{106}\) Article 2(4) of Regulation 883/2013

\(^{107}\) Article 11.2 GIPs

\(^{108}\) Workshop held at ICF on 14 September 2016

\(^{109}\) Article 7(4) of the Regulation.
powers. However, it is difficult to measure whether and to what extent these delays occur and impact the duration of investigations. Statistical data\textsuperscript{110} are available on the average duration of investigations over time which shows that, excluding the average duration of selection corresponding to these cases, the average duration of investigations fell in 2016 but is broadly similar to the average duration over the past 5 years. However, these data do not explain the reasons for these trends. The Supervisory Committee Activity Reports for the past two years\textsuperscript{111} indicated that the Committee had analysed a number of reports on investigations lasting more than 12 months and concluded that in around half of all reports, there were either no reasons for non-completion of investigations or the reasons indicated were considered insufficient. However, in 2014, the Supervisory Committee published an opinion\textsuperscript{112} in which it reported that, based on information provided by OLAF, 29 per cent of (115 out of 391) investigations lasting more than 12 months reported to the Supervisory Committee in 2014 were delayed due to ‘external reasons’ of the type which may be linked to the issues described above regarding national law. These reasons are:

- **Quality of cooperation with stakeholders (lack of/slow cooperation).** This relates to investigations for which OLAF was awaiting responses from stakeholders and/or the provision of information or assistance from outside sources. In such cases, the information/assistance was either provided with significant delay or not provided at all. These issues were identified as the primary reasons for delaying 20 per cent of investigations lasting more than 12 months (reported to the Supervisory Committee in 2014). The Supervisory Committee subsequently substantiated this reason in 70 per cent of (56 of 80) investigations lasting more than 12 months. The Supervisory Committee concluded that the lack of/slow cooperation relates mainly to investigations in the trade and customs and in the agriculture and structural funds sector, ‘which may result from the fact that in these areas OLAF is dependent to a large extent on co-operation with Member States’ authorities’.\textsuperscript{113} Indeed, the OLAF reports on which these data are based describe delays in the cooperation of ‘Member States’ authorities’ as the source of delays in 37 of these 80 investigations. This represents roughly 10 per cent of all investigations lasting more than 12 months reported to the Supervisory Committee in 2014. However, as mentioned above, the Supervisory Committee reported that in only 14 per cent of cases is the impact of the lack of/slow cooperation on the duration of the investigation (expressed in months of delay) provided.

- **Pending results of third parties’ audits and/or investigations.** This relates to cases where OLAF’s investigative activities were pending the results of on-going criminal or administrative national investigations or of audits conducted in parallel.\textsuperscript{114} Although it is not clear that such delays are driven by OLAF’s need to navigate national law in external investigations, it is possible that they are related. OLAF indicated that 9 per cent of (35 of 391) investigations lasting


\textsuperscript{113} Ibid.

\textsuperscript{114} Ibid.
more than 12 months were delayed for this reason, with the Supervisory Committee substantiating this in all but one of these investigations. Half of these investigations related to the agriculture and structural funds sector.

On the basis of the data and analysis presented above, it is not possible to quantify the extent to which references in Regulation 883/2013 to national law in the context of on-the-spot checks have impacted the duration of investigations (expressed in months of delay). The data presented above could be used as a proxy estimate of the proportion of cases (potentially 10-20 per cent) delayed beyond 12 months due to the need to navigate national rules/practices and engage with national authorities.

Quality / completeness of OLAF reports

The fact that investigators are able to conduct certain investigative activities in some countries but not others may create differences in the quality and comprehensiveness/completeness of the facts established by OLAF in its reports.

Issues surrounding the quality of OLAF’s reports are discussed in Section 4.4.3. However, this evaluation has not found conclusive evidence to suggest that the lack of autonomous powers of investigation in Member States has impacted adversely on the quality and completeness of the evidence in OLAF’s reports. There is some analysis in the Supervisory Committee’s Activity Report 2016 on the proportion of judicial recommendations not followed-up by Member States due to a lack of, or insufficient, evidence, but there is no information available to determine whether and to what extent the evidence in these cases was insufficient for reasons related to differences in national law (giving rise to differences in the responsiveness of Member States and/or variability in investigative activities undertaken across Member States). Consequently, evidence surrounding the impact of differences in national law on the quality and completeness of the facts established by OLAF in its reports is qualitative/anecdotal in nature.

4.2.1 On-the-spot checks, inspections and interviews

4.2.1.1 Background

As part of external and internal investigations, OLAF can carry out on-the-spots checks and inspections of economic operators in Member States and third countries, and on the premises of international organisations. In addition, it may conduct such checks and inspections on economic operators in cases where there is a need to establish whether the EU’s financial interests have been affected in connection with a grant agreement or decision, or a contract concerning EU funding. In the context of such investigations, subject to EU law, the Office has the obligation to act in compliance with national law and practices, and with procedural guarantees defined in the Regulation. In turn, national authorities must assist the Office with its investigative tasks, including by applying for judicial authorisations as necessary, and must ensure


116 The definition of the checks and inspections is found in Article 9(1) of Regulation 2988/95, according to which checks can be carried out on the conformity of administrative practices with [EU] rules, the existence of necessary substantiating documents and their concordance with the [EU]’s revenue and expenditure, and the circumstances in which such financial transactions are carried out and checked.

117 In accordance with relevant cooperation and mutual assistance agreements and any other legal instruments in force.

118 The relevant procedures for such checks and inspections are defined in Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities.
that OLAF investigators are allowed access to information and documents relating to the subject of the investigation under the same conditions as equivalent national authorities.119

As part of internal investigations within IBOAs, OLAF carries out administrative investigations in accordance with the provisions of Regulation 883/2013 and with decisions adopted by the respective IBOA, which lay down the terms and conditions for internal investigations concerning them.120 In such investigations, OLAF has the obligation to inform the IBOA concerned and to use appropriate communication channels to transmit information relating to the case.121 It has the right to:

- immediate and unannounced access to relevant information (including in databases) and to the IBOA’s premises and accounts, with the possibility of copying or obtaining extracts from relevant documents or the contents of any data medium held by the IBOA122 while informing the IBOA (Art. 4(4));
- request oral information, including through interviews, and written information123; and
- carry out on-the-spot checks and inspections124 at the premises of economic operators in order to obtain access to relevant information.125

4.2.1.2 Purpose of the evaluation

The evaluation sought to measure the sufficiency and clarity of investigative tools and powers available to OLAF related to conducting on-the-spot checks, inspecting premises and interviewing witnesses and persons concerned. It also considered evidence on how these powers and tools have been implemented in practice to better understand whether and how this has and might influence the achievement of results and the protection of the EU financial interests.

4.2.1.3 Findings

**On-the-spot checks and inspections of economic operators in external and internal investigations**

Evidence was gathered and analysed from the various stakeholder consultation activities and the desk and legal research regarding on-the-spot checks and inspections conducted on economic operators in the context of external and internal investigations.

An issue raised at a workshop with OLAF heads of units and other OLAF staff was the legal basis for conducting on-the-spot checks and inspections on economic operators in the framework of internal investigations. Article 4(3) of Regulation 883/2013 states that ‘In accordance with the provisions and procedures laid down by Regulation (Euratom, EC) No 2185/96, the Office may carry out on-the-spot checks and inspections at the premises of economic operators in order to obtain access to information relevant to the matter under internal investigation’. This gives rise to a structural issue as the investigation is internal but the economic operators are in

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119 Article 3(3) of Regulation 883/2013
120 Article 4(1) of Regulation 883/2013
121 Article 4(6) of Regulation 883/2013
122 Article 4(2)(a) of Regulation 883/2013
123 Article 4(2)(b) of Regulation 883/2013
124 See Footnote 10 for the definition of on-the-spot checks and inspections,
125 Article 4(3) of Regulation 883/2013
Member States for which national rules and practices become relevant via reference to Regulation 2185/96.

Stakeholders frequently described the challenges for OLAF investigators in navigating national law and practices when conducting on-the-spot checks and inspections on economic operators in the Member State concerned. This points to the importance of the AFCOS in helping investigators to understand and navigate these national laws/practices but, in practice, the AFCOS may have insufficient staff, powers or knowledge to fulfil this role (an issue discussed further in Section 4.3.1).

A large number of stakeholders (including OLAF investigative and non-investigative staff and Commission services) who were interviewed and/or participated in the OLAF evaluation conference, held in March 2017, cited the challenges in interpreting/applying powers to conduct on-the-spot checks and inspections on economic operators given the reference within the Regulation to national rules and practices. The point was also raised by some stakeholders that it is not just the national rules and practices that can be challenging to navigate across different Member States, but it is also not always clear who the ‘competent authority’ is in each Member State (e.g. anti-fraud authority; customs authorities; etc.). The challenges associated with the dependency on national rules and practices was also discussed at length at a workshop with OLAF heads of units and other staff where it was suggested that EU law is needed that removes the reliance on national law.

Examples of the issues raised – not an exhaustive list but, rather, examples indicative of the more common comments made – amongst the many stakeholders consulted for the evaluation include:

- The Regulation harmonises the maximum competence of OLAF but in practice it depends on national powers and, in some Member States, it is not clear what those are. Although the powers available to OLAF are the same as those of the corresponding administrative authorities in the Member State concerned, the powers vary according to the country and, in some cases, it is not clear to which corresponding body OLAF can be compared.
- Investigators face challenges in trying to navigate national law given the differences in those laws. These challenges are compounded by Regulation 883/2013’s reference to national ‘practices’ given the ambiguity in how these should be defined/interpreted.
- It is not always clear as to how this reference to national rules and practices should be interpreted in the context of centralised expenditure and subsequent administrative investigations that do not have an equivalence in national legislation.

At the OLAF evaluation conference, OLAF’s Director-General highlighted these issues. He noted that OLAF’s main investigative tool under Regulation 883/2013 is on-the-spot checks and inspections of economic operators, but the legal basis for these is unclear and patchy given the Regulation makes reference to other tools/regulations as well as ‘rules and practices’ of Member States, which makes the legal framework underpinning these tools challenging to interpret and apply in practice.

A study published by Utrecht University\(^\text{126}\) echoes this sentiment (regarding the piecemeal nature of OLAF’s powers in undertaking on-the-spot checks and inspections of economic operators). It states that ‘a first strategy could be to define in a EU

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\(^{126}\) Utrecht University (2017), Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB), April, https://www.ris.uu.nl/ws/files/32039338/Report_Investigatory_powers_and_procedural_safeguards_Utrecht _University_1_.pdf.
regulation, amending Regulation 2185/96, a clear set of autonomous investigative powers, without referring back to national law. An autonomous mandate of investigation comes with autonomous powers that can be used in the territories of all member states. This also has the advantage that these autonomous powers would not differ from country to country and, within every country, would not differ between the income and expenditure side of the EU budget.’

A similar proposition was discussed at a workshop involving the evaluation team’s external expert panel at which the current situation was described as a ‘patchwork’ of national rules and practices for which the solution could neither be found in the AFCOS nor through referring back to national legislation.

In the context of these issues, and to complement the evidence and analysis set-out above, OLAF staff were surveyed on the extent to which they agree that OLAF’s powers and tools under Regulation 883/2013 are clear regarding conducting on-the-spot checks and inspections:

• Regarding on-the-spot checks, similar proportions of respondents agreed or strongly agreed that OLAF’s powers are clear in relation to internal investigations involving IBOAs\(^{127}\) (42 per cent, n=14) and in relation to external investigations involving Member States (50 per cent, n=16). Staff from the ISRU were far more likely to agree/strongly agree than staff from investigative units. These figures were considerably higher than the proportions of respondents who said that OLAF’s powers are clear in relation to conducting on-the-spot checks within third countries (16 per cent, n=5) or international organisations (13 per cent, n=4). Again, ISRU staff were more likely to agree/strongly agree than staff from investigative units.

• Regarding inspections, around one-in-five respondents (OLAF staff) agreed or strongly agreed that OLAF’s powers are clear in relation to inspections within Member States\(^{128}\), third countries and/or international organisations.

The relatively low proportion of survey respondents who said that OLAF’s powers are clear in relation to conducting on-the-spot checks and inspections within third countries in particular may be because Regulation 2185/96 does not apply to third countries and so there is a gap in relation to on-the-spot checks and inspections in third countries. However, as stated in Regulation 883/2013, OLAF may carry-out on-the-spot checks and inspections in third countries (and on the premises of international organisations) in accordance with the cooperation and mutual assistance agreements and any other legal instrument in force. This was reiterated in a recent response to a Parliamentary Question\(^{129}\) in the European Parliament which confirmed that ‘for OLAF’s operational activities in non-EU countries, OLAF may, in accordance with cooperation and mutual administrative assistance agreements and any other legal instrument in force, carry out on-the-spot checks and inspections on economic operators. In this respect, OLAF

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\(^{127}\) Article 4(3) makes reference to ‘on-the-spot checks … at the premises of economic operators’ and not ‘on-the-spot checks within IBOAs’. The survey question made reference to ‘on-the-spot checks within IBOAs’ to facilitate the consolidation of survey questions and the shortening of the survey length overall. It is unlikely that the inclusion of the words “at the premises of economic operators” and the inclusion of the words “within IBOAs” in the survey question had any impact on responses. Consequently, the results of this survey question should be interpreted as relating to on-the-spot checks at the premises of economic operators rather than within IBOAs.

\(^{128}\) Article 3(1) makes reference to ‘inspections in the Member States’ and not ‘inspections of premises within the Member States’. The survey question made reference to ‘inspections of premises within the Member States’ to facilitate the consolidation of survey questions and the shortening of the survey length overall. It is unlikely that the inclusion of the words “premises within” in the survey question had any impact on responses. Consequently, the results of this survey question should be interpreted as relating to inspections in the Member States rather than inspections of premises within the Member States.

exercises the powers conferred on the Commission by Regulation 2185/96, in accordance with Art. 3(1) of Regulation 883/2013(2). All recently concluded international agreements contain general anti-fraud clauses. Specific references to OLAF's powers are also included in Financing Agreements with non-EU countries and international organisations, under which financial aid is provided. In addition, OLAF has signed a number of Administrative Arrangements with competent authorities in non-EU countries, to provide further assistance and exchange information where necessary. Consequently, in practice, gaps in relation to on-the-spot checks and inspections in third countries may exist only insofar as they are not covered by one or more of the agreements referenced above.

Prima facie, the survey results presented above regarding on-the-spot checks might be interpreted as conflicting somewhat with the views of those interviewed who highlighted the challenges in interpreting and applying in practice Regulation 883/2013’s provisions surrounding on-the-spot checks in Member States. However, the evaluation does not reach this conclusion for the following reasons:

- OLAF’s powers and tools under Regulation 883/2013 regarding on-the-spot checks and inspections might be considered clear (i.e. it is clear what powers OLAF does and does not have, and the due consideration that needs to be given to national rules and practices) while also being challenging to apply in practice. That is, it is not necessarily inconsistent to form a view that Regulation 883/2013 is clear on the extent and nature of OLAF’s powers for conducting on-the-spot checks and inspections, while also forming a view that those powers are difficult to apply in practice given the need to navigate national law and practices. In this context, the 'clarity' of these powers should not be equated with their practical applicability.
- As noted above, survey respondents who are 'closer' to these powers and tools (OLAF investigators) were less likely to agree that these powers and tools are clear compared to survey respondents who are not directly involved in interpreting and applying these powers and tools (ISRU staff).

**Inspections of premises of EU IBOAs in internal investigations**

In relation to inspections of the premises of EU IBOAs in the context of internal investigations, the OLAF Director-General noted at the OLAF evaluation conference that OLAF requires the cooperation of EU IBOAs and this varies in practice, with some IBOAs allowing OLAF to carry-out inspections while others do not. He noted that OLAF should not be at the mercy of the IBOAs when it comes to conducting such inspections.130

Another issue surrounding inspections in the context of internal investigations analysed by the evaluation team is the degree of consistency between Regulation 883/2013 and the GIPs. The Regulation does not explicitly and directly describe OLAF’s powers to conduct inspections at the premises of EU IBOAs in the context of internal investigations. Rather, as noted above, it sets-out OLAF’s powers to conduct 'inspections at the premises of economic operators’. However, the Regulation does include the following Articles of relevance to inspections of EU premises:

- ‘...the Office shall carry out administrative investigations within the institutions, bodies, offices and agencies...’ (Article 4(1)).

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130 Related issues surrounding this point are discussed further in section 4.3.2 in the context of cooperation involving EU IBOAs.
• ‘...administrative investigations’ (‘investigations’) shall mean any inspection, check or other measure undertaken by the Office in accordance with Articles 3 and 4...’ (Article 2(4)).

• ‘...the Office shall have the right of immediate and unannounced access to any relevant information, including information in databases, held by the institutions, bodies, offices and agencies, and to their premises. The Office shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies.’ Article 4(2(a)).

Consequently, although the Regulation does not directly/explicitly describe ‘inspections at the premises of EU, institutions, bodies, offices and agencies’, it can be inferred from the Articles described above that this is provided for by Regulation 883/2013.

In contrast, the GIPs devote an entire Article (Article 13) to the inspection of EU IBOAs’ premises, specifying very clearly (Article 13.1) that ‘The investigation unit may carry out inspections of the premises of the EU institutions, bodies, offices or agencies at any time during an investigation.’ Consequently, there is an inconsistency between the Regulation and the GIPs in the clarity of the detail surrounding inspections of EU premises, although they are not necessarily inconsistent in how they describe the scope and nature of the powers. The GIPs provide more explicit detail than the Regulation on OLAF’s powers to inspect EU premises.

Additionally, the manner in which OLAF informs an EU IBOA of its intention to carry out an inspection on its premises may vary in practice. Article 4(4) of the Regulation states that ‘the institutions, bodies, offices and agencies shall be informed whenever the staff of the Office conduct an internal investigation on their premises or consult a document or request information held by them’. However, provisions in the arrangements concluded with IBOAs differ on this point, which generates inconsistencies in the way the Regulation is applied. Specifically:

• At the European Commission, OLAF informs the Secretary General and the Director General of the Directorate General concerned of its intention to access Commission premises at the latest at the time of its visit (Article 4.1 of the Administrative Arrangement between OLAF and the European Commission).

• At the European Parliament, OLAF informs the Secretary General of its intention in writing at least 48 hours in advance. Such notification can exceptionally be postponed to the moment OLAF wishes to access the premises, with a written justification of the reasons why (Article 5.4 of the Practical Arrangements between the European Parliament and OLAF).

In practice, access to the premises of the European Parliament and to information is denied to OLAF investigators when the investigation concerns a Member of the European Parliament, due to their immunity. This is discussed further in section 4.2.3.4 below.

To complement this evidence, OLAF staff were surveyed on the extent to which they agree that OLAF’s powers to inspect premises are clear. A significantly higher proportion of respondents (75 per cent of respondents, n=24) agreed/strongly agreed that these powers are clear in relation to inspections of the premises of EU IBOAs compared to inspections within Member States, third countries and/or international organisations.

The results of the survey may help to explain why more stakeholders did not raise issues surrounding inspections in the context of internal investigations during the interviews – because a high proportion of stakeholders (at least those from OLAF, if not others) believe that OLAF’s powers are clear when it comes to conducting inspections of EU IBOAs’ premises. The relatively low proportion of OLAF survey respondents who believe that OLAF’s powers to inspect are clear when it comes to Member States is likely to reflect, at least in part, the issues discussed above surrounding references to national rules and practices.


**Interviews**

In relation to OLAF’s powers to conduct interviews with persons, the main issue raised by stakeholders in the course of interviews, workshops and the OLAF evaluation conference relates to the authorisation necessary to conduct interviews and the burden this can create for investigators.

At the OLAF evaluation conference, the Chair of the European Parliament’s Committee on Budgetary Control noted that the need for an authorisation for interviewing witnesses can be a long procedure. This was echoed by an OLAF non-investigative staff member who highlighted the ‘burdensome’ and ‘cumbersome’ process involved in obtaining an authorisation to interview a witness, a process which they suggested can take half a day. An OLAF investigator noted some of the practical difficulties in trying to identify a witness (for which authorisation to interview must be sought) prior to an on-the-spot check. A further complication arises when distinguishing between an ‘interview’ and a ‘statement’ insofar as Article 9 of Regulation 883/2013 places requirements (related to prior notice) upon OLAF investigators intending to interview witnesses and/or persons concerned, but these same requirements do not apply to the taking of statements in the context of on-the-spot checks and inspections. It is ICF’s understanding that Regulation 883/2013 introduced provisions related to taking statements (without the need to provide prior notice to the person concerned/witness making the statement) to apply in situations where OLAF investigators were conducting an on-the-spot check or inspection during the course of which information was required from the person concerned/witness. At a workshop involving ICF’s expert panel, the distinction between interviews and statements in the context of Regulation 883/2013 was discussed. While Regulation 883/2013 does not define nor elaborate on the two forms of gathering evidence, the GIPs provide the following definitions:

- **Statements** – a statement is a written record of evidence relevant to an investigation provided by a person within the framework of an OLAF case.
- **Interviews** – an interview is a formal dialogue with a person concerned or a witness in order to obtain evidence relevant to an investigation and which is always duly recorded.

Despite this elaboration provided in the GIPs, participants in the aforementioned workshop agreed that the legal basis of statements vis-à-vis interviews should be clarified, particularly given the requirements of Article 9 regarding prior notice in relation to interviews.

Survey respondents were asked about the clarity of OLAF’s powers and tools with respect to conducting interviews. Overall, respondents were more likely to agree or strongly agree that OLAF’s powers are clear where the persons involved are in IBOAs. This is broadly consistent with the comments from stakeholders surrounding the clarity/sufficiency of tools and powers for internal vs external investigations.

**4.2.1.4 Concluding remarks**

OLAF’s investigative powers and tools under Regulation 883/2013 are largely unchanged from those established by Regulation 1073/1999.

Regardless, the majority of respondents to the online survey indicated that Regulation 883/2013 increased their understanding of OLAF’s role in investigations. This was especially so for external investigations, for which Member State respondents were most likely to agree that it increased their understanding. For internal investigations the European Commission and other EU IBOAs were most likely to agree.

Survey respondents from OLAF were generally more likely to agree that specific powers and tools (surrounding inspections, interviews and on-the-spot checks) were clear/sufficient in the context of internal rather than external investigations.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Regarding specific investigatory tools and powers, stakeholders noted that Regulation 883/2013 is generally clear but they queried the clarity/sufficiency of the Regulation in relation to the following areas:

- On-the-spot checks and inspections of economic operators in external and internal investigations, where various stakeholders (including OLAF investigative and non-investigative staff and Commission services) cited challenges in interpreting/applying Regulation 883/2013 in practice to on-the-spot checks and inspections given the Regulation’s reference to national rules and practices. The point was also made by some stakeholders that it is not just the national rules and practices that can be challenging to navigate across different Member States, but it is also not always clear as to who the ‘competent authority’ is in each Member State is (e.g. anti-fraud authority; customs authorities; etc.). The impact on on-the-spot checks and inspections of economic operators of this dependency on national rules and practices is difficult to measure/establish in practice although qualitative/anecdotal evidence collected during this evaluation suggests it has the potential to delay investigations and compromise the completeness and/or quality of OLAF’s reports.

- Inspections of premises of EU IBOAs in internal investigations, where there is an inconsistency between the Regulation and the GIPs in the clarity and transparency of the detail surrounding inspections of EU premises, although they are not necessarily inconsistent in how they describe the scope and nature of the powers – the inconsistency stems from the fact that the GIPs provide more transparent/explicit detail than the Regulation on OLAF’s powers to inspect EU premises. Additionally, the manner in which OLAF informs an EU IBOA of its intention to carry-out an inspection on its premises may vary in practice.

- Interviews with witnesses (in particular), where the process of seeking prior authorisation can be both logistically difficult (as some witnesses will not be known until an on-the-spot check is completed) and time-consuming. Further, there is some confusion over the difference between an interview (for which prior authorisation does apply) and a statement (for which it does not).

The evaluation identifies the following potential improvements to Regulation 883/2013’s provisions surrounding on-the-spot checks, inspections and interviews:

- Revising Regulation 883/2013 to enable OLAF to conduct on-the-spot checks and inspections in a similar manner across all EU Member States, regardless of differences in national law and practices.

- Revising Regulation 883/2013 to allow OLAF to conduct an on-the-spot check and/or inspection of premises and interview a person concerned or witness identified during an on-the-spot check and/or inspection of premises (which may need to be facilitated by amending the Regulation’s provisions surrounding prior notice to persons concerned). This would overcome the practical difficulties that investigators can face in identifying witnesses and persons concerned prior to an on-the-spot check or inspection, and it would also allow the investigator to enter into a dialogue with the person concerned or witness rather than just request a written statement from them. Related to this is the need to clarify the legal basis of statements vis-à-vis interviews in the context of the requirements to seek prior authorisation for interviews (which does not apply to statements obtained in the course of an on-the-spot check).

4.2.2 Digital forensic operations

4.2.2.1 Background

In relation to internal investigations, Article 4(2) states that OLAF ‘shall’ have the right of immediate and unannounced access to any relevant information, including
information in databases, held by the institutions, bodies, offices and agencies, and to their premises’ and it also states that OLAF ‘may take a copy of, and obtain extracts from, any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearance’.

Similarly, in relation to external investigations, Article 3(5) states that OLAF ’may have access to any relevant information, including information in databases, held by the institutions, bodies, offices and agencies, connected with the matter under investigation, where necessary in order to establish whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union’.

The inconsistency in the powers available under internal investigations (‘shall have the right’) and external investigations (‘may have access’) is reflective of Regulation 883/2013’s dependency on national rules and practices when it comes to external investigations.

Guidance on how to interpret and implement Article 4(2) specifically (and Article 7(1) of Regulation (EC) 2185/96) is set out in the Guidelines on Digital Forensic Procedures for OLAF Staff131

Guidelines on Digital Forensic Procedures for OLAF Staff

Procedural guarantees during digital forensic operations are addressed, to a certain extent, in Guidelines on Digital Forensic Procedures adopted in 2013 and adopted in 2016. The 2016 Guidelines introduced a number of clearer safeguards, applicable to collection of forensic data in both internal and external investigations, in particular regarding collecting information on devices that may be considered as private devices or containing information of ‘a legally privileged nature’.132 A procedural mechanism is foreseen in both internal and external investigations whereby, after the device has been seized by OLAF, a meeting is organised between the person concerned and OLAF to resolve any issue.

4.2.2.2 Purpose of the evaluation

The evaluation sought to measure the sufficiency and clarity of investigative tools and powers available to OLAF related to undertaking digital forensic activities. It also considered evidence on how these powers and tools have been implemented in practice to better understand whether and how this has and might influence the achievement of results and the protection of the EU financial interests.

4.2.2.3 Findings

Despite the provisions within the Regulation described above, a number of stakeholders consulted in the course of this evaluation study suggested the Regulation is ambiguous and insufficient in the context of the range of devices and scenarios involving digital evidence. For example, although the Regulation’s reference to ‘databases’ and ‘any data medium’ might be interpreted as covering all digital/electronic devices and scenarios, there are specific scenarios – such as where the device itself is private (i.e. the personal property of the person concerned) but is linked to an EU IBOA in some way (for example, if the private device is on the premises of an EU IBOA and/or is connected to the IBOA’s network, etc.) – which

132 Articles 5 and 6 of the Guidelines on Digital Forensic Procedures.
might test the relevance and applicability of the Regulation (specifically whether the term ‘held by’ in the Articles quoted above applies in such scenarios).

This lack of clarity surrounding digital forensic operations under certain scenarios was also raised by OLAF’s Director-General at OLAF’s evaluation conference held in March 2017. A representative from an OLAF investigative unit raised a number of scenarios in which it was unclear whether Regulation 883/2013 gave OLAF investigators the legal powers and tools to access/seize certain data. Such scenarios involved situations where there is data held on a private mobile phone but it contains an IBOA’s SIM card, or a private laptop computer is connected to an IBOA’s network, or data stored on the cloud. However, arguably each of these scenarios could describe a situation in which the actual data/information is owned by the IBOA (even if the device is not) and, hence, it could be obtained/seized by OLAF.

At a workshop involving OLAF heads of units and other staff, it was noted that OLAF conducts digital forensic operations on the basis of general provisions (within Regulation 883/2013) which might be sufficient for accessing/seizing electronic data but may not keep pace with technological developments. It was suggested that the Regulation should be ‘technology agnostic’ but could be clearer and more explicit about the scenarios in which OLAF’s investigative tools and powers apply for digital forensic operations (without referring to specific hardware or software on which such data might be held/stored).

In stakeholder interviews, at the aforementioned OLAF workshop and at a workshop involving ICF’s external expert panel, it was noted that OLAF can carry-out digital forensic operations in the context of an on-the-spot check providing that the national authority has the power to conduct such operations. Consequently, as per the earlier discussion regarding on-the-spot checks and inspections, OLAF is at the ‘mercy’ of national legislation with regard to digital forensic operations. On this basis, some stakeholders suggested that OLAF should be given autonomous powers to cover digital forensic operations (in the same way that OLAF should be given autonomous powers for conducting on-the-spot checks and inspections in Member States).

Evidence from stakeholder interviews and workshops on digital forensic operations is complemented by additional quantitative (and, in some cases, qualitative) data and evidence from the online survey. Specifically, OLAF respondents to the survey were asked whether they associate obstacles/shortcomings in the application of OLAF’s powers in relation to digital forensic operations. Responses varied, although roughly half as many respondents (41 per cent, n=11) associated obstacles/shortcomings in the application of OLAF’s powers in EU IBOAs compared to the number of respondents (79 per cent, n=23) who associated obstacles/shortcomings in the application of OLAF’s powers in Member States. Among the survey respondents who associated obstacles/shortcomings in the application of OLAF’s powers in relation to digital forensic operations to a large extent, the reasons given were consistent with the evidence emerging from the interviews and workshops surrounding the dependency of OLAF’s digital forensic operations on national law.

4.2.2.4 Concluding remarks

The evaluation found a lack of clarity and specificity surrounding OLAF’s powers to conduct digital forensic operations driven by two factors:

- OLAF’s powers to conduct digital forensic operations during external investigations are dependent on national rules and practices, which vary, lack clarity or are inexistent.
- Regulation 883/2013 does not specify whether OLAF’s powers extend to accessing organisational information and data which has been stored and/or accessed via private devices/hardware (such as phones, computers, tablets, etc.) or private online accounts (such as accounts linked to the cloud).
On the basis of this evidence, the evaluation concludes there is a case for revising (and/or clarifying) Regulation 883/2013 to provide OLAF with the power to undertake digital forensic operations in external investigations.

Further, a number of stakeholders at EU level noted that rules on conducting forensic operations, due to their intrusive nature and possible interference with the right to privacy, should be more clearly spelled out in the Regulation. While the adoption of the Guidelines on Digital Forensic Procedures for OLAF Staff (described earlier) were noted as a positive improvement towards more legal certainty, it is only an internal document which does not bear the same legal value as a Regulation. Consequently, further clarity could be provided within the Regulation regarding the scope/reach of OLAF’s powers to undertake digital forensic operations given the different dynamics/scenarios put forward by stakeholders (mostly involving a mix of private devices/accounts and organisational data/information) for which it is unclear as to whether and how Regulation 883/2013 would apply.

4.2.3 Precautionary measures

4.2.3.1 Background

The context of a given investigation can justify the adoption of administrative precautionary measures.

Where an OLAF investigation in progress shows that it might be appropriate to take precautionary measures to protect the Union’s financial interests, Article 7(6) of Regulation 883/2013 indicates that OLAF must without delay inform the IBOA concerned by the investigation in progress of the need to consider precautionary measures to protect the financial interests of the Union. In such situations, the IBOA concerned is informed by the Office about:

- the identity of the person concerned by the investigation and a summary of the facts at the time;
- information relevant to determining whether such precautionary measures should be taken; and
- any measures of confidentiality recommended.

On this basis, the IBOA will decide whether to take appropriate precautionary measures to protect the financial interests of the Union, including those aimed at safeguarding evidence.

Article 7(7) makes reference to the competent authorities of the Member States, at OLAF’s request, taking the appropriate precautionary measures under their national law to protect the financial interests of the Union, in particular measures for the safeguarding of evidence. OLAF can provide information when it might be appropriate to adopt precautionary measures, although the adoption of such measures is left to the authorities of the Member State concerned and also IBOAs. Such measures are taken in accordance with national/EU law. In cases where external investigations involve third-countries or international organisations, the modalities of their cooperation during investigations are defined in administrative arrangements concluded with OLAF’s partner countries/organisations. On this basis, the Office and its partners may exchange operational, strategic or technical information, which can

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132 Interviews with OLAF non-investigative staff and Commission services.
135 Article 7(6) of the Regulation.
136 Article 7(7) of the Regulation.
include progress reports. OLAF is supported by relevant Commission services and the European External Action Service (EEAS).\textsuperscript{137}

\textbf{4.2.3.2 Purpose of the evaluation}

The evaluation sought evidence on the 
\textit{sufficiency and clarity of provisions within Regulation 883/2013 for taking precautionary measures}. This included considering evidence on whether and to what extent precautionary measures have been taken in practice, and the drivers for their use.

\textbf{4.2.3.3 Findings}

At the OLAF evaluation conference held in March 2017, it was suggested that further work was required to look at the degree of clarity surrounding the timing and legality of precautionary measures. This issue was raised specifically in the semi-structured depth interviews with stakeholders, the findings from which are presented below.

A number of stakeholders welcomed the inclusion of Article 7(6) and 7(7) in Regulation 883/2013, which provides for precautionary measures. An OLAF investigator highlighted the potential benefits of precautionary measures for protecting the EU's financial interests (by stopping funding, stopping payments and freezing contracts, whilst the investigation continues), and noted that it is often used by OLAF with good success. An EU IBOA suggested that it is not used very frequently in practice but it is positive that the option exists as introduced by Regulation 883/2013. A spending DG confirmed that it had taken precautionary measures and they felt that these had a positive impact on the investigation.

Other stakeholders suggested that it is rare for precautionary measures to be used. One OLAF investigator stated that they had not seen Article 7(6) activated and suggested that investigative units are reluctant to initiate precautionary measures for fear of putting their investigation at risk. However, it is not the case that Article 7(6) has not been ‘activated’. Although data are not available on the use of Article 7(6), evidence is available to demonstrate that it has been used by OLAF and by at least some EU IBOAs. As discussed in Section 8 of this report, the Early Detection and Exclusion System (EDES) procedure requires hearing from the economic operator concerned, and this can alter the course of an investigation.\textsuperscript{138} This same OLAF investigator suggested that it could be worth including a link between precautionary measures and EDES within Regulation 883/2013 (as the Regulation as currently drafted is unclear on the link).

Some stakeholders noted that the inconclusive nature of the evidence presented by OLAF in support of a precautionary measure (given the investigation is still ongoing at the time the evidence is provided and, hence, the person concerned has not been found guilty) is a significant factor explaining the reluctance of some stakeholders to follow-up on precautionary measures. For example, one spending DG suggested that precautionary measures are not always taken because there is no conclusive evidence of fraud committed by the beneficiary. Another EU IBOA made a similar remark, noting that if an OLAF investigation is ongoing, the IBOA cannot always disclose evidence of wrongdoing to the beneficiary and that perhaps there should be something in Regulation 883/2013 about the fact that if an OLAF investigation is ongoing or concluded, there should be an automatic possibility to take action against the beneficiary concerned (as these consequences are not automatic). A managing authority indicated that, based on the general rule of law (that a person remains

\textsuperscript{137} Article 14 of the Regulation.

\textsuperscript{138} Interview with OLAF non-investigative staff and Commission services
innocent until proven guilty), they do not alert the beneficiary to the ongoing investigation unless it is closed and proven.

Linked to the inconclusive nature of the evidence (at that stage of the investigation) is the risk of having decisions to suspend payments quashed by a court and/or damages having to be paid. An OLAF investigator raised the issue of suspended payments being overturned by the administrative court if the decision to suspend payments cannot be substantiated. This was reiterated by a spending DG which said it has significant concerns regarding requests from OLAF for precautionary measures because they arise by definition at a stage when the investigation is far from being completed and they noted that beneficiaries are quick to take a managing authority to court to challenge suspended payments.

A small number of stakeholders raised the issue of the completeness of the information provided by OLAF (an issue for which complementary evidence from the online survey is presented below). A representative from the European Commission noted that OLAF needs to improve the quality of information shared in order to assess whether to take precautionary measures. For instance, it was suggested that OLAF does not disclose the origin of the information and this lack of information prevents the Commission from assessing the need to take any precautionary measures. But the stakeholder recognised that sometimes OLAF does not want to provide facts to the IBOA concerned by the investigation in progress at that stage because the contradictory procedure would jeopardise the ongoing investigation. An OLAF investigator also noted that an authorising officer will ask for facts and evidence to proceed to the suspension of payments, but this can be a problem as the Head of Unit (HoU) within OLAF cannot transfer information about facts that are not established and on which the person concerned has not had the opportunity to comment. They suggested that there is a need for clearer procedures surrounding precautionary measures.

Complementing the in-depth evidence gathered and analysed from the stakeholder interviews and workshops/conference is survey data on precautionary measures. Just over one-third (n=17) of survey respondents (from the European Commission, other EU IBOAs, Member State stakeholders and third countries) agreed that the information provided to them by OLAF with regard to precautionary measures is exhaustive and in line with the requirements set by Article 7. Member State stakeholders were most likely to agree that they are provided with the information they need to take precautionary measures, despite OLAF investigators suggesting that Member States were less likely to act on OLAF’s advice (compared to EU IBOAs).

4.2.3.4 Concluding remarks

The evaluation found that although, generally, there was widespread support for the Regulation 883/2013 provision related to precautionary measures, in practice the feasibility of taking precautionary measures was often questioned by those with responsibility for taking such measures. This relates to the uncertainty surrounding the legality of such measures given they are taken at a point in time when OLAF’s investigation has not yet concluded and the person concerned has not been found guilty of an offence.

The interplay between Article 7(6) of Regulation 883/2013 (surrounding precautionary measures) and Article 9 (regarding procedural guarantees) – as well as wider EU law related to an individual’s fundamental rights (including the right to a fair hearing and the presumption of innocence) – remains unclear. This lack of clarity is likely to explain in part the reluctance of some stakeholders to take precautionary measures. Linked to the inconclusive nature of the evidence (at that stage of the investigation) is the risk of having decisions to suspend payments quashed by a court and/or damages paid.
4.2.4 Immunity of Members of the European Parliament (MEPs)

4.2.4.1 Background

Regulation 883/2013 applies to Members of the European Parliament (MEPs), although whereas clause (12) of Regulation 883/2013 notes that ‘Investigations should be conducted in accordance with the Treaties and in particular with Protocol No 7 on the privileges and immunities of the European Union, while respecting the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (3) (‘the Staff Regulations’) and the Statute for Members of the European Parliament...’.

Protocol (No 7) on the Privileges and Immunities of the European Union creates immunities surrounding MEPs and privileges in relation to their offices and documentation. For example, Article 1 of the Protocol states that ‘The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation’. In addition, Article 8 states that ‘Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties’.

Consequently, along with the Statute for Members of the European Parliament, this restricts in practice the information that OLAF can gather from MEPs, and the access it can gain to their offices/facilities, in the course of an internal investigation.

4.2.4.2 Purpose of the evaluation

The purpose of the evaluation in this context was to review issues surrounding the immunity and privileges of MEPs as they affect OLAF’s ability to use the investigative tools and powers in Regulation 883/2013.

4.2.4.3 Findings

The immunity of MEPs in the context of OLAF investigations was discussed at the OLAF evaluation conference held in March 2017. A stakeholder from the European Parliament noted that the Statute for Members of the European Parliament imposes limitations to certain OLAF investigative powers when they concern the sphere of immunity of the MEPs. He confirmed that this applies to provisions of Regulation 883/2013 regarding unannounced access and inspections, searches and seizures in relation to European Parliament premises, but that this is not the case for administrative documents (e.g. claims of reimbursement). He suggested that accessing the documents of MEPs or their offices would require the European Parliament to lift the immunity of MEPs and, in principle, only a competent national (judicial) authority can request such lifting (which could be considered for the EPPO). By way of example, the representative made reference to a 2011 case in which MEPs were suspected to have received money in exchange of tabling parliamentary amendments and for which the European Parliament only granted OLAF full access to the offices of MEPs at the request of a national judicial authority. However, another conference attendee questioned this, implying that there is no formal/legal provision specifying that only judicial authorities can request the lifting of immunity to access the premises of MEPs. Interviews with stakeholders primarily focused on the immunity afforded to MEPs vis-à-vis others and the unequal treatment in which this may manifest itself. At the very least, it was argued, their immunity should be clarified. For example, it was noted by one OLAF investigator that there are many cases involving Accredited Parliamentary Assistants (APAs) but, because they often share offices with their MEP, access to OLAF is denied. The powers of OLAF concerning accredited assistants, who do not benefit from such an immunity but often share an office or working material with their MEP, are not specified either in the Regulation or the Practical Arrangements between the European Parliament and OLAF.
An additional issue regarding the immunity of MEPs was raised at the workshop with OLAF Heads of Unit and other staff. This related to the basis on which MEPs’ immunity is clarified. The workshop discussed briefly existing texts applying between OLAF and the European Parliament. Specifically:

- the Inter-institutional Agreement of 25 May 1999 between OLAF and the European Parliament; and

The workshop noted that the rules for MEPs and their immunity in the context of OLAF internal investigations should ideally be found in Regulation 883/2013 (rather than within an inter-institutional agreement).

4.2.4.4 Concluding remarks

The evaluation found a lack of clarity surrounding the immunity of an MEP. This lack of clarity extends to the process by which this immunity can be lifted/waived (specifically, whether only judicial authorities can request the lifting of immunity).

Further, there is a degree of uncertainty surrounding OLAF’s powers surrounding Accredited Parliamentary Assistants (APAs), who do not benefit from the immunity afforded to MEPs, but the effects of an MEP’s immunity may extend to APAs where they share an office or working material. The powers of OLAF concerning accredited assistants are not specified either in the Regulation or the Practical Arrangements between the European Parliament and OLAF.

4.3 Cooperation and information exchange

This section describes the different tools and mechanisms in place for OLAF to cooperate and coordinate its actions with its main partners. It distinguishes between investigation-related cooperation and policy-related cooperation when it comes to Member States and IBOAs. The focus of Regulation 883/2013 is on investigation-related cooperation. Provisions on OLAF’s cooperation with its partners were extended considerably under Regulation 883/2013.

4.3.1 Member States

4.3.1.1 Background

Member States have an obligation to assist OLAF in the context of internal and external investigations. First, they are required by Article 3(4) of the Regulation to set-up an Anti-Fraud Coordination Service (AFCOS) to facilitate cooperation and the exchange of information. In addition, Member States have an obligation to assist OLAF’s staff as necessary for them to carry-out their tasks effectively, and to ensure they have access to all relevant information and documents relating to the investigated matter under the same conditions as national authorities.\(^\text{139}\) In practice, the extent of the resources and competences granted to AFCOS vary from one Member State to another.\(^\text{140}\)

Article 1(5) of the Regulation provides that Member States’ competent authorities may conclude administrative arrangements with OLAF, in particular regarding the transmission of information and the conduct of investigations. While existing arrangements were concluded prior to the entry into force of the Regulation, a provision expressly referring to them was introduced in the Regulation.

\(^{139}\) Articles 3(3) and 7(3) of Regulation 883/2013

\(^{140}\) Workshop held at ICF on 14 September 2016
At present, OLAF has concluded 11 Administrative Cooperation Arrangements (ACAs) providing some practicalities for the exchange of information with the authorities of nine Member States and the conduct of investigations. They are relevant to both internal and external investigations. OLAF may sign ACAs with different authorities from the same Member State. However, ACAs do not constitute a prerequisite for conducting investigations in Member States but rather provide some practical modalities for cooperation in this context where there is an identified need.

4.3.1.2 Purpose of the evaluation

This evaluation analysed available mechanisms for cooperation and information exchange between OLAF and the Member States and their impact on the quality and timeliness of investigations, information sharing and cooperation (in particular in relation to the quality, reliability and admissibility of evidence) and, ultimately, on the protection of the EU-financial interests. Elements of the Regulation considered include:

- Role and profile of AFCOS.
- Assistance provided by OLAF to Member States.

The findings are presented throughout by type/stage of cooperation – investigation-related cooperation, coordination cases and policy-related cooperation.

4.3.1.3 Findings

Investigation-related cooperation

Cooperation and information exchange – AFCOS

Stakeholders with whom interviews were conducted as part of this evaluation (especially a large number of AFCOS representatives) asserted that the creation of the AFCOS had improved cooperation and the exchange of information with OLAF. Judicial and managing authorities offered a similar view, highlighting not just the communication channels between AFCOS and OLAF but also those across national authorities leading to improved coordination.

One AFCOS representative noted that Regulation 883/2013 brought a positive change and the creation of the AFCOS offers a better representation of the protection of the EU’s financial interests. Another AFCOS representative noted that there was no awareness on the matter of PIF before the AFCOS was created. Now the fight against fraud could be even more promoted and widespread if the AFCOS was more than one person. Two stakeholders who were interviewed (an OLAF investigator and an AFCOS) both suggested that the establishment of the AFCOS, and the subsequent cooperation between the AFCOS and OLAF, had helped to reduce the average duration of investigations through greater coordination and streamlined processes for accessing people, places and information.

However, despite these perceived and/or actual benefits, there are also a number of shortcomings in practice regarding the role of the AFCOS which were highlighted in stakeholder interviews as well as other consultation events (e.g. OLAF evaluation conference and related meetings/workshops).

At the OLAF evaluation conference, OLAF’s Director-General noted that, in principle, Regulation 883/2013 ‘extended the direct reach of OLAF in Member States’ but, in practice, this was often not the case. Specifically, a number of stakeholders highlighted the diverse profile of the different AFCOS, which is supported by evidence provided by OLAF based on a survey it sent to the different AFCOS which showed significant diversity in the organisation, tasks and powers of the AFCOS (see box).
Current profile of the AFCOS

- Organisation of the AFCOS:
  - Just over 80 per cent of the AFCOS have one central office only, with most of the remaining 20 per cent operating with both a central office and local units.
  - More than half of the AFCOS have fewer than 5 FTEs, while one-quarter operate with 11-20 FTEs. Only two Member States operate AFCOS with more than 20 FTEs – one with 30 FTEs and one with 80 FTEs.

- Tasks of the AFCOS:
  - All but two AFCOS indicated that tasks falling within their competence include cooperation and exchange of information with OLAF, while all but four indicated that tasks also include the facilitation of contacts between national authorities and OLAF. There was one AFCOS common to both sets of respondents (i.e. that suggested that neither of these tasks fall within their competence).
  - More than half of them cooperate with a wide range of national authorities (notably anti-corruption, anti-fraud, customs, EU fund managing authorities and tax administrations), thereby offering OLAF with indirect access to these.

- Powers of the AFCOS:
  - Close to 30 per cent of the AFCOS have investigative powers (criminal or administrative), while the rest do not.

- Cooperation between the AFCOS:
  - Just under half of them are already cooperating with other AFCOS, with a further one-fifth envisaging cooperation with other AFCOS in the future.

Source: OLAF survey of AFCOS, July 2016.

Given this variation in the AFCOS, an OLAF investigator noted that one implication is that OLAF does not receive the same level and nature of support in each Member State. The investigator indicated that greater specificity in Regulation 883/2013 regarding the AFCOS would have been helpful and that, ultimately, the competencies and responsibilities of the AFCOS should be consistent across the EU. Although harmonisation was not an option described explicitly by many stakeholders, there was a desire to have greater predictability – if not consistency – in the competencies and responsibilities of the AFCOS and the support they provide to OLAF in the course of an investigation. An OLAF staff member in a non-investigative function noted that the Commission had originally proposed much stronger wording for Regulation 883/2013 in Council, but the current wording notes that these services should ‘facilitate’ these investigations and the exchange of information.

At a workshop involving AFCOS representatives, it was apparent that the suggestion to introduce greater specificity in Regulation 883/2013 regarding the AFCOS was contentious and somewhat polarising. While some AFCOS expressed a desire to see Regulation 883/2013 amended to further specify the competencies and responsibilities of each AFCOS, others indicated very clearly that they would resist any such attempts, preferring instead to maintain a high-level coordination role as it is currently being provided.

At a workshop of OLAF heads of unit and other staff, there was a clear consensus that Regulation 883/2013 should be amended to specify the competencies and
responsibilities of the AFCOS to ensure they can fulfil their obligations and to overcome the lack of a national legal basis for supporting OLAF with its investigations.

Survey respondents were asked about the nature and extent of cooperation between OLAF and Member States. Detailed findings are included within Annex 11. The headline findings include:

- Eighty-six per cent (n=18) of OLAF investigative staff that responded to the survey agreed that the AFCOS strengthened cooperation between OLAF and Member States’ authorities.
- Sixty-seven per cent (n=14) of OLAF investigative staff that responded to the survey agreed that cooperation and exchange of information with Member States’ authorities during investigations is overall effective, enabling the staff of the Office to fulfil their investigative tasks.

A wider range of survey respondents (OLAF, European Commission, other EU IBOAs, Member States, third countries and associations of lawyers and prosecutors) were asked for their views on the impacts and outcomes associated with Regulation 883/2013 with regard to the implementation of AFCOS, the establishment of ACAs and the strengthened information exchange with partners. Twenty-eight per cent, (n=35) agreed/strongly agreed that the Regulation’s provisions surrounding cooperation and information exchange with Member States increased the misused EU public money recovered. Thirty-one per cent (n=40) agreed/strongly agreed that the Regulation’s provisions surrounding cooperation and information exchange with Member States increased the deterrence of fraud. And 30 per cent (n=40) agreed/strongly agreed that the Regulation’s provisions surrounding cooperation and information exchange with Member States increased the number of criminal investigations and prosecutions of financial fraud.

In conclusion, regarding the competencies and responsibilities of the AFCOS, to some extent differences in the level and/or nature of support provided by the AFCOS should be expected as they reflect the varied national contexts within the EU28. Such variations may not create problems in and of themselves if the support provided is at least adequate across all Member States. In this context, an appropriate approach would be to specify minimum requirements for the AFCOS in Regulation 883/2013, rather than seeking to harmonise the AFCOS which, in practice, is likely to be met with strong resistance from some Member States and may not be necessary in practice.

Cooperation and information exchange – national authorities

As noted earlier, Member States have an obligation to assist OLAF in the context of internal and external investigations.

As part of the evaluation, evidence was sought on the effectiveness of current arrangements for cooperating with Member States during an investigation.

Evidence arising from the interviews with stakeholders was somewhat mixed. A small number of AFCOS representatives suggested that cooperation with national authorities had improved as a result of the establishment of the AFCOS, partly through the AFCOS’ ability to identify the right contacts within national authorities and to coordinate contact.

A national judicial authority submitted that they had had a good experience thus far with OLAF’s assistance and exchange of information and they had not encountered legal barriers to the exchange information with OLAF. The quality of information and evidence received was good and very detailed and could be used in national judicial proceedings. Another national judicial authority suggested that they provide OLAF with all the assistance and information they need in line with their national legislation. This point was echoed by a managing authority who noted that the element determining
the extent of cooperation with OLAF is mainly legal in nature as the managing authority is obliged to cooperate with OLAF because it is in an EU Regulation.

In contrast, one OLAF investigator noted that getting information or documents from national judicial authorities can be challenging and varies considerably across Member States. This investigator noted that some national administrations have an arrangement to cooperate with OLAF which eases this exchange of information but not all administrations are interested in cooperating with OLAF.

An OLAF member of staff in an investigative support function suggested that the cooperation of national judicial authorities and their ability to support OLAF in conducting its investigative activities (e.g. access to data, on-the-spot checks) is limited by two key factors:

- insufficiently strong AFCOS (as described above); and
- a lack of understanding of OLAF powers.

Finally, one OLAF investigator suggested that there are certain obstacles or constraints in relation to Article 8 and Article 12 of Regulation 883/2013 on the exchange of information as investigators cannot share information on cases that should remain confidential, which gives rise to cumbersome procedural and administrative requirements (which can cause delays in exchanging information). It was also noted that the same can happen with national judicial authorities that are also reluctant to share information with OLAF on ongoing cases (making it difficult, for example, to understand more about the activities of national prosecutors). It was suggested that this is counterproductive in the sense that both parties are working towards the same objective (closing an investigation as soon as possible and prosecuting the economic operator before it goes into bankruptcy, or closes a subsidiary in another Member State).

In conclusion, the evidence gathered and analysed on the effectiveness of arrangements for cooperating with Member States during an investigation is somewhat mixed, but does not point to an obvious need to revise Regulation 883/2013. To the extent that the cooperation of national judicial authorities is limited by insufficiently strong AFCOS, this has the potential to be addressed at least in part by the approach suggested above to specify minimum requirements for the AFCOS in Regulation 883/2013.

**Coordination cases**

In addition to external investigations, OLAF can open a coordination case whereby one of its investigation units provides assistance and contributes to investigations carried out by competent national authorities on the basis of a request from the competent national authorities when no investigative action from OLAF is necessary. A coordination case is also the only option available to OLAF in the context intra-Community VAT fraud for which OLAF has no competence to investigate. This power derives from OLAF’s objective to assist Member States in organising close and regular cooperation between competent authorities and coordinate their actions aimed at protecting the EU’s financial interests (Article 1(2) of Regulation 883/2013), and is defined in the GIPs. In such cases, OLAF cannot conduct investigative activities and its role is limited to the facilitation of:

- the collection of relevant documents and information in evidence format;
- gathering evidence during operational meetings;
- taking statements from individuals who can provide relevant information; and
- taking samples for scientific examination.

In terms of the decision to open a coordination case (or an investigation), the GIPs (Article 5.3) specify that the ISRU’s opinion shall be based on whether the information falls within OLAF’s competency to act, the information is sufficient to justify the
opening of an investigation or coordination case and falls within the IPPs established by the Director-General.\textsuperscript{141}

Coordination cases can be reclassified as investigation cases upon request by OLAF’s Director-General (upon request of the investigation unit and a positive opinion from the ISRU).

Unpublished data sourced from OLAF shows that the number of ongoing coordination cases at the end of each year since the introduction of Regulation 883/2013 has been lower than in any year in the preceding period 2008-2012 (Figure 4).

\textit{Figure 4. Number of coordination cases (ongoing at end of period), 2008-2016}

Source: OLAF data (unpublished). 2016 data are partial-year data only.

This reflects the change in the number of coordination cases opened (both in absolute terms and as a share of total case selection decisions) over the same period (Figure 5). The figures indicate the decline in the number of coordination cases opened.

The decline in the number of coordination cases was highlighted by a number of stakeholders interviewed for this evaluation study. One investigator noted that although coordination cases consume fewer resources than investigations, they can take longer than an investigation because, in a coordination case, an OLAF investigator does not have control over the overall process and there may be a larger number of stakeholders involved. A number of investigators suggested that this is the main reason for the decline in the number of coordination cases in recent years. The potentially lengthy nature of coordination cases compared to investigations can have a disproportionate and adverse impact both on workload and on OLAF’s performance statistics. For these reasons, the focus has increasingly shifted away from coordination cases and towards investigations.

One investigator suggested that, overall, coordination cases work well, with operational meetings organised that work well as a channel of communication. Another investigator highlighted that subsidiarity is the principle on which coordination cases are effectively based. If a Member State can do better than OLAF while there is an OLAF investigation ongoing, then OLAF will stop its investigation and give priority (and assistance) to the Member State. However, one investigator noted that, compared to an investigation, when a coordination case is closed, although OLAF facilitated the exchange of information, OLAF does not receive the outcome of the coordination case. There is no monitoring or follow-up, which the interviewee felt should be revisited in terms of the procedures associated with coordination cases.

The most common issue raised among the stakeholders (OLAF investigative and non-investigative staff) who commented on the issue of coordination cases related to the lack of clarity within Regulation 883/2013 on the subject. For example, an interviewee from the ISRU noted that OLAF’s role in coordination cases is ‘totally unclear’ in the Regulation, which contains only provisions on investigations. It was unclear to this interviewee whether Article 1(2) is simply a reference to a competence referenced elsewhere in the Regulation or whether it is a standalone legal basis for coordination cases. Another interviewee, from an OLAF investigative support function, noted that the question as to what OLAF can do in a coordination case has been raised with the Ombudsman via a pending case for which OLAF had to explain the legal basis for OLAF’s role in coordination cases. This was challenging given the lack of detail in Regulation 883/2013. A number of interviewees acknowledged that the GIPs (Article 10) provide detailed guidance on coordination cases, although one investigator suggested that Article 10 of the GIPs might be seen to contradict Regulation 883/2013 by describing OLAF’s role in facilitating the collection/gathering of certain information.
which the investigator felt could only be collected/gathered through an inspection which OLAF could not undertake given all investigative activity ceases during a coordination case.

In conclusion, it may be beneficial to revise Regulation 883/2013 to elaborate on the legal basis for OLAF’s role in coordination cases. Although OLAF’s role is elaborated within the GIPs, the recent Ombudsman’s case suggests there is a degree of uncertainty surrounding the legal framework underpinning the scope/nature of OLAF’s involvement in coordination cases that would benefit from additional clarification being provided within Regulation 883/2013. In practice, this may not impact the number of coordination cases given the potentially disproportionate (and adverse) impact such cases can have on OLAF’s workload and performance statistics, but it would have the benefit of clarifying/confirming the legal basis for OLAF’s role.

Policy-related cooperation

OLAF and the AFCOS, as well as other Member State authorities, also cooperate in the AFCOS group of the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF).

Little evidence was provided by stakeholders on policy-related (versus investigation-related) cooperation during the stakeholder interviews. An interviewee from an OLAF non-investigative unit indicated that OLAF encourages the exchange of views on all aspects of anti-fraud policy. In their view, COCOLAF has improved the exchange of information on policy aspects and this has had some small effects on investigative issues.

An AFCOS interviewee described discussing the exchange of best practice during several COCOLAF meetings and highlighted as a recent initiative in the PIF area a Working Party within the COCOLAF focused on preparing guidelines for Member States on how to work on national anti-fraud strategies.

Another interviewee from an OLAF non-investigative unit described annual meetings with the AFCOS under the umbrella of COCOLAF where the discussions cover ongoing issues and developments since the last meeting. Bilateral meetings are also held to advance policy cooperation. It was suggested that the AFCOS did not constitute a very active group from a policy perspective.

Finally, information from OLAF suggests that working groups under the umbrella of COCOLAF have had tangible results over time, including the development of handbooks on conflict of interest in structural funds and in agriculture, the identification of forged documents and, most recently, the development of anti-fraud strategies. Moreover, OLAF staff frequently provide training to, or take part in conferences and seminars with, staff of national or regional authorities.

In conclusion, although little evidence was provided by stakeholders on policy-related cooperation, the evidence that was gathered suggests that COCOLAF has had a positive impact in facilitating the exchange of views and best practice among Member States in the context of anti-fraud policy/strategy.

4.3.1.4 Concluding remarks

Much of the focus of stakeholders and other sources of evidence was on the role and profile of the AFCOS in facilitating cooperation and the exchange of information with OLAF.

The overwhelming view of survey respondents and stakeholders interviewed is that the creation of the AFCOS strengthened cooperation and the exchange of information between OLAF and Member States’ authorities.

Stakeholders and survey respondents cited a number of benefits arising from this improved cooperation and the exchange of information between OLAF and Member
States’ authorities, including reduced investigation duration, increased criminal investigations and prosecutions, increased recovery of misused public funds and increased deterrence.

Despite this, a number of stakeholders highlighted shortcomings with the AFCOS. In particular, the lack of specificity in Regulation 883/2013 means that there is little-to-no consistency in the size, profile and powers of the AFCOS, meaning that OLAF does not receive the same level and nature of support in each Member State. In light of this, it was suggested that Regulation 883/2013 could potentially be amended to more clearly specify (and potentially harmonise) the nature of the AFCOS.

In addition, there is scope for the Regulation to specify clearly the relevance of the AFCOS’ role in facilitating effective cooperation and exchange of information in the context of internal investigations.

More broadly, there is mixed evidence regarding the impact of Regulation 883/2013 on the nature and extent of cooperation with national authorities (especially judicial authorities), although some stakeholders submitted that Regulation 883/2013 has improved cooperation as it places a legal obligation on national authorities to cooperate.

In recent years, there has been a decline in the number of coordination cases undertaken by OLAF, which appears to be driven largely by changing OLAF internal priorities given the disproportionate and adverse impact that coordination cases can have on OLAF’s workload and performance statistics.

Where coordination cases are undertaken by OLAF, there is a lack of clarity surrounding OLAF’s role based on Regulation 883/2013 (although the GIPs provide further elaboration and guidance on the subject).

Finally, policy-related coordination via COCOLAF was viewed by Member States as a driver of more effective coordination with OLAF.

4.3.2 EU IBOAs

4.3.2.1 Background

Article 4 of the Regulation regulates the exchanges of information between OLAF and IBOAs targeted by an (envisaged or ongoing) investigation, as well as the modalities of their cooperation, OLAF’s powers and obligations and the IBOAs’ duty to cooperate.

In addition, Article 1(5) of the Regulation provides that IBOAs may conclude administrative arrangements with OLAF, in particular regarding the transmission of information and the conduct of investigations. A number of administrative arrangements are in force between OLAF and IBOAs, which may have an impact on the application of the Regulation’s provisions relating to the cooperation between OLAF and IBOAs. An additional arrangement is currently being negotiated with the European Court of Auditors.

Practical Arrangements between the European Parliament and the European Anti-Fraud Office (2013 – the arrangement was signed before the entry into force of Regulation 883/2013); administrative arrangements between OLAF and the European Commission (2015); administrative arrangements with the European External Action Service (EEAS) (2015)); administrative arrangements with the European Investment Bank and the European Investment Fund (2016); administrative arrangements with the Economic and Social Committee (2016) and the European investment Bank (2016); administrative arrangements with the European Central Bank (2016); administrative arrangements with the Council of the European Union (February 2017) and administrative arrangement with the Committee of the Regions (May 2017).
IBOA staff have a duty to cooperate with and supply information to OLAF in the context of internal investigations.\textsuperscript{143} In cooperation with OLAF, the IBOA concerned may decide to take appropriate precautionary measures to protect the financial interests of the Union, including measures for the safeguarding of evidence.\textsuperscript{144}

4.3.2.2 Purpose of the evaluation

The evaluation analysed for the nature and extent of cooperation and information exchange between OLAF and IBOAs. It also looked at its impact on the protection of the EU financial interests. Elements of the Regulation considered included:

- Inter-institutional agreements and administrative arrangements.
- Exchange of information and cooperation with IBOAs during the investigative phase.
- Facilitating exchange of best practices in the Fraud Prevention and Detection Network.

4.3.2.3 Findings

Investigation-related cooperation

The evaluation has sought and analysed evidence on the nature and extent of cooperation and information exchange between OLAF and EU IBOAs in relation to investigations.

Views from stakeholders interviewed for this study were generally positive about cooperation between OLAF and IBOAs. A number of spending DGs highlighted the positive collaboration they have with OLAF, responding to OLAF requests for information in a timely manner. One DG noted that they were unaware of any cases where Commission services refused OLAF access to information. They noted that such cooperation and information exchange is also enshrined in MoU, and OLAF can inform the Secretariat-General of the European Commission if there are any obstructions. This stakeholder noted that a major improvement has been the improved sharing of information with the Commission as reflected in the MoU and Regulation 883/2013 (which, to a large extent, codified existing practices).

One IBOA suggested that the reliability, quality and admissibility of evidence improved because IBOAs’ practices have improved, in part as a result of documentation being transmitted by a central point which has made the process for exchanging information more efficient. This IBOA suggested that confidentiality rules can be an obstacle to good cooperation and they also noted that further information from OLAF regarding what IBOAs are expected to do (by way of active cooperation and information exchange) would be useful given the complexity of OLAF investigative procedures.

Another IBOA noted that among other IBOAs (beyond the European Commission), the extent to which they cooperate with OLAF depends on the investigator leading the case – some are very familiar with the project and conduct the investigation with very little need for support whereas others request more supporting documents or clarifications and request interviews. This is often driven by the complexity of the case.

Evidence has also been gathered on Administrative Cooperation Arrangements (ACAs) between OLAF and EU IBOAs and the impact these have had on cooperation and information exchange. A small number of investigators suggested that ACAs had

\textsuperscript{143} Article 4(7) of Regulation 883/2013
\textsuperscript{144} Article 7(6) of Regulation 883/2013
improved OLAF’s cooperation with EU IBOAs and clarified to OLAF investigators what they can do. An interviewee from an investigative-support function within OLAF noted the usefulness of ACAs in the context of IBOAs’ willingness to cooperate. They submitted that EU IBOAs understand OLAF’s investigative powers under Regulation 883/2013 and the ACAs can play a useful role in explaining and elaborating existing powers and investigative processes. They noted that ACAs can help to overcome any lack of clarity regarding Regulation 883/2013. They also indicated that ACAs can create a basis for regular meetings with the IBOA which may contribute to the resolution of problems, although this depends on the willingness of the IBOAs (and an ACA doesn’t necessarily help to resolve conflict between the two parties`). An IBOA which recently concluded an ACA with OLAF reiterated the point made above regarding the role/value of an ACA in elaborating Regulation 883/2013 and providing a codified framework for cooperation and information exchange. In contrast, at the OLAF evaluation conference, a member of the OLAF Supervisory Committee queried the role of ACAs (and similar arrangements, such as MoUs), suggesting that Regulation 883/2013 should clearly define the nature of cooperation between OLAF and others rather than using these separate arrangements.

Information from the stakeholder interviews has been supplemented by survey data on the nature and extent of cooperation and information exchange involving EU IBOAs. OLAF investigators who responded to the survey were asked about the effectiveness (quality, duration and timeliness) of cooperation between OLAF and IBOAs in the context of investigations. Half (n=10) of all respondents agreed/strongly agreed that the cooperation and exchange of information with IBOAs during investigations is overall effective, enabling OLAF to fulfil its investigative tasks. Almost the same number again (52 per cent; n=11) agreed or strongly agreed that cooperation and exchange of information with IBOAs with whom Administrative Arrangements were signed is more effective compared to cooperation in the absence of such arrangements.

**Cooperation with Eurojust and Europol**

A specific provision (Article 13) within Regulation 883/2013 foresees the practicalities of cooperation with Eurojust and Europol, which sets an obligation for OLAF, where necessary, to facilitate such cooperation, to conclude administrative arrangements with them to regulate exchanges of operational, technical and strategic information, including personal data and classified information, and progress reports.\(^{145}\)

In practice, an administrative arrangement was concluded with Europol in 2004,\(^ {146}\) which regulates exchanges of technical and strategic information, cooperation in the field of intelligence and technical support, common reporting and mutual consultations, the participation of OLAF and Europol in joint investigation teams (JITs), cooperation in the field of training and working groups, and the appointment of contact points between the two bodies.

A new arrangement is currently under discussion and the recent revision of the Europol legal framework\(^ {147}\) may further impact on the cooperation. In practice, it is possible that delays with the conclusion on this arrangement as well as data protection and exchange of information issues, such as the delayed participation of OLAF in a

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\(^{145}\) Article 13(1) of Regulation 883/2013


focal point on excise fraud, may have hindered the effectiveness of the cooperation between OLAF and Europol.\footnote{Scoping interview with Europol.} In an interview with Europol, it was noted that OLAF is waiting for the update of Europol’s legal framework before progressing further with revised arrangements for cooperation. As noted by an interviewee from an OLAF non-investigative unit, Regulation 883/2013 provides a legal basis for cooperation and exchange of information with Europol but, in reality, this has been discussed at length as to how administrative arrangements will operate in practice because Europol has different rules and access rights.

On 24 September 2008, Eurojust and OLAF signed a Practical Agreement on Arrangements of Cooperation\footnote{Available at http://www.eurojust.europa.eu/about/Partners/Pages.eu-institutions-agencies-and-bodies.aspx#olaf} regulating the cooperation between the two bodies, including operational and strategic cooperation, collaboration in JITs and involvement in relevant professional training, seminars and workshops. Such agreements are important for a number of reasons, especially given the complementary nature of the two organisations and the role of Eurojust in coordinating investigations and prosecution procedures regarding the protection of the financial interests of the European Union\footnote{Ibid.}. The on-going revision of the Eurojust Decision may further impact on the cooperation. Interviews held with Eurojust and DG JUST suggest that cooperation between the two organisations in the context of JITs and coordination meetings is highly effective. However, in the context of this evaluation, some stakeholders raised an issue surrounding the legal basis for JITs. At the OLAF evaluation conference, a member of a national judiciary suggested that provisions may be necessary in Regulation 883/2013 for JITs.

**Policy-related cooperation**

OLAF cooperates with other IBOAs on a regular basis via different forums. It provides support and advice, and exchanges best practices with the Commission services as part of the Fraud Prevention and Detention Network (FPDNet), created following the adoption of the Commission’s Anti-Fraud Strategy.\footnote{European Commission, Communication on the Commission Anti-Fraud Strategy, COM(2011) 376 final, 24 June 2011.} Pursuant to the Commission’s Anti-Fraud Strategy and earlier Commission guidelines\footnote{Communication from the Commission to the Council, the EP and the ECA of 17.12.2007, COM(2007) 806, and accompanying Staff Working Document, SEC(2007) 1676.}, OLAF reviews other services’ policy initiatives under the angle of effective fraud prevention (fraud-proofing). In the framework of the Commission’s Strategic Planning and Programming Cycle\footnote{https://ec.europa.eu/info/strategy/how-priorities-are-set_en}, OLAF advises Commission services on their policy planning and reporting in the domain of fraud prevention and detection. Further, OLAF provides training on fraud prevention policies to the staff of other EU IBOAs.

The inter-institutional exchange of views (see Section 3.2.4.3) also constitutes a forum for OLAF to exchange information with other IBOAs involved in the protection of the EU’s financial interests. EU disciplinary authorities are also requested to report regularly on decisions to initiate or not disciplinary enquiries as a follow-up to OLAF investigations.\footnote{OLAF, Guidelines on disciplinary monitoring, 12 May 2014.}

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As with the earlier discussion of COCOLAF, little evidence was provided by stakeholders on policy-related cooperation via the stakeholder interviews. An interviewee from an OLAF non-investigative unit indicated that OLAF encourages the exchange of views on all aspects of anti-fraud policy. In their view, FPDNet has improved the exchange of information on policy aspects and this has had some small effects on investigative issues.

4.3.2.4 Concluding remarks

Views among stakeholders were generally positive about cooperation between OLAF and IBOAs, with some stakeholders submitting that cooperation had improved since the introduction of Regulation 883/2013, partly for reasons related to the establishment of ACAs and MoUs linked to the provisions of Regulation 883/2013.

Evidence on ACAs between OLAF and EU IBOAs suggests that, overall, these have had a positive impact on cooperation and information exchange. However, this impact would have been felt more evenly had ACAs been in place with all EU IBOAs and had there been greater consistency among the ACAs already in place.

Little evidence is available on cooperation and exchange of information with Eurojust and Europol. Delays in agreeing new administrative arrangements with Europol may have hindered the effectiveness of cooperation with OLAF. Interviews with Eurojust and DG JUST suggest that cooperation between OLAF and Eurojust has been highly effective.

4.3.3 Third countries and international organisations

4.3.3.1 Background

Article 1(1)(b) of Regulation 883/2013 states that in order to achieve its objectives, OLAF must exercise its power of investigation conferred on the Commission by relevant EU acts as well as cooperation and mutual assistance agreements with third countries and international organisations. In addition, Article 14 of Regulation 883/2013 provides that administrative arrangements may be concluded with relevant third countries and international organisations concerning operational, strategic, or technical information.

In addition, Article 17 of the GIPs specifies that investigative missions can be conducted by investigation units in cases where the evidence needed to establish the existence of fraud, corruption or other illegal activities is not available in the Member States. Such missions can relate to illegal activities in the fields of customs, traditional own resources, expenditure of EU funds, including through international organisations or financial institutions, or other bodies funded by the EU.

As of July 2017, OLAF had signed ACAs with 27 third country authorities and with 12 international/regional organisations. In the past, OLAF has entered into some ACAs together with EuropeAid, as co-signatory, with partners from the African continent. For the majority of its ACAs however, OLAF concludes the cooperation arrangement with the concerned partner alone.

ACAs are considered by OLAF as particularly important to facilitate international cooperation. Indeed, while in EU Member States AFCOS are a useful resource to identify the relevant competent authorities for specific investigations, the need to identify partners for cooperation is crucial in third countries. However, the

155 Scoping interview with Dir. B, OLAF.
provisions of the Regulation are not sufficient to guarantee the effectiveness of such arrangements as the Regulation is not binding for third-countries.156

Annex 5 presents an overview of the ACAs currently in place between OLAF and competent authorities in Member States, third countries or international organisations.

4.3.3.2 Purpose of the evaluation

The evaluation analysed available mechanisms for cooperation and information exchange between OLAF and third countries and international organisations in the course and at the end of investigations, and their impact on the quality and timeliness of information sharing and cooperation for the achievement of results in terms of timely opening and completion of investigations in the areas of EU external aid and customs. Elements considered include:

- ACAs.
- Exchange of information and cooperation with third countries and international organisations during the investigative phase.

4.3.3.3 Findings

Among the stakeholders interviewed, an OLAF investigator emphasised that the main issue for OLAF’s investigations in third countries is that all cooperation (of third countries’ authorities in addition to persons concerned) is done on a voluntary basis given the non-binding nature of Regulation 883/2013 in third countries. However, in the context of investigations in third countries, OLAF may decide to conduct investigative activities within the relevant EU delegations, for which the tools and powers set-out in Regulation 883/2013 (regarding the role and responsibilities of EU IBOAs involved in an external investigation) would apply. Such provisions are not voluntary and, hence, EU delegations would be required to cooperate with an investigation involving a third country. In addition, as confirmed in a recent response to a question within the European Parliament157: ‘All recently concluded international agreements contain general anti-fraud clauses. Specific references to OLAF’s powers are also included in Financing Agreements with non-EU countries and international organisations, under which financial aid is provided’. As such, these anti-fraud clauses within the agreements may impose contractual requirements on third countries to cooperate with OLAF.

In that regard, a number of stakeholders highlighted the role/importance of ACAs in facilitating the effective cooperation and exchange of information with third countries:

- An OLAF investigator highlighted the role of ACAs as a tool that allows OLAF to engage effectively with third countries and international organisations. Although ACAs do not alter the fact that the powers available to OLAF are dependent upon the powers partners have on the other side, ACAs help to build trust and good cooperation and, in doing so, facilitate the development of constructive relationships/partnerships. ACAs are not a guarantee of success but do help to improve cooperation.
- Another OLAF investigator suggested that the added value of an ACA lies in the data protection rules – it tends to be a difficult issue to solve, in particular with international organisations, and an ACA can help in that regard. It is of course possible to work with third countries without an ACA – the ACA is not the legal basis of OLAF’s intervention in third countries – but it helps to promote effective cooperation.

