

**SUPERVISORY COMMITTEE**



**OLAF SUPERVISORY COMMITTEE**

**OPINION No 2/2017**

Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19)

Brussels 28 September 2017

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## Introduction

1. The European Antifraud Office (OLAF) was established 18 years ago, in 1999, as an administrative investigation body with the aim of fighting fraud, corruption and other illegal activities affecting the financial interests of the European Union. From its inception, the extent and impact of OLAF's powers and composition have been somewhat overshadowed by the possible creation of a European Prosecutor's Office, on which legislative work began in 2001, spearheaded by the Commission and the European Parliament.

Finally in June 2017 the Council announced the adoption of the Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') by October 2017 conditional on the prior consent of the European Parliament. In that event, the Commission would certainly envisage revising the OLAF Regulation, a process which could overlap with the current evaluation exercise. As a consequence, a thorough analysis of how OLAF's powers and composition would interact with the future EPPO goes beyond the scope of this opinion. However, given OLAF's history, its investigations were strongly influenced by the future role that the EPPO would play in the European area of justice; therefore references to it in this evaluation seem unavoidable.

2. In March 2016 the European Commission partially waived the immunity of the Director-General of OLAF from legal proceedings in response to a request from the Belgian national judicial authorities on the basis of the principle of sincere cooperation. The Director-General was under a national criminal inquiry over allegations that he was responsible for unlawful interception of telephone conversations in his official capacity during an OLAF investigation<sup>1</sup>.

This extremely serious and unprecedented situation requires close scrutiny of the application of the Regulation to the investigative measures that OLAF is entitled to undertake and to the protection of fundamental rights. The way in which the paramount principles of independence, supervision, legality check, impartiality, integrity, good governance and accountability were implemented demand careful consideration.

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<sup>1</sup> Order of the President of the General Court 20 July 2016 in Case T-250/16 R Director-General of the European Anti-Fraud Office (OLAF) v European Commission: *Faits à l'origine du litige "des allégations d'écoutes téléphoniques illégales"* (point 15). The Order dismissed a second application brought by the Director-General of OLAF asking the President of the Court to suspend the operation of the Commission Decision as a matter of urgency in order to avoid serious and irreparable harm to his own independence and the independence and proper working of OLAF.

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As far as the waiver of immunity was concerned, the Director-General brought an action before the General Court of the Court of Justice of the European Union seeking the annulment of the Commission decision on the grounds that the measure was liable to call into question his independence<sup>2</sup>. The Supervisory Committee (SC) is not acquainted with the detailed submissions of either party to the General Court, before which the main action brought by the Director-General is still pending. The matter also raises questions about the adequacy of the SC's powers to safeguard the independence of OLAF.

3. Since 1999, the OLAF Regulation has been amended twice. In September 2013 Regulation No 883/2013 replaced the first Regulation (Regulation No 1073/99). The aims of the amendment were to improve OLAF's operational efficiency, increase its independence and strengthen respect for procedural rights and guarantees during investigations.

Three years later, in October 2016, Regulation No 883/2013 underwent early amendment without waiting for the assessment period set in the reform to make changes to the independence of the Secretariat of the SC and the SC budget. The amendment, enacted by Regulation No 2016/2030, resulted in unforeseen adverse challenges for the SC's work and institutional position and, as a consequence, on the suitability of the mechanisms for supervision and reinforcement of OLAF's independence.

The SC will give further consideration to the second reform in the near future.

### Methodology

4. The SC's core remit of regular monitoring of OLAF's investigative function in order to strengthen the Office's independence was to a certain extent clarified by the new Regulation. The new wording gives the SC the task of supervising OLAF's 'proper exercise' of the competences conferred upon it by the Regulation<sup>3</sup>. However, the SC's feeling is that the mechanisms provided for this supervision remain ambiguous and further clarification is necessary, in particular on the application of procedural guarantees and the protection of fundamental rights.

The SC is aware that in the new Regulation the legislator removed from the SC responsibility for *ex ante* legality control, which was subject of the EU General Court ruling in case T-48/05 *Franchet and Byk v. Commission*. The Court ruled that the SC must be consulted prior to transmission of case reports to national judicial authorities for the sake of protecting fundamental rights<sup>4</sup>. The SC believes there is still a need for clear rules on the mechanisms by which it evaluates OLAF's investigative function after the closure of investigations.

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<sup>2</sup> Ibid. The final decision on this matter is still pending before the General Court.

<sup>3</sup> See the first paragraph of Article 15(1) *in fine*.