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156 Workshop held at ICF on 14 September 2016.
cooperation. Equally, if there is no will to cooperate with OLAF, this is unlikely to change with the signing of an ACA.

- A national authority in a third country confirmed this point (above), indicating that their ACA is very effective and necessary and that without it, there would be no information exchange (from their perspective it is the legal basis on their side to provide information to OLAF).
- An international organisation noted that their ACA with OLAF works well although they submitted that the level of cooperation between the two parties had always been good even before the ACA (the ACA simply formalised this cooperation).
- An OLAF investigator suggested that ACAs should be implemented for all third countries given it helps to identify the authority in third countries who can cooperate with OLAF immediately.

Despite these findings, some concerns were raised by certain stakeholders regarding Article 14. An OLAF investigator cited the Article as an improvement associated with Regulation 883/2013 given it introduces the possibility to develop close cooperation with third countries and international organisations. It also introduces the possibility to develop administrative arrangements. However, one investigator suggested that Article 14 contains confusing text which reflects the compromise struck when the Regulation was being negotiated but, in practice, this hinders OLAF’s investigative processes. Specifically, Article 14(1) says “Administrative arrangements may be agreed, as appropriate, by the Office with competent authorities in third countries and with international organisations. The Office shall coordinate its action, as appropriate, with the competent Commission services and with the European External Action Service, in particular before agreeing on such arrangements. Such arrangements may concern exchange of operational, strategic or technical information, including, on request, progress reports.” The investigator suggested that some interpretations of this text within Article 14 are that an administrative arrangement is required before information can be exchanged. They cited an example case where an external legal advisor had argued that in the absence of an ACA, there was no legal basis for the exchange of information and therefore OLAF was not permitted to exchange information outside of an ACA. This resulted in an investigation being blocked until the matter is resolved before a court (it remained an ongoing case at the time of writing this report).

Another investigator raised a separate concern with Article 14 regarding the transmission of OLAF recommendations to third countries. Article 14(2) says “The Office shall inform the competent authorities of the Member States concerned before information provided by them is transmitted by the Office to competent authorities in third countries or to international organisations.” Consequently, the investigator submitted that this prevents OLAF from doing what had been done prior to the introduction of Regulation 883/2013 – sending recommendations arising from investigations directly to the relevant authorities within third countries. The investigator suggested that they now need to use Article 14 and ask the EEAS for authorisation before proceeding.

In terms of possible improvements to arrangements (and the legal framework underpinning such arrangements) for cooperation and information exchange involving third countries and international organisations (over and above those implied by the findings presented above), an OLAF advisor suggested that OLAF should be given the capability to conduct investigations in third countries and OLAF’s powers should be reinforced in third countries.

4.3.3.4 Concluding remarks

ACAs formed the main area of focus in stakeholder discussions surrounding cooperation and information exchange with third countries and international organisations.
ACAs are considered by OLAF and a range of other stakeholders as particularly important to facilitate international cooperation.

Concerns were raised by certain stakeholders regarding Article 14. Although Article 14 introduces the possibility to develop close cooperation (including via ACAs) with third countries and international organisations, Article 14(1) appears somewhat ambiguous as to whether an administrative arrangement is required before information can be exchanged.

4.3.4 Contribution of coordination and information exchange to the protection of EU financial interests

The evaluation sought and analysed evidence on the extent to which the provisions of Regulation 883/2013 regarding cooperation and information exchange, and the manner in which those provisions have manifest themselves through the implementation of arrangements (formal and informal) for cooperating and exchanging information, may have given rise to observable and measurable outcomes and impacts related to the overarching objective of Regulation 883/2013 (as set-out in Article 1 of the Regulation) to ‘step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union’. To test this, the evaluation team undertook contribution analysis as part of this evaluation to test certain hypotheses regarding links between inputs/activities, outputs, outcomes and impacts, which were then tested against the data and evidence collected as part of the evaluation.

The evaluation team analysed data to see whether there is evidence that arrangements for cooperation and information exchange set-out in Regulation 883/2013 strongly influenced the performance of the investigative function.

The main findings from the contribution analysis are set out below.

4.3.4.1 Contribution of the AFCOS to the protection of EU financial interests

Contribution analysis was undertaken to test the hypothesis that the powers of the AFCOS, their staffing and participation in cooperation may have influenced the achievement of results.

Survey respondents cited that the establishment of AFCOS positively influenced the effectiveness and efficiency of:

- the selection and opening of cases by OLAF;
- the conduct of external investigations; and
- the improved exchange of information between OLAF and Member States.

In terms of the influence of AFCOS on the results of the investigation procedures (i.e. recommendations, follow-up and recoveries), survey respondents acknowledged that the set-up and activity of the AFCOS have somewhat contributed to the achievement of the results. Six AFCOS interviewees considered that the varied nature and powers of AFCOS could undermine the effectiveness and efficiency of the coordination of investigations. But they generally agreed that the set-up of the AFCOS brought efficiencies in the conduct of investigation without clearly stating, though, that this in turn directly influenced the results of such investigations.

Consequently, it can be inferred that the set-up of the AFCOS generated efficiencies in the conduct of investigations and in the exchange of information between OLAF and Member States. The more powers and staff given to AFCOS, the better the coordination of efforts. Depending on the situation in each Member State, AFCOS might have positively influenced the follow-up to OLAF recommendations, although this could not be ascertained from the contribution analysis.
4.3.4.2 Contribution of ACAs to the protection of EU financial interests

Contribution analysis was undertaken to test the hypothesis that the pre-existence of ACAs may also have influenced the achievement of the results.

The evidence presented earlier indicates that a number of stakeholders hold the view that ACAs with third country authorities can further codify the relationships with OLAF and contribute to the efficiency and effectiveness of cooperation and coordination efforts.

Some survey respondents (25 per cent, n=20) acknowledged that cooperation and exchange of information with international organisation and third countries’ authorities with whom ACAs were signed is more effective compared to cooperation in the absence of such arrangements. Respondents (48 per cent, n=23) agreed that the signature of ACAs generally led to strengthened cooperation and exchange of information between OLAF and its partners and the improved efficiency of cooperation activities.

The extent to which an ACA impacts on the efficiency of an investigation was not commented on by all the interviewees. It is reasonable to assume that the pre-existence of an ACA is a condition for increased efficiency in the cooperation and coordination of OLAF investigations but it is not sufficient in itself to have an impact on the achievement of the results of an OLAF investigation.

4.4 Investigative recommendations and follow-up

4.4.1 Background

Once an investigation is completed, a Final Report on the legal basis for the investigation, the procedure followed, the facts and the preliminary qualification in law, as well as OLAF’s estimation of the financial impact of the action concerned, is drafted under the authority of the Director-General.158 This report may be accompanied by recommendations as to the actions that should be taken following the investigation, which include the amounts to be recovered and the preliminary legal classification of the facts established. The report and the recommendations must be clearly separated according to internal instructions circulated by the Director-General.159

Recommendations include:160

- **Judicial recommendation**: this constitutes a request to Member States’ judicial authorities to consider taking legal action in response to an alleged criminal offence.
- **Disciplinary recommendation**: this constitutes disciplinary measures to be taken by the relevant IBOA in response to a disciplinary offence committed by a staff member.
- **Financial recommendation**: this constitutes estimated amounts to be recovered or prevented from being unduly spent (or, for revenues, from being evaded) by the relevant IBOA or competent authority in the Member State concerned.
- **Administrative recommendation**: this constitutes administrative measures by the relevant IBOA to address weaknesses in its administrative procedures to prevent fraud.

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158 Article 11(1) of the Regulation
159 OLAF Director General, Instructions on clearly separating the Final Report and the accompanying Recommendations, 21 April 2015
160 Article 11(2) of the Regulation and Article 19 of the GIPs
Reports constitute admissible evidence before national courts under the same conditions as equivalent national reports\(^\text{161}\), although it is not always clear as to the identity of the national competent authorities and their reports. The report is sent to the competent authorities of the Member State(s) and/or the IBOA concerned. Article 11(4) provides that the IBOA concerned by an internal investigation “shall take such action, in particular of a disciplinary or legal nature, as the results of the internal investigation warrant.” In discussion with OLAF, it was noted that this provision is interpreted as an obligation for the IBOA to take the recommendation into account and take action that is appropriate given the elements presented in the final report. Such actions include examining the case and deciding on whether to take disciplinary action or not. When the facts established could give rise to criminal proceedings, the information must be transmitted to the judicial authorities of the Member State concerned.\(^\text{162}\) When it comes to external investigations, where the investigation relates to expenditure, the report and recommendations are sent to the relevant EU IBOA, and where the investigation relates to revenue, they are sent to the Member State. Member States shall report when they have taken action following a recommendation on their own initiative or if requested by OLAF (Art 12 (3) Reg. 883/2013).

OLAF regularly (annually) and systematically monitors financial, judicial and disciplinary recommendations and there are guidelines for financial, judicial and disciplinary monitoring. However, there is not a similar monitoring system in place for administrative recommendations.

In practice, the follow-up to judicial recommendations varies in practice depending on factors such as Member States’ rules on the admissibility of evidence and national authorities,\(^\text{163}\) but also the quality and robustness of the evidence presented and the different priorities at a national level.\(^\text{164}\)

According to the GIPs, the ISRU (Review) reviews the Final Report and the recommendations including the accompanying draft notes and letters in order to provide an opinion to the OLAF Director-General.\(^\text{165}\) It will analyse whether the investigation unit complied with rights and procedural guarantees, data protection requirements, and the legality, necessity and proportionality of the investigation,\(^\text{166}\) as well as whether the preliminary qualification of the facts under national criminal law is correct. OLAF’s Director-General may request a report on the actions taken by the competent authorities and/or IBOA concerned.\(^\text{167}\)

In the event that an investigation finds no evidence against the person concerned, OLAF’s Director-General will close the case and inform the person concerned of the decision within 10 working days.

### 4.4.2 Purpose of the evaluation

The evaluation sought to address two main issues regarding investigative recommendations and follow-up:

- **Quality, duration and timeliness of OLAF's investigations, final reports and recommendations**, and how these factors influence results at the level of:
- recoveries to the EU budget/financial corrections, prevention of funds unduly spent, prevention of EU revenues being evaded;
- quality, reliability and admissibility of evidence in administrative and criminal judicial proceedings in Member States and indictment;
- the imposition of administrative sanctions by IBOA, improved control and administration systems in IBOA; and
- the imposition of disciplinary sanctions as a result of disciplinary recommendations;

- Follow-up to OLAF recommendations by Member States and IBOA and how this influences the protection of the EU financial interests, including:
  - Information provided by the Member States to OLAF as regards the follow-up to recommendations.
  - Specific difficulties (if any) encountered by Member States’ judicial authorities to follow-up OLAF recommendations and possibility to address them at the level of the Regulation.

4.4.3 Findings

4.4.3.1 OLAF’s final reports and recommendations

Stakeholders interviewed for this evaluation were asked about the quality and relevance of OLAF’s recommendations and final reports. A range of views were put forward which are summarised below.

Several stakeholders raised concerns about the quality of OLAF’s recommendations and reports. Article 11(1) of Regulation 883/2013 (elaborated by Article 19 of the GIPs) is quite clear as to the required scope and content of OLAF’s final reports, but the concerns raised by stakeholders relate more to shortcomings in OLAF’s application/execution of Article 11 of the Regulation (based on the quality of the reports) rather than shortcomings in the Regulation itself. A spending DG noted that what largely effects the quality and impact of OLAF investigations is the quality of the final reports such that poorly presented final reports will have little to no influence on national authorities. The stakeholder went on to remark that only in exceptional cases have they seen OLAF final reports where, in their view, nearly impossible things were proven, but also some reports where nothing is proven and the report jumps to conclusions too quickly. This variability in report quality was also highlighted by a representative from an EU delegation who said that the quality varies depending on the investigators. An AFCOS representative also noted that the quality of reports varies on a case-by-case basis. Another spending DG cited factual errors that have been present in past reports from OLAF. They asserted that OLAF’s report and recommendations were not always clear.

In contrast, an OLAF investigator suggested that the quality of OLAF’s reports has improved thanks to the Regulation. The reports used to be less structured and uniform. The interviewee felt that there are now higher standards when it comes to the legality of reports and recommendations, although they also suggested that it could now be time to reflect upon how to make them more investigation-friendly and operational. The investigator did not elaborate on the specific aspects of Regulation 883/2013 which were considered to have driven an improvement in the quality of
OLAF’s reports. However, Table 4 below compares the Articles in Regulation 1073/99 and Regulation 883/2013 that are most likely to influence the quality of OLAF’s final reports and recommendations. The table shows that:

- Regulation 883/2013 provides further detail and specification of the required scope and content of OLAF’s final reports. In addition to the requirements set-out in Regulation 1073/99, Regulation 883/2013 also requires OLAF’s reports to cover ‘the legal basis for the investigation’, ‘the procedural steps followed’ and, in relation to the facts established, ‘their preliminary classification in law’.
- Regulation 883/2013 added a provision for an internal advisory and control procedure, including a legality check.
- Regulation 883/2013 also added a requirement for the OLAF Director-General to adopt guidelines on investigation procedures for the staff of the Office. The resulting GIPs provide additional detail on the requirements associated with OLAF reports.

Consequently, a combination of the additional detail provided by Regulation 883/2013 (both directly via Article 11(1) and indirectly via the GIPs) on the required scope/content of OLAF reports and the introduction of the legality checks may have had a positive impact on the overall quality of OLAF reports and recommendations.

Table 4. Comparison of main legal provisions potentially impacting the quality of OLAF’s final reports

<table>
<thead>
<tr>
<th>Regulation 883/2013</th>
<th>Regulation 1073/99</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 11(1)</td>
<td>Article 9(1)</td>
</tr>
<tr>
<td>On completion of an investigation by the Office, a report shall be drawn up, under the authority of the Director-General. That report shall give an account of the legal basis for the investigation, the procedural steps followed, the facts established and their preliminary classification in law, the estimated financial impact of the facts established, the respect of the procedural guarantees in accordance with Article 9 and the conclusions of the investigation.</td>
<td>On completion of an investigation carried out by the Office, the latter shall draw up a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken.</td>
</tr>
<tr>
<td>Article 17(7)</td>
<td>-</td>
</tr>
<tr>
<td>The Director-General shall put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Member States concerned, with particular reference to Article 11(2).</td>
<td>-</td>
</tr>
<tr>
<td>Article 17(8)</td>
<td>-</td>
</tr>
<tr>
<td>The Director-General shall adopt guidelines on investigation procedures for the staff of the Office.</td>
<td>-</td>
</tr>
</tbody>
</table>

Finally, some stakeholders raised a point regarding receiving OLAF final reports and other investigation-related information – an issue discussed at the AFCOS workshop held in April 2017 during which a number of AFCOS representatives expressed a desire to receive OLAF’s final reports. An AFCOS interviewee noted that, from a strategic perspective, the AFCOS would like to receive information at least about the total number of cases, as well as about the origin and type of recommendations issued. Another AFCOS representative noted that it would be interesting and useful to have...
some information on the outcome of external investigations (for example, on the situation of certain economic operators), yet it receives no information on that. Finally, a further AFCOS representative noted that it would be useful to have the case information when liaising with national authorities.

In response, representatives at the OLAF workshop held in April 2017 were uniformly against any proposition to oblige OLAF to share its reports with the AFCOS. The main reason given at the workshop was that the AFCOS perform an administrative service to facilitate effective cooperation and exchange of information with the Office, and the sharing of reports would raise concerns for OLAF that the AFCOS would seek to gather intelligence on behalf of their governments which would extend their role/remit beyond that which is specified in Regulation 883/2013. Workshop participants emphasised that the reports and recommendations are intended for judicial authorities.

To complement the evidence arising from stakeholder interviews (and the data on cases closed with recommendations, presented in Annex 11), survey respondents (OLAF, European Commission, other EU IBOAs, Member States, third countries and associations of lawyers and prosecutors) were asked about the quality of OLAF’s reports and recommendations:

- Sixty-six per cent, (n=52) agreed or strongly agreed that OLAF’s investigation reports are overall clear and comprehensive.
- Fifty-nine per cent, (n=47) agreed or strongly agreed that OLAF’s recommendations are clearly formulated, including a well-defined description of the actions to be taken.
- More than half of all respondents (n=41) agreed or strongly agreed that OLAF’s recommendations include estimated amounts to be recovered, as well as the preliminary classification in law of the facts established.
- Finally, 56 per cent, (n=44) of respondents agreed or strongly agreed that, when it comes to external investigations, OLAF’s reports take into account the national law of the country concerned.

In all cases, non-OLAF respondents were less likely to agree than OLAF respondents (detailed findings can be found in Annex 11). The survey data were also, at times, broadly consistent with the findings arising from the semi-structured depth interviews with stakeholders, especially surrounding the clarity and completeness of OLAF’s recommendations and reports.

Stakeholders were also asked about the follow-up to OLAF reports and recommendations by national and EU authorities. Findings are presented below, alongside other evidence.

4.4.3.2 Follow-up – financial recommendations

Data shows that there was a higher number of financial recommendations issued by OLAF in the period since the introduction of Regulation 883/2013 (2013-2016) compared to the preceding period (2008-2012) (Figure 6). A total of €3.1 billion was recommended for recovery during the period 2012-2016\(^{168}\).

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\(^{168}\) Based on OLAF data (unpublished). Data on amounts recommended for recovery prior to 2012 are not available.
Interviews with stakeholders covered a number of issues related to follow-up to OLAF’s financial recommendations. The main, common issue raised by stakeholders relates to the amount of funds recommended for recovery by OLAF.

A spending DG indicated that it follows-up on all financial recommendations, although not always in a manner consistent with OLAF’s recommendation and this concerns mostly the amount recommended for recovery. A European Commission official commented on the amounts OLAF recommends for recovery in cases involving structural funds for which the Commission has specific guidelines related to public procurement errors and specific thresholds of recovery for each error of which OLAF is unaware (meaning that OLAF may sometimes recommend a recovery level far in excess of that in the Commission guidelines). But the official also pointed to the benefits of collaborating with OLAF to influence what the report says in terms of financial recoveries/correction (an issue discussed further below). A similar point about the excessive level of recovery recommended was made by a judicial authority and a managing authority, as well as some of the stakeholders who provided the views captured further below.

An EU IBOA described OLAF’s financial recommendations as exaggerated, incorrect and extremely difficult to implement, and suggested it would be better if OLAF had more realistic figures. An OLAF investigator noted the difficulty that stakeholders have in following-up and implementing OLAF recommendations where they recommend recoveries of funds. The interviewee suggested that significant recoveries related to a specific programme or area of policy may undermine public confidence in the impact/effectiveness of that programme/policy.

Another OLAF investigator noted that recovery is recommended but sometimes only partially followed by Commission services and, therefore, it may be beneficial to create a tri-partite commission and involve the concerned Commission services to discuss and determine the financial recommendations.
In relation to the appropriateness/proportionality of the amounts recommended by OLAF for recovery, the OLAF ‘Instructions on drafting Financial Recommendations and related sections of the Final Report’\(^{169}\) provide instructions for the determination of:

- the estimated financial impact of the facts established (to be included in the relevant section of the final report);
- the estimated amounts to be recovered (for financial recommendations);
- the estimated amounts to be prevented from being unduly spent and amounts to be prevented from being evaded (for financial recommendations); and
- the estimated amounts prevented from being unduly spent pursuant to Article 7(6) of Regulation 883/2013 and amounts prevented from being evaded (for the relevant section in the final report).

The Instructions provide detailed guidance on estimating the amounts to be recovered under a range of different scenarios. Specifically, in relation to the comment made above by a European Commission official (surrounding structural funds and public procurement), the Instructions indicate that it may not be justified/proportionate to recover the entire amount paid to a contractor when the contractor has delivered some or all of the works/services under that contract and that, instead, the amount recommended for recovery should be decided on a case-by-case basis. Consequently, recognising that these instructions were only recently adopted (October 2016), it is clear that they provide for situations whereby the whole amount paid is not recommended for recovery but, rather, a proportion thereof. Previously, if an irregularity was found by OLAF in a category of expenditure, it would recommend recovering the amount affected by this irregularity in full, which is different from the spending DG's approach – they send their own auditors and they use for recovery the so-called COCOF guidelines\(^{170}\) that contains for each type of irregularity a gradation of the amount to be recovered (in percentages).

Other stakeholders made the more general observation regarding differences in the amounts recommended for recovery by OLAF and the amounts actually recovered by stakeholders. Some echoed the suggestion regarding greater collaboration – OLAF working with EU IBOAs and national authorities to determine an appropriate recovery level.

The aforementioned ‘Instructions on drafting Financial Recommendations and related sections of the Final Report’ already make provision for OLAF to collaborate with stakeholders in relation to improving the quality of the financial recommendations. The Instructions note that OLAF’s investigation units should consider collaborating with the relevant Commission services or other EU IBOAs if investigators believe that such collaboration may be useful for improving the quality of the financial recommendations. Data are not available to indicate whether and to what extent this collaboration takes place in practice currently.

Finally, an OLAF investigator who was interviewed said that one of OLAF’s biggest challenges regarding financial recommendations is the timeliness with which they are issued and followed-up on versus the duration of the expenditure programmes to which the recommendations relate. The example cited was a 7-year programme which can be extended to n+1 to n+2 and for which the Member State decides to pursue the financial recovery at the end of the programming period to protect the EU budget. This

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may be viewed as something of an outlier in terms of contract duration, and it is not typical of other spending programmes, but the principle is valid – that the follow-up to financial recommendations can be driven by the timing (contract duration) of the programme.

Survey respondents (European Commission, other EU IBOAs and Member States) were asked about follow-up to OLAF’s financial recommendations. Around three-quarters (n=29) of respondents suggested that OLAF’s financial recommendations are followed-up upon within the reporting period (12 months), while 90 per cent (n=35) agreed that OLAF’s financial recommendations lead to recovery proceedings. Just over two-thirds (69 per cent, n=27) submitted that OLAF’s investigation units provide the necessary assistance in relation to the actions to be taken following OLAF’s financial recommendations (Figure 7).

*Figure 7. Follow-up to OLAF’s financial recommendations – the extent to which survey respondents agreed with the following statements*

4.4.3.3 Follow-up – judicial recommendations

The number of judicial recommendations issued by OLAF has been higher in every year since the introduction of Regulation 883/2013 (compared to the preceding period 2008-2012) (Figure 8).
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Figure 8. Number of judicial recommendations issued by OLAF, 2008-2016

Source: OLAF data (unpublished).

The lack of time series data means it is not possible to identify any trends over time in the results/outcomes of these judicial recommendations. Available data for the period 2008-2016 shows that a decision has not yet been taken for 43 per cent of judicial recommendations issued by OLAF. For the remaining 57 per cent of judicial recommendations issued by OLAF, just over half were dismissed and the remaining decisions involved indictments (Figure 9).

Figure 9. Results of judicial recommendations issued 2008-2016

Source: OLAF data (unpublished).

Interviews with stakeholders covered a number of issues related to follow-up to OLAF’s judicial recommendations. The main, common issue raised by stakeholders relates to the admissibility of OLAF’s investigation evidence.

A national judicial authority noted that the quality and reliability of OLAF’s recommendations and reports are not really an issue in the stakeholder’s national proceedings, but rather it is a question of the relevance of the evidence given the different aims of the investigations – OLAF’s aim is to recover funds, while the national competent authority’s aim is to establish the criminal reliability of an individual.
An AFCOS representative noted that the facts in OLAF’s final reports are admissible in their national courts as they are compliant with the country’s criminal code.

This point was echoed by a national judicial authority which noted that OLAF investigative reports have constituted admissible evidence in criminal judicial proceedings within their Member State. However, this interviewee also noted that, in some cases, it is better to have a less-thorough investigation and a much earlier conclusion so that the judicial authority can start its investigation earlier.

Another judicial authority suggested that the quality of an OLAF report depends on the degree to which OLAF respects Regulation 883/2013 and the national legislation of Member States. If these are both respected, there should not be any problems to accept the OLAF report as evidence.

An AFCOS representative indicated that OLAF’s reports are not sent to the AFCOS. It was felt that reports should also go to the managing authority to allow them to take precautionary measures as necessary.

Two judicial authorities mentioned issues related to the timing of OLAF’s investigations and reports as an important determinant of the nature and extent of follow-up. One judicial authority noted that the main difficulty in following-up is the time period between commission of the offence and the moment the judicial authority receives the OLAF report or recommendation (they reported that this can be as long as 5 to 6 years). Another judicial authority noted that in a few cases they received the OLAF recommendations too late.

Survey respondents were asked about follow-up to OLAF’s judicial recommendations. Thirty-eight per cent (n=8) of respondents agreed that national judicial authorities follow up on the judicial recommendations provided by the Office within the reporting period (12 months), while less than one-third (29 per cent, n=6) agreed that judicial recommendations lead to the opening of criminal proceedings (Figure 10).

*Figure 10. Follow-up to OLAF’s judicial recommendations – the extent to which survey respondents agreed with the following statements*

*Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 21.*
4.4.3.4 Follow-up – administrative recommendations

The number of administrative recommendations issued by OLAF was in steady decline year-on-year during the period 2008-2012, but it has since increased relatively significantly since the introduction of Regulation 883/2013 (Figure 11).

Figure 11. Number of administrative recommendations issued by OLAF, 2008-2016

Although data are available on the follow-up to judicial, financial and disciplinary recommendations, data are not available when it comes to administrative recommendations and follow-up. During the stakeholder interviews, very little evidence was presented that could be substantiated.

OLAF respondents to the survey respondents were asked about follow-up to OLAF’s administrative recommendations. One-in-five (n=5) respondents agreed that IBOAs follow up on the administrative recommendations provided by the Office within the reporting period. The same proportion agreed that administrative recommendations lead to amendments introduced to administrative procedures (Figure 12).
4.4.3.5 Follow-up – disciplinary recommendations

Data sourced from OLAF shows that the number of disciplinary recommendations issued by OLAF has varied over the period 2008-2016 (Figure 13). There is no discernible trend in the number of disciplinary recommendations issued by OLAF since the introduction of Regulation 883/2013 in 2013.

**Figure 13. Number of disciplinary recommendations issued by OLAF, 2008-2016**

Source: OLAF data (unpublished).

Time series data on the results of these disciplinary recommendations are not available, but data from The OLAF Report 2016 for the period 2014-2016 shows that
disciplinary action had been taken in two-thirds of cases where a decision had been taken by the appointing authorities.

Available data from the OLAF Supervisory Committee’s 2016 Annual Activity Report indicates that, since 1 October 2013, eight disciplinary recommendations (representing 15 per cent of the total number of disciplinary recommendations made in that period) had not been followed-up by the receiving authorities invested with disciplinary powers.

OLAF respondents to the survey were asked about follow-up to OLAF’s disciplinary recommendations. Only one-in-four (n=5) respondents agreed that the EU disciplinary authority follows up on the disciplinary recommendations provided by the Office within the reporting period (6 months) – over half of respondents did not know (Figure 14).

Figure 14. Follow-up to OLAF’s disciplinary recommendations – the extent to which OLAF survey respondents agreed the EU disciplinary authority follows up on disciplinary recommendations within the reporting period

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 21.

In contrast, 85 per cent of Commission’s services\textsuperscript{171} agreed or strongly agreed that OLAF’s disciplinary recommendations are followed-up on within the reporting period (6 months). The excessive severity of recommendations was cited as a reason for not following up on OLAF’s recommendations within the reporting period.

Survey respondents were also asked about the assistance provided by OLAF’s investigative units in relation to the actions to be taken following OLAF’s disciplinary recommendations. Two-thirds of Commission services\textsuperscript{172} respondents agreed or strongly agreed that OLAF’s investigation units provide the necessary assistance in relation to the actions to be taken following OLAF’s disciplinary recommendations (however, the remaining one-third of respondents did not know). Similarly, two-thirds of Commission services respondents agreed or strongly agreed that the templates used for disciplinary monitoring are fit for purpose while 16 per cent stated “not at

\textsuperscript{171} Although Commission services are part of IBOAs, the answers to these particular survey questions were disaggregated to reflect the specific answers of Commission services

\textsuperscript{172} Although Commission services are part of IBOAs, the answers to these particular survey questions were disaggregated to reflect the specific answers of Commission services
all”. Finally, half of Commission services respondents agreed that agreed that the accompanying guidance for disciplinary monitoring is fit for purpose while 30 per cent stated “not at all”.

In an interview with IDOC, it was suggested that OLAF’s reports are increasingly less comprehensive, with important elements sometimes missing. They also suggested that there is scope for greater collaboration during the course of an investigation. They noted that IDOC will not be contacted before the report is finalised, despite the fact that there were occasions when IDOC could have provided assistance but OLAF refused on the grounds that IDOC is part of the Commission.

### 4.4.4 Concluding remarks

The number of investigation cases concluded with recommendations had almost doubled by 2015 when compared to the end of the pre-evaluation period (i.e. 2012). However, when considering the total number of closed cases, the share accounted for by closed investigations with recommendations has remained fairly stable. The data also shows a doubling in the number of financial and judicial recommendations since 2013, which has been the main driver behind the overall increase in recommendations since 2013.

Evidence on the quality and comprehensiveness of OLAF’s final reports and recommendations is mixed:

- Almost two-thirds of survey respondents agreed or strongly agreed that OLAF’s investigation reports are overall clear and comprehensive. However, these figures mask the diversity of responses by stakeholder type, with 40-70 per cent of non-OLAF stakeholders agreeing, while around 80 per cent of OLAF respondents agreed.
- More than half agreed or strongly agreed that OLAF’s recommendations are clearly formulated with a well-defined description of the actions to be taken. But, again, responses varied considerably by stakeholder type, 40-56 per cent of non-OLAF stakeholders agreeing, while around 80 per cent of OLAF respondents agreed.
- Interviews with stakeholders highlighted a number of concerns regarding the quality and completeness of OLAF reports. These concerns relate more to shortcomings in OLAF’s application/execution of the Regulation rather than Regulation itself.
- Despite this, in principle at least a combination of the additional detail provided by Regulation 883/2013 (both directly and indirectly via the GIPs) on the required scope/content of OLAF reports and the introduction of the legality checks may have had a positive impact on the overall quality of OLAF reports and recommendations.

A number of AFCOS representatives proposed amending Regulation 883/2013 such that it obliges OLAF to share reports with the AFCOS. This is despite the fact that these reports are intended for judicial authorities and not the AFCOS whose role under the Regulation is to facilitate effective cooperation and exchange of information with OLAF and not to follow-up on investigative recommendations.

Stakeholders suggested that the sometimes disproportionately high levels of recoveries recommended by OLAF is a factor that has a negative influence on the nature and extent of the implementation of financial recommendations. OLAF recently adopted a set of internal ‘Instructions on drafting Financial Recommendations and related sections of the Final Report’, which should make a difference given they provide extensive detail on how to estimate the amounts to be recovered and they provide for situations whereby the whole amount paid is not recommended for recovery but, rather, a proportion thereof. These Instructions also make provision for OLAF to collaborate with stakeholders in relation to improving the quality of financial recommendations.
In relation to follow-up to judicial recommendations, a common issue raised via the stakeholder consultation relates to the admissibility of OLAF’s investigation evidence, for which stakeholders noted that the quality and admissibility of an OLAF report depends on whether OLAF has complied with the legal requirements of Regulation 883/2013, including the rights and procedural guarantees of the persons concerned, and it also depends on the national legislation of Member States.

In relation to follow-up to administrative recommendations, relatively less evidence was available. Survey data suggests a minority of OLAF respondents believed that IBOAs follow-up on administrative recommendations within the reporting period, but this could not be substantiated. The same proportion agreed that administrative recommendations lead to amendments introduced to administrative procedures.

Finally, in relation to disciplinary recommendations, in fewer than half of cases, disciplinary recommendations resulted in decisions and disciplinary action being taken by EU IBOAs. Insufficient data are available to determine the reasons why more disciplinary recommendations did not result in disciplinary action. The excessive severity of recommendations was cited as a reason for not following up, but this could not be substantiated, nor could it be linked to the propensity to take disciplinary action. It was also suggested that gaps within OLAF’s reports led to IDOC needing to complete some elements (which may have been avoided had OLAF collaborated with IDOC during the investigation), but again this was difficult to substantiate with hard evidence/data and could not be directly linked to the ability/willingness of IBOAs to take disciplinary action.

### 4.5 Procedural guarantees

This section focuses on the main provisions of Regulation 883/2013 defining the procedural safeguards applicable to OLAF’s investigative powers, as well as the relevant implementing rules. In practice, these safeguards have also been addressed in the case law of the Court of Justice of the European Union (CJEU), which has been examined as part of this evaluation. This section also presents analysis of evidence on how these provisions regarding procedural guarantees have been implemented in practice to better understand whether and how this might influence the achievement of results and the protection of the EU financial interests, including via the increased admissibility of OLAF’s investigative findings/evidence.

This section should be reviewed alongside section 6.1.2 which presents evidence on the coherence of Article 9.

#### 4.5.1 Background

External and internal investigations must be conducted in compliance with the procedural guarantees defined in Article 9 of the Regulation (elaborated in Article 8.6 of the GIPs).\(^{173}\)

The guarantees provided to a person concerned or witness by Article 9 of the Regulation were defined by taking into account the administrative nature of investigations\(^{174}\) and include:

- the right to an objective and impartial investigation in accordance with the principle of the presumption of innocence (Article 9(1));
- the right to avoid self-incrimination (Article 9(2));

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\(^{173}\) Recital 23 of Regulation 883/2013

\(^{174}\) Recital 22 of Regulation 883/2013
• the right to be informed (with prior notice, the period of which may be shortened if agreed by the person concerned/witness or on duly reasoned grounds of urgency of the investigation) of the intention of OLAF to interview the person concerned/witness (Article 9(2));

• the right to be assisted by a person of the individual’s choice (Article 9(2)); and

• the right for the person concerned to comment on the facts of the case (Article 9(4)).

These provisions of the Regulation are further explained/elaborated (in an operational context) in the GIPs (Article 8), which notes that all investigative actions performed by OLAF must be conducted with full respect for the rights of the person concerned, including data protection and procedural guarantees and rights applicable to OLAF investigations.

In relation to procedural guarantees, the ISRU reviews and verifies the legality, proportionality and necessity of the proposed investigative measures. The modalities of these checks are defined under Article 12 of the GIPs. Any extension to the scope of the investigation beyond that agreed with the ISRU needs to be requested to the ISRU by the investigation unit. The ISRU is also responsible for assessing the legality and necessity of proposals to merge or split cases. All ISRU opinions are submitted to OLAF’s Director-General for a decision or to authorise an investigative activity.

As an additional safeguard concerning the respect by OLAF of procedural guarantees, any person affected by an investigation may address a complaint directly to OLAF. The Legal Advice Unit within OLAF ensures that all complaints are dealt with ‘promptly and in a diligent and fair manner’175.

Any person affected by an OLAF investigation can also address himself/herself to external and independent institutions or bodies (European Ombudsman, European Data Protection Supervisor, the Court of Justice of the European Union). The Legal Advice Unit prepares OLAF’s position in all these cases (for the cases heard by the Court of Justice of the European Union, the Legal Advice Unit sends a factual and legal contribution to the European Commission’s Legal Service176,177, which represents OLAF (as part of the EC) before the Court).

### 4.5.2 Purpose of the evaluation

This evaluation analyses the appropriateness of provisions on procedural rights – whether it was appropriate for Article 9 to have been included within the Regulation and whether the specific guarantees/rights provided for under Article 9 are appropriate in light of the objectives of (and powers/tools within) the Regulation and existing citizen rights enshrined in law. The evaluation also analyses procedures to ensure the procedural guarantees of persons under investigation are respected, including internal and external control and complaint mechanisms178. Finally, the evaluation focuses on the extent to which the Regulation has achieved a proper balance between investigative powers and procedural rights.

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176 The procedure is also available on OLAF website http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en (Part B)

177 For more information, see http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en

178 Control and complaint mechanisms/bodies are discussed in section Error! Reference source not found.
4.5.3 Findings

4.5.3.1 The right to an objective and impartial investigation in accordance with the principle of the presumption of innocence (Article 9(1))

This relates to Article 41(1) (Right to good administration) in the Charter of Fundamental Rights of the European Union (the Charter)\(^{179}\) which states that ‘Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union’, and Article 47 (Right to an effective remedy and to a fair trial) – albeit the context for this right is a hearing/trial rather than an investigation – which states that ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law’. It also relates to Article 48(1) (Presumption of innocence and right of defence) which states that ‘Everyone who has been charged shall be presumed innocent until proved guilty according to law’.

Unsurprisingly, the appropriateness and proportionality of this procedural right was not called into question by the evidence collected and analysed during the course of the evaluation given the fundamental nature of the rights it is seeking to guarantee.

4.5.3.2 The right to avoid self-incrimination (Article 9(2))

This right is linked primarily to the Regulation 883/2013 provisions surrounding prior notice of interviews and the right to comment on the facts of the case. As noted in Directive (EU) 2016/343\(^{180}\) on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, ‘suspects and accused persons should not be forced, when asked to make statements or answer questions, to produce evidence or documents or to provide information which may lead to self-incrimination’.

A study published by Utrecht University\(^{181}\) highlights the heightened safeguards associated with Article 9(2) compared to other EU IBOAs with administrative investigation powers (DG Competition, European Central Bank and European Securities and Markets Authority). It notes that Regulation 883/2013 ‘provides for a level of safeguards during the interviews which is higher than that provided in the context of other EEA’s interviews (particularly as regards the right of access to a lawyer and the privilege against self-incrimination)’.

Despite this, the appropriateness of the right to avoid self-incrimination in and of itself is not called into question by this evaluation. Rather, to the extent that the right to avoid self-incrimination manifests itself (to some extent) through the other Article 9 procedural rights described below, an assessment of its appropriateness is partly captured there.

In the literature reviewed for the evaluation, Ligeti (2017) highlight two inconsistencies associated with the Article 9 right surrounding self-incrimination which potentially undermine the coherence/clarity of the Article:


\(^{181}\) Utrecht University (2017), Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB), April, https://www.ris.uu.nl/ws/files/32039338/Report_Investigatory_powers_and_procedural_safeguards_Utrecht_University_1_.pdf.
• Article 9(2) makes reference to situations in which ‘in the course of an interview, evidence emerges that a witness may be a person concerned’. In such situations, Regulation 883/2013 stipulates that ‘The Office may not use that person’s past statements against him without giving him first the opportunity to comment on those statements’. In this context, Ligeti (2017) highlight an inconsistency with Article 16(6) of the GIPs which takes a more restrictive interpretation by stating ‘Where a person concerned was previously interviewed as a witness, the investigation unit shall not use his past statements against him in any way’.

• As noted above, Article 9(2) makes reference to ‘evidence’ emerging ‘that a witness may be a person concerned’. Ligeti (2017) note that Article 16(4) of the GIPs state ‘If during the course of an interview it becomes apparent that a witness is in fact a person concerned, the interview shall be ended’. Consequently, the Regulation specifies ‘evidence’ emerging whereas the GIPs do not. Further, Article 2(5) of the Regulation defines a person concerned as ‘any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of Union’ – hence, it refers to ‘suspicion’ and not ‘evidence’ (as referenced by Article 9(2)).

On the first inconsistency, the Utrecht study\textsuperscript{182} also references this inconsistency between the Regulation and the GIPs. Revisions to the GIPs would ensure they are consistent with (and not more restrictive than) Regulation 883/2013. This is particularly relevant in the context of the perceived proportionality of Article 9 (discussed above), for which it is possible that some stakeholders concluded that Article 9 is disproportionate on the basis of the (more restrictive) wording of the GIPs, which may have been conflated with the guarantees specified in the Regulation.

On the second inconsistency, it may enhance the coherence and clarity of Regulation 883/2013 if Article 9 (and the GIPs) were revised to ensure consistency in the basis on which a person concerned is defined (i.e. ‘evidence’, ‘suspicion’ or if it ‘becomes apparent’). This was a key theme emerging from the stakeholder interviews, for which a number of interviewees (primarily OLAF investigators) described the lack of clarity in the Regulation as to how a person concerned is defined. A common comment made by a number of stakeholders (especially OLAF investigators) in this regard was that the definition of the person concerned in Regulation 883/2013 is insufficiently clear and there are no criteria in the Regulation or the GIPs for determining what constitutes ‘suspicion’ (in the context of identifying a person concerned). In that regard, again, revisions to the GIPs (and potentially Regulation 883/2013) to ensure consistency in the definition of a person concerned (specifically, the basis on which that view is formed) would bring potential benefits (at least by way of improved clarity and consistency), as would further guidance on what constitutes suspicion (or, more specifically, sufficient suspicion to conclude that an individual is a person concerned).

4.5.3.3 The right to be informed – with prior notice – of the intention of OLAF to interview the person concerned/witness (Article 9(2))

This procedural guarantee was relatively contentious in the eyes of stakeholders consulted for this evaluation. The reasons for this relate primarily to the challenges and burdens associated with providing prior notice, particularly in the context of witnesses in external investigations where it isn’t always feasible to identify the

\textsuperscript{182} Utrecht University (2017), Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB), April, https://www.ris.uu.nl/ws/files/32039338/Report_Investigatory_powers_and_procedural_safeguards_Utrecht _University_1_.pdf.
witness in advance of conducting an on-the-spot check. However, OLAF’s internal ‘Review Digest Compilation of Best Practices’ (April 2016) notes that investigators may, in exceptional circumstances, be granted authorisations to interview unknown witnesses if their identity is unknown at the time a mission is planned (although the request and authority should be limited to persons who can be identified as being linked to the matter under investigation). This would allow investigators to interview witnesses who are only identified during an on-the-spot check, albeit in exceptional circumstances only.

Examples of the types of comments received from stakeholders on this issue in the course of this evaluation are outlined below.

An AFCOS interviewee questioned the requirement under Article 9(2) to provide an invitation to an interview to a person concerned with at least 10 working days’ notice. The interviewee was not aware of the reason why this period of prior notice was included and they suggested that it provides the person concerned with an opportunity to tamper with and/or destroy evidence. The interviewee felt that a period of time shorter than 10 working days would be more appropriate.

Another AFCOS interviewee countered this argument to some extent, but in the context of an on-the-spot check (rather than an interview), although the principle is the same. The interviewee suggested that, in their Member State, when an on-the-spot check is announced, it is generally the case that all documents and information are prepared by the beneficiaries in advance and, thus, the check is productive. In contrast, when it is unannounced, the economic operator is not as prepared and often calls a lawyer. In the case of a recent unannounced on-the-spot check, the economic operator eventually agreed to the check, although OLAF was unable to access all the documents as not all necessary documents were in the same location. This example points to the potential advantages of providing prior notice to interviewees, although it does not help to answer the question as to how much prior notice is appropriate.

An OLAF investigator highlighted that the current drafting of Article 9(2) is unclear in relation to prior notice. The Article reads ‘The invitation to an interview shall be sent to a person concerned with at least 10 working days’ notice. That notice period may be shortened with the express consent of the person concerned or on duly reasoned grounds of urgency of the investigation. In the latter case, the notice period shall not be less than 24 hours’. The investigator noted that it is unclear whether the reference to ‘the latter case’ refers to ‘the express consent of the person concerned’ or ‘on duly reasoned grounds of urgency of the investigation’. That is, it is unclear from the Regulation as to whether the person concerned could agree to reduce the notice period to less than 24 hours.

Finally, Ligeti (2017) point to the lack of specificity in Article 9(2) in terms of the minimum content of information that OLAF needs to give to the interviewee about the subject of the interview. In interviews with OLAF staff during the course of their research, Ligeti (2017) conclude that OLAF provides some information about the subject matter of the interview in the letter of invitation, although the detail of the information varies considerably in practice according to the stage of development of the investigation and, hence, further clarification should be provided. A review of the GIPs indicates that they provide some further elaboration regarding the information to be provided in the invitation, but this focuses on informing the individual of their rights, rather than the subject of the interview:

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• Article 9(2) of Regulation 883/2013 (which relates to persons concerned) – ‘The invitation shall include a list of the rights of the person concerned, in particular the right to be assisted by a person of his choice.’

• Article 16(2) of the GIPs (which relates to witnesses) – ‘The investigation unit shall inform him of his right not to incriminate himself. He shall also be informed that he may use an official EU language of his choice’.

• Article 16(5) of the GIPs (which relates to persons concerned) – ‘The investigation unit shall inform the person concerned of his right not to incriminate himself and of his right to be assisted by a person of his choice. He shall also be informed that he may use an official EU language of his choice.’

Consequently, neither the Regulation nor the GIPs describe the minimum information to be provided on the subject of the interview. In addition, the GIPs and the Regulation are somewhat inconsistent if the Regulation’s reference to ‘a list of the rights of the person concerned’ is viewed as more far-reaching than the GIPs’ reference to ‘his right not to incriminate himself’ and ‘his right to be assisted by a person of his choice’.

4.5.3.4 The right to be assisted by a person of the individual’s choice (Article 9(2))

This is another fundamental right under the Charter, for which Article 47 (Right to an effective remedy and to a fair trial) states that ‘Everyone shall have the possibility of being advised, defended and represented’. As noted above, the context for this right within the Charter is a hearing/trial rather than an investigation although Ligeti (2017) suggest that ‘extending the right to assistance to OLAF interviews facilitates the admissibility of OLAF Final Reports as evidence in national judicial proceedings’.

Again, unsurprisingly, the appropriateness and proportionality of this procedural right was not called into question in the evidence sources ICF analysed during the course of the evaluation.

4.5.3.5 The right for the person concerned to comment on the facts of the case (Article 9(4))

Article 9(4) provides a right for the person concerned to comment on the facts of the case. The Regulation also provides for this right to be ‘deferred’ by the OLAF Director-General. Specifically, Article 9(4) states that ‘In duly justified cases where it is necessary to preserve the confidentiality of the investigation and/or entailing the use of investigative proceedings falling within the remit of a national judicial authority, the Director-General may decide to defer the fulfilment of the obligation to invite the person concerned to comment’.

At the OLAF evaluation conference in March 2017, there were a mix of views on the appropriateness and impact of Article 9(4) in relation to the right for the person concerned to comment on the facts of the case and the right for the OLAF Director-General to defer this issue. A national prosecutor argued that the right to comment under Article 9(4) could be abused and appears disproportionate given that the risk of being prosecuted is still very low following OLAF input. However, data from The OLAF Report 2016\textsuperscript{184} shows an indictment rate of 44 per cent in cases where OLAF issued judicial recommendations between 1 January 2009 and December 2016.

A similar view was put forward by a judge at the conference who suggested that the right to comment is an unnecessary complication given that OLAF is an investigative

body that makes recommendations but not decisions that affect the legal standing of the person concerned. However, the same judge suggested that the evidentiary value of the OLAF reports should be made clearer (as often judicial authorities start the investigation from scratch) which, prima facie, is a potential contradiction as to the role of OLAF reports/recommendations in judicial proceedings (and the corresponding procedural guarantees required).

An alternative view was put forward by a conference attendee from the European Commission who suggested that because OLAF’s findings are the basis of far-reaching measures (financial recovery, exclusion from future contracts, termination of on-going grants, etc.), the Commission has to conduct a contradictory procedure and, therefore, if the person has already been heard by OLAF, it improves the quality/admissibility of OLAF’s reports.

Finally, a stakeholder at the conference from the Court of Justice of the European Union (CJEU) made the argument that the right to be heard exists outside Regulation 883/2013 (because of the Charter (Article 41(2)), CJEU jurisprudence and case law) and would apply to OLAF investigations in any case (even if Article 9 did not exist). The stakeholder argued that what Regulation 883/2013 introduces in addition to this is the ability for OLAF to defer this right to comment and, in that regard, it limits fundamental rights and, consequently, is as important for OLAF as it is for persons concerned.

Article 9(4), and the right to comment, also generated a number of views from stakeholders consulted for this evaluation. An interviewee from Commission services was concerned that the lack of available data on OLAF’s use of the power to defer the fulfilment of the obligation to invite the person concerned to comment meant it was not possible to assess whether OLAF was using this power excessively. The European Ombudsman made a similar point. OLAF’s Director-General suggested in an interview that the deferral provision was used more often in the past, but it is increasingly used as an exception (given it is unclear). One investigator suggested that this reflects the preferences of the ISRU and OLAF’s Director-General (to use the deferral provision as an exception).

Other common points raised in interviews with stakeholders were:

- The opportunity to comment risks undermining a subsequent criminal investigation (as it discloses the fact that the person is being investigated, which may lead to them tampering with and/or destroying evidence). However, as noted above, the Regulation also provides for the opportunity to comment to be ‘deferred’ by the OLAF Director-General, including for reasons related to preserving the confidentiality of the investigation.

- It is unclear what OLAF does with the comments it receives from persons concerned. One spending Directorate-General suggested that it had not seen any OLAF final reports which make reference to comments being received and incorporated within the report. However, this could not be substantiated by ICF and nor was it clear whether such reports related to cases where comments were actually received. An investigator said that it was unclear how the comments should be used (e.g. attached to the OLAF final report) and, in practice, there was little-to-no consistency across investigative units.

- Article 9(4) states that ‘once the investigation has been completed and before conclusions referring by name to a person concerned are drawn up, that person shall be given the opportunity to comment on facts concerning him’. It was suggested that this reference to the investigation having been completed implies that no further/new investigative acts will be undertaken, regardless of the nature and extent of the comments OLAF receives.
• It is unclear as to how the term ‘opportunity’ (as referenced in Article 9(4)) should be interpreted. It was suggested by a small number of investigative staff that, currently, OLAF decides if persons concerned can comment through interviews or in writing, but often the lawyers of the persons concerned will seek interviews to try and delay/disrupt the closing of an investigation. It was suggested that it would be helpful to have this clarified. However, Article 9(4) does specify that ‘the Office shall send the person concerned an invitation to comment either in writing or at an interview with staff designated by the Office’. Consequently, to that end, it appears clear from the Regulation that the comments may be provided either in writing or at an interview.

• In cases that are closed where no evidence has been found against the person concerned indicating the existence of a fraud, corruption or other illegal activity, it is unclear as to whether the person concerned should be given the opportunity to comment. An investigator suggested that internal guidelines were recently received regarding the opportunity to comment, although the investigator did not specify whether those guidelines provide guidance on this issue and, in the meantime, it was suggested that different approaches persist across investigative units. An OLAF document from 2014 (‘Instructions on the possible closure of an investigation without giving the opportunity to comment’) indicates that an investigation may be closed without giving the person concerned an opportunity to comment in the specific case where no evidence has been found against the person concerned indicating the existence of a fraud, corruption or other illegal activity. This was reiterated in another OLAF document from 2016 (‘Review Digest Compilation of Best Practices’). However, for clarity and transparency, there may be benefit in capturing this within the published GIPs.

• Article 9(4) makes reference to the person concerned having the opportunity to comment on ‘a summary of the facts’ but, in practice, it is unclear as to what form that summary should take. In the absence of this clarity, investigative units will continue to take different approaches.

• Article 9(4) also makes reference to ‘duly justified cases’ for which further guidance/clarification would be useful to understand how to define/classify such cases.

• Finally, it is unclear from the Regulation whether ‘deferral’ actually means ‘cancellation’ (or ‘avoidance’) and, if not, it isn’t clear how the obligation should eventually be discharged.

In conclusion, the evaluation finds that there is a lack of clarity as to how certain aspects of Article 9(4) are intended to work in practice. These include whether there are circumstances in which additional investigative acts could/should be undertaken (depending on the comments received), what form the summary of facts should take and how the term ‘deferral’ should be interpreted (e.g. cancellation or delay and, if delay, until what time).

4.5.4 Concluding remarks

The evaluation identified relatively polarised views in relation to Article 9 overall. A number of stakeholders spoke positively about the introduction of provisions on procedural rights within Regulation 883/2013, the perceived benefits of which include greater credibility, transparency, accountability and quality of OLAF’s work. They suggested that the outcomes from OLAF’s administrative investigations are often designed for criminal proceedings and, hence, higher standards of protection of rights are required. Data from The OLAF Report 2016 confirms that almost 30 per cent of OLAF’s investigations resulted in judicial recommendations over the period 2009-2016. In contrast, the majority of stakeholders interviewed for the evaluation expressed the view that Article 9 introduced a set of rights and safeguards that are disproportionate
to the administrative nature of OLAF’s investigations. They were seen as time-consuming processes that slow down investigations.

The evaluation analysed evidence against each individual guarantee within Article 9:

- The right to an objective and impartial investigation in accordance with the principle of the presumption of innocence (Article 9(1)). The appropriateness and proportionality of this procedural right was not called into question by the evidence collected and analysed during the course of the evaluation given the fundamental nature of the rights it seeks to guarantee.

- The right to avoid self-incrimination (Article 9(2)). Although the appropriateness of the right to avoid self-incrimination in and of itself is not called into question by this evaluation, inconsistencies have been identified which should be addressed to provide additional certainty and clarity.

- The right to be informed – with prior notice – of the intention of OLAF to interview the person concerned/witness (Article 9(2)). This issue was one of the more contentious guarantees in the eyes of stakeholders consulted for this evaluation. The reasons for this relate primarily to the challenges and burdens associated with providing prior notice, combined with the perceived disproportionality of the length of the notice period (at least 10 working days’ notice). Again, this evaluation finds inconsistencies (including between the Regulation and the GIPs) in this area which should be addressed to improve clarity.

- The right to be assisted by a person of the individual’s choice (Article 9(2)). Again, unsurprisingly, the appropriateness and proportionality of this procedural right was not called into question in the evidence sources ICF analysed during the course of the evaluation given the fundamental nature of the right.

- The right for the person concerned to comment on the facts of the case (Article 9(4)). This is arguably one of the most contentious guarantees under Article 9 in the eyes of stakeholders. Among those who did not believe that this right is appropriate and proportionate either sought to argue that OLAF’s reports do not change the legal standing of a person concerned, and/or that the right may undermine future criminal proceedings by alerting in advance the person concerned. Among those who do believe it is appropriate and proportionate, they pointed to the evidentiary value of OLAF’s investigative reports.

In conclusion, the evaluation finds evidence that, in general, the procedural guarantees introduced by Article 9 of Regulation 883/2013 reflect (and codify/clarify) to a large extent existing rights and guarantees under EU law. Given the role of OLAF reports in criminal proceedings (with 44 per cent of all cases with judicial recommendations in the past 7 years resulting in indictments), the rights/guarantees under existing EU law which are reflected in Article 9 are considered proportionate. However, the evaluation identifies a number of aspects of Regulation 883/2013 and the GIPs that are unclear and/or inconsistent and would benefit from revision. These include:

- Article 9(2):
  - Inconsistencies between the Regulation and the GIPs when referring to the use of past statements.
  - Inconsistencies between the Regulation and the GIPs when referring to the basis on which decisions are taken that a witness is in fact a person concerned.
  - A lack of clarity within the Regulation whether the person concerned could agree to reduce the notice period to less than 24 hours.
A lack of clarity within the Regulation regarding the minimum information to be provided on the subject of the interview.

- Article 9(4):
  - A lack of clarity within the Regulation as to whether further/new investigative acts can be undertaken as necessary where comments on the facts are received by OLAF from a person concerned.
  - A lack of clarity within the Regulation as to what form the ‘summary of the facts’ should take.
  - A lack of clarity within the Regulation as to how to define/classify ‘duly justified cases’.
  - A lack of clarity within the Regulation as to whether ‘deferral’ (in the context of the deferral of the opportunity to comment) should be interpreted as ‘cancellation’ or ‘avoidance’ and, if not, how the obligation should eventually be discharged.

Further, aspects of Article 9 specific to Regulation 883/2013 (specifically, the period of prior notice to be given to persons concerned in advance of an interview) are arguably disproportionate in relation to their intended objective (and the consequent impact on investigative procedures/durations) and could benefit from revision.

4.6 Confidentiality and data protection

4.6.1 Background

General rules on confidentiality of information and data protection are defined in Article 10 of the Regulation, which provides that information transmitted or obtained in the course of external investigations, in whatever form, is protected by the relevant provisions, while information transmitted or obtained in the course of internal investigations is subject to professional secrecy and protected by the rules applicable to EU institutions.

Furthermore, IBOAs have an obligation to establish appropriate procedures ensuring the confidentiality of OLAF investigations at all stages. This obligation extends to ensuring that the legitimate rights of the person concerned are guaranteed and, where applicable, that national rules relating to judicial proceedings are respected. In addition, OLAF has an obligation to ensure the confidentiality of an internal investigation by providing appropriate channels for transmitting information whenever the IBOA’s usual channels of communication cannot ensure such confidentiality, or even by deferring the provision of such information in exceptional cases. Finally, in duly justified cases, due to the obligation to preserve the confidentiality of investigations or in cases involving judicial proceedings at a national level, OLAF’s DG may decide to defer the fulfilment of the obligation to invite the person concerned to comment foreseen in Article 9.

Article 10(4) offers the possibility for the Office to designate a Data Protection Officer. As a service of the Commission, OLAF is subject to Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by Community

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185 Article 4(5) and 10(3) of Regulation 883/2013
186 Article 10(3) of Regulation 883/2013
187 Article 4(6) of Regulation 883/2013
institutions and bodies\textsuperscript{188} and is under the supervision of the EDPS. In 2008, the Data Protection Officer for OLAF was appointed by a Decision of OLAF Director General. It sets out the implementation rules concerning the Data Protection Officer at OLAF to monitor compliance with Regulation 45/2001.\textsuperscript{189} In addition, the processing of personal data in OLAF is governed by the Director-General’s "Instructions to staff on data protection for investigative activities (ISDP)” of 2013.

Data protection rules also apply to exchanges with third countries; according to Article 14(2) of the Regulation, the Office must keep a record of all transmissions of personal data and the grounds for such transmissions.

4.6.2 Purpose of the evaluation

The purpose of the evaluation was to consider evidence on the clarity and impact of the provisions of Regulation 883/2013 related to confidentiality and data protection.

4.6.3 Findings

Among the stakeholders who were interviewed for this evaluation, an OLAF investigator submitted that the Regulation has a great effect on the fact that the work of OLAF is compliant with data protection and fundamental rights. The Regulation and GIPs have spelled them out and created a reflex among investigators. The EDPS also stressed the change of culture within OLAF and the improved quality of its work with respect to data protection rights, following the entry into force of the Regulation and in particular thanks to the control of the Legal Review Unit. However, the investigator made the point that data protection rules, by the effect of the ECJ case law, evolve and so the proper application of these rules can sometimes feel like hitting ‘a moving target’.

In contrast, some challenges related to data protection and confidentiality rules were highlighted by some stakeholders.

- An IBOA and another OLAF investigator highlighted some of the practical constraints associated with these rules. They mentioned the difficulties inherent in seeking to limit how many people know about a case and to inform the person concerned.
- Two OLAF investigators noted that data retention rules are sometimes an impediment to the collection of evidence, but they recognised the need for balance between data protection and the effectiveness of investigations. Still, according to another OLAF investigator and one staff member of OLAF investigative support, the six-months limitation for data retention in EU IBOAs create a challenge for internal investigations, considering that the selection of cases can already take two months.
- Another IBOA added that confidentiality rule could create an additional challenge to the implementation of financial recommendations. Indeed, beneficiaries have difficulties understanding that amounts need to be recovered without being presented with the facts of the case.
- An OLAF non-investigator also stated that the inability for OLAF to reciprocate exchanges of information with partners outside of the EU (i.e. third countries or international organisations) affected the cooperation with such partners.

\textsuperscript{188} Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

\textsuperscript{189} Director General of OLAF, Decision adopting implementing rules concerning the Data Protection Officer pursuant to Article 24(8) of Regulation (EC) 45/2001, 19 December 2008.
One staff member of OLAF investigative support and the EDPS explained that persons involved in investigations make use of the possibility open to them under Regulation 45/2001 to request access to their data for the purpose of circumventing the limitations on access to the investigative file. However, due to the sensitive nature of investigations, granting such access to the file may be deferred in cases where it might endanger the investigation, under the control of the EDPS.

Survey respondents were asked for their views on the clarity and impact of the provisions of Regulation 883/2013 related to confidentiality and data protection. Almost 75 per cent (n=63) of respondents agreed that provisions of the Regulation regarding confidentiality/data protection (Article 10) are clear, while 64 per cent (n=54) agreed or strongly agreed this definition contributed to strengthening the protection of personal data of individuals subject to investigations.

4.6.4 Concluding remarks

Most stakeholders agree that the provisions of the Regulation regarding confidentiality and data protection (Article 10) are clear.

Almost two-thirds of survey respondents agreed that the confidentiality and data protection provisions in the Regulation contribute to strengthening the protection of personal data of individuals subject to investigations.

A small number of stakeholders described the logistical challenges associated with complying with these provision and the impact this can have on the efficiency of the investigative function.

4.7 Supervisory Committee

4.7.1 Background

The Supervisory Committee is a body composed of independent members which is responsible for monitoring the implementation by the Office of its investigative function, in order to reinforce the Office’s independence. Changes brought by Regulation 883/2013 intended to clarify the role of the Supervisory Committee. However, in practice, the European Parliament suggested that further clarification of its mandate is required, especially in relation to its monitoring role, but it was rejected by the Council. Article 15(1) of Regulation 883/2013 provides that the Supervisory Committee should “monitor the implementation by OLAF of its investigative function”, and in particular “developments concerning the application of procedural guarantees and the duration of investigations”.

The Supervisory Committee addresses opinions to OLAF’s DG on its own initiative or at the request of the DG or of any IBOA. In its opinions, the Supervisory Committee issues a number of recommendations, which are then discussed between the Office and the Supervisory Committee. It also delivers a yearly opinion on the draft budget submitted by OLAF.

The Supervisory Committee is regularly informed by OLAF’s Director-General of the Office’s activities, especially concerning its investigative function and follow-up actions. In application of the Director-General’s obligation to communicate information about cases lasting more than 12 months, in 2015, OLAF transmitted 622 documents to the Supervisory Committee providing information on such cases, and 562

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190 Article 15(1) of Regulation 883/2013
191 Scoping interviews with Unit D, OLAF, and IDOC
192 Article 15(1) of Regulation 883/2013
193 OLAF Annual Report 2015, p. 40
documents in 2016\(^{194}\). It protects the independence of OLAF’s Director-General and is informed in cases where the latter decides to bring an action before the CJEU after identifying a suspected breach of his independence by the Commission.\(^{195}\)

Finally, the Supervisory Committee reports on its activities once a year to the European Parliament, the Council, the Commission and the Court of Auditors, where it assesses the Office’s independence, the application of procedural guarantees and the duration of investigations.

### 4.7.2 Purpose of the evaluation

This evaluation seeks to address two main issues regarding OLAF’s governance, mainly in relation to its Supervisory Committee:

- **Mandate of the Supervisory Committee**, relationship with OLAF and provisions to ensure the independence and autonomy of the Supervisory Committee and its secretariat; how this influences the achievement of the objectives of Regulation 883/2013.

- **Tools and information available to the Supervisory Committee** to implement its mandate according to Regulation 883/2013.

### 4.7.3 Findings

The clarity of the Supervisory Committee’s role and mandate was discussed at the OLAF evaluation conference held in March 2017. The Chair of the Supervisory Committee noted that the mission of the Supervisory Committee is twofold – to support OLAF (advising the OLAF Director-General and safeguarding its independence) and to monitor/oversee its investigative function, particularly in relation to the respect of procedural guarantees. She indicated that these two roles can be in conflict, with the challenge being to maintain an appropriate balance between them. Another member of the Supervisory Committee indicated that, in relation to the Supervisory Committee’s role and mandate, the legislator left some issues unresolved and never decided whether the Supervisory Committee should be an advising or a supervising body. He noted that this gave rise to a degree of confusion given the different interpretations and perceptions of the Supervisory Committee’s role (largely, whether the main role and mandate of the Supervisory Committee is of a supervisory nature – monitoring and supervising its investigative function to ensure its compliance with Regulation 883/2013 – or whether it’s role is more heavily weighted towards supporting and safeguarding the independence of OLAF), adding that this is a weak point of Regulation 883/2013 – that the Supervisory Committee’s role is open to (different) interpretation(s).

At a workshop involving ICF’s expert panel, a similar set of issues were discussed. The main points were that the Regulation is unclear as to the Supervisory Committee’s mandate and powers, especially in relation to OLAF’s conduct in undertaking investigations and what the Supervisory Committee should have access to and how (on what conditions) by way of information and data to enable it to discharge its function. This clarity should be provided through revisions to Regulation 883/2013.

The semi-structured depth interviews with stakeholders were used to explore views on the role and mandate of the Supervisory Committee. Selected points raised by stakeholders during the course of the interviews are summarised in Annex 11. In summary, there was a strong consensus across a range of stakeholders (including OLAF, external stakeholders and the Supervisory Committee itself) that the

\(^{194}\) OLAF Annual Report 2016, p. 41  
\(^{195}\) Article 17(3) of Regulation 883/2013
Supervisory Committee’s role and mandate, as set-out in Regulation 883/2013, are unclear and open to interpretation. These views are consistent with the discussion from the OLAF evaluation conference summarised above. An additional point raised in a number of interviews (which, as noted above, also came up at the workshop involving ICF’s expert panel) is whether the Supervisory Committee should be entitled to information on individual, ongoing cases to allow it to fulfil its mandate. As described in more detail later in this section of the report, the Joint Opinion of the Legal Services of the European Parliament, the Council and the Commission, of 12 September 2016, confirms that Regulation 883/2013 does not empower the Supervisory Committee to review individual investigations.

The online survey (the detailed results of which are presented in Annex 11) provides further stakeholder evidence surrounding the role and mandate of the Supervisory Committee. Survey respondents (OLAF and the European Commission) were asked whether they associate obstacles or shortcomings with certain specific elements of Regulation 883/2013 linked to the governance of OLAF. The most commonly-cited obstacles and shortcomings were associated with the definition of the role and tasks of the Supervisory Committee (with 50 per cent, n=15, citing this as an obstacle/shortcoming), the content of the Supervisory Committee’s recommendations (47 per cent, n=14) and the working arrangements between OLAF and the Supervisory Committee (43 per cent, n=13). Recent developments with regards to the working arrangements are described in the box below.

**Working arrangements between OLAF and the Supervisory Committee**

The working arrangements between the Supervisory Committee and OLAF were established in January 2014 and set out the practical details as regards the information to be provided to the Supervisory Committee by OLAF. When the Supervisory Committee expressed dissatisfaction about the working arrangements, OLAF proposed revising them. Discussions between the Supervisory Committee and OLAF, including the involvement of the former Commission Vice-President Georgieva, commenced towards the end of 2014. On a number of outstanding specific issues regarding the nature and extent of the transmission of information from OLAF to the Supervisory Committee, the Legal Services of the European Parliament, Council and Commission were requested to provide a joint Opinion.

In September 2016, the Joint Opinion of the Legal Services of the European Parliament, the Council and the Commission on three aspects of the relationship between OLAF and its Supervisory Committee was published which clarified certain aspects related to the transmission of information from OLAF to the Supervisory Committee. This Opinion called for OLAF and its Supervisory Committee to organise their collaboration in a jointly agreed framework, fully respecting the applicable legal provisions. Following this Joint Opinion, OLAF set out its position on the outstanding specific issues to which the Joint Opinion related, noting that it...
was waiting for the Supervisory Committee to resume discussions on the working arrangements and to find an agreement to implement the Joint Opinion of the Legal Services of the three Institutions and develop the technical application. Nevertheless, in March 2017, the Supervisory Committee issued a letter which noted that 'Building on the Joint Opinion of the Legal Services of the European Parliament, the Council and the Commission, the Supervisory Committee of OLAF decided, in its plenary meeting of 28 February 2017, to discontinue the working arrangements setting the modalities of transmission of operational information between the Directorate-General of OLAF and the Committee'.

Comments received from OLAF argued that Regulation 883/2013 and the Joint Opinion of the three Legal Services do not cover all aspects of the transmission of information from OLAF to the Supervisory Committee, (such as data protection, timetable and modalities of transmission). Therefore, in OLAF's view, there is still space for, and great utility of, practical arrangements with the Supervisory Committee.

In an interview for this evaluation, a member of the Supervisory Committee suggested that the joint legal opinion and the Regulation be used as working arrangements since any new document would also be subject to interpretation.

4.7.4 Contribution of the Supervisory Committee to the protection of EU financial interests

This evaluation study sought to gather and analyse evidence on the extent to which the provisions of Regulation 883/2013 regarding the Supervisory Committee may have given rise to observable and measurable outcomes and impacts related to the overarching objective of Regulation 883/2013 (as set-out in Article 1 of the Regulation) to ‘step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union’. To test this, ICF undertook contribution analysis as part of this evaluation to try and test certain hypotheses regarding links between inputs/activities, outputs, outcomes and impacts, which are then tested against the data and evidence collected as part of the evaluation.

In this context, ICF analysed data to see whether there is evidence that arrangements for the Supervisory Committee set-out in Regulation 883/2013 contribute to the effective and efficient functioning of the OLAF.

The main findings from the contribution analysis are set out below.

- The new provisions of the Regulation related to the Supervisory Committee did not reinforce the governance of OLAF by the regular monitoring of the implementation by the Office of its investigative function. Although the clarification of the roles of the Supervisory Committee and its modus operandi were welcomed by OLAF, several shortcomings created confusion as to the exact role of the Supervisory Committee as a "monitoring, control, oversight body" and/or a "safekeeping body".

- OLAF stakeholders regarded the Supervisory Committee more as a control body than a guardian of OLAF independence. All stakeholders agreed that external controls can, in theory, positively influence the effectiveness and efficiency of the selection and investigation processes, although in the case of the Supervisory Committee it did not appear to have had a particular influence. Instead, stakeholders agreed that political pressure and/or interferences with OLAF work negatively influenced the efficiency of the selection process as well as the efficiency of OLAF investigative work.

4.7.5 Concluding remarks

A number of stakeholders highlighted the dual role of the Supervisory Committee and the fact that Regulation 883/2013 leaves open to interpretation its mandate/role.
This has generated a degree of confusion given the different interpretations and perceptions of the Supervisory Committee’s role (largely, whether the main role and mandate of the Supervisory Committee is of a supervisory nature – monitoring and supervising its investigative function to ensure its compliance with Regulation 883/2013 – or whether it’s role is more heavily weighted towards supporting and safeguarding the independence of OLAF).

Stakeholders also suggested that this lack of clarity over the Supervisory Committee’s role and mandate had contributed to a deterioration in the relationship (and cooperation) with OLAF.

The most commonly-cited obstacles and shortcomings were associated with the definition of the role and tasks of the Supervisory Committee, the content of the Supervisory Committee’s recommendations and the working arrangements between OLAF and the Supervisory Committee (which were discontinued in March 2017, upon request of the Supervisory Committee). Comments received from OLAF argued that Regulation 883/2013 and the Joint Opinion of the three Legal Services do not cover all aspects of the transmission of information from OLAF to the Supervisory Committee, (such as data protection, timetable and modalities of transmission). Therefore, in OLAF’s view, there is still space for, and great utility of, practical arrangements with the Supervisory Committee.

4.8 Inter-institutional exchange of views

4.8.1 Background

Regulation 883/2013 introduced the inter-institutional exchange of views (Article 16) with the aim of reinforcing the governance of OLAF.

Article 16 of Regulation 883/2013 foresees the organisation of an exchange of views between OLAF’s Director-General and EU institutions once a year, involving the European Parliament, the Commission, and the Council. The Supervisory Committee shall participate in this exchange and representatives of the Court of Auditors, Eurojust and Europol may be invited on an ad hoc basis. The exchange of views aims to discuss, for example:

- OLAF’s strategic priorities;
- the activity reports and opinions of the Supervisory Committee as well as reports of the Director-General;
- OLAF’s relations with IBOAs, Member States, competent authorities in third countries and international organisations; and
- the effectiveness of OLAF’s work.

4.8.2 Purpose of the evaluation

The purpose of the evaluation was to consider evidence surrounding the scope and organisation of the annual exchange of views with the institutions and how this influences the achievement of the objectives of Regulation 883/2013.

4.8.3 Findings

Stakeholders consulted had mixed views with regards to the effectiveness of the inter-institutional exchange of views. The evidence gathered is too limited to allow the evaluator to derive robust findings on the matter. The following evidence is based on a limited number of interviews and qualitative responses from the survey:

- One OLAF staff member, one survey respondent and one member of the Supervisory Committee considered that the inter-institutional exchange of views between the European Parliament, the Council, the Supervisory Committee and the Commission contributes to the transparency of the work of the Office.
• One OLAF staff member and one survey respondent noted that the inter-institutional exchange of views has the potential to discuss strategic and operational matters through an open and constructive dialogue. Although the OLAF interviewee recognised that this potential is somewhat watered-down by political considerations, it is still useful for OLAF to have feedback on the strategic priorities for investigation policies.
• One member of the Supervisory Committee added that a preparation of the meeting, notably with regard to an agenda of the meeting accompanied by key decision points would enhance the usefulness of such annual meetings. Similarly having access to statistical information concerning the follow-up given to the Office’s investigations and to the information transmitted by the Office would provide a context within which a “real” exchange of views could take place.

4.8.4 Concluding remarks

The inter-institutional exchange of views between the European Parliament, the Council and the Commission contributes to the transparency of the work of the Office. The opportunity for an open and constructive dialogue is somewhat watered-down by political considerations coming from all the participants in the exchange.

The preparation of such a meeting with all parties involved around an agenda with key decision points as mentioned in the Regulation would greatly enhance the usefulness of such a meeting.

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200 For reference, the preamble of the Regulation states that “Preparation for the exchange of views should take place at technical level and should include [as necessary], a preparatory meeting between the relevant services of the institutions concerned. When discussing the effectiveness of the work of the Office with regard to the performance of its mandate, the institutions participating in the exchange of views should be able to address statistical information concerning the follow-up given to the Office’s investigations and to the information transmitted by the Office”.

201 Article 19 of the Regulation states that the exchange of views may relate to:

• (a) the strategic priorities for the Office’s investigation policies;
• (b) the opinions and activity reports of the Supervisory Committee provided for under Article 15;
• (c) the reports of the Director-General under Article 17(4) and, as appropriate, any other reports by the institutions relating to the mandate of the Office;
• (d) the framework of the relations between the Office and the institutions, bodies, offices and agencies;
• (e) the framework of the relations between the Office and the competent authorities of the Member States;
• (f) the relations between the Office and the competent authorities in third countries as well as international organisations in the framework of the arrangements referred to in this Regulation;
• (g) the effectiveness of the work of the Office with regard to the performance of its mandate.
5 Evaluation findings – efficiency

The evaluation has assessed efficiency in terms of the extent to which the implementation of Regulation 883/2013 had an impact on the resources of OLAF and its partners’ resources and the use of those resources. In doing so, the evaluation also considered whether the tools available in Regulation 883/2013 for the conduct of OLAF administrative investigations, their follow-up and the successful cooperation with other entities were efficient for the achievement of the Regulations’ overarching objective. The section focusses on the efficiency of changes brought about by the Regulation, not the efficiency of OLAF.

### Summary of evaluation findings – efficiency

- **The operational efficiency of the selection phase has greatly increased under Regulation 883/2003** compared with prior to its implementation in terms of the volume and speed of processing incoming cases. **The speed of the case selection process also significantly increased** compared to the period prior to the entry into force of Regulation 883/2013.

- **The operational efficiency of the investigation process in producing its outputs has greatly increased under Regulation 883/2013** compared to prior to its implementation in terms of the volume of processing of opened and ongoing cases. The evaluation could not conclude on the efficiency of the Regulation in generating the intended results.

- The extent to which the higher standard the procedural guarantees of individuals subject to investigations had a positive impact on the efficiency of investigative function is subject to a debate among stakeholders and especially amongst investigative staff.

- **The cooperation and information exchange between OLAF and its partners was found to be efficient. The level of efficiency in this regard was higher for IBOAS than for Member States and third countries.** National circumstances determined the level of efficiency in cooperating and exchanging information. Member States or third countries with the resource capacity, willingness and being “well-networked” were more efficient in coordinating efforts with OLAF than others.

- **The process for appointing members of the Supervisory Committee was subject to criticism** in that it might have undermined its independence and in return negatively impacted on the performance of its control and supervisory functions. **The mandate of the Supervisory Committee as defined by Regulation 883/2013 was seen as not conducive to its efficiency** because of its ambiguous interpretation. The resources available to the secretariat of the Supervisory Committee appeared to be constrained by its budget and might have led to delays in undertaking some of their duties.

- **OLAF powers are generally considered as clear and sufficient by the majority of interviewees.** Inefficiencies mainly stems from the obligation to follow national rules in case of on-the-spot checks and inspections in Member States (resulting from Regulation 883/2013’s reference to Regulation 2185/96 which subsequently refers to the legislation of the Member States rather than defining/providing its own procedure for on-the-spot checks and inspections) and the time taken in obtaining the authorisation from national authorities to exercise these powers. This is especially the case for on-the-spot checks which are deemed by the majority of interviewees as too long to organise due to the notification of national authorities and OLAF’s internal approval procedures.
5.1 Human and financial resources for implementing Regulation 883/2013

This section describes the context for the assessment of the efficiency of the different components of the Regulation elaborated in the next sections. It describes the evolution of financial and human resources across the Office before and during the evaluation period. This provides a reference for the efficiency considerations related to the Regulation in later sections.

5.1.1 Human resources

The number of OLAF staff members declined by 11% between 2009 (468) and 2016 (415). This decrease involved staff in non-investigative functions. Figure 15 indicates that more than eight in ten staff members are deployed in the investigative fight against fraud, whereas more than one in ten work on the OLAF policy strategy and coordination actions and the rest (one in ten) on administrative support. The share of staff providing administrative support has decreased slightly. Despite the staff reductions, OLAF's capacity to work on core anti-fraud actions (e.g. investigations) has not been affected.

Figure 15. Allocation of OLAF staff by type of activity

![Allocation of OLAF staff by type of activity](image)

Source: OLAF annual report, breakdown not reported on for the year 2014.

5.1.2 Financial resources

Figure 16 and Figure 17 indicate the OLAF budgetary allocations during the 2002-2008 and the 2011-2015 periods. Since 2009, the OLAF annual budget has been stable varying from around EUR 57 million to EUR 59 million a year. Prior to 2009, the OLAF

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202 The year 2009 has been taken as a reference point as the breakdown of the budget for the years 2009 and 2010 is not available from the Annual Reports.
budget\textsuperscript{203} ranged from EUR 38 million to EUR 53 million. Prior to 2009, a yearly average of EUR 32 million was spent on OLAF staff and external agents compared to a yearly average of EUR 42 million during the 2011 to 2015 period. The proportion of budgetary spend on staff did not change due to OLAF’s recruitment of less expensive external agents. The budget allocated to infrastructure and ICT spending varied from a yearly average of EUR 10 million prior to 2009 to EUR 11.5 million thereafter it was relatively stable. Similarly, the budget allocated to expenditures on investigations revolved around EUR 1.6 million before and after 2009.

Figure 16. Allocation of administrative budget for the period - 2002-2008

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure16.png}
\caption{Allocation of administrative budget for the period - 2002-2008}
\end{figure}

Source: OLAF Annual Reports, ICF extrapolation

\textsuperscript{203} Note that on average 95% of the budgeted amounts in the year were committed during that year.
Figure 17. Allocation of administrative budget for the period - 2011-2015

Source: OLAF Annual Reports, ICF extrapolation

5.2 Opening investigations

In preparation of the entry into force of Regulation 883/2013 a new case selection procedure was introduced in 2012. Prior to 2012, it took 6 months on average to select a case or dismiss incoming information. This duration was reduced to less than two months afterwards in line with the target set by the Regulation. The introduction of the ISRU expedited the case selection process and helped to drive efficiencies in terms of the reduced time taken to make case selection decisions, and reduced the workload for investigative staff who would otherwise be involved in evaluation and case selection\(^{204}\). Whilst recognising the increase in efficiency of the case selection process, Stakeholders consulted felt that the requirement under Article 5(4) of Regulation 883/2013 to reach a decision on whether to open an investigation within two months of receipt by the Office of a request is at times insufficient\(^{205}\).

In terms of human resources, the overall increases in the number of investigative staff was associated with a decrease in the number of staff not directly involved in the fight against fraud and anti-fraud policy work. Figure 18 indicates the evolution of the number of investigative staff.

\(^{204}\) Source: OLAF management Information and interviewees (predominantly OLAF staff working across a mix of investigative and non-investigative functions, but also AFCOS representatives, international organisations, spending DGs and other EU IBOAs).

\(^{205}\) It was argued that the tow-month target artificially limits the quality / quantity of the ISRU’s evaluation of incoming information and that it should be possible for the Office to prolong the selection in view of the complexity of the given case would be better.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Figure 18. Allocation of OLAF investigative staff by role, 2009-2016

Source: OLAF data (unpublished)

During the period 2008 to 2016, the number of incoming information grew from 1028 in 2008 to 1136 in 2016, an annual growth rate of 1.26%.

Figure 19. Number of incoming information 2008-2016

Sources: OLAF data (unpublished), ICF calculations, and OLAF Annual Reports

A total of 152 selection cases were opened in 2008 and 219 in 2016 (with a peak of 431 in 2012). This represents an average growth rate of 4.7% a year or a 34% difference in the total number of cases between the 2008-2011 and 2013-2016.

The growth rate was calculated from 2008 to 2015. The calculation of the average growth rate excluded the year 2012 which has had a disproportionate number of cases opened. The assumption is that the backlog of cases was cleared during 2012 leading to an abnormal number of cases being opened.

The period compared are 2008-2011 and 2013-2016.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Figure 20. Number of selection cases opened, 2008-2016

![Number of selection cases opened, 2008-2016](image)

Sources: OLAF data (unpublished), ICF calculations, and OLAF Annual Reports.

The figures for 2012 include 219 investigation cases, already previously under evaluation, opened as a result of the reorganisation of 1.2.2012. Without these cases, the amount of investigation cases opened in 2012 amounts to 212. Coordination cases are not reported in the figure.

Table 5 presents the main indicators for measuring the efficiency of the case selection process. The year 2012 have been disregarded so as to compare the period prior to the implementation of the Regulation with the period after its implementation.

Table 5. Indicators for assessing the efficiency of the case selection process

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Ratio of selection cases opened compared to incoming information</td>
<td>15.2%</td>
<td>17.7%</td>
</tr>
<tr>
<td>Average number of incoming information per investigative staff</td>
<td>6.3</td>
<td>7.9</td>
</tr>
<tr>
<td>Average number of selection cases opened per investigative staff</td>
<td>1</td>
<td>1.4</td>
</tr>
<tr>
<td>Average number of selection cases dismissed per investigative staff</td>
<td>5.3</td>
<td>6.5</td>
</tr>
<tr>
<td>Average duration of the case selection phase (Months)</td>
<td>6.3 months (2008)</td>
<td>1.8 months (2013)</td>
</tr>
<tr>
<td></td>
<td>5.8 months (2009)</td>
<td>2 months (2014)</td>
</tr>
<tr>
<td></td>
<td>6.3 months (2010)</td>
<td>1.7 months (2015)</td>
</tr>
<tr>
<td></td>
<td>6.8 months (2011)</td>
<td>1.7 months (2016)</td>
</tr>
</tbody>
</table>
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Sources: OLAF data (unpublished), ICF calculations, and OLAF Annual Reports. The number of investigative staff for 2008 has been estimated on the basis of the year 2009 to enable comparisons between the two periods.

Most of the indicators presented in Table 5 suggest that the case selection process has been more efficient under Regulation 883/2013 than before. The case selection process maintained the number of cases opened whilst the incoming information increased. OLAF investigative staff were able to process more incoming information, open more selection cases and dismiss more cases than before the Regulation. The higher level of efficiency took place with a new procedure for selecting cases, during organisational transformation characterised by a reduction in staff (although the number of investigative staff increased), and an increasing number of incoming information. In addition, the average duration of the selection phase decreased.

However, the contribution analysis concluded that the selection process has not significantly contributed to increasing the efficiency of the investigative function. The selection process did contribute to dismissing a higher number of incoming cases and avoided the creation of bottlenecks in the investigation function. Although the time taken from incoming information being received to cases being selected decreased, the overall duration of investigations has remained stable and/or slightly decreased depending on whether the indicators for the duration of “cases closed only” or “cases closed and ongoing cases” are considered.

Summary of evaluation findings – opening investigations

The case selection process has been more efficient after the entry into force of Regulation 883/2003 in:

- processing a higher number of incoming information
- opening a higher proportion of incoming cases
- selecting and or dismissing incoming cases much faster than before

The cost effectiveness of the case selection process as measured by the productivity of case selectors also increased compared to before Regulation 883/2003.

Although the selection process has been more efficient in selecting and or dismissing cases quickly, its influence on the investigative function and/or the outcomes of the investigations appears to have been small.

5.3 Investigative process, tools and powers

Regulation 883/2013 clarified the investigative powers entrusted to OLAF and the investigation procedure. These changes were expected to enhance the effectiveness and efficiency of OLAF’s investigative activity. This section first reports on the efficiency of the investigative process and then on the efficiency of investigative tools and related powers.

5.3.1 Efficiency of the investigative process

The average number of OLAF investigative staff declined from 163 in 2009 to 148 in 2011 and rose again to 168 in 2016. The number of investigative staff from 2013 to 2016 increased by 7% compared to the period 2008 to 2012 (see Figure 15). In comparison, as seen in Figure 20, the total number of cases opened increased by 32% between the two periods.

Figure 21, Figure 22 and Figure 23 indicate the volume of investigative work (ongoing cases, closed cases, closed cases with recommendations) between 2008 and 2016. The Figures all show a substantial increase in investigation work during 2013 to 2016 compared to the previous four-year period.
Figure 21. Number of ongoing investigations from 2008 to 2016

When compared period before 2013, the number of closed investigation cases almost doubled in the period from 2012-13 to 2016.

Figure 22. Number of closed investigations over 2008 to 2016 period

When compared to before 2013, the number of closed investigation cases with recommendations almost doubled since 2013.
Figure 23. Number of closed investigations with recommendations over 2009 to 2016 period

![Bar chart showing the number of closed investigations with recommendations from 2008 to 2016.](image)

Sources: OLAF data (unpublished), ICF calculations, and OLAF Annual Reports (investigation cases only – excludes coordination cases)

Table 6 presents the main indicators for measuring the efficiency of the investigative function. 2012 has been disregarded so as to compare the period prior to the implementation of the Regulation with the period after implementation. The estimates of the cost of each ongoing case did not lead to useful findings.

Table 6. Indicators for assessing the efficiency of OLAF investigative function before and after the entry into force of Regulation 883/2013

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Average number of selection cases opened per investigative staff</td>
<td>1</td>
<td>1.4</td>
</tr>
<tr>
<td>Average number of ongoing cases per investigative staff</td>
<td>2.2</td>
<td>3.4</td>
</tr>
<tr>
<td>Average number of closed cases per investigative staff</td>
<td>0.9</td>
<td>1.7</td>
</tr>
<tr>
<td>Average number of closed</td>
<td>0.5</td>
<td>0.9</td>
</tr>
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The cost per ongoing case was calculated using the “investigation budget implementation”, as well as the mission budget implementation from 2012 to 2015. The budget per ongoing case fluctuated from EUR 4,562 to EUR 6,270 with an average of EUR 5,442 per ongoing case. This calculation does not take into account the cost of human resources working on the case.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
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<tbody>
<tr>
<td>cases with recommendations per investigative staff</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average duration (months) of closed case vs. closed and ongoing cases</td>
<td>Period from 2008 to 2011</td>
<td>Period from 2013 to 2016</td>
</tr>
<tr>
<td>Closed cases only</td>
<td>Max = 27</td>
<td>Closed cases only</td>
</tr>
<tr>
<td></td>
<td>Median = 24.4</td>
<td>Median = 23.3</td>
</tr>
<tr>
<td></td>
<td>Min = 22.2</td>
<td>Min = 22.3</td>
</tr>
<tr>
<td>Closed &amp; ongoing cases</td>
<td>Max = 22.4</td>
<td>Max = 18.7</td>
</tr>
<tr>
<td></td>
<td>Median = 20.5</td>
<td>Median = 17.8</td>
</tr>
<tr>
<td></td>
<td>Min = 18.9</td>
<td>Min = 17.2</td>
</tr>
</tbody>
</table>

Sources: OLAF data (unpublished), ICF calculations, and OLAF Annual Reports. The number of investigative staff for 2008 has been estimated on the basis of the year 2009 to enable comparisons between the two periods.

The indicators suggest that investigative staff conducted more investigations in the period since Regulation 883/2013 than before. The overall duration of investigations has tended to remain stable and/or slightly decrease depending on whether the indicators on the duration of investigations take into account “cases closed only” or “cases closed and ongoing cases” are considered.

Table 7 presents the main indicators for measuring the efficiency of the investigative function in generating its intended results. The year 2012 have been disregarded so as to compare the period prior to the implementation of the Regulation with the period after. The ratios reporting on the efficiency of the investigative function in generating its results are not directly comparable\textsuperscript{209}. The ratios were estimated on the basis of several assumptions (see footnote 209. They indicate that the efficiency of OLAF in generating its results have tended to remain stable and or slightly increase. However, the amount recoveries might relate to the period before the implementation of Regulation 883/2013 due to the length of time taken for the recoveries to be effective. Hence, the evaluation cannot conclude on the extent to which the Regulation has been efficient in generating the intended results.

Table 7. Indicators for assessing the efficiency of OLAF investigative function before and after the entry into force of Regulation 883/2013

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Average amounts recommended for recovery per investigative staff (EUR Million) (no time lag)</td>
<td>N/A</td>
<td>3.3</td>
<td>4.4</td>
<td>4.8</td>
</tr>
<tr>
<td>Average amounts recovered per</td>
<td>1</td>
<td>0.9</td>
<td>1</td>
<td>N/A</td>
</tr>
</tbody>
</table>

\textsuperscript{209} Firstly a change in accounting rule meant that the numbers reported in the year 2011 show exceptionally high amounts of recoveries. The amounts of recoveries from 2008 to 2011 have not been calculated in the same manner than the amounts of recoveries from 2012 until 2015. Secondly, the method for arriving to these ratios could have been different. Provided that investigations have a duration of a 2 years and that it takes longer for the defrauded amounts to be recovered.
<table>
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<tbody>
<tr>
<td>investigatory staff (EUR Million) (no time lag)</td>
<td>N/A</td>
<td>0.9</td>
<td>1.1</td>
<td>N/A</td>
</tr>
<tr>
<td>Average amounts recovered per investigative staff (EUR Million) (four-year time lag)</td>
<td>2.8</td>
<td>2.4</td>
<td>3.0</td>
<td>N/A</td>
</tr>
<tr>
<td>Ratio of EUR amounts recovered for 1 EUR of OLAF budget (no time lag)</td>
<td>N/A</td>
<td>2.5</td>
<td>3.0</td>
<td>N/A</td>
</tr>
<tr>
<td>Summary of evaluation findings – investigative tools and powers</td>
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</table>

OLAF powers are generally considered as clear and sufficient by the majority of interviewees. Inefficiencies mainly stem from the obligation to follow national rules in case of on-the-spot checks and inspections in Member States (resulting from Regulation 883/2013’s reference to Regulation 2185/96 which subsequently refers to the legislation of the Member States rather than defining/providing its own procedure for on-the-spot checks and inspections) and time taken in obtaining the authorisation from national authorities to exercise these powers\(^\text{210}\). This is especially the case for on-the-spot checks which are deemed by the majority of interviewees as too long to organise due to the notification of national authorities and OLAF's internal approval procedures. Interviewees also cited the following items as potential source of inefficiencies:

- the OCM, OLAF case management system, which often slows down the investigation process
- Access to forensic data at national level that can be problematic\(^\text{211}\)
- The lack of access to bank accounts\(^\text{212}\).

The extent to which Regulation 883/2013 was efficient in generating

\(^\text{210}\) Note that there is no improvement or decline in efficiency compared to the period pre-implementation of the Regulation.

\(^\text{211}\) A majority of survey respondent disagreed with the fact the statement that "OLAF’s powers are clear regarding undertaking digital forensic operations and considered it as a shortcoming.

\(^\text{212}\) Four survey respondents cited the lack of access to bank accounts as a limitation of OLAF investigative powers.
its intended results could not be ascertained significantly.

Inefficiencies mainly stemmed from the obligation to follow national rules in the case of on-the-spot checks and inspections in Member States (resulting from Regulation 883/2013’s reference to Regulation 2185/96 which subsequently refers to the legislation of the Member States rather than defining/providing its own procedure for on-the-spot checks and inspections) and time taken in obtaining the authorisation from national authorities to exercise these powers. OLAF’s limited access to forensic data and bank accounts were cited as factors limiting the efficiency of the investigation process.

5.4 Procedural rights and safeguards

The Regulation mainly clarified procedural guarantees of individuals (in particular the notion of person concerned). This was expected to not only strengthen the procedural guarantees of individuals subject to investigations but also to enhance the effectiveness and efficiency of OLAF’s investigative activity.

With regard to the first point, the clarification was welcome amongst the wider stakeholder landscape. The Regulation de facto strengthened the procedural rights of the persons under investigations.213

The prevailing view among investigative staff interviewed214 was that the clarification of procedural guarantees was welcome but that it had had a slight negative effect on the efficiency of the investigative function, potentially slowing down the investigative process and/or granting disproportionate rights to the subject of an administrative investigation. Several stakeholders argued that strengthening the procedural guarantee of individual subjects and enhanced efficiency of investigative functions did not constitute conflicting objectives. Affording a high level of procedural rights can improve the legal standing of the case (i.e. the quality and the reliability of the investigative results produced by OLAF) and later on facilitate the follow up of the cases at national level.

Summary of evaluation findings – Procedural rights and safeguards

The Regulation strengthened the procedural guarantees of individuals subject to investigations. The extent to which this had a positive impact on the efficiency of investigative function was subject to a debate among stakeholders and mainly amongst investigative staff.

5.5 Cooperation and information exchange

Overall, the cooperation and information exchange between OLAF and its partners was considered efficient. This was especially so for IBOAS. The factors contributing to greater efficiency in exchanging information and cooperating on OLAF investigations were:

- Clear definitions of irregularities and fraud

213 This was evidenced by the survey results (e.g. 72% of survey respondent (n=85) agreed that the definition of procedural guarantees, as outlined by Article 9 of the Regulation, contributed to strengthening the procedural guarantees of individuals subject to investigations; 80% of survey respondent (n=85) agreed that The procedural guarantees as outlined in the provisions of Article 9 of the Regulation are clear; and 64% of survey respondents (n=84) agreed that the definition of confidentiality and data protection provisions, as outlined by Article 10 of the Regulation, contributed to strengthening the protection of personal data of individuals subject to investigations; last 74% of survey respondents (n=85) agreed that The provisions of the Regulation regarding confidentiality and data protection (Article 10) are clear.

214 Five investigative staff interviewed confirmed the statement.
• Clear roles and division of responsibilities between OLAF and its partners
• Codification of processes for the coordination of investigative efforts and information exchange.
• Structured and clear channels of communication.
• Harmonised investigative practices
• Mutual trust between institutions

This section reports on the efficiency cooperation and information exchange as perceived by three types of stakeholders: Member States; IBOAs; and, third countries and International Organisations.

5.5.1 Member States

AFCOS are the first point of contact at Member State level for the coordination of investigative efforts as well as sending request for assistance. The level of efficiency related to cooperation and information exchange depends on the pre-existence of established and structured cooperation and communication channels. Such features usually involves role and tasks of AFCOS at national level, an appropriate scale and nature of the powers of the AFCOS, and, to a lesser extent, the presence of administrative arrangements. As AFCOS’ competences and powers differ from one country to another so does their efficiency in cooperating and exchanging information with OLAF.

Illustrative examples of efficient practices cited by the stakeholders consulted include:

• The harmonisation of definitions, concepts and modus operandi
• Cooperation arrangements
• The tools supporting cooperation and information exchange (such as AFIS)

Illustrative examples of inefficiencies related to cooperation and information exchange cited by the stakeholders consulted include:

• Delays in identifying the right interlocutor or authorities at national level
• Lack of understanding of some judicial authorities of the case and or the speed at which judicial authorities (can) take action after an OLAF recommendation.

215 The Clarity of role and tasks given to AFCOS is a factor that positively influence the efficiency of OLAF’s application of the Regulation with regard to implementation of cooperation tools. (37 entries out of 274 from survey respondents)
216 The scale and nature of the powers of the AFCOS is a factor that positively influence the efficiency of OLAF’s application of the Regulation with regard to implementation of cooperation tools. (31 entries out of 274 from survey respondents)
217 Presence and quality of administrative arrangements AFCOS is a factor that positively influence the efficiency of OLAF’s application of the Regulation with regard to implementation of cooperation tools. (25 and 28 entries respectively out of 274 from survey respondents)
218 The contribution analysis concluded that “The pre-existence of ACAs is a condition for increased efficiency of the cooperation and coordination on OLAF investigations but it is not sufficient in itself to have an impact on the achievement of the results of an OLAF investigation”.
219 Other factors limiting the efficiency cited by stakeholders were the occasional lack of willingness of national judicial authorities to cooperate with OLAF, which may stem from a variety of reasons, including political (for sensitive cases); the on-going competence-related issues; the judicial secrecy in national criminal investigations.
• Unproductive time lag between AFCOS being notified of a request for assistance and an official letter reaching out to the right authority
• Lack of good will and or ability to provide OLAF with high quality information
• Member States’ political priorities or constraints on resources

5.5.2 EU IBOAs

The cooperation and level of information exchange between OLAF and IBOAs was deemed as efficient. Enhanced cooperation with IBOAS via FPDNet meetings led to a clarification OLAF’s expectations vis-a-vis IBOAs and has contributed to an improvement in investigative practices and cooperation. This has mainly taken place thanks to the exchange of best practices between EU institutions as well as improved inter-institutional dialogue. Other factors which have led to increased efficiency are:

• IBOAs' willingness and ability to provide OLAF with high quality information.
• Anti-fraud legislation and frameworks at EU-level other than the Regulation 883/2013.

One factor negatively influencing the efficiency of cooperation and information exchange was political, in particular the diverging interpretation of OLAF powers in relation to specific EU institutions (e.g. European Parliament, Council of the European Union) which could limit OLAF powers in specific cases.

5.5.3 Third countries and international organisations

The cooperation and level of information exchange between OLAF and third countries and International Organisations was seen as more efficient when specific cooperation arrangements were in place. However, the establishment of cooperation arrangements was considered not sufficient in itself to have an impact on the achievement of the results of an OLAF investigation. Factors which have led to an increase in efficiencies were (as in the case of national authorities):

• Third countries' willingness and ability to provide OLAF with high quality information
• Third countries’ political priorities
• Third countries’ resources

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220 Member States’ willingness and ability to provide OLAF with high quality information was cited as a factor with positive influence on the efficiency of OLAF’s application of the Regulation with regard to exchange of information and cooperation in the context of follow-up to an investigation (81 entries out of 272).

221 Member States’ political priorities or constraints on resources was cited as a factor with negative influence on the efficiency of OLAF’s application of the Regulation with regard to exchange of information and cooperation in the context of follow-up to an investigation (21 and 26 entries respectively out of 272).

222 Note that and the inter-institutional exchange of views contributed to better cooperation even if it is not in its prime objectives.

223 This was also corroborated by the contribution analysis.

224 IBOAs’ willingness and ability to provide OLAF with high quality information was regarded as a positive factor influencing efficiency of OLAF’s application of the Regulation with regard to exchange of information and cooperation in the context of follow-up to an investigation (46 entries out of 272 from survey respondents).

225 Anti-fraud legislation and frameworks at EU-level other than the Regulation was seen as a positive factor influencing OLAF’s application of the Regulation with regard to exchange of information and cooperation in the context of investigations. (54 entries out of 296 from survey respondents).
The obstacles to greater efficiency lie in the fact that third country cooperation with OLAF is done on a voluntary basis. As obligations to cooperate are difficult to enforce in practice, there is no real sanction in the case of absence of cooperation and information exchange. Hence cooperation arrangements with third countries should be developed and updated.

**Summary of evaluation findings – cooperation and information exchange**

The cooperation and information exchange between OLAF and its partners was found efficient. The level of efficiency in this regard was higher for IBOAS than for Member States and third countries. The factors contributing to a greater efficiency in exchanging information and cooperating on OLAF investigations were:

- Clear definitions on irregularities and fraud
- Clear roles and responsibilities between OLAF and its partners
- Codification of processes for the coordination of investigative efforts and information exchange.
- Structured and clear channels of communications
- Standardised investigative practices
- Mutual trust between institutions

National circumstances determined the level of efficiency in cooperating and exchanging information. Member States with the resource capacity, willingness, as well as being “well-networked” were more efficient in coordinating efforts with OLAF than others.

**5.6 Supervisory Committee**

This section reports on the composition and mandate of the Supervisory Committee and their influence on the efficiency of the workings of the Supervisory Committee and its relations with OLAF.

Members of the Supervisory Committee (SC) are appointed by the European Parliament, the Council and the Commission, the bodies that are meant to safeguard the independence of OLAF investigative work, including during internal investigations. Issues around potential conflict of interests in the appointment of SC Members were raised by several interviewees. For instance the appointment of the members of the SC was seen as lacking clear criteria for appointing them into the position. Some stakeholders considered that some of the previous members of the SC were ill-equipped for the job and/or lacked professional qualification and/or experience to fulfil their duties. This might have hindered the capacity for collaborating with OLAF. These issues appeared to have been solved in 2017 with the appointment the new members of the Supervisory Committee.

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226 Those three factors were considered to positively influence the efficiency of OLAF’s application of the Regulation with regard to exchange of information and cooperation in the context of follow-up to an investigation (24, 7 and 5 entries respectively out of 272)

227 These factors of efficiency have been cited by the survey respondents.

228 The potential issues related to the fact that candidates for becoming members of the Supervisory Committee had also applied for the position of Director General of the Office or that the appointees had strong links with Members of the European Parliament.

229 To the question “The appointment and renewal procedure for members of the SC are clear” 26% of survey respondents disagreed while 19% agreed. The majority of respondents did not know and/or responded neither agree or disagree. (n=27)

230 To the question “The appointment and renewal of the members of the SC is transparent” 22% of survey respondents disagreed while 15% agreed. The majority of respondents did not know and/or responded neither agree or disagree. (n=27)
The mandate of the SC as defined by Regulation 883/2013 was not conducive to its efficiency. The section on effectiveness already concluded that Regulation 883/2013 leaves open to interpretation the mandate and role of the SC. The lack of a shared understanding on the role and tasks of the SC did not lead to a more efficient cooperation between the SC and OLAF. Similarly, the Regulation 883/2013’s definition of the respective functions of the SC and those of the Office was not considered by stakeholders to have improved the efficiency in OLAF’s investigative function. The contribution analysis concluded that the new provisions of the Regulation related to the SC did not reinforce the governance of OLAF by the regular monitoring of the implementation by the Office of its investigative function. OLAF stakeholders regarded the SC more as a control body than a guardian of OLAF independence. All stakeholders agreed that external controls can, in theory, positively influence the efficiency of the selection and investigation processes, although in the case of the SC it did not appear to have had a particular influence. Instead, stakeholders agreed that political pressure and/or interferences with OLAF work negatively influenced the efficiency of the selection process as well as the efficiency of OLAF investigative work.

Resources made available to the SC were considered by SC members as insufficient. The budget of the Supervisory Committee depended directly on the OLAF budget, potentially undermining its independence, which in 2017 was no longer the case. Members also complained that the secretariat of the SC was understaffed to carry out its role efficiently, having to rely on the legal service of the European Commission on specific legal matters. Issues arose when the secretariat was unable to work in one of the official language of a Member State and or on complex legal matters. This might have led to delays in responding and preparing for plenary meetings and/or undertaking their duties. One OLAF interviewee viewed this criticism as unfounded arguing that workload of the secretariat did not justify more resources.

**Summary of evaluation findings – Supervisory Committee**

The process for appointing members of the SC was subject to criticism in that it might have undermined its independence and in return negatively impacted on the performance of its control and supervisory functions.

The mandate of the SC as defined by Regulation 883/2013 was seen as not conducive to its efficiency. This was because Regulation 883/2013 left open to interpretation the mandate and role of the SC. However, all stakeholders agreed that external controls can, in theory, positively influence the efficiency of the selection and investigation processes.

The resources available to the secretariat of the Supervisory Committee appeared to be constrained and might have led to delays in undertaking some of their duties such as the preparation to meetings.
Evaluation findings – coherence

This section focuses on the extent to which Regulation 883/2013 provides OLAF with a coherent legal framework to accomplish its investigative tasks and to achieve its specific objectives (internal coherence). It examines the extent to which the main elements of the Regulation produce complementarities and synergies or, on the contrary, result in overlaps or inconsistencies. This section also explores the extent to which Regulation 883/2013 is coherent with other EU anti-fraud instruments and policy developments (external coherence).

Summary of evaluation findings – coherence

- Evidence related to the internal coherence of the key elements of the Regulation indicates that, overall, they provide a coherent framework for OLAF investigative tasks. However, a majority of stakeholders (OLAF investigative and non-investigative staff, Commission services, EU control bodies, EU IBOAS, former Supervisory Committee members, national judicial and managing authorities) consulted for his evaluation pointed out that there is scope to improve the coherence and consistency between:
  - Regulation 883/2013 and the more practical guidance provided in the GIPs. The GIPs are an internal document aimed to provide practical guidance to OLAF staff on the conduct of OLAF investigations and thus do not have the same legal value as the Regulation. While generally acknowledging the contribution of the GIPs to greater consistency in OLAF’s investigative acts, reports and recommendations, OLAF investigative and non-investigative staff also noted instances where the GIPs are more precise on certain procedures than the Regulation. This could potentially lead to inconsistent application of the Regulation in practice.
  - The procedural guarantees under Article 9 of Regulation 883/2013 and the administrative nature of OLAF’s investigations. While the introduction of provisions on procedural rights within the Regulation may have improved the credibility, transparency, accountability and quality/admissibility of OLAF’s investigations, the majority of stakeholders suggested that Article 9 introduced a set of rights and safeguards that are disproportionate to the administrative nature of OLAF’s investigations. Given the role of OLAF reports in criminal proceedings, the rights/guarantees under existing EU law which are reflected in Article 9 are considered by ICF to be proportionate, although they may not be seen as coherent if viewed purely through the lens of an administrative investigation (without due regard to the potential role of OLAF’s investigations in criminal proceedings).
  - The external controls and complaints mechanisms. A majority of stakeholders consulted for this study (OLAF investigative and non-investigative staff, EU control bodies) highlighted that the number of external controls (by the EDPS, Ombudsman, CJEU) and the internal complaints mechanisms created overlaps and duplications in the scope of their control and lacked coordination. While highlighting the necessity of these controls, stakeholders suggested finding a mechanism to ensure hierarchy and/or better consistency between them.

- Evidence related to the external coherence of the key elements of the Regulation indicates that:
A lack of harmonised terminology and concepts in Regulation 2185/96 and Regulation 2988/95 may lead to incoherent practices and divergent interpretations of OLAF's investigative tools in external investigations (this was suggested by OLAF investigative and non-investigative staff).

Potential inconsistencies may stem from the application by OLAF investigators of provisions of Regulation 515/97 and Regulation 883/2013 as customs investigations carried out by OLAF are not limited by the provisions of Regulation 515/97 and can also be carried out in the frame of Regulation 883/2013. OLAF investigators suggested aligning certain requirements in both Regulations to the extent that specificities of the assistance and coordination cases in customs matters are taken into account.

Coherence issues exist between the application of OLAF’s investigative powers and tools in internal investigations as they are provided in Regulation 883/2013 and the provisions of administrative arrangements signed with certain EU IBOAs and internal decisions issued by EU IBOAs.

There are no potential inconsistencies between Regulation 883/2013 and future data protection rules regulating the processing of personal data by EU IBOAs as the characteristics of OLAF investigations were taken into account at an early stage of the elaboration of the proposal amending Regulation 2001/45.

There are potential overlaps between the mandate of the Supervisory Committee and the proposal on the establishment of a Controller of Procedural Guarantees.

The future relationship between EPPO and OLAF is in part governed by wording of Article 101 of the proposed EPPO Regulation to avoid any overlaps between the mandates of the two Offices.

6.1 Internal coherence of Regulation 883/2013

Internal coherence in this context refers to the extent to which the different elements of Regulation 883/2013 operate within a coherent legal framework. It also refers to the extent to which these elements enable the Regulation to achieve a balance and consistency between procedural guarantees and investigative powers, and between independence, cooperation, supervision and control.

6.1.1 Impact of the Guidelines on Investigation Procedures on a coherent internal legal framework for OLAF investigative tasks

This section assesses, based on evidence gathered during this evaluation, the impact that the Guidelines on Investigation Procedures (GIPs) has on the coherence and consistency of the application of the key elements of the Regulation.

The aim of the GIPs is to complement the Regulation by providing for more detailed procedural rules guiding OLAF's investigative actions on aspects such as the different stages of an investigation, categories of investigation activities, rules on necessary authorisations and the legality checks during an investigation. As the GIPs are internal rules adopted to provide practical guidance to the staff of the Office on the conduct of
investigations and the procedural guarantees and rights of persons concerned or witnesses, they do not have the same legal value as the Regulation and do not create nor alter any rights or obligations arising under the Regulation.\textsuperscript{231} It was acknowledged that they contribute, to a certain extent, to greater consistency in OLAF’s investigative acts, reports and recommendations.\textsuperscript{232}

However, as the GIPs are publicly available, OLAF non-investigative staff referred to the need to clarify any differences between the GIPs and the Regulation to avoid any legal contestation and to ensure legal certainty for both OLAF investigators and persons concerned by an OLAF investigation. Indeed, a number of differences between Regulation 883/2013 and the GIPs exist as certain procedural requirements added in the GIPs go beyond the provisions or obligations of the Regulation and are perceived by OLAF investigators as creating additional administrative burden.\textsuperscript{233} These are:

- **Distinction between person concerned and witness in an external investigation.** If a person concerned is identified during an on-the-spot check (and not before an on-the-spot check), the procedural rules have to be respected (for example authorisations, obligation to inform), creating operational challenges and additional delays in an investigation. An investigator can then take a statement of a witness (which implies not asking questions) or interview a witness. However, a witness could potentially incriminate him/herself in a statement or during an interview. Article 16(6) of the GIPs provide that this statement or interview cannot be used against the witness, an obligation which is not specified in the Regulation (Article 9).

- **Reports on the investigative activities following an on-the-spot check.** Article 14(6) of the GIPs indicate that the participating national inspectors should countersign the report of the activities undertaking during the on-the-spot check and that this report should be drawn in accordance with the applicable rules of the Member States. In the view of certain OLAF investigators, this is an additional requirement which is not foreseen in the Regulation and creates operational challenges in practice. It appears to be rare that national authorities accompany OLAF investigators during the entirety of on-the-spot checks and as a result, they rarely countersign a report of a procedure they did not witness. In their opinion, this procedural requirement is not necessary as it would imply that a third person should agree on a report of investigative activities that were not done through coercion but on a voluntary basis. In principle, the countersigning of the report by the economic operator should be sufficient.

- **Missions in third countries.** Regulation 883/2013 mentions in a few instances the possibility of conducting investigations in third countries, while also making references to the application of Regulation 2185/96 and Regulation 2988/95 on the conduct of on-the-spot checks in third countries.\textsuperscript{234} The GIPs provide for additional clarifications on the conduct of these missions that are not included in the Regulation.\textsuperscript{235} OLAF investigators held the view that these clarifications and the fact that the GIPs impose additional authorisations (such as obtaining the cooperation of national authorities of third countries before carrying out a

\textsuperscript{231} Recital 18 and Article 17(8) of Regulation 883/2013.
\textsuperscript{232} Interviews with OLAF investigative and non-investigative staff.
\textsuperscript{233} Interviews with OLAF investigative staff.
\textsuperscript{234} Articles 1(1)(b) and 3(1) of Regulation 883/2013.
\textsuperscript{235} Article 17 GIPs.
mission in third countries) represents an additional operational burden not adapted to the needs of a mission in third countries.

A number of OLAF investigators interviewed referred to the need to adapt or update the GIPs in light of the numerous additional guidelines and instructions adopted in recent years. With practice and implementation of Regulation 883/2013, the GIPs did not provide sufficient guidance on certain points of the Regulation, notably on points where the Regulation refers to the (divergent) laws and practices of Member States and the points raised above. Suggestion was made that, if amended, the GIPs should become more of a ‘procedural code’ of OLAF investigations in the future on the model of the former OLAF Manual before 2012, thus centralising references to various guidelines, instructions, relevant EU legislation and Regulation 883/2013 where needed. A few other OLAF investigators were however of the view that the GIPs should remain a guiding document. Due to the procedure to amend the GIPs and the necessity to retain some flexibility in the application of investigation procedures that the instructions address in practice, a ‘consolidated’ version of the GIPs would not bring additional benefits.

6.1.2 Balance between procedural guarantees and OLAF investigative powers

Strengthening the procedural guarantees of individuals subject to an OLAF investigation and associated safeguards is one of the major changes brought about by Regulation 883/2013. The findings of this section should be reviewed alongside Section 4.5 of this report which presents evidence on the implementation in practice of provisions regarding procedural guarantees in the Regulation and the GIPs. The rights provided in Article 9 concern to a large extent case law and practices that existed before the entry into force of the Regulation. Nonetheless, Regulation 883/2013’s inclusion of a clearer set of rules on procedural guarantees and safeguards was widely acknowledged as a significant improvement by a wide range of stakeholders consulted for this study.

This section will analyse aspects of the procedural guarantees set out in the Regulation that bring challenges to the balance between them and the scope of OLAF’s investigative powers. These challenges derive mainly from the dual nature of OLAF’s investigative measures, OLAF’s administrative investigative powers and the potential evidentiary value of OLAF’s reports in national law. Evidence gathered during this evaluation shows that the main instances where these challenges arise are related to the right to be informed, the opportunity to comment and its deferral, and the collection of forensic data.

6.1.2.1 ‘Dual nature’ of OLAF’s investigative activities

The coherence challenges appearing between the procedural guarantees and OLAF investigative powers stem primarily from the ‘dual nature’ of the Office’s investigative acts: OLAF administrative investigations are also conducted on potential criminal offences such as fraud or corruption. Additionally, its reports and recommendations, albeit not binding, may also be sent to national judicial authorities, hence connecting the issue of ensuring the admissibility of evidence collected during an investigation with that of the respect of procedural guarantees.

236 Interviews with OLAF non-investigative staff.
237 Interviews with OLAF investigators.
239 Interviews with OLAF staff, EU IBOAs, Member States’ judicial authorities and AFCOS.
240 OLAF Director-General, Commission services and Supervisory Committee representatives at OLAF’s Conference on 1-2 March 2017, interviews with OLAF investigative and non-investigative staff.
Generally, procedural guarantees in criminal investigations are set at a higher threshold as a result of the scope of the investigative powers attributed to public authorities investigating criminal offences.\(^{241}\) In comparison, procedural guarantees in administrative investigations are usually set at a lower level as the level of intrusion and interference with the rights of individuals is less significant. This difference was generally highlighted by a number of OLAF investigators consulted on the balance between procedural guarantees and OLAF investigative powers: in their view, aspects of procedural guarantees and safeguards introduced by the Regulation were considered as commensurate with those guaranteed in national criminal procedures and/or set higher standards than those prescribed in similar administrative investigations in Member States. Other stakeholders consulted at EU level echoed this point by referring to the investigative powers of other international bodies carrying out administrative investigations (e.g. the EIB, UN bodies, World Bank) which have a lower level of control on their investigative actions and which do not have their investigative powers bound by a legislative instrument of a similar nature as Regulation 883/2013.\(^{242}\)

However, as mentioned above, the specific nature and scope of OLAF’s administrative investigations should be taken into account when assessing the balance between the level of procedural guarantees and the scope of OLAF’s investigative powers, as well as the fact that, legally, most of the procedural guarantees listed in Article 9 had to be complied with by the Office before the entry into force of the Regulation.

One of the main justifications to include these rights more clearly in the Regulation stemmed from the transmission of OLAF’s reports and recommendations to national judicial authorities, among other recipients. It was affirmed that the content of Article 9 of Regulation 883/2013 as the rights contained therein would thus enhance the legitimacy of OLAF investigations and ensure the admissibility of OLAF final reports as evidence in national judicial proceedings.\(^{243}\) As analysed in section 4.4.3, over the period 2008-2016, 60 per cent of OLAF’s recommendations were judicial recommendations thus confirming to a certain extent this justification.

However, the findings developed below present some limitations to this reasoning. Indeed, based on an analysis of the examples raised by OLAF investigators regarding a potential lack of balance between the level of procedural guarantees and the extent of OLAF’s investigative powers, the most contentious provisions are those contained in Articles 9(2) regarding the right to be informed for a person concerned or a witness of an OLAF interview and in Article 9(4) on the opportunity to comment and its deferral.

### 6.1.2.2 Article 9(2): the right to be informed

As analysed in section 4.5 of this report, Article 9(2) raises questions surrounding the practicalities and resource implications associated with the notice period(s) under the Regulation. OLAF investigators interviewed noted the administrative burden and the number of authorisations associated with this procedure, calling for additional clarity in the Regulation and the GIPs on the scope of this provision. While the administrative burden is not necessarily an indicator of a lack of balance between procedural

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\(^{242}\) Interviews with OLAF investigative and non-investigative staff, Commission services and other EU IBOAs. See also findings of the case study presented in Annex 7 and publication of Luchtman, M.J.J.P. and Vervaele, J.A.E. (eds), Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB), 2017, Utrecht University.

guarantees and investigative powers, a lack of balance may be detected in external investigations where the cooperation of the person concerned with OLAF investigators remains voluntary, as OLAF conducts administrative investigations and the investigative powers do not provide for such an obligation to cooperate with OLAF investigators. Unlike in internal investigations where EU staff have an obligation to cooperate with OLAF based on the provisions of the Staff Regulations, a person concerned in an external investigation retains the possibility to refuse to cooperate with OLAF. In the view of OLAF investigators and non-investigative staff consulted, the investigative powers of the Office in this context should be equivalent to or aligned to the protection afforded to the individual. 244

6.1.2.3 Article 9(4): the opportunity to comment and its deferral

As regards Article 9(4), uncertainties were pointed out by OLAF investigators on the implementation of the obligation to inform a person concerned and the deferral of this obligation to avoid jeopardising an ongoing investigation or findings that would later be transmitted to a national judicial authority. Several conflicting interpretations of this right were found during stakeholder consultations and discussed during OLAF’s conference in March 2017.

Some stakeholders were of the view that this right is proportionate to OLAF’s investigative powers as it may be considered as an equivalent of the right to be heard in criminal proceedings. 245 In particular, they considered that a deferral of the opportunity to comment, in particular in cases where a case is closed without providing the person concerned the opportunity to comment, would be an equivalent of a denial of the right to be heard. In practice, a number of stakeholders interviewed at EU and national level noted that the opportunity to comment provided in Article 9(4) is necessary as OLAF investigations and recommendations may have a significant impact on the situation of persons concerned that may have to recover funds, be excluded from future contracts, termination of ongoing grands and criminal sanctions. 246 Commission services interviewed highlighted a number of instances of cases where the respect of the opportunity to comment has supported them during the adversarial proceedings that they have to follow when implementing an OLAF (financial) recommendation before national authorities: the procedure is more procedurally sound when the person concerned has already been given the opportunity to comment.

It should be noted that, as for the right to be informed, a distinction exists between the application of the opportunity to comment, and in particular its deferral, in internal and external investigations. In internal investigations, the deferral of this right requires the approval of the Secretary General or the equivalent authority of the EU IBOA to which the member or EU official concerned by an internal investigation belongs. 247 In external investigations, the review of the decision to defer the opportunity to comment is performed internally by the ISRU. Evidence collected from interviews of OLAF staff indicates that such deferral is in practice exceptional, strictly reviewed by the ISRU and internal instructions indicate a compulsory list of conditions to be met before an investigation can be closed without giving the person concerned the opportunity to comment. For a number of stakeholders, the implementation of the opportunity to comment in practice raises several legal uncertainties, also due to the

244 Interviews with OLAF investigators and workshop with OLAF staff in April 2017.
246 Interviews with OLAF non-investigative staff, Commission services, national managing authorities.
247 Article 18-3 of the GIPs.
variety of situations that may be encountered in practice, and called for a clearer rules
for the application of this right. A suggestion was also made to strengthen the controls
over the application of the deferral to comment by including an additional external
review of the application of this right, a function which could be endorsed by the
Supervisory Committee.

Other stakeholders had a different interpretation of the opportunity to comment,
distinguishing it from the right to be heard as analysed above.\textsuperscript{248} The reasoning
is based on existing case law of the Court of Justice that ruled that OLAF investigative
measures and subsequent reports and recommendations do not affect the rights of a
person concerned by an OLAF investigation.\textsuperscript{249} Additionally, this reasoning is
reinforced by the provisions of the Regulation where the evidentiary value of OLAF’s
reports is not ensured in front of national authorities but subject to the application of
national legislation.\textsuperscript{250} The practice of OLAF investigators and national authorities
consulted confirm that, generally, as OLAF recommendations are not binding, the
evidence contained in OLAF’s reports will be submitted to an adversarial procedure
before competent authorities at a national level or a Commission service, as they are
the competent authorities to take a final decision on how to respond to the
recommendation. These national authorities or Commission services would usually
start a procedure collecting evidence as per provisions of national legislation or EU
Regulations applicable to the procedure.

This state of play on the admissibility of evidence contained in OLAF’s reports opens a
debate on the level of rights that a person concerned by an OLAF investigation should
have access to. As an OLAF report does not necessarily lead to a person being indicted
or to a recovery of funds, OLAF investigators should have the possibility to use the
deferral to comment. Other stakeholders suggested to remove this right from the
Regulation altogether: it adds an ‘unnecessary complication’ to OLAF’s investigations
as long as OLAF has only administrative investigative powers and no coercive powers,
and as long as the evidentiary value of OLAF’s reports is not clearer.\textsuperscript{251}

6.1.2.4 Procedural safeguards in the context of the collection of digital
forensic operations

A last point should be mentioned in this section concerning the collection of digital
forensic operations carried out by OLAF in the context of on-the-spot checks.\textsuperscript{252} As
analysed in section 4.2.2 of this report, the collection of forensic data in the context of
administrative investigations must be carried out in ‘compliance with national legal
provisions’. Interviews with OLAF staff indicated that such forensic operations are not
possible in many Member States: the use of such investigative power is often subject
to a judicial authorisation, due for example to the interference of this investigative
power with the right to privacy. The scope of this power is therefore unclear.\textsuperscript{253}

\textsuperscript{248} Interviews with OLAF investigators and workshop with OLAF staff in April 2017; interviews with national
judicial authorities; national judicial representative at OLAF’s conference March 2017.

\textsuperscript{249} For example, see judgments of the Court of First Instance in case T-193/04, Tillack v Commission of 4

\textsuperscript{250} Whereas clause (31) and Article 11 of Regulation 883/2013.

\textsuperscript{251} National judicial representative at OLAF’s conference in March 2017; Interviews with OLAF investigative
and non-investigative staff.

\textsuperscript{252} Art. 4(2) of Regulation 883/2013 (as regards internal investigations) and Art. 7(1) of Regulation 2185/96
(as regards external investigations).

\textsuperscript{253} See also Luchtman, M.J.J.P. and Vervaele, J.A.E. (eds), Investigatory powers and procedural safeguards:
Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities
(ECN/ESMA/ECB), 2017, Utrecht University, p.41.
Procedural guarantees during digital forensic operations are addressed, to a certain extent, in Guidelines on Digital Forensic Procedures adopted in 2013 and adopted in 2016. The 2016 Guidelines introduced a number of clearer safeguards, applicable to collection of forensic data in both internal and external investigations, in particular regarding collecting information on devices that may be considered as private devices or containing information of ‘a legally privileged nature’. A procedural mechanism is foreseen in both internal and external investigations whereby, after the device has been seized by OLAF, a meeting is organised between the person concerned and OLAF to resolve any issue.

A number of stakeholders at EU level noted that rules on the conduct forensic operations, due to their intrusive nature and possible interference with the right to privacy, should be more clearly spelled out in the Regulation. While the adoption of the Guidelines were noted as a positive improvement towards more legal certainty, it is only an internal document which does not bear the same legal value as a Regulation.

6.1.2.5 Conclusion

The main challenges relating the balance between procedural rights provided in Regulation 883/2013 and OLAF’s investigative powers concern Articles 9(2) and 9(4). Due to the dual nature of OLAF’s investigative measures, in-between administrative and criminal law areas, the application of certain procedural guarantees call for stronger investigative powers (e.g. obligation to cooperate on economic operators in external investigations) and/or a change to the evidentiary value of OLAF’s reports before national authorities.

Regarding this last point, the opportunity to comment and its deferral is key to the legal debate surrounding the balance of procedural guarantees with OLAF’s investigative powers. It is also closely linked to the question whether procedural guarantees provided for in Article 9 of the Regulation have improved the admissibility of evidence before national (judicial) authorities. While evidence has been gathered regarding the usefulness and to some extent the necessity of this right for procedures in the implementation of financial recommendations, its importance in the implementation of judicial recommendations is more limited: as per national legislation, most national judicial authorities carry out their own investigative measures and only a minority accepts OLAF reports as evidence in national proceedings. Based on this state of play, suggestion was made to either change the evidentiary value of OLAF’s reports in national proceedings or deleting the opportunity to comment from the Regulation.

Finally, the unclear scope of application of digital forensic operations, both in its material scope (e.g. the media concerned) and ‘territorial’ scope (it is an investigative power subject to judicial supervision in most Member States), calls for a clarification of this investigative power in the Regulation as well as clearer procedural safeguards in the Regulation.

6.1.3 Balance between independence, cooperation, supervision and control of OLAF investigative powers

The findings presented in preceding subsections suggested a potential tension between the extent and nature OLAF’s investigative powers and the procedural guarantees granted to individuals subject to an investigation. Therefore, this section examines the extent to which Regulation 883/2013 has achieved a proper balance

254 Articles 5 and 6 of the Guidelines on Digital Forensic Procedures.
255 Interviews with OLAF non-investigative staff and Commission services.
between OLAF’s independence, cooperation, supervision and control mechanisms. More specifically, this section assesses the coherence of the overlapping of external controls on OLAF investigative measures.

An incoherent aspect of Regulation 883/2013 raised by stakeholders raised by stakeholders consulted for this study is the different external controls that apply to OLAF’s investigative acts, in addition to the internal legality checks and the complaints addressed to OLAF’s Director-General, namely:

- the Court of Justice of the EU (CJEU);
- the European Ombudsman; and
- the European Data Protection Supervisor (EDPS).

The table below shows an overview of both internal and external control mechanisms on OLAF investigative measures throughout the different investigation phases. Political control over OLAF exercised by the EP and the inter-institutional exchange of views are not included in the table.

**Table 8. Internal and external control mechanisms**

<table>
<thead>
<tr>
<th>Phases of an investigation</th>
<th>Internal controls</th>
<th>External controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selection / Opening of an investigation</td>
<td>Prior legality check by ISRU on a proposed investigative measure and opinion submitted to the Director General</td>
<td>Ombudsman EDPS CJEU</td>
</tr>
<tr>
<td></td>
<td>Decision by the DG to open or dismiss a case</td>
<td></td>
</tr>
<tr>
<td>On-going investigation</td>
<td>Legality check by ISRU (systematic review of the legality, necessity and proportionality of the proposed measure) and opinion to the OLAF DG</td>
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<tr>
<td></td>
<td>Authorisation to conduct and investigative measure by OLAF DG</td>
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<td></td>
<td>Legal advice by OLAF legal unit (C4)</td>
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<tr>
<td></td>
<td>OLAF internal complaints procedure: Following a recommendation of the Supervisory Committee, OLAF has formalised its internal complaints procedure which is now published on its website</td>
<td></td>
</tr>
<tr>
<td></td>
<td>OLAF Data Protection Officer</td>
<td></td>
</tr>
<tr>
<td>Review phase / Closure of an investigation</td>
<td>Legality review by ISRU of OLAF investigative measures after the completion of an investigation and before the adoption of the final report and recommendations: review of compliance with legality, necessity and proportionality and that the respect of the procedural rights of persons concerned</td>
<td>ECA Ombudsman EDPS CJEU</td>
</tr>
<tr>
<td></td>
<td>OLAF Director General adopts the final report and recommendations or closing the case after Unit 01 has issued an opinion.</td>
<td>Supervisory Committee</td>
</tr>
</tbody>
</table>

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256 Interviews with OLAF investigators and non-investigative staff, Commission services representatives.

257 This is discussed in further detail section 4.8.

258 The Supervisory Committee is involved to the extent it has a general role to monitor and respect of procedural guarantees as per Article 15(1) of the Regulation.
Several OLAF investigative and non-investigative staff as well as EU control bodies themselves mentioned that the proliferation of these external controls and complaints mechanisms created overlaps and duplication in the scope of their control functions as an individual can bring cases through these different channels simultaneously and this creates an additional administrative burden on OLAF to respond to each of these control bodies’ requests for information. They pointed to the lack of coordination between these procedures as they are not, for example, bound by similar timeframes.

According to these stakeholders, this appears to be a challenge for achieving a balanced and coherent approach between these controls and OLAF’s investigative function where the results of these different institutions could generate conflicting or inconsistent results. While stakeholders interviewed highlighted the necessity of these controls, suggestions were made by OLAF staff to find a mechanism to either provide a hierarchy or to ensure better consistency and coherence between them.

**6.2 External coherence of Regulation 883/2013**

External coherence of the Regulation refers to the extent to which the Regulation and its specific objectives are coherent with other legal instruments used by the Office in the conduct of its investigative or cooperation actions. This section also explores the extent to which the Regulation fits into the wider EU policies and current policy developments for the protection of the EU’s financial interests.

**6.2.1 Coherence with other EU legal instruments**

As developed in section 4.2, the legal basis framing the scope of OLAF’s investigative tools and powers is to be found in both horizontal regulations such as Regulation 883/2013, Regulation 2185/96 and Regulation 2988/95, and other sectoral regulations concerning specific EU policy areas such as e.g. customs, the common agricultural policy, and structural funds. This section analyses findings on the coherence of the Regulation with a number of such horizontal and sectoral regulations. Regulation 883/2013 makes a number of cross references to Regulation 2185/96 and Regulation 2988/95 that may result in inconsistencies as to the implementation of OLAF’s investigative tools and powers. This sub-section also considers the coherence between these different regulations, and the interactions between Regulation 883/2013 and Regulation 515/97. Finally, this sub-section also analyses coherence issues that may arise between Regulation 883/2013 and administrative arrangements signed between OLAF with certain EU IBOAs.

**6.2.1.1 Coherence between Regulations 883/2013, 2185/96 and 2988/95**

At EU level, OLAF investigative staff and AFCOS referred to certain inconsistencies between Regulation 883/2013 and other regulations also impacting the consistency and the legal basis OLAF’s investigative tools such as Regulation 2185/96 and Regulation 2988/95 for the conduct of external investigations in Member States and third countries, and the definition of key concepts respectively (e.g. ‘irregularity’, ‘economic operator’).

Inconsistencies cited by interviewees relate primarily to the fact that these Regulations appear outdated as they entered into force more than a decade prior to the introduction of Regulation 883/2013 in 2013, which gives rise to a degree of inconsistency in terminology and definitions (see Table 9 below), potentially undermining the coherence of OLAF’s investigative tools and divergent interpretations of their scope. Additionally, it emerges from these Regulations that on-the-spot checks and inspections of economic operators must be conducted ‘in compliance with the rules and practices of the Member States concerned’. Hence, as presented in Section 4.2, both EU and national law define the scope of OLAF’s investigative powers and tools. This has for example an impact the scope of the collection of forensic data as...
Article 7 of Regulation 2185/96 only mentions that on-the-spot checks and inspections may concern ‘computer data’ and further specifications on the scope of the type of forensic data are provided in Regulation 883/2013.

Table 9. Summary of main terms used in Regulation 883/2013, Regulation 2185/96 and Regulation 2988/95

<table>
<thead>
<tr>
<th>Regulation 883/2013</th>
<th>Regulation 2185/96</th>
<th>Regulation 2988/95</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Fraud, corruption or any other illegal activity affecting the financial interests of the Union”</td>
<td>“Irregularity”</td>
<td>“Irregularity”, “corruption”</td>
</tr>
<tr>
<td>“Administrative investigation”, “on-the-spot checks” and “inspections”</td>
<td>“On the spot checks”, “inspections”</td>
<td>“Checks”, “inspections on the spot”</td>
</tr>
<tr>
<td>“Interview”</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>“Person concerned”</td>
<td>“Economic operator concerned”</td>
<td>“Economic operator”</td>
</tr>
<tr>
<td>“Witness”</td>
<td>-</td>
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<tr>
<td>“Statement”</td>
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<td>-</td>
</tr>
<tr>
<td>-</td>
<td>“computer data”</td>
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</tr>
</tbody>
</table>

Other examples of inconsistencies or incompatibilities between these Regulations referred to by OLAF investigators were:

- Compatibility between Article 7(2) Regulation 883/2013 and Article 6 Regulation 2185/96 regarding the term ‘authorisation’ and the type of documents required. While Regulation 883/2013 focuses on the authorisation for the subject matter and the purpose of the investigation, Regulation 2185/96 refers to an authorisation indicating the subject matter and purpose of an on-the-spot check or inspection. An authorisation for an investigation as provided in Article 7(2) of Regulation 883/2013 is broader: it is not an authorisation for a specific investigative step (such as on-the-spot checks or inspections in Article 6 of Regulation 2185/96) but for the overall investigative activity. It appears that as a result, there is a difference in scope between the two provisions, which may have an impact on the content and number of authorisations required for the conduct of an investigation. Although not creating major issues in practice (internal work-forms have been adapted), the provisions could be aligned to avoid confusion and ensure consistency in Regulation 883/2013 with the current practice of the Office.

- Compatibility between Article 7 of Regulation 2185/96 regarding the conduct of on-the-spot checks and Article 9(2) of Regulation 883 on interviewing witnesses. It appears that for the conduct of on-the-spot checks, OLAF investigators could ask a number of ‘clarifications’ to persons that are not subject to an investigation or witnesses, in line with the investigation powers that some national authorities have; clarifications that can imply asking questions from these persons. This appears to be conflicting with the
requirement set in Article 9(2)(3) where interviews of witnesses require an explicit authorisation.

Several suggestions for how this state of play could be improved were made:

- To consolidate all OLAF investigative tools and powers in one single instrument (i.e. instead of the situation which prevails at present whereby Regulation 883/2013 refers to other Regulations) while leaving aside other sectoral legislation or,

- alternatively, to align Regulation 2158/96 and Regulation 2988/95 with the content of Regulation 883/2013 to ensure consistency between these instruments. However, such adjustment should take into account the impact it may have on other activities of EU IBOAs or Commission services regulated by these Regulations (e.g. audits).

6.2.1.2 Interactions between Regulation 883/2013 and Regulation 515/97

OLAF staff consulted highlighted an inconsistency issue of between Regulation 883/2013 and Regulation 515/97. These two instruments do not have the same scope of application. Regulation 515/97 is applicable to mutual administrative assistance between Member States and the Commission in customs and agricultural matters. When applying Regulation 515/97, OLAF investigators have no investigative powers and can only support Member States with the coordination of cases. In this context, these two instruments are distinct and there can be no confusion between them.

However, some OLAF investigative staff noted potential inconsistencies in the application by OLAF investigators of provisions of Regulation 515/97 and Regulation 883/2013. Some indicated that these inconsistencies may arise in cases where OLAF investigators use Regulation 515/97 to conduct investigations that should in principle be regulated by Regulation 883/2013. This situation could raise a potential coherence issue as, in principle, all investigative acts carried out by OLAF investigators should follow the provisions of Regulation 883/2013.

Customs investigations carried out by OLAF are not limited by the provisions of Regulation 515/97 as they can also be carried out in the frame of Regulations 883/2013 and 2185/96. In this case, OLAF investigative staff referred to a possible harmonisation of certain requirements such as the obligation to draft reports of missions in third countries in Regulation 515/97 and the obligation to have final reports in Regulation 883/2013 could be aligned. A suggestion was also made by OLAF investigators interviewed to clarify in Regulation 883/2013 the right to have immediate and unauthorised access to relevant documentation kept by national customs authorities and to information held in Member States’ databases. This suggestion would feed into an effort of harmonisation of OLAF’s investigative powers in the area of customs.

A small number of OLAF investigators indicated that such harmonisation should be limited to certain aspects only and take into account the specificities of the assistance and coordination cases in customs area. Given the high number of persons concerned usually involved in custom cases, a ‘full’ harmonisation would lead to excessive administrative burden and extension of investigations should the same procedural steps be imposed in customs cases as it is the case for other OLAF investigations framed by Regulation 883/2013.

259 Interviews with OLAF investigative staff, AFCOS representatives and conclusions of an Experts’ Workshop (18 April 2017).
6.2.1.3 Coherence between Regulation 883/2013, inter-institutional agreements, internal decisions and other administrative arrangements signed with EU IBOAs

This section analyses the potential coherence issues between Regulation 883/2013, inter-institutional agreement and the administrative arrangements signed with EU IBOAs. Sections 4.2.4 and 4.3.2 of this report presented the EU IBOAs with which OLAF has signed such agreements and arrangements: while OLAF signed an inter-institutional agreement with the European Parliament and a number of ACAs with a number of EU IBOAs, it is not the case for all of them.

Coherence challenges stem from the scope of certain OLAF investigative powers and tools in internal investigations and the limitations to these by the inter-institutional agreement signed with the European Parliament. As analysed in section 4.2.4.3, evidence collected for this study shows that, in practice, the application of the right of immediate and unannounced access and the collection of forensic data as provided for in Article 4(2) of the Regulation can be challenging in practice when it comes to the premises of the European Parliament, when the investigation concerns a Member of the European Parliament. The agreement signed with the European Parliament refers to Protocol 7 on privileges and immunities – as does Article 1(3) of the Regulation. As a result, there is a view that accessing documents held by Members of the European Parliament – or gaining access to their offices – requires lifting their immunity by the President of the European Parliament.260 The situation of the Accredited Parliamentary Assistants of MEPs is also unclear: although they are not members of the European Parliament as defined in the Staff Regulations, they often share offices with their MEP to which access is subject to a decision of the President of the European Parliament. A number of OLAF investigators interviewed thus noted a discrepancy between the provisions of the Regulation on internal investigations and its limitation by an inter-institutional agreement, thus leading to an unequal application of OLAF’s investigative powers and tools among EU IBOAs. In their view, the Regulation should ensure equality between EU IBOAs and uniform application of the Regulation at an EU level.

Coherence challenges may also stem from internal decisions by IBOAs to join the inter-institutional agreement. The agreement indicates the scope of application of the decision regarding OLAF’s internal investigations: alongside the reference to OLAF’s competence to investigate “fraud, corruption and any other illegal activity affecting the financial interests of the Communities” and references to the Staff Regulation, a number of internal decisions extend to other topics. For example, OLAF investigators noted that internal decisions indicated OLAF’s competence for serious misbehaviour and situations touching upon the reputational aspects of the IBOA (e.g. conflict of interest not leading to an impact on EU’s financial interests, issues of fake diplomas, etc.).261 The impact of such situations on the EU’s financial interests and the link with OLAF’s scope of investigative competences as defined in Article 1 of the Regulation is somewhat unclear. Additionally, in practice, this raises a question surrounding which legal instrument is OLAF competent to act: Regulation 883/2013 or an internal decision issued by an EU IBOA. In order to avoid any inconsistencies between the Regulation and other internal decisions, the suggestion was made to clarify OLAF’s competence in internal investigations and not in a ‘patchwork’ of internal decisions issued by IBOAs and thus putting at risk a coherent application of OLAF’s investigative powers and tools.

Finally, coherence issues may appear as a result of the application of the administrative arrangements signed with a number of IBOAs. Albeit these

260 This is further discussed in Section 4.2.4.3.
261 These internal decisions are not published.
arrangements are signed to clarify the practical implementation of the access to premises and exchange of information between OLAF and the concerned IBOAs and thus hold a lesser legal value than Regulation 883/2013, OLAF investigators observed practical differences between these arrangements (e.g. notification procedures and timeframes) which could have an impact on a consistent application of the Regulation throughout all EU IBOAs. Similarly to the internal decisions, suggestion was made by OLAF investigators and Supervisory Committee representatives to clarify to the extent possible these procedures in one instrument instead of a patchwork of administrative arrangements.262

6.2.2 Coherence with future legislative and policy developments

Another potential coherence issue highlighted by stakeholders for this study relates to the necessary alignment of data protection provisions of Regulation 883/2013 with the new data protection rules to be adopted by 2018, the potential overlaps between the control and mandate of the Controller of Procedural Guarantees and of the Supervisory Committee, and the interactions between Regulation 883/2013 and the future EPPO.

6.2.2.1 Alignment of Regulation 883/2013 with the new data protection rules

Currently, Regulation 883/2013 and its Article 10 are consistent with the provisions set in Regulation 2001/45 on the processing of personal data by EU IBOAs.263 The Commission submitted a proposal to amend Regulation 2001/45 to align it with the General Data Protection Regulation (GDPR) adopted in 2016.264 This proposal should be adopted by 2018 to enter into force at the same time as the GDPR. If adopted, OLAF non-investigative staff indicated that the recast Regulation 2001/45 would have an impact on the role and mandate of OLAF’s Data Protection Officer and on the wording of Article 10 of Regulation 883/2013.

No other major inconsistencies were reported in this context, as it appears that possible concerns on the particularities of OLAF investigations and the processing of personal data (for example the notification to and information of a person concerned) were taken into consideration at an early stage of the elaboration of the proposal amending Regulation 2001/45.265

6.2.2.2 Proposal for a Controller of Procedural Guarantees

As described in section 3.3.1.1, the proposal for a Controller of Procedural Guarantees relates to

- an ex-ante control: control of OLAF’s access to offices of MEPs/members of EU institutions (prior authorisation mechanism) and

262 Interviews with OLAF investigators and points raised during OLAF’s conference in March 2017.
263 Regulation on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

- an ex-post review: the competence to review mechanisms on the respect of procedural guarantees by OLAF by reviewing and providing recommendations on complaints filed by persons concerned by OLAF investigations.266

The reasoning behind the proposal for the establishment of a Controller, as initially presented by the Commission in its Communication of 17 July 2013, was the need to align OLAF’s procedural safeguards with criminal standards and procedural safeguards proposed in the EPPO’s proposal.267 The Commission specified in this Communication that the function of the Controller was to be distinguished from that of the Supervisory Committee, which would continue monitoring the respect of procedural rights and reasonable deadlines for closing cases by OLAF as currently provided in Article 15(1) of the Regulation. The Controller would provide the Supervisory Committee an overview of his activities.

The Impact Assessment accompanying the proposal for the establishment of a Controller stressed the need to find the proper balance between OLAF’s investigative powers and controls. It presented the option for a Controller that would be an expert independent from OLAF or its Supervisory Committee as the option that would offer higher protection of the procedural safeguards than the option where the Controller would be part of the Supervisory Committee’s Secretariat.268 With regards to the establishment of a Controller of Procedural Guarantees, a number of EU control bodies emphasised that its role and mandate should be well-defined and not overlap with the role of the Supervisory Committee. They expressed the view that the Controller should be an independent body, including from the Commission, and thus not be, from an institutional point of view, part of the Supervisory Committee.

Supervisory Committee representatives noted the lack of added value of the current proposal for a Controller as its role and mandate would overlap with that of the Supervisory Committee. In their view, the proposal endangers OLAF’s independence and leads to conflict of interests and overlapping of competences with those of the Supervisory Committee.

In its 2014 report on Safeguarding OLAF’s investigative independence, the Supervisory Committee highlights that:269

- As the Controller would have the competence to prevent OLAF’s Director General from undertaking certain investigative acts, the proposal endangers the investigative independence of OLAF and overlaps with the competences of the current OLAF Investigation Selection and Review Unit (the prior legality control of OLAF’s investigative measures);
- The proposal may lead to conflicts of interest as the Controller would be attached to the Commission and thus affect the “inter-institutional balance” necessary for OLAF to conduct internal investigations.
- The foreseen competences of the Controller would overlap with the competences of the Supervisory Committee in cases where procedural guarantees are not respected due to excessive duration of investigations or due to a violation of the independence of OLAF.

269 Supervisory Committee, Report 1/2014 on Safeguarding OLAF’s investigative independence, 2014; OLAF conference on the evaluation of Regulation 883/2013 and interviews with Supervisory Committee members.
The Supervisory Committee holds the view that an additional body to implement the procedural guarantees would be redundant and that this function should be carried out either by the Supervisory Committee or by a Controller within the Supervisory Committee.

The European Court of Auditors is of the opinion that the Controller and its secretariat should be independent from the Commission and thus not be attached to it nor to any of the other institutions involved in the appointment of the Controller.\(^{270}\)

Few other stakeholders pointed out that, while the establishment of the Controller may constitute progress in terms of strengthening the respect of procedural guarantees as it would be an independent review body and can intervene in investigations, it does not fully address the issue of effective remedies available to persons subject to an OLAF investigation as none of the current review mechanisms and including the Controller, provide for sufficient and immediate remedy for violation of procedural guarantees.

In particular, one stakeholder noted during OLAF’s Conference in March 2017 that, as the CJEU considered OLAF reports inadmissible for an action for annulment and that the only action available before the CJEU is an action for damages (which is not immediate and leave OLAF reports and evidence collected unaffected), the establishment of an immediate remedy against OLAF investigative measures may be necessary. In this context, the proposal for establishing a Controller of procedural guarantees is considered as a good step towards this objective, yet it may not prove to be sufficient for several reasons:

- the complaint to the Controller: the outcome is just an opinion of the Controller to the DG and the latter is not bound by it; furthermore, to receive a complaint, a person concerned should be properly informed beforehand, thus leaving the question of the deferral of the opportunity to comment open;
- the Controller’s competence would cover only rights included in Article 9, leaving out the rest, such as the right to privacy; and
- the authorising function of the Controller covers only the access to the office of a Member of an EU institution and is not granted to others; this function should be extended to every person subject to an investigation by OLAF.

Further analysis on the definition of the role and tasks of the Supervisory Committee and modalities for OLAF to report to the Supervisory Committee are examined in Section 3.2.4.2 and in the future outlook section (section 7.3).

### 6.2.2.3 Regulation 883/2013 and proposal for the establishment of an EPPO

The proposal for a Regulation on a European Public Prosecutor Office (EPPO) includes, in its Article 101, the framework of the possible future relationship between EPPO and OLAF.

A number of stakeholders (OLAF non-investigative staff and academics) raised concerns on the clarity of this Article and the impact it may have on the complementarities of the mandates between the two Offices on points such as:

- The principle of non-duplication and the opening of an administrative investigation by OLAF;

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The modalities of the future cooperation between OLAF and EPPO in terms of the status of OLAF investigations carried out on behalf of EPPO and the status/admissibility of the evidence gathered in this context in front of national courts.

However, other (OLAF non-investigative staff) emphasized that a lack of clarity appeared to be inevitable in this context, and that further clarifications on the mandate of OLAF should be included in Regulation 883/2013 rather than in an EPPO Regulation.

Furthermore, several stakeholders consulted (OLAF staff, academics and EU IBOAs) stressed that OLAF’s role should not be limited to become a supporting body of EPPO. They indicated that OLAF should at least retain its competence to investigate in non-participating Member States in the EPPO and in third countries. Further analysis on these points and the possible scenarios of the relationship between OLAF and EPPO are explored in the future outlook section.
7 Evaluation findings – relevance

This section presents evidence and findings on the extent to which the tools, powers and specific objectives of Regulation 883/2013 remain relevant for the overarching objective of protecting the financial interests of the EU. The relevance of both the objectives and means of the Regulation are considered. This section focuses on the following aspects: (i) relevance of the specific objectives of Regulation 883/2013 for the overarching objective of protecting the financial interests of the EU; (ii) relevance of the tools and control mechanisms introduced by Regulation 883/2013 for the specific objectives; and (iii) relevance of the specific objectives of Regulation 883/2013 in the context of wider EU policies and current policy developments. The assessment of the findings presented in this section are based on evidence arising from interviews with stakeholders and desk research.

Summary of evaluation findings – relevance

- Evidence (desk research and interviews) related to the relevance of Regulation 883/2013’s specific objectives of effective and efficient OLAF investigations, strong procedural guarantees, improved cooperation with Member States, EU IBOAS and third countries and reinforcing OLAF governance shows that they remain relevant for the fight against fraud and protecting the financial interests of the EU. More specifically:
  - The selection and opening of cases can be further developed in practice by enabling the Office to strengthen its intelligence gathering and detect fraud in a more proactive manner;
  - Cooperation and information exchange with Member States is relevant as it supports the design of national anti-fraud practices and legislation. It also exerts, to a certain extent, a deterrent effect on fraudulent behaviours across Member States; and
  - The objective of improving cooperation with third countries and international organisations remains relevant in light of the share of the EU budget spent on external aid and development. However, several stakeholders (OLAF investigators, Commission services and third countries) referred to the rather limited relevance of the Regulation to improve the effectiveness of OLAF investigative actions in third countries as the Regulation is not binding outside the EU Member States.