<sup>4</sup> See the last paragraph of Article 11(7) of Regulation No 1073/99 and article 17(5)(b) of Regulation No 883/2013. See Rules of Procedure of the OLAF SC (OJ L 308 of 24.11.2011) Article 13.5 on "Action to be taken

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5. Drawing on the experience the SC acquired in the regular monitoring of investigations and its role, in January 2017 the SC began the process of examining:

- 30 opinions on cases ‘dismissed’ by OLAF;
- 3 final case reports of closed cases;
- reports of complaints received by OLAF from 2014 to 2017;
- information on OLAF’s reports and recommendations forwarded to institutions and to judicial authorities of the Member States that were not followed for the period 2014 to 2016;
- the investigation policy priorities and annual work plans for the period 2014 to 2017;
- 218 reports on investigations lasting more than 12 months for the period January 2017 to April 2017.

In addition the SC examined:

- cases brought before the Court of Justice relating to OLAF,
- European Ombudsman decisions on complaints concerning OLAF,
- the reports and opinions of previous SCs.

Selection of information on OLAF casework that the SC analysed was made by OLAF.

## CHAPTER I

### The legal framework in which OLAF operates

#### The role of OLAF – the legislative background

6. The scope for OLAF’s field of competence and Regulation No 883/2013 itself are confirmed by Article 325(4) TFEU empowering the institutions to adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union for an effective and equivalent protection of the EU's financial interests in all Member States and all the EU’s Institutions, bodies, offices and agencies. Regulation No 883/2013 therefore sets administrative investigations led by OLAF within the scope of protection of financial interests of the EU.

Article 1(4) of Regulation No 883/2013 gives OLAF the duty to conduct internal administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interest of the EU. To that end it investigates serious matters relating to the discharge of professional duties constituting a dereliction of the obligations of

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on information supplied by the Director General", in particular on the mechanism that was established in agreement with OLAF to secure compliance with fundamental rights and procedural guarantees on "cases requiring information to be forwarded to the judicial authorities of a Member State".

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officials and other servants of the Union liable to result in disciplinary or criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or staff members of institutions, bodies, offices or agencies not subject to the Staff Regulations.

Article 1(4) also gives OLAF competences to investigate conduct affecting the financial interests of the Union, thereby leaving investigations of any other misconduct outside of the scope of the Office's investigation. However, the OLAF Regulation confirmed that the responsibility of the Office extends beyond the protection of the financial interests to include all activities relating to the protection of Union interests against irregular conduct liable to result in administrative or criminal proceedings. OLAF may also launch administrative investigations to verify whether failure by an official or former official to comply with his obligations under the Staff Regulations has occurred, without explicitly limiting the scope of investigations to conduct affecting the financial interests of the Union<sup>5</sup>.

In practice, OLAF investigations focus on fraud (which is a category of criminal law). At the same time, the legislator left the way open for the evidence gathered during administrative investigations to be sent to judicial authorities of the Member States. Furthermore, OLAF gives recommendations to take a specific action in the national disciplinary, administrative, financial and/or criminal proceedings. OLAF therefore conducts investigations which have continuation in national criminal proceedings; moreover, the evidence gathered has the same value as evidence of administrative bodies of the Member States<sup>6</sup>.

In this context, the adoption of the Directive for the Protection of the Financial Interests in July 2017 broadened the criminal-law competence for the protection of the EU's financial interests and expanded the scope of OLAF investigations to cover VAT. This will have an impact on OLAFs remit

7. Regulation No 883/2013 contains several links between OLAF investigations and criminal proceedings. This makes OLAF investigations a quasi-preparatory phase of criminal proceedings<sup>7</sup>.

Future investigations led by OLAF will have a direct link to criminal proceedings in the close relationship and information exchange with the EPPO<sup>8</sup>. Especially if OLAF will provide operational support to the EPPO<sup>9</sup> or will conduct administrative investigations, OLAF will do so exclusively for the purpose of criminal investigations and proceedings run in a Member State. Such cases will be subject to amendment of Regulation No 883/2013 so that the

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<sup>5</sup> The SC noted this already in its Opinion No 4/2011, p. 4.

<sup>6</sup> Article 11(2) of Regulation No 883/2013

<sup>7</sup> Regulation No 883/2013 –including Recitals (6) and (29) Article 11(2)

<sup>8</sup> Article 101(1) of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (as set out in Council document 9941/17 of 2017-06-30)

<sup>9</sup> Ibid. Article 101(3) (a).