- Overall, the evidence and analysis indicates that Regulation 883/2013’s investigative tools and control mechanisms have proven relevant to achieving the Regulation’s specific objectives, with some exceptions:
  - Specifically, provisions in the Regulation on the cooperation and exchange of information with Member States (for example, via the AFCOS) and on certain investigative tools (for example, forensic collection of data) should be further adapted to the changing landscape of cross-border crime and technical progress to ensure they remain relevant.
  - Uniform OLAF investigative tools would be needed throughout EU Member States to improve the effectiveness and efficiency of OLAF investigative measures (e.g. on-the-spot checks, collection of forensic data).
  - The provisions in the Regulation regarding the procedural rights and safeguards surrounding persons concerned remain relevant, including the review and internal controls introduced by the Regulation; a
number of stakeholders suggested that a Controller of Procedural Guarantees would be an unnecessary additional layer of control and not relevant in view of the sufficient existing control mechanisms.

- Improved cooperation and information exchange with national judicial authorities could be achieved by changing internal practices related to the monitoring of judicial recommendations and thus establishing more direct channels of information exchange.

- Albeit administrative cooperation arrangements signed between OLAF and certain EU IBOAs are necessary to facilitate the practical access to – and confidentiality of – internal investigations, their relevance was questioned by a number of stakeholders to the extent they limit the uniform application of Regulation 883/2013 in EU IBOAs.

- In the context of future policy developments, OLAF’s investigative tools and powers will remain relevant and complementary to the actions of a future EPPO in the EU anti-fraud landscape.

### 7.1 Regulation 883/2013 and the protection of the EU’s financial interests

At the EU level, OLAF is the key institution to detect and fight fraud damaging the EU’s financial interests. Its current mandate and role is the manifestation of a process that started within the Commission with the set-up of the Unit for the Coordination of Fraud Prevention (UCLAF) in 1988. Started in 2004 and completed in 2013, the objective of the reform of the former Regulation concerning OLAF investigations, Regulation 1073/1999, was to improve OLAF’s efficiency and effectiveness, by reviewing its governance and procedural rules, following a request from the European Parliament and the Council to consolidate the existing EU anti-fraud legislation. Additional challenges identified by the Commission in its proposal were obtaining accurate data on the extent of fraud and prosecution within Member States, improving cooperation on cross-border cases and enhancing effective court action in criminal law.

Within this context, this subsection examines the extent to which the specific objectives of Regulation 883/2013 (referred to in Article 1 Regulation 883/2013 and in the evaluation’s ToR) proved relevant for the overarching objective of protecting the financial interests of the EU. Findings arising from evidence gathered through desk research and stakeholder interviews focus on the effectiveness and efficiency of OLAF investigative activities, the cooperation with Member States and third countries).

#### 7.1.1.1 Relevance of the objectives to improve the effectiveness and efficiency of OLAF investigative activities

This subsection presents evidence and findings regarding the relevance of the objective to improve the effectiveness and efficiency of OLAF investigative activities, in particular on the selection and opening of investigations.

As set out in Sections 3.2.1.2 and 4.1, OLAF investigations are selected and opened based on information received either from public or private sources. A number of OLAF investigative and non-investigative staff suggested the establishment of a stronger intelligence unit within OLAF, entrusting it with a more proactive role in seeking

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information to form the basis of decisions to open investigations in certain sectors. While Regulation 883/2013 gives OLAF’s Director General with the competence to open an OLAF investigation on its own initiative, it appears that this provision of the Regulation is not often applied in practice. The Office relies on the incoming information provided by Member States and EU IBOAs as the principal source of information surrounding potentially fraudulent activities. To this end, the Irregularity Management System (IMS) gathers details of fraud and irregularities in the use of EU funds by Commission services and national authorities. While this information is necessary, it only provides for a partial picture of the fraud committed across the EU Member States as administrative authorities may not have knowledge of offences of a criminal nature (nor communicating with national criminal authorities), thus potential fraud cases may be overlooked. OLAF investigators hence suggested that a stronger intelligence unit within the Office would be relevant to detect and investigate more fraud cases.

In light of the above, the objective to improve the effectiveness and efficiency of OLAF investigative activities remains a relevant objective of the Regulation. As regards the selection and opening of cases, evidence collected suggests that this phase could be further developed in practice (as the legal basis is already set in the Regulation) by enabling the Office to strengthen its intelligence gathering and detect fraud in a more proactive manner.

7.1.1.2 Relevance to improve the cooperation and information exchange with Member States

National stakeholders (AFCOS representatives and managing authorities) interviewed referred to the relevance and positive impact of the Regulation 883/2013 and its application by OLAF on the design of national anti-fraud legislation and practices. In their view, OLAF’s investigative actions are relevant for raising awareness of the EU’s financial interests among national authorities, Commission spending services and other EU IBOAs that results in the more systematic reporting to OLAF of irregularities and suspected cases of fraud. Additionally, a number of national stakeholders emphasised in their interviews that OLAF investigative actions in Member States are relevant for – and led to – the strengthening of controls throughout EU Member States as a result of the process of implementing OLAF financial recommendations that had a relevant, beneficial impact on improving national controls of both managing and audit authorities in Member States.

Although not directly related to the specific objectives or tools of the Regulation, national managing authorities stressed the important and relevant role that OLAF can play in prevention and training on issues of fight against fraud. While AFCOS play often an important role in providing insights into EU anti-fraud policies and legislation, a number of national managing authorities also pointed out the relevance of OLAF information/examples of cases that could be used by national authorities in their training. While some information can be found in OLAF Annual Reports, more practical information on the detection of fraud and irregularities stemming from cases investigated by OLAF was viewed as relevant and necessary by national managing authorities to better detect suspected fraud and subsequently notify/inform OLAF of the activities that give rise to these suspicions.

274 Article 5(2) Regulation 883/2013.
275 L. Kuhl and R. Panait, ‘Les négociations pour un Parquet européen : un organe d’enquête et de poursuite européen pour la lutte antifraude dans l’Union européenne, ou un deuxième acteur de coordination judiciaire ?’, RSC 2017, Dalloz, p.41
While measuring a ‘deterrent effect’ of OLAF’s investigative actions is challenging due in part to missing data, national stakeholders interviewed (AFCOS, judicial and managing authorities) highlighted the relevance and added value of Regulation 883/2013 and its application in the fight against transnational fraud and the detection of fraud or irregularities that otherwise would not be brought to the attention of national authorities.

Based on the outcome of interviews conducted with national stakeholders (AFCOS, judicial and managing authorities) and OLAF staff, the relevance of OLAF investigative actions in Member States in generating a potential deterrent effect varies from one Member State to another. This appears to be linked to several external factors such as:

• The varied ‘sensitivity’ of certain Member States to the harm to the EU’s financial interests and the pre-existence of national structures fighting fraud. It appears that certain EU Member States have less sensitivity (i.e. they afford a relatively lower priority to fraud against the EU’s financial interests) than other Member States, where the fight against fraud and the establishment of a strong AFCOS was part, for example, of their accession process to the EU. In some Member States, AFCOS was established as part of existing structures and represented an extra burden on sometimes scarce national resources.

• The distribution of competences in certain Member States between various national authorities at central and regional level may also play a role in enhancing or decreasing the effectiveness and efficiency of OLAF investigative actions.

• The amount of EU funds received by Member States: OLAF investigators and AFCOS representatives noted that a higher number of OLAF investigations in certain Member States does not necessarily reflect a national system that is more fraud-prone, but can be linked to the total amount of EU funds received.

According to interviews with OLAF staff and national judicial authorities, the main limitations to OLAF’s investigations having a deterrent effect in Member States appear to be linked to the administrative nature of the investigations. While OLAF has strong cooperation with administrative authorities – or at least these authorities have an obligation to cooperate with OLAF (Article 3 Regulation 883/2013) – the lower level of cooperation with judicial authorities, notably regarding the follow-up to OLAF judicial recommendations and the level of indictment, appears to be one of the major impediments to a deterrent effect of OLAF investigative actions.

To conclude, the objective of improving the cooperation and information exchange with Member States remains a relevant objective of the Regulation, as it supports the design of national anti-fraud practices and legislation and exerts – to a certain extent – a deterrent effect on fraudulent behaviours across Member States.

7.1.1.3 Relevance of the objective to improve cooperation with third countries and international organisations

Outside the EU, international organisations and third country stakeholders consulted held the view that although OLAF investigations in third countries and cooperation with international organisations are necessary to fight fraud in EU (external aid) funds, Regulation 883/2013 was of only limited relevance to improving the effectiveness of OLAF investigative actions in third countries as the Regulation is not applicable outside the EU Member States. Indeed, while the application of Regulation 883/2013 by OLAF in investigations in third countries led to a certain amount of financial recoveries, OLAF investigators and Commission services have reported on the difficulties of the application of the provisions of Regulation 883/2013 (and Regulation 2185/96) for the conduct of OLAF investigative measures in third countries. As analysed in section 4.3.3 of this report, the most relevant tool for improving cooperation with third countries
remain the conclusion of ACAs in order to identify the relevant counterparts in third countries.

The objective to improve cooperation with third countries and international organisations remains relevant in light of the share of the EU budget spent in external aid and development. The limitations in practice mainly stem from the limited extra-territorial application of the Regulation outside the EU Member States.

7.2 Regulation 883/2013’s tools and control mechanisms

OLAF’s investigative powers and tools under Regulation 883/2013 are instrumental for the conduct of EU administrative investigations. Findings presented in Section 4.2 highlighted some of the shortcomings and potential improvements associated with the Regulation’s investigative tools and powers, including adapting OLAF’s investigative tools on collecting forensic data (Article 4 of Regulation 883/2013).

This section is structured on the basis of the specific objectives of the Regulation – namely effectiveness and efficiency of OLAF investigative actions, strengthening of procedural guarantees, improving cooperation and reinforcing the governance of OLAF, with a discussion on the relevance of the investigative tools and control mechanisms within each subsection.

7.2.1 Relevance of the Regulation’s means with respect to effectiveness and efficiency of OLAF investigative actions

This subsection analyses the findings on the relevance of the tools enhancing the effectiveness and efficiency of OLAF investigative activity, in particular with respect to issues such as the need for uniform investigative tools, forensic collection of data, and the relevance of the GIPs and other instructions and guidelines in clarifying internal investigative procedures.

Overall, national stakeholders (judicial and managing authorities) interviewed noted that Regulation 883/2013’s tools and their application by OLAF investigators remain particularly relevant for the detection and investigation of transnational fraud and irregularities. This is mainly explained by the nature of OLAF which, as an EU institution, has more and quicker access to a number of databases and information that is less accessible and available to national authorities. Unsurprisingly also, this is reinforced by the investigative powers of OLAF investigators who, unlike national police or judicial authorities, can collect evidence and information in several Member States. As an example, OLAF investigative staff referred to OLAF’s forensic expertise that can support national authorities in coordination cases and the possibility for OLAF investigators to conduct administrative investigations in parallel to national criminal investigations. These are perceived as particularly relevant investigative tools by national authorities as they support speeding investigations at national level and finding relevant evidence supporting a case of suspicion of fraud or irregularity.

As developed in other sections of this report (section 4.2 and 6), while Regulation 883/2013’s investigative tools are relevant for enhancing the effectiveness and efficiency of administrative investigations in Member States, uniform OLAF investigative tools would be needed throughout the EU to improve effectiveness and efficiency of OLAF investigative measures. Two main points were raised by OLAF staff in this context. The first one concerned the relevance of one of the main investigative tools available to OLAF investigators, namely the on-the-spot checks.276 The application of this tool is hampered in practice by the references in Regulation

276 Articles 3 and 4 of Regulation 883/2013 and Regulation 2185/96.
883/2013 to Member States’ laws and practices (section 4.2), creating disparities between Member States in its application. Similarly, the relevance of the collection of forensic data by OLAF investigators in internal and external investigations is limited as digital forensic operations should be carried out ‘in compliance with national legal provisions’. In a number of Member States, the collection of forensic data in an administrative investigation is subject to a judicial authorisation. As regards this second point, it was suggested that the technological evolution in this field (e.g. cloud storage, information stored on other devices than professional ones) may necessitate additional powers for OLAF investigators to ensure the relevance of this tool for enhancing the effectiveness and efficiency of OLAF’s investigative activity (see Section 4.2.2).

Finally, as regards improving the efficiency and effectiveness of OLAF investigative actions, OLAF staff noted the relevance of the GIPs and other internal instructions as relevant tools to clarify internal procedures associated with Regulation 883/2013. The GIPs are considered an improvement compared to the state of play before the entry into force of Regulation 883/2013 as less-experienced investigators now have access to clearer procedures. For example, the various authorisations included in the GIPs, and punctuating an investigation procedure, support investigators with the different legal aspects of an investigation. As a publicly available document, individuals subject to an OLAF investigation are also informed of these aspects and thus the GIPs contribute to enhancing legal certainty around OLAF investigative activities. Alongside the GIPs, a number of additional internal instructions and guidelines, are issued to clarify additional procedures or legal aspects of OLAF investigative procedures: they concern a variety of matters such as transmission of information to other bodies or within the Office, drafting recommendations and reports, etc. Taking into account the procedure to modify the GIPs and the need to adapt or clarify certain organisational aspects of the work of an investigator, such instructions can be considered as necessary to ensure coherence of practices across investigative units. However, in light of the number of instructions and guidelines adopted since 2013 (around 20), OLAF staff questioned the relevance of the GIPs and some suggested an update or consolidation of the GIPs.

7.2.2 Relevance of the Regulation’s means with respect to strengthening of procedural guarantees of individuals subject to investigation

From the perspective of individuals subject to an OLAF investigation, strong and clear procedural rights in Regulation 883/2013 are relevant for providing appropriate safeguards, taking into account the ‘variable geometry of OLAF’s legal framework’. Due to variable national legal frameworks and different standards of procedural safeguards in Member States, information gathered in one Member State during an OLAF investigation can be later used in another Member State and lead to sanctions. While this is inevitable in a transnational framework such as the fight against fraud in the EU, it creates risks for undermining the legal protection of persons investigated by OLAF and highlights the need for strong procedural guarantees at an EU level. Against this background, strengthening procedural safeguards and guarantees was...
one of the main reforms introduced by Regulation 883/2013 to increase credibility, transparency and trust in OLAF’s investigative acts.281

Evidence gathered during stakeholder consultations shows that provisions of Article 9 and 10 of the Regulation and other internal control mechanisms remain relevant tools and measures in light of the Regulation’s objective to strengthen procedural guarantees of individuals subject to an OLAF investigation.

7.2.2.1 Procedural guarantees and safeguards

As mentioned in section 4.5, the inclusion of Article 9 has been acknowledged as a positive improvement of Regulation 883/2013 by most OLAF and EU IBOAs’ staff consulted for protecting the rights of individuals subject to an OLAF investigation, although concerns have been raised about the proportionality of Article 9 (see section 4.5). Although, from a legal perspective, these were obligations that OLAF investigators had to comply with following case law of the Court of Justice, ECHR and provisions of the Charter of Fundamental Rights, a majority of OLAF staff supported this change as a clarification of procedural guarantees.

Stakeholders at EU level questioned the collection of forensic data in accordance with the principles of necessity and proportionality, the application of these principles in practice and thus the relevance of this investigative power.282 The GIPs provide that forensic operations and analysis are limited to ‘extracting data necessary and relevant to the investigation concerned’ and that digital forensic operations should be ‘preceded by the preliminary identification of the media concerned’.283 Additional OLAF guidelines on the conduct of digital forensic operations clarify the different steps of this operation and measures taken to safeguard digital evidence.284 Some OLAF staff considered that the GIPs, the additional guidelines on the conduct of digital forensic operations and the internal controls carried out by the ISRU are sufficient to guarantee the necessity and proportionality of forensic operations and data gathering. Other OLAF staff and EU control bodies’ staff noted that these may not be sufficient to meet certain procedural guarantees and safeguards: as an example, given the nature of OLAF administrative investigations, it may be more difficult to identify the media concerned before an investigation is carried out thus leading to collecting all information on a computer. However, this is rather an issue of the application of the investigative tools by OLAF investigators rather than questioning the relevance of the tools and internal mechanisms established to control OLAF’s investigative powers and forensic data collection. Thus it reinforces the relevance and necessity to have such clear guidelines and ensure their respect throughout the investigative procedure.

7.2.2.2 Control mechanisms

The review function introduced by Regulation 883/2013 (Article 17) and the internal controls over OLAF investigative activities was mentioned as a relevant improvement of Regulation 883/2013 by OLAF staff for strengthening procedural guarantees of individuals subject to investigation.

Regarding other additional controls, a number of EU control bodies and AFCOS representatives were of the view that there is a need to strengthen the current mechanisms of control by appointing a Controller of Procedural Guarantees.285 They

281 European Court of Auditors, Opinion on establishing a Controller, 2014.
282 Interviews with OLAF staff and EU control bodies.
283 Article 15(2) and (3) of the GIPs.
285 The proposal for a Controller of Procedural Guarantees is discussed in further detail in Section 8.3.1 on the future outlook.
referred to the relevance of an external and independent reviewer of OLAF’s adherence to the procedural safeguards during an investigation. In contrast, a number of OLAF staff and other EU control bodies suggested that the existing control mechanisms are sufficient to ensure compliance with procedural rights given the administrative nature of the investigations carried out by the Office (as examined in the previous section on coherence).

### 7.2.3 Relevance of the Regulation’s means with respect to improving cooperation and information exchange

Evidence presented in this subsection examine the relevance of tools or mechanisms of Regulation 883/2013 aimed at improving the cooperation and information exchange between OLAF and Member States, EU IBOAs and third countries and international organisations.

#### 7.2.3.1 With Member States

Stakeholders consulted for this evaluation commented on the relevance of AFCOS’ mandate and possible improvements to increase their relevance in the cooperation and information exchange between OLAF and national authorities, as well as in the fight against fraud in structural funds. Other stakeholders also commented on the relevance of the cooperation with national judicial authorities in the follow-up of OLAF recommendations.

**Relevance of AFCOS**

OLAF investigators stated that the establishment of AFCOS in Member States was a necessary development and a relevant part of the mechanism for facilitating and assisting the application of Regulation 883/2013 in Member States.

As examined in Section 4.3, a number of AFCOS pointed out that the Regulation could have brought more clarity on their responsibilities and roles. In their view, the role of the AFCOS could be emphasised and, as an institution at a national level supporting OLAF’s actions, their relevance could be increased. Suggested changes included making AFCOS part of a body with criminal investigative powers or a centralised body with similar competences to OLAF to be able to better assist OLAF in its requests. Some AFCOS, however, were of the view that coordination powers were sufficient given the competences of other more specialised national institutions.

Several AFCOS referred to the lack of ‘direct’ or ‘horizontal’ administrative cooperation between authorities at a national level, in particular between AFCOS (Article 3(4) Regulation 883/2013). They were of the view that possible amendments to Regulation 883/2013 could be brought to the mandate and role of the AFCOS to ensure horizontal cooperation between them, without necessarily involving OLAF, which would support strengthening the prevention and detection of fraud across the EU.

In this context, the “Cooperation project in the anti-fraud sector” was mentioned by several AFCOS.286 This project aimed at feeding the debate on mutual administrative assistance between Member States in the area of structural funds. In contrast to the Common Agricultural Policy where mutual administrative assistance is possible through Regulation 515/97, it is not possible for Member States to directly exchange information in the area of structural funds although this area represents the largest expenditure of EU funds and is vulnerable to transnational fraud. The main solution

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286 Results of the project and various workshops can be found here: [http://www.politicheeuropee.it/attivita/19826/cooperation-in-the-anti-fraud-sector](http://www.politicheeuropee.it/attivita/19826/cooperation-in-the-anti-fraud-sector). The project was carried out by Italy, and 15 Member States have responded positively to a possible partnership request in this field, namely: Bulgaria, Croatia, Czech Republic, Cyprus, Estonia, France, Greece, Hungary, Latvia, Luxembourg, Malta, the Netherlands, Poland, Romania and Spain.
identified in this project was to use AFCOS as a clearly identified channel to improve and facilitate the exchange of information between Member States.

Few other AFCOS representatives, although supportive of mutual administrative assistance on the expenditure side, were of the view that such assistance should remain on a voluntary basis and not made mandatory.

**Cooperation and information exchange with national judicial authorities**

A key aspect of the cooperation with Member States is the follow-up to OLAF reports and recommendations sent to national authorities after an investigation is closed. In cases of suspected fraud, the follow-up to OLAF's judicial recommendations by national judicial authorities is perceived as a significant indicator of the relevance of OLAF's investigative actions in the fight against fraud. A number of OLAF non-investigative staff noted that the (seeming) low number of judicial indictments following OLAF investigations may be interpreted as a limitation to the relevance of OLAF's investigative actions in the fight against fraud in the EU.

This interpretation does not seem to be substantiated by available data for the period 2008-2016. The latter shows that judicial recommendations represent approximately 60 per cent of the total of OLAF investigations with recommendations. However, this figure is only a first indicator which does not take into account the length of time judicial proceedings can take at national level. Hence it is also necessary to examine the share of decisions taken or not by judicial authorities based on OLAF judicial recommendations. As shown in Figure 10 in section 4 of this report, over the period 2008-2016, a decision has not yet been taken for 43 per cent of judicial recommendations issued by OLAF. For the remaining 57 per cent, just over half were dismissed and the remaining of decisions resulted in indictments. Therefore, almost half of the judicial recommendations issued by OLAF where a decision has been taken by national judicial authorities resulted in an indictment.

The non-binding nature of OLAF judicial recommendations and the independence of national judicial authorities to initiate criminal proceedings following the communication of an OLAF judicial recommendation is firmly established in the Regulation, stemming from the administrative nature of OLAF investigative actions. With the aim of improving cooperation and information exchange where necessary with judicial authorities, OLAF staff suggested changing internal practices related to the monitoring of judicial recommendations by establishing more direct channels of information exchange. This could be envisaged as an additional contact point to AFCOS in certain Member States (which is already a practice in with a few Member States), or a dedicated unit to the monitoring and follow-up of judicial recommendations within the Office.

**7.2.3.2 With EU IBOAs**

Some OLAF investigative staff mentioned concerns regarding the relevance of the administrative cooperation arrangements (ACAs) signed between OLAF and certain EU IBOAs as per Article 1(5) of Regulation 883/2013. In their view, these administrative arrangements should respect the primacy of EU law, namely of the Regulation over administrative arrangements. In practice these arrangements seem to circumvent provisions of the Regulation, notably those on access to premises of EU IBOAs: while the Regulation states that “the Office shall have the right of immediate and

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287 OLAF data, not yet published. Also see data on the number of closed investigations with recommendations between 2008 and 2015 and the follow-up of judicial recommendations in OLAF's 2015 Annual report.
unannounced access”, in practice this access is sometimes not granted or, despite the signature of an arrangement, unclear.\textsuperscript{288}

While agreeing that clearer provisions should be included in the Regulation regarding the conduct of internal investigations and on OLAF’s investigators access to premises to ensure equality between EU IBOAs and uniform application of the Regulation at EU level, a number of OLAF staff agreed on the relevance of these arrangements with EU IBOAs to the extent that they facilitate practical access to and the confidentiality of internal investigations.

Other EU control bodies’ representatives held the opposite view, stating that these arrangements are necessary to take into account the particularities and the functioning of certain EU IBOAs. To a certain extent, OLAF is viewed as a body that is part of the Commission, not totally independent from political pressures from the Commission and, as a result, certain EU IBOAs cannot be considered on a par with other Commission services or EU executive agencies.

7.2.3.3 With third countries and international organisations

Regulation 883/2013 covers cooperation with third country authorities and international organisations in a number of articles.\textsuperscript{289} While Article 14 of Regulation 883 provides for a loose definition of an ACA with a third country or international organisation, a number of OLAF staff pointed out that ACAs, in contrast with those signed with Member States, are particularly relevant for cooperation with third countries. While the existence of an ACA with certain third countries or international organisations is not a guarantee of a high-level of cooperation, it is nonetheless of particular importance for OLAF investigators to identify relevant counterparts and thus a starting point to their investigations in third countries.

The process leading to the signature of an ACA with a third country authority or international organisation creates the opportunity to explain to third countries and international organisations OLAF’s powers and the extent of the possible cooperation with OLAF. Therefore, in addition to the signature of ACAs, the development of personal interactions between OLAF and counterparts in third countries and international organisations is necessary to ensure a degree of cooperation and information exchange between third countries and OLAF. Thus, fora for training spearheaded by OLAF (for e.g. the Pilot Group\textsuperscript{290}) or other instances where OLAF has been instrumental in shaping international investigation standards or practices (for e.g. the Conference of International Investigators of International Institutions and Organisations) are also relevant for the cooperation with third-countries and international organisations.

The ACAs do not solve the issue of immunities granted to staff of international organisations nor the fact that Regulation 883/2013 is not applicable in third countries. In practice, the spending agreements rather than the Regulation are used as a basis to initiate OLAF investigative measures in third countries.

\textsuperscript{288} Article 3(2) Regulation 883/2013.

\textsuperscript{289} Articles 1(1)(b), 3(1) and 14 of Regulation 883/2013.

\textsuperscript{290} OLAF cooperates with a large number of partner organisations in non-EU countries to ensure that EU development and humanitarian aid reaches its intended beneficiaries, without being diverted by fraud and corruption. The Pilot Group is a biennial event bringing together OLAF’s partner authorities in Africa. It was created in 2007 to strengthen the cooperation between OLAF and these authorities as well as to enhance trans-African cooperation. More information available here: https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/10072015_olaf_signs_acas_with_2_african_partners_en.pdf.
7.2.4 Relevance of the governance of OLAF provisions in the Regulation

The role and mandate of the Supervisory Committee is relevant and necessary to ensure the preservation of procedural guarantees and the independence of OLAF’s investigative actions. Some OLAF non-investigative staff highlighted the dual nature of the Supervisory Committee – both monitoring OLAF’s investigative actions and preserving its independence – which they suggested was unbalanced in practice. They referred to a number of instances where this independence was at risk that were flagged to the Supervisory Committee and that these issues remained unaddressed.

The Working arrangements between OLAF and the Supervisory Committee were deemed relevant and necessary by the Supervisory Committee regarding the implementation in practice of provisions relating to the application of procedural guarantees and the duration of investigations by OLAF, in particular issues of disclosing information transmitted to judicial authorities in Member states and the monitoring of the duration of OLAF investigations. However, these working arrangements were discontinued in March 2017. The transmission of information on an investigative case between the Supervisory Committee and OLAF is primarily based on Regulation 883/2013 provisions (as until now), and Regulation 45/2001, as well as on the Opinion of the European Data protection Supervisor and the Joint Opinion of the Legal Services of the three Institutions.

The entry into force of the amendment to Regulation 883/2013 regarding the Secretariat of the Supervisory Committee was not identified as a major point bringing improvements or, on the contrary, impeding the cooperation between the Supervisory Committee and OLAF by stakeholders interviewed (OLAF investigators, OLAF non-investigative staff, EU control bodies). One representative of an EU control body suggested however that this separation between the Secretariat of the Supervisory Committee from OLAF may adversely impact on cooperation between the two parties in the long term, emphasising that constructive cooperation between the Secretariat and OLAF is necessary. In this stakeholder’s view, the Secretariat’s independence is distinct from the independence of the Supervisory Committee and a separate Secretariat may undermine the access to information, notably from the European Commission, necessary for the fulfilment of the Supervisory Committee’s mandate.

A need to further strengthen or modify the governance of OLAF, notably regarding the relationship between the Supervisory Committee and a future Controller of Procedural Guarantees, is examined in the Future Outlook section below.

7.3 Relevance of Regulation 883/2013 and wider EU policies/developments

The previous sub-sections highlighted the relevance of the specific objectives and tools under Regulation 883/2013 identifying where stakeholders consulted for this study highlighted areas for potential improvement. The mandate and powers of OLAF, as provided for under Regulation 883/2013, remain relevant in the wider EU anti-fraud policy landscape and are to a certain extent confirmed with the need to establish an institution such as EPPO.

291 Article 15 Regulation 883/2013.
292 Article 15(1) Regulation 883/2013.
293 Note from the Supervisory Committee on the discontinuation of the working arrangements between the Supervisory Committee and OLAF of 6 March 2017.
294 This is discussed in further detail in section 4.7.
Several OLAF investigative staff indicated that, while OLAF investigative tools and powers are relevant for an administrative investigation, achieving more concrete results in the fight against fraud at an EU level would require additional prosecution powers. The establishment of an EPPO aims at bridging this gap between the administrative and criminal field and thus putting an end to a situation where the fight against fraud at EU level was done using (enhanced) administrative means only. According to OLAF staff and national judicial authorities consulted, the EPPO would also simplify the follow-up to judicial recommendations as it would represent a more direct channel of communication with national judicial authorities.

With the establishment of the EPPO, OLAF investigators as well as other stakeholders consulted in EU IBOAs and Member States pointed out the continuing relevance of Regulation 883/2013 to provide for administrative investigations by OLAF. As indicated previously, only a proportion of OLAF’s investigations result in a judicial recommendation – thus, administrative investigations carried-out by OLAF would remain relevant. Furthermore, OLAF’s administrative investigations would remain relevant in Member States not participating in the EPPO and in third countries.

Additional key aspects of the likely future interactions between OLAF and EPPO are examined in the coherence and future outlook sections (sections 6 and 7.3) of this report.
8 Evaluation findings – future outlook

This section considers whether Regulation 883/2013 should be amended in view of the evolving legal and political landscape in the field of the protection of the EU’s financial interests (PIF).

Summary of evaluation findings – future outlook

- While the provisions of the draft EPPO Regulation allow to envisage the main modalities of the cooperation between the EPPO and OLAF, some areas remain unclear and may require further clarification, for instance via amendments to Regulation 883/2013.

- OLAF will remain relevant in the field of PIF due to its substantive mandate, which completes the EPPO’s mandate; its place in the future institutional setting where not all Member States will participate in the EPPO; and the procedural rules applicable to EPPO investigations, which enable the EPPO to rely on OLAF’s experience and expertise in the field of PIF.

- The adoption of the PIF Directive will have little impact over OLAF’s mandate. However, since the PIF Directive will define the competence of the EPPO, a combined assessment of the two bodies’ material competence enables to identify the domains in which OLAF’s and the EPPO’s actions may be complementary.

- One of the expected consequences of the creation of the EPPO is to avoid the duplication of investigations (at criminal and administrative level) in PIF cases. For this reason, OLAF will not be able to conduct a parallel administrative investigation on the same facts as an EPPO investigation. The EPPO will also be able to refer a case back to OLAF in case it is not competent or dismisses the case.

- Article 101 of the draft EPPO Regulation only mentions cases involving participating Member States (though the modalities of cooperation with non-participating Member States are defined under Article 59a(3) of the draft Regulation). Even in cases involving participating Member States only, debates remain regarding the role to be played by OLAF in EPPO investigations. While the current wording of the draft Regulation tends to show that OLAF will play a supporting role for the EPPO, some stakeholders argue in favour of a more substantial role to be played by OLAF in criminal investigations. However, this could only be achieved by aligning procedural guarantees with guarantees offered in criminal investigations. Questions also remain regarding the admissibility of evidence collected by OLAF before the EPPO.

- When it comes to OLAF’s role in fraud prevention, most of the elements informing the authorising officer for the purpose of the EDES are communicated by OLAF once the investigation is closed, in order to preserve the confidentiality of investigations. This may lead to important but mostly inevitable delays in identifying and taking appropriate measures against unreliable economic operators. The EDES rules foresee that in case of compelling legitimate ground to preserve the confidentiality of the investigation, the right to be heard or notification to the economic operator (compulsory under the EDES rules) can be exceptionally deferred.

- The creation of a Controller of Procedural Guarantees attracts contradicting opinions. On the one hand, some stakeholders argue that the creation of an independent review authority would lead to a better protection of procedural guarantees of persons concerned in OLAF investigations. On the other hand, several review mechanisms are already
in place and creating an additional one may lead to confusion and contradicting solutions.

8.1 OLAF in the new institutional context

The establishment of the EPPO will impact OLAF’s role in relation to possible criminal conduct affecting the EU’s financial interests, especially when such conduct falls within the competence of the EPPO (Sections 8.1.1 and 0). The change results in particular from the obligation imposed on all EU institutions, bodies, and agencies, including OLAF, to report without undue delay to the EPPO any suspected criminal conduct in respect of which the EPPO could exercise its competence (Article 24 (1) draft EPPO Regulation), as well as from the cooperation between the EPPO and OLAF as envisaged under Article 101 of the EPPO Regulation.

8.1.1 OLAF’s mandate in the new EPPO landscape

As described in Annex 9, in some Member States national rules on the admissibility of OLAF reports as evidence before criminal courts, despite the fact that Article 11(2) of Regulation 883/2013 requires that OLAF reports constitute admissible evidence in national proceedings under the same conditions as national administrative reports, require investigative acts to be conducted again by national authorities. One of the expected consequences of the creation of the EPPO was to avoid duplications of administrative and criminal investigations into the same facts. In the Commission’s initial proposal, the EPPO’s exclusive competence to deal with PIF-related criminal offences guaranteed that there would be no need for OLAF to investigate suspected criminal behaviours. Under the current draft Regulation, this is no longer the case and the EPPO’s mandate is framed in a way that will require OLAF and the EPPO to cooperate.

8.1.1.1 Substantive mandate

The EPPO’s material competence is defined in the upcoming PIF Directive (see box below). In contrast, OLAF’s mandate extends beyond criminal behaviours affecting the EU’s financial interests, as it conducts administrative investigations on both fraudulent and non-fraudulent irregularities.

EPPO’s competence and the definition of PIF offences

The impact of the 1995 PIF Convention on national criminal laws and on their harmonisation of the definition of PIF offences has been limited, and thus results in an important variation from one Member State to another on what is considered as a criminal PIF offence. This situation shall be corrected by the future Directive on the protection of the Union’s financial interests by criminal law (PIF Directive), which provides for new definitions, as well as provisions dealing with the level of sanctions and time bar periods.

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298 Minimum of maximum penalty only applicable when there is “Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 shall be punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damages or advantages. The damages or advantages of the criminal offences referred to in Article 3(a), (b) and (c) and Article 4 shall be presumed to be considerable when involving more than EUR 100 000. The damages or
The PIF Directive aims at approximating national substantive criminal laws. The decision was taken to base the instrument on Article 83 (2) TFEU, and not on Article 325 (4) TFEU. The text can thus only provide for the adoption of minimum rules with regard to the definition of criminal offences and sanctions.

The PIF Directive will be subject to the regime introduced by the Lisbon Treaty, under which the Commission and the Court of Justice of the European Union—unlike the Maastricht PIF Conventions—have the powers to respectively launch infringement proceedings and interpret the PIF Directive. These powers will help to ensure the effective implementation of the PIF Directive and to provide a uniform interpretation of the offences it defines.

The adoption of the PIF Directive will have a limited impact on the scope of OLAF’s competence, which is defined in other instruments. However, a comparative analysis of the PIF Directive, the EPPO Regulation, and OLAF’s founding instruments enables the identification of areas in which OLAF and the EPPO shall both be competent and will thus need to cooperate.

OLAF’s material competence is broader than the EPPO’s, as it encompasses both fraudulent (criminal) and non-fraudulent (administrative) irregularities. OLAF will retain an essential role in relation to purely administrative irregularities such as genuine errors in custom declarations or, in relation to internal investigations, cases in which OLAF investigates serious matters relating to the discharge of professional duties by members and staff of the EU institutions and bodies not amounting to fraud, corruption or any other PIF offence (e.g. the “Eurostat affair” or the “Dalli case”).

In addition, PIF-related criminal offences no longer fall under the EPPO’s exclusive competence, as this competence will be shared with participating Member States.

Even in cases falling under the mandate of the EPPO, Article 25 of the draft EPPO Regulation defines a number of thresholds and exceptions framing the EPPO’s competence:

- The EPPO may exercise its competence under conditions for criminal offences that caused or are likely to cause damage of less than EUR 10,000, or the case has repercussions at EU level, or EU officials could be suspected of committing the offence;
- The EPPO may not exercise its competence and should refer the case to national authorities where, the maximum sanction is less severe than for an inextricably linked offence, or is equal to an inextricable linked offence that has not been instrumental to the main offence; or the damage does not exceed the damage caused to another victim. However, with the consent of national authorities concerned, the EPPO will be able to exercise its competence if it appears that it is best placed to investigate or to prosecute.

advantages of the criminal offences referred to in Article 3(d) and subject to Article 2(2) shall always be presumed to be considerable.” (Art. 7 (3) PIF Directive)

Decision 1999/352/EC of 28 April 1999 establishing the European Anti-fraud Office (OLAF) and Regulation 883/2013.


See in this regard EUObserver, “OLAF leak: no clear evidence against Dalli” available here.

Article 25(2) draft EPPO Regulation

Article 25(3) draft EPPO Regulation

Article 25(3a) draft EPPO Regulation
In cases where the EPPO’s competence is restricted, as well as in those where Member States act rather than the EPPO, OLAF’s investigative and coordination functions remain relevant to support national authorities under the same conditions as under the current provisions of Regulation 883/2013.

Finally, OLAF’s administrative investigations may lead to the identification of criminal conduct, and to recommendations for judicial follow-up either by the EPPO or by the Member States.

### 8.1.1.2 Institutional setting

As the EPPO will be established on the basis of an enhanced cooperation, not all EU Member States will participate in the EPPO (see Section 3.3.2.1). In cases involving only participating Member States, the provisions of the EPPO Regulation will apply. In cases involving non-participating Member States only, ‘traditional’ players will be involved as they are today (i.e. OLAF for administrative investigations, Europol and Eurojust for police and judicial cooperation, and national authorities for prosecution).

‘Mixed’ cases will create practical challenges and require strong cooperation between all the players involved and legal regimes applicable (see Section 8.1.3.3). However, the latest version of the draft Regulation introduced a provision according to which the EPPO will be able, after authorisation by participating Member States, to apply autonomously other existing EU instruments for judicial cooperation with non-participating Member States.

In addition, in cases falling under the EPPO’s competence and involving third countries, the EPPO and OLAF shall rely on the agreements and arrangements they respectively concluded with them. OLAF will remain an important partner in the coordination of such cases.

### 8.1.1.3 Procedural rules

According to Article 101 (2) of the draft EPPO Regulation, OLAF will not open a parallel administrative investigation where the EPPO is already investigating into the same facts.

The 2013 proposal for the EPPO Regulation was almost silent about the procedure for cooperation between the EPPO and OLAF, and only included a reference to the cooperation between the EPPO and the Commission, including OLAF, in its Article 58. In the latest version of the draft Regulation, Article 101 is devoted to their cooperation, along with several recitals. These provisions may furthermore be complemented by the conclusion of a working arrangement of a technical and/or operational nature, which shall aim at facilitating their cooperation and the exchange of information between them.

Their cooperation is first envisaged in general terms. The EPPO shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange. This relationship shall aim in particular to ensure that all available means are used to protect the Union’s financial interests through the complementarity and support by OLAF to the EPPO.

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305 Article 105 of the draft EPPO Regulation

306 A. Weyembergh, I. Armada and C. Brière, Interagency cooperation, EP study, 2014 and interview with third country

307 Article 104(3) draft EPPO Regulation

308 Article 101 (1) draft EPPO Regulation
The article then sets out the modalities of this cooperation. In the course of an investigation, the EPPO can request OLAF to support or complement its activity.\(^\text{309}\)

- OLAF may be requested to provide information, analyses (including forensic analyses), expertise and operational support, and to that end the body can rely on its own tools and expertise in this field.\(^\text{310}\)
- In addition, OLAF can be requested to facilitate coordination of specific actions, in particular investigations, of the competent national administrative authorities and EU bodies. Within the EPPO, the European Delegated Prosecutor (EDP) handling the case works in cross-border cases in close cooperation with other EDPs. The EDP handling the case has the possibility to regularly consult them and to assign them the conduct of a necessary investigative measure.\(^\text{311}\) This form of integrated cooperation, i.e. cooperation within the EPPO, replaces the need for coordination of actions between judicial authorities. This mechanism is complemented by the support offered by OLAF at administrative level, which may be necessary to ensure for instance that judicial investigative measures receives an adequate administrative follow-up.
- Finally, OLAF can be requested to conduct administrative investigations, which may be conducted for the purposes of administrative, financial or disciplinary follow-up to the EPPO’s investigations. This last possibility reflects the importance of multidisciplinary approach in fighting fraud against the EU’s financial interests.\(^\text{312}\)

The establishment of the EPPO requires a re-thinking of the role of OLAF, notably to avoid duplications and to guarantee the efficiency of the protection of the EU’s financial interests.

### 8.1.2 OLAF’s mandate in the new PIF landscape

The adoption of the new PIF Directive will harmonise the definition of certain PIF-related offences, previously included in the PIF Convention. This Directive will also form the basis for the material competence of the EPPO (Art. 25 (1) EPPO Regulation).

The inclusion or not of VAT fraud in the PIF Directive was a core question in the negotiations. The European Parliament, supported by the Commission, was in favour of the inclusion of VAT fraud in the scope of the Directive, on the grounds that VAT fraud and carrousel fraud were a major threat against the EU’s financial interests.\(^\text{313}\) VAT is part of the Union’s financial interests that OLAF is mandated to protect.\(^\text{314}\) Indeed, VAT is one of the components of the EU’s own resources as a uniform rate of 0.3% is levied on the harmonised VAT base of each Member State. In addition, recent case law by the CJEU recognised VAT as forming part of the financial interests of the Union (see Section 3.3 for more information).

\(^{309}\) Article 101 (3) draft EPPO Regulation

\(^{310}\) For more details on OLAF’s expertise in this field, see e.g. OLAF, OLAF Digital Forensic Operations Information Leaflet, available at: http://ec.europa.eu/anti-fraud/sites/antifraud/files/digital_forensic_leaflet_en.pdf

\(^{311}\) Article 31 (1) EPPO Regulation

\(^{312}\) Investigations in this field indeed often present a multidisciplinary character, involving not only criminal investigation authorities, but also administrative, customs and tax authorities (Commission, Impact Assessment accompanying the proposal for a Council regulation on the establishment of the EPPO, SWD (2013) 274 final, p. 21.

\(^{313}\) Council of the European Union, Inter-institutional File No 2012/0193 (COD), 17 September 2015.

\(^{314}\) See Regulation 883/2013, Article 1 (4), which refers to OLAF’s conduct of administrative investigations for the purposes of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union (Art. 1 (4)). See also the case law of the Court of Justice of the European Union (e.g. Taricco, C-105/14).
There is some political resistance in some Member States to work with OLAF on VAT cases because of a fear that the Commission will use any cooperation with OLAF as a way to extend its competence and influence in the area of VAT.\textsuperscript{315} The compromise reached on the PIF Directive, which is applicable in all EU Member States (except Denmark and the United Kingdom),\textsuperscript{316} may help to lessen this resistance, and encourage national authorities to request the assistance of OLAF in VAT-related fraud cases. Indeed, the application of the Directive is limited to serious offences against the common VAT system, thus granting the EPPO the competence to investigate and prosecute such offences (Article 2 (2) PIF Directive).

On the other hand, OLAF lacks investigative tools to effectively investigate VAT fraud.\textsuperscript{317} Indeed, while VAT is now recognised as a financial interest of the Union and VAT fraud can thus be investigated by OLAF in application of Article 1(1) of Regulation 883/2013, OLAF’s competence to perform on-the-spot checks and inspections, as defined in Regulation 2185/96, only concerns irregularities affecting revenue accruing from the EU’s traditional own resources (mainly customs duties),\textsuperscript{318} which do not include VAT. OLAF has no access to Eurofisc or the VAT Information Exchange System (VIES), and no access to bank account information. It is thus limited to act as a service platform to coordinate the operational activities of the Member States at their request.\textsuperscript{319}

As stated in Section 8.1.1, the EPPO as foreseen in the current version of the EPPO Regulation will not be competent in all the Member States, nor will it be competent for all forms of VAT-related fraud. OLAF will therefore remain relevant in some cases. However, its investigative powers will remain limited because it cannot conduct on-the-spot checks in VAT fraud-related cases.

### 8.1.3 Cooperation between OLAF and partners in the new landscape

This section analyses possible scenarios of cooperation between OLAF and the EPPO, from case selection and exchanges of information (Section 8.1.3.1), to cases involving Member States participating in the EPPO (Section 8.1.3.2), and so-called “complex” cases (Section 8.1.3.3). It then considers possible changes in the cooperation with other agencies competent in the field of PIF in the new landscape (Section 8.1.3.4).

#### 8.1.3.1 Case selection

Due to the coexistence of the EPPO and OLAF in the future PIF landscape, a good coordination of their activities will be necessary to ensure an efficient selection and opening of cases. The two bodies are likely to assess incoming information differently, due to their complementary mandates: OLAF is likely to focus on indications of information about administrative irregularities while the EPPO will concentrate on indications of criminal offences. Pursuant to Article 101(1) of the draft EPPO Regulation, the two bodies will “establish and maintain a close relationship based on mutual cooperation [...] and information exchange.” Effective exchanges of information between the EPPO and OLAF will be crucial to ensure the efficiency of the protection of the Union’s financial interests.

\textsuperscript{315} House of Lords, EU Committee, Stopping the Carousel: Missing Trader Fraud in the EU, May 2007, Written evidence by OLAF, p. 133, § 10.

\textsuperscript{316} See PIF Directive, Preamble, recitals 37 and 38.

\textsuperscript{317} Interview with OLAF official. See also Council Regulation No 2185/96 [OJ L 292/2].

\textsuperscript{318} Article 1 of Regulation No 2185/96.

\textsuperscript{319} House of Lords, EU Committee, Stopping the Carousel: Missing Trader Fraud in the EU, May 2007, Written evidence by OLAF, p. 132, § 1.
Transfer of information from OLAF to the EPPO

Two scenarios were identified where OLAF may transfer information about a potentially criminal conduct for the EPPO to investigate.

As a consequence of OLAF’s obligation not to open parallel investigations to EPPO investigations, in the event OLAF receives allegations indicating that a criminal offence falling under the EPPO’s competence may have been committed, the Office has an obligation to report it to the EPPO without undue delay. This will enable the EPPO to confirm whether it is conducting an investigation into the same facts, and, if not, to review the information and decide whether or not to take on the case, in particular in the light of Articles 25(2) and (3) of the draft EPPO Regulation.

At this stage of the negotiations, it is unclear how OLAF will perform this assessment of the facts and determine whether the case would be best suited for the EPPO. As described under Section 4.1, incoming information sometimes requires further investigation by OLAF to determine the nature and seriousness of the alleged conduct. However, the assessment of the legal status of a case is not always easy or clear cut. It may evolve over time: a case initially considered as an “irregularity” might be later reclassified as “fraud”, and vice versa (e.g. due to the identification of new factual elements, a better assessment of the value of the damage suffered, or on the contrary insufficient evidence). Recital (51) of the draft EPPO Regulation provides that national authorities in the Member States and EU IBOAs should follow existing reporting procedures, and have in place efficient mechanisms for a preliminary evaluation of allegations they receive, which may require them to “make use of OLAF”.

In other cases, OLAF may identify indications of a criminal offence in the course of an ongoing administrative investigation. Article 101(2) of the draft EPPO Regulation only regulates the opening of parallel investigation. However, considering the objective of the EPPO to avoid duplication of investigations, such cases will require OLAF to close the ongoing investigation and address a judicial recommendation to the EPPO. From the discussions during the OLAF conference, it is unclear at this stage whether this should be done immediately when the possible criminal qualification of the facts becomes apparent, or whether OLAF will be able to finalise its investigation by undertaking all the planned investigative acts. 320

Transfer of information from the EPPO to OLAF

The EPPO may need to transfer information to OLAF in cases where it considers that there are no reasonable grounds to believe, on the basis of information it received, that an offence within its competence is being or has been committed. 321 This may also happen in instances where the EPPO dismisses a case and refers it to OLAF for administrative follow-up or recovery. 322 In such situations, the EPPO may request that OLAF considers whether to open an administrative investigation, or take other administrative follow-up or monitoring action, in particular for the purpose of taking precautionary measures, recovery or disciplinary action.

320 Representative of a national judicial authority, OLAF conference on the evaluation of Regulation 883/2013.
321 Recital 105 of the draft EPPO Regulation.
322 Recital 105 and Article 39(4) of the draft EPPO Regulation.
8.1.3.2 Cooperation between OLAF and the EPPO in standard cases involving participating Member States

The nature of the cooperation between OLAF and the EPPO is the subject of numerous debates amongst stakeholders, academics and experts, 323 aiming to determine which form of cooperation would be most fruitful. The need for the EPPO to benefit from OLAF’s experience and expertise in the field of PIF is accepted, and is reflected in the current wording of Article 101(3) of the draft EPPO Regulation.

Otherwise, two main positions are articulated. Some stakeholders argue in favour of a more supportive role for OLAF, while others advocate for more powers to be granted to OLAF under the supervision of the EPPO 324. The latter argue that the fact that OLAF will be competent to conduct administrative investigations only upon the EPPO’s request may bring confusion. 325.

Article 101 of the draft EPPO Regulation favours the first position (see Section 8.1.1.3). In this regard, the future establishment of the EPPO calls for amendments to Regulation 883/2013, at the very least to mention and organise the cooperation between OLAF and the EPPO from OLAF’s perspective. To ensure the coherence of the legal framework and legal certainty, a provision mirroring Article 101 of the EPPO Regulation should be introduced in Regulation 883/2013, as well as a mention of the possibility to conclude a working/administrative arrangement between the two bodies. Indeed, the impact of the creation of the EPPO over OLAF’s competence should be regulated by a legal instrument specific to OLAF (i.e. Regulation 883/2013) rather than the EPPO Regulation. 326

The second position argues that OLAF’s current powers are insufficient to add value to the EPPO’s actions. To address this shortcoming, OLAF could be requested to conduct not only administrative investigations on behalf of the EPPO, as currently provided in Article 101(3) of the draft EPPO Regulation, but also “auxiliary judicial services” 327 in the context of criminal investigations. Such services would be performed upon instructions and guidance by the EPPO. 328 Some stakeholders argued that this would be possible in cases where criminal safeguards were applied to such investigative acts. 329

Another pending question concerns the admissibility of evidence collected by OLAF in cases involving the EPPO. Firstly, the draft EPPO Regulation does not address the question of the admissibility of such evidence when collected in an administrative investigation opened on the basis of Article 101(3) of the draft EPPO Regulation. Following Article 11 (2) of Regulation 883/2013, on the basis of national law, the EPPO may be able or unable to use OLAF reports as admissible evidence depending on the Member State where the investigation takes place, which may hamper the effectiveness and efficiency of its investigations, and may lead to a duplication of investigative measures in those Member States where administrative reports are not

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323 As observed during the OLAF Conference on the Evaluation of Regulation 883/2013.
324 Interviews with OLAF non-investigative staff; OLAF conference on the evaluation of Regulation 883/2013.
325 Representatives of national judicial authorities at the OLAF conference on the evaluation of Regulation 883/2013.
326 Representative of OLAF investigative staff at the OLAF conference on the evaluation of Regulation 883/2013.
328 Ibid.
329 Representatives of the Institute of Legal Studies, Polish Academy of Science and of the CJEU, at the OLAF conference on the evaluation of Regulation 883/2013.
admissible. One solution to this issue may be to clarify whether and under which conditions the EPPO may integrate evidence collected by OLAF into its case so that it is admissible before national criminal courts.

### 8.1.3.3 Cooperation between OLAF and the EPPO in complex cases

The cooperation between the EPPO and OLAF as envisaged in Article 101 of the draft EPPO Regulation only foresees the modalities of their cooperation in relatively straightforward cases (i.e. when the EPPO is competent and when the facts are committed within one or more Member States participating to the establishment of the EPPO).

However, further factors create complexity in the future PIF landscape, and thus in the cooperation between the EPPO and OLAF.

- A first challenge stems from the fact that the EPPO will be set up as an enhanced cooperation. The draft Regulation provides for the ability of the EPPO to rely on EU instruments in criminal matters. OLAF may in this regard play an important role to partially correct the asymmetry among Member States. Indeed, it would retain its competence in non-participating Member States, and may initiate its own administrative investigations, geared towards the adoption of a judicial recommendation, which may help to complement the work of the EPPO in the participating Member States.

- Complexity can also arise in cases involving third-countries, due to the diversity of the legal regimes applicable, which may vary from one third country to another. The cooperation with a given third-country will determine whether the EPPO is recognised as a competent authority able to rely on multilateral international agreement (Art. 104 (4) draft EPPO Regulation), or whether the European Delegated Prosecutor handling the case will be allowed to have make use of his/her powers as a national prosecutor (Art. 104 (5) draft EPPO Regulation). Such diversity is also present when looking at OLAF's relations with third countries, as it has signed ACAs with a small number of national partner authorities and counterpart services of international organisations.

### 8.1.3.4 Interagency cooperation

To mitigate the problems of complexity mentioned above, close cooperation between all EU stakeholders in the field of PIF, such as Eurojust and Europol will be necessary. The nature of this cooperation may need to be clarified.

The draft EPPO Regulation, in its Chapter VIII envisages that they will develop a close relationship with the EPPO, in particular to avoid duplication of efforts and to ensure the complementarity of their activities. Such provisions are complemented by those included in the instruments establishing the different players concerned, such as Article 13 of Regulation 883/2013, which organises OLAF’s cooperation with Eurojust and Europol in the field of PIF.

The exchange of information between these bodies is undermined by the patchwork of provisions organising such exchanges and the still fragmented data protection regime at EU level. Legal obstacles to the exchange of information between administrative, judicial and law enforcement authorities at national and EU level was also pointed out.

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330 Article 104 (3) of the draft Regulation
332 Representative of the Supervisory Committee at the OLAF conference on the evaluation of Regulation 883/2013.
333 A. Marletta, Eucrim 2016 n°3, p. 142.
as a shortcoming that should be addressed.\textsuperscript{334} Cooperation between agencies can also take the form of operational cooperation, notably via the involvement of Eurojust, Europol and OLAF in Joint Investigation Teams (JITs), which may increase the chances of a national follow-up.\textsuperscript{335}

In the future, these bodies will have to integrate the EPPO in the existing web of provisions / arrangements / agreements defining their mutual cooperation. Potential weaknesses or loopholes might be difficult to address, as they touch upon the identity of each agency/body. They would also likely require more legislative changes than the modification of relevant provisions in Regulation 883/2013.

Recent legislative developments (i.e. the adoption of the Europol Regulation and the on-going negotiation of the draft Eurojust Regulation) impact on the modalities of exchanges of information. Whereas OLAF would be able, like Eurojust, to access data stored in Europol’s databases on the basis of a hit / no hit mechanism (Art. 21 Europol Regulation), the similar possibilities are not foreseen concerning its access to the data stored in Eurojust’s and the EPPO’s databases.\textsuperscript{336}

Regarding their cooperation on operational matters, all relevant EU actors may be involved in JITs created in PIF cases and involving the EPPO.\textsuperscript{337} More generally, all EU IBOAs with specific PIF responsibilities shall develop a close relationship with the EPPO, and they shall also intensify their mutual cooperation, in particular to avoid duplication of efforts and ensure the complementarity of their work.\textsuperscript{338} Key factors in the success of interagency cooperation would be the establishment of channels of communication, as well as the limitation of the risk of tensions.

The EU legal framework should favour cooperation and complementarity, rather than competition, between the different EU bodies and agencies with specific PIF responsibilities.\textsuperscript{339} Tensions might arise in cases where the attribution of competences between the EU bodies and agencies and national authorities is unclear, in particular amongst Member States regarding their reporting and cooperation obligations.\textsuperscript{340}

\section*{8.2 Early Detection and Exclusion System (EDES)}

The Early Detection and Exclusion System (EDES) is the system established by the Commission to reinforce the protection of the Union’s financial interests and ensuring sound financial management.\textsuperscript{341} The EDES rules are defined in Articles 105a to 108 of Regulation (EU, Euratom) No 966/2012 as lastly amended by Regulation (EU, Euratom) 2015/1929,\textsuperscript{342} and the new system became operational as of January 2016. It has replaced the former Early Warning System (EWS) and Central Exclusion Database (CED).

\textsuperscript{334} Court of Auditors, Special Report No 24/2015 Tackling intra-Community VAT fraud, 2015

\textsuperscript{335} A. Marletta, Eucrim 2016 n°3, p. 143. On the latter, see Article 6, Europol Regulation – request by Europol for the initiation of a criminal investigation, and Articles 6 and 7 of Eurojust Council Decision – request by National Member or the College to undertake an investigation or prosecution of specific acts.

\textsuperscript{336} This statement is valid under the versions of the two drafts Regulations in July 2017.

\textsuperscript{337} If the EPPO is able to participate in a JIT, as a fully-fledge member or as a participant,

\textsuperscript{338} Interview with OLAF investigative staff

\textsuperscript{339} Interview with OLAF investigative staff

\textsuperscript{340} Interviews with OLAF investigative staff and national AFCOS


EDES’ purpose and actions

The EDES is composed of an early detection and an exclusion (sanctions-related) branch. The early detection branch aims to protect the EU’s financial interests against unreliable economic operators by informing authorising officer of risks threatening the EU's financial interests by registering an early detection case on the operator.

IN its sanctions-related branch, the EDES enables the following actions:

- Excluding an economic operator from receiving EU funding (Article 106(1) and (2) of Regulation (EU, Euratom) No 966/2012);
- Imposing a financial penalty on an economic operator (Article 106(13) of Regulation (EU, Euratom) No 966/2012); or
- In the most serious cases, publishing information related to such exclusion and/or financial penalty on the Commission’s website (Articles 106(16) and (17) of Regulation (EU, Euratom) No 966/2012).

The information on early detection, exclusion and/or the imposition of financial penalty may stem, inter alia, from facts and findings gathered by OLAF (Article 106(2)(a) of Regulation (EU, Euratom) No 966/2012), in the course of external investigations (see Section 3.2.1.1). The information stemming from OLAF in the course of its investigation or upon completion thereof is sent by OLAF to the responsible authorising officer. It is the responsibility of the authorising officer to decide on the action to be taken under EDES. The decision to exclude and/or to impose a financial penalty on an economic operator is – for situations referred to in Articles 106(1)(c) to (f) - centrally assessed by a panel (‘the EDES Panel’), which is chaired by a standing high-level independent chair and issues a recommendation to the contracting authority. The responsible authorising officer will then take a decision based on the Panel’s recommendation. In the event the responsible authorising officer decides not to follow the Panel’s recommendation, s/he needs to justify this decision.

The corresponding case is registered on the EDES database. All authorising officers in EU institutions and bodies and their staff can access EDES. Read access to the exclusion branch only is available to Member State authorities and entities that implement EU spending programmes. In addition, there is an interface between OLAF’s Irregularity Management System (IMS) and EDES, which enables EDES users in EU IBOAs to consult IMS data related to shared management funding only, though IMS records can also be used in the event that an economic operator flagged in the IMS applies for directly managed funding. In practice, OLAF reports are one of the sources of information for the EDES Panel to start an adversarial procedure with the economic operator concerned, issue a preliminary classification and draft a recommendation on whether or not to impose an administrative sanction against an economic operator. It is thus crucial for the functioning of EDES to receive appropriate and timely information from OLAF.

In cases relying on an OLAF investigation, OLAF is contacted during the Panel procedure for an update on the facts of the case, on the state of play of potential national judicial proceedings for an update on the facts of the case and for clarification about the elements of the case that may be notified to the person or economic operator concerned. At this stage, OLAF may also request the deferral of the notification. During the procedure, a representative of OLAF’s Fraud Prevention Unit

342 Art. 14, Guidelines on Investigation Procedures (GIP) for OLAF Staff.
344 Article 108 of Regulation No 2015/1929.
345 Interview with Commission services
and the investigator in charge (or his/her Head of Unit/Service) are invited to attend Panel meetings.

In early detection processes, OLAF is also requested for information updates early on, if possible before the consultation starts. OLAF is consulted regarding the disclosure of investigation-related information during the process.

Regarding OLAF’s input into the EDES, overall OLAF non-investigative staff reported a successful cooperation with the EDES Panel since the EDES was set up. However, Commission services indicated that OLAF reports lacked clarity at times, and did not always enable the establishment of the facts of the case. In addition, OLAF recommendations reportedly could be more precise, especially when it comes to the estimated amounts for recovery. As a consequence, in such cases it was difficult for the EDES Panel to decide on proportionate and timely sanctions against the economic operator concerned.

Another issue reported by Commission services was that in a majority of cases, authorising officers were informed about a case once the investigation had been finalised (Article 11 of Regulation 883/2013), rather than earlier in the course of the investigation where it might be necessary to take precautionary measures. Indeed, Article 7(6) of Regulation 883/2013 provides that "where investigations show that it might be appropriate to take precautionary administrative measures to protect the financial interests of the Union, the Office shall without delay inform the institution, body, office or agency concerned of the investigation in progress".

Given the average length of OLAF investigations, the transfer of information regarding economic operators under investigation, as well as their potential registration on the EDES and the application of potential sanctions, can be considerably delayed as a result of the practice of informing the authorising officers when the investigation is finalised. In the meantime, the economic operators concerned could apply for additional EU funding. For this reason, stakeholders in the Commission called for a more systematic sharing of information via intermediate reports or the creation of formal contact points, during investigations.

However, OLAF investigative units appeared to be reluctant to communicate information about ongoing investigations, through fear of putting their investigation at risk. Indeed, the EDES procedure requires that the economic operator concerned is heard, which will inform the operator of the ongoing investigation and affect its confidentiality. It should be recalled that the EDES rules in Regulation (EU, Euratom) No 966/2012 foresee the possibility to defer the notification to the economic operators in case of compelling legitimate grounds to preserve the confidentiality of the investigations, although the finer details of scope and implementation of such deferral may still have to be worked out in practice.

8.3 Other current policy developments

This section assesses the added value of Regulation 883/2013 in the light of other potential policy developments. The Controller of Procedural Guarantees (Section 8.3.1) has been the subject of a legislative proposal, while non-financial fraud is seen as a possible future priority in the broader fight against fraud (Section 8.3.2).
8.3.1 Controller of Procedural Guarantees

A number of internal and external control mechanisms are in place to supervise the respect of the guarantees defined in the Regulation 883/2013. However, there are concerns as to whether the protection thus offered is sufficient and whether persons concerned have immediate access to a remedy in the event that rights were breached. In this respect, it can be considered that external review mechanisms currently available, the European Court of Auditors, the European Ombudsman, and the EDPS “do not have the necessary competence to act as an authority providing for a sufficient and immediate remedy to redress potential violations of rights and procedural guarantees of persons under investigation.” In addition, the limitations of the control exercised by the CJEU and the length of such proceedings also limit access to an effective remedy.

In response to calls for an independent monitoring of procedural guarantees and in preparation for the establishment of the EPPO (see Section 8.1), the Commission put forward in 2014 a proposal for the creation of a Controller of procedural guarantees in charge of:

- Reviewing complaints lodged by persons under investigation about violation of their procedural guarantees, and
- Authorising OLAF to conduct certain investigative measures in respect of members of EU institutions.

In October 2014, the Coreper endorsed the Council’s position according to which the results of the present evaluation would inform the negotiations on this proposal. Stakeholders’ opinions collected as part of this evaluation on the need to create such a Controller were mixed.

First of all, the survey conducted as part of this evaluation sought views from stakeholders as to whether a controller of procedural guarantees would address shortcomings linked to the protection of procedural rights. Fifteen per cent (n=6) of respondents agreed that this would address the shortcomings, whereas 56 per cent (n=22) did not agree (Figure 24).

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349 CJEU representative at the OLAF conference on the evaluation of Regulation 883/2013.

In addition, a number of stakeholders interviewed, in particular within OLAF, questioned whether the introduction of an additional control mechanism would add value to existing procedures. Several concerns were identified:

- The creation of the Controller may create confusion and a risk of parallel procedures and contradictory recommendations, thereby creating an additional administrative burden, undermining the efficiency of the Regulation as well as the quality of the protection offered to persons concerned.\(^{351}\)
- Concerns about the financial burden the Controller would create and its impact on OLAF’s effectiveness were also expressed by the Council.\(^{352}\)
- OLAF non-investigative staff added that an external control mechanism for the respect of procedural guarantees may be superfluous, given that the Legal Advice Unit was best placed to do it in an independent and objective manner. Their knowledge and experience of OLAF investigations also limited the risk of interpretation problems. Furthermore, the current confidentiality rules would prevent an external controller reviewing ongoing investigations.\(^{353}\)
- The CONT Committee of the European Parliament criticised the proposal because it does not address the issue of the immunity of OLAF investigators.

\(^{351}\) Interviews with OLAF non-investigative staff, investigative staff, policy staff and with Commission services; P. Klement, OLAF conference on the evaluation of Regulation 883/2013  
\(^{352}\) Minutes of a meeting with Commissioner Oettinger on the evaluation of Regulation 883/2013 held on 7 April 2017.  
\(^{353}\) Interview with OLAF non-investigative staff.
from prosecutions, and that it undermined the independence of OLAF. The latter view was shared by the Supervisory Committee. Overall, OLAF’s position, supported by practitioners and academics, is that a reinforcing control mechanisms may be excessive in comparison with OLAF’s administrative powers, which do not involve sanctioning powers or enforcement powers.

However, some stakeholders argued in favour of the creation of a Controller of procedural guarantees:

- According to the European Court of Auditors and the CJEU, current review mechanisms did not offer immediate remedy to persons involved in OLAF investigations in case of breach of their procedural rights. In spite of its possible insufficiencies, the proposal constituted a progress compared to the current situation and could even be a solution to the multiple and insufficient authorities available for remedies at present.
- One AFCOS representative suggested it is important to establish the Controller, because in the Regulation procedural guarantees and the investigation procedure are clearly defined, but a specific person should be appointed to be independent and empowered to work on this area.
- The European Court of Auditors also welcomed the Commission’s proposal as it provided for an inter-institutional appointment of the Controller that would guarantee its independence. In the eyes of the Court, the introduction of an external control would be a “major improvement” compared with existing controls for individual investigations, which are internal. However, they also stressed that the Controller should not be attached to any EU institution and should have its own budget line to further guarantee its independence.
- The Ombudsman suggested that the role of the Controller could complement the role of the Supervisory Committee if the Controller were in charge of dealing with individual cases while the Supervisory Committee would concentrate on systemic issues.

If the Regulation is amended to provide OLAF with additional powers or to strengthen the evidentiary value of OLAF reports before criminal courts, opening the possibility for a judicial review of procedural guarantees offered in OLAF’s investigations will likely be needed. In that case, the creation of a Controller of Procedural Guarantees would no longer be needed.

### 8.3.2 Non-financial fraud

At present, OLAF’s mandate for investigations is limited to fraud, corruption, and other illegal activities affecting the financial interests of the Union. However, some

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354 Minutes of a meeting with Commissioner Oettinger on the evaluation of Regulation 883/2013 held on 7 April 2017.
355 Supervisory Committee representative at the OLAF conference on the evaluation of Regulation 883/2013.
356 Minutes of a meeting with Commissioner Oettinger on the evaluation of Regulation 883/2013 held on 7 April 2017, and OLAF conference on the evaluation of Regulation 883/2013.
357 Minutes of a meeting with Commissioner Oettinger on the evaluation of Regulation 883/2013 held on 7 April 2017.
358 CJEU representative at OLAF conference on the evaluation of Regulation 883/2013.
359 Court of Auditors, 2014, Opinion on establishing a Controller of procedural guarantees.
360 Interview with the European Ombudsman.
361 Minutes of a meeting with Commissioner Oettinger on the evaluation of Regulation 883/2013 held on 7 April 2017.
362 Article 1 of Regulation 883/2013.
stakeholders considered that OLAF’s experience, network and expertise could also be used in the field of non-financial fraud as well. In particular, OLAF’s investigative role in customs matters, which directly affect the EU’s budget, could be strengthened, and OLAF’s expertise on customs issues could be used to support the fight against other types of fraud that do not concern the PIF, such as counterfeit goods violating health and safety regulations. In the past, OLAF supported specific cases in relation to food fraud, by getting involved in operational customs issues or providing advice. Relevant Commission Directorates General emphasized the importance of the issue with OLAF’s Director General. According to Commission services, a broad interpretation of the provisions of Regulation 883/2013 could enable OLAF to intervene in non-financial fraud cases.

However, expanding OLAF’s investigative mandate to other types of non-financial fraud (e.g. food fraud) creates challenges from a legal and political perspective. Indeed, as such types of fraud do not affect the EU’s financial interests, it may require a revision not only of Regulation 883/2013, but also of the Office’s founding instrument. Commission Decision No 1999/352/EC provides that OLAF’s external investigative powers must strengthen the fight against fraud, corruption and any other illegal activity adversely affecting the [Union]’s financial interests “as well as any other act or activity by operators in breach of [Union] provisions.” It is unclear what the vague wording of the latter provision covers. However, any amendment of Regulation 883/2013 to modify OLAF’s investigative mandate would be based on Article 325 TFEU, which is focused solely on fraud affecting the financial interests of the EU.

However, strong political support would be needed to achieve this. In addition, a staff member of Commission services indicated that any extension of OLAF’s competence should carefully assess any potential overlaps with the mandate of existing stakeholders competent in the fields of fight against counterfeit goods, as well as health and safety breaches.

363 Interviews with OLAF investigative staff and non-investigative staff
364 Interview with Commission services
365 Article 2(1) of Commission Decision No 1999/352/EC/
366 Interview with OLAF non-investigative staff
9 Evaluation conclusions and recommendations

This section draws together the conclusions from the evaluation and recommendations for improvements (either via revisions to Regulation 883/2013 or other, non-regulatory changes) in view of the shortcomings identified during this evaluation (see preceding sections) and given the evolving legal and political landscape in the field of the protection of the EU’s financial interests (PIF).

The conclusions and recommendations are structured around the following key areas of Regulation 883/2013:

- the impact of the changes in the procedure for case selection;
- the sufficiency and clarity of powers and tools available to OLAF;
- available mechanisms for cooperation and information exchange;
- appropriateness of provisions on procedural rights and safeguards; and
- appropriateness of governance arrangements.

In addition, conclusions and recommendations are presented with respect to the future outlook for Regulation 883/2013. That is, whether the Regulation should be amended in view of the evolving legal and political landscape in the field of the protection of the EU’s financial interests.

9.1 Overview

The assessment of the effectiveness, efficiency, coherence and relevance of Regulation 883/2013 has unveiled a number of potential shortcomings in the provisions of the Regulation and/or their application. While some of these shortcomings cannot be addressed by revising the Regulation, a number of possible revisions were identified by the evaluation team to address the issues identified. Two types of shortcomings in relation to the Regulation were identified:

- Lack of clarity of the provisions in Regulation 883/2013:
  - Clarify the application of the case selection criteria and the communication around the outcomes of the case selection process. First, clarify the comprehensiveness and weight of the case selection criteria. Second, clarify the instances when OLAF will communicate case selection decisions, as well as the audience to whom it is communicated (e.g. provider of incoming information, requestor of the investigation).
  - Define and simplify the range of OLAF’s investigative activities and powers. First, the Regulation should consolidate the diverse legal bases for OLAF’s investigative powers and tools by aligning the different provisions they contain and consolidating them into one legal instrument. Second, OLAF should have the power to conduct on-the-spot checks and inspections in a similar manner across all EU Member States, regardless of differences in national law and practices. Third, the different scenarios under which digital forensic evidence can be accessed and collected should be clarified.
  - Strengthen the cooperation between OLAF and Member States. Minimum requirements and desired profiles for the AFCOS should be defined: this could be done on the basis of assessing the current features of the AFCOS

367 i.e. Regulation 883/2013 for investigative matters, but also Council Regulation 2185/96 regulating on-the-spot checks, as well as sectoral legislation, including Regulation 515/97 on mutual administrative assistance in the field of customs.
against a set of criteria such as human resources\textsuperscript{368}, coordination function (i.e. facilitation of cooperation between OLAF and AFCOS and between AFCOS themselves)\textsuperscript{369}, information broker (i.e. competence for reporting of irregularity\textsuperscript{370}, assisting in the exchange of information as well as reporting on the follow-up to OLAF investigations).

- Clarify a number of points of detail in the Regulation related to the procedural guarantees of individuals subject to investigations without changing fundamentally the core rights and guarantees for persons concerned given OLAF reports and recommendations can be admissible evidence in judicial proceedings.

- Strengthen the cooperation with third country authorities and international organisations. ACAs should be promoted to third countries and international organisations that receive EU funds. In the absence of such agreements, the revised Regulation should make clear that the signature and adoption of ACAs are not a pre-requisite for information exchange and cooperation between OLAF and third countries / international organisations.

- Strengthen the governance of OLAF. First, a clearer (and possibly narrower) definition of the mandate of the Supervisory Committee should be adopted. Second, Article 15 of the Regulation should be revised to clarify that the Supervisory Committee has no mandate/role in monitoring individual cases as it is provided for under Art 17(7) and implemented by the ISRU and the Legal Advice Unit of the Office. Second, a monitoring system relying on the analysis of anonymised case data should be implemented to allow the Supervisory Committee to better monitor the duration of investigation (Article 7(8)) and provide recommendations on the resources needed to carry out the investigative function and on the investigative priorities of the Office (Article 15 (1) paragraph 3).

- Limitation of the mandate of OLAF:
  - Loosen the requirements on the timing of the interview with the subject of an investigation so that it can be organised at the same time as an on-the-spot check and/or inspection of premises whilst guaranteeing an equal level of safeguards for the procedural rights of the person concerned.
  - Clarify OLAF’s investigative powers to conduct digital forensic operations and, specifically, obtain/access data and information stored on private devices/accounts.
  - Extend the investigation mandate of OLAF to customs matters and possibly other types of fraud that do not concern the PIF, such as counterfeit goods violating health and safety regulations.

\textbf{9.2 Opening investigations}

This section presents the main conclusions related to the opening of OLAF’s investigations and suggest recommendations for improvement.

\textsuperscript{368} AFCOS rely on 8.6 Full Time Equivalent on average to perform their functions. This is based on the AFCOS survey run by OLAF and has been calculated on the basis of weighted average.

\textsuperscript{369} 93\% of AFCOS are entrusted with the task of cooperating and exchanging information with the Office. 83\% facilitate contacts between national authorities and OLAF. Most AFCOS cooperate with authorities in charge of (1) Anti-corruption; (2) Anti-fraud; (3) customs; (4) EU programme funding; (5) Judicial matters; (6) law enforcement matters; (7) Auditing matters; (8) Budgetary, financial and tax matters.

\textsuperscript{370} 57\% of AFCOS have this competency at national level.
9.2.1 Conclusions

There has been an increase in the case selection activity of OLAF in terms of the number of cases opened and the number of cases dismissed. The number of cases selected in recent years is significantly higher than it was pre-2012.

There were mixed views from stakeholders as to whether the case selection criteria and their application is transparent. The perceived lack of clarity of the case selection criteria may be because Regulation 883/2013 does not specify:

- whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions;
- whether the selection criteria should be weighted equally or differently;
- the extent of discretion of the OLAF Director-General vis-à-vis the selection criteria;
- the relative weight to be given to the Investigation Policy Priorities (IPPs) vis-à-vis the selection criteria.

Among non-OLAF stakeholders (AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations), a common view was it is unclear how the case selection criteria and their application impact the selection of cases. A number of non-OLAF stakeholders suggested that they do not always receive from OLAF information on case selection decisions and, when they do, it was often generic and lacking in specific detail.

The perceived lack of clarity as to how the criteria are applied may reflect that Regulation 883/2013 only requires that OLAF communicate case selection decisions to those involved in requesting the investigation and those who provided incoming information, with reasons when a case is not opened. This reduces both the number of instances when OLAF should be communicating case selection decisions, and the audience to whom it communicates. The Supervisory Committee concluded in 2014 that OLAF does not systematically inform sources of information of OLAF’s decisions. It is not clear whether and to what extent that situation has changed since. The lack of systematic communication of case selection decisions may reflect the inconsistency in the wording of the Regulation and the GIPs in relation to this issue. The GIPs use less-binding terminology (‘may’ instead of ‘shall’, and ‘where necessary’) in places than the Regulation.

It is clear from the evidence (data published by OLAF as well as the views of interviewees) that the IPPs have had a negligible impact on case selection decisions. The lack of specificity in Regulation 883/2013 regarding how the IPPs should be applied to case selection decisions in practice provides the ISRU with additional flexibility to convert a potential dismissal decision (based on an assessment of incoming information against the other selection criteria) into an opening decision. As such, this lack of specificity may enhance the effectiveness of the Regulation and, consequently, there may be a case for leaving the Regulation unchanged and not specifying more clearly how the IPPs should be applied to case selection decisions. However, it may be beneficial from a transparency perspective to revise the GIPs such that they accurately reflect the reality as to how the IPPs are used in practice. That is, while the GIPs currently state that ‘the opinion on the opening of an investigation or coordination case shall be based on whether the information falls within OLAF’s competency to act, the information is sufficient to justify the opening of an investigation or coordination case and falls within the Investigative Policy Priorities (IPP) established by the Director-General’, they could make clear that OLAF ‘only use the IPPs where the criteria set out in the Regulation would suggest a dismissal of the case’.
A number of stakeholders interviewed considered that the ISRU expedited the case selection process, helping to drive efficiencies, but suggested scope for improving the knowledge/experience of ISRU staff. Similarly, in 2014, the Supervisory Committee recommended that OLAF increase the number of selectors with investigative experience, apply the principle of specialisation among selectors and ensure that selectors have appropriate legal, linguistic and sectoral expertise. OLAF stakeholders interviewed indicated that ISRU staff regularly engage with investigative units to seek their views on incoming information prior to case selection, and that this has been the case for the past 2-3 years.

Despite the 2014 Supervisory Committee opinion on the staffing of the ISRU, and the problems perceived by selected stakeholders consulted, there is no clear evidence to suggest that shortcomings exist/persist in relation to the staffing of the ISRU which impact upon the effectiveness of Regulation 883/2013. The evaluation found no evidence that the experience and expertise of case selectors, and/or the model of engagement between selectors and investigators, needs improving.

9.2.2 Recommendations

While the creation of the ISRU and the introduction of the Single Point of Entry (SPE) are widely acknowledged as an improvement in OLAF’s functioning, some improvements could still be introduced to further improve the effectiveness of the Office’s selection of cases.

At the moment, Article 5(1) of Regulation 883/2013 defines the selection criteria and IPPs to be followed by OLAF to open and or dismiss cases. OLAF investigative staff were more likely than non-OLAF stakeholders to say that the selection criteria are clear and helpful in guiding the selection of cases. Some issues were highlighted with regard to determining the extent of analysis (of incoming information) that should be undertaken by selectors against the criteria and the potential duplication of efforts between selectors and investigators in undertaking tasks related to the assessment of incoming information against the criteria. Non-OLAF stakeholders are unclear as to how the case selection criteria, in particular their application, impacts the selection of cases in practice. This may be because rationale for case selection is only communicated when cases are dismissed but also of the lack of clarity on the application of the selection criteria (e.g. exhaustiveness of the list, weighting, level of discretion in their application by the Director General).

In particular, the Supervisory Committee called for a better evaluation of the implementation of previous IPPs by OLAF, and for the acknowledgement of EU spending priorities and EU policy priorities in PIF matters. Based on this observation, the clarification of IPPs and of their weight in the selection process may be envisaged, though the fact that OLAF’s does not have a proactive role in looking for information limits its ability to identify cases matching IPPs and prioritise them.

Recommended changes to Regulation 883/2013

- **Recommendation 1** – Revise Article 5 (Opening of investigations) to clarify:
  (a) whether the selection criteria constitute an exhaustive list of factors to be considered in case-opening decisions; (b) whether the selection criteria should be weighted equally or differently; and (c) the extent of discretion of the OLAF Director-General vis-à-vis the selection criteria.

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372 Interview with OLAF non-investigative staff.
Recommended non-regulatory changes

• **Recommendation 2** – Revise Article 7 of the GIPs to ensure consistency with the language in Regulation 883/2013 regarding communicating case selection decisions to those involved in requesting the investigation and those who provided incoming information.

• **Recommendation 3** – Revise Article 5 of the GIPs to confirm that OLAF only use the Investigative Policy Priorities (IPP) where the case selection criteria set out in Regulation 883/2013 would suggest a dismissal of the case.

• **Recommendation 4** – The duration of the case selection process (alongside the duration of investigations) should be systematically monitored on a case-by-case basis (using anonymised meta data) to measure the effect of the case selection process on the duration of investigations. This will empower the Supervisory Committee to better respond to its monitoring obligations under the Regulation, notably on the duration of the investigations and allocation of resources.

9.3 Investigative tools and powers

This section presents the main conclusions related to the investigative tools and powers and suggest recommendations for improvement.

9.3.1 Conclusions

Regarding specific investigatory tools and powers, stakeholders noted that Regulation 883/2013 is generally clear but they queried the clarity/sufficiency of the Regulation in relation to the following areas:

• **On-the-spot checks**, where very little evidence was provided by stakeholders in relation to on-the-spot checks undertaken as part of internal investigations (involving on-the-spot checks conducted on economic operators); instead, various stakeholders (including OLAF investigative and non-investigative staff and Commission services) cited challenges in interpreting/ applying Regulation 883/2013 in practice to on-the-spot checks in external investigations given the Regulation’s reference to national rules and practices. The point was also made by some stakeholders that it is not just the national rules and practices that can be challenging to navigate across different Member States, but it is also not always clear as to who the 'competent authority' is in each Member State is (e.g. anti-fraud authority; customs authorities; etc.). The impact on external investigative on-the-spot checks of this dependency on national rules and practices is difficult to measure/establish in practice although qualitative/anecdotal evidence collected during this evaluation suggests it has the potential to delay investigations and compromise the completeness and/or quality of OLAF’s reports.

• **Regarding inspections**, two separate issues emerged:
  - In the context of external investigations, the issues raised by stakeholders were broadly consistent with those described for on-the-spot checks (regarding the challenges associated with the interface between Regulation 883/2013 and national rules and practices). This reflects the fact that on-the-spot checks and inspections (in the context of external investigations in Member States) are covered together in Regulation 883/2013.
  - In the context of internal investigations, there is an inconsistency between the Regulation and the GIPs in the clarity and transparency of the detail surrounding inspections of EU premises, although they are not necessarily inconsistent in how they describe the scope and nature of the powers – the inconsistency stems from the fact that the GIPs provide more transparent/explicit detail than the Regulation on OLAF’s powers to inspect.
EU premises. Additionally, the manner in which OLAF informs an EU IBOA of its intention to carry-out an inspection on its premises may vary in practice.

- **Interviews** with witnesses (in particular), where the process of seeking prior authorisation can be both logistically difficult (as some witnesses will not be known until an on-the-spot check is completed) and time-consuming. Further, there is some confusion over the difference between an interview (for which prior authorisation does apply) and a statement (for which it does not).

The evaluation identifies the following potential improvements to Regulation 883/2013’s provisions surrounding on-the-spot checks, inspections and interviews:

- Revising Regulation 883/2013 to enable OLAF to conduct on-the-spot checks and inspections in a similar manner across all EU Member States, regardless of differences in national law and practices.

- Revising Regulation 883/2013 to allow OLAF to conduct an on-the-spot check and/or inspection of premises and interview a person (identified as a person concerned or witness during the course of that on-the-spot check and/or inspection) at the same time (which may need to be facilitated by amending the Regulation’s provisions surrounding prior notice to persons concerned). Related to this is the need to clarify the legal basis of statements vis-à-vis interviews in the context of the requirements to seek prior authorisation for interviews (which does not apply to statements obtained in the course of an on-the-spot check).

The evaluation found a lack of clarity and specificity surrounding OLAF’s powers to conduct **digital forensic operations** driven by two factors:

- OLAF’s powers to conduct digital forensic operations during external investigations are dependent on national rules and practices, which vary.

- Regulation 883/2013 does not specify whether OLAF’s powers extend to accessing organisational information and data which has been stored and/or accessed via private devices/hardware (such as phones, computers, tablets, etc.) or private online accounts (such as accounts linked to the cloud).

On the basis of this evidence, the evaluation concludes there is a case for revising (and/or clarifying) Regulation 883/2013 to provide OLAF with the power to undertake digital forensic operations in external investigations, as these currently fall within the scope of criminal investigations at a national level which requires approval from the Member State and/or economic operator concerned. Further, clarity could be provided within the Regulation regarding the scope/reach of OLAF’s powers to undertake digital forensic operations given the different dynamics/scenarios put forward by stakeholders (mostly involving a mix of private devices/accounts and organisational data/information) for which it is unclear as to whether and how Regulation 883/2013 would apply.

In relation to **precautionary measures**, the evaluation found that although there was generally widespread support for the Regulation 883/2013 provision related to precautionary measures, in practice the feasibility of taking precautionary measures was often questioned by those with responsibility for acting on OLAF’s recommendation. This relates to the uncertainty surrounding the legality of such measures given they are taken at a point in time when OLAF’s investigation has not yet concluded and the person concerned has not been found guilty of an offence.

The interplay between Article 7(6) of Regulation 883/2013 (surrounding precautionary measures) and Article 9 (regarding procedural guarantees) – as well as wider EU law related to an individual’s fundamental rights (including the right to a fair hearing and the presumption of innocence) – remains unclear. This lack of clarity is likely to explain in part the reluctance of some stakeholders to follow-up on precautionary
measures. Linked to the inconclusive nature of the evidence (at that stage of the investigation) is the risk of having decisions to suspend payments quashed by a court and/or damages having to be paid.

The evaluation found a lack of clarity surrounding the immunity of an MEP. This lack of clarity extends to the process by which this immunity can be lifted/waived (specifically, whether only judicial authorities can request the lifting of immunity).

Further, there is a degree of uncertainty surrounding OLAF’s powers surrounding Accredited Parliamentary Assistants (APAs), who do not benefit from the immunity afforded to MEPs, but the effects of an MEP’s immunity may extend to APAs where they share an office or working material. The powers of OLAF concerning accredited assistants are not specified either in the Regulation or the Practical Arrangements between the European Parliament and OLAF.

In relation to OLAF reports and follow-up, the number of investigation cases concluded with recommendations had almost doubled by 2015 when compared to the end of the pre-evaluation period (i.e. 2012). However, when considering the total number of closed cases, the share accounted for by closed investigations with recommendations has remained fairly stable. The data also shows a doubling in the number of financial and judicial recommendations since 2013, which has been the main driver behind the overall increase in recommendations since 2013.

Evidence on the quality and comprehensiveness of OLAF’s final reports is mixed:

Although around 80 per cent of OLAF respondents to the online survey agreed or strongly agreed that OLAF’s investigation reports are overall clear and comprehensive, fewer non-OLAF stakeholders (40-70 per cent) agreed that this was the case.

Stakeholders suggested that the sometimes disproportionately high levels of recoveries recommended by OLAF is a factor that has a negative influence on the nature and extent of follow-up to financial recommendations. OLAF recently adopted a set of ‘Instructions on drafting Financial Recommendations and related sections of the Final Report’, which should make a difference given they provide extensive detail on how to estimate the amounts to be recovered and they provide for situations whereby the whole amount paid is not recommended for recovery but, rather, a proportion thereof. These Instructions also make provision for OLAF to collaborate with stakeholders in relation to improving the quality of financial recommendations.

In relation to follow-up to judicial recommendations, a common issue raised via the stakeholder consultation relates to the admissibility of OLAF’s investigation evidence, for which stakeholders noted that the quality and admissibility of an OLAF report depends on the degree to which OLAF respects Regulation 883/2013 and the national legislation of Member States.

9.3.2 Recommendations

At least in cases where the investigated conduct potentially falls under the scope of criminal law, OLAF operates in a “two tier system”373, in which its administrative investigations prepare for a potential criminal investigation. OLAF only has administrative powers to conduct its investigations.374 While OLAF stakeholders have called for an increase of the Office’s powers (e.g. to extend its access to information such as bank account data; extend the scope of the access to information in databases not only related to IBOAs such as the forensic acquisition of data on private devices)

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373 Bazzocchi V. (Ed.), Protecting fundamental and procedural rights, From the investigations of OLAF to the future EPPO, Fondazione Basso, 2014
374 Interview with Member State AFCOS
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

given the strengthening of procedural guarantees brought by Regulation 883/2013, other stakeholders have argued that if such an increase were to take place, OLAF would no longer be an administrative authority and its investigations would need to be subject to the control of a judge.

When it comes to external investigations, OLAF’s investigative powers are defined under Article 3 of the Regulation and the Office’s access to information and documents is limited to the terms and conditions applicable to its national authorities. The effectiveness of OLAF’s powers in external investigations depends on national law and practices, as well as on the relevant national authorities’ approach to cooperating with OLAF. This situation leads to a different application of the Regulation in each of the Member States and affects its consistent, effective and efficient application. In this context, the Office’s powers could be clarified by granting OLAF with uniform investigative powers at EU level.

Regarding internal investigations, OLAF’s powers as defined under Article 4 of the Regulation appear to be more uniform. However, in practice, some IBOAs are reluctant to let OLAF access to their premises and conduct investigative acts. A recast of the Regulation should stress the importance of a uniform application of its provisions in all IBOAs. In addition, while ACAs concluded between the Office and individual IBOAs should take into account the specificities of each IBOA's function in relation to EU financial interests, the relevant provisions of the Regulation should apply uniformly in all IBOAs regardless of whether ACAs are in place or not.

**Recommended changes to Regulation 883/2013**

- **Recommendation 5** – Revise Article 3 (External investigations) to enable OLAF to conduct on-the-spot checks and inspections in a similar manner across all EU Member States, regardless of differences in national law and practices. This extends to OLAF’s power to undertake digital forensic operations in a similar manner across all EU Member States.

- **Recommendation 6** – Revise Article 3 (External investigations), Article 4 (Internal investigations), Article 6 (Access to information in databases prior to the opening of an investigation) and ‘Whereas clause 14’ to confirm OLAF’s powers to undertake digital forensic operations where organisational information/data is stored on private devices/accounts (clarifying whether and how this interferes with the right to privacy).

- **Recommendation 7** – Revise Article 4 (Internal investigations) to clarify OLAF’s powers with respect to Accredited Parliamentary Assistants (APAs) in situations where the effects of an MEP’s immunity may extend to APAs where they share an office or working material.

- **Recommendation 8** – Revise Article 6 (Access to information in databases prior to the opening of an investigation) to ensure equivalence of access to

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375 Interviews with OLAF non-investigative staff and investigative staff; and OLAF conference on the evaluation of Regulation 883/2013.

376 Interview with Member State judicial authority

377 OLAF conference on the evaluation of Regulation 883/2013; Interview with OLAF investigative staff

378 Article 3(3) of Regulation 883/2013.

379 M. Simonato, “OLAF Investigations in a Multi-Level System Legal Obstacles to Effective Enforcement”, Eurcrim, 2016 n°3, pp.136-141

380 Interview with Member State AFCOS and G. Kessler in the OLAF conference on the evaluation of Regulation 883/2013.

381 OLAF Director General at conference on the evaluation of Regulation 883/2013.
information in databases of EU IBOAs and Member States. In addition, Article 6(1) should be amended to remove reference to the ‘indispensable’ nature of the relevant information in databases to which OLAF shall have the right of access given this may be overly restrictive in practice and, in any case, is arguably redundant and/or inconsistent with the reference within Article 6(1) to the Office respecting ‘the principles of necessity and proportionality’ in exercising the right of access.

9.4 Cooperation and information exchange

This section presents the main conclusions related to cooperation and information exchange and suggest recommendations for improvement.

9.4.1 Conclusions

Much of the focus of stakeholders and other sources of evidence was on the role and profile of the AFCOS in facilitating cooperation and the exchange of information with OLAF.

The overwhelming view of survey respondents and stakeholders interviewed is that the creation of the AFCOS strengthened cooperation and the exchange of information between OLAF and Member States’ authorities.

Stakeholders and survey respondents cited a number of benefits arising from this improved cooperation and the exchange of information between OLAF and Member States’ authorities, including reduced investigation duration, increased criminal investigations and prosecutions, increased recovery of misused public funds and increased deterrence.

Despite this, a number of stakeholders highlighted shortcomings with the AFCOS. In particular, the lack of specificity in Regulation 883/2013 means that there is little to no consistency in the size, profile and powers of the AFCOS, meaning that OLAF does not receive the same level and nature of support in each Member State.

In light of this, it was suggested that Regulation 883/2013 could potentially be amended to more clearly specify (and potentially harmonise) the nature of the AFCOS.

In addition, there is scope for the Regulation to specify clearly the relevance of the AFCOS’ role in facilitating effective cooperation and exchange of information in the context of internal investigations.

More broadly, Regulation 883/2013 appears to have impacted positively on the nature and extent of cooperation with national authorities (especially judicial authorities). There is evidence to suggest that cooperation has improved and the reason cited by a number of stakeholders was the existence of Regulation 883/2013 as it places a legal obligation on national authorities to cooperate.

In recent years, Member States have increasingly cooperated with OLAF in the context of investigations rather than coordination cases. There has been a decline in the number of coordination cases undertaken by OLAF, which appears to be driven largely by changing OLAF internal priorities given the disproportionate and adverse impact that coordination cases can have on OLAF’s performance statistics.

Where coordination cases are undertaken by OLAF, there is a lack of clarity surrounding OLAF’s role based on Regulation 883/2013 (although the GIPs provide further elaboration and guidance on the subject).

Finally, policy-related coordination via COCOLAF was viewed by Member States as a driver of more effective coordination with OLAF.

Views among stakeholders were generally positive about cooperation between OLAF and IBOAs.
Regulation 883/2013 appears to have helped strengthen cooperation and information exchange between OLAF and EU IBOAs, including via administrative arrangements. However, this impact could have been felt more evenly had these administrative arrangements been in place with all EU IBOAs and had there been greater consistency among the administrative arrangements already in place.

Little evidence is available on cooperation and exchange of information with Eurojust and Europol. Delays in agreeing new administrative arrangements with Europol may have hindered the effectiveness of cooperation with OLAF. Interviews with Eurojust and DG JUST suggest that cooperation between OLAF and Eurojust has been highly effective.

ACAs formed the main area of focus in stakeholder discussions surrounding cooperation and information exchange with third countries and international organisations. ACAs are considered by OLAF and a range of other stakeholders as particularly important to facilitate international cooperation.

Concerns were raised by certain stakeholders regarding Article 14. Although Article 14 introduces the possibility to develop close cooperation (including via ACAs) with third countries and international organisations, Article 14(1) appears somewhat ambiguous as to whether an administrative arrangement is required before information can be exchanged.

9.4.2 Recommendations

OLAF’s cooperation with its partners in the context of investigations (IBOAs and Member States, third countries and international organisations), and with other stakeholders active in the field of the protection of the EU’s financial interests (Eurojust, Europol) is central to its effective functioning.

The cooperation between OLAF and Member States in investigations could be improved by specifying the minimum requirements (based on the most common features) for the competencies and responsibilities of the AFCOS which vary considerably across Member States. However, this amendment would likely be opposed by some of the Member States, who could consider this provision contrary to the subsidiarity principle.

Several stakeholders requested a closer cooperation between OLAF and its partners in the context of investigations. Regarding external investigations, several AFCOS called for regular communication with OLAF in the course of investigations, in particular to avoid parallel investigations. It seems that such communication issues stem from a strict application of the principle of confidentiality of investigations. In internal investigations, EU IBOAs asked that intermediate information be sent by OLAF during the course of an investigation for them to be able to take precautionary measures where necessary. This suggests that Article 7(6), according to which the Office has an obligation to inform IBOAs without delay of the investigation in progress where precautionary measures are needed, is not applied in a satisfactory/timely manner. In general, some stakeholders perceived OLAF investigations as disruptive for judicial proceedings as they could alert a suspect and hinder the effectiveness of a criminal investigation. Improving cooperation and the coordination of investigations could help mitigating this shortcoming, although a revision of Regulation 883/2013 would not necessarily be needed to achieve this. Improving the reporting on the follow-up to recommendations would also contribute to a higher effectiveness of the work of the

382 Interviews with AFCOS
383 Interview with EU IBOA and with OLAF investigative staff
Office. This could be achieved by making the reporting on the follow-up to an OLAF investigation systematic and mandatory for AFCOS and any relevant Member State authority.

**Recommended changes to Regulation 883/2013**

- **Recommendation 9** – Revise Article 3 (External investigations) to specify a minimum requirement for the competencies and responsibilities of the anti-fraud coordination services (AFCOS) in all Member States. Similarly, Article 4 (Internal investigations) should be revised to include a reference to the AFCOS (of a comparable/similar nature to the reference within Article 3(4)) to denote the relevance of the AFCOS role in facilitating effective cooperation and exchange of information in the context of internal investigations.
- **Recommendation 10** – Revise Article 14 (Cooperation with third countries and international organisations) to confirm that the exchange of operational, strategic or technical information can take place in the absence of an administrative arrangement.

**Recommended non-regulatory changes**

- **Recommendation 11** – At least six factors conducive to efficiency in cooperating with OLAF partners were identified (see chapter on efficiency). Such factors should be codified in existing and future cooperation arrangements which were found, in themselves, to enhance the effectiveness and efficiency of the cooperation between OLAF and its partners.

9.5 Procedural rights and safeguards

This section presents the main conclusions related to procedural rights and safeguards afforded to the subjects of investigations and suggest recommendations for improvement.

**9.5.1 Conclusions**

The evaluation identified relatively polarised views in relation to Article 9 overall. A number of stakeholders spoke positively about the introduction of provisions on procedural rights within Regulation 883/2013, the perceived benefits of which include greater credibility, transparency, accountability and quality of OLAF’s work. They suggested that the outcomes from OLAF’s administrative investigations are often designed for criminal proceedings and, hence, higher standards of protection of rights are required. It was suggested that adherence to the procedural guarantees in Regulation 883/2013 may improve the admissibility of evidence from OLAF’s investigations for subsequent criminal proceedings. In contrast, the majority of stakeholders interviewed for the evaluation expressed the view that Article 9 introduced a set of rights and safeguards that are disproportionate to the administrative nature of OLAF’s investigations. They were seen as time-consuming processes that slow down investigations.

The evaluation analysed evidence against each individual right within Article 9:

- The right to an objective and impartial investigation in accordance with the principle of the presumption of innocence (Article 9(1)). The appropriateness and proportionality of this procedural right was not called into question by the evidence collected and analysed during the course of the evaluation given the fundamental nature of the rights it seeks to guarantee.
- The right to avoid self-incrimination (Article 9(2)). Although the appropriateness of the right to avoid self-incrimination in and of itself is not called into question by this evaluation, inconsistencies have been identified which should be addressed to provide additional certainty and clarity.
The right to be informed – with prior notice – of the intention of OLAF to interview the person concerned/witness (Article 9(2)). This issue was one of the more contentious guarantees in the eyes of stakeholders consulted for this evaluation. The reasons for this relate primarily to the challenges and burdens associated with providing prior notice, combined with the perceived disproportionality of the length of the notice period (at least 10 working days’ notice). Again, this evaluation finds inconsistencies (including between the Regulation and the GIPs) in this area which should be addressed to improve clarity.

The right to be assisted by a person of the individual’s choice (Article 9(2)). Again, unsurprisingly, the appropriateness and proportionality of this procedural right was not called into question in the evidence sources ICF analysed during the course of the evaluation given the fundamental nature of the right.

The right for the person concerned to comment on the facts of the case (Article 9(4)). This is arguably one of the most contentious guarantees under Article 9 in the eyes of stakeholders. Among those who did not believe that this right is appropriate and proportionate either sought to argue that OLAF’s reports do not change the legal standing of a person concerned, and/or that the right may undermine future criminal proceedings by alerting in advance the person concerned. Among those who do believe it is appropriate and proportionate, they pointed to the evidentiary value of OLAF’s investigative reports.

In conclusion, the evaluation finds evidence that, in general, the procedural guarantees introduced by Article 9 of Regulation 883/2013 reflect (and codify/clarify) to a large extent existing rights and guarantees under EU law. Given the role of OLAF reports in criminal proceedings (with 44 per cent of all cases with judicial recommendations in the past 7 years resulting in indictments), the rights/guarantees under existing EU law which are reflected in Article 9 are considered proportionate. However, the evaluation identifies a number of aspects of Regulation 883/2013 and the GIPs that are unclear and/or inconsistent and would benefit from revision. Further, aspects of Article 9 specific to Regulation 883/2013 (such as the period of prior notice to be given to persons concerned in advance of an interview) are arguably disproportionate in relation to their intended objective (and the consequent impact on investigative procedures/durations) and could benefit from revision.

**9.5.2 Recommendations**

Challenges created by procedural guarantees in the context of investigations, such as their impact on the efficiency of investigations due to the obligation to respect notification periods for instance, were generally acknowledged as necessary to guarantee fair investigations. Therefore they may not be addressed by specific recommendations.

However, the lack of clarity of the conditions under which a person concerned should be given the opportunity to comment on the facts of a case could be addressed, at least via instructions or a revision of the GIPs.

The creation of a Controller of procedural guarantees received mixed opinions and may not be appropriate in the current setting of OLAF. A prevailing opinion seems to be that creating an additional control mechanism would create unnecessary confusion. If the structure of OLAF or the roles of external control mechanisms were to be changed, the proposal for a Controller may become relevant.

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384 Interviews with OLAF investigative staff
385 Interview with OLAF non-investigative staff
Recommended changes to Regulation 883/2013

- **Recommendation 12** – Revise Article 9 (Procedural guarantees) to:
  - Enable OLAF to conduct an on-the-spot check and/or inspection of premises and interview a person concerned or witness identified during an on-the-spot check and/or inspection at the same time (in the absence of prior notice being provided).
  - Clarify whether a person concerned can agree to reduce the notice period for an interview to less than 24 hours.
  - Reflect/capture the additional detail and clarity on procedural guarantees as specified within the GIPs (and as clarified according to the non-regulatory recommendations set-out below).

- **Recommendation 13** – Revise Article 2 (Definitions) and/or Article 9 (Procedural guarantees) to ensure consistency in the basis on which a person concerned is defined (i.e. ‘evidence’, or ‘suspicion’).

Recommended non-regulatory changes

- **Recommendation 14** – Revise Article 16 of the GIPs to ensure the language in the GIPs is consistent with the language in Regulation 883/2013 regarding the use of past statements where a person concerned was previously interviewed as a witness.

- **Recommendation 15** – Clarify within the GIPs the following issues related to Article 9 of Regulation 883/2013:
  - Where comments on the facts are received by OLAF from a person concerned, whether additional investigative acts could/should be undertaken as necessary. [NOTE: to the extent that this would suggest a continuation of an existing investigation, an alternative recommendation would be to amend Article 9(4) so that it does not specify that the opportunity to comment is only provided once the investigation is closed]. Where these additional investigative acts reveal new findings relating to the person concerned, that person should be given the opportunity to comment on the new findings before conclusions are reached.
  - Whether a person concerned should be given the opportunity to comment in cases that are closed where no evidence has been found against the person concerned indicating the existence of a fraud, corruption or other illegal activity.
  - What form the ‘summary of the facts’ should take.
  - How to define/classify ‘duly justified cases’.
  - Whether ‘deferral’ (in the context of the deferral of the opportunity to comment) should be interpreted as ‘cancellation’ or ‘avoidance’ and, if not, how the obligation should eventually be discharged.

- **Recommendation 16** – Regular monitoring of the procedural rights afforded using anonymised case level data is recommended in order to assess their impact on the efficiency of the investigative function. Indicators linking the type of safeguards put in place and the length of the case, the follow-up actions at national level or the admissibility of the evidence of an OLAF case in judicial processes at national level would help OLAF in its reporting duties and in making decisions on the best use of OLAF resources at case selection stage. This would also allow to better respond monitoring obligations concerning the application of procedural guarantees under the Regulation.
9.6  Supervisory Committee

9.6.1  Conclusions

A number of stakeholders highlighted the dual role of the Supervisory Committee and the fact that Regulation 883/2013 leaves open to interpretation its mandate/role.

This has generated a degree of confusion given the different interpretations and perceptions of the Supervisory Committee’s role (largely, whether the main role and mandate of the Supervisory Committee is of a supervisory nature – monitoring and supervising its investigative function to ensure its compliance with Regulation 883/2013 – or whether it’s role is more heavily weighted towards supporting and safeguarding the independence of OLAF).

Stakeholders also suggested that this lack of clarity over the Supervisory Committee’s role and mandate had contributed to a deterioration in the relationship (and cooperation) with OLAF.

The most commonly-cited obstacles and shortcomings were associated with the definition of the role and tasks of the Supervisory Committee, the content of the Supervisory Committee’s recommendations and the working arrangements between OLAF and the Supervisory Committee (which were discontinued in March 2017, upon request of the Supervisory Committee). Comments received from OLAF argued that Regulation 883/2013 and the Joint Opinion of the three Legal Services do not cover all aspects of the transmission of information from OLAF to the Supervisory Committee, (such as data protection, timetable and modalities of transmission). Therefore, in OLAF’s view, there is still space for, and great utility of, practical arrangements with the Supervisory Committee.

9.6.2  Recommendations

Shortcomings regarding provisions regulating the governance of OLAF mainly relate to the clarity of the role/mandate of the Supervisory Committee.

The lack of a common understanding on the Supervisory Committee’s mandate and role was consistently raised as a major shortcoming of the Regulation.\(^{386}\) Suggestions for improvement of the functioning of the Supervisory Committee include clarifying the role of the Supervisory Committee, and whether it amounts to a monitoring role over individual cases, which created issues of access to information and cooperation. In addition, the role of the Supervisory Committee should evolve with any amendment made to the Regulation. For instance, in the event OLAF’s powers are reinforced, OLAF recommendations could be acknowledged as intended to produce legal effects, which would open the way for a judicial control by the CJEU,\(^ {387}\) and would limit the need for internal controls. In the event a Controller of procedural guarantees is set up, its mandate could be to monitor the respect of procedural guarantees in individual cases, while the Supervisory Committee could be tasked with monitoring systemic issues only.\(^ {388}\)

Another governance-related issue lies with the procedure to lift the immunity of the Director-General and other members of staff upon request of a national judicial authority. The Court of Auditors and the European Parliament called for a clarification of the procedure and full transparency about all requests from national judicial authorities.

\(^{386}\) Interviews with OLAF non-investigative and investigative staff, Supervisory Committee

\(^{387}\) Interview with OLAF non-investigative staff.

\(^{388}\) Interview with EU control body
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

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At the moment, the Regulation refers to Protocol No 7 on the privileges and immunities of the European Union attached to the TEU and TFEU.

Recommended changes to Regulation 883/2013

- **Recommendation 17** – Revise Article 15 (Supervisory Committee) to
  - Clarify whether the main role and mandate of the Supervisory Committee is to monitor and supervise OLAF’s investigative function (to ensure its compliance with Regulation 883/2013) or to support and safeguard the independence of OLAF.
  - Confirm that the Supervisory Committee has no mandate/role in monitoring individual cases (provided for under Article 17(7) as discharged ex-ante by the ISRU (legal review) and ex-post by the Legal Advice Unit (complaints)).

Recommended non-regulatory changes

- **Recommendation 18** – Implement a monitoring system relying on the analysis of anonymised case data to allow the Supervisory Committee to better monitor the duration of investigations and the drivers of investigation durations.

- **Recommendation 19** – A regular monitoring function and system based on core indicators (e.g. duration of investigations, use of resources, safeguard afforded) could help the Supervisory Committee in performing their monitoring duties more efficiently, i.e. saving time and efforts to the Supervisory Committee secretariat and Members of the Supervisory Committee.

9.7 Future Outlook

This section presents the main conclusions related to the future of the Regulation in the midst of the evolving legal and political landscape in the field of the protection of the EU’s financial interests (PIF) and suggests specific recommendations.

9.7.1 Conclusions

The creation of the EDES calls for enhancing good cooperation and communication between OLAF and the authorising officers and the EDES Panel, for a timely transmission of OLAF’s information collected during OLAF investigations, so that they can be used in a timely manner to detect unreliable economic operators or proceed with an exclusion or financial penalty as the case may be. However, the occasional lack of clarity of OLAF recommendations as well as OLAF’s reluctance to share information before the investigation is closed to preserve its confidentiality have been flagged as obstacles to an effective cooperation. Conversely, the inconclusive nature of preliminary information transmitted by OLAF pursuant to Article 7(6) of Regulation 883/2013 has been mentioned as a factor preventing Authorising Officers from quick follow-up through precautionary measures.

The need for creating a Controller of Procedural Guarantees will depend on future developments of OLAF and of its investigative function. In the current situation, creating a Controller on top of other review and monitoring mechanisms may lead to confusion and inconsistencies in the protection of persons and entities concerned in OLAF investigations. Depending on whether and how the mandates of the Supervisory Committee and/or other review bodies are amended, the need for a Controller may

arise in the future. In any event, while the creation of an independent review mechanism may improve the protection of procedural guarantees, it may also create issues in relation to access to information about ongoing investigations.

While OLAF’s expertise and experience could prove useful to step up the fight against non-financial fraud, extending OLAF’s investigative role would likely be difficult politically. In addition, a revision of Regulation 883/2013 in this objective would likely be based on Article 325 TFEU, which sets the EU’s competence to fight against fraud against its financial interests.

OLAF will remain relevant after the EPPO is created due to its mandate, which completes the EPPO’s mandate; its place in the future institutional setting where not all Member States will participate in the EPPO; and the procedural rules applicable to EPPO investigations, which enable the EPPO to rely on OLAF’s experience and expertise in the field of PIF.

Article 101 of the draft EPPO Regulation foresees some of the modalities of the cooperation between the EPPO and OLAF. However, some areas, including the transfer of information from OLAF to the EPPO, in particular in view of the opening of a case by the EPPO, the transmission of information by the EPPO to OLAF in cases where it is not competent or decides not to act, and the nature of OLAF’s supporting role in the EPPO’s cases, will need to be clarified in the future. This could be achieved by the adoption of a working arrangement between the EPPO and OLAF to a certain extent, and/or by amending Regulation 883/2013.

9.7.2 Recommendations

The introduction of the EPPO will create a need for adjustments to current applicable rules. In particular, while the draft EPPO Regulation includes explicit references to OLAF, in particular in its Article 101, these provisions would need to be mirrored and clarified in Regulation 883/2013. Some aspects of the cooperation of the two bodies, such as the procedure to determine which of the two bodies would be competent to handle an investigation or the admissibility of evidence collected by OLAF in cases involving the EPPO, are still unclear. In addition, Article 104 of the draft EPPO Regulation defines the modalities of cooperation with third-countries and international organisations from a judicial perspective, but does not refer to external investigations conducted by OLAF. The binding force of Recital 105, and of the EPPO’s requests made on its basis, remain unclear.\(^{390}\)

More generally, the role to be played by OLAF in relation to the EPPO still raises questions. The current wording of Article 101 of the draft EPPO Regulation defines this role as supportive of the EPPO’s activities. However, some stakeholders still call for more powers to be granted to OLAF, which could perform acts going beyond its administrative mandate under the control of the EPPO. This option could be envisaged if safeguards equivalent to those applicable in criminal proceedings could be applied to such acts.

The creation of a new body such as EPPO also calls for new cooperation arrangements, such as a working arrangement with OLAF. OLAF’s internal structure may also need to be adjusted to ensure a smooth cooperation with the EPPO.

Other new legislative instruments redefine the mandate and functioning of other relevant actors in the field of PIF, such as Eurojust and Europol. This new political landscape creates a need for adjustments to the legal framework regulating OLAF’s cooperation with them.

\(^{390}\) OLAF Conference on the evaluation of Regulation 883/2013.
In an evolving PIF landscape, questions may be raised as to whether OLAF’s mandate should evolve too. Currently, OLAF’s investigative mandate is limited to fraud, corruption and other illegal activities affecting the financial interests of the Union. However, OLAF investigative staff considered that OLAF’s experience, network and expertise could also be used in other areas (such as customs matters and possibly other types of fraud that do not concern the PIF, such as counterfeit goods violating health and safety regulations). Expanding OLAF’s mandate to other types of non-financial fraud (e.g. food fraud) may, however, be more politically and legally challenging as they do not affect the EU’s financial interests, which may require a revision not only of Regulation 883/2013, but also of the Office’s founding instrument.

**Recommended changes to Regulation 883/2013**

- **Recommendation 20** – Revise Regulation 883/2013 to facilitate a synergetic and complementary relationship between OLAF and the future EPPO, covering:
  - the procedure to be followed in cases where an ongoing OLAF investigation uncovers indications that the facts may fall under the EPPO’s mandate;
  - modalities of exchanges of information between EPPO and OLAF;
  - OLAF’s duties and procedure in situations where the EPPO needs to transfer information to OLAF as defined in Recital 105;
  - the procedure for judicial follow-up by the EPPO to such investigations could be included in Regulation 883/2013; and
  - the conditions under which the EPPO may integrate evidence collected by OLAF in its case so that it is admissible before national criminal courts.

- **Recommendation 21** – Revise Regulation 883/2013 to facilitate OLAF’s cooperation with the EPPO on VAT-related cases, by extending OLAF’s access to VAT-related information (e.g. by granting it access to databases such as Eurofisc and VIES).

- **Recommendation 22** – OLAF’s mandate could be redefined to include auxiliary judicial services on behalf of the EPPO. This amendment would need to be accompanied by a revision of Article 9 of Regulation 883/2013 to align procedural guarantees with those applicable in criminal proceedings for such investigative acts.

- **Recommendation 23** – Revise Regulation 883/2013 to extend the application of the investigation mandate of OLAF to customs matters and possibly other types of fraud that do not concern the PIF, such as counterfeit goods violating health and safety regulations.

- **Recommendation 24** – Revise Regulation 883/2013 to align the provisions on cooperation with Eurojust and Europol with the provisions featured in the two agencies’ respective legal frameworks (once the negotiations on the Eurojust Regulation have resumed).

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391 Interview with OLAF investigative staff

392 Commission Decision No 1999/352/EC provides that OLAF’s external investigative powers must strengthen the fight against fraud, corruption and any other illegal activity adversely affecting the [Union]’s financial interests “as well as any other act or activity by operators in breach of [Union] provisions.” The vague wording of the latter provision may seem to open the possibility to amend Regulation 883/2013 and extend the scope of OLAF’s external investigations.
Recommended non-regulatory changes

- **Recommendation 25** – A working arrangement between the EPPO and OLAF (Article 99 of the EPPO Regulation) should clarify:
  - the criteria to be applied by OLAF to determine whether allegations should be transferred to the EPPO; and
  - the case selection process within the EPPO.

- **Recommendation 26** – A specific OLAF unit dealing with EPPO relations, either at policy or investigative level, could be created to maintain close contacts with EPPO and carry out its requests.

- **Recommendation 27** – The EPPO should sign the Inter-institutional Agreement of 25 May 1999 concerning OLAF internal investigations, which would confer OLAF with investigative powers concerning staff of the EPPO when there are indications that irregularities or offences may have been committed.
Annex 1  Methodology

This annex provides a detailed description of the methodological approach to the evaluation. It begins with an overview of the methodological approach before elaborating on each stage of the method, describing in detail the main tasks of the evaluation. The annex concludes with mentioning the challenges encountered in each step as well as the completeness and usefulness of the data.

A1.1 Overview

The evaluation was conducted using a mixed-methods approach, combining several data collection and analytical tools and techniques based on a combination of primary and secondary research. The methodological approach consisted of four stages: inception; data collection and analysis; synthesis; and reporting. These stages of the evaluation and their corresponding tasks are presented in Figure 25 below.

Figure 25. Stages of the evaluation and key tasks

Source: ICF.

A1.2 Stage 1 - Inception

The evaluation study commenced with an inception stage. Each of the six tasks included in the inception phase are summarised in Table 10 below. The inception stage was an important first stage of the evaluation, forming the basis for the subsequent stages of the study.
Table 10. Inception stage – tasks

<table>
<thead>
<tr>
<th>Tasks of the method</th>
<th>Short description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Task 1.1 Kick-off meeting</td>
<td>Meeting to discuss the proposed methodological approach to the evaluation, as well as the expectations and priorities of OLAF.</td>
</tr>
<tr>
<td>Task 1.2 Collection of relevant documentation and stakeholder mapping</td>
<td>Exercise to gather available documentation on which to conduct desk research and map stakeholders with whom to engage in Stage 2.</td>
</tr>
<tr>
<td>Task 1.3 Early engagement with expert panel</td>
<td>Brainstorming meeting with experts to agree on assumptions to be tested and lines of inquiry.</td>
</tr>
<tr>
<td>Task 1.4 Scoping interviews</td>
<td>Face-to-face interviews with OLAF staff and other members of the Steering Group, to better understand the needs and expectations of the users of this evaluation.</td>
</tr>
<tr>
<td>Task 1.5 Context analysis and establishment of performance baseline</td>
<td>Generation of a comprehensive but concise overview of the application of Regulation 883/2013 over the evaluation period.</td>
</tr>
<tr>
<td>Task 1.6 Refining methods and tools</td>
<td>Update and refine the method of approach of the evaluation for the following stages.</td>
</tr>
</tbody>
</table>

Source: ICF.

The inception stage was run largely as intended. The main tasks within the inception phase were the early engagement with the expert panel and the scoping interviews.

A1.2.1 Early engagement with expert panel

Early engagement with the evaluation study’s expert panel took the form of an all-day workshop held towards the end of the inception phase. During the workshop the intervention logic and underpinning evaluation framework were reviewed, as well as the cause and effect-chains corresponding to the key elements of Regulation 883/2013. The outcomes from the workshop were reflected in ICF’s Inception Report and subsequently in ICF’s research tools (including interview topic guides and survey questionnaire).

A1.2.2 Scoping interviews

The scoping interviews were conducted to better understand the needs and expectations of the users of the evaluation. In total, 15 face-to-face scoping interviews were conducted across different stakeholders (OLAF staff in investigative functions; OLAF staff in policy related functions; a former chair of the Supervisory Committee; Commission services; other EU institutions, bodies, offices and agencies (IBOAs); Member State stakeholders; membership organisations, EU & national associations of lawyers and prosecutors). The scoping interviews were conducted between August and mid-September 2016. Further information on the scoping interviews can be found in Annex 4.

A1.2.3 Stage 1 - Challenges encountered and data assessment

For stage 1 there were a couple of challenges related to the early engagement with the expert panel, the context analysis and establishment of performance baseline, as well as the refining of methods and tools. Firstly, the limited availability of experts meant that the meeting with the expert panel was organised at the end of stage 1. Secondly, for the context analysis, the lack of disaggregated data reduced the amount of data from which the baseline was formed and from which the development of
Interview topic guides was informed. Finally, lack of disaggregated data required changes to the analytical approach.

**A1.3 Stage 2 - Data collection and analysis**

The second stage of the evaluation involved data collection and analysis. This stage consisted of the collection of evidence structured across four tasks: desk research; stakeholder consultation; case studies; and analysis. The analysis stage involved a number of distinct tasks including legal analysis, contribution analysis and analysis of the stakeholder consultation. Table 11 below summarises each task of the data collection and analysis stage.

*Table 11. Data collection and analysis stage – tasks*

<table>
<thead>
<tr>
<th>Tasks of the method</th>
<th>Short description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Task 2.1 Desk research</td>
<td>Exercise to collect, structure and analyse all relevant documentation related to Regulation 883/2013 and its implementation.</td>
</tr>
<tr>
<td>Task 2.2 Stakeholder consultation</td>
<td>Exercise to gather in-depth insights into the application of the Regulation through stakeholder interviews and an online survey.</td>
</tr>
<tr>
<td>Task 2.3 Case studies</td>
<td>Exercise to further deepen the insights into key findings using evidence from the stakeholder interviews and the online survey.</td>
</tr>
<tr>
<td>Task 2.4 Analysis - Legal analysis</td>
<td>Comprehensive legal analysis of the provisions of the Regulation and of any other relevant legal instruments in the area of anti-fraud.</td>
</tr>
<tr>
<td>Task 2.4 Analysis - Analysis of performance data against baseline</td>
<td>Review and analysis of all performance data collected by OLAF as well as collection and analysis of complementary datasets.</td>
</tr>
<tr>
<td>Task 2.4 Analysis - Contribution analysis</td>
<td>Tests of a number of hypotheses about links between inputs, outputs, outcomes and impacts, captured in the Regulation's theory of change.</td>
</tr>
<tr>
<td>Task 2.4 Analysis - Analysis of the stakeholder consultation</td>
<td>Summary of the evidence gathered by stakeholder groups.</td>
</tr>
</tbody>
</table>

*Source: ICF.*

The main tasks during the data collection and analysis stage were the desk research, the stakeholder consultation, the case studies and the subsequent analysis. Each of these tasks is described in more detail below.

**A1.3.1 Desk research**

The desk research consisted of bibliographic references provided by the ISSG during and after the kick-off meeting as well as documents suggested during the scoping interviews. Furthermore, complementary research was also conducted to identify additional sources of information, in particular recent studies and academic articles, which had not been considered in the proposal. All sources of information were reviewed and relevant elements were extracted to inform the evaluation findings.

**A1.3.2 Stakeholder consultation**

The stakeholder consultation aimed to collect a range of detailed evidence surrounding the application of Regulation 883/2013 through stakeholder interviews and an online-survey.
Semi-structured depth interviews were conducted with 160 stakeholders and an online survey surveyed 168 stakeholders. It is estimated that 61 stakeholders were consulted via both interviews and the online survey (Figure 26). In addition to this, one focus group with AFCOS stakeholders was also organised and executed in November 2016.

Figure 26. Number of stakeholders interviewed and/or surveyed

A1.3.2.1 Stakeholder interviews

The stakeholder interviews were conducted over a period of seven months (October 2016 to May 2017). The consulted stakeholders were identified according to three factors: (1) their involvement in the various provisions of the Regulation; (2) their involvement in internal and/or external investigations; and (3) their involvement in different aspects of the EU’s budget, such as revenue or expenditures (and what type of involvement, i.e. operational appropriations and/or administrative expenditures), and/or sector of the EU budget concerned (e.g. cohesion funds, external aid, etc.). Annex 4 provides more detailed information on the different stakeholders involved in the various stages of the stakeholder consultation.

Interview topic guides were developed based on the desk research made and tailored to the various stakeholder types interviewed. While the main evaluation questions to be addressed with each stakeholder type were the same across stakeholders (i.e. questions on relevance, effectiveness, efficiency, coherence and future outlook), the focus of the interviews varied based on the type of stakeholder interviewed. The different focus is depicted in Table 12 below.

Table 12. Focus of the interviews by type of stakeholder

<table>
<thead>
<tr>
<th>Type of stakeholder</th>
<th>Focus of the interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>OLAF Staff</td>
<td>Overall management, Investigative function, support and assistance to Member States, third countries and international organisations, and EU Anti-Fraud Policy.</td>
</tr>
<tr>
<td>OLAF’s partners – EU Institutions, bodies and Agencies</td>
<td>Internal investigations, information exchange, cooperation mechanism, respective roles, tools for cooperation, as well as reporting and follow-up on recommendations.</td>
</tr>
</tbody>
</table>

393 Scoping interviews were conducted in August and September 2016.
<table>
<thead>
<tr>
<th>Type of stakeholder</th>
<th>Focus of the interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>OLAF’s partners – Supervisory Committee; EDPS, EU Ombudsman, ECJ</td>
<td>OLAF’s powers, OLAF’s partners’ respective powers, governance arrangements, selection of cases, procedural rights and safeguards, implementation of opinions and their influence on effectiveness and efficiency, and participation in annual meetings.</td>
</tr>
<tr>
<td>OLAF’s partners – Member State stakeholders (e.g. AFCOS, administrative &amp; Judiciary)</td>
<td>External investigations, mechanisms for cooperation and information exchange (including tools), respective roles, quality, timeliness of evidence and support, as well as reporting and follow up on recommendations.</td>
</tr>
<tr>
<td>OLAF’s partners – 3rd countries &amp; international organisations</td>
<td>External investigations, cooperation agreements, mechanism for cooperation and information exchange (e.g. tools), respective roles, quality, timeliness of evidence and support, as well as reporting and follow up on recommendations.</td>
</tr>
<tr>
<td>OLAF’s other stakeholders: Membership organisations, EU &amp; national associations of lawyers and prosecutors</td>
<td>OLAF’s powers, OLAF’s partners’ respective powers, governance arrangements, selection of cases, procedural rights and safeguards, as well as implementation of opinions and their influence on effectiveness and efficiency.</td>
</tr>
</tbody>
</table>

Source: ICF.

Typically interviews lasted between one and three hours and were held either face-to-face or over the phone. Furthermore, interviews were recorded with the prior written permission of the interviewee, and the purpose of the recording was purely to assist with the write-ups. After the interviews were conducted the write-ups were, in several cases, sent to the interviewees for completion or analysis, and the interviewees’ comments or amendments were taken into account in the analysis.

**A1.3.2.2 Online survey**

In addition to the stakeholder interviews described above, a detailed online survey was also developed with the intention to complement information collected via the in-depth interviews and desk research by broadening the evidence base. The survey questionnaire, hosted and launched by SurveyGizmo\(^{394}\), covered the main themes of the evaluation framework and the key provisions of the Regulation. It contained predominantly closed questions (i.e. multiple choice questions) and the type as well as the amount of questions varied according to stakeholder type. For a detailed description of the stakeholders surveyed, please see the stakeholder consultation report in Annex 4.

The survey was launched after extensive revisions on 30 January 2017 to all stakeholders besides OLAF staff and third countries, which received the survey on 3 February and on the 31 March, respectively. Stakeholders from EU delegations were

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\(^{394}\) SurveyGizmo is a professional online survey tool that enables organisations to build surveys and collect data through its online platform. More information is to be found on SurveyGizmo’s website [https://www.surveygizmo.com/](https://www.surveygizmo.com/).
also invited to the survey in end of April. The survey respondents were given a month to submit their response to the online survey, although the survey remained open also after the set deadline\(^{395}\). Respondents were given the chance to forward their invitation to colleagues or any other contacts they would consider as relevant respondents to the survey. Moreover, respondents that had not yet completed the survey were sent a reminder two weeks after their initial invitation. Data collection for the survey stopped on the 31 April 2017.

**A1.3.2.3 Other stakeholder consultation**

Finally, stakeholder consultation also occurred during meetings and conferences that ICF attended. Attending the following events enabled ICF to gather further information:

- Conference on “Cooperation project in the Anti-fraud sector”. The conference was held in Brussels on 9 November 2016 by the Italian AFCOS (Guardia di Finanza), and provided information on existing best practices in mutual administrative assistance in the sector of structural and investment funds, and on the evolving legislative EU anti-fraud landscape.
- “Lunch debate on the revised Regulation 45/2001”, organised by OLAF’s DPO and DG JUST on 24 January 2016. The meeting presented the Commission proposal to revise Regulation 45/2001 and align it with the EU Data Protection reform as well as the adoption of the General Data Protection Regulation. The meeting presented the new features of the Commission proposal and, if adopted, the extent to which it could impact OLAF’s work.
- Conference on the evaluation of Regulation 883/2013 organised by OLAF, on 1-2 March 2017. The conference brought together various representatives from OLAF, EU Member States, EU IBOAs, international organisations, academic organisations and judicial practitioners. During this conference, the preliminary findings of ICF’s evaluation study were discussed.

**A1.3.3 Case studies**

Case studies constituted another core part of the method. The purpose of the case studies was to gain deeper insights into the key findings from the stakeholder interviews and the online survey. Five case studies were conducted, divided according to five different themes as summarised in \(\square\) below. The generic approach for the five case studies have been:

- Desk research: includes reviewing evidence from documents, generic interviews and the survey, based on the themes and questions of each case study;
- data extraction: includes review of aggregated data;
- data analysis: includes analysis of patterns, typologies, and clusters of cases to be tested or validated during the case study;
- gap analysis: includes an assessment of the extent to which the fieldwork undertaken can inform the case studies; and
- additional interviews: involves conducting interviews to deepen the findings gathered to date, and complete the evidence base.

Table 13. Description and approach to the thematic case studies

<table>
<thead>
<tr>
<th>Annex and case study</th>
<th>Description</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annex 6: Case</td>
<td>This case study explains the ...</td>
<td>Interviews were conducted</td>
</tr>
</tbody>
</table>

\(^{395}\) EU delegations were the only stakeholder group that were given a week to respond to the survey.
<table>
<thead>
<tr>
<th>Annex and case study</th>
<th>Description</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>study: best practice in investigations</td>
<td>variation in performance across the type of investigation cases, sectors, investigated bodies or structures, and derives good practices in terms of investigative processes, cooperation and information sharing.</td>
<td>with heads of investigative units. The interviews were used to establish best practices by type of investigative cases.</td>
</tr>
<tr>
<td><strong>Annex 7:</strong> Case study: comparison of OLAF’s investigative function</td>
<td>This case study compares the investigative function of OLAF Regulation against similar entities, form selection of cases, procedural safeguards, and complaints. The case focuses on internal investigations only.</td>
<td>Telephone interviews were conducted with five international institutions against which the investigative functions of OLAF were compared. Comparisons were based on: selection process, internal advisory and control procedure, and legality checks, nature of the procedural guarantees granted to suspected persons, complaints procedures, procedures for ensuring the confidentiality of investigation and respect of data protection rules.</td>
</tr>
<tr>
<td><strong>Annex 8:</strong> Case study: follow-up to financial recommendations in external investigations</td>
<td>This case study is of a qualitative nature and aims to identify best practices in the follow-up of OLAF’s recommendations (financial and judicial) at a national level and actions taken following an investigation led by OLAF in EU Member States. The case study analyses the reasons why follow-up to recommendations is successful or not.</td>
<td>Interviews for this case study were undertaken with key external partners and national authorities, AFCOS members, judicial / law enforcement authorities and legal practitioners.</td>
</tr>
<tr>
<td><strong>Annex 9:</strong> Case study: follow-up to judicial recommendations in external investigations</td>
<td>This case study identifies best practices in the follow-up to judicial recommendations by OLAF in the context of external investigations. It enables the identification of success stories in Member States and their components. The case study</td>
<td>Interviews were undertaken with national judicial authorities to assess how administrative and criminal investigations connect in different legal systems – two interviews were conducted in one Member...</td>
</tr>
</tbody>
</table>
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Annex and case study: Internal investigation follow-up

<table>
<thead>
<tr>
<th>Description</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>also examines the possible impact of future developments of the EU anti-fraud landscape, in particular the creation of the EPPO.</td>
<td>State where judicial follow-ups are frequent and in another Member State where judicial follow-ups are less frequent.</td>
</tr>
</tbody>
</table>

Annex 10: Case study: follow-up to recommendations in internal investigations

<table>
<thead>
<tr>
<th>Description</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>This case study is of a qualitative nature and aims to identify best practices in the follow-up of OLAF’s disciplinary, administrative and financial recommendations at an EU level and actions taken following an internal investigation led by OLAF within the EU institutions.</td>
<td>Interviews for this case study (face to face and by telephone / videoconference) were undertaken with stakeholders involved in investigations and internal investigation follow-up.</td>
</tr>
</tbody>
</table>

Source: ICF.

A1.3.3.1 Approach to Case study 2

The approach to this case study has been to engage with organisations active in promoting the anti-corruption agenda at the regional and / or global level and, thus, known to have established procedures for investigations, forms of collaboration and information exchange and sanctions policies. The stakeholders consulted for the purpose of this case study are outlined in Table 14 below.

Table 14. Comparator organisations selected for the case study

<table>
<thead>
<tr>
<th>Geographical remit</th>
<th>Regional</th>
<th>Global</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stakeholder</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Designated Unit</th>
<th>Office of Internal Audit</th>
<th>Inspectorate General, EIB Group</th>
<th>Office of the Chief Compliance Officer</th>
<th>Directorate of Internal Oversight</th>
<th>World Bank’s Integrity Vice Presidency</th>
</tr>
</thead>
</table>

Benchmarking evidence was gathered on various aspects of the investigative process in place for conducting internal investigations in each comparator organisation, notably:

- processes for opening, conducting and concluding internal investigations, including follow-up actions;
- conferred investigative powers and tools;
- procedural rights granted to suspected individuals or entities;
- data protection and confidentiality safeguards in place; and
- complaint mechanisms and external controls in place.

Performance data was also gathered to offer insights into the outcomes achieved by current investigative processes within OLAF and comparator organisations; while
additional evidence was collected on best practices to identify the processes that have achieved or are expected to achieve the best results.

Table 15 below outlines key process and performance indicators that have helped guide the evidence-gathering exercise undertaken as part of this research.

Table 15. Process and performance indicators

<table>
<thead>
<tr>
<th>Process indicators</th>
<th>Performance indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opening, conducting and following up to internal investigations</td>
<td>Case selection</td>
</tr>
<tr>
<td>Operational procedures for the selection, opening, conduct and follow-up to internal investigations</td>
<td>Total number of incoming items of information (or reports of fraud) received</td>
</tr>
<tr>
<td>Overall process followed by the institution (including the people involved) when assessing incoming information</td>
<td>Number of incoming items of information received from public vs private sources</td>
</tr>
<tr>
<td>Specific case selection criteria</td>
<td>Total number of cases selected</td>
</tr>
<tr>
<td></td>
<td>Total number of selected cases opened vs dismissed</td>
</tr>
<tr>
<td></td>
<td>Average duration (in months) of the selection phase</td>
</tr>
<tr>
<td></td>
<td>Investigation</td>
</tr>
<tr>
<td></td>
<td>Number of ongoing investigations as of year end</td>
</tr>
<tr>
<td></td>
<td>Number of closed investigations as of year end</td>
</tr>
<tr>
<td></td>
<td>Number of closed investigations with recommendations (e.g. judicial/administrative/financial/disciplinary recommendations)</td>
</tr>
<tr>
<td></td>
<td>Average duration (in months) of closed cases</td>
</tr>
<tr>
<td>Investigative powers and tools</td>
<td>Appropriateness of powers / tools conferred</td>
</tr>
<tr>
<td>Extent / nature of investigative powers and tools conferred</td>
<td></td>
</tr>
<tr>
<td>Specific tools used for the purpose of information exchange, secured communications and storage, reporting and analysis of investigation data</td>
<td></td>
</tr>
<tr>
<td>Appropriateness of investigative tools</td>
<td></td>
</tr>
<tr>
<td>Recommendations / outcomes of investigations</td>
<td></td>
</tr>
<tr>
<td>Type(s) of recommendations issued to external parties</td>
<td>Total number of recommendations issued</td>
</tr>
</tbody>
</table>
### A1.3.4 Analysis

The analysis task consisted of a number of sub-tasks, the main elements of which included the legal analysis, the contribution analysis and the stakeholder consultation analysis.

#### A1.3.4.1 Legal analysis

The legal analysis was conducted through reviewing the Regulation’s main provisions to assess their clarity, internal and external coherence and potential impact on the functioning of the Regulation. Inputs from experts and stakeholder interviews formed an additional part of the review of the main provisions and their assessment.

#### A1.3.4.2 Contribution analysis

Contribution case studies formed the basis for the contribution analysis. For each case study, the method involved defining the link between variables as well as the influence of explanatory variables on impact variables. The second step was then to test these links and the positive/negative influences on the basis of the descriptive analysis, survey and interview analysis. Given the evidence available (which has also been triangulated), assumptions were rejected and/or validated. Finally, the contribution

<table>
<thead>
<tr>
<th>Process indicators</th>
<th>Performance indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extent of follow-up by external parties</td>
<td>Number of recommendations issued, by type</td>
</tr>
<tr>
<td>Enablers of / barriers to follow-up</td>
<td>Amounts recommended for recovery</td>
</tr>
<tr>
<td></td>
<td>Amounts actually recovered</td>
</tr>
<tr>
<td><strong>Procedural rights granted to suspected persons (including complaints and external controls)</strong></td>
<td><strong>Quantitative / qualitative evidence in relation to impacts of establishing procedural rights on resourcing</strong></td>
</tr>
<tr>
<td><strong>Procedural guarantees</strong></td>
<td><strong>Quantitative / qualitative evidence in relation to impacts of establishing procedural rights on duration of investigations</strong></td>
</tr>
<tr>
<td>Nature / extent of procedural rights conferred to suspected individuals / organisations</td>
<td>Number of complaints received</td>
</tr>
<tr>
<td>Nature / extent of procedures / processes in place to safeguard procedural rights conferred to suspected individuals / organisations</td>
<td>Number of external controls performed by a third-party</td>
</tr>
<tr>
<td>Nature / extent of confidentiality and data protection mechanisms</td>
<td><strong>Best practices</strong></td>
</tr>
<tr>
<td>Nature / extent of complaint mechanisms</td>
<td><strong>Quantitative / qualitative evidence relating to performance results attributed to specific procedures / processes</strong></td>
</tr>
<tr>
<td>Nature / extent of external controls</td>
<td><strong>Suggestions for improvement</strong></td>
</tr>
<tr>
<td>Outcomes driven by procedural guarantees in place</td>
<td><strong>Procedural guarantees</strong></td>
</tr>
</tbody>
</table>

---

A1.3.4.1 Legal analysis

The legal analysis was conducted through reviewing the Regulation’s main provisions to assess their clarity, internal and external coherence and potential impact on the functioning of the Regulation. Inputs from experts and stakeholder interviews formed an additional part of the review of the main provisions and their assessment.

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Contribution case studies formed the basis for the contribution analysis. For each case study, the method involved defining the link between variables as well as the influence of explanatory variables on impact variables. The second step was then to test these links and the positive/negative influences on the basis of the descriptive analysis, survey and interview analysis. Given the evidence available (which has also been triangulated), assumptions were rejected and/or validated. Finally, the contribution
case studies were then summarised to report on the main links and the extent of the contribution of key variables.

**A1.3.4.3 Stakeholder consultation analysis**

The stakeholder consultation analysis involved analysing inputs from stakeholders interviewed and stakeholders surveyed via the online survey.

Stakeholder interview write-ups were analysed using Nvivo software\(^{396}\). Interviews were coded in Nvivo using a node tree that matches the key components of the Regulation and the evaluation criteria. The node tree helped the evaluation team to answer specific evaluation questions and to search the range of evidence by topics and key words. This enabled reporting on comprehensive and in-depth findings from all stakeholders interviewed.

The survey results were analysed using standard computer software (Microsoft Excel) where aggregated data has been presented on a question by question basis as well as presented in charts. Some survey results were also analysed by stakeholder type (including type of OLAF staff).

**A1.3.5 Stage 2 - Challenges encountered and data assessment**

The challenges encountered and the solutions found for tasks in Stage 2 are described below. Moreover, issues with data quality are also briefly described.

**A1.3.5.1 Desk research – challenges and data assessment**

What regards desk research, the main challenge was the large amount of information to process. The use of Nvivo enabled a selection of the most relevant and up-to-date information in each source, as the information coded in Nvivo directly addressed the evaluation criteria.

There were no major data gaps identified in the qualitative data with regards to the evaluation questions. However, less information was found on the relevance of the Regulation. Moreover, a cost-effectiveness analysis was not feasible to conduct due to scarce amounts of data found via desk research.

**A1.3.5.2 Stakeholder consultation – challenges and data assessment**

**Stakeholder interviews**

Challenges encountered in relation to the stakeholder interviews were in many cases related to keeping in line with the work plan. For instance, the scheduling of interviews with stakeholder categories (other than AFCOS), started later than scheduled due to:

- the time taken to develop and sign-off the remaining interview topic guides;
- the time taken to identify relevant national managing and judicial authorities. ICF needed to liaise with the AFCOS or rely on stakeholder referrals for identifying additional potential interviewees. The time taken to complete this was mainly dependent on the intermediaries’ responsiveness. It has, for example, taken longer than anticipated to identify relevant national prosecutors, e.g. those who have received judicial recommendations from OLAF; and
- the time taken for approval to receive the contact details for certain stakeholders (on account of data protection requirements) from OLAF.

Cases when interviewees declined interviews and/or referred to other people, or when contacted interviewees were no longer employed at OLAF, also slightly delayed the

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\(^{396}\) Nvivo is a powerful tool for structuring and analysing qualitative data. For more information, please see Nvivo's website: http://www.qsrinternational.com/what-is-nvivo.
scheduling as well as the finalization of the interviews. In some cases when stakeholders declined interviews, given their role and the importance of their input for the evaluation, it was agreed that they would provide inputs in writing where possible (with the offer of a follow-up interview as needed/feasible). Moreover, finding relevant stakeholders in national authorities and in third countries with a sufficient conversational level of English also delayed the identification and responses to invitations for interview. Where the knowledge of the language was within the competences of the evaluation team, an interview in their mother tongue was organised (French, German, Bulgarian and Romanian).

Another factor delaying the scheduling of interviews with third country stakeholders was a challenge encountered when identifying the same. Based on information of cases closed with a recommendation in third countries contained in OLAF Annual Reports of 2014 and 2015, ICF initially identified nine third countries for the purpose of this evaluation. However, some of these countries either did not have an ACA signed with OLAF or there had been no OLAF investigations concluded in some of the initially selected third countries. After discussions and advice from relevant OLAF Units (A2, A4 and D3), additional steps were undertaken by ICF to replace these countries and find the relevant stakeholders with sufficient and relevant cooperation experience with OLAF.

During the interviews, a challenge was also to cover all questions in the topic guides within the allocated interview time. Where it was not possible to extend the interview duration, some themes and questions were prioritised over others. In other instances, interviewees were not able to comment on certain themes, having limited knowledge of certain (or all) steps in the investigation procedure, or no involvement in the application of some of the provisions of Regulation 883/2013. In such cases, those questions were left unanswered. Some interviewees provided some information which allowed ICF to further refine some questions.

Potential data issues are related to that many of the stakeholders interviewed preferred not to be recorded. Nevertheless, almost all interviewees were willing to proof read write-ups for quality assurance purposes.

**Online survey**

Regarding the online survey, one of the main challenges was the extensive revision of the survey pre-launch, which was made with the purpose to ensure the best possible layout and user experience for all stakeholders targeted. There were also some minor challenges with launching the survey, as some small number of invitations were not delivered properly. This issue was quickly amended by updating the faulty email addresses.

The data collected through the survey is believed to have good quality, albeit some limitations do exist. These limitations mainly relate to cases where certain questions were asked to specific stakeholder groups only, resulting in some questions having a low number of responses. Another relatively minor data assessment issue is related to the interpretation of the open text responses and comments. Data issues related to the online survey and in particular the different stakeholders are discussed more in detail in Annex 4.

**A1.3.5.3 Case studies – challenges and data assessment**

Identifying member states who should be interviewed as a priority has been a challenge in Case studies 3 and 4. Although general information could be identified about the nature and extent of some Member States’ cooperation with OLAF, interviewees were generally reluctant to name Member States with whom cooperation was problematic. In order to determine which Member States would be best placed to answer the case study questions, ICF have reviewed the information collected. For case study 4, the quantitative data to be analysed was not disaggregated. No data concerning recommendations sent to IBOAs and addressed by IBOAs could be
identified (only general data, not disaggregated by type of partners, could be used). This limited the extent to which the study team was able to make an assessment on the overall effectiveness of the Office with regard to follow-up/monitoring of recommendations sent to IBOAs.

**A1.3.5.4 Analysis – challenges and data assessment**

The legal analysis did not encounter any major issues. The scope of the review was restricted to key articles of the Regulation as identified under the contextual analysis of the key components in the inception report. In order to keep the scope of the analysis manageable, legal instruments of the wider legal framework were also considered but in relation to the functioning of the Regulation only.

The lack of available disaggregated data posed a major challenge for the contribution analysis. This influenced the reach of the correlation analyses delivered and consequently on the extent to which unambiguous analyses could be made or the extent to which the significance of links between variables could be tested. In the absence of such data, correlation analyses were run on aggregated data, and thus limited in terms of the number of tests that could be performed. Similarly, the limited number of responses to some questions in the survey rendered the testing of some hypotheses using survey results difficult in a few cases (e.g. influencing factors). Exploiting the several sources of evidence to better verify some of the assumptions by way of triangulation was a workaround. In the absence of additional sources of information and the ambiguous results the tests were indicated as "inconclusive".

The stakeholder consultation analysis faced two main issues. The first one was related to the limited number of responses to questions only relevant to specific stakeholders. Survey questions with fewer responses were carefully considered and their results were not reported in percentages but in absolute numbers. Interview questions with fewer responses were either not reported on and or used to illustrate findings derived from other sources. The second issue was related to that qualitative responses to open questions were sometimes difficult to interpret - either due to the lack of clarity and or to the sheer variety of topics commented on by respondents.

**A1.4 Stage 3 - Synthesis**

The third phase of the evaluation was the synthesis stage, which comprised of three tasks: triangulation of evidence and integration of results of the analytical exercises; analysis of possible future scenarios; and roundtable meetings/workshops. A short description of each task is given in Table 16 below.

**Table 16. Main steps of the synthesis stage**

<table>
<thead>
<tr>
<th>Tasks of the method</th>
<th>Short description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Task 3.1 Triangulation of evidence and integration of results of the analytical exercises</td>
<td>Synthesis of the evidence gathered, leading to robust conclusions.</td>
</tr>
<tr>
<td>Task 3.2 Analysis of possible future scenarios</td>
<td>Analysis of OLAF’s future positioning, considering the changes in the policy landscape.</td>
</tr>
<tr>
<td>Task 3.3 Roundtable meetings/workshops</td>
<td>Different rounds of roundtable meetings focused on presenting for discussion and to critically challenge ICF’s preliminary findings.</td>
</tr>
</tbody>
</table>

Source: ICF.

**A1.4.1 Triangulation of evidence and integration of results of the analytical exercises**
The synthesis stage included organising, analysing and triangulating all evidence collected as well as synthesising the results of the evaluation. The evidence presented was triangulated to the best extent possible, using the above described sources of data, and ultimately helping to ensure the robustness of the findings. The following triangulation exercises were used, especially when analytical exercises were inconclusive or led to ambiguous findings:

- Triangulation of evidence gathered from different stakeholders (consistency of views and opinions expressed by different stakeholder groups);
- triangulation of information collected by different researchers, but joining-up through regular team briefing/de-briefing sessions; and
- methodological triangulation of evidence gathered through different methods (desk research, interviews, projective drawings).

Triangulation required consideration of several sources of evidence for the findings, considering perspectives of multiple stakeholders, and using theoretical filters to better interpret the results. Moreover, to answer evaluation questions, separate triangulation exercises have been undertaken on a tool-by-tool basis.

To examine patterns of agreement, convergence or complexity, all evidence based on the evaluation questions and themes was synthesised. The synthesis involved separate analytical exercises, followed by the triangulation of separate findings and then the creation of a narrative that summarises the key results and their reach and putting them into a context.

### A1.4.2 Analysis of possible future scenarios

The analysis of possible future scenarios was based on evaluating OLAF’s likely role in the context of changes in the anti-fraud policy landscape. The changes examined are:

- the creation of the EPPO;
- the functioning of the EDES and relation with OLAF investigations;
- the impact of the creation of a controller of procedural guarantees; and
- the possibility to extend OLAF’s mandate to non-financial fraud.

Each of these scenarios was elaborated and tested using research conducted during the data collection phase, results of the analysis phase and the case studies. In addition, the scenario of the creation of the EPPO was examined in more detail compared to the other scenarios.

The feasibility of each scenario was assessed in terms of:

- **Legal feasibility:** whether amendments would be required to Regulation 883/2013 and, if so, what kind of amendments, and whether the Treaty would allow for it.
- **Technical / practical feasibility:** whether the scenario would work in practice, what would be the operational requirements, etc.
- **Financial feasibility:** what resources are associated with the scenario and would these make sense from a ‘value for money’ perspective.
- **Political feasibility:** whether the scenario would be likely to be accepted politically.

The legal analysis conducted by the evaluation team along with the support of external experts and the data collected (especially during events and conferences, such as the OLAF evaluation conference) informed the assessment of the legal feasibility of the scenarios. The technical and political feasibility assessments were mainly based on stakeholder interviews, and the financial feasibility assessment is qualitative.

Each of the scenarios was discussed and the main findings tested at a workshop with ICF’s external experts held in April 2017.
A1.4.3 Roundtable meetings

Three roundtable meetings were facilitated by ICF in April 2017, each involving a distinct set of stakeholders – ICF’s expert panel, AFCOS representatives and OLAF staff.

Each meeting focused on discussing and critiquing ICF’s emerging findings, thereby helping to shape ICF’s Draft Final Report.

The expert panel consisted of four topics for discussion: evaluation objectives and status; preliminary findings (effectiveness and efficiency); preliminary findings (coherence and relevance); and preliminary findings (future outlook and analysis of future scenarios). The AFCOS roundtable meeting focused on a subset of issues surrounding cooperation, information exchange and follow up. Finally, the OLAF roundtable meeting focused on a range of specific findings and themes related to the evaluation criteria and questions.

A1.4.4 Stage 3 - Challenges encountered and data assessment

The challenges encountered in the triangulation and synthesis was related to many of the data issues mentioned previously, related to some inconclusive data collected from interviews and online survey, which made triangulation more difficult in some instances.

No major challenges were reported for the analysis of future scenarios other than that data to inform the assessment of the financial feasibility of scenarios has been more difficult to identify as compared to the other future scenarios.