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procedural rights and guarantees and rules on evidence would reflect requirements given by the relevant Member State's national law.

8. The proposal for establishment of the EPPO did not clarify OLAF's mandate or its powers. If the EPPO proposal is approved in its current version, OLAF would be competent for:

- a) investigations under 'the current mandate' in all EU Member States (including those not taking part in the EPPO);
- b) investigations below the threshold set for the EPPO (general threshold of EUR 10 000 or the special threshold of EUR 10 million in the case of VAT fraud) in the Member States taking part in the EPPO;
- c) investigations delegated to OLAF by EPPO and actions requested by EPPO.

In the cases under c), it has not been clarified yet whether OLAF would open its own investigation or would somehow work within the procedural framework of the EPPO. The opinion of the SC is that these crucial questions of competence must be fully resolved by the OLAF Regulation.

The opinion of the SC is that an amendment to Regulation No 883/2013 should unify grounds for all OLAF investigations in order to avoid fragmentation and interpretation difficulties, and to strengthen clarity of law and procedural guarantees. The unified legal framework should also contain an exhaustive code of OLAF's powers. The Regulation will need to pay special attention to clarification of powers with regard to the EU institutions and the division of competences between OLAF and the future EPPO.

### **Legal instruments available to OLAF**

9. In the protection of the EU's financial interests and the application of antifraud rules, the OLAF Regulation is inextricably linked to Regulations No 2185/96 and No 2988/95 and complemented by many other legal instruments such as decisions, sectoral rules, interinstitutional agreements, guidelines, instructions and administrative arrangements.

In particular, the new Regulation No 883/2013 introduced the 'guidelines on investigation procedures', a document giving practical guidance to the staff of the Office on: (i) the conduct of investigations; (ii) the procedural guarantees and rights of persons concerned and witnesses; and (iii) details on the internal advisory and control procedures to be followed, including a legality check. These guidelines were given a primary role in Regulation No 883/2013 and conceived as a way of enabling the Director-General to act independently. Investigators are bound by these guidelines, which need to be submitted to the SC before being adopted (see recitals 18 and 19 and Article 17(8) of Regulation No 883/2013) and sent to the institutions. Article 41 of the Charter of Fundamental Rights, which deals with good administration made these rules binding on OLAF itself.

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10. The ‘guidelines on investigations procedures’ were adopted in September 2013; they comprise a body of 28 articles, some of which simply reproduce existing legal provisions. They were published on the Office’s website for the sake of transparency, in conformity with the new Regulation<sup>10</sup>.

A major impact of the guidelines was the establishment of a new structure in OLAF dealing with the internal organisation and repartition of tasks for the different investigation units including the creation of what is known as the Investigation Selection and Review Unit. The Unit serves as the initial filter for the analysis of incoming information, as the body for decision making on cases to be opened. It also performs the legality check during the investigation and serves as the final reviewer of case reports and decision-making on OLAF recommendations.

The SC expresses its doubts about the effectiveness and transparency of this structure and calls for the legislator to reflect on consequences that such a structure and its flexible legal basis may have for the rights of individuals. The legislator needs to establish a framework of permanent structures to secure stability of the investigation service.

The SC acknowledged that the body of 28 articles that formally constitute the guidelines on Investigation Procedures was supplemented from its adoption in 2013 by numerous guidelines to OLAF staff issued between 2014 and 2016, including:

- guidelines /vademecum on case selection;
- general instructions on the transmission of cases;
- instructions concerning the continuous conduct of investigations
- procedures for splitting and merging investigations and coordination cases;
- procedures on allegations from persons concerned regarding the disclosure of confidential information;
- instructions on possible closure of investigations without giving the opportunity to comment;
- instructions on separating the final report and accompanying recommendations;
- guidelines on financial monitoring.

Given the above, the SC considers that the patchwork of rules does not provide the conduct of investigations with the transparency intended by the legislator and that the number of instructions may mislead OLAF staff, and specifically investigators. This situation could be prevented by having comprehensive investigation procedures laid down in the Regulation.

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<sup>10</sup> See Recital 18 and Article 17.8 last para. of Regulation No 883/2013.