For the roundtable meetings, no major challenges were encountered. The insights gained were deemed useful and have been used to inform the evaluation. For example, some of ICF’s findings were either too general or even wrong, and the meetings confirmed some of the comments from the ISSG made earlier at a meeting in April as well as helped to better tailor some of the findings and ‘push’ the reasoning further.

A1.5 Stage 4 – Reporting

The evaluation involved the creation of six reports, each followed by a report meeting. An Inception Report was submitted in September 2016, followed by an Inception Meeting. Two Progress Reports were submitted: one at the end of November 2016 and one mid-fieldwork Progress Report submitted at the end of January 2017. A Progress Meeting was held in February 2017 to discuss the mid-fieldwork Progress Report. An Interim Report was submitted in March 2017, followed by an Interim Meeting. Finally, a Draft Final Report was submitted on 31 May, with a Draft Final Report meeting held shortly thereafter, and a Final Report was submitted on 31 August 2017 and was followed by a Final Report meeting. In addition to these deliverables, ICF produced materials (agenda and slides) for the various workshops described herein as well as a set of slides which ICF presented at OLAF’s evaluation conference on 1 March 2017.
Annex 2  Description of research tools

This annex provides an overview and a description of the main research tools elaborated and used by the evaluation team to collect the data that informed this report.

A2.1 Interview topic guides

Semi-structured in-depth interviews were conducted on the basis of topic guides elaborated by the evaluation team and validated by OLAF. Each topic guide was structured around the evaluation criteria used for the assignment (effectiveness, efficiency, relevance, coherence and future outlook).

A total of ten topic guides were drafted, each of them tailored to gather the views of a specific stakeholder group on the application of Regulation 883/2013, including areas for improvement of the Regulation and perspectives on the future outlook of OLAF in the new PIF landscape. A topic guide was drafted for each of the following stakeholder groups:

- AFCOS;
- Member States stakeholders (other than AFCOS);
- Membership organisations (EACN, IAACA, ECLA(UK), NACP);
- European Commission spending services, other services and other IBOAs;
- EU control bodies (EDPS, European Ombudsman, CJEU, ECA and European Parliament);
- Third countries and international organisations;
- OLAF DG;
- OLAF investigative staff;
- OLAF policy staff; and
- Supervisory Committee.

Each topic guide was introduced by a privacy and confidentiality statement informing the interviewee about ICF’s data protection and confidentiality policy.

Additional topic guides were elaborated during the inception phase of the assignment to conduct scoping interviews with a selection of key stakeholders. These topic guides were more generic and aimed to provide the evaluation team with the necessary knowledge to fine tune its methodology and research tools for the subsequent phases of the assignment.

A2.2 Online survey questionnaire

ICF developed a detailed online survey hosted by SurveyGizmo. It contained predominantly closed questions (i.e. multiple choice questions), with some questions offering the possibility for respondents to complete outlier responses with open responses. The survey was intended to broaden the evidence base to be collected from different stakeholder groups consulted for this evaluation. It complemented information collected via the in-depth interviews and desk research.

The survey questionnaire covered the main themes of the evaluation framework and the key provisions of the Regulation. Questions varied according to stakeholder type.

A2.3 Workshop materials

ICF organised four workshops (two workshops with external experts, one with OLAF staff and one with AFCOS representatives) throughout the assignment to collect experts and key stakeholders’ views on the preliminary findings of the evaluation.

For the first experts workshop organised on the 14th of September 2016, the evaluation team prepared a briefing note summarising the main elements of the contextual analysis. In addition, for each of the workshops, the evaluation teams prepared an agenda and corresponding slides to structure the discussions amongst
stakeholders, and collect participants’ views pending questions about the evaluation findings.
Annex 3  References
This will provide a detailed list of all references reviewed as part of the desk research and legal analysis.

A3.1 OLAF internal documents

A3.1.1 Internal guidelines

- OLAF, Instruction on the possible closure of an investigation without giving the opportunity to comment, 2014.
- OLAF, Instruction on the transmission of Final reports to EU institutions, bodies, offices and agencies, 2014.
- OLAF, Instruction on the transmission of information concerning the opening of investigations, 2014.
- OLAF, Instructions on clearly separating the Final Report and the accompanying Recommendations, 2015.
- OLAF, Instructions on the transmission of information to EU institutions, bodies, offices and agencies following a decision to dismiss a case, 2014.
- OLAF, Procedures following the delegation of the exercise of functions to Directors A and B, 2014.
- OLAF, Single Point of Entry (SPE) - Note for the attention of Directors A, B, C, D and Heads of Unit 0.1, 0.2, 2014
- OLAF, Guidelines on case selection and review.
- OLAF, Vademecum for the use of workform for opinion on Decision to open an Investigation Case - Annex to the note on Guidelines on case selection.
- OLAF, Vademecum for the use of workform for opinion on opening decision - Annex to the note on Guidelines on case selection.
- OLAF, Procedures for the splitting and merging of investigations and coordination cases.
- OLAF, Digest of rulings of the Court of Justice of the European Union with relevance to OLAF, July 2016.
- OLAF, Judicial Review of non-binding recommendations in Member States, 2016

A3.1.2 OLAF Working tools

• OLAF, Administrative Cooperation Arrangement (ACA) between OLAF and the European Commission, 2015
• OLAF, Annex 1 - Commission databases accessible to OLAF (ACA between OLAF and the European Commission)
• OLAF, Annex 2 - Specific provisions concerning administrative cooperation between OLAF and the Investigation and Disciplinary Office (DG HR/IDOC) (ACA between OLAF and the European Commission)
• OLAF, Annex 3 - Specific provisions concerning administrative cooperation between OLAF and the Internal Audit Services (IAS) (ACA between OLAF and the European Commission)
• OLAF, Administrative Cooperation Arrangement (ACA) with the EEAS, 2015
• Court of Auditors, Decision of the Court laying down arrangements for cooperation with OLAF in respect of access by the latter to audit information, 2004.
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• OLAF, Administrative Cooperation Arrangements (ACAs) in force with Member States authorities, 2016.
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• European Commission, Commission decision concerning internal investigations in relation to the prevention of fraud, corruption and any illegal activities detrimental to the Community’s interests, 1999.
• OLAF, Legal Advice Note, Legal basis for forwarding of information concerning OLAF external investigation to EIB, 2012.
• OLAF, Legal Advice Note, OLAF competence in money laundering matters, July 2012.
• OLAF, Legal Advice Note, OLAF competence in VAT fraud related matters, July 2012.
• OLAF, Legal Advice Note, OLAF competence to investigate in matters arising under the FAFA between the EU and the UN, June 2013.
• OLAF, Outcome of a survey sent to MS AFCOS, July 2016.
• OLAF, Member States’ description of national law and procedures, Presentation of national law/procedures applicable in protection of EU financial interests, 2015
• EDPS, Opinion on a notification for prior checking received from the Data Protection Officer of OLAF on Regular monitoring of the implementation of the investigative function (case 2007-0073).
• OLAF’s Supervisory Committee, Note to Commission - Consultation of the Legal Services of the European Parliament, the Council and the European Commission
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concerning the interpretation of the legal framework applicable to the supervision of OLAF, May 2016.

- OLAF, Responding to CAB request of 30 March 2016 on OLAF-SC Working Arrangements in the context of the consultation of the Legal Services of the three institutions, 2016.

- EESC, Draft Opinion, Consultative Commission on Industrial Change (CCMI), Fighting corruption in the EU: meeting business and civil society concerns, July 2015.

- European Commission, Letter from the European Commission to European Parliament about OLAF’s Supervisory Committee role, September 2015.


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A3.2 Documents sourced and reviewed by ICF

A3.2.1 Relevant legislation and guidelines


- Council Regulation (Euratom, EC) No 2185/96 on the on-the-spot checks and inspections in order to protect the European Communities’ financial interests against fraud and other irregularities, 1996.


A3.2.2 Other relevant policy documents and reports

- Regulation (EU, Euratom) No 883/2013 on investigations conducted by the European Anti-Fraud Office (OLAF), 2013.

- European Commission, Communication, Protection of the financial interests of the EU by criminal law and by administrative investigations, 2011.
- Court of Auditors, Court of Auditors, Special Report 1/2005 on the management of the OLAF, 2005.
• Court of Auditors, Special Report No 24/2015 Tackling intra-Community VAT fraud, 2015.
• Activity Report of the OLAF supervisory Committee 2014.
• Activity report of the OLAF supervisory committee 2015.
• OLAF’s comments on the 2015 Activity Report of the OLAF Supervisory Committee - 12 may 2016.
• OLAF, Control of the duration of investigations conducted by the European Anti-fraud Office - Opinion N° 4/2014.
• Opinion N° 2/2016 of the OLAF Supervisory Committee on the OLAF Annual Activity Report (Ares(2017)729825 - 09/02/2017)
• OLAF’s reply to the Supervisory Committee Opinion 2/2016 on the OLAF Annual Activity Report (Ares(2017)1626249 - 27/03/2017)
• OLAF SC, Discontinuation of the Working Arrangements between the Supervisory Committee of OLAF and the European Anti-Fraud Office – Note for the attention of OLAF’s DG (Ares(2017)1600820 - 24/03/2017)
• Presidency of the Council of the EU, Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office - Presidency text, 7761/17, 3 April 2017

A3.2.3 Other relevant studies and academic articles
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• PwC, How does organized crime misuse EU funds?, 2011
• European Parliament, Deterrence of fraud with EU funds through investigative journalism, PE 490.663, 2012.
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• European Parliament, Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds, PE 490.676, 2013.
• PwC, Public procurement: costs we pay for corruption, 2013.
• University of Birmingham Conference, The challenges of transnational investigations, 2013
• ERA, Making the fight against corruption in the EU more effective, 2013.
• European Parliament, The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area, PE 510.000, 2014.
• Bazzocchi V. (Ed.), Protecting fundamental and procedural rights, From the investigations of OLAF to the future EPPO, Fondazione Basso, 2014.
• Bazzocchi V. (Ed.), EPPO and OLAF investigations. The judicial review and procedural guarantees, 2016.
• Ecorys, Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests, 2013.
• Relationships between the national judicial authorities and the investigative agencies in the view of the EPPO, and national reports of Germany, Italy, France, Poland, Spain and the UK, Project financed by the European Commission under the Hercule III Programme, 2015.
• Negri, D., Best practices and operational models in financial-economic investigations in Europe in view of the EPPO, part of the Project financed by the European Commission under the Hercule III Programme.
• A.C.M. Spapens, M. Peters, D. Van Daele, Administrative approaches to Crime, Administrative measures based on regulatory legislation to (serious and organized) crime. Legal possibilities and practical applications in 10 EU Member States, 2015.
• Summary of Research Project financed by the European Commission - OLAF under the Hercule III Programme, Relationships between the national judicial authorities and the investigative agencies in the view of the EPPO, Operational models and best practices in fight against EU frauds, 2015.
• Kuhl L. and Panait R., Les négociations pour un Parquet européen : un organe d’enquête et de poursuite européen pour la lutte antifraude dans l’Union européenne, ou un deuxième acteur de coordination judiciaire ?, RSC 2017 p.41
• Weyembergh A. and Briere C., Towards a European Public Prosecutor’s Office (EPPO) (Study commissioned by the LIBE Committee) November 2016


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• L. Laudati, Data protection at OLAF, Eurcrim, 2013 n°1, pp.14-17.

• Michiel Luchtman & John Vervaele (eds), Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities (Report, ECN/ESMA/ECB) April 2017

• Progetto di cooperazione nel settore antifrode - Cooperation project in the anti-fraud sector (Gangemi 2017)
Annex 4  Stakeholder consultation report

This evaluation study draws on data from direct consultations with various stakeholder groups involved in the implementation of Regulation 883/2013. This annex constitutes the stakeholder consultation report which presents the main steps and findings of the consultation of interested parties and stakeholders.

This report outlines how the consultation of stakeholders informed the findings, conclusions and recommendations of this evaluation study and, as such, this report supports the assessment of the robustness of the evidence base used for this evaluation.

Consistent with the evaluation study ToR, the report structure follows the European Commission’s Better Regulation Guidelines397. According to the Guidelines, the stakeholder consultation report is to consist of a number of elements398. Those elements are presented in the table below, including where they can be found in this report.

Table 17. Elements covered in the Stakeholder Consultation Report

<table>
<thead>
<tr>
<th>Elements covered</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information on which stakeholder groups participated, which interests they</td>
<td>A4.2 and</td>
</tr>
<tr>
<td>represented and whether all identified stakeholder groups have been reached</td>
<td>A4.3</td>
</tr>
<tr>
<td>Documentation of each consultation activity undertaken on the same initiative</td>
<td>A4.2 and</td>
</tr>
<tr>
<td>including, if applicable, reasoning as to how and why the consultation strategy</td>
<td>A4.4</td>
</tr>
<tr>
<td>outlined in the technical offer, or inception report was altered</td>
<td>A4.4</td>
</tr>
<tr>
<td>Description of the results of each consultation activity, if different</td>
<td>A4.4</td>
</tr>
<tr>
<td>consultation activities have been undertaken on the same consultation scope,</td>
<td>A4.5</td>
</tr>
<tr>
<td>including interdependencies</td>
<td></td>
</tr>
<tr>
<td>A description of how the results of the consultation have fed into the evaluation</td>
<td>A4.4</td>
</tr>
<tr>
<td>findings</td>
<td></td>
</tr>
<tr>
<td>Consistency of consultation results across consultation activities</td>
<td>A4.5</td>
</tr>
</tbody>
</table>

A4.1 Overview of main stakeholder consultation activities

The table below provides an overview of the stakeholders consulted through semi-structured depth interviews and an online survey. Other consultation activities are described in the next section.

A total of 267 stakeholders were consulted through interviews and survey: 160 were consulted through interviews and 168 through the online survey. It is estimated that 61 stakeholders were consulted via both interviews and the online survey (see Annex 1 and Figure 26 above). At least 29 of the interviews informed the development of five case studies.

Information on the coverage and representativeness of the data collected through the stakeholder consultation is further specified below in section 3.

398 Elements which concerned an open public consultation, which was not required within this evaluation, were removed.
Changes in the compositional mix of stakeholders are presented in the white columns in the table below. The reasons for the changes are presented under section 4.

**Table 18. Overview of stakeholder consultation**

<table>
<thead>
<tr>
<th>Category</th>
<th>Total stakeholders consulted(^{399})</th>
<th>Stakeholders consulted via interviews</th>
<th>Stakeholders consulted via survey</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Target #</td>
<td>Difference (actual &amp; target)</td>
</tr>
<tr>
<td>OLAF staff in Investigative functions, or investigative-support functions, or management functions(^{400})</td>
<td>100</td>
<td>53</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OLAF staff in policy related functions and other (non-investigative or management-related) functions (^{401})</td>
<td></td>
<td>13</td>
<td>30</td>
</tr>
<tr>
<td>Supervisory Committee</td>
<td>3</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>EU control bodies</td>
<td>9</td>
<td>8(^{402})</td>
<td>5</td>
</tr>
<tr>
<td>Commission services and EU executive</td>
<td>49</td>
<td>28(^{404})</td>
<td>20</td>
</tr>
</tbody>
</table>

\(^{399}\) Stakeholders consulted several times, i.e. via the survey and the interviews have been removed from the total figure.

\(^{400}\) Including staff from Directorate C (Investigation support services), the DPO, Advisors to the DG, and from Unit 0.1 - Investigation Selection and Review.

\(^{401}\) Including staff from Unit 0.2 - Human Resources and Budget.

\(^{402}\) European Parliament (3); EU Ombudsman (1); EDPS (2); European Court of Auditors (1); CJEU (1).

\(^{403}\) Ombudsman (1); Court of Auditors (1).

\(^{404}\) DG DEVCO (4) (incl. 1 EU DEL); BUDG (2); DG CONNECT (2); DG HR. IDOC.1 (2); DG JUST (1); EASME (2); REA (2); SG (2); EACEA (1); AGRI (1); DG EAC (1); DG EMPL (1); DG GROW (1); DG NEAR (1); DG REGIO (1); DG RTD (1); ECHO (1); IAS (1); SJ (1);

\(^{405}\) DG HR (3); DG SG (3); DG ECHO (2); DG DEVCO (2); DG TAXUD (2); DG AGRI (1); DG BUDG (1); DG EAC (1); DG EMPL (1); DG ENV (1); DG SCIC (1); DG JRC (1); DG JUST (1); DG NEAR (1); DG RTD (1); DG FPI (1); European Policy Strategy Centre (EPSC) (1); Infrastructures and Logistics - Brussels (OIB) (1); Internal Audit Service (IAS) (1). EU executive agencies: Non-specified Executive Agency (2), EACEA (1), EASME (1). INEA (1), REA (1).
## A4.3 Stakeholder groups and their interests

Different stakeholder groups were concerned by different provisions in Regulation 883/2013. Their views were informed by their knowledge of the application of Regulation 883/2013. For example, whilst OLAF staff in investigative were knowledgeable about close to all of the investigative-related provisions in the

<table>
<thead>
<tr>
<th>Category</th>
<th>Total stakeholders consulted</th>
<th>Stakeholders consulted via interviews</th>
<th>Conducted or used for the case studies</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Target</td>
<td>Difference (actual &amp; target)</td>
</tr>
<tr>
<td>agencies</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>267</td>
<td>-1</td>
</tr>
<tr>
<td>Other EU institutions, bodies, offices</td>
<td>9</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Member State stakeholders</td>
<td>69</td>
<td>35</td>
<td>42</td>
</tr>
<tr>
<td>Third countries</td>
<td>12</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>International organisations</td>
<td>11</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>Membership organisations, EU &amp; national associations of lawyers and prosecutors</td>
<td>5</td>
<td>1</td>
<td>5</td>
</tr>
</tbody>
</table>

**Source:** ICF analysis

406 European Investment Bank (2); EEAS (1); Council of the EU (1); Eurojust (1); EUROPOL (1).

407 European Investment Bank (2); EEAS (1); European Research Council (1).

408 21 AFCOS (AT; BE; BG; CY; DE; EE; EL (2); ES, FR, HR, IT, LT (2); PL, RO, SE (2), SI, SK); 9 national managing authorities (BG; DE; EL; FR; HU; LT; NL (2), RO); 6 national judicial authorities (BG, CZ, HU, NL, RO, SK).

409 BG (7); SK (6); CZ (5); EE (5); ES (4); HU (3); UK (3); CY (2); IT (2); LT (2); NL (2); RO (2); SE (2); AT (1); BE (1); DK (1); DE (1); EL (1); LV (1); LU (1); MT (1).

410 Bosnia and Herzegovina (2); the Occupied Palestinian Territories (1); and 6 unspecified.

411 African Union; Council of Europe (2); EBRD (2); Global fund to Fight Aids, Tuberculosis & Malaria; United Nations Headquarters; United Nations Development Programme; World Bank (2).

412 The African Union Commission and one other, unspecified International Organisation.

413 European Partners Against Corruption (EPAC).

414 Bulgarian Supreme Cassation Prosecutor Office; Legal Interaction Alliance; one unspecified organisation from Lithuania and the Centre for Criminal Tax Law (CDPT).
Regulation, non-OLAF investigative staff had limited knowledge about those. This is due to their lack of access to OLAF cases and to information on the investigative processes beyond what is publicly available and as per OLAF’s working principle “access on the ‘need to know’ principle”. This section presents the issues that the different groups were mostly knowledgeable about.

The various stakeholder groups consulted also emphasised that Regulation 883/2013 should be considered within a larger EU and national legal framework – taking into account Regulation 2185/96 to carry out on-the-spot checks and inspections in EU Member States, the EU’s Financial Regulation (Regulation on the financial rules applicable to the general budget of the Union), its sectoral legislation (governing different EU funds) and a diversity of national legislative and administrative systems – as well as supporting mechanisms, e.g. the IMS, PIF reports, etc. The different elements of the framework were mentioned in the different consultation activities conducted within this evaluation.

**OLAF staff were the most represented within the stakeholder consultation (100 in total)**

The table below provides a breakdown of categories of OLAF staff consulted by consultation activity. 26 OLAF staff were consulted twice, via an interview and participation to the survey.

**Table 19. Categories of OLAF staff consulted by consultation activity**

<table>
<thead>
<tr>
<th># stakeholders interviewed</th>
<th># stakeholders consulted via the survey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dir A</td>
<td>19</td>
</tr>
<tr>
<td>Dir B</td>
<td>10</td>
</tr>
<tr>
<td>Dir C</td>
<td>13</td>
</tr>
<tr>
<td>Dir D</td>
<td>13</td>
</tr>
<tr>
<td>ISRU</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>416</td>
</tr>
<tr>
<td>Total</td>
<td>66</td>
</tr>
</tbody>
</table>

OLAF staff in investigative functions – Directorates A and B – were consulted on all aspects of Regulation 883/2013, as well as internal and external factors which have influenced how the Regulation is being applied.

The following sectors of the EU budget were thus covered: Agricultural and Structural Funds (Units B3-B5); External Aid (Unit A4 and A2); Centralised Expenditure (Unit A3); and Customs and Trade Fraud (B1). Internal investigations were covered through consultations of staff in unit A1 EU Staff.

Investigative support staff – Directorate C were consulted to understand the tools and support (legal support; ICT support) at OLAF’s disposal to conduct its investigative functions and their appropriateness. Legal issues raised over the interpretation of some of the regulation’s provisions were also discussed. Complaints brought to EU Ombudsman and issues dealt with by the Data Protection Officer were also discussed.

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416 Internal Auditor; DG Assist; DG DPO; DG PA.
417 Unit 0.2 - Human Resources and Budget; Advisor; DG Team; DPO.
OLAF staff in policy-related functions – Directorate D – were consulted to understand how the Directorate’s policy work supports fraud prevention and detection, as well as OLAF’s investigative function, relations with the AFCOS and COCOLAF members, EU anti-fraud strategy and action plan and support mechanisms, e.g. FPDNnet, EDES, irregular reporting system, the ACAs and relations with third countries and international organisations were covered. Relations with the Supervisory Committee and its role in supervising OLAF’s investigative function were also discussed. The future outlook for OLAF within a changed landscape, e.g. with the establishment of the EPPO, was also discussed.

Staff in ISRU – Unit 0.1 were consulted on the review of incoming information and on the process of supporting OLAF’s DG in selecting cases for opening of an investigation or a coordination case.

HR & budget – Unit 0.2 were consulted on OLAF’s capacity – in terms of human and financial resources – to conduct its investigative function.

The Director General, his Adviser, his personal assistant, OLAF’s Internal Auditor and the DG Data Protection Officer were also consulted on high-level issues related to the intentions of Regulation 883/2013, its application, and related management and organisational issues.

**National stakeholders from EU Member States were the second most consulted group (69)**

Since the Regulation leaves room for Member States to implement certain provisions of the Regulation differently under different national legal systems, thus influencing OLAF’s remit and powers (especially regarding on-the-spot checks and access to data), the AFCOS and national stakeholders were consulted to understand the diversity of situations in which OLAF investigators operate under Regulation 883/2013.

69 National stakeholders from EU Member States were consulted. 20 national stakeholders take part in both the survey and interviews. Those 69 represented 25 Member States.

20 stakeholders took part in interviews, as initially planned in the Inception phase of this evaluation, and 22 took part in the online survey. Three did not take part neither in the interviews nor survey (FI, IE, PT)\(^{418}\). They participated through a separate workshops with some other AFCOs on 26 April.

The overview table below shows that the most participation came from BG, SK, CZ, ES and EE, and HU. This corresponds to Member States with a large number of concluded investigations in 2014 and 2015\(^ {419}\) - 30 in BG, 30 in HU, 15 in SK, ten in CZ. It also covers a diversity of AFCOS.

**Table 20. Categories of national stakeholders consulted by consultation activity**

<table>
<thead>
<tr>
<th></th>
<th># stakeholders interviewed</th>
<th># stakeholders consulted via the survey</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Target</td>
<td>Difference</td>
</tr>
<tr>
<td>BG</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>SK</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

\(^{418}\) They declined to participate in a group interview for AFCOS and did not take part in the online survey.

\(^{419}\) Figure 18 of OLAF’s 2014 and 2015 Annual Report. Note: Only external investigations in the following reporting sectors are counted: Agricultural Funds, external aid, new financial instruments, Structural Funds. http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2015_en.pdf
Consulting the AFCOS allowed the evaluation team to gather information on how well cooperation between OLAF, the AFCOS and other national stakeholders has been structured.

Consulting national authorities managing EU funds allowed the evaluation team to gather information on (1) the detection of fraud and irregularities and the provision of incoming information, and the role of supporting tools such as the IMS, (2) cooperation in the case of an OLAF investigation and the role of the AFCOS, (3) policy work supporting OLAF investigations, (4) level of engagement and consultation in the course of an investigation and in its aftermath.

Consulting national judicial authorities allowed the evaluation team to gather information on cooperation with OLAF investigators in the course of investigations, and
also when following-up on judicial recommendations. Issues covered were level of communication and sequencing or lack thereof of OLAF and national investigations.

The EU & national associations of lawyers and prosecutors 420 consulted shared information on how they perceived OLAF and national efforts to protect and investigate harm against the EU’s financial interests and how cooperation at both levels worked. They were rather distant from Regulation 883/2013, however, and views were general overall.

**Services of Commission DGs and EU executive agencies (49)**

Forty-nine stakeholders from Services of Commission DGs and EU executive agencies were consulted. Eleven took part both in the survey and interviews. They have been distinguished between those managing and controlling (including auditing) EU funds and developing policies and anti-fraud strategies, and those involved in governance, legal and disciplinary issues.

Within the first group, Services of Commission spending DGs and EU executive agencies were consulted to understand their role in supporting OLAF to conduct its investigations. They were consulted on channelling incoming information to OLAF, supporting OLAF investigators in their investigative process, the level of communication which occurred in the process and their role in following-up OLAF recommendations at the end of the process.

Stakeholder coverage of spending DGs and executive agencies is presented in the table below.

**Table 21. Overview of Commission spending DGs and executive agencies consulted by consultation activity**

<table>
<thead>
<tr>
<th># stakeholders consulted through interviews</th>
<th># stakeholders consulted through survey</th>
<th>consulted</th>
</tr>
</thead>
<tbody>
<tr>
<td>DG DEVCO 4, incl. 1 EU DEL</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>DG ECHO</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>DG JUST 421</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG AGRI</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG EAC</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>EASME</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>REA</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG EMPL</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG NEAR</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG RTD</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG CONNECT</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>DG TAXUD</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>EACEA</td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

420 European Partners Against Corruption (EPAC); Bulgarian Supreme Cassation Prosecutor Office; Legal Interaction Alliance; one unspecified organisation from Lithuania and the Centre for Criminal Tax Law (CDPT).

421 DG JUST was also consulted on the future outlook of the EU anti-fraud landscape.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th># stakeholders consulted through interviews</th>
<th># stakeholders consulted through survey</th>
<th>consulted</th>
</tr>
</thead>
<tbody>
<tr>
<td>INEA</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Non-specified Executive Agencies;</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>DG GROW</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG REGIO</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG ENV</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG JRC</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>DG FPI</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>20</td>
</tr>
<tr>
<td></td>
<td></td>
<td>21</td>
</tr>
</tbody>
</table>

In terms of data coverage, the mix of stakeholders consulted reflects the core sectors of OLAF's ongoing investigative work in 2014, i.e. (1) Structural Funds (153 ongoing investigations in 2014), (2) External aid (79), (3) Agricultural Funds (60), (4) Customs and Trade (56), (5) Centralised Expenditure (49), (6) EU Staff (43), (7) Tobacco and Counterfeit goods (23), (8) New Financial Instruments (13). The mix also covers well the three modes of management of EU funds (direct, shared and indirect). This was important to understand the division of responsibility between EU MS and OLAF to detect, prevent and investigate fraud cases. Sectoral legislation (governing different EU funds) was mentioned in those consultations.

Within the second group, Commission staff were consulted on certain provisions of the Regulation and accompanying measures, e.g. internal investigations, EDES, the clearing house, the use of precautionary measures, and disciplinary measures following an OLAF investigation. The following were consulted: SG; DG HR; BUDG; IAS; SJ; DG SCIC; European Policy Strategy Centre (EPSC); Infrastructures and Logistics - Brussels (OIB); Internal Audit Service (IAS).

**Third countries (12) and international organisations (11)**

12 stakeholders from Third countries were consulted. They were from accession countries Serbia and Bosnia and Herzegovina and from Senegal and the occupied Palestinian Territories. Six survey participants were from unspecified countries.

11 stakeholders from International organisations were consulted. They were from the African Union (one stakeholder consulted via the survey and an interview); Council of Europe; EBRD; the World Bank; Global fund to Fight Aids, Tuberculosis & Malaria; United Nations Headquarters; United Nations Development Programme; and one other, unspecified, International Organisation

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422 Data on number of ongoing investigations by sector at the end of 2014, source: OLAF Annual Report 2014.

423 As per the terminology used in OLAF Annual Report 2014, the term 'Structural Funds' covers the following: European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF) and European Maritime and Fisheries Fund (EMFF, and its predecessors EFF and FIFG), as well as the EAGGF Guidance Section.


425 As per the terminology used in OLAF Annual Report 2014, the term 'Agricultural Funds' covers the following: European Agricultural Fund for Rural Development (EAFRD), European Agricultural Guidance and Guarantee Fund (EAGGF — except the EAGGF Guidance Section) and pre-accession funding, including through the IPA, Phare and Sapard programmes.
Consulting Third countries and International organisations allowed the evaluation team to understand the level of cooperation of these organisations with OLAF. Although less familiar with OLAF’s investigative powers and tools, these interviews shed light on the exchange of information between these institutions and OLAF, as well as the possible follow-up actions based on OLAF investigations.

The Supervisory Committee (3) and OLAF control bodies (9)

Three former members of the Supervisory Committee were interviewed to understand their views on their mandate, according to Regulation 883/2013, and their effective ability to influence OLAF’s investigative work. They discussed difficulties in interpreting provisions in the Regulation on their role and what they could or could not have access to in terms of information on cases, and the Joint Legal Services Opinion which sought to clarify that. Capacity issues faced were also discussed. They were not consulted via the survey on account of the limited number of members.

Nine members of staff of several EU control bodies (European Parliament; EU Ombudsman; EDPS; European Court of Auditors; CJEU) were consulted to collect their views on problems that Regulation 883/2013 sought to address; improvements introduced by Regulation 883/2013 and issues with practical implementation, e.g. interpretation of certain legal provisions. They were mainly consulted on their ability to control and supervise OLAF’s investigations which was limited due to the confidentiality requirements around OLAF cases. Two took part in both the survey and interviews.

Other EU institutions, bodies, offices and agencies (IBOAs) (9)

Nine stakeholders from other EU institutions, bodies, offices and agencies (IBOAs) were consulted. They were from the European Investment Bank; Council of the EU; Eurojust; EUROPOL; the EEAS; and the European Research Council. One took part in both the survey and an interview.

They were consulted mainly on law enforcement cooperation with OLAF; governance issues; and on OLAF’s future outlook and current and future legislative proposals.

The EIB, as an institution administering EU funds, was interviewed on the same issues as Commission spending DGs and executive agencies.

A4.4 Evolution of stakeholder engagement plan

This section describes the changes to the stakeholder consultation plan, difficulties encountered and solutions found.

ICF consulted 267 stakeholders via interviews and the survey (two more than proposed at the proposal stage). A total of 160 interviews were conducted of 161 planned and there were changes in the mix of stakeholders interviewed. Those changes did not modify data coverage in any substantial manner, nor introduce bias, however. The changes are presented in Table 22 below.

Table 22. Changes in stakeholder consultation and reasons

<table>
<thead>
<tr>
<th>Stakeholder category</th>
<th>Change</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>• OLAF staff in policy-related functions and other (non-investigative or management-related) functions</td>
<td>A reduction of interviews with OLAF staff in policy-related functions and other (non-investigative or management-related) functions (-17)</td>
<td>Considering the focus of Regulation 883/2013 on OLAF’s investigative function, it was agreed to focus interviews with OLAF staff involved in investigative functions, investigative-support functions, or management</td>
</tr>
<tr>
<td>• OLAF staff in investigative functions, investigative-support</td>
<td>Compensated by an increase (+23) in</td>
<td></td>
</tr>
</tbody>
</table>

September, 2017
### Stakeholder category Change Reason

<table>
<thead>
<tr>
<th>Stakeholder category</th>
<th>Change</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>functions, or management functions</td>
<td>interviews with OLAF staff in investigative functions, investigative-support functions, or management functions</td>
<td>functions. This change also responded to a request from the Inter-Services Steering Group (ISSG).</td>
</tr>
<tr>
<td>• Commission services and EU executive agencies</td>
<td>+8 interviews</td>
<td>Considering the importance of Commission services and EU executive agencies in managing EU funds, and also preventing, detecting, and supporting OLAF staff during investigations, it was agreed that additional interviews were conducted with them.</td>
</tr>
<tr>
<td>• Other EU institutions, bodies, offices and agencies</td>
<td>-4 interviews</td>
<td>To offset some of the additional interviews with Commission services and EU executive agencies, and considering other EU IBOAs’ comparatively limited involvement in OLAF investigative function, the number of interviews within this category was reduced.</td>
</tr>
<tr>
<td>• Member State stakeholders</td>
<td>-7 interviews</td>
<td>Some national managing and judicial authorities declined to be interviewed for reasons related to their limited availability. Some provided inputs in writing. Data coverage was ‘compensated’ through participation in the survey.</td>
</tr>
<tr>
<td>• Third countries and International organisations</td>
<td>Third countries (-6)</td>
<td>Given difficulties with identifying relevant stakeholders to interview in these third countries (nine planned), less interviews were conducted with that</td>
</tr>
<tr>
<td></td>
<td>International organisations (+4)</td>
<td></td>
</tr>
</tbody>
</table>

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426 Two additional judicial authorities (EL and DE) were contacted at the request of the client, after the submission of the DFR – one positive response has been received to date.

427 Some of these countries did not have an ACA signed with OLAF or the ACA was signed with the customs’ authorities.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Stakeholder category | Change | Reason
--- | --- | ---
Membership organisations, EU & national associations of lawyers and prosecutors | -4 interviews | Identifying relevant contacts proved difficult and interviewing additional stakeholders from more relevant groups was preferred.

Supervisory Committee | -1 interview | No response to invitation (or reminders) to interview

Other EU control bodies | +3 interviews | More stakeholders from the EP were planned, to respond to the Steering Group’s request.

A4.5 Consultation activities

This section presents the method and tools used to consult the different stakeholders mentioned above. Each method and tool is presented in turn, below:

- interviews;
- online survey;
- workshops; and
- conferences and meetings.

They allowed for collecting information from various stakeholder groups and were complementary, thus allowing proper data triangulation. The table below presents this by describing the purpose and main results of each consultation activity, including complementarities.

Table 23. Purpose and results of the stakeholder consultation activities

<table>
<thead>
<tr>
<th>Activity</th>
<th>Purpose</th>
<th>Strengths and complementarities achieved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interviews with 160 stakeholders from the 9 categories&lt;sup&gt;428&lt;/sup&gt;</td>
<td>Gather detailed information on the application of Regulation 883/2013 from the points of views of 8 different stakeholder categories.</td>
<td>Interview evidence forms the main component as it generated substantive qualitative information to inform the findings and conclusions (in Chapters 4-9) and the case studies (Annexes 5-9).</td>
</tr>
</tbody>
</table>

<sup>428</sup> OLAF staff in policy related functions and other (non-investigative or management-related) functions; OLAF staff in investigative functions, investigative-support functions, or management functions; Commission services and EU executive agencies; Other EU institutions, bodies, offices; Member State stakeholders; Third countries and International organisations; Membership organisations, EU & national associations of lawyers and prosecutors; Supervisory Committee; Other EU control bodies.
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<table>
<thead>
<tr>
<th>Activity</th>
<th>Purpose</th>
<th>Strengths and complementarities achieved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Survey sent to stakeholders from 8 categories&lt;sup&gt;429&lt;/sup&gt;</td>
<td>Broaden the evidence base beyond stakeholders interviewed.</td>
<td>The survey allowed the evaluation team to reach a wider audience and to generate quantitative findings to complement the qualitative information on the extent to which certain issues were common across different stakeholders and this again has been used to inform evaluation findings/conclusions (in Chapters 4-9).</td>
</tr>
<tr>
<td>Four ICF validation workshops with: - OLAF - some AFCOS - ICF's experts</td>
<td>Gather in three separate workshops (1) a group of AFCOS, (2) OLAF, (3) four high-level experts from different backgrounds to discuss emerging findings, and validate them.</td>
<td>The workshops were used to test some of the findings arising predominantly from the interviews and survey. They were useful to critically reflect at high level on emerging findings and provide strategic steer to ICF’s evaluation team.</td>
</tr>
<tr>
<td>Conferences and meetings</td>
<td>Maintain stakeholder engagement through participation in OLAF events and update wider audience of progress in the evaluation</td>
<td>The conference findings informed the primary evidence as well as offering an opportunity to again verify and cross-check emerging findings. They allowed ICF to understand topical issues of concern regarding OLAF. This fed into the evaluation and reflections on its recommendations.</td>
</tr>
</tbody>
</table>

**Interviews**

Fifteen scoping interviews were conducted and 145 in-depth interviews, of which at least 29 were used or conducted for informing the case studies (presented in Annexes 5-9).

Fifteen scoping interviews were conducted with a diverse range of stakeholders to better understand the needs and expectations of the users of this evaluation and to enhance the study team’s understanding of OLAF’s functioning and performance to

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<sup>429</sup> Members of the Supervisory Committee were not sent the survey on account of their small number.

<sup>430</sup> Academics, judges, operational staff from various Member States (BE, ES, NL, LV, PL)
date. The findings from these scoping interviews informed the contextual analysis and the evaluation approach in particular, as well as the research tools.

**Online survey**

The survey was launched on 30 January to all respondents other than OLAF staff and third countries. The survey was sent to 186 contacts within this group. Following this initial launch, the survey was also sent to 95 OLAF staff contacts on 3 February; Nine third country stakeholders on the 31 March (1 bounced) and 6 EU delegation contacts on the 21 April (none responded), thus bringing the total number of contacts directly invited to complete the survey to 295.

The survey was relatively long for some stakeholders and was mentioned by some stakeholders in their feedback on the survey. However, prima facie, this did not appear to have a material impact (if any) on the response rate.

Another challenge related to specific aspects of the design/routing of the survey. For instance, some respondents highlighted that the survey left insufficient space and opportunities to comment on their answers or add other options than those specified in the questions. Furthermore, some concerns were raised as to whether certain questions were sufficiently tailored and that some respondents were obliged to answer certain questions outside their functions or their knowledge of the application of the Regulation.

Certain questions were asked to specific stakeholder groups only, which resulted in some questions with low numbers of responses. For example, two questions which were only asked of OLAF’s Unit 0.1 Investigation Selection and Review received a total of eight responses each. Another example relates to a small number of questions which were only asked of specific OLAF staff (as it was felt they would be best placed to respond), resulting in around 30 responses only to these questions.

As a result of the survey design where many questions were targeted at certain sub-groups of stakeholders only, small bases do occur among a number of survey questions. Nevertheless, there are no specific themes or types of questions where this issue is specifically concentrated.

Finally, some of the open text comments provided by respondents were insufficiently detailed or clear, making interpretation challenging.

**ICF validation workshops**

ICF consulted (1) its internal high level experts, (2) OLAF and (3) the AFCOS via four separate validation workshops. The purpose of those workshops was to test emerging findings. They were useful to critically reflect at high level on emerging findings and provide strategic steer to ICF’s evaluation team.

Two workshops were organised with ICF’s internal high level experts during the evaluation. A first workshop was held on 14 September to gather the experts’ views on the overall scope of the assignment; discuss the key points for the contextual analysis; identify key issues to be explored as part of the evaluation; and invite comments on the evaluation framework. The second workshop was held on 18 April and focused on, amongst other things, the analysis of possible future scenarios for OLAF.

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431 Overall, 50 questions have at least one sub-question with 40 or fewer responses. Of these, 22 questions have 30 or fewer responses and 17 questions have 20 or fewer responses.
Two separate workshops were organised with OLAF staff and the AFCOs, both on 26 April. Findings on various key evaluation issues and OLAF’s future outlook were discussed.

At the OLAF workshop, members of all Directorates and the Principal Advisor participated.

Countries represented at the AFCOS workshop were BG, EE, FI, EL, IE, IT, MT, PT, SK. Two members of OLAF were also present.

**Conferences and meetings**

ICF attended the following events during which further information of use to the evaluation was collected:

- Conference on the evaluation of Regulation 883/2013 organised by OLAF on 1-2 March 2017, which brought together various representatives from OLAF, EU Member States, EU IBOAs, international organisations, academic organisations and judicial practitioners. Preliminary findings of ICF’s evaluation study were discussed.
- Conference on “Cooperation project in the Anti-fraud sector” held in Brussels on 9 November 2016 by the Italian AFCOS (Guardia di Finanza). The conference notably provided information on existing best practices in mutual administrative assistance in the sector of structural and investment funds, and on the evolving legislative EU anti-fraud landscape.
- A “lunch debate on the revised Regulation 45/2001” organised by OLAF’s DPO and DG JUST on 24 January 2016 to present the recent Commission proposal to revise this Regulation and align it with the EU Data Protection reform and the adoption of the General Data Protection Regulation. It presented the new features of the Commission proposal and to what extent it could impact OLAF’s work if adopted.

**A4.6 Consistency of results across consultation activities**

The table below presents key results per consultation activity, organised by evaluation theme, as well as the level of (1) consistency of results across consultation activities and (2) complementarity of results across consultation activities.

Overall, there was a large degree of convergence in results from the different consultation activities.

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432 Opening investigations; investigative powers & tools; cooperation & information exchange; investigative recommendations & follow-up; procedural rights & safeguards; Supervisory Committee.
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Table 24. Main results of the consultation processes and level of their consistency and complementarity

<table>
<thead>
<tr>
<th>Evaluation issue</th>
<th>Headline results</th>
<th>Consistency of results across consultation activities</th>
<th>Complementarity of results across consultation activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opening investigations</td>
<td>Selection criteria considered overall helpful for OLAF investigative staff yet lack of clarity on the impact of case selection criteria on selection decisions amongst non-OLAF stakeholders ⁴³³</td>
<td>Most respondents - aside from those from the European Commission and other EU IBOAs - agreed that the case selection criteria and their application are transparent overall, while almost 30 per cent (n=16) disagreed</td>
<td>Some stakeholders (e.g. AFCOS and IBOAs) reported lack of information on opening of cases and lack of clarity on how the selection criteria were effectively applied</td>
</tr>
<tr>
<td></td>
<td>The introduction of selection criteria overall improved consistency in the cases selected for investigation yet some OLAF staff reported potential</td>
<td>Most survey respondents – aside from those from the European Commission and other EU IBOAs -</td>
<td>Discussion on whistleblowing status of informants</td>
</tr>
</tbody>
</table>

⁴³³ AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations.
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

#### Evaluation issue

<table>
<thead>
<tr>
<th>Headline results</th>
<th>Consistency of results across consultation activities</th>
<th>Complementarity of results across consultation activities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Interviews</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inconsistencies in application of the selection criteria</td>
<td>agreed or strongly agreed that the information provided by OLAF on the reasons for opening an investigation was comprehensive and most also agreed it was transparent.</td>
<td></td>
</tr>
<tr>
<td>IPPs play a marginal role at best in case selection, being used only when one or more of the selection criteria set out in the Regulation would suggest a dismissal of the case</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lack of information communicated to relevant stakeholders on case selection decisions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Some scope for improving the knowledge/experience of ISRU staff (legal knowledge and language specialisms)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Survey</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Workshops</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Conferences</strong></td>
<td></td>
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</tr>
</tbody>
</table>

**Investigative tools**

<p>| Agreement that OLAF’s Survey respondents | The issue of the Challenges in |
|------------------------------------------|------------------------------|-------------------------------|
| High                                     | High                         |                               |</p>
<table>
<thead>
<tr>
<th>Evaluation issue</th>
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<th>Complementarity of results across consultation activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigative powers and tools were largely unchanged with the introduction of Regulation 883/2013 and that it mainly clarified OLAF’s role in internal investigations.</td>
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<tr>
<td>Lack of agreement amongst stakeholders (even those within the same group / organisation) on whether the Regulation provides OLAF with sufficient tools and powers to conduct administrative investigations.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Challenges for OLAF investigators in navigating national law and practices, e.g. to conduct digital forensic operations, or access bank (from OLAF) were generally more likely to agree that specific powers and tools (surrounding inspections, interviews and on-the-spot checks) were clear/sufficient in the context of internal rather than external investigations.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OLAf investigators, ie. ‘closer’ to these powers and tools were less likely to agree that these powers and tools are clear compared to survey respondents who are not directly involved in interpreting and applying these powers and tools.</td>
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<tr>
<td>Legal basis for conducting on-the-spot checks in the framework of internal investigations was raised at a workshop with OLAF heads of units and other staff.</td>
<td></td>
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<tr>
<td>Challenges associated with the dependency on national rules and practices was also discussed at length at a workshop with OLAF heads of units and other staff.</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Issues related to the authorisation necessary to conduct interviews and the burden this can create for investigators and lack of clarity surrounding digital forensic operations.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evaluation issue</td>
<td>Interviews</td>
<td>Survey</td>
<td>Workshops</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------</td>
<td>-----------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>accounts/statements of beneficiaries</td>
<td>(e.g. ISRU staff)</td>
<td>Most respondents agreed that OLAF’s powers to inspect premises are clear in relation to inspections of the premises of EU IBOAs. A far lesser proportion agreed in relation to inspections within Member States. The survey question made reference to ‘inspections of premises within the Member States’ to facilitate the consolidation of survey questions and the shortening of the survey length overall. It is unlikely that the inclusion of the words “premises within” in the survey question had any impact on responses. Consequently, the results of this survey question should be interpreted as relating to inspections in the Member States rather than inspections of premises within the Member States.</td>
<td></td>
</tr>
<tr>
<td>OLAF investigative staff and AFCOS referred to certain inconsistencies between Regulation 883/2013 and Regulation 2185/96 and Regulation 2988/95 also impacting the consistency and the legal basis OLAF’s investigative tools</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Issues around some specific provisions were reported: the authorisation</td>
<td></td>
<td></td>
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</tbody>
</table>
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>Interviews</td>
<td>Survey</td>
<td>Workshops</td>
<td>Conferences</td>
</tr>
<tr>
<td>Necessary to conduct interviews (e.g. of witnesses) and the burden this can create for investigators; need to improve clarity surrounding the timing and legality of precautionary measures; length of “on-the-spot” checks due to the notification of national authorities and OLAF’s internal approval procedures.</td>
<td>Survey respondents from OLAF investigative units agreed that OLAF provides information to IBOAs and Member States with regard to precautionary measures that is exhaustive and in line with the requirements set by Article 7. Only one-third of respondents from European Commission, other EU IBOAs, Member State stakeholders and third countries agreed with this statement.</td>
<td>Conduct interviews raised at workshop involving ICF’s expert panel, as well as need to clarify the legal basis for statements vis-à-vis interviews.</td>
<td></td>
</tr>
</tbody>
</table>
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
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<tr>
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<th>Complementarity of results across consultation activities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cooperation and information exchange</strong></td>
<td>Stakeholders were mixed on the level of cooperation and information exchange between OLAF and national authorities. AFCOS strengthened cooperation and the exchange of information between OLAF and Member States’ authorities, yet agreement that some AFCOS had insufficient staff, powers or knowledge to fulfil this support role. While OLAF has strong cooperation with administrative authorities – or at least these authorities know with certainty what OLAF’s role is in coordination cases.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Most OLAF investigative survey respondents considered that cooperation and exchange of information with Member States’ authorities and IBOAs during investigation had been overall effective. This was not the case in the case of cooperation and exchange of information with between OLAF and third countries’ authorities in the context of investigations.</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>Shortcomings in practice regarding the role of the AFCOS were highlighted. At a workshop involving AFCOS representatives, it was apparent that the suggestion to introduce greater specificity in Regulation 883/2013 regarding the AFCOS (profile, size, powers, etc.) is contentious and relatively.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>At the OLAF evaluation conference, the OLAF Director-General noted that OLAF requires the cooperation of EU IBOAs and this varies in practice. Shortcomings in practice regarding the role of the AFCOS were highlighted.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

**Evaluation issue:**
- Have an obligation to cooperate with OLAF (Article 3 Regulation 883/2013), the level of cooperation with judicial authorities is lower, notably regarding the follow-up to OLAF judicial recommendations and the level of indictment
- Improved cooperation and exchange of information between OLAF and Member States’ authorities, leads to reduced investigation duration, increased criminal investigations and prosecutions, increased recovery of misused public funds and increased deterrence

**Headline results**

<table>
<thead>
<tr>
<th>Evaluation issue</th>
<th>Interviews</th>
<th>Survey</th>
<th>Workshops</th>
<th>Conferences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per cent (n=2) agreed it had been overall effective</td>
<td>A majority of survey respondents agreed that the creation of the AFCOS strengthened cooperation and the exchange of information between OLAF and Member States’ authorities, although improvements to AFCOS powers and capacity would be helpful</td>
<td>Improved cooperation and exchange of information between OLAF and Member States’ authorities, leads to reduced investigation duration, increased criminal investigations and prosecutions, increased recovery of misused public funds and increased deterrence</td>
<td>At a workshop of OLAF heads of unit and other staff, there was a clear consensus that Regulation 883/2013 should be amended to specify the role and obligations of the AFCOS</td>
<td></td>
</tr>
</tbody>
</table>

**Consistency of results across consultation activities:**
- polarising

**Complementarity of results across consultation activities:**
- The vast majority of Member State respondents agreed that the activities organised in the context of COCOLAF led to a more polarising
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

#### Headline results

<table>
<thead>
<tr>
<th>Evaluation issue</th>
<th>Interviews</th>
<th>Survey</th>
<th>Workshops</th>
<th>Conferences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigative recommendations and follow-up</td>
<td>Agreement that the quality and comprehensiveness of OLAF’s final reports is mixed</td>
<td>Almost two-thirds of survey respondents agreed that OLAF’s investigation reports are overall clear and comprehensive, with 40-70 per cent of non-OLAF stakeholders agreeing, while around 80 per cent of OLAF respondents agreed.</td>
<td>More than half agreed that OLAF’s recommendations are clearly formulated with a well-defined description of the actions to be taken,</td>
<td>The follow-up to judicial recommendation varies in practice depending on factors such as Member States’ rules on the admissibility of evidence and national authorities. AFCOS representatives expressed a desire to receive OLAF’s final reports.</td>
</tr>
<tr>
<td></td>
<td>effective cooperation</td>
<td>particularly important to facilitate international cooperation</td>
<td>the follow-up to judicial recommendations depends on factors such as MS rules on evidence, national authorities</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Drivers for follow-up reported were: quality of OLAF reports; right to be heard not deferred; timely reports; information provided by OLAF to facilitate precautionary measures.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Drivers for follow-up

- Quality of OLAF reports
- Right to be heard not deferred
- Timely reports
- Information provided by OLAF to facilitate precautionary measures

### Conference

- Medium
- High
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Evaluation issue</th>
<th>Headline results</th>
<th>Consistency of results across consultation activities</th>
<th>Complementarity of results across consultation activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interviews</td>
<td>Survey</td>
<td>Workshops</td>
<td>Conferences</td>
</tr>
<tr>
<td>level of indictment</td>
<td>with 40-56 per cent of non-OLAF stakeholders agreeing, and around 80 per cent of OLAF respondents agreed</td>
<td>at the OLAF workshop were uniformly against as this would extend AFCOS’ role/remit beyond that which is specified in Regulation 883/2013 when the reports and recommendations are intended for judicial authorities.</td>
<td></td>
</tr>
<tr>
<td>Positive impact of the Regulation 883/2013 and its application on the design of national anti-fraud legislation and practices.</td>
<td>The vast majority of survey respondents (European Commission, other EU IBOAs and Member States) suggested that OLAF’s financial recommendations were followed-up upon within the reporting period (12 months), while 90 per cent (n=35) agreed that OLAF’s financial recommendations led to recovery proceedings</td>
<td></td>
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</tr>
</tbody>
</table>

September, 2017
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

#### Headline results

<table>
<thead>
<tr>
<th>Evaluation issue</th>
<th>Interviews</th>
<th>Survey</th>
<th>Workshops</th>
<th>Conferences</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Procedural rights and safeguards</strong></td>
<td>A minority of survey respondents agreed that national judicial authorities followed up on OLAF judicial recommendations and IBOAs followed up on administrative and disciplinary recommendations.</td>
<td>The regulation strengthened procedural rights and in some cases, introduced Rights and safeguards, are somewhat commensurate to those of persons subject to criminal investigations, and as such can be considered as criminal.</td>
<td>The majority of survey respondents agreed that procedural guarantees under Article 9 of the Regulation are clear and contributed to strengthening the procedural guarantees of individuals subject to investigations.</td>
<td>At the OLAF evaluation conference, OLAF’s Director-General indicated that procedural guarantees, whilst having strengthened the transparency and accountability of OLAF, but had been disproportionate – (OLAF has no powers to conduct criminal</td>
</tr>
<tr>
<td><strong>Interviews</strong></td>
<td>High</td>
<td>High</td>
<td></td>
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</tbody>
</table>
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

#### Headline results

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<th>Workshops</th>
<th>Conferences</th>
</tr>
</thead>
<tbody>
<tr>
<td>investigative staff</td>
<td>The Regulation has made OLAF more compliant with data protection and fundamental rights although some issues remain</td>
<td>confidentiality and data protection provisions in the Regulation had contributed to strengthening the protection of personal data of individuals subject to investigations.</td>
<td>disproportionate to the administrative nature of OLAF’s investigations</td>
<td>investigations but must respect the rights of persons as if they were subjected to one).</td>
</tr>
</tbody>
</table>

| Supervisory Committee and other control mechanisms | Difference in opinion between the Supervisory Committee on whether the Supervisory Committee should be entitled to information on individual, ongoing cases to allow it to fulfil its mandate, | A larger portion of survey respondents (OLAF and the European Commission) disagreed that the role and tasks of the Supervisory Committee (Article 15), clarifications | At a workshop involving ICF’s expert panel, the main points were that the Regulation is unclear as to the Supervisory Committee’s mandate and | The clarity of the Supervisory Committee’s role and mandate was discussed at the OLAF evaluation conference – the legislator left some issues unresolved and never decided |

| Consistency of results across consultation activities | Medium | High |

---

435 OLAF respondents constituted the bulk of the sample for this question (27 of 30 respondents) and so the data for these questions will disproportionately reflect the views of OLAF staff.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

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</thead>
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<td>Survey</td>
<td>Workshops</td>
</tr>
<tr>
<td>solved by the Joint Opinion of the Legal Services of the European Parliament, the Council and the Commission, of 12 September 2016</td>
<td>regarding modalities for OLAF to report to the Supervisory Committee on investigations, and the definition of working arrangements between the Supervisory Committee and OLAF, had led to a more effective and efficient cooperation between the Supervisory Committee and OLAF</td>
<td>powers, especially in relation to OLAF’s conduct in undertaking investigations and what the Supervisory Committee should have access to</td>
<td>whether the Supervisory Committee should be an advising or a supervising body</td>
</tr>
<tr>
<td>While stakeholders interviewed highlighted the necessity of external controls and complaints mechanisms, they agreed that they had proliferated and were somewhat overlapping and had created administrative burden on OLAF to respond</td>
<td></td>
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</tr>
</tbody>
</table>

Inter-institutional exchange of views

Stakeholders consulted had mixed views as regard to the effectiveness of the inter-institutional exchange of views. The evidence gathered was limited:

They broadly considered that inter-institutional exchange of views contribute to transparency of the work of the Office but have been watered-down by political

| Medium | Low |
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

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</tbody>
</table>

considerations and their rather generic and formal nature.
Annex 5  List of ACAs

Table 25. Overview of ACAs between OLAF and Member States as at 1 September 2017

<table>
<thead>
<tr>
<th>National authority</th>
<th>Ministry of Interior</th>
<th>Ministry of Finance</th>
<th>General/ Public Prosecutor’s Office</th>
<th>Police/ LEA</th>
<th>Development Agency</th>
<th>Court of Audit/ audit authority</th>
<th>AML authority</th>
<th>Finance inspector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current ACAs</td>
<td>ES</td>
<td>EE, ES, PL</td>
<td>CZ, LV</td>
<td>DE</td>
<td>SE</td>
<td>IT</td>
<td>BE</td>
<td>IT</td>
</tr>
</tbody>
</table>

Table 26. Overview of ACAs between OLAF and Third Country Authorities And Counterpart Administrative Investigative Services of International Organisations as at 1 September 2017

<table>
<thead>
<tr>
<th>Institution</th>
<th>Partners</th>
<th>Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFRICA (Regional)</td>
<td>Forum des Inspections Générales d’Etat d’Afrique (FIGE)</td>
<td>OLAF + EuropeAid</td>
</tr>
<tr>
<td>ANGOLA</td>
<td>Office of the Inspector General of Angola</td>
<td>OLAF</td>
</tr>
<tr>
<td>CONGO BRAZZAVILLE</td>
<td>Inspection Générale d’Etat du Congo Brazzaville</td>
<td>OLAF+ EuropeAid</td>
</tr>
<tr>
<td></td>
<td>Commission nationale de lutte contre la corruption du Congo Brazzaville</td>
<td>OLAF + EuropeAid</td>
</tr>
<tr>
<td>DJIBOUTI</td>
<td>Inspection Générale d’Etat de la République de Djibouti</td>
<td>OLAF + EuropeAid</td>
</tr>
<tr>
<td>MOROCCO</td>
<td>Administration des Douanes et Impôts Indirects (ADII) du Royaume du Maroc</td>
<td>OLAF</td>
</tr>
<tr>
<td></td>
<td>Inspection Générale des Finances du Maroc</td>
<td>OLAF + EuropeAid</td>
</tr>
<tr>
<td>SENEGAL</td>
<td>Inspection générale d’Etat du Sénégal</td>
<td>OLAF + EuropeAid</td>
</tr>
</tbody>
</table>

OLAF usually enters into administrative cooperation arrangements (ACAs) together with EuropeAid, as co-signatory, unless the operational partner in the third country is a judicial/prosecution body, a customs administration or an international organisation, in which case OLAF concludes the cooperation arrangement with the concerned partner alone.
## Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Institution</th>
<th>Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office National de Lutte Contre la Fraude et la Corruption de la République du Sénégal (OFNAC)</td>
<td>OLAF</td>
</tr>
<tr>
<td>SOUTH AFRICA National Prosecuting Authority of South Africa (NPA)</td>
<td>OLAF</td>
</tr>
<tr>
<td>TUNISIA Contrôle Général des Finances de la République de Tunisie</td>
<td>OLAF</td>
</tr>
<tr>
<td>UGANDA Inspectorate of Government of the Republic of Uganda</td>
<td>OLAF</td>
</tr>
<tr>
<td>ARGENTINA Fiscalía de Investigaciones Administrativas (FIA) de la República Argentina</td>
<td>OLAF</td>
</tr>
<tr>
<td>UNITED STATES OF AMERICA Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)</td>
<td>OLAF</td>
</tr>
<tr>
<td>AUSTRALIA Australian Customs and Border Protection Service</td>
<td>OLAF</td>
</tr>
<tr>
<td>BANGLADESH Export Promotion Bureau Ministry of Commerce</td>
<td>OLAF</td>
</tr>
<tr>
<td>CHINA General Administration of China Customs</td>
<td>OLAF</td>
</tr>
<tr>
<td>TAIWAN Taiwan Customs</td>
<td>OLAF</td>
</tr>
<tr>
<td>TAIWAN Bureau of Foreign Trade (BOFT)</td>
<td>OLAF</td>
</tr>
<tr>
<td>BELARUS State Customs Committee</td>
<td>OLAF</td>
</tr>
<tr>
<td>Former Yugoslav Republic of MACEDONIA Public Prosecutor's Office</td>
<td>OLAF</td>
</tr>
<tr>
<td>KOSOVO(^{437}) Kosovo Police</td>
<td>OLAF</td>
</tr>
<tr>
<td>MOLDOVA Moldovan Customs Service</td>
<td>OLAF</td>
</tr>
<tr>
<td></td>
<td>The National Anti-Corruption Centre of the Republic of Moldova</td>
</tr>
<tr>
<td>UKRAINE Ministry of Revenue and Duties</td>
<td>OLAF</td>
</tr>
</tbody>
</table>

\(^{437}\) This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

#### September, 2017

<table>
<thead>
<tr>
<th>Institution</th>
<th>Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td>The National Anti-Corruption Bureau of Ukraine (NABU)</td>
<td>OLAF</td>
</tr>
<tr>
<td>Palestinian Anti-Corruption Commission</td>
<td>OLAF</td>
</tr>
</tbody>
</table>

**INTERNATIONAL ORGANISATIONS**

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Union Commission (AUC)/ Office of Internal Audit (OIA)</td>
<td>OLAF</td>
</tr>
<tr>
<td>European Investment Bank (EIB)</td>
<td>OLAF</td>
</tr>
<tr>
<td>Global Fund to Fight Aids, Tuberculosis and Malaria</td>
<td>OLAF</td>
</tr>
<tr>
<td>Inter-American Development Bank (IDB)</td>
<td>OLAF</td>
</tr>
<tr>
<td>International Fund for Agricultural Development (IFAD)</td>
<td>OLAF</td>
</tr>
<tr>
<td>Organisation for Economic Co-operation and Development (OECD)</td>
<td>OLAF</td>
</tr>
<tr>
<td>United Nations Development Programme (UNDP)</td>
<td>OLAF</td>
</tr>
<tr>
<td>United Nations Office for Project Services</td>
<td>OLAF</td>
</tr>
</tbody>
</table>
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Institution</th>
<th>Partners</th>
</tr>
</thead>
<tbody>
<tr>
<td>WORLD BANK</td>
<td>OLAF</td>
</tr>
<tr>
<td>World Bank’s Integrity Vice-Presidency</td>
<td></td>
</tr>
<tr>
<td>World Food Program</td>
<td>OLAF</td>
</tr>
<tr>
<td>Office of the Inspector General of WFP (OIG)</td>
<td></td>
</tr>
</tbody>
</table>
Annex 6  Case study: best practice in investigations

A6.1 Introduction

A6.1.1 Background
OLAF investigates fraud, corruption and serious misconduct within the European institutions or linked to EU interventions and funding in the Member States and/or outside the EU – i.e. in third countries and/or in international organisations. OLAF administrative investigations cover fraud, corruption and any other illegal activity affecting the financial interests of the European Union, including those committed by EU officials or economic operators in a variety of sectors supported by EU funds.

A6.1.2 Purpose
This case study aims to capture and explain the variation in practices across different types of investigations and investigated bodies or structures as well as forming a judgment on the effectiveness of those investigative practices. It explores factors improving (or hindering) the performance of OLAF’s investigative function. The objective is to identify good practices that can be institutionalised.

A6.1.3 Scope
With respect to Regulation 883/2013, the case study covers mainly: external and internal investigations (Articles 3 and 4); the opening of investigations (Article 5); investigation procedure (Article 7); and information access and sharing (Articles 6, 8, 12). Reporting and follow-up are not strictly included in the scope of this case study (i.e. Article 11) as it is covered in other case study.

A6.1.4 Methodology
Case study findings are based on stakeholder consultations with OLAF investigative and non-investigative staff, Commission services and AFCOS undertaken as part of this evaluation.

A6.2 Findings
This section presents findings related to good investigative practices and potential practices which, depending on the context, can be transferable across sectors and geographies.

A6.2.1 Practices relating to the opening of investigations
The new selection procedure based on Article 5 of the Regulation established a more homogeneous practice in the selection of information as well as a more transparent procedure as the outcome of the selection is approved by OLAF’s Director-General. The fact that the duration of the selection is limited to two months is considered as time-saving for investigators who can focus only on investigative actions compared to the more flexible selection procedure before Regulation 883/2013 entered into force.

A6.2.1.1 Selection and analysis of incoming information
Factors facilitating the selection and analysing of incoming information

- The time limit of two months is viewed as a positive development and is conducive to efficiency.

Factors hindering the selection and analysing of incoming information

Analysing the incoming information to verify an allegation of irregularity or suspicion of fraud within the Regulation’s timeframes can be challenging for the following reasons:

- Case selectors may not have the knowledge and/or experience to deal with complex cases. At times this has resulted in:
- Opening cases where there is no allegation of irregularity or fraud
- Opening complex cases which do not include sufficient information
- Opening cases when one case involving a person concerned and or economic operator is already opened. The merging of cases after the cases are opened, thus extending the scope of an existing case, by an investigator takes more time and is procedurally longer.

- Case selectors might perform some of the tasks normally assigned to investigators. For instance, a case selector might have to verify information and perform analytical tasks on the incoming information they receive. This might sometimes overlap on the tasks of the investigators and might lead to some duplication of effort.
- When making requests to the managing authorities, the selection unit asks AFCOS not to disclose that OLAF is initiating the request. This might cause delays in obtaining the information.

Noteworthy practices existing for the selection and analysis of incoming information

- The set-up of the ISRU and the practice of preparing a written opinion on the selection of cases within two months led to a more homogeneous, transparent and objective selection process.

Possible practices for the selection and analysis of incoming information

- The selection unit could consider using OLAF’s case management system to match the meta-data of the case under selection with those of open cases. The system could highlight duplicates in case files and/or help in establishing patterns of fraud while preserving the anonymity of each case.
- The selection unit could consider using OLAF’S case management system to spot possible fraud patterns and proactively alert AFCOS and/or spending DGs of the (new) risks they might face. It can use the historical results of investigations to set priorities and/or inform the probability of recovering defrauded amounts. Due to its position as an EU office, OLAF is in a better position than national authorities to detect the modus operandi of pan-European fraudulent schemes.
- The selection unit could consider briefing AFCOS on how to obtain information from managing authorities at a national level without disclosing the fact that OLAF is initiating the request. For instance, they can brief the AFCOS to make a reference to the obligation of Member States to collaborate with EU institutions to justify the request for information.
- A formal feedback mechanism from investigative units to the case selection unit may be useful if not already in place to improve the efficiency of the case selection process as a whole. Such feedback would help to transfer some knowledge from investigators on how to handle more complex cases. Performance Indicators on the overall duration of the case from selection to closure might help to integrate and/or manage the process better. Alternatively, the interface between the selection unit and the investigation units may benefit from a formal handover procedure including the analysis undertaken as part of the case selection process prior to an investigation commencing.

A6.2.2 Practices relating to the conduct of investigations

The Regulation makes a distinction between internal and external investigations, and provides stronger investigation tools for internal investigations than for external
in investigations. This section keeps the distinction between internal and external investigations as defined in the Regulation but in practice, there may be cases where an internal investigation requires external investigative tools (conducting an on-the-spot check in a Member State) and vice-versa (where there is involvement of an EU official).

A6.2.1.1 Practices relating to internal investigations

Factors facilitating the conduct of internal investigations

- The main differences between OLAF’s investigative tools in internal investigations and external investigations are the immediate and unannounced access to premises of EU IBOAs (Article 3) and the obligation to cooperate on EU staff. This in theory should grant more powers to OLAF to access the required information and to verify the allegations against the person concerned.

Factors hindering the conduct of internal investigations

- Undertaking immediate and unannounced access to premises and information may require prior authorisation from IBOAS. In some IBOAs, it is framed by agreements concluded so as to authorise access to premises and the interviewing of staff (notification procedures). This appears to create discrepancies between IBOAs as carrying-out investigations in certain IBOAs is less problematic than in others. Cooperation with the European Parliament is the most problematic due to the immunity and privileges granted to MEPs. This is a hindering factor in conducting internal investigations (inspections of premises and collection of forensic data).

- In the context of internal investigations, practical issues can appear when:
  - OLAF investigators interview a person not belonging to EU staff (Accredited Parliamentary Assistants or other staff under a contract not covered by the Staff Regulations).
  - When OLAF investigators interview a witness, they need a specific authorisation from OLAF’s DG so as they can hear a witness, even if the person concern is an EU staff.
  - OLAF investigators are limited by the nature of the data they can collect. For instance, during internal investigations in IBOAS, the search is limited to specific key words, and requests for information should target specific services where the investigators think the data is located. This requires prior knowledge of organisational and operating structure of the institutions and can slow down the access to information.
  - Investigators during digital forensic operations do not have direct access to all Commission databases and rely on the approval and cooperation from the European Commission services to grant such access.

Possible practices for the conduct of internal investigations

- Administrative arrangements or protocols between OLAF and the European Parliament should be put in place to investigate in cases of allegations of irregularities or fraud concerning persons working for and or in the European Parliament.

- OLAF’s case management system should support the investigator managing the procedural safeguards and data protection rules tied to the case. For instance, with regard to data protection rules, the procedures of notifications (e.g. privacy statements) of the stakeholders (person concerns, witnesses, whistleblowers) during the investigation should be recorded, managed and monitored in the system.
A6.2.2.2 Practices relating to external investigations

Cooperation with Member States and coordination of investigations

Factors facilitating cooperation with Member States

- Overall, the knowledge of national law and rules on administrative investigations and prosecutions facilitates the cooperation between the Office and Member States authorities on administrative investigations. Such knowledge can be acquired through fora such as AFCOS meetings and the anti-fraud networks via meeting and exchanging with counterparts.
- Having OLAF investigators with specialist knowledge of several Member States, the right language skills and/or seconded from Member States would facilitate cooperation with Member States.

Factors hindering cooperation with Member States

- A disproportionate amount of time is spent in the planning of on-the-spot checks in Member States due to the process to be followed to seek the right authorisations. Before an on-the-spot check is organised, an investigator needs to find available forensic colleagues to accompany him/her and get all the necessary procedural authorisations. This is also subject to a review mechanism internal to OLAF.
- The powers granted by the Regulation on the extent to which of investigators can get to forensic data are limited by national administrative inspection rules.

Noteworthy practices existing for the conduct of internal investigations in Member States

- Linking an OLAF administrative investigation to a case with a criminal component and/or allegations leading to a criminal case led by national authorities facilitates cooperation with Member States. OLAF can then have access to criminal investigative support and work in close cooperation with judicial authorities. Judicial authorities can then use the national investigative powers that OLAF do not have (e.g. access to bank accounts, communications, etc.)

Possible practices for the conduct of external investigations in Member States

- Knowledge of national rules on administrative investigations and prosecution could be codified and rendered accessible to investigators.
- In order to save time and ease the process of planning and authorising on-the-spot-checks in Member states, the case management system could a notification system or mechanism to inform OLAF investigators of the status of the authorisation(s). This would assist investigators to be informed of possible ‘bottlenecks’ and support them with organising the on-the-spot-check with national authorities which often have their own busy schedules.

Cooperation with third-countries and international organisations

Factors facilitating cooperation with third-countries and international organisations

- Administrative arrangements between OLAF and international organisations do not create legal obligations but facilitate the investigation of fraud cases involving persons concerned and/or economic operators in third countries.
- The inclusion of clauses for cooperation with OLAF in contracts between the Commission services and external parties facilitate the investigation of fraud cases outside the European Union.
• In customs matters, cooperation without an ACA is possible if a ‘letter of intent’ is sent to the relevant authorities so as to be able to conduct an inspection of the premises and have access to documents.

Factors hindering cooperation with third-countries and international organisations

• The duration of investigations in third countries is particularly long and resource intensive.
• Ambiguity around the legal standing of an ACA in relation to cooperation and information exchange in third countries gives rise to alternative interpretation of Article 14 of the Regulation, including one interpretation suggesting that cooperation cannot take place without an ACA.
• Contract clauses for cooperation with OLAF in contracts between the Commission services and external parties in the investigation of fraud cases outside the European Union are not always enforceable and the level of sanctions not dissuasive enough.

Noteworthy existing practices for the conduction of investigations in third-countries and international organisations

• Whenever several investigations are opened in a third country, investigators gather information, documents and interviews on more than one case.
• Administrative Cooperation Agreements facilitate cooperation.
• Contract clauses specifying the obligation to cooperate in cases of administrative investigations facilitate cooperation with third countries and which contain sanctions which are likely to have a dissuasive effect are deemed as effective.
• Letters of intent sent to the relevant authorities facilitate cooperation concerning the investigation of customs cases in the absence of an ACA.

Possible practices for the conduction of investigations

• OLAF to negotiate ACAs with all third countries and international organisations.
• OLAF to advise IBOAs to include clauses for cooperation with all Commission contracts and/or grant agreements with sanctions likely to have a dissuasive effect.
• OLAF to proceed to investigations of those partners (of economic operators based outside Europe) established in Europe so as to exercise its powers even in cases of suspicion of fraud concerning economic operators based outside Europe.

A6.2.3 Practices relating to the exchange of information

Access to information on fraudulent activities is by nature a challenge. It is even more a challenge when investigating fraud outside one organisation to another and/or from one jurisdiction to another.

A6.2.3.1 Practices relating to information sharing

Factors facilitating information sharing

• The support from AFCOS to obtain relevant information from national authorities has facilitated the gathering of evidence at a national level.
• Cooperation with Europol in the context of customs cases allows OLAF to use Anti-Fraud Information System (AFIS) in complement to the Secure Information Exchange Network Application (SIENA) as not all authorities involved in
customs cases have access to SIENA. This allows communication via email with police, customs and tax authorities, which is more flexible than deploying a mobile office. Europol can cross-match information gathered on the ground and provide it to Member States.

Factors hindering information sharing

- At selection stage, request for information from national managing authorities needs to be justified but mentioning OLAF compromises the confidentiality of the case.

- Support from AFCOS to provide access to the right information varies according to their competence and national legal frameworks authorising the transfer of information within the framework of an administrative investigation conducted by OLAF i.e. without a judicial authorisation. For instance, most Member States cannot legally share tax information and/or bank accounts without judicial authorisation.

- With external investigations, Article 3(5) of the Regulation provides that OLAF investigators may have access to any relevant information included in databases held by IBOAs without specifying which authorities or IBOAs should provide such access. Some IBOAs have shared their internal databases with OLAF while others have been reluctant to do so.

- Exchange of information with third country authorities is difficult without an ACA. Only law enforcement or judicial authority in third countries have the powers to cooperate in such cases but in practice this does not take place on a frequent basis. International organisations financing projects in those countries and with whom OLAF have signed ACAs could be a more efficient conduit to obtain the information sought after.

Noteworthy existing practices for information sharing

- Some IBOAs have given full OLAF full access to their databases.

- ACAs facilitate information sharing with IBOAs, third countries and international organisations.

Possible practice for information sharing

- OLAF investigators facing refusal to share information in third countries should consider requesting information via international organisation through which funds are managed and/or that also finance projects in similar countries.

A6.3 Conclusions and recommendations

The case study recorded some practices which are specific to sectors and/or geographies as well as practices that are applicable to a wide range of contexts. Overall, the existing obligations and or practices derived from such obligations were seen as conducive to enhancing the effectiveness of the investigative function:

- Time limits for deciding on whether to open or close investigations allows to start the administrative investigation earlier than was the case prior to the entry into force of Regulation 883/2013.

- Investigators’ knowledge of in-country rules and/or personal contacts increase the speed of the cooperation with Member States and or third countries and access to information.

- The establishment of AFCOS facilitates overall in-country cooperation and access to information.
The signature of ACAs in that they facilitate cooperation with Member States, IBOAs and international organisations, especially clauses on the duty to cooperate, sanctions and protocols for information exchanges.

The case study also highlighted potential practices which OLAF could adopt. This includes but is not limited to:

- Using the case management system to avoid duplicates in case files at selection stage and to help establish fraud patterns which can then be used for prevention purposes.
- Adopting a feedback mechanism or monitoring data would improve efficiency of the case selection process as investigators could comment on whether case selection on specific cases could be improved and or case selectors could pin down the effect that their approach to case selection have on the conduct of the investigation and its results.
- Using the case management system to support the investigator managing the procedural safeguards and data protection rules tied to the case.

Codifying the national rules on administrative investigations and prosecution to render this readily accessible to less experienced investigators.
Annex 7 Case study: comparison of OLAF’s investigative function

A7.1 Introduction

A7.1.1 Background

OLAF investigates fraud, corruption and serious misconduct within the European institutions. It is also involved in developing anti-fraud policy at the EU level. Similar to OLAF, other EU and extra-EU organisations play an important role in detecting, investigating and stopping fraud. To conduct fraud investigations as effectively as possible, these organisations have, in accordance with the investigative powers they have been conferred, put in place investigative procedures and processes.

A7.1.2 Purpose

This case study compares anti-corruption / anti-fraud investigative processes across OLAF and various international organisations, including international financial institutions and / or development banks. The main objective is to shed light on processes in place in comparator organisations for undertaking internal investigations and the outcome(s) driven by such processes.

A7.1.3 Scope

With respect to Regulation 883/2013, the case study covers Article 5 (selection of investigations), Articles 7 and 11 (investigation procedures) and Articles 9 and 10 (procedural guarantees, confidentiality and data protection).

As regards the nature of investigations considered, emphasis was placed on internal investigations. External and / or criminal investigations were not considered as part of this case study research. For OLAF, internal investigations constitute administrative investigations within EU institutions, bodies, offices and agencies (IBOAs). For comparator organisations, on the other hand, these relate to administrative investigations undertaken in relation to allegations made against members of the organisations’ governing bodies, shareholders, directors, staff and / or beneficiaries / clients.

A7.2 Findings

This section provides a comparative assessment between OLAF and comparator organisations as regards their respective roles and responsibilities, their investigative budgets, their investigative processes and resulting outcomes / achievements.438

A7.2.1 Roles and responsibilities

A7.2.1.1 Profile of OLAF and comparator organisations

A comparative assessment of institutional characteristics between OLAF and the comparator group shows that, similar to OLAF, designated anti-corruption units within comparator organisations undertake their investigative duties on an independent basis, though they are generally held accountable to a higher authority within the organisation (e.g. the secretariat, the chair, etc.)439. In general, the legal basis for comparator organisations’ anti-fraud policies and / or authority to undertake investigations is on par with OLAF’s, specifically in terms of the objectives they seek to achieve, notably to minimise / combat the risk of fraud, corruption, collusion and

438 Where quantitative data and other evidence are compared, figures are provided for the period 2008-2016, as much as possible.
439 Consultation with comparator organisations – AU, CoE, EIB, EBRD and WB
coercion. In addition to investigating matters of alleged corruption / fraud, comparator organisations undertake preventive work which generally consists of devising and implementing proactive measures against corruption and fraud.

A7.2.2 Resource management

A7.2.2.1 Human resources

Human resources relates to the number of employees or the number of posts filled in any given year within OLAF and each of the comparator organisations. The research focused primarily on the number of investigators working on alleged corruption / fraud cases over the period assessed.

OLAF’s total personnel count stood at 422 personnel in 2015, a near 10 per cent decrease from the total staff count recorded in 2009. However, in spite of the downward trend, the share of investigative staff was 40 per cent in 2015, the highest recorded since 2009 when investigative staff constituted 34 per cent of total staff.

As regards comparator organisations:

- Staff FTE count at the EIB rose by nearly 55 per cent between 2009 and 2015. About 1,000 new employees were recruited over the period. The share of investigative staff remained stable, attaining a yearly average of 0.4 per cent. In absolute terms, though, an additional seven new recruits were taken on board for investigative work.

- Sixteen new recruits arrived at the WB over the period 2009-2012 to work on the Group’s anti-corruption / anti-fraud activities. Over the course of 2013, eight departures were observed, reducing the total staff count to 86 personnel. Beyond 2013, the total staff count remained unchanged at an estimated 87 personnel. The share of investigative staff increased by 20 percentage points between 2009 and 2015. In absolute terms, the overall number of investigators / specialists increased from 47 in 2009 to 70 in 2015.

- Over the period 2010-2015, staff FTE count at the COE remained fairly stable, except between 2013 and 2014 when almost 150 departures were reported over the course of the year. A similar picture is observed for the number and share of investigative personnel. The yearly average FTE count for staff involved in anti-corruption / anti-fraud investigations was about 0.4

A7.2.2.2 Budgets

There has been little change to OLAF’s overall administrative budget and associated allocations to investigative work over recent years. Between 2011 and 2016, OLAF’s average yearly administrative budget was in the order of EUR 58 million (to the nearest whole number). Investigations and / or anti-fraud initiatives were allocated, on average, about 2 per cent of the overall administrative budget (worth about €1.2 million in value terms). On the other hand, OLAF’s overall investigation budget increased by close to 60 per cent between 2011 and 2016, with budget levels reaching a record high of €3 million in 2014. This appears commensurate with changes in

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440 Official websites / anti-fraud policies / investigation procedure – comparator organisations
441 This result should be read with caution as, for the WB, the share of investigative staff is calculated on the basis of total personnel involved in anti-corruption / fraud-related activities as opposed to the Group’s total personnel count
442 This is taken to include operating costs and capital expenditure associated with anti-corruption / anti-fraud activities
OLAF’s investigative activity, whereby a sustained and significant upward trend in the number of cases selected and opened can be observed over the same period (this is further discussed in section 1.4).

Among comparator organisations, an upward trend was generally observed in administrative budget levels allocated to anti-corruption / anti-fraud-related activities. This was specifically the case for the CoE and the EIB, for which significant increases in budget levels were reported in certain years, notably: 2015-16 and 2009-10 for the CoE and 2012-13 for the EIB. The overall picture was nonetheless mixed for the EIB with significant reductions observed in 2011-12 and 2013-14. In these years, the EIB’s investigation budget also fell but only to a limited extent when compared to changes in the administrative budget. The allocated investigation budget was at its highest in 2016, at €3 million. As for the WB, although relatively stable at a yearly average of US$20 million, the budget allocated to the Integrity Vice Presidency (INT) for its anti-corruption work decreased by almost 10 per cent over the 2012-15 period. In its 2015 annual report, the INT attributes the reduction to corporate reforms and “a tighter budget environment”.

A7.2.3 Opening, conduct and follow-up to investigations

A7.2.3.1 The investigative process

The lifecycle of investigations

OLAF receives information about possible fraud and irregularities from a wide range of sources. This incoming information is assessed centrally by the Selection and Review Unit in order to determine whether it meets OLAF’s criteria for opening an investigation, i.e.

(1) remit (assessing whether a particular matter falls within OLAF’s legal competence);

(2) degree of suspicion (assessing whether there is sufficient suspicion of fraud or irregularities to open an investigation); and

(3) relevance (if sufficient suspicion is established, the Unit will assess whether it is appropriate to open an investigation on the basis of other interrelated criteria, notably: proportionality, efficient use of investigative resources; and (3) subsidiarity / added value).

If, as and when assessed, a particular matter meets all of the aforementioned criteria, the Selection and Review Unit submits an Opinion to the Director-General. The Director-General takes the ultimate decision of whether to: (1) open an internal investigation; (2) open an external investigation; (3) open a coordination case; or (4) dismiss the case. When a decision is taken to open a case, the relevant investigative unit within either Directorate A or Directorate B of OLAF will undertake a preliminary examination of the information collected or obtained during the selection process to establish what investigative or coordination activities are required. The next course of action depends on the extent of substantiated evidence of fraud / corruption gathered at the preliminary stage:

444 Sources: (1) consultation with OLAF’s investigative staff; (2) OLAF. 2017. What we do. Available at: https://ec.europa.eu/anti-fraud/about-us/mission_en
445 OLAF’s official website
• If the evidence available does not indicate the existence of a fraud, corruption or other illegal activity affecting the financial or other interests of the EU, no further investigation action is undertaken. A Final Report is submitted to the Director-General who confirms and approves closure.

• On the other hand, if there is sufficient evidence of fraud / corruption, investigative activities commence. Additional evidence is gathered through various activities (e.g. witness statements, fact-finding missions, inspections, on-the-spot checks, digital forensic examinations, etc.) to determine whether there is cause for concern and remedial action needs to be taken. Upon completion of investigative work, a Final Report is prepared, consisting of all of the activities that have been completed, all of the findings gathered, and conclusions established over the course of the investigation or coordination case.

There are some commonalities between OLAF’s investigative process and that of (most) comparator organisations, notably\textsuperscript{446}: (1) separate designated units for selection / opening and conducting of investigations; (2) higher authority approval for opening, conducting and concluding investigations; (3) initial assessment of incoming information prior to opening an investigation, including preliminary evidence-gathering and correspondence with the source of information; (4) in-depth assessment of allegations pertaining to fraud / corruption / other illegal activity through the gathering of additional information via multiple channels (e.g. interviews, available documentation and/or intelligence, etc.); and (5) reporting, dissemination of investigative findings internally and to the suspected individual or entity and final internal consultation on remedial actions / sanctions.

Table 27 below compares the key features of the investigative processes followed by each comparator organisation.

Table 27. Investigative processes (internal investigations) – comparator organisations

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Opening an investigation</th>
<th>Conducting an investigation</th>
<th>Concluding an investigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU</td>
<td>All incoming information is assessed by an Inter-Committee. Note: no specific selection criteria have been established by the Unit.</td>
<td>If an investigation is required, the Inter-Committee makes a recommendation for an in-depth investigation to the Internal Audit Unit with a pre-established work plan. Evidence is gathered by the Internal Audit Unit. Conclusions of the investigation are summarised in an Investigation Report which is submitted to the Chairperson</td>
<td>Working with the HR Director and the Disciplinary Committee, the Chairperson will decide on an appropriate sanction.</td>
</tr>
</tbody>
</table>

\textsuperscript{446} Consultation with OLAF and comparator organisations
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Opening an investigation</th>
<th>Conducting an investigation</th>
<th>Concluding an investigation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>COE</strong></td>
<td>Incoming information stems from a range of sources, notably: (1) CoE staff; (2) whistle-blowers from within and or outside the CoE; (3) intelligence sent via email or an online form. There are no set criteria for opening a case, although emphasis is placed on the extent of available credible evidence that a fraud may or may not have been committed; and professional judgement.</td>
<td>The specifics of conducting an investigation at the CoE are not known.</td>
<td>The specifics of concluding an investigation at the CoE are not known.</td>
</tr>
<tr>
<td><strong>EIB</strong></td>
<td>All incoming information is stored in the Inspectorate General (IG/IN)’s case management system. There are no set selection criteria for the purpose of opening an investigation, although the extent of reputational risk is a key factor (i.e. the seriousness of the allegation, irrespective of the source). The Head of Division decides on whether a selection case is to be opened.</td>
<td>Various types of information will be gathered and examined over the course of an investigation (e.g. documents of any type; electronic data; video, audio and photographic data; results of inspections and tests; the investigator’s observations; information provided by witnesses)</td>
<td>Investigative findings are drafted and reported. Where the Head of IG/IN determines that an allegation has been substantiated and requires follow-up action, the findings are documented and referred to the relevant authorities within the EIB for further action. Where an allegation has not been substantiated, the findings are documented in the case management system and the case is closed.</td>
</tr>
</tbody>
</table>
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

#### Organisation | Opening an investigation | Conducting an investigation | Concluding an investigation
---|---|---|---
EBRD | A pre-assessment of incoming information is undertaken. The EBRD evaluates the seriousness of a particular matter reported and gathers first evidence to determine the reliability of the information received and the likelihood of the allegation having occurred. | A pre-inquiry kicks off with investigators gathering sufficient information and evidence to determine whether the allegation is “provable”. If the pre-inquiry reveals cause for concern, additional evidence is gathered, mostly through interviews with witnesses to further substantiate the claims. | In the event of substantiated investigative findings, the suspected individual / entity is informed. They have the possibility to respond to the facts, on the basis of which the EBRD will make a final decision on any remedial action necessary or the sanction(s) to be imposed. |
WB | The Intake Unit gathers incoming information and undertakes a preliminary assessment of whether any allegation is warranted. Selection is based on the following criteria: (1) the amount of money at risk, (2) the credibility of the information received; (3) financial risks for the bank; (4) the significance of the project to which the allegation relates; and (5) the likelihood of success if a case was to be investigated. | Upon receipt of the findings of the pre-assessment, a management team decides whether to open an investigation. This team consists of a Manager of Operations and two Deputy Managers. If the decision is to open a case, the case is assigned to the Investigation Unit. | At the end of an investigation, a report is prepared and submitted to the President of the World Bank which contains a summary of investigative findings and whether: 1. an internal process for sanctions has been launched or 2. a referral has been issued. A referral is a letter sent by WB to the relevant state or ministry, informing them of the findings and inviting them to engage. |

Sources: consultation with comparator organisations; EIB Investigation Procedures

### A7.2.3.2 Investigative powers and tools

Interviews and access to documentation and other intelligence feature among the core powers / tools shared by OLAF and comparator organisations.\(^{447}\)

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\(^{447}\) Please note that some uncertainty still exists as regards OLAF’s powers in relation to access to some forms of data or evidence (e.g. electronic data)
Table 28 outlines core investigative powers and tools that can be exercised by OLAF and comparator organisations as part of internal investigations. This is followed by a discussion of commonalities and differences across OLAF and the comparator organisations.

**Table 28. Overview of investigative powers and tools conferred to OLAF and comparator organisations**

<table>
<thead>
<tr>
<th>Entity</th>
<th>Interview</th>
<th>Inspection</th>
<th>On-the-spot check</th>
<th>Consultation with external parties</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>OLAF</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>OLAF can also conduct investigative missions (third-countries); and digital forensic operations with inspections / on-the-spot checks; can demand immediate and unannounced access to documents, accounts and other information held by EU bodies in whatever format; and can question suspects and witnesses</td>
</tr>
<tr>
<td>AU</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>Specific tools</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Limited information exchange, except with OLAF with whom an ACA has been agreed</td>
</tr>
<tr>
<td>COE</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>Access to electronic data (e.g. emails)</td>
</tr>
</tbody>
</table>
### Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Entity</th>
<th>Interview</th>
<th>Inspection</th>
<th>On-the-spot check</th>
<th>Consultation with external parties</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>EIB</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td>Review of documentation kept by relevant implicated parties such as borrowers, promoters, contractors, subcontractors, consultants, suppliers and third parties. Specific tools: Whistle-blower’s identity, where applicable, is confidential throughout the investigation and details are securely stored (e.g. in a safe); secure and access-restricted online archiving; upcoming: encryption of emails.</td>
</tr>
<tr>
<td>EBRD</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td>Specific tools: Use of encrypted email for communications / correspondence.</td>
</tr>
<tr>
<td>WB</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>Specific tools: Referrals / investigative reports sent to concerned Member States or enforcement agencies. Limits to information-sharing / application of special privileges and protection. Secure database with OLAF, as a result of the ACA. Database is used to identify issues of common interests and for exchange of information.</td>
</tr>
</tbody>
</table>
Investigative powers conferred

The evidence gathered indicates that investigation units within OLAF and each comparator organisation are able to interview a person concerned or a witness at any time during an investigation. Within OLAF, members of the Directorate A and Directorate B investigation units also have, in the course of an investigation, the authority to take statements or conduct interviews with persons (in relevant institutions, bodies, offices and agencies of the Union, the competent authorities of the Member States, the competent authorities in third countries, and international organisations) holding relevant information pertinent to the case, in the course of an investigative mission in a third country. Suspects and witnesses have a duty to cooperate as part of internal investigations. They are however entitled to exercising their right to silence or assert their privilege against self-incrimination should they wish to do so. These rights are conferred by OLAF (as well as comparator organisations) as part of investigations. A more in-depth discussion of procedural rights is provided in the next section.

Access to and review of documentation is also a privilege accorded to OLAF and some comparator organisations, notably: the CoE and the EIB. Investigative units are able to request access to offline or online data (which is in possession of concerned parties or witnesses) that may be pertinent to an investigation. For instance, the EIB has the power to request and review documentation kept by relevant implicated parties such as borrowers, promoters, contractors, subcontractors, consultants, suppliers and third parties, as applicable.

OLAF, the EIB and the EBRD can also exercise their power to undertake inspections of premises during an investigation. This power entitles them to access any information held by concerned staff, including, copies of electronic data, copies of private documents, where these may be relevant to the investigation. In addition to inspections, OLAF has the power to undertake on-the-spot checks to access any evidence that may be necessary for the investigation. Furthermore, digital forensic operations may be carried out by OLAF within the framework of inspections or on-the-spot checks. These generally involve examination of digital media concerned and access to content that is relevant to the investigation.

Investigative tools

With the exception of the WB, comparator organisations have indicated that secure data handling measures constitute important investigative tools. They help ensure that confidentiality is preserved and that information leaks are minimised, thereby instilling trust in the investigative process and encouraging cooperation, especially on the part of witnesses (e.g. “whistle-blowers”). Many comparator organisations have implemented these measures as a result of the ACA agreed with OLAF which focuses on secure information exchange. Measures implemented by comparator organisations include, inter alia, data encryption, access-restricted servers or data archiving and confidential data safe-keeping (e.g. storage in company safe).

A7.2.3.3 Recommendations and follow-up actions

An OLAF investigation unit will close an investigation by decision of the Director-General. On the basis of the investigative findings, the Director-General will make recommendations for action to be taken by EU institutions, bodies, offices or agencies, Member States, third countries and/or international organisations. Recommendations can be of a judicial, disciplinary, administrative and/or financial nature. Their implementation is monitored by investigators who ensure that recommendations are abided by implemented within the timeframe set by the Director-General.

Among comparator organisations, administrative / disciplinary and financial recommendations are most commonly issued. The EIB also operates an “exclusion
procedure,” whereby further instalments of a loan may be blocked or funding may have to be paid back. Exclusions can last for up to three years, depending on the seriousness of the matter investigated. Exclusions often result from information shared by the European Commission, its executive agencies, other institutions, bodies or European offices on unreliable economic operators. This information is shared via the Early Detection and Exclusion System (EDES) database which comprises information pertaining to early detection, exclusion, and/or financial penalty imposed on certain economic operators. The grounds for exclusion concern: bankruptcy and insolvency situations; non-payment of taxes or social security contributions; grave professional misconduct; fraud, corruption, participation in a criminal organisation; serious breach of contract; and irregularity.

On the other hand, administrative / disciplinary measures are more common when seeking to rectify staff misconduct. At the CoE and EBRD, for instance, such measures include: (1) termination or non-renewal of contract; (2) demotion or removal of financial and/or other important responsibilities; or (3) suspension.

Some comparator organisations also offer some flexibility as to how recommendations are to be implemented by the recipient(s). For instance, the EIB may waive financial sanctions which will be conditional on the concerned entity investing the money internally into the implementation of anti-fraud measures or initiatives. Similarly, the EBRD may relax sanctions against the concerned person/entity and issue a Settlement Agreement instead. Settlements are intended to be an efficient way to resolve investigations without resorting to the full enforcement proceedings. The criteria that the EBRD will consider when determining whether to settle a particular case includes: (1) whether the concerned party has admitted culpability; (2) whether settlement will result in resource savings to the EBRD; (3) whether the concerned party has agreed to cooperate or is cooperating with the EBRD’s investigation; and (4) whether the concerned party has taken corrective measures or has shown that it will no longer be a significant reputational or integrity risk to the EBRD.

A7.2.4 Procedural guarantees

A7.2.4.1 Procedural rights

Procedural guarantees are in place in all comparator organisations. There is greater uniformity in procedural rights across international institutions and some development banks, namely the AU, EIB, EBRD and WB. As such, people/entities under investigation are entitled to “due process.” This encompasses their rights: (1) to be notified about an allegation against them; (2) to present any additional evidence at an interview and to have the evidence included in the investigation and taken into consideration when the facts are established; (3) to be informed of the outcome of the investigation; (4) to be provided with a copy of the investigative findings report; (5) to comment on/refute the investigative findings; and (6) to appeal.

The CoE’s procedural guarantees are similar to those established by the other comparator organisations but more in line with OLAF’s. As such, suspected persons/entities are also granted with: (1) the right to silence; (2) the right to keeping the case confidential; (3) the right to having their personal information protected and stored securely; and (4) the right to being assisted/accompanied by a colleague during interviews.

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448 EBRD. Date unknown. BRD’s Settlements: How Settlement Agreements Fit within EBRD’s Enforcement Regime. Available at: file:///C:/Users/30205/Downloads/settlement.pdf
As regards OLAF’s procedural guarantees, these also extend to the provision of: (1) the right to a minimum period of notice before interviews; (2) the right of suspects to comment on past statements made by them as witnesses if such statements could be used in a current investigation against them; (3) the right of persons under investigation to obtain access to records of their interviews so that they can approve the record or add observations; (4) the right of persons under investigation to receive a copy of the records of their interviews; and (5) the right to use any of the official languages of the institutions of the Union.

A7.2.4.2 Safeguards – data protection and confidentiality

OLAF, as well as comparator organisations operating within EU jurisdictions (i.e. the CoE, EIB, EBRD) are subject to Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data and are, thus, under the supervisory powers of the European Data Protection Supervisor (EDPS). Certain procedural rights have been established under the data protection regulation and are to be complied with by OLAF and the relevant comparator organisations. These include the rights of information about personal data being processed and of access to such data. If people believe that the processing of their data is illegal, they are also entitled to object and exert their rights of rectification, blocking, and erasure of their data. Investigators comply with various data protection requirements put in place by their respective organisation. These are outlined in Table 29 below.

While the AU and the WB also strive to preserve data protection and confidentiality, they are not legally bound to do so. The AU has set out specific provisions relating to data confidentiality in their Standard Operating Procedures. Investigators are required to protect suspects’ identity and any personal information gathered on them.

Table 29. Data protection-related actions at OLAF, CoE, EIB

<table>
<thead>
<tr>
<th>OLAF</th>
<th>CoE</th>
<th>EIB</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Specific instructions:</strong> these specify, in practical terms, what investigators must do to satisfy data protection requirements in all aspects of his/her work</td>
<td>Training is consistently provided to staff on confidentiality obligations, especially staff who might have become aware of private information</td>
<td>All provisions contained in Regulation (EC) 45/2001 are contained in the EIB’s Staff Code of Conduct and Investigation Procedures</td>
</tr>
<tr>
<td><strong>Workform templates:</strong> OLAF has incorporated the concept of “privacy by design” in these workforms by including in the template any necessary data protection paragraphs</td>
<td>ACA with OLAF</td>
<td>ACA with OLAF</td>
</tr>
<tr>
<td><strong>Secure case management system:</strong> a Data Protection Module (DPM) has been created and is used to store information about compliance with all data protection requirements for each relevant data subject in each OLAF case</td>
<td></td>
<td>Storage: all documentation and information for cases are kept in a secure and confidential manner by IG/IN and is retained for at least five years and up to ten years maximum from the date of closure of the case</td>
</tr>
<tr>
<td><strong>Administrative Cooperation Agreements (ACAs):</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
OLAF has developed a framework for “repeated, mass or structural” transfers, which could be included in memoranda of understanding with its partners. ACAs act as safeguards as regards data transfer.

Please note that no detailed information was available for the EBRD.


A7.2.4.3 Internal complaints mechanisms

All complaints in connection with OLAF’s investigations are addressed to the Director-General. OLAF’s procedure for dealing with such complaints depends on the nature of the complaint449 (as shown in Figure 27 below).

Figure 27. Complaints-handling by OLAF

<table>
<thead>
<tr>
<th>Nature of complaint</th>
<th>Complaint(s)</th>
<th>Complaint-handling</th>
<th>Final decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concerned parties to an investigation</td>
<td>Official and other EU staff</td>
<td>Complainants handled by OLAF’s Legal Advice Unit (LEA): the LEA reports its findings to the Director-General (DG);</td>
<td>Within two months of the registration date of the complaint</td>
</tr>
<tr>
<td>Article 90a of the Staff Regulations</td>
<td>Data subjects</td>
<td>Complainants handled by OLAF’s Legal Advice Unit (LEA): the LEA reports its findings to DG</td>
<td>Within four months of the registration date of the complaint</td>
</tr>
<tr>
<td>... procedural guarantees in the context of investigations</td>
<td></td>
<td>Objections on the processing of personal data reviewed by the LEA, after consulting the Advisor to the responsible investigative Director and the Data Protection Officer (DPO); final decision is taken by the DG</td>
<td>Within two months of the registration date of the objection</td>
</tr>
<tr>
<td>... data protection</td>
<td>... public access to documents or files under Regulation 1049/2001</td>
<td>Requests handled by the LEA, after consulting the Advisor to the responsible investigative Director; final decision is taken by the Responsible Director (or the Head of the Investigation Selection and Review Unit)</td>
<td>Within 15 working days of the registration date of the request</td>
</tr>
</tbody>
</table>

Source: OLAF (2016)

With the exception of the AU, comparator organisations do not have formal complaint procedures in place. Staff misconduct, malpractices or other violations can nonetheless be reported to the relevant personnel – e.g. Secretary-General (CoE), Management Committee (EIB), Ethics Office (WB). The AU, on the other hand, offers people / entities the possibility to issue a formal complaint at any stage of the investigative process. The complaint is directed to the Chairperson who reviews the request and takes a final decision. If the complainant is not happy with the outcome, they have the possibility to take the matter before the Administrative Tribunal.

A7.2.4.4 External controls

Complainants are able to address their complaints concerning actions taken by OLAF to various institutions or bodies external to OLAF450, notably:


450
• the European Ombudsman for investigating complaints concerning maladministration in the institutions and bodies of the European Union;
• the European Data Protection Supervisor (EDPS) for investigating complaints relating to infringements of data protections;
• the Court of Justice of the European Union; and
• national courts that may be addressed in the context of judicial proceedings initiated following OLAF investigations.

Comparator organisations did not provide any evidence of external controls / mechanisms which people / entities can resort to in order to make a complaint about staff conduct or other aspects of their work.

A7.2.5 Investigative outcomes

A7.2.5.1 Data / evidence on outcomes – OLAF

The total number of cases under investigation grew by 32 per cent between 2008 and 2016. This is likely to have been the result of a growing backlog of (unsolved) cases over the years and a higher number of allegations issued to OLAF. As such, the number of ongoing / unsolved cases and the amount of incoming information rose by close to 25 per cent and 35 per cent respectively over the assessed period. The number of new investigations launched, on the other hand, grew at a rate commensurate with the level of incoming information and ongoing cases under investigation. The number of new opened cases grew by more than 50 per cent between 2008 and 2015. On average, the share of new opened cases grew by about 16 per cent year-on-year.

In spite of the high levels of investigative activity, the number of closed cases grew rapidly and consistently. As such, an additional 158 investigations were closed in 2015 when compared to 2008 (+108 per cent). Additionally, the average duration of the selection phase was significantly lower in 2015 than in 2008, falling by nearly 65 per cent.

Table 30. Selected performance data, 2008-15 – OLAF

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</thead>
<tbody>
<tr>
<td>New incoming information</td>
<td>1,028</td>
<td>959</td>
<td>979</td>
<td>1,046</td>
<td>1,264</td>
<td>1,294</td>
<td>1,417</td>
<td>1,372</td>
</tr>
<tr>
<td>Cases dismissed</td>
<td>617</td>
<td>755</td>
<td>622</td>
<td>728</td>
<td>1,054</td>
<td>961</td>
<td>1067</td>
<td>1200</td>
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<tr>
<td>New cases opened</td>
<td>144</td>
<td>148</td>
<td>150</td>
<td>144</td>
<td>431</td>
<td>253</td>
<td>234</td>
<td>219</td>
</tr>
<tr>
<td>Ongoing cases</td>
<td>322</td>
<td>342</td>
<td>359</td>
<td>352</td>
<td>515</td>
<td>484</td>
<td>474</td>
<td>398</td>
</tr>
<tr>
<td>Cases under investigation</td>
<td>466</td>
<td>490</td>
<td>509</td>
<td>496</td>
<td>946</td>
<td>737</td>
<td>708</td>
<td>617</td>
</tr>
<tr>
<td>Closed investigations, without recommendation</td>
<td>51</td>
<td>59</td>
<td>61</td>
<td>68</td>
<td>182</td>
<td>145</td>
<td>103</td>
<td>139</td>
</tr>
<tr>
<td>Closed investigations with</td>
<td>95</td>
<td>81</td>
<td>75</td>
<td>86</td>
<td>84</td>
<td>148</td>
<td>147</td>
<td>165</td>
</tr>
</tbody>
</table>

OLAF’s official website
--- | --- | --- | --- | --- | --- | --- | --- | ---
Closed investigations | 146 | 140 | 136 | 154 | 266 | 293 | 250 | 304
Average duration (in months) of selection phase | 4.8 | 5.4 | 6.3 | 6.8 | 1.4 | 1.8 | 2.0 | 1.7
Average duration (in months) of closed investigations | 27.4 | 31.4 | 28.5 | 33.1 | 30 | 28.2 | 26.9 | 27.9

Sources: OLAF; OLAF’s Annual Reports

A7.2.5.2 Data / evidence on outcomes – comparator organisations

The evidence gathered in relation to comparator organisations was sparse. Data pertaining to investigative outcomes was available, to a limited extent, for the EIB, the EBRD and the WB.

In terms of the number of allegations issued, data provided by the EIB indicates a three-fold increase in the number of incoming information. Similarly, the number of ongoing investigations grew substantially, reaching a record high of 123 investigations in 2015 (355 per cent higher than in 2008). In spite of the growing backlog of investigations, the share of closed cases was about 20 percentage points higher in 2015 than in 2008. Of the 65 cases under investigation in 2008, 18 cases were closed in the same year (approximately 30 per cent), while 115 out of 237 cases (approximately 50 per cent) were closed in 2015. No data was available on the duration of these investigations and its evolution over time.

The WB offered an overview of its investigative outcomes over the period 2008-15. They indicated that the level of investigative activity has remained relatively stable over time. As such, the number of cases investigated ranged between 65 and 75 per year over the period 2008-15. It was further reported that the average duration of the selection and investigation phases last up to three and 15 months.

Finally, the EBRD indicated that the number of cases opened on an annual basis can be in the order of 80 cases, of which 44 per cent are likely to relate to staff misconduct and the remaining 56 per cent to beneficiaries / clients. The EBRD has established timeframes for completing investigations – a maximum of six months for staff-related investigations and 12 months for investigations pertaining to a beneficiary / client. Any prolongation needs to be justified and is thus avoided.

A7.2.6 Best practices

Comparator organisations were asked about any best-practice procedures followed as part of their investigative activities which could potentially be replicated by OLAF and / or other similar organisations.

Most comparator organisations reported having implemented secure (offline and online) data storage and transfer measures as part of their investigations. This is to facilitate and / or guarantee safe information exchange, especially when dealing with...
confidential data. Additionally, for the CoE, specialised training for the fraud division and other staff members is key. As of 2016, 300 employees had participated in fraud awareness activities and / or received relevant training. The CoE has also made significant investments in improving internal control / procurement practices so as to ensure that they are in line with good practice and do not give rise to unnecessary mistakes, anomalies, and fraud activities.

Finally, the EBRD felt that a well-defined and robust triage system – i.e. one that would allow the swift and effective selection of cases most likely to be substantiated during the course of an investigation – should be in place to help investigative units in identifying the most serious cases, while screening out cases that are unfounded and impose significant resourcing burdens. The EBRD also called for a more proportionate sanctioning approach. For instance, where immediate remedial action has been taken by the suspected entity (e.g. suspension of staff, reform of internal anti-fraud measures and policies, etc.), the EBRD felt that an investigation could be ceased or concluded to avoid additional resources being spent on a less serious matter but channelled towards more substantiated claims.

A7.3 Conclusions and recommendations

This case study research revealed high consistency in OLAF’s and comparator organisations’ anti-fraud policy mandates and investigation procedures, but also uncovered the nuanced ways in which they operate owing to differences in conferred investigative powers / tools and procedural guarantees in place.

Minimal differences were found with respect to the organisations’ investigation procedures which generally comprise a three-tiered approach: (1) preliminary review of incoming information; (2) in-depth assessment of substantiated allegations; and (3) final reporting and dissemination of investigative findings. Unlike OLAF, however, comparator organisations do not have a pre-defined set of criteria for selecting cases in the preliminary review stage of the investigative process.

With regard to investigative powers and tools, the evidence suggests that interviews and inspections constitute key investigative activities that comparator organisations are able to undertake as part of internal investigations. OLAF is entitled to do the same but enjoys additional privileges, such as: the ability to conduct on-the-spot checks, sometimes coupled with digital forensic operations, to take samples for scientific examination and to conduct investigative missions in third countries. Another notable difference uncovered between OLAF and comparator organisations was the lack of formal complaints mechanisms in place, although staff misconduct, malpractices or other violations can be reported to relevant personnel – e.g. Secretary-General (CoE), Management Committee (EIB), Ethics Office (WB). Similar findings were observed as regards external controls. Such mechanisms were not reported by comparator organisations which may suggest that none is in place.

As regards outcomes, investigations undertaken by comparator organisations were found to be shorter in duration. While the duration of the selection phase within OLAF is more in line with that observed among comparator organisations, the investigation phase lasts for more than two years as opposed to an average of one year across comparator organisations (e.g. EBRD, WB). This difference can possibly be attributed to the extent of evidence-gathering and / or breadth of investigative activities that can be undertaken by OLAF as opposed to comparator organisations. In that regard, comparator organisations have suggested that OLAF provide additional consideration to planning investigative activities so as to avoid unnecessary delays in concluding internal investigations. Delays also arise when recommendations are not taken on board by the recipient. This involves additional time spent on monitoring and engaging with recipients until corrective actions are confirmed. In those instances, some comparator organisations have indicated that remedial recommendations may be relaxed if the recipient takes immediate corrective actions (e.g. suspension). This generally helps to expedite the investigative process. Comparator organisations have
suggested that OLAF follow suit in order to reduce the duration of internal investigations and channel the time saved to other pressing matters.
Annex 8  Case study: follow-up to financial recommendations in external investigations

A8.1 Introduction

A8.1.1 Background

Upon completion of an external investigation, if OLAF makes financial recommendations, it issues its final report together with the financial recommendations to the relevant spending DG under the authority of the OLAF Director-General.

Financial recommendations in external investigations are as a rule addressed to competent authorities of the Member States concerned in revenue cases, and to IBOAs providing or managing the EU funds. If, however, in a closure of a case on expenditure with financial recommendations, Member States’ authorities need to be informed, they are sent copies of the financial recommendations for information only.

The aim of financial recommendations is to seek the recovery of the defrauded EU funds or to prevent additional amounts from being disbursed from the national authorities. The national authorities are then responsible for recovering the recommended amount from the beneficiaries. There is a standard recovery procedure: after the IBOA has received the recommendations from OLAF, they send a pre-information letter to the national party with the elements for recovery, so that they can provide arguments; once arguments are received (or if no answer has been received), the authorising officer decides on whether to continue with the full recovery, a partial one, or whether the recovery is not justified in view of legal, contractual, contextual factors.

The implementation of financial recommendations follows the stages set out below (Figure 30).
Figure 28. Financial monitoring process

The steps illustrated above are summarised as follows:

- **Reporting period:** Where a recommendation has been issued, the case will be entered into the ‘reporting period’ stage. This stage will reflect the 12 months indicated in the recommendation within which the competent authorities are requested to provide OLAF with information on the actions or decisions taken following the recommendation.
- **No information:** at the end of the reporting period, where OLAF has not received information from the competent authorities on actions or decisions taken, the case will be entered into the ‘no information’ stage.
- **On-going:** Where OLAF has received information from the competent authorities that the matter is under consideration but that a decision whether to initiate recovery proceedings has not yet been taken, the case will be entered into the ‘on-going’ stage.
- **Recovery proceedings:** where OLAF has received information that the competent authorities have initiated recovery proceedings, the case will be entered into the ‘recovery proceeding’ stage.
- **No recovery proceedings:** where OLAF has received information that competent authorities have decided not to initiate recovery proceedings, the case will be entered into the ‘no recovery proceeding’ stage.

**A8.1.2 Purpose**

This case study aims to identify best practices and shortcomings in the different stages of the implementation of OLAF's financial recommendations following an external investigation. The respective factors improving (or hindering) the

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452 OLAF’s Guidelines on financial monitoring, p. 4.
effectiveness and efficiency of the different stages in the follow-up process are analysed.

For this purpose, the following elements are assessed:

- clarity of financial recommendations;
- roles and responsibilities of spending DGs and national partner institutions in the implementation of financial recommendations;
- effectiveness of follow-up during the ‘reporting period’,
- effectiveness of follow-up during the ‘no information stage’ and the ‘ongoing stage’;
- and
- effectiveness of follow-up during the ‘recovery proceedings stage’ and the ‘no recovery proceedings stage’.

A8.1.3 Scope

This case study analyses practices of follow-up of selected spending DGs receiving financial recommendations following external investigations in the fields of structural funds, new financial instruments and external aid. Practices of selected IBOAs receiving financial recommendations were analysed for this case study. Selection criteria were IBOAs receiving a high number of financial recommendations covering a variety of different thematic fields and types of spending, including structural funds, new financial instruments, external aid and direct expenditure. The following IBOAs receiving financial recommendations were analysed for this case study:

- DG CONNECT;
- DG DEVCO;
- DG EAC;
- DG REGIO;
- EEAS; and
- REA.

This case study covers mainly Article 11 of Regulation 883/2013, which regulates the investigation report and actions to be taken following investigations, including in external investigations (Article 11(1), 11(2), 11(3), 11(6)). However, some elements of Article 3 on external investigations, Article 7 on investigation procedure and Article 12 on the exchange of information between OLAF and the competent authorities in the Member States have also been explored. Within these articles, only those provisions relating to the follow-up to financial recommendations in the context of an external investigation were assessed.

A8.1.4 Methodology

This case study is based on both desk research and consultation with stakeholders.

With regard to desk research, the case study team explored available documentation and data gathered during the inception and interim phase of the evaluation. In particular, the following sources were taken into account:

- OLAF, Guidelines on Financial Monitoring, 12 May 2014;,
- Instructions on drafting Financial Recommendations and related sections of the Final Report of October 2016 (OLAF internal document);
- Guidelines on Investigation Procedures for OLAF Staff, 1 October 2013 (GIPs); and
- Statistical data on recommendations issued between 2008 and 2016 provided by OLAF.

In addition, interviews with representatives of the above mentioned selected IBOAs (as part of the broader stakeholder consultation but also particularly conducted for this case study) fed into this case study.

A8.2 Findings
This section presents the main findings of the case study.

A8.2.1 Roles and responsibilities

Interviews with stakeholders showed that there is clarity regarding the roles and responsibilities for follow-up within the spending DGs - the authorising officer is responsible for follow-up - as well as the cooperation with national partners. Within the Commission’s services consulted for this case study, internal procedures and mechanisms for follow-up were said to be clear, effective and efficient (outlining roles and responsibilities of different units in relation to follow-up and reporting to OLAF). However, sometimes in combined cases it is not always clear which DG has to act, but this is not an issue specific to OLAF cases.

With regard to cooperation with OLAF, the stakeholder consultation showed that the Administrative Arrangements on cooperation between OLAF and other Commission services are considered in theory a valuable tool as they outline the exact competences of the two bodies, leaving limited room for confusion. In practice, however, stakeholders stated that these arrangements were not always applied.

### Article 16.4 of the Administrative Arrangements:

16.4. Twice a year, OLAF will transmit to the DG/S a list of ongoing external investigations and coordination cases, indicating the Head of Unit in charge, the opening of which they have been informed of. For fraud prevention purposes the DG/S may request OLAF to provide relevant information on on-going external investigations and coordination cases.

The spending DG on the other hand has to (and does) inform OLAF once a year about their follow-up to recommendations.

A problem specific to DG EAC is that they work together with decentralised agencies (under indirect management) at a national level which means work is spread across a large number of units in OLAF so they do not always have a single point of contact within OLAF who coordinates communication and information exchange.

A8.2.2 Clarity of financial recommendations

All stakeholders consulted agreed on the fact that the formulation of financial recommendations is crucial for an effective follow-up process. However, amongst the recipients of OLAF’s financial recommendations following external investigations consulted for this case study all suggested that there is room for improvement in terms of their clarity. Interviewees argued that this that was to some extent due to the way the investigations are conducted as well as the way final reports and recommendations are drafted.

A8.2.1.1 The investigation phase

All stakeholders consulted for this case study agreed that closer cooperation with spending DGs during the investigation phase was key for drafting relevant recommendations that can be implemented in practice. Such involvement would allow for early verification of the accuracy of the findings and the information on which OLAF’s final report is based. Most spending DGs consulted for this evaluation claimed that they were generally not consulted by OLAF at any stage of the investigation, with the exception of some very delicate cases, where they have been afforded an opportunity to express their views prior to the provision of the recommendations.

Another issue raised by the DGs consulted for this evaluation was the situation where OLAF informs the spending DG during an investigation that there was no ground for further investigation of a case (e.g. because it was not cost-effective to continue), but OLAF still requested to be informed about the follow-up. One interviewee raised that it was not clear to them what to do with such informal follow-up requests.
Best practice example in Court of Auditors investigations

The Court of Auditors systematically involves other EU institutions during their investigations by applying a so-called ‘Fact clearing memo’, which is a template where the recommendations and information about the case is stored in one database ensuring closer cooperation between the auditor and the spending DG.

Besides involving the spending DGs, one interviewee also considered it useful for OLAF to further cooperate with beneficiaries during the investigation phase. This is however only possible to the extent to which the outcome of the investigation is not jeopardised, for example by warning potential suspects of the ongoing investigation. In addition, a clearer distinction between irregularities and fraud was recommended by this interviewee, as not all cases are of a criminal nature. OLAF should involve the beneficiaries even more during external investigations that are not aimed at initiating criminal proceedings.

A8.2.1.2 Final reports and recommendations

Several stakeholders interviewed for this case study considered close involvement of the spending DGs in the formulation of recommendations as very effective in clarifying the basis on which OLAF has reached these recommendations. However, views were mixed among different DGs as to how well such cooperation with OLAF works in practice. Some interviewees praised the good cooperation with OLAF while others said that they were not involved in the formulation of recommendations at all.

According to one interviewee, cooperation was considered very positive. For example, there were cases where OLAF contacted the spending DG before they concluded the report to see what could be done in terms of financial corrections and this was reflected in the final report/recommendations. According to the interviewee, this was a good way of proceeding when formulating financial recoveries. Another interviewee praised the good cooperation with OLAF and considered them responsive to their questions in regular meetings as well as on an informal basis.

Other stakeholders however explained that they had never been given the opportunity to input into the drafting of reports or recommendations, which was considered as hindering the implementation of the recommendations. While consulted stakeholders understood that OLAF’s investigations needed to be independent, they agreed that it would be useful, once investigations are complete, for the spending DG to give information about the context of the case to ensure proportionality between findings and recommendations and whether recovery is legally possible in different national contexts. One interviewee explained that in cases in which they were not involved, it might have appeared as if recommendations had not been implemented, whereas they were not applicable in reality to the specific case.

Close cooperation with spending DGs was also considered important when it comes to the determination of the amounts to be recovered. Some stakeholders suggested that, for recipients of recommendations, it was not always clear how the amounts to be recovered are calculated and sometimes they were considered by these stakeholders to be unrealistic. The supporting documents often do not provide more clarity in this regard (for example, why they prove that fraud also concerns other projects or entities). This leads, in the follow-up phase, to difficulties for the spending DG, which carries the burden of proof, to substantiate facts before the beneficiary from which the funds have to be recovered.

For example, as one interviewee stated, in some cases the funds related to the fraudulent activity are less than the full amount recommended to be recovered. Despite this, OLAF would still recommend full recovery instead of splitting the amount into a fraud-related amount and amounts related to other irregularities.

A common example of fraud is that OLAF finds that an organisation has multiple contracts with different DGs or Agencies and they shift money back and forth between
different contracts, overspending on one contract and underspending on another – so they pad their budget and claim more from the Commission. OLAF only defines the overall amount to be recovered and does not break down which amount should be recovered from which contract, making the coordination required to recover the money complex for the spending DG.

Another interviewee confirmed that often financial recommendations could not be followed-up on in practice. They claimed that OLAF did not consider sufficiently the context of corrective actions, i.e. financial recommendations are not always the most appropriate action. Sometimes other preventative or administrative measures would be more effective. For example, preventing beneficiaries from having new contracts with IBOAs is often easier than having to recover the identified amount.

To address this issue, interviewees of spending DGs considered it useful to have access to the Instructions on drafting Financial Recommendations and related sections of the Final Report. In addition, a fact sheet of the findings that could be sent to the beneficiary could be useful as it is easier for the investigator to draft this rather than for the service which receives it.

Financial Recommendations and related sections of the Final Report aim to ensure a consistent practice throughout the Office and to guide OLAF staff on the determination of relevant amounts and on the content of OLAF financial recommendations and relevant sections of OLAF final reports. One chapter of the instructions specifically focuses on the determination of the "estimated amounts to be recovered". Information is provided to OLAF staff about the specificities of shared management, direct and indirect management, revenues, etc.

While the adoption of such instructions should help to better clarify the basis of financial recommendations, in particular with regard to the amounts to be recovered, it is too early to assess the impact of these instructions.

A8.2.3 Effectiveness of follow-up

Once financial recommendations have been issued, the case enters into the 'reporting period' stage. This stage reflects the twelve months indicated in the recommendation within which the competent authorities are requested to provide OLAF with information on the actions or decisions taken following the recommendation.

Officials at spending DGs consulted for this case study agreed that the time period of twelve months had never been a problem in the follow-up to recommendations. The main problem however is finding the right person/address/legal representative to talk to and that they are have not declared bankruptcy before being identified. This problem would not be solved if there was more time for follow-up.

In another DG, an interviewee stated that once they received recommendations from OLAF, they felt solely responsible for following-up. Again, they were aware of the twelve months period, which was not considered an issue, but they did not know what is expected from them as there is no template, form of other communication to guide them. They felt that there is no structured support in the follow-up of recommendations and that they do not know what happens to the information they give to OLAF.

Stakeholders consulted for this case study had different views about the 'no information stage' (involving cases where no information on actions or decisions taken is provided to OLAF) and cases that enter into the 'ongoing stage' (the stage

453 Instructions published on 7 October 2016 (ARES(2016)5820127)
where OLAF has received information that the matter is under consideration, but no decision has been taken yet).

Interviewees explained that delays can occur, for example, where the beneficiaries are very small and either disappear, or do not have any money or recreate themselves as a different legal entity so that the amount was not recoverable. These cases are given a low-priority but remain open as there is no clear stopping point as to when these cases can be considered lost. Spending DGs have limited resources and often recovery would cost more than the amount to be recovered.

In other cases, the national agency simply pays the recommended amount to the spending DG even though they cannot recover it from the beneficiary (for example because they have disappeared or become bankrupt) as they consider the costs to find the beneficiary higher than the amount to be recovered.

Nevertheless, according to one interviewee, these types of cases should still be followed-up as even if the recovery costs more than the recovered amount, the reputational risk is often higher than the financial risk. It is therefore an important deterrent effect to show that individuals perpetrating fraud will be caught and sanctioned, even if on a purely financial calculation it is not worth the efforts of recovery.

Another interviewee from a spending DG stated that they would not know about these different stages of the implementation procedure, as there were no reminders from OLAF to report on the steps. Since there were no clear instructions as to how to report back and no feedback from OLAF, it was not considered as being urgently expected. Within this spending DG they installed their own system to keep track of the implementation of recommendations and to report back, but they feel the information flow was too one-sided (from the DG to OLAF). This could be seen, according to this interviewee, in OLAF’s Annual Report, where only the amount which is recommended to be recovered, but not the actual recovery, is mentioned.454

In terms of good practice, one interviewee compared the process of OLAF’s financial monitoring with the one of the Internal Audit Service (IAS) called the Governance, Risk and Compliance system (GRC), which is a template where the recommendations and information about a case is stored in one database to which both the IAS and the respective DG have access. There, the monitoring was considered to work better as DGs feel more involved and informed about the different stages. The interviewee was however aware of the fact that both processes are not fully comparable, in particular given the more sensitive nature of OLAF’s data.

In order to improve awareness of the different stages of follow-up, one interviewee considered the processes of the Internal Audit Service as good practice of a more structured approach to follow-up. There, a shared database platform is used containing all relevant information about a case accessible for all DGs concerned.

All stakeholders consulted agreed that the length of OLAF’s investigations had an effect on the effectiveness of the recovery proceedings stage. The biggest challenge is that by the time investigations are completed – which can take up to five years or more – national agencies state that their statute of limitation or document retention had expired in the meantime so documents are no longer there or the beneficiaries had disappeared or become bankrupt.

Due to the challenges above, some stakeholders mentioned that the results of the recovery procedure could be rather disappointing compared to the resources deployed to implement it.

A8.3 Conclusions and recommendations

Overall, the analysis conducted as part of this case study showed that roles, responsibilities and procedures applicable to financial recommendations were clear. Administrative arrangements were considered as particularly helpful for cooperation, though they were not always applied.

The clarity of financial recommendations made by OLAF could be improved. In particular, stakeholders called for more cooperation with spending DGs during the investigation as well as to define recommendations and determine amounts to be recovered. In practice, spending DGs claimed to be rarely contacted by OLAF. However, it was acknowledged that the 2016 Instructions on financial recommendations were likely to clarify the process to draft such recommendations.

Overall, the time left to follow-up on OLAF recommendations was considered sufficient. Delays were noted in cases where beneficiaries were small entities and disappeared, or when they created a new legal entity, which prevented the recovery of the amounts concerned. DGs called for a more structured approach to follow-up processes.

The following recommendations are made to improve the effectiveness of follow-up to financial recommendations:

- **Recommendation 1**: OLAF should provide additional opportunities for spending DGs to engage with OLAF during the investigation stage and during the drafting of final reports and recommendations to ensure/verify the relevance of financial recommendations and the feasibility of their implementation. This should be undertaken in a manner which does not compromise or call into question OLAF’s independence, for example by affording an opportunity for spending DGs to share their views on financial recommendations and/or to comment on OLAF’s proposed financial recommendations.

- **Recommendation 2**: Drawing on the IAS and CoA processes for cooperation and monitoring in the course of the GRC system, OLAF should consider developing a restricted database for recommendations and information about a case, to which both OLAF and the spending DGs have access (as far as the sensitive and confidential nature of OLAF’s data allows).

- **Recommendation 3**: OLAF should provide spending DGs with a clear and comprehensive description of how it has determined the sums recommended to be recovered. For example, OLAF could consider providing spending DGs with access to the internal ‘Instructions on drafting Financial Recommendations and related sections of the Final Report’. In addition, OLAF could consider sending the beneficiary a fact sheet of the findings of the investigation.
Annex 9  Case study: follow-up to judicial recommendations in external investigations

A9.1 Purpose, scope and methodology of the case study

A9.1.1 Background

Where in external investigations OLAF establishes that a criminal offence may have occurred in a Member State, the investigation directorate proposes that the Director-General make judicial recommendations for action to be taken by the judicial authorities of the Member States.

Where OLAF has issued a judicial recommendation following external investigation, the actions taken by the competent authorities implementing the recommendation follows the following stages:

*Figure 29. Judicial monitoring process*  

The steps illustrated above can be summarised as follows:

**Reporting period:** Where a recommendation has been issues, the case will be entered into the reporting period stage. This stage will reflect the 12 months indicated in the recommendation within which the competent authority is requested to provide OLAF with information on the actions or decisions taken following the recommendation.

**No information:** at the end of the reporting period, where OLAF has not received information from the competent national or EU authorities on actions or decisions taken, the case will be entered into the no information stage.

**On-going criminal investigations:** Where OLAF has received information that a criminal investigation has been opened and in respect of which no decision on indictments has yet been taken, the case will be entered into the on-going stage.

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455 OLAF’s Guidelines on judicial monitoring, p. 5.
Indictment: Where OLAF has received information that a decision to indict has been taken concerning one or more persons either identified by OLAF or by the competent authorities, the case will be entered into the indictment stage. Pre-trial settlements are equivalent to indictment decisions.

Dismissal: Where OLAF receives information that a decision to dismiss has been taken concerning all of the persons either identified by OLAF or by the competent authority, without indictment, whether or not this decision follows a criminal investigation.

A9.1.2 Purpose

This case study aims to identify best practices and shortcomings in the follow-up to OLAF’s judicial recommendations following an external investigation. In particular, the case study looks into reasons why recommendations are dismissed or lead to judicial follow-up before national courts.

For this purpose, the following topics are assessed:

- roles and responsibilities within OLAF and national judicial authorities in the implementation of judicial recommendations;
- clarity of judicial recommendations
- effectiveness of follow-up to OLAF’s judicial recommendations; and
- recommendations to improve the effectiveness of judicial recommendations.

A9.1.3 Scope

This case study analyses practices of follow-up to OLAF’s judicial recommendations in selected Member States following external investigations. Selection criteria were:

- Member States receiving a high number of judicial recommendations;
- Member States covering both good and problematic practices of cooperation;
- a equal share of Member States having joined the EU before and after 2004;

According to these criteria, the following Member States receiving judicial recommendations were analysed for this case study: Bulgaria, France, Germany, Greece, Netherlands, Poland, Romania, and Slovakia.

This case study covers mainly Article 11 of Regulation 883/2013, which regulates the investigation report and actions to be taken following investigations, including in external investigations (Article 11(1), 11(2), 11(3), 11(6)). However, some elements of Article 3 on external investigations, Article 7 (investigation procedure) and Article 12 on the exchange of information between OLAF and the competent authorities in the Member States have also been explored. Within these articles, only those provisions relating to the follow-up to financial recommendations in the context of an external investigation were assessed.

A9.1.4 Methodology

This case study is based on both desk research and consultation with stakeholders.

With regard to desk research, the case study team explored available documentation and data gathered during the inception and interim phase of the OLAF evaluation. In particular, the following sources were taken into account:

- OLAF, Guidelines on Judicial Monitoring, 12 May 20214,
• Analysis on Member States follow-up to OLAF’s judicial recommendations issued between 1 January 2008 and 31 December 2015,
• Guidelines on Investigation Procedures for OLAF Staff, 1 October 2013 (GIP),
• Statistical data on recommendation issued between 2008 and 2016 provided by OLAF.

In addition, interviews with OLAF staff as well as representatives of national judicial authorities of the selected Member States (as part of the broader stakeholder consultation but particularly conducted for this case study) fed into this case study.

A9.5 Findings

A9.5.1 Roles and responsibilities

Roles and responsibilities of staff dealing with judicial monitoring within OLAF were considered overall clear by all stakeholders contacted for this case study. This is in particular the case since the reform introduced by the Guidelines on Investigation Procedures for OLAF Staff of October 2013, which strengthened the position of investigators. Investigators drafted the final report with a proposal of recommendations. The monitoring of the implementation of the recommendation was done by different follow-up units. Now investigators are also in charge of the monitoring so that there is no segregation of duty between the investigation and follow-up phase. While some interviewees thought that the reform had brought more clarity of roles and responsibilities, others were of the view that the reform had created a lack of transparency. It was argued that in the past, the follow-up unit had the possibility to be an interface between the competent DG and the national authority which now no longer exists.

All stakeholders consulted for this case study agreed that close cooperation with national authorities was key for effective follow-up to OLAF’s judicial recommendations. OLAF staff reported that cooperating and exchanging information with national authorities works best in countries where they have prosecutors in place that are designated and specialised in working with OLAF. On the other hand, as one interviewee stated, the more decentralised the national contact points were set up in a country the more difficult cooperation was.

Recommendations are not always sent to the competent national authority, according to a representative of a national authority, as there is no uniform rule at OLAF how to send final reports with recommendations. As almost each report is transmitted in a different way, it is difficult to establish national procedures for follow-ups of recommendations, according to one interviewee. For example, one AFCOS indicated that in some cases recommendations are sent to the Permanent Representation which has to forward it to the competent authority. This prolongs the procedure of follow-up and the longer it takes the more it affects successful implementation of recommendations.

A9.5.2 Clarity of judicial recommendations

Stakeholders interviewed for this study agreed that the level or clarity of recommendations was key for their effective follow-up. Nevertheless, Member States’ views regarding clarity of recommendations and the extent to which their implementation was achievable in practice were mixed. One judicial authority representative stated that they found it difficult that final reports and recommendations were sent in English and not in the national language. Not all national prosecutors know English well enough to fully understand what is requested and sometimes several versions of the same report circulate (official and unofficial translations) leading to confusion.
A9.5.3 Effectiveness of follow-up to OLAF’s judicial recommendations

Member States’ judicial authorities dismissed 169 judicial recommendations issued by OLAF between 1 January 2008 and 31 December 2015, out of a total of 317 recommendations.457

Reasons for dismissal were insufficient evidence (94), no criminal offence (37), time-barring (23), low priority (8), lack of territorial competence (2) and other reasons (5).458

National stakeholders consulted for this case study confirmed in particular difficulties in the implementation of recommendations related to admissibility of evidence, time-barring and low priority.

Finally, OLAF staff raised the issue of limited investigative powers of OLAF when it comes to effectiveness of OLAF’s reports, recommendations and their follow-up.

Admissibility of evidence

Stakeholders in the Member States and within OLAF consulted for this case study agreed that OLAF’s judicial recommendations were mostly useful to open investigations at national level. However, the biggest challenge to implement recommendations in practice was, in spite of Article 11 (2) of Regulation 883/2013 suggesting otherwise, that in some Member States national authorities do not consider the final report as admissible evidence. This means that OLAF’s investigations are often replicated in the context of criminal proceedings meaning that the local prosecutor has to carry out the entire investigation again. The results of such second investigations are often different to those of the first one as people are warned, might hide evidence and do not want to repeat the same things in yet another interview. Sometimes national investigations must even be closed because the prosecutor cannot find the same evidence.

Another difficulty is dealing with 28 different criminal systems. For example, in Italy an administrative report can be considered as evidence in trial, whereas in Romania OLAF’s reports are used as a source to find further evidence so that the report enters at least the trial although it is not itself considered as evidence. In other Member States OLAF’s reports are not used in national courts at all. In Germany, reports could be used as evidence depending on the nature of the elements (e.g. documents) included in the report. Finally, judicial authorities have different margins of appreciation to follow-up to OLAF’s recommendations or not.

Solutions to address the issue of limited admissibility of the final reports as evidence, as suggested by stakeholders consulted:

On EU level:

- Amending Regulation 883/2013 by introducing further investigative powers to OLAF.
- Introducing a provision that evidence collected can be considered as admissible evidence before national courts.

457 OLAF Analysis on Member States follow-up to OLAF’s judicial recommendations issued between 1 January 2008 and 31 December 2015, Ref. Ares(2017), p. 1. The analysis covers 25 Member States and 169 cases. No judicial recommendations have been issued for Croatia, whereas for Malta and Slovenia there are no dismissals.

458 OLAF Analysis on Member States follow-up to OLAF’s judicial recommendations issued between 1 January 2008 and 31 December 2015, Ref. Ares(2017), p. 1. The analysis covers 25 Member States and 169 cases. No judicial recommendations have been issued for Croatia, whereas for Malta and Slovenia there are no dismissals.
• Introducing the European Public Prosecutor Office (EPPO).
• Training of OLAF investigators to improve effectiveness of follow-up.

On national level:
• Establishing centralised and specialised public prosecutors that are only competent for OLAF cases.

Time-barring
Several stakeholders interviewed for this case study also raised the difficulty of the time period between the offence and OLAF’s report and recommendations. A major factor influencing the follow-up to judicial recommendations is the length of the investigation and whether there have been sufficient contacts with national authorities to understand the specificities of national law. As often five or more years pass in between, national public prosecutors face difficulties to collect full evidence and often the offence is time-barred by the time they receive the recommendations. Also following an OLAF investigation, the persons concerned become aware that they are being investigated so they have time to make evidence disappear or organise bankruptcy before criminal proceedings.

Low priority
Not all OLAF cases have the same level of priority for the Member State concerned as they have for OLAF. Factors influencing whether recommendations are followed up on national level or not can, according to national judicial authorities, be the value of the case, the seriousness of the offence, if corruption is involved or if there is a reputational risk. One interviewee elaborated that an average OLAF case has a value of around EUR 1 million. However, for the irregularity to be immediately noticeable it would need to be more than EUR 10 million. Therefore, cases of relatively low value would not be followed up, also because costs to follow up were sometimes higher than the amount at stake. In other Member States interviewees said that follow-up could also be influenced by political considerations. Therefore most judiciaries have a backlog as terrorism and other forms of crimes have higher priority than OLAF cases. One interviewee even stated that white collar crime and fraud against EU money was not their priority as “EU money is considered free money in countries which are net beneficiaries.” Finally it was described by one stakeholders that some countries simply ignore OLAF’s recommendations because OLAF only does administrative investigations.

OLAF’s limited investigative powers
Another challenge for OLAF, as raised in several interviews by its staff, is the fact of its limited investigative powers. While some national prosecutors consider OLAF’s reports ready to be used in trial, they often overlook the fact that OLAF cannot even summon people, order bank disclosures, wiretapping or the enforcement of on the spot checks making them fully dependent on the willingness of national prosecutors to assist and cooperate. One interviewee stated that often national prosecutors did not know this limitation. If OLAF had more investigative powers, as one interviewee stated, judicial recommendations could be useful, effective and robust. This would also guarantee that national prosecutors took OLAF more seriously. “OLAF has to follow the same standards of a criminal body regarding procedural guarantees but doesn’t avail itself of the corresponding powers.”

Effects of Regulation 883/2013
Overall stakeholders consulted for this case study were not of the view that the effectiveness of follow-up to OLAF’s judicial recommendations had significantly changed since the entry into force of Regulation 883/2013. Even though Member States are by law now obliged to follow-up, in practice however not much had changed as prosecutors and magistrates considered themselves independent. OLAF’s reports
and recommendations are not considered to be binding, as all the competent national authority is compelled to do is to examine OLAF’s findings and take any action they consider appropriate to comply with EU law. Member States are under no obligation to institute criminal proceedings following a recommendation from OLAF. In the light of figures, as one interviewee described it, “national judicial follow-up to OLAF’s findings is its Aquilles heel” or as another stakeholder put it, due to the lack of sanctioning powers, OLAF may appear to be a “toothless tiger” compared with the weight of its objectives. These arguments were commonly put forward in support of the EPPO.

A9.6 Conclusions and recommendations

Roles and responsibilities regarding judicial recommendations were considered to have been clarified by the adoption of the GIPs in 2013. Cooperation with national authorities is key to ensure a good follow-up to judicial recommendations. Overall it was observed that follow-up worked best in those Member States where specialised prosecutors worked with OLAF on a regular basis.

The clarity of recommendations was crucial to guarantee a follow-up. Overall, the main issues encountered when it comes to the effective follow-up to recommendations were the admissibility of OLAF reports as evidence before national courts, which was not possible in all Member States; time barring induced by the length of OLAF investigations; and national priorities differing from the nature of OLAF cases.

The following recommendations to improve the effectiveness of follow up of judicial recommendations can be put forward:

- **Recommendation 1**: Regulation 883/2013 should be amended in a sense that a clear provision ensures that information OLAF collects and presents in final reports and can be immediately used as admissible evidence in trial before national courts.

- **Recommendation 2**: Regulation 883/2013 should be amended to give more investigative powers to OLAF, including the competence to summon people, order bank disclosures, wiretapping or the enforcement of on the spot checks.

- **Recommendation 3**: Member States should be obliged to have a separated specialised prosecutor for EU fraud. Such prosecutors should regularly be trained.
Annex 10 Case study: follow-up to recommendations in internal investigations

A10.1 Introduction

This section firstly provides some background information with regard to OLAF’s recommendations. It also provides information on the purpose and scope of this specific case study.

A10.1.1 Background

This section of the case study report intends to provide quantitative information on the recommendations issued and provided by OLAF to IBOAs. Figure 30 below highlights the share of investigations that were closed with recommendations since 1999. The percentage of investigations concluded with recommendations fluctuated between 43% in 2002 and 59% in 2014, with a high peak in 2008 (65%) and a low peak in 2012 (30% - which witnessed the reorganisation of OLAF and the high number of cases processed). The available data does not distinguish between internal and external investigations.

Figure 30. Share of investigations closed with recommendations

The figure below shows the number and type of recommendations issued by OLAF in the period 2008-2016. The graph shows that the number of financial recommendations increased as of 2012, becoming the most common type of recommendation issued by the Office. Administrative and disciplinary recommendations were issued to a lesser extent.

Source: OLAF Annual Reports 2005-2014

In the context of this case study, “IBOAs” is considered as a general term, comprising both Commission Services and other institutions (Committees, Court of Justice, IDOC, European Parliament, European investment Bank, etc.). When possible, when analysing the evaluation evidence (interviews, survey results, etc.), this category was disaggregated (for example, commission services’ views were provided separately). This is indicated below in the analysis.

The figure covers both internal and external investigation cases.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Figure 31. Number and type of recommendations issued by OLAF

The figure below shows the evolution in the number of recommendations provided to IBOAs, Member States and other recipients (not specified). The number of recommendations sent to national authorities was overall higher than the number of recommendations issued to IBOAs, with the exception of 2012 and 2016 (for which, however, partial data are available).

Figure 32. Evolution in the number of recommendations issued to IBOAs, MS and other recipients (2012-2016)

When looking at recommendations provided to IBOAs in the period 2012-2015, the average number of recommendations sent annually was 134\(^{461}\). In 2013 and 2015, a particularly high number of recommendations was sent (151 and 159 respectively). 2012 was the year with the smaller amount of recommendations (102), which reflects the general trend outlined in Figure 34 above.

Finally, when looking at the specific recipients of recommendations within IBOAs, available data shows that most of the recommendations were sent to Commission’s services (441 in total), EU Agencies, the European Parliament, EEAS (though these might be addressed to third country authorities) and the European Investment Bank.

\(^{461}\) 2016 was not included in this calculation as the data available is partial
A10.1.2 Purpose

This case study overall aimed to identify both best practices and shortcomings in the follow-up to OLAF’s recommendations provided to IBOAs following internal investigations. More specifically, the case study looked at aspects of effectiveness in the follow-up process (i.e. cooperation arrangements, tools in place, deadlines, information exchange, etc.) and assessed the extent to which such process led to concrete actions being taken (following OLAF’s recommendations) to strengthen the protection of the EU financial interests. Moreover, the case study also intended to explore the impact of the follow-up process on the resources of IBOAs as well as cost-efficiencies brought by supporting tools made available by the Office. Finally, the case study also included an outlook component, identifying the main areas for improvement and drafting concrete recommendations on possible measures to be introduced to address the identified shortcomings.

A10.1.3 Scope

The case study covered mainly Article 11 of Regulation 883/2013 (investigation report and action to be taken following investigations). Within this Article, only aspects of cooperation with IBOAs were explored.

As agreed with OLAF, although IBOAs are involved in both internal and external investigations, the focus of this case study was on internal investigations only.

In the context of this case study, “IBOAs” was considered as a general term, comprising both Commission Services and other institutions (Committees, Court of Justice, IDOC, European Parliament, European investment Bank, etc.). When possible, when analysing the evaluation evidence (interviews, survey results, etc.), this category was disaggregated (for example, commission services’ views were provided separately). This is indicated below in the analysis.

It was not always possible to disaggregate evaluation results by type of investigation and compare the different types of collaboration between OLAF and IBOAs (i.e. in the context of investigations on staff members vs. cooperation with spending DGs). However, most of the interviews undertaken in the context of this case study were with spending DGs thus including views on this type of cooperation while the interviews undertaken with IDOC representatives reflected views on disciplinary investigations.

More information on the scope of the case study is included in the main findings below.

A10.2 Main findings

This section presents the main findings of the case study. As mentioned above, the findings cover the provision of recommendations to IBOAs, the monitoring/follow-up process (i.e. the phase following the issuing of OLAF’s recommendations) as well as the outcomes and impacts of the latter (i.e. amounts recovered and disciplinary actions taken).

In addition, in order to facilitate the understanding of the content and context of the case study, the section firstly presents some general information on the mandate, roles and responsibilities of different actors involved in investigations, recommendations and the monitoring process.

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462 As agreed with OLAF, although IBOAs are involved in both internal and external investigations, the focus of this case study was on internal investigations only.
When presenting the issues described above, the section particularly looks into the following aspects:

- overall effectiveness of OLAF (identification of best practice, factors improving cooperation and information exchange, effectiveness of guidance and templates provided, etc.); and
- shortcomings identified and possible areas for improvement.

While in its initial design, the case study also intended to assess the impact of the follow-up/ monitoring process on resources within OLAF and IBOAs, insufficient information was provided by the stakeholders consulted on this particular issue.

### A10.2.1 Roles and responsibilities

The graph below provides an overview of the overall process with regard to internal investigations conducted by OLAF as well as the particular steps covered by this case study and highlighted in the box (i.e. recommendations and monitoring/follow-up phase).

The actors involved in the steps, which are relevant for this case study are (in addition to OLAF) IBOAs and the Commission's Investigation and Disciplinary Office (IDOC).

*Figure 33. Internal investigation process and scope of this case study*

The table below provides more information on the mandate, roles and activities of the different actors involved in the steps, which are relevant for this case study, as outlined by the documents laying down the legal base and outlining the functioning of OLAF/cooperation with IBOAs and IDOC.

*Table 31. Mandate/roles and activities of stakeholders involved*
<table>
<thead>
<tr>
<th>Document</th>
<th>Actor</th>
<th>Mandate/role/activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation 883/2013 (art 11)</td>
<td>OLAF (art 11)</td>
<td>On completion of an investigation by the Office, a report shall be drawn up, under the authority of the Director-General. The report shall be accompanied by recommendations of the Director-General on whether or not action should be taken.</td>
</tr>
<tr>
<td></td>
<td>IBOAs (art 11)</td>
<td>Reports and recommendations drawn up following an internal investigation and any relevant related documents shall be sent to the institution, body, office or agency concerned. That institution, body, office or agency shall take such action, in particular of a disciplinary or legal nature, as the results of the internal investigation warrant, and shall report thereon to the Office, within a time-limit laid down in the recommendations accompanying the report, and, in addition, at the request of the Office.</td>
</tr>
<tr>
<td></td>
<td>OLAF (art 17.5)</td>
<td>The Director-General shall inform the Supervisory Committee periodically of cases in which the recommendations made by the Director-General have not been followed.</td>
</tr>
<tr>
<td>Guidelines on investigation procedures (art 24, 26, 26 and 27)</td>
<td>OLAF General (art 24)</td>
<td>- During the monitoring phase the investigation unit shall, upon request, provide all necessary assistance to the competent authorities. - During the monitoring phase, the investigation unit shall follow the progress of the implementation of Recommendations and record the outcome of actions taken by the competent authorities resulting from Recommendations. The following actions shall be undertaken by OLAF in relation to the monitoring of the Implementation of Recommendations (art 26) - request information from the EU institution, body, office, agency or Member State concerning actions taken in respect of Recommendations made - consult the information systems in which EU institutions, bodies, offices, agencies and Member States record actions taken in respect of Recommendations made. - monitor the need to maintain the deferral of information to data subjects - record actions taken in respect of Recommendations made, their progress and any results thereof in OLAF's case management system (art 27).</td>
</tr>
<tr>
<td>Instructions on drafting Financial Recommendations and related sections of the Final Report</td>
<td>OLAF</td>
<td>These instructions aim at ensuring a consistent practice throughout the Office and should guide OLAF staff notably on the determination of relevant amounts and on the content of OLAF financial recommendations and relevant sections of OLAF final reports.</td>
</tr>
</tbody>
</table>
## Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

<table>
<thead>
<tr>
<th>Document</th>
<th>Actor</th>
<th>Mandate/role/activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guidelines on financial monitoring</td>
<td>OLAF</td>
<td>It is the responsibility of OLAF to monitor the actions taken by IBOAs following financial recommendations. The investigation units are responsible for recording in the monitoring modules any information received by IBOAs with respect to decisions and actions taken following the recommendations.</td>
</tr>
<tr>
<td>IBOAs (disciplinary authorities)</td>
<td>Provide information to OLAF with regard to the actions taken following financial recommendations issued by OLAF within the deadline indicated on the recommendations (12 months for disciplinary recommendations)</td>
<td></td>
</tr>
<tr>
<td>Guidelines on disciplinary monitoring</td>
<td>OLAF</td>
<td>It is the responsibility of OLAF to monitor the actions taken by IBOAs (disciplinary authorities) following disciplinary recommendations. The investigation units are responsible for recording in the monitoring modules any information received by IBOAs with respect to decisions and actions taken following the recommendations.</td>
</tr>
<tr>
<td>IBOAs (disciplinary authorities)</td>
<td>Provide information to OLAF with regard to the actions taken following disciplinary recommendations issued by OLAF within the deadline indicated on the recommendations (6 months for disciplinary recommendations)</td>
<td></td>
</tr>
<tr>
<td>Guidelines on the use of OLAF final reports by commission services</td>
<td>OLAF</td>
<td>OLAF unit in charge of the investigation is the contact point for all questions regarding the final report and matters relating to the implementing measures. The final reports adopted by OLAF are accompanied, where applicable, by recommendations, which are not legally binding. OLAF final reports shall contain all findings and conclusions established in the course of an investigation. It shall also indicate if OLAF investigators enabled the concerned party to express his/her views on the facts that concern him/her before drawing its final conclusions.</td>
</tr>
<tr>
<td>IBOAs</td>
<td>Once the reports and recommendations are transmitted to the competent authorising officer by delegation (AOD), it is up to them to decide which implementing actions should be taken in order to safeguard the EU’s financial interests. The competent service should react in good time to OLAF’s recommendations. It shall inform the Office on its assessment of the recommendations and the measures it intends to take. It is the responsibility of the AOD to establish the amount to be recovered. The AOD has to decide on any actions to be undertaken which are determined by the specific circumstances of the case. The AOD shall also open a contradictory procedure before taking any measures concerning the entity concerned</td>
<td></td>
</tr>
<tr>
<td>Document</td>
<td>Actor</td>
<td>Mandate/role/activities</td>
</tr>
<tr>
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</tr>
<tr>
<td>Administrative Arrangements on cooperation between OLAF and IDOC</td>
<td>OLAF</td>
<td>Inform IDOC of the intention to conduct within the meaning of the OLAF Regulation (so that no administrative inquiry will be opened by IDOC regarding the same facts) When IDOC send information on cases that concern or could concern OLAF competences, OLAF will inform IDOC promptly of its decision to open an investigation or coordination case or to dismiss the case</td>
</tr>
<tr>
<td></td>
<td>IDOC</td>
<td>Carry out administrative inquiries on behalf of the Appointing Authority to determine whether has been a failure to comply with the obligations incumbent on Commission Members and staff. Carry out pre-disciplinary hearings at the initiative of the Appointing Authority following an IDOC administrative inquiry or an OLAF investigation Carry out disciplinary procedures for the Appointing Authority When IDOC receives information requiring investigation that concerns OLAF competences, IDOC will transmit to OLAF, without delay, the information related to the case. With regard to probable IDOC administrative inquiry case, IDOC should inform OLAF of those cases prior to opening an administrative inquiry</td>
</tr>
</tbody>
</table>

The table above shows that the there is sufficient information, within existing legal/working documents, on the mandate/roles/activities of the different actors with regard to the issuing of recommendations and their monitoring/follow up. While Regulation 883/2013 provides general information, the GIP as well as the guidance on financial and disciplinary monitoring provide more specific/operational information on roles and responsibilities. The guidelines in particular, provide clear indications on the process, further outlining the activities to be carried out on both sides (OLAF and IBOAs).