## CHAPTER II

### **The investigation lifecycle: the impact of the new Regulation No 883/2013 on the effective conduct of investigations by OLAF**

11. OLAF has to perform its investigations in accordance with a series of rules and principles. These include: independence, legality, proportionality, subsidiarity, impartiality, objectivity, fairness, a reasonable time-scale, observance of the presumption of innocence, confidentiality and professional secrecy. The new Regulation improved some of those rules, in particular on the protection of fundamental rights and procedural guarantees. However, principles applying to the investigatory function remain scattered among numerous legal instruments<sup>11</sup>, making clarification necessary. The guidelines on investigations procedures adopted by the Director-General in accordance with Article 17(8) of the new Regulation were not able to replace the legislator's role in setting clear investigation rules.

The SC examined the implementation of OLAF's new powers and the principles governing the investigatory function, taking into account the entire lifecycle of a case and in the light of the Charter of Fundamental Rights'

### **The opening of investigations: expression of OLAF's independence**

12. The SC always pays particular attention to the key moment of the proceedings i.e. the decision whether to open or to dismiss an investigation. This is not only because the Director-General needs to take such a decision in full independence, without any pressure from any government, institution or individual, but also due to the consequences that this decision has on EU and Member States' antifraud investigation policy and on the rights of individuals under investigation.

13. In contrast to the wording of the former Regulation<sup>12</sup>, Article 5 of the new Regulation enshrined the principle of opportunity in the investigation process by: (i) setting the criteria for opening investigations; and (ii) giving the Director-General of OLAF a large margin of discretion prior to decide whether or not is it opportune to open an inquiry. The notion of 'sufficient suspicion' that European jurisprudence established as a precondition for the opening of an investigation<sup>13</sup> was integrated in the text of the Regulation and complemented by other decision-making factors such as the investigation policy priorities, the annual management plan, and the need for efficient use of resources and for proportionality of the

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<sup>11</sup> Including Regulation No 2988/1995 and Regulation No 2185/1996, the Interinstitutional Agreement, Administrative arrangements between the institutions and OLAF, Commission Decision 1999/352/EC and its subsequent amendments,

<sup>12</sup> Article 5 of Regulation No 1073/1999 merely indicated that external/internal investigations "shall be opened by a decision of the Director of the Office"

<sup>13</sup> See cases C-15/00 Commission of the European Communities v European Investment Bank and C-11/00 Commission of the European Communities v European Central Bank.



means employed. These standards were even widened with regard to the freedom of choice granted to the Director-General for internal investigations<sup>14</sup>.

The SC finds this variety of criteria for opening investigations to be too flexible and may put at risk legal certainty and fair treatment of incoming information by OLAF, unless mechanisms are put in place to counterbalance any potential abuse of discretion or undue external pressure on the Director -General of OLAF.

The wide discretion granted to the Director-General by the new Regulation at this key moment should be reconsidered by the legislator and certainly balanced by the obligation of regularly inform the SC of his reasoned decision when he decides not to open an investigation. This would serve as a mechanism of accountability and strengthening of OLAF's independence.

14. Article 5 of the new Regulation did not establish a subsequent duty for the Director-General to inform the competent authorities of the Member State or the institution concerned when he decides whether or not open an external or internal investigation<sup>15</sup>. This may lead to risks of loss of information and impunity of offenders. The legislator needs to solve this problem of information loss because it may deprive the Member States of the possibility to use that information as grounds for their own investigation policy

15. The SC examined whether the internal implementing rules of this selection and opening stage adopted in the 'guidelines on investigation procedures' ensured transparency and the independence of the investigation process. This is of particular importance given the forthcoming establishment of the EPPO and its interaction with OLAF in the opening /dismissal of cases and over access to information.<sup>16</sup>

In the monitoring experience of the SC, it was found that the assessment of the broad criteria referred to above for allegations and incoming information was carried out by a very limited number of staff in OLAF in the Investigation, Selection and Review Unit, without making consistent use of the staff members who are experts in the relevant areas of OLAF's work in the investigation units and investigative support units. Given these units' expertise in each operation sector, their involvement should be always required when incoming information is being assessed. The collection, evaluation, treatment, analysis and dissemination of

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<sup>14</sup> Last paragraph of Article 5(1) of Regulation No 883/2013 'account shall be taken of the institution, body, office or agency best placed to conduct them, based, in particular, on the nature of the facts, the actual or potential financial impact of the case, and the likelihood of any judicial follow-up'.

<sup>15</sup> Article 5(5) and (6) of Regulation No 883 reads 'the DG ...may without delay send any relevant information...'.

<sup>16</sup> See Recital (103) and Articles 39(4) and 101(3) of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (as set out in Council document 9941/17 of 2017-06-30)



information must be ensured by a strong and well-structured case information and management system that is to be used as a working tool by investigators and not as a purely information storage system.

With the experience gained by OLAF since its establishment, the Regulation should better indicate the main areas of OLAF's investigations (which include structural funds, agriculture, own resources, customs, external aid, corruption...). This would clarify OLAF's investigatory rules and powers in those sectors. If the Regulation gives OLAF a transparent structure, this will support independence in the proper exercise of the Office's powers and provide a sound foundation for OLAF to work together with the EPPO.

### **The conduct of investigations: the investigative measures that OLAF is entitled to undertake**

16. The close connection between administrative and criminal law in the protection of the EU's financial interests was a source of disorientation for OLAF when implementing its powers<sup>17</sup>. This occurred in particular when OLAF applied excessively high criminal law investigation standards to investigating acts of an administrative nature and, conversely, when it applied administrative standards to investigation activities that could require judicial authorisation<sup>18</sup>.

17. Regulation No 883/2013 was unable to surmount this problem, which was somewhat impaired by the new possibility to combine both internal and external aspects in one single investigation without having a comprehensive framework of investigation actions in place<sup>19</sup>. Administrative investigations encompass any inspection, check or 'other measure' undertaken by OLAF as provided for in Articles 3 and 4. These articles in principle appear to contain an exhaustive group of investigation measures for external and internal investigations respectively, including on-the-spot checks and inspections, immediate and unannounced access to information held by the institutions, oral information from members and staff members. The new Regulation explicitly included other investigation measures such as the conduct of interviews of a person concerned or a witness. However, the approach chosen by the legislator in drafting the provisions left room for interpretation on how to conduct these investigation measures and for which kind of investigations they were to be used for, i.e.

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<sup>17</sup> From the SC's monitoring experience, including the evidence value of OLAF final report in the Member States. Information sent by OLAF to the SC from 2012 to 2016 on 142 cases closed with judicial recommendations and on recommendations by OLAF not followed up by the judicial authorities of the Member States.

<sup>18</sup> See European Ombudsman Decision in case 1663/2014/OV on OLAF's conduct in an external investigation.

<sup>19</sup> Article 7(4) of Regulation No 883/2013 reads 'When an investigation combines external and internal elements articles 3 and 4 shall apply respectively'.

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internal/external/coordination. This was a source of inconsistencies in the application of the Regulation and created grounds for complaints<sup>20</sup>.

18. The European Parliament has requested on several occasions that all of OLAF's investigatory powers be grouped in a single Regulation<sup>21</sup>. The SC agrees with this ambitious project, particularly in the light of the establishment of the EPPO. In this new context, comprehensive and harmonised grounds for OLAF investigations, providing clear rules on its competences and on procedural rights and guarantees, are desirable for all types of OLAF investigations. Moreover, the procedural rights and guarantees should be limited only by well-reasoned deferrals<sup>22</sup> or immunities deriving from the Treaties<sup>23</sup>.

19. In the short term, the SC promotes maximum harmonisation of rules for all OLAF investigations and competences in order to guarantee the foreseeability of its acts and guarantee that the persons concerned and other subjects involved in investigations are equal before the law. The SC considers developments in the field of protection of financial interests of the EU has helped to overcome the distinction between internal and external investigations. However it brings practical challenges in the form of unequal guarantees for persons concerned and different investigative powers of OLAF. For similar reasons the SC does not support leaving important investigative competences to working arrangements between OLAF and the EU institutions: this causes fragmentation of OLAF's investigative rules and powers, which, in turn, lowers the protection of the EU's financial interests.

20. Drawing on its monitoring experience, the SC considers that OLAF's investigations must be conducted on the basis of clear means of action; procedural weaknesses may result in legal obstacles to opening of investigations by national authorities or in acquittals.

The legislative technique used by the legislator when drafting the provisions on the Commission's powers of investigation in competition law has proved suitable for achieving effective investigations in that domain. The technique could therefore serve as a guide for amending the OLAF Regulation<sup>24</sup>.

<sup>20</sup> See SC Decision of the European Ombudsman in case 2676/2009/ANA, preliminary-ruling procedures and direct actions cases pending against OLAF before the ECJ. Information sent from OLAF to SC on 13 complaints to OLAF filed in 2014, 2015 and 2016 regarding procedural guarantees under OLAF's complaint procedure made public on OLAF's internet site on 20 January 2014.

<sup>21</sup> See Resolutions of June 15 June 2006 on Protection of the Financial Interests of the Communities and the Fight against Fraud-2004 Annual Report and of 19 February 2008 on PFI and the Fight against Fraud- Annual Reports 2005 and 2006.

<sup>22</sup> Limitations set out in Article 52(1) of the Charter of Fundamental Rights of the European Union.

<sup>23</sup> In particular Protocol No 7 on the privileges and immunities of the European Union.

<sup>24</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty: Chapter V 'Powers of investigation'.

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21. The SC finds that OLAF does not have all the investigative tools it would need to assist the forthcoming EPPO to investigate contemporary forms of crime, financial crime and irregularities especially. Any investigator dealing with financial fraud or corruption needs to have access to information on money transfers. OLAF would need: (i) modern operative tools enabling investigation of crime affecting the EU's financial interests that is committed online; (ii) a legal basis enabling it to request access to bank accounts and similar information on money transfers (such as via PayPal). Where approval by a court or other authority is needed, the national authorities should provide OLAF with all assistance necessary, in line with national law, in order to avoid delays.

22. The recently adopted Directive on the Protection of the Financial Interests of the EU included VAT tax fraud under the EU's financial interests as an own resource<sup>25</sup>. As OLAF will have clear competences and tools to investigate intra-EU VAT fraud it will need access to EUROFISC and VIES<sup>26</sup> data<sup>27</sup>. Provision will also have to be made for promoting exchange of information relevant to OLAF investigations with financial intelligence units (FIUs). Closer cooperation with FIUs, including exchange of information on money laundering, should be possible anyway because FIUs operate as administrative authorities in most EU countries.<sup>28</sup>

Removing the obstacles to effective cooperation between tax administrations and customs, and with law enforcement bodies and financial institutions at national and EU level is a part of the Commission's strategy to combat VAT fraud<sup>29</sup>. The SC welcomes such an approach.

23. The SC's opinion is that the Commission should explore the possibility of expanding OLAF's competences, especially into the closely related field of protection of intellectual property rights in relation to imports into the EU single market. Closer work and exchange of operative information with the European Union Intellectual Property Office could be considered as well.

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<sup>25</sup> See Case C-539/09 *Commission v Germany*, para. 72; Case C-617/10 *Akerberg Fransson*, para. 25, 26; Case C-105/14 *Taricco*, para. 39.

<sup>26</sup> The EUROFISC network was established by a regulation on administrative cooperation and combating VAT fraud (Council Regulation 904/2010 (OJ L268 of 12/10/2010, p.1). It is a mechanism enabling Member States to enhance their administrative cooperation in combating organised VAT fraud and especially carousel fraud. VIES (VAT Information Exchange System) enables companies to obtain rapid confirmation of the VAT numbers of their trading partners and VAT administrations to monitor and control the flow of intra-Community trade to detect all kinds of irregularities (See e.g. Council Regulation (EEC) No 218/92 of 27 January 1992 on administrative cooperation in the field of indirect taxation (VAT)).

<sup>27</sup> European Court of Auditors: Special Report, 'Tackling intra-Community VAT fraud: More action needed', p. 9-10, p. 38, p. 43-44, p. 52

<sup>28</sup> As it gathers intelligence, an FIU may have occasion to request information from its counterparts in other Member States using the FIU network (FIU.net), with the possibility to track and protect the information at the same time — Article 5(4) of Council Decision 2000/642/JHA.

<sup>29</sup> See: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an Action Plan on VAT, 'Towards a single EU VAT area - Time to decide'

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24. The issue of supervision and the legality check of OLAF's investigatory actions relating to the respect of fundamental rights and procedural guarantees will be considered later in this Opinion<sup>30</sup>. However, the fact that the Director-General of OLAF was under criminal investigation by the Belgian judicial authorities over unlawful interception of a telephone conversation during an OLAF investigation<sup>31</sup> is a very serious matter which demands thorough scrutiny by the legislator on the internal advisory, control and legality check mechanisms in the new Regulation with regard to the investigative measures that OLAF is allowed to take<sup>32</sup>. The Regulation must avoid a similar situation arising in the future by establishing consistent independent supervision and legality check mechanisms.

The SC believes that the legislator should give consideration to appointing a fundamental rights and procedural guarantees officer for OLAF. This would also involve determining how such an officer would interact with court supervision and with the SC, and ensuring that it would work in close connection with fundamental rights and procedural guarantees experts in each OLAF sector.

Another option would be to expand the SC from five to seven members, as was proposed in the past, and for the Committee to be given specific competences in this area and in the field of confidential exchange of information, given the future interaction with the EPPO.

### **OLAF's access to information**

25. OLAF Regulation needs to allow OLAF to collect evidence located in the premises of economic operators who have received EU funds. The amended Regulation should also provide for comprehensive rules setting out the conditions in which OLAF may enter premises of EU institutions and collect all evidence located in official premises of such institutions, including data stored on devices, connected computer systems and media.

26. The SC notes there are no rules concerning OLAF's competence to access or request access to traffic data and electronic communications, including official or private communications stored on devices, media or connected computer systems. An amendment should, at least, contain provisions concerning communications stored on devices, media or

<sup>30</sup> See infra chapter V on the Role, Status and competences of the SC and its Secretariat.

<sup>31</sup> The investigation question, OF/2012/0617 was conducted in compliance with the Instructions to Staff on Investigative Procedures that in many aspects anticipated the content of the reform of OLAF's Regulation. See Annex 3 of the Activity Report of the SC 2012-2013 and the SC Opinion No 2/2012 "Analysis of the case OF/2012/0617".

<sup>32</sup> See Jurisprudence from Joint cases F-5/05 and F-7/07 *Violetti and Others v Commission*. Case T-48/05 *Yves Franchet and Daniel Byk v Commission*. See Rules of Procedure of the OLAF SC (OJ L 308 of 24.11.2011) Article 13.5 on "Action to be taken on information supplied by the Director General", in particular on the mechanism that was established in agreement with OLAF to secure compliance with fundamental rights and procedural guarantees on "cases requiring information to be forwarded to the judicial authorities of a Member State".



connected computer systems that OLAF would need to access during on-the-spot checks. If OLAF were to have the power to request records of telephone and data traffic<sup>33</sup>, similar to the European Securities and Markets Authority, there should always be a limit on this in the form of prior judicial approval.

### **Duty to cooperate with OLAF**

27. Regulation No 883/2013 clarified the terms under which national authorities cooperate with OLAF. However, experience has showed that the quality of the assistance provided to OLAF by the national authorities differs widely owing to the differing national laws on administrative cooperation. OLAF's autonomy to perform on-the-spot checks and inspections (as provided for in Regulation 2185/96) means that it sometimes carries out such checks without full knowledge of the assets that the national authorities can bring to the investigative process.

The national administrative authorities should be obliged to provide immediate assistance to OLAF if coercive measures are needed to enforce OLAF competences. Harmonisation or, preferably, unification is appropriate mainly in the case of on-spot-checks, in which national rules and practices<sup>34</sup> – and hence also OLAF competences – significantly differ. The investigative powers of OLAF inspectors should have the same EU law basis, and the inspectors should have the possibility to exercise and enforce these powers equally in all Member State territories. In this respect the national law provisions should oblige the specific national administrative authorities to initiate national proceedings, exchange information with OLAF and support its investigative actions in their territory. OLAF, as the SC repeatedly mentions, should be obliged to provide the national authorities with information from the investigation in question in order to enhance the effectiveness of both OLAF and national investigations, avoid duplication of actions and reduce the duration of investigations. The SC sees this mechanism as also contributing to the protection of fundamental rights.

28. Progress in anti-fraud financial investigation should not depend on decisions of various subjects whether or not to cooperate with the investigator. Moreover, if duties are laid down by EU legislation, there should also be a possibility to deal with failures to comply with those duties and a possibility to enforce the investigation body's competences. This general requirement relates also to setting clear rules on duties of witnesses and potential sanctions in the event of non-appearance to testify.

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<sup>33</sup> Article 23c of the Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, article and 62 of the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

<sup>34</sup> Article 3(3) of Regulation (EU) No 883/2013.

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The duties to appear and testify should be, however, limited to the territory of which the respective person is resident. In cases where a person voluntarily agrees to testify at the headquarters of OLAF or in another place outside of the country of residence, he/she should be eligible for the reimbursement of their expenses.

The SC is aware that since OLAF lacks legal personality, this could be an obstacle to potential sanctions being imposed. However, failure to comply with duties set up by the Regulation should have consequences. A possible solution would be to impose sanctions via national proceedings initiated on the Office's request. However, the SC will explore these questions at a later stage together with questions concerning the establishment of the EPPO.

### **The duration of OLAF's investigations: the reinforcement of OLAF's independence**

29. The right of people to have their affairs handled by OLAF within a reasonable time is guaranteed by Article 41 of the Charter of Fundamental Rights. This right has not been integrated in Article 9 of the new Regulation as it was suggested during the legislative procedure<sup>35</sup>. This is of particular importance in OLAF investigations since a lengthy investigation out of proportion to the circumstances and complexity of a case may have serious negative consequences on both the rights of the defence of the persons concerned and on the follow-up to the investigation by the competent authorities.

The fact that the time has elapsed in an investigation can make it more difficult for exculpatory evidence, in particular statements from witnesses for the defence, to be collected, or even unlikely that they will be collected. Similarly, the administrative, disciplinary or judicial follow-up may be compromised, in particular due to limitation periods for the acts in question. The SC's monitoring experience has showed that this was indeed the case in particular in final reports and recommendations forwarded to the national judicial authorities. OLAF made available to the SC short notes in excel tables, including quotations of the reasons given by Member State judicial authorities for dismissing OLAF reports<sup>36</sup>.

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<sup>35</sup> See SC Opinion No 4/2011 on the Amended on the Amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999 and European Court of Auditors Opinion No 6/2011

<sup>36</sup> Ref. Information sent by OLAF to the SC from 2012 to 2016 on 142 cases closed with judicial recommendations and on recommendations by OLAF not followed up by the judicial authorities of the Member States.



The SC considers that Regulation should be amended to include a requirement for the Director General of OLAF to take into account statutory limitations in the Member States concerned by an investigation. At least 18 months before expiration of the statutory limitation period, OLAF should send an interim report to the authorities of respective Member States. The form and content of the interim report would be equivalent to the final report and it would not contain recommendations.

30. The general aim of the SC's review of the duration of investigations is to strengthen OLAF's independence by verifying that no external interference in the impartial conduct of investigations takes place and that delays do not prevent the intended result of an investigation, for example, by running up against the time bar.

Article 7.8 of the new Regulation extended the reporting obligation from OLAF to the SC on the duration of investigations from 9 months to 12 months after their opening and every 6 months thereafter. However, it did not substantially change the content of that reporting exercise; the Director-General of OLAF should indicate the reasons and the remedial measures envisaged to speed up the investigation<sup>37</sup>.

31. The legislator should consider amending this provision so that explicit rules on the information to be sent to the SC are set. In contrast to the reporting information sent by OLAF to the SC prior to the adoption of the new Regulation<sup>38</sup>, the terms of this provision were interpreted in a narrow sense by OLAF. This had a major impact on the SC's remit in this area<sup>39</sup>.

#### **Closing of the investigation: final report, recommendations and follow-up**

32. When OLAF completes an investigation, its report must be based on elements which have evidential value and are subject to the same evaluation rules as those applicable in the administrative or judicial proceedings of the Member State in which their use proves necessary.

The SC considers of fundamental importance for the effectiveness of OLAF's investigatory work the new provision on an '*internal advisory and control procedure including a legality check, relating inter alia to the respect of the national law of the Member State*' to be put in place by the Director-General of OLAF. However, this internal check on the respect of the

<sup>37</sup>See Article 11 7 of Regulation No 1073/1999 read "*the Director shall inform the SC of the reasons for which it has not been possible to wind up the investigation and of the expected time for completion*".

<sup>38</sup> See Annex 40 to the OLAF model forms following the SC Opinion 2/2009 on "OLAF's reports on investigations that have been in progress for more than nine months" and "Memo on the SC's monitoring of OLAF's investigative function covering the period from 1999 to 2012".

<sup>39</sup> The SC examined 218 reports on investigations running over a 12-month period, sent by the Director-General between January and April 2017, which did not contain the relevant information that would allow the SC to fulfil its remit.

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national law of the Member State was not provided for in the “Guidelines on investigation procedures” as part of the competences of the Investigation Selection and Review Unit, which remained in charge of the legality check and review mechanisms during the entire investigation lifecycle<sup>40</sup>. The control of this matter was conducted by a limited number of staff in the Investigation Selection and Review Unit and was not reinforced by the *ex ante* control mechanism that the SC carried out before this competence was removed in the new Regulation<sup>41</sup>.

The legislator should give careful consideration to the impact of removing this monitoring and quality control mechanism from the SC. In any case, in order for the SC to be in a position to assist the Director General in discharging his/her duties in this area, the Committee would need at least to receive from OLAF the investigation report sent to the Member State judicial authority and the reply from that authority to OLAF.

33. The final reports and recommendations transmitted by OLAF to Member State judicial authorities were not followed up in around 50 % of cases. From the monitoring experience of the SC, the reasons for this were of a diverse nature, for example, facts allegedly committed were considered