The consultation with stakeholders showed that there is an overall clarity with regard not only to the roles and responsibilities but also concerning the procedures to follow. With regard to cooperation with IDOC, stakeholder consultation showed that the Administrative Arrangements on cooperation between OLAF and IDOC are considered as a valuable tool as they outline the exact competences of the two bodies, leaving limited room for confusion. The collaboration between OLAF and IDOC was overall considered as effective and no overlap or investigations being run in parallel were reported. Some shortcomings in cooperation were only identified in relation to the quality of recommendations provided to IDOC, as further elaborated below.

Within the Commission’s services consulted in the context of this case study, internal procedures and mechanisms for follow up were praised to be clear, effective and efficient (outlining roles and responsibilities of different units in relation to follow-up and reporting to the Office). Good communication with OLAF (as also explored in the sub-sections below) was also identified as a key factor contributing to improving the clarity of roles/responsibilities/procedures (as informal contacts helped addressing existing doubts and concerns).

With regard to the resources used for/allocated to the follow up of OLAF’s recommendations, Commission’s services indicated that this depends, to a large extent, on the case and nature of the recommendations. There are some factors,
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

which impact on the extent to which the follow up of recommendations might be resource intensive:

- The sum to be recovered – as an example, recoveries of 2,000 euro are simpler than recoveries of millions of euros;
- The involvement of other DGs - cases where other services are involved (“multi-layered” cases) tend to be more resource-intense as more complex and needing more coordination;

Due to the above-mentioned challenges, some stakeholders mentioned that the results of the recovery procedure can be rather disappointing compared to the resources deployed to implement it.

The stakeholder consultation also identified some factors, which, on the other hand, led to an increased efficiency in the use of resources. The recent centralisation of audits for some Commission’s services, for example, was certainly a good practice in this regard. A Common support services (CAS) has been established for the entire research family with a mandate on fraud detection. As explained by one interviewee (Commission Services), the implementation of an OLAF recommendation used to be much more resource intensive two to three years ago (when it was done “in-house”) before the centralisation of audits.

A10.2.2 Clarity of OLAF’s recommendations

All the stakeholders interviewed within Commission’s services agreed on the fact that the formulation of recommendations is key to an effective follow-up process. The importance of having clear and comprehensive recommendations was widely stressed by the interviewees.

While, overall, OLAF’s recommendations were found to be quite comprehensive and clear, some areas for improvement have been also identified.

According to two stakeholders interviewed in the context of this case study (both within OLAF and Commission’s services), there is a need for more consistency in the degree of detail provided. Generally financial recommendations provide an amount to be recovered, disciplinary recommendations do not go into the details of the action to be taken. Moreover, with regard to financial recommendations, the level of detail can also vary substantially. While some are clear and detailed (i.e. including figures, straightforward sums for recovery, etc.), others are less thorough.

The majority of the Commission’s services interviewed in the context of this case study mentioned some difficulties in understanding the internal calculations made by OLAF with regard to the sums to be recovered, which are included in the financial recommendations sent to IBOAs. The supporting documents often do not provide more clarity in this regard (for example why they prove that fraud also concerns other projects or potential perpetrators). This leads, in the follow-up phase, to difficulties to substantiate facts before the debtor (from which the funds have to be recovered).

Another interviewee pointed out at some issues triggered by the (sometimes) insufficient awareness/knowledge of OLAF with regard to specific thresholds of recovery concerning errors identified in public procurement of structural fund. Interviewees both within OLAF and IBOAs suggested that training for OLAF investigators might be further organised to improve their awareness of the specificities.

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463 CAS is part of the Common Support Centre

of different EU funds thus increasing the quality of recommendations and the effectiveness of follow-up/monitoring.

In October 2016, the Instructions on drafting Financial Recommendations and related sections of the Final Report was published by OLAF and circulated internally. The instructions aim to ensure a consistent practice throughout the Office and to guide OLAF staff on the determination of relevant amounts and on the content of OLAF financial recommendations and relevant sections of OLAF final reports. One chapter of the instructions specifically focuses on the determination of the "estimated amounts to be recovered". Information is provided to OLAF staff about the specificities of shared management, direct and indirect management, revenues, etc. It is possible that this information addressed (at least to some extent) the issues described above with regard to insufficient awareness/knowledge of OLAF with regard to the specificities of EU funds. While the adoption of such instructions should help to better define financial recommendations, in particular with regard to the amounts to be recovered, it is too early to assess their impact.

When doubts and concerns arise, evidence showed that they are usually easily addressed by informal contacts with OLAF investigators. Cooperation with OLAF was considered as very effective in clarifying doubts with regard to the content of the recommendations. According to an interviewee, there were cases where OLAF contacted the Commission’s services before they concluded the report in order to see what could be done in terms of financial corrections and this was reflected in the final report/recommendations. According to the interviewee, this was a very good way of proceeding when formulating financial recoveries.

Less positive views on the clarity and comprehensiveness of OLAF’s recommendations were put forward by IDOC. According to an interviewee within the disciplinary office, some shortcomings are triggered by the absence of contacts/communication between the two bodies during the investigations and the drafting of reports/recommendations. “When IDOC receives a report, some evidence which could have been collected during an investigation is missing or we disagree on the legal analysis of the facts.” Another interviewee added that, “due to independence-related concerns, OLAF refuses to have discussions during the investigations. For instance, even if something is unclear, IDOC will not be contacted before the report is finalised”. This had negative consequences on the quality and comprehensiveness of reports and recommendations (“incomplete reports cannot be used”) and, consequently, on the extent to which the latter were followed up by IBOAs. The interviewee called for more cooperation with OLAF investigators in order to avoid discrepancies in recommendations (especially in relation to the legal analysis – application of the Staff and Financial Regulations, etc.). Finally, according to IDOC representatives, the overall reduction in the length of investigations has also generated a negative impact on the quality and comprehensiveness of OLAF’s reports. “The pressure of deadlines had an impact on the reports’ usefulness and quality”.

Survey results showed that 66% of the respondents agreed or strongly agreed that OLAF’s investigation reports are overall clear and comprehensive.

However, when commenting on the extent to which the recommendations are clearly formulated, including a well-defined description of the actions to be taken, the percentage dropped to 59%. When asked about the extent to which the recommendations are clearly formulated, including estimated amounts to be

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464 Please note that this answer comprises responses from OLAF staff, IBOAs, MS and third country authorities and therefore this statement applies to ALL OLAF recommendations. Disaggregated data were not available.
recovered, as well as the preliminary classification in law of the facts established the percentage was even lower, 51\textsuperscript{465\%}.

Moreover, survey data also showed that 36\% of OLAF staff did not (at all) associate shortcomings and obstacles with regard to the robustness of reports and recommendations and almost 30\% associated some shortcomings and obstacles only to some extent. Moreover, one respondent on 22 also declared that such shortcomings and obstacles can be identified on a large extent.

**A10.2.3 Effectiveness of follow-up**

Disciplinary and financial monitoring commences when an investigation is closed and the final report accompanied by recommendations is sent to IBOAs. OLAF does not carry out monitoring with regard to administrative recommendations while judicial monitoring is not covered by this case study. The purpose of financial and disciplinary monitoring is to collect information on the latest actions taken by IBOAs following OLAF’s recommendations. The information provides the basis on which OLAF reports on the results of its recommendations.

The consultation undertaken in the context of this case study showed that both OLAF and IBOAs overall did not identify major shortcomings in the follow-up/monitoring phase. Interviews with OLAF officials showed that the constant improvements in the quality of reports and recommendations (also linked to an increased experience of investigators) led to a more effective monitoring process. IBOAs were also overall positive with regard to the follow-up/monitoring process. The case study found that follow-up procedures are defined by each DG individually and are dealt by each institution differently. Those procedures were overall found to work effectively within the institutions interviewed.

A key factor leading to an effective follow-up/monitoring is the good cooperation and exchange of information taking place between IBOAs and OLAF not only following the submission of recommendations but also throughout the entire follow-up/monitoring process. According to stakeholders consulted in the context of this case study, such informal cooperation takes place on a regular basis. In addition to contacts (telephone, email, etc.) between investigators and relevant services within IBOAs, more formal meetings are also organised to discuss the status quo of the implementation of recommendations (usually once a year). The extent to which informal contacts take place between OLAF and IBOAs usually depends on the quality of the recommendations provided. The more comprehensive and clear the recommendations are, the less the partners will need to establish contacts to clarify their content. As put by one interviewee (Commission’s services) “there is a mutual interest in cooperating and clarifying” and contacts with OLAF’s investigators were perceived as very effective and efficient.

However, evaluation evidence and, more specifically, the survey results also showed that there might be room for improving the financial and disciplinary follow-up/monitoring conducted by OLAF. Survey data showed that:

- 47\% of OLAF investigators agreed or strongly agreed that the financial monitoring conducted by OLAF following the submission of an investigation report is effective (i.e. in terms of quality, duration and timeliness), however, almost 30\% disagreed or strongly disagreed; and
- Only 29\% of OLAF investigators agreed that the disciplinary monitoring conducted by OLAF following the submission of an investigation report is effective in terms of quality, duration and timeliness (it is however important to

\textsuperscript{465} As above, this comment applied to ALL OALAF recommendations. Disaggregated data were not available.
know that a big share of respondents, 41%, indicated not to know enough on this particular topic).

The main issue, which was cited by a vast majority of stakeholders consulted in the context of this case study as limiting the effectiveness of the follow-up/monitoring process, is the “uncertainty” over the binding nature of OLAF’s recommendations. Regulation 883/2013, in fact, is not clear in this concern. While article 11.4 says that IBOAs “shall take such action, in particular of a disciplinary or legal nature”, the Regulation also adds that this should be done “as the results of the internal investigation warrant”. In other words, IBOAs are “obliged” to look into the matter, if there is a recommendation, and take the measures they deem appropriate. As a consequence, if they convene that there should be no sanction, they are not “obliged” to impose one. Regulation 883/2013 (article 17(5)) also states that the Office shall “inform the Supervisory Committee periodically of cases in which the recommendations made by the Director-General have not been followed”. In this context, the Regulation also says that IBOAs “shall report thereon to the Office, within a time-limit laid down in the recommendations accompanying the report, and, in addition, at the request of the Office”. However, as pointed out by some interviewees, there are no binding consequences for not reporting on time other than a very light deterrent effect.

According to the stakeholders consulted, the “inconsistencies” presented above might trigger negative consequences on the effectiveness of the follow-up/monitoring process, especially with regard to the timeliness of reporting to OLAF on the actions taken. The vast majority of interviewees, who commented on this issue, expressed the need to revise the phrasing of the Regulation with regard to OLAF’s recommendations and follow-up, in order to make the implementation process clearer.

The subsections below provide more detailed information on various aspects linked to the follow-up/monitoring process (namely the timeliness in addressing the recommendations, the actions taken and reporting to OLAF as well as the overall quality/usefulness of OLAF’s assistance throughout the process).

**A10.2.3.1 Addressing recommendations – overall timeliness**

With regard to the overall timeliness of the follow-up process, mixed views were reported by stakeholders interviewed within OLAF and IBOAs.

According to an OLAF official, while the timeliness is improving and the persons concerned / potential perpetrators are increasingly cooperating in the context of financial recommendations, some recoveries can be still very slow (seven years in one case). On the other hand, according to most of the IBOAs interviewed in the context of this case study, the follow-up/monitoring process is usually smooth. Some delays can be triggered by the need to consult, in case of Commission’s services, other DGs or different units within the same DG (financial, operational units, etc.).

With regard to the time taken to implement the recommendations, one stakeholder (Commission services) mentioned that the latter very much depends on the cooperation established with the debtor (in the context of recovery of funds). Longer cases can take up to one year (if there is no consensus) while if the persons concerned / potential perpetrators accept the findings of OLAF’s investigations, recovery can be done rather quickly – two to three months.

**A10.2.3.2 Addressing recommendations – actions taken by IBOAs**

As also highlighted in the “Guidelines on the use of OLAF final reports by Commission services for recovery procedures and other measures in the direct expenditure and external aid sector”, once the reports and recommendations are transmitted by OLAF to the competent AOD, it is up to them to decide which implementing actions should be taken in order to safeguard the EU’s financial interests. As already outlined above, this is in line with Article 11.4 of the OLAF Regulation, which states that IBOAs “shall
take such action, in particular of a disciplinary or legal nature, as the results of the internal investigation warrant”. The implementation of recommendations is therefore a responsibility of IBOAs who are ultimately in charge of:

- establishing the amount to be recovered;
- deciding on the actions to be taken, i.e. termination or other preventive measures (suspension of payments, reinforced controls...); and
- determining the need for disciplinary action against the staff member involved.

The interviews undertaken in the context of this evaluation confirmed that IBOAs do not always decide to take actions following OLAF’s recommendations. For example, in some instances:

- IBOAs might not follow-up OLAF’s recommendations in the exact way the office recommended, especially with regard to the amount concerned for recovery;
- IBOAs might have found that the facts had been insufficiently established by the investigative activities carried out;
- In the context of financial recommendations, IBOAs might decide to not make recoveries based on OLAF’s recommendations; and
- In the context of disciplinary recommendations, IBOAs might not consider the facts established by OLAF serious enough to trigger disciplinary procedures.

A10.2.3.3 Addressing recommendations – reporting to OLAF

Concerning the reporting to the Office, mixed views were reported by OLAF’s officials and Commission’s services interviewed.

According to OLAF, IBOAs usually do not report back to OLAF about the actions implemented following a recommendation (i.e. spontaneously). They were judged, however, to be reactive to OLAF’s requests for feedback. According to two interviewees, the Regulation could be stronger and clearer on the duty to report to OLAF in the follow-up context. This would improve the effectiveness of the follow-up/monitoring process and lead to efficiency gains (in the current situation, asking IBOAs to provide information on follow-up actions can be, in some cases, resource-intensive).

IBOAs interviewed were more positive with regard to the extent to which they report back to OLAF on the implementation of recommendations. The actions taken following OLAF’s recommendations are encoded in internal databases. The latter also provide information on the status of the recovery process (for each case and recommendation) and explain why, if so, the recovery process was not successfully terminated.

According to the IBOAs interviewed, this information is shared with OLAF both on a regular basis as well as in the context of the annual reporting. Case-specific reporting is undertaken every six months for disciplinary recommendations and every year for financial recommendations. Some interviews reported, however, that these deadlines are sometimes not respected because the implementation of the recommendation is stuck / blocked and there are no new elements to report to OLAF. In the context of the annual reporting to the Office, on the other hand, more comprehensive information is provided to the office (usually the whole internal database with information on the status of all “active” recommendations is sent).

Finally, one interviewee (Commission’s services) also reported an overall lack of feedback, from OLAF, on the information reported annually. This leads to a situation where many old cases are not properly closed/archived and deleted from the internal monitoring database.

The survey results also showed that the vast majority of stakeholders (both within OLAF and IBOAs) did not identify major issues with reporting to OLAF on the implementation of recommendations. In fact, survey data with regard to the follow-up to OLAF’s recommendations by EU authorities following investigations showed that:
• 58.80% of OLAF investigators agreed that IBOAs overall follow up on the financial recommendations provided by the Office within the reporting period (12 months);
• 70% of OLAF investigators agreed or strongly agreed that IBOAs overall report on the actions taken following the financial recommendations.

With regard to financial monitoring, the survey data showed that:

• 66% of Commission’s services and 80% of other IBOAs agreed or strongly agreed that OLAF’s financial recommendations are followed-up upon within the reporting period (12 months). Lengthy and complicated procedures, entailing the need to coordinate with other Commission services and recommendations not a priority for DGs were cited as main reasons for not following up OLAF’s recommendations within the reporting period;
• 80% of Commission’s services and 90% of other IBOAs agreed or strongly agreed that reporting to OLAF on the actions taken following the financial recommendations takes place.

With regard to disciplinary monitoring, the survey data showed that:

• 84.5% of Commission’s services agreed or strongly agreed that OLAF’s disciplinary recommendations are followed-up upon within the reporting period (6 months). The excessive severity of recommendations were cited as a reason for not following up OLAF’s recommendations within the reporting period;
• 100% of Commission’s services agreed or strongly agreed that reporting to OLAF on the actions taken following the disciplinary recommendations takes place.

A10.2.3.4 OLAF’s assistance

Evidence gathered showed that OLAF’s assistance throughout the follow-up/monitoring process was assessed as beneficial by the stakeholders consulted. As mentioned above, IBOAs particularly praised the availability of OLAF investigators not only in clarifying the content of the recommendations but also in providing guidance in relation to the actions to be implemented, difficulties to be overcome and reporting to the Office.

While informal contacts were positively assessed, more negative views were expressed in relation to the guidelines provided by OLAF in the interviews undertaken. For example, one interview stated that OLAF’s guidelines to Commission services on the use of recommendations are not really helpful as they are drafted in too general terms (not adapted to the specific funds or taking into consideration the work of a specific service). There is a need from EC to have more guidance, especially (in case of financial recommendations) on how OLAF calculated the total amount to be recovered (evidence is sometimes confusing as elaborated above).

Survey data with regard to OLAF’s assistance in the follow-up/monitoring process showed that respondents were overall positive with regard to the overall assistance provided by OLAF as well as specific guidance and templates (in particular for financial monitoring – less so in relation to disciplinary monitoring):

466 Although Commission services are part of IBOAs, the answers to these particular survey questions were disaggregated to reflect the specific answers of Commission services and other IBOAs.
467 As above
468 Although Commission services are part of IBOAs, the answers to these particular survey questions were disaggregated to reflect the specific answers of Commission services.
469 As above.
• 65% of OLAF investigators agreed or strongly agreed that OLAF’s investigation units provide the necessary assistance to IBOAs in relation to the actions to be taken following OLAF’s recommendations (all types);

• 66% of Commission’s services and 50% of other IBOAs\(^{470}\) agreed or strongly agreed that OLAF’s investigation units provide the necessary assistance in relation to the actions to be taken following OLAF’s financial recommendations. 30% of other IBOAs said that OLAF did not at all provide the necessary assistance;

• 73% of Commission’s services and 60% of other IBOAs\(^{471}\) agreed or strongly agreed that the templates used for the financial monitoring are fit for purpose;

• 60% of Commission’s services and 70% of other IBOAs\(^{472}\) agreed or strongly agreed that the accompanying guidance for financial monitoring is fit for purpose.

• 66% of Commission’s services\(^{473}\) agreed or strongly agreed that OLAF’s investigation units provide the necessary assistance in relation to the actions to be taken following OLAF’s disciplinary recommendations (however, it is important to stress that 33% of respondents also indicated not to know enough on this particular topic);

• 66% of Commission’s services\(^{474}\) agreed or strongly agreed that the templates used for the disciplinary monitoring are fit for purpose while 16% stated “not at all”;

• 50% of Commission’s services\(^{475}\) agreed that the accompanying guidance for disciplinary monitoring is fit for purpose while 30% stated “not at all”.

With regard to the outcomes and impacts of the follow-up process, it is not possible to provide a precise assessment in the absence of quantitative data on recommended recoveries/actual recoveries disaggregated by type of partner. However, available data (2016 Supervisory Committee report) indicated that:

• Since 1 October 2013, OLAF reported to the Supervisory Committee that eight disciplinary recommendations (i.e. 15% of the total number of disciplinary recommendations made in the same period) have not been followed up by the receiving authorities invested with disciplinary powers;

• Five financial recommendations (i.e. close to 1% of all financial recommendations issued by OLAF in the same period), issued between October 2013 and February 2016, were not implemented by the relevant authorities responsible for the management of EU funds\(^{476}\).

The data presented above seemed to indicate that issues with IBOAs not following OLAF’s recommendations arise rarely in practice.

A10.3.1 Conclusions and recommendations
A10.3.1 Conclusions

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\(^{470}\) Although Commission services are part of IBOAs, the answers to these particular survey questions were disaggregated to reflect the specific answers of Commission services and other IBOAs.

\(^{471}\) As above

\(^{472}\) As above

\(^{473}\) Although Commission services are part of IBOAs, the answers to these particular survey questions were disaggregated to reflect the specific answers of Commission services

\(^{474}\) As above

\(^{475}\) As above

\(^{476}\) The report did not specify whether these are IBOAs.
All the stakeholders interviewed (both within OLAF and Commission’s services) agreed on the fact that the **formulation of recommendations** is key to an effective follow-up process. While, overall, OLAF’s recommendations were found to be quite comprehensive and clear, some areas for improvement have been also identified (not linked to shortcomings in the legal basis of OLAF but rather to practical cooperation), mainly:

- Need for more consistency in the degree of detail provided (especially with regard to financial recommendations); and
- Need to improve the clarity and transparency of the internal calculations made by OLAF with regard to the sums to be recovered, which are included in the financial recommendations;
- Need to cooperate and exchange information between OLAF and IBOAs during investigations in order to improve the quality and comprehensiveness of reports and recommendations (in particular during disciplinary investigations).

The consultation undertaken in the context of this case study showed that both OLAF and IBOAs overall did not identify major shortcomings in the **follow-up/monitoring phase**. Interviews with OLAF officials showed that the constant improvements in the quality of reports and recommendations (also linked to an increased experience of investigators) led to a more effective monitoring process. IBOAs were also overall positive with regard to the follow-up/monitoring process and the assistance provided by OLAF throughout the process.

On the other hand, the main issue, which was cited by the vast majority of stakeholders consulted in the context of this case study, and which severely limited the effectiveness of the follow-up/monitoring process, was the “uncertainty” over the binding nature of OLAF’s recommendations. Regulation 883/2013, in fact, is not clear in this regard. While article 11.4 says that IBOAs “shall take such action, in particular of a disciplinary or legal nature”, the Regulation also adds that this should be done “as the results of the internal investigation warrant”. In other words, IBOAs are legally “obliged” to look into the matter, following OLAF’s recommendations, and take the measures they deem appropriate. As a consequence, if they convene that there should be no sanction, they are not “obliged” to impose one.

According to the stakeholders consulted, this “inconsistency” might trigger negative consequences on the effectiveness of the follow-up/monitoring process, especially with regard to the timeliness of reporting to OLAF on the actions taken. The vast majority of interviewees, who commented on this issue, expressed the need to revise the phrasing of the Regulation with regard to OLAF’s recommendations and follow-up, in order to make the implementation process clearer.

Available data (number of reports from OLAF to the Supervisory Committee concerning recommendations not followed), however, seemed to suggest that issues with IBOAs not following OLAF’s recommendations arose rarely in practice.

### A10.3.2 Recommendations

Based on the evidence collected and presented above, three main recommendations could be put forward concerning the cooperation between OLAF and IBOAs with regard to the implementation of OLAF’s recommendations:

- **Recommendation 1** (for both OLAF and IBOAs) - Maintain effective communication and exchange of information throughout the process leading to the drafting of recommendations. Further improve cooperation between OLAF and IBOAs before closing the case/investigation and exchange of information/discussions with regard to the formulation of recommendations (in particular concerning the amounts to be recovered in the context of financial recommendations);
• **Recommendation 2** (for OLAF) – Improve the comprehensiveness of information provided to IBOAs with regard to the calculation of the amounts to be recovered (if this was not directly agreed with the concerned services before issuing the recommendations). Improve the consistency in the level of information/details provided in the recommendations issued to IBOAs (especially with regard to financial recommendations);

• **Recommendation 3** (revision of OLAF Regulation) - The phrasing of Article 11(4) of the OLAF Regulation could be made more explicit with regard to the non-binding nature of recommendations and their follow up (in terms of IBOAs’ overall responsibilities over defining the actions to be taken and their implementation). Moreover, the phrasing could be stronger and clearer with regard to the duty (for IBOAs) to report to the Office on actions taken with regard to the implementation of recommendations issued. This would improve the effectiveness of the follow-up/monitoring process and lead to efficiency gains.
Annex 11 Additional detailed evaluation evidence

This annex presents detailed evidence that underpins the findings, conclusions and recommendations from the main report.

A11.1 Case selection criteria

Evidence on the clarity of the case selection criteria was gathered from non-OLAF stakeholders (European Commission, other EU IBOAs, Member States and third countries) via the online survey. Respondents were asked whether the case selection criteria and their application are transparent (Figure 34). Half of respondents (50 per cent, n=29) agreed or strongly agreed that the criteria and their application are transparent overall, while almost 30 per cent (n=16) disagreed or strongly disagreed. The proportion of respondents that agreed/strongly agreed was broadly consistent (ranging between 50 per cent and 60 per cent of respondents) across different stakeholder types with the exception of European Commission respondents (just over one-quarter agreed or strongly agreed while a similar proportion neither agreed nor disagreed). Respondents from the European Commission and other EU IBOAs were most likely to disagree/strongly disagree that case selection criteria and their application are transparent, with around 40 per cent of these respondents indicating as much.

Figure 34.Extent to which respondents agreed that case selection criteria and their application are overall transparent

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 58.

OLAF survey respondents were also asked about the impact of the Regulation’s case selection criteria (Figure 35):

- Fifty seven per cent (n=17) agreed or strongly agreed that the case selection criteria had reduced the time taken to select which cases should be opened/investigated. This figure was broadly similar across the two main respondent types – OLAF investigators and staff from the ISRU.
- Forty seven per cent (n=14) did not know what impact the selection criteria had on the number of recommendations made to Member States and opinions to third countries (and the resulting amount of follow-up activity). Staff in investigative roles were more likely than staff in the ISRU to respond in this manner.
Similar proportions/nos of respondents agreed and disagreed that the selection criteria contributed to an increase in recommendations, opinions and follow-up. ISRU staff were more likely than staff in investigative roles to agree or strongly agree with these statements.

**Figure 35. Extent to which survey respondents agreed with the following statements concerning the impact of case selection criteria**

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 30.

**A11.2 Communicating case selection decisions**

Non-OLAF stakeholders (European Commission, other EU IBOAs, Member States and third countries) that responded to the online survey were asked about the transparency and completeness of the information provided by OLAF on the reasons for opening an investigation. Forty-one per cent (n=24) of survey respondents agreed that the information provided was comprehensive and 45 per cent (n=26) agreed it was transparent (Figure 36). Respondents from the European Commission and other EU IBOAs were more likely to disagree/strongly disagree that the information provided by OLAF was comprehensive and transparent, with around 40-60 per cent of respondents disagreeing compared with 0-15 per cent of respondents from Member States and third countries. It is not clear why the survey results differed in this manner given the Regulation (and the GIPs) do not differentiate between these stakeholder types when it comes to communicating case selection decisions.
Figure 36. Extent to which survey respondents agreed with the following statements concerning the opening of investigations

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 58.

Survey respondents were also asked about the timeliness of such information provided by OLAF. Forty two per cent (n=24) of respondents agreed/strongly agreed that the decision from OLAF whether to open an investigation was communicated to the respondent promptly, while 31 per cent (n=18) disagreed or strongly disagreed (Figure 37). Those more likely to agree or strongly agree were from the European Commission while other EU IBOAs were least likely to agree or strongly agree. The proportion of respondents that disagreed or strongly disagreed was similar across stakeholder types, ranging from 29 per cent of respondents (European Commission) to 36 per cent of respondents (institutions, bodies, offices and agencies of an EU Member State).
A11.3 Investigative tools and powers

A11.3.1 Overall clarity and sufficiency of tools and powers

A number of stakeholders interviewed felt that OLAF’s investigative powers and tools were largely unchanged by the introduction of Regulation 883/2013. OLAF’s Director-General, as well as investigative staff, considered that the investigative powers and tools under Regulation 883/2013 largely reflect those established by Regulation 1073/1999. One investigator suggested that Regulation 883/2013’s reference to Regulation 2185/96 in the context of external investigations effectively meant that OLAF’s powers related to external investigations are largely defined in Regulation 2185/96 and, therefore, Regulation 883/2013 primarily establishes OLAF’s tools/powers for internal investigations, most of which are largely unchanged from Regulation 1073/1999.

Regarding external investigatory tools and powers, evidence from the literature\(^\text{477}\) suggests that Regulation 883/2013 has helped to define OLAF’s investigative powers. Bazzocchi (2014) suggests that Regulation 883/2013 introduced a range of improvements and innovations in terms of defining OLAF’s investigative powers, including amongst other things Article 10 (regarding follow-up by Member States) which allows for an improved follow-up of OLAF investigations in the Member States and increases transparency.

Survey respondents were asked to what extent they agreed that Regulation 883/2013 (outlining responsibilities, roles and rules with regard to on-the-spot checks, inspections and administrative investigations) increased their understanding of the role of OLAF in the context of internal and external investigations. Two-thirds (n=27) of respondents agreed or strongly agreed that the Regulation had increased their understanding.

\(^{477}\) Bazzocchi, V. (2014), Protecting fundamental and procedural rights from the investigations of OLAF to the future EPPO.
understanding of OLAF’s role in internal investigations, while 80 per cent (n=52) agreed or strongly agreed that this was the case for external investigations (Figure 38). Prima facie, this is consistent with the views of Bazzocchi (2014). Among those who responded to the question regarding internal investigations, the European Commission and other EU IBOAs were most likely to agree/strongly agree that the Regulation had increased their understanding of OLAF’s role, whereas for external investigations, Member State respondents were most likely to agree/strongly agree.

**Figure 38. Extent to which survey respondents agreed that OLAF’s powers and tools increased their understanding of OLAF’s investigative role**

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 41 (internal investigations) and 68 (external investigations).

The sufficiency of Regulation 883/2013’s investigative tools and powers is discussed in detail below. However, some stakeholders made general observations as to whether
the Regulation provides OLAF with sufficient tools and powers to conduct administrative investigations. For example, one EU IBOA suggested that OLAF’s investigative tools are sufficient and help to create an ‘OLAF brand’. In contrast, a spending DG noted that OLAF needs more powers given they have powers to prosecute persons concerned. Regarding this latter point, issues surrounding OLAF’s powers in the context of the EPPO are discussed in Chapter 7.

**A11.3.2 On-the-spot checks, inspections and interviews**

OLAF staff were surveyed on the extent to which they agree that OLAF’s powers and tools under Regulation 883/2013 are clear regarding conducting on-the-spot checks (Figure 39).

Similar proportions of respondents agreed or strongly agreed that OLAF’s powers are clear in relation to conducting on-the-spot checks in relation to internal investigations involving IBOAs\(^{478}\) (42 per cent, n=14) and in relation to external investigations involving Member States (50 per cent, n=16). Staff from the ISRU were far more likely to agree/strongly agree than staff from investigative units.

These figures were considerably higher than the proportions of respondents who said that OLAF’s powers are clear in relation to conducting on-the-spot checks within third countries (16 per cent, n=5) or international organisations (13 per cent, n=4). Again, ISRU staff were more likely to agree/strongly agree than staff from investigative units.

*Figure 39. Extent to which survey respondents agreed that OLAF’s powers and tools are clear regarding conducting on-the-spot checks in the following areas*

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\(^{478}\) Article 4(3) makes reference to ‘on-the-spot checks ... at the premises of economic operators’ and not ‘on-the-spot checks within IBOAs’. The survey question made reference to ‘on-the-spot checks within IBOAs’ to facilitate the consolidation of survey questions and the shortening of the survey length overall. It is unlikely that the exclusion of the words “at the premises of economic operators” and the inclusion of the words “within IBOAs” in the survey question had any impact on responses. Consequently, the results of this survey question should be interpreted as relating to on-the-spot checks at the premises of economic operators rather than within IBOAs.
OLAF staff were surveyed on the extent to which they agree that OLAF’s powers to inspect premises are clear. A significantly higher proportion of respondents (75 per cent of respondents, n=24) agreed/strongly agreed that these powers are clear in relation to inspections of the premises of EU IBOAs compared to inspections within Member States, third countries and/or international organisations (for which around one-in-five respondents agreed/strongly agreed that OLAF’s powers are clear) (Figure 40). In all cases (EU IBOAs, Member States, third countries and/or international organisations), responses were generally similar across the main respondent types (OLAF investigators and the ISRU).

Figure 40. Extent to which survey respondents agreed that OLAF’s powers and tools are clear regarding carrying-out inspections of premises within the following areas

Survey respondents were asked about the clarity of OLAF’s powers and tools with respect to conducting interviews. Overall, respondents were more likely to agree or strongly agree that OLAF’s powers are clear where the persons involved are in IBOAs (61 per cent of respondents, n=20, agreed/strongly agreed) compared with persons interviewed in Member States, third countries and/or international organisations (where the proportion of respondents who agreed/strongly agreed that OLAF’s powers...
are clear ranged from 15 per cent to 21 per cent of respondents) (Figure 41). This is broadly consistent with the comments from stakeholders surrounding the clarity/sufficiency of tools and powers for internal vs external investigations.

Figure 41. Extent to which survey respondents agreed that OLAF’s powers and tools are clear regarding conducting interviews with persons in the following areas

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 33.

A11.3.3 Digital forensic operations

OLAF respondents to the survey were asked whether they associate obstacles/shortcomings in the application of OLAF's powers in relation to digital forensic operations (Figure 42). Responses varied, although roughly half as many respondents (41 per cent, n=11) associated obstacles/shortcomings in the application of OLAF's powers in EU IBOAs compared to the number of respondents (79 per cent, n=23) who associated obstacles/shortcomings in the application of OLAF's powers in Member States. Among these respondents, staff from within the OLAF ISRU were considerably more likely to associate obstacles/shortcomings than OLAF staff within investigative units with the exception of where these obstacles/shortcomings are associated with the application of OLAF's powers in Member States – in that case, OLAF investigative staff were marginally more likely to say that they associated obstacles/shortcomings.
Figure 42. Extent to which survey respondents associated obstacles/shortcomings in the application of OLAF’s powers in relation to digital forensic operations in the following areas

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 26-29.

Among the survey respondents who associated obstacles/shortcomings in the application of OLAF’s powers in relation to digital forensic operations to a large extent, reasons given included:

- it is not clear whether OLAF holds an autonomous power to carry-out digital forensic operations or whether its powers stem from the powers of national authorities;
- in some cases, the powers of the national authorities to perform the digital forensic operations are not clearly defined;
- there can be certain restrictions on gathering forensic data in Member States;
- some IBOAs try to find excuses and legal justifications that OLAF cannot be allowed to conduct digital forensic operations, which is the incorrect interpretation of the existing law, but a clearer description of OLAF’s powers under Regulation 883/2013 in relation to digital forensic operations could help; and
- it is unclear to what extent digital forensic operations may be carried out on mailboxes of economic operators.

These responses are consistent with the evidence emerging from the interviews and workshops surrounding the dependency of OLAF’s digital forensic operations on national law.

Exploring these comments further (regarding the uncertainty surrounding the legal basis for conducting digital forensic operations, especially in Member States), Figure 43 presents data on the extent to which survey respondents from OLAF believe that its powers are clear regarding undertaking digital forensic operations. It shows that uncertainty is highest in relation to OLAF’s powers to undertake digital forensic operations within third countries, followed closely by international organisations and Member States. Survey respondents were most likely to agree that OLAF’s powers are
clear in relation to digital forensic operations involving EU IBOAs. Levels of certainty surrounding digital forensic operations involving EU IBOAs were highest amongst staff from OLAF’s internal legal service (100 per cent, n=4), followed by the ISRU (75 per cent, n=6) and then investigative staff (43 per cent, n=9). Levels of uncertainty were broadly comparable across all OLAF staff when it comes to digital forensic operations outside of EU IBOAs.

Figure 43. Extent to which survey respondents agree that OLAF’s powers are clear regarding undertaking digital forensic operations in the following areas

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 32-33.

A11.3.4 Precautionary measures

OLAF investigative staff responding to the survey were asked about the completeness of the information OLAF provides with regard to precautionary measures and whether this information is followed-up on (Figure 44). Despite the survey respondents being from OLAF investigative units, only 45 per cent (n=9) agreed that OLAF provides information to IBOAs and Member States with regard to precautionary measures that is exhaustive and in line with the requirements set by Article 7; 30 per cent of respondents (n=6) did not know while one-quarter (n=5) disagreed. In terms of follow-up to this information, investigators were twice as likely to think that IBOAs habitually follow OLAF’s suggestions when it comes to precautionary measures (38 per cent, n=8) compared to Member States (19 per cent, n=4).
One of the respondents that strongly disagreed that IBOAs habitually follow OLAF’s suggestions/provision of information with regard to appropriate precautionary measures suggested that the difficulty that IBOAs experience is that they are expected to stop payments without revealing to the economic operator that this is due to an OLAF investigation, which can be challenging in practice.

A wider group of stakeholders (European Commission, other EU IBOAs, Member State stakeholders and third countries) were also surveyed on their views regarding the information provided by OLAF in the context of precautionary measures. Just over one-third (n=17) of respondents agreed that the information provided to them by OLAF with regard to precautionary measures is exhaustive and in line with the requirements set by Article 7; a similar proportion neither agreed nor disagreed while around half as many again disagreed. Member State stakeholders were most likely to agree that they are provided with the information they need to take precautionary measures, despite OLAF investigators suggesting that Member States were less likely to act on OLAF’s advice (compared to EU IBOAs).

Finally, survey respondents were also asked to what extent they agreed that cooperation with OLAF in the context of precautionary measures was ‘smooth’ overall. Just over half (54 per cent, n=26) agreed or strongly agreed that this was the case, while only 10 per cent (n=5) disagreed. Prima facie, this suggests a potential inconsistency in respondents’ views (with a higher proportion of respondents overall saying that cooperation with OLAF was smooth compared to the proportion of respondents saying that they received all the information they need to take precautionary measures). However, the two questions are measuring slightly different aspects of precautionary measures (one deals with the substance/content in the form of information provided by OLAF, while the other deals with the process of interaction and cooperation), and when analysed by stakeholder type, the data shows some examples of greater consistency between the two questions. For example, Member State stakeholders were most likely to agree that cooperation with OLAF in the context...
of precautionary measures was smooth overall, suggesting in combination with the evidence presented above that Member States believe they receive all the information they need regarding precautionary measures and they cooperate smoothly with OLAF, (although according to OLAF investigators, Member States are less likely to act on OLAF’s suggestions).

Figure 45. Extent to which survey respondents agreed that cooperation with OLAF in the context of precautionary measures was overall smooth

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 48.

A11.4 Cooperation and information exchange

A11.4.1 Member States

A11.4.1.1 Investigation-related cooperation

OLAF investigative staff that completed the online survey were asked a range of statements concerning the effectiveness of cooperation between OLAF and Member States in the context of investigations (Figure 46):

- In relation to the cooperation and exchange of information with Member States’ authorities during investigations, 67 per cent (n=14) agreed/strongly agreed that this is overall effective, enabling the staff of the Office to fulfil their investigative tasks.
- In relation to the cooperation and exchange of information with Member States’ authorities with whom Administrative Cooperation Arrangements (ACAs) are signed, 53 per cent (n=11) agreed/strongly agreed that this is more effective (i.e. in terms of quality, timeliness and duration) compared to cooperation in the absence of such arrangements.
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Figure 46. Cooperation and information exchange (Member States) – the extent to which survey respondents agreed with the following statements

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 21.

Regarding the establishment of the AFCOS, 52 per cent, (n=13) of OLAF respondents agreed/strongly agreed that the establishment of AFCOS led to an increased exchange of information between OLAF and Member States. Seventy-five per cent, (n=18) agreed/strongly agreed that the establishment of AFCOS strengthened cooperation between OLAF and Member States’ authorities. Again, no respondents disagreed (Figure 47).
Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

Figure 47. Cooperation and information exchange (Member States) – the extent to which survey respondents agreed with the following statements regarding the AFCOS

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 25.

OLAF investigative survey respondents were also asked about perceived obstacles and shortcomings surrounding the cooperation and exchange of information between OLAF and Member States. Only 11 per cent (n=3) of respondents perceived obstacles/shortcomings with the functioning of AFIS, while 44 per cent (n=12) of respondents perceived obstacles/shortcomings with the cooperation between AFCOS and OLAF. A further 40 per cent (n=11) of respondents perceived obstacles/shortcomings with the implementation/operation of AFCOS (Figure 48).

Figure 48. Extent to which survey respondents associated obstacles/shortcomings with the following aspects of cooperation and information exchange
Finally, a wider range of respondents (OLAF, European Commission, other EU IBOAs, Member States, third countries and associations of lawyers and prosecutors) were asked for their views on the impacts and outcomes associated with Regulation 883/2013 with regard to the implementation of AFCOS, the establishment of ACAs and the strengthened information exchange with partners:

- Twenty-eight per cent, (n=35) agreed/strongly agreed that the Regulation’s provisions surrounding cooperation and information exchange with Member States increased the misused EU public money recovered. Member State respondents were most likely to agree (38 per cent, n=23) among respondent groups with 10 or more responses, while the European Commission was least likely to agree (15 per cent, n=4).
- Thirty-one per cent (n=40) agreed/strongly agreed that the Regulation’s provisions surrounding cooperation and information exchange with Member States increased the deterrence of fraud. Again, Member State respondents were most likely to agree (42 per cent, n=25) while around one-fifth (n=5) of OLAF and European Commission staff agreed that there would be an increased deterrence.
- Thirty per cent (n=40) agreed/strongly agreed that the Regulation’s provisions surrounding cooperation and information exchange with Member States increased the number of criminal investigations and prosecutions of financial fraud (Figure 49). Once again, Member State respondents were most likely to agree (35 per cent, n=21) and then OLAF and the European Commission respondents (both with around 23 per cent, n=6).

Figure 49. Cooperation and information exchange (Member States) – the extent to which survey respondents agreed with the following statements regarding the impacts of the cooperation and exchange of information between OLAF and Member States
A11.4.1.2 Policy-related cooperation

Member State stakeholders provided their views on COCOLAF and its impact via the online survey (Figure 50). Seventy per cent (n=27) of Member State respondents agreed that the activities organised in the context of COCOLAF led to a more effective cooperation; only 8 per cent (n=3) disagreed. Further, two-thirds (n=26) of Member State respondents agreed that the topics discussed in the context of COCOLAF meetings reflect the most pressing priorities for the protection of the EU’s financial interests.

Figure 50. Extent to which Member State survey respondents agreed with the following statements regarding COCOLAF

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 39.

A11.4.1.3 Coordination cases

Survey respondents (OLAF and Member States) provided their views on coordination cases (Figure 51). Specifically, respondents were asked to what extent they agree with the following statements:

- **Regulation 883/2013** (the Regulation) is clear regarding OLAF’s role in coordination cases. Overall, 38 per cent (n=15) agreed or strongly agreed that this was the case. Responses varied considerably by respondent type – only 10 per cent (n=2) of OLAF staff who answered this question said they agreed, compared to 62 per cent (n=13) of Member State respondents. In this regard, the response from OLAF staff is consistent with the messages emerging from the stakeholder interviews. Regulation 883/2013 does not provide sufficient detail to know with certainty what OLAF’s role is in coordination cases.

- **The Guidelines on Investigation Procedures (GIPs) provide clear guidance regarding the conduct of coordination cases.** Overall, 41 per cent (n=17)
agreed or strongly agreed that this was the case. Again, responses varied by respondent type, with 24 per cent (n=5) of OLAF staff agreeing, compared to 57 per cent (n=12) of Member State respondents.

- **The criteria to decide whether Regulation 883/2013 or Regulation 515/97 are used as a legal basis for coordination cases are clear.** Overall, 27 per cent (n=11) agreed or strongly agreed that this was the case. Fourteen per cent (n=3) of OLAF respondents agreed while 38 per cent (n=11) of Member State respondents agreed.

**Figure 51. Extent to which survey respondents agreed with the following statements regarding coordination cases**

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 42.

**A11.4.2 EU IBOAs**

OLAF investigators who responded to the survey were asked about the effectiveness (quality, duration and timeliness) of cooperation between OLAF and IBOAs in the context of investigations:

- **Half (n=10) of all respondents agreed/strongly agreed that the cooperation and exchange of information with IBOAs during investigations is overall effective, enabling OLAF to fulfil its investigative tasks. Only one respondent (of 21 in total) disagreed or strongly disagreed.**
- **Fifty-two per cent (n=11) of respondents agreed or strongly agreed that cooperation and exchange of information with IBOAs with whom Administrative Arrangements were signed is more effective compared to cooperation in the absence of such arrangements. Again, only one respondent disagreed or strongly disagreed.**
- **One-in-five (n=4) respondents agreed or strongly agreed that cooperation and exchange of information with Eurojust and Europol has improved since the entry into force of Regulation 883/2013 outlining new cooperation provisions with the two Agencies (Article 13). More than half of respondents did not know.**
Figure 52. Cooperation and information exchange (IBOAs) – the extent to which survey respondents agreed with the following statements

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 21.

A11.4.3 Third countries and international organisations

OLAF investigators were surveyed on the extent to which they agree with a range of statements concerning the effectiveness of cooperation between OLAF and third countries’ authorities in the context of investigations:

- In relation to the cooperation and exchange of information with third countries’ authorities during investigations, 10 per cent (n=2) agreed/strongly agreed that this is overall effective enabling the staff of the Office to fulfill their investigative tasks, while most respondents (57 per cent, n=12) didn’t know if this was the case.

- In relation to the cooperation and exchange of information with third countries’ authorities with whom ACAs were signed, one-quarter (n=6) agreed/strongly agreed that this is more effective compared to cooperation in the absence of such arrangements, while most respondents (57 per cent, n=12) didn’t know if this was the case.

- In relation to the Anti-fraud information System (AFIS), only one respondents suggested that this is a useful tool to foster cooperation and the exchange of information with third countries’ authorities in the context of investigations, while 67 per cent (n=14) didn’t know if this was the case.

- Finally, in relation to the tools used by OLAF for cooperation with third countries’ authorities during investigations, 10 per cent (n=2) agreed/disagreed that these are fit for purpose while most respondents (71 per cent, n=15) didn’t know if this was the case (Figure 53).
Figure 53. Cooperation and information exchange (third countries) – the extent to which survey respondents agreed with the following statements

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 21.

A11.5 OLAF’s final reports and recommendations

Data were analysed regarding the number of investigations concluded with recommendations to consider whether there may be prima facie evidence that Regulation 883/2013 had given rise to an increase in the proportion of cases resulting in recommendations.

The number of investigation cases concluded with recommendations had almost doubled by 2015 when compared to the end of the pre-evaluation period (i.e. 2012). However, when considering the total number of closed cases, the share accounted for by closed cases with recommendations appears to have remained fairly stable over the period 2008-15 (other than a dip in 2012). The share of investigation cases concluded with recommendations is negatively correlated with the number of opened cases. This association is statistically significant which means that the number of cases opened strongly influences the share of cases that are closed, especially with recommendations.

Figure 54 below shows how the increase in the number of recommendations issued after Regulation 883/2013 came into power (from 2013) falls across the different recommendation types (financial, judicial, administrative and disciplinary). It indicates that a doubling in the number of financial and judicial recommendations since 2013 has been the main driver behind the overall increase in recommendations since 2013.

Figure 54. Number of recommendations issued, by recommendation type, 2008-2015
Survey respondents (OLAF, European Commission, other EU IBOAs, Member States, third countries and associations of lawyers and prosecutors) were asked about the quality of OLAF’s reports and recommendations (Figure 55):

- Sixty-six per cent, (n=52) agreed or strongly agreed that OLAF’s investigation reports are overall clear and comprehensive. However, responses varied considerably by stakeholder type – 40 per cent (n=4) of EU IBOA respondents agreed, 50 per cent (n=9) of Commission respondents agreed, 70 per cent (n=19) of Member State respondents agreed and 81 per cent (n=17) of OLAF respondents agreed.

- Fifty nine per cent, (n=47) agreed or strongly agreed that OLAF’s recommendations are clearly formulated, including a well-defined description of the actions to be taken. Again, responses varied considerably by stakeholder type – 40 per cent (n=4) of EU IBOA respondents agreed, 44 per cent (n=8) of Commission respondents agreed, 56 per cent (n=15) of Member State respondents agreed and 81 per cent (n=17) of OLAF respondents agreed.

- More than half of all respondents (n=41) agreed or strongly agreed that OLAF’s recommendations include estimated amounts to be recovered, as well as the preliminary classification in law of the facts established. Responses by stakeholder type were – 28 per cent (n=5) of Commission respondents agreed, 41 per cent (n=11) of Member State respondents agreed, 50 per cent (n=5) of EU IBOA respondents agreed and 81 per cent (n=17) of OLAF respondents agreed.

- Finally, 56 per cent, (n=44) of respondents agreed or strongly agreed that, when it comes to external investigations, OLAF’s reports take into account the national law of the country concerned. Again, responses varied considerably by stakeholder type – 28 per cent (n=5) of Commission respondents agreed, 30 per cent (n=3) of EU IBOA respondents agreed, 59 per cent (n=16) of Member State respondents agreed and 86 per cent (n=17) of OLAF respondents agreed.
Figure 55. Quality of OLAF’s reports and recommendations – the extent to which survey respondents agreed with the following statements regarding report/recommendation content and quality

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 79.

A11.6 Procedural guarantees

Evidence sourced primarily from semi-structured depth interviews with stakeholders, but also the online survey, relates to three core issues – the appropriateness of provisions on procedural guarantees; the proportionality of provisions on procedural guarantees; and the impact of provisions on procedural guarantees.

A11.6.1 Appropriateness of procedural guarantees

In relation to the appropriateness of Regulation 883/2013’s provisions on procedural guarantees, stakeholders consulted for this evaluation offered high-level views on the inclusion of Article 9 within Regulation 883/2013. A greater number of stakeholders (both internal and external to OLAF) did not believe that the inclusion of Article 9 in Regulation 883/2013 was a positive development, although many of those stakeholders expressed that view with reference to the perceived imbalance with investigative powers, as discussed further below. That is, many stakeholders who spoke negatively of the provisions on procedural guarantees did so in relative terms (relative to the powers and tools at OLAF’s disposal) rather than in absolute terms. Despite this weight of opinion, a number of other stakeholders spoke positively about the introduction of these provisions within the Regulation. An OLAF advisor described Article 9 as an enormous step forward which has reinforced the Office’s ‘prestige’. One investigator described Article 9 as extremely important and suggested that it has generated improvements in OLAF’s investigations. A managing authority noted that, overall, Article 9 has had a positive impact. And an interviewee from an investigative support unit within OLAF noted that these types of provisions help to improve the position of OLAF – the procedural guarantees were introduced to give more credibility and higher standards to OLAF’s work. In addition to these views, many stakeholders
expressed positive sentiments towards the procedural guarantees *in principle* but, *in practice*, they suggested that such guarantees are disproportionate, as explored in further detail below.

The evidence from the semi-structured depth interviews with stakeholders has been supplemented with responses to the online survey. Specifically, survey respondents\(^8\) were asked for their views regarding a range of statements related to the appropriateness and application of procedural guarantees and safeguards:

- In relation to *procedural guarantees under Article 9* of the Regulation (such as right to avoid self-incrimination, right be assisted by a person of choice, etc.), four-in-five (n=71) respondents agreed or strongly agreed that these provisions are clear. OLAF respondents (85 per cent, n=29) were most likely to agree.
- In relation to the *definition of procedural guarantees*, 73 per cent (n=64) respondents agreed or strongly agreed that this definition contributed to strengthening the procedural guarantees of individuals subject to investigations. Views across different stakeholder types were broadly similar, with roughly 70-75 per cent of each stakeholder type agreeing.
- In relation to *OLAF’s internal complaints system*, 37 per cent (n=33) agreed or strongly agreed that this constitutes an effective mechanism for persons involved in investigations to object to the handling of their procedural guarantees and personal data by OLAF. Responses once again did not vary materially across stakeholder types.
- In relation to *external and independent institutions and bodies* (European Ombudsman, European Data Protection Supervisor, the Court of Justice of the European Union), around one-quarter (27 per cent, n=23) of respondents agreed or strongly agreed that these are more effective than OLAF’s internal complaints system for persons involved in investigations to object to the handling of their procedural guarantees and personal data. Responses varied somewhat across different stakeholder types but both OLAF and the European Commission had around one-third of respondents agreeing with this statement.

Respondents (OLAF\(^8\), associations of lawyers and prosecutors, EU control bodies and ‘other’ respondents) were also asked whether they associate obstacles or shortcomings with certain elements of Regulation 883/2013 linked to the protection of procedural rights (Figure 56):

- In relation to the *definition of procedural rights* in the Regulation (Article 9), almost two-thirds (63 per cent, n=24) did not perceive any shortcomings or obstacles.
- In relation to the *functioning of OLAF’s internal complaints system*, fewer than one-in-five (18 per cent, n=7) respondents perceived shortcomings/obstacles.
- In relation to the *functioning of other complaint systems run by external and independent institutions and bodies*, fewer than one-in-three (29 per cent, n=11) perceived obstacles/shortcomings. Two respondents perceived overlapping areas of competence (across the external control bodies) which can create delays and can be exploited by persons concerned / potential perpetrators.
Finally, in relation to cooperation between OLAF and bodies responsible for external controls, around a quarter (26 per cent, n=10) perceived obstacles/shortcomings.

Figure 56. Extent to which survey respondents identified obstacles/shortcomings linked to the protection of procedural rights

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 38-39.

Specific comments from respondents regarding these obstacles/shortcomings included:

- The definition of procedural rights as formulated is an 'open' list. It thus provides the possibility for extensive interpretation and potential violation of guarantees not specified. The guidelines do not address the role of OLAF’s internal legal advice unit and the complaints mechanism.
- Although it is important to ensure procedural guarantees, one has to acknowledge that it is time-consuming and slows down the investigations. It is thus a matter of striking the right balance so that the procedural guarantees are respected but the investigative performance is not paralysed.
- There should be consistency in the regulation concerning procedural rights of persons interviewed. There should be clear exceptions to the notice periods, to allow flexibility in accordance with the needs of the investigation. The "statement" should disappear from the regulation or should be clearly defined. The procedural guarantees for persons investigated in internal investigations (EU Staff) should not be dependent on the IBOAs. Article 12(2) third paragraph should be clarified and, in general, the transmission of information to a national authority should not be subject to any restriction. The procedural rights and personal data provisions should not be designed as to constitute obstacles to investigations, but to represent fair balances for the persons involved.
- Some obstacles to more efficient case work are not being caused by internal procedures but by the Regulation that imposes additional authorisation and notification procedures on the investigation units.
• OLAF should be given equivalent data protection provisions to a law enforcement authority in a Member State.
• The difficulties stem not from the definition of procedural guarantees, per se, but from the definition of the person concerned, which is not exactly clear.
• The issue is not the Regulation but the relationship with Regulation 45/2001 which is not suited to investigations.

A11.6.2 Proportionality of procedural guarantees

Regarding the proportionality of provisions on procedural guarantees, stakeholders consulted for this evaluation offered high-level views on the proportionality of the procedural guarantees set out in Article 9 vis-à-vis the investigative powers and tools provided for by Regulation 883/2013. A significant number of stakeholders interviewed for the evaluation expressed the view that Article 9 introduced rights and safeguards that are disproportionate to the administrative nature of OLAF’s investigations. It was suggested that there should be an equivalence between the investigative powers of the Office and the protection afforded to the individual, which is not the case currently. Instead, the protection afforded to the individual was viewed as commensurate with criminal rather than administrative investigations, which it was argued is inappropriate given an OLAF investigation does not change the legal situation of the person concerned.

At the OLAF evaluation conference, OLAF’s Director-General spoke at length on the topic of procedural guarantees. He noted that these rights have strengthened the transparency and accountability of OLAF, but the rights themselves are effectively the same as those afforded to persons who are subject to criminal investigations. They are disproportionate – OLAF has no powers to conduct criminal investigations but must respect the rights of persons as if they were subjected to one.

A counterargument to the view that Regulation 883/2013 creates a mismatch between the administrative powers of investigation and the criminal standards of rights/guarantees was advanced by some stakeholders who pointed out that the outcomes from OLAF’s administrative investigations are often designed for criminal proceedings in cases where judicial recommendations are made. If the evidence emerging from OLAF investigations were conducted in a purely administrative fashion, the results of the investigation could not be admitted as evidence in criminal proceedings within Member States. This point was also made at the workshop of OLAF heads of unit and other staff – the only instance where the procedural guarantees were considered proportionate would be where administrative evidence can be used in a criminal procedure against the person.

A related point was made by an interviewee from a national judicial authority who suggested that, because OLAF’s procedural guarantees are similar to the criminal procedures within the interviewee’s country, it improves the admissibility of OLAF’s evidence in criminal proceedings. Similarly, two AFCOS interviewees made related remarks, indicating that the procedural rights and guarantees under Article 9 reflect those in their national criminal law, which increases the likelihood that OLAF’s reports can be used as admissible evidence for national criminal proceedings.

The majority of stakeholders interviewed for the evaluation expressed the view that Article 9 introduced rights and safeguards that were disproportionate to the administrative nature of OLAF’s investigations. Among the many stakeholders who commented on this issue:
• An OLAF investigator noted that it is good to have procedural guarantees but there is a discrepancy between OLAF’s powers and the rights of the person, which are disproportionate.
• An MEP suggested that it appeared counterintuitive that OLAF is regarded as a serious institution with all the checks and balances (the same ones as those at a Member State level) but without the same powers.
• An EU IBOA noted that the investigative powers of the Office have to be equivalent to the protection afforded to the individual, which is not the case currently.
• An OLAF investigator commented that OLAF’s investigations, as far as the protection of rights of persons are concerned, now follow criminal law standards, but OLAF’s powers are regulated at an administrative law level, creating an imbalance between the obligations of the Office and the rights of the Office.
• One spending DG was relatively outspoken on the issue, suggesting that the introduction of procedural guarantees has largely contributed to making OLAF a ‘lame duck’ and such guarantees were not necessary, conceptually wrong (because an OLAF investigation does not create a legal burden / change the legal situation of a person concerned) and don’t play a key role in investigations – it was an error to include them in the Regulation.

A11.6.3 Impact of procedural guarantees

In relation to the impact of the provisions on procedural guarantees introduced by Regulation 883/2013, many stakeholders (primarily OLAF, given the nature of the impact on investigative processes) spoke of the direct impact (both positive and negative) on investigations:

• An OLAF investigator suggested that the procedural guarantees introduced by Regulation 883/2013 are too burdensome for the purposes of an OLAF investigation, which impacts adversely on the efficiency of an administrative investigation.
• Another investigator suggested that the procedural guarantees contribute significantly to the operational work of the OLAF investigative units.
• An investigator reiterated this point, suggesting that the provisions on procedural guarantees make things much slower and less effective for investigators.
• A representative from an OLAF non-investigative unit noted that the provisions on procedural guarantees translated into additional procedures and created an administrative burden for investigators, which translates into a greater workload for investigators (which subsequently means fewer investigations).
• Another OLAF investigator noted the impact on the operational work of investigation units, suggesting that the requirement for procedural guarantees had an adverse impact on the efficiency/quality of investigations.
• Finally, another OLAF investigator submitted that the procedural guarantees improved neither the quality nor efficiency of investigations. On the contrary, they generated opportunities for external lawyers to get involved in the process which slowed down the process, created pressure on investigators to close cases within a particular timeframe and subsequently impacted adversely on the quality of those investigations.

The evidence from the semi-structured depth interviews with stakeholders has been supplemented with responses to the online survey. Specifically, survey respondents
were asked for their views regarding a range of statements related to the appropriateness and application of procedural guarantees and safeguards. Among the findings, around 80 per cent of respondents agreed that procedural guarantees under Article 9 of the Regulation are clear, while almost 75 per cent agreed that the definition of procedural guarantees under Article 9 contributed to strengthening the rights of individuals subject to investigations (Figure 57).

**Figure 57. Extent to which survey respondents agreed with the following statements**

![Survey Results Graph]

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 85-87.

Survey respondents (OLAF, associations of lawyers and prosecutors, EU control bodies and ‘other’ respondents) were also asked whether they associate obstacles or shortcomings with certain elements of Regulation 883/2013 linked to the protection of procedural rights. Almost two-thirds of respondents did not perceive any shortcomings or obstacles related to the definition of procedural rights under the Regulation.

Finally, survey respondents were asked about the outcomes of Regulation 883/2013 in relation to procedural guarantees. Similar proportions/numbers (45-47 per cent, n=61-64) agreed or strongly agreed that the introduction of clarifications and new provisions regarding procedural guarantees under the Regulation triggered some initial/emerging impacts with regard to the following:

- better protection of fundamental rights as guaranteed by EU Charter and legislation;
- better protection of personal data;
• reinforced reliability of OLAF’s reports and recommendations; and
• enhanced transparency of OLAF’s investigative work resulting in increased public trust in OLAF’s activities and improved public perception.

Figure 58. Extent to which survey respondents agreed with the following statements regarding the impact of procedural guarantees

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 138-140.

A11.7 Data protection and confidentiality

Survey respondents were asked for their views on the clarity and impact of the provisions of Regulation 883/2013 related to confidentiality and data protection:

• In relation to provisions of the Regulation regarding confidentiality/data protection (Article 10), almost three-quarters (74 per cent, n=63) agreed or strongly agreed these are clear.
• In relation to the definition of confidentiality and data protection provisions (Article 10), almost two-thirds (64 per cent, n=54) agreed or strongly agreed this definition contributed to strengthening the protection of personal data of individuals subject to investigations.
Figure 59. Confidentiality and data protection – the extent to which survey respondents agreed with the following statements

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 85-87.

Respondents (OLAF\textsuperscript{485}, associations of lawyers and prosecutors, EU control bodies and 'other' respondents) were also asked whether they associate obstacles/shortcomings with specific elements of Regulation 883/2013 linked to confidentiality and data protection (Figure 60):

- In relation to the definition of confidentiality and data protection in the Regulation (Article 10), almost two-thirds (63 per cent, n=24) of respondents did not perceive any obstacles/shortcomings. Of the 29 per cent (n=11) respondents that did perceive obstacles/shortcomings, one suggested Article 10 is ‘superfluous’ compared to Regulation 45/2001.
- In relation to the tasks, roles and responsibilities of the OLAF Data Protection Officer, almost half (49 per cent, n=19) did not perceive any obstacles/shortcomings. Of the 28 per cent (n=11) respondents that did perceive obstacles/shortcomings, one commented that the tasks, roles and responsibilities of OLAF’s Data Protection Officer are not clear.

\textsuperscript{485} OLAF respondents constituted the bulk of the sample for this question (32 of 38-39 respondents) and so the data for these questions will disproportionately reflect the views of OLAF staff.
Figure 60. Confidentiality and data protection – extent to which survey respondents identified obstacles/shortcomings

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 38-39.

Finally, survey respondents were asked about the impact of Regulation 883/2013 in relation to confidentiality and data protection. Forty-six per cent (n=64) of respondents agreed or strongly agreed that Regulation 883/2013 had led to the better protection of personal data, with only 4 per cent (n=6) disagreeing (Figure 61).

Figure 61. Extent to which survey respondents agreed that Regulation 883/2013 led to the better protection of personal data

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 140.
A11.8 Role and mandate of the Supervisory Committee

A number of points regarding the role and mandate of the Supervisory Committee were raised by stakeholders during the course of the interviews, including:

- There is lack of clarity in the Regulation on the mandate of the Supervisory Committee, including the information it should be entitled to and the activities it should conduct. The Regulation is vague: it says its role is to ensure independence of the investigative function, so some parties have argued that this requires access to individual investigations, whereas others have disagreed, since the Supervisory Committee is not a Court of Justice. The Joint Opinion of the Legal Services of the European Parliament, the Council and the Commission, of 12 September 2016, confirms that Regulation 883/2013 does not empower the Supervisory Committee to review individual investigations. (OLAF Head of Unit).

- At the beginning, the concept of a Supervisory Committee was to ‘supervise’ the independence of OLAF in relation to the Commission. The mandate of the Supervisory Committee initially was to ensure OLAF’s independence from the Commission so that the Commission would not impede OLAF’s investigations. The Supervisory Committee has interpreted its mandate now in a very specific way: both supervise OLAF but also, under political pressure from the European Parliament, to ‘criticise’ OLAF in all its aspects. (MEP).

- Regarding the role of the Supervisory Committee, if they have a control power over OLAF’s activities, it will seriously impair the functioning of the Office. But Article 15 is not clear on what the Supervisory Committee’s role should be. A wording along the lines of "Monitoring the implementation of investigations in order to make sure that investigations are done independently" would be clearer. (OLAF investigator)

- The role of the Supervisory Committee is certainly not clear enough. The Regulation defines its function as a supporting function and a form of control function. In practice, its supporting role has been minimal. (Representative from OLAF non-investigative unit)

- The implementation of the Article 15 is difficult. The way the Supervisory Committee interpret their mandate is not the same as the way OLAF does. This could be clarified. (Representative from OLAF investigative support unit)

Stakeholders also suggested that this lack of clarity over the Supervisory Committee’s role and mandate had contributed to a deterioration in the relationship (and cooperation) with OLAF:

- The Supervisory Committee’s mandate is not sufficiently developed under the current Regulation. The Supervisory Committee could assume such a role (of supervision) but the relationship between the two institutions is rather tense. In the past there have been difficult times, characterised by a reluctance to cooperate. (Representative from OLAF non-investigative unit)

- The mandate of the Supervisory Committee in Regulation 883/2013 is not helpful, or conducive to good cooperation for either side. (Representative from OLAF non-investigative unit)

- Relations with the Supervisory Committee have not been very clear and in recent years have become strained. The provisions in the Regulation are not clear on what the Supervisory Committee is supposed to do, and the parties involved in interpreting those provisions had different views. (Representative from OLAF non-investigative unit)

- The Supervisory Committee’s role is poorly defined in the Regulation but, in practice, in the past or now with Regulation 883/2013, there have always been tensions between OLAF and the Supervisory Committee. (OLAF investigator)

- The (bad) state of communication between the Supervisory Committee and OLAF undermines the credibility of the fight against fraud. (EU IBOA)
In an interview with a member of the Supervisory Committee itself, a number of points were raised regarding the alternative interpretations of its role and mandate and the tools and information available to the Supervisory Committee to fulfil its role/mandate:

- The Supervisory Committee’s role is not described well enough in the Regulation – is the Supervisory Committee expected to act as an advisory board or a supervisory board?
- There are differences in the interpretation of the Regulation’s articles on what the Supervisory Committee’s role and mandate is. OLAF has a different view to that of the members of the Supervisory Committee.
- Nothing is clear on the Supervisory Committee’s role in the Regulation and, as a result, the Committee was not given access to the case management system at OLAF so the Supervisory Committee cannot make its own inquiries – it was given no access to anything.
- Ultimately the Supervisory Committee’s role and mandate in the Regulation is not sufficiently clear, so the Committee created its own, but to perform its function it needs access to the OCM and OLAF’s systems.
- No other control body is supervising the investigative function of OLAF. The Supervisory Committee has a mandate to supervise the investigative function of OLAF and its respect of procedural guarantees and individual rights but its work has been hindered.
- If the Supervisory Committee is to be provided with sufficient tools/powers to safeguard the independence of OLAF, the following would be required:
  - an independent budget;
  - full-time members, or at least a full-time Chair; and
  - access to cases via the case management system.

Respondents to the online survey (OLAF and the European Commission) were asked for their views regarding a range of statements concerning governance changes linked to the implementation of the Regulation (in particular clarifications with regard to the role of – and working arrangements with – the Supervisory Committee:

- In relation to the clarifications with regard to the role and tasks of the Supervisory Committee (Article 15), 40 per cent (n=12) disagreed that this led to a more effective and efficient cooperation between the Supervisory Committee and OLAF. The same proportion didn’t know if this was the case.
- In relation to clarifications regarding modalities for OLAF to report to the Supervisory Committee on investigations, more than one-third (36 per cent, n=11) disagreed that these led to a more effective and efficient cooperation between the two bodies. The same proportion did not know what impact this had.
- In relation to the definition of working arrangements between the Supervisory Committee and OLAF, 41 per cent (n=12) disagreed that this enabled a successful cooperation between the two bodies. More than one-third (35 per cent, n=10) didn’t know.

\[486\] OLAF respondents constituted the bulk of the sample for this question (27 of 30 respondents) and so the data for these questions will disproportionately reflect the views of OLAF staff.
Respondents (OLAF and the European Commission) were also asked whether they associate obstacles or shortcomings with certain specific elements of Regulation 883/2013 linked to the governance of OLAF. The most commonly-cited obstacles and shortcomings were associated with the definition of the role and tasks of the Supervisory Committee (with 50 per cent, n=15, citing this as an obstacle/shortcoming), the content of the Supervisory Committee’s recommendations (47 per cent, n=14) and the working arrangements between OLAF and the Supervisory Committee (43 per cent, n=13). The aspect of the governance of OLAF with which survey respondents were least likely to associate obstacles or shortcomings was the definition of the mandate and powers of the OLAF Director General, with only one respondent suggesting that there were obstacles/shortcomings in relation to this aspect of Regulation 883/2013 (Figure 63).

487 OLAF respondents constituted the bulk of the sample for this question (27 of 30 respondents) and so the data for these questions will disproportionately reflect the views of OLAF staff.

Figure 62. Supervisory Committee – the extent to which survey respondents agreed with the following statements

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 29-30.
Finally, survey respondents (OLAF and the European Commission) were asked about the outcomes of Regulation 883/2013 in relation to the clarification of the role and tasks of the Supervisory Committee and working arrangements with OLAF. A quarter (n=8) of respondents agreed that the governance provisions of Regulation 883/2013 had increased the accountability of OLAF’s investigative function, while close to 37 per cent (n=11) didn’t know. Fewer respondents (13 per cent, n=4) agreed that these governance provisions increased the effectiveness of OLAF’s investigations in terms of the duration of investigations, while close to one-third (33 per cent, n=10) disagreed. Finally, 17 per cent (n=5) of respondents agreed that the governance provisions of the Regulation increased the transparency of OLAF’s functioning, while around one-in-five (23 per cent, n=7) disagreed and close to one-third (30 per cent, n=9) didn’t know (Figure 64).

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OLAF respondents constituted the bulk of the sample for this question (27 of 30 respondents) and so the data for these questions will disproportionately reflect the views of OLAF staff.
Figure 64. Extent to which survey respondents agreed with the following statements on impact of Regulation 883/2013 on Supervisory Committee and working arrangements with OLAF

<table>
<thead>
<tr>
<th>Statement</th>
<th>Strongly agree</th>
<th>Agree</th>
<th>Neither agree nor disagree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>Don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increased the accountability of OLAF’s investigative function</td>
<td>27%</td>
<td>17%</td>
<td>13%</td>
<td>7%</td>
<td>37%</td>
<td></td>
</tr>
<tr>
<td>Increased effectiveness of OLAF’s investigations in terms of duration of investigations</td>
<td>18%</td>
<td>17%</td>
<td>33%</td>
<td>7%</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>Increased transparency of OLAF’s functioning</td>
<td>17%</td>
<td>23%</td>
<td>25%</td>
<td>7%</td>
<td>30%</td>
<td></td>
</tr>
</tbody>
</table>

Source: Online survey Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Number of respondents = 30.
Annex 12 The evaluation criteria and corresponding evaluation questions

A12.1 Effectiveness

1. To what extent have the specific objectives of Regulation 883/2013 been met so far? To what extent have the different components of the Regulation contributed to achieving the specific objectives of Regulation 883/2013 and to an improved protection of EU financial interests (recovery/financial corrections, prosecution, indictment and deterrence)?

2. Which are the external factors beyond the influence of OLAF (including the follow-up responsibilities – once OLAF concludes an investigation - of Member States and other Commission services and EU institutions, bodies, offices and Agencies) that have contributed to or influenced the achievement of the objectives of Regulation 883/2013, and how?

3. To what extent do the legal instruments contained in Regulation 883/2013 provide OLAF with sufficient tools to accomplish its mandate?

4. What are the shortcomings that can be identified in the different components of Regulation 883/2013 or in their implementation, which negatively affect the achievement of the Regulation's objectives?

A12.2 Efficiency

5. To what extent has the implementation of Regulation 883/2013 impacted on OLAF's resources and the use of those resources? And on the resources of other actors in the application of Regulation 883/2013?

6. To what extent are the tools available in Regulation 883/2013 for the conduct of OLAF administrative investigations, their follow-up and the successful cooperation with other entities efficient for the achievement of the overarching objective of protecting the financial interests of the EU?

A12.3 Coherence

7. To what extent does the current set of rules in Regulation 883/2013 provide OLAF with a coherent legal framework to accomplish its tasks? In particular, to what extent has the Regulation achieved a proper balance between investigative powers and procedural rights? And to what extent has Regulation 883/2013 achieved a proper balance between independence, cooperation, supervision and control?

8. Q8: To what extent does Regulation 883/2013 fit into the wider EU policies and current policy developments for the protection of the EU's financial interests?

A12.4 Relevance

9. To what extent have the specific objectives of Regulation 883/2013 proved to be relevant for the overarching objective of protecting the financial interests of the EU?

10. To what extent have the tools and control mechanisms introduced by Regulation 883/2013 proved to be relevant to achieve the specific objectives?

11. To what extent are the specific objectives of Regulation 883/2013 relevant in the context of wider EU policies and current policy developments for the protection of the EU's financial interests?

A12.5 Outlook:

12. In the current institutional and legal framework, and in the light of current policy
developments if shortcomings regarding the protection of the financial interests of the Union are identified in Regulation 883/2013 or its application, how could they be addressed?

13. To what extent should Regulation 883/2013 be reviewed in the new institutional context emerging from the negotiations on the EPPO Regulation?
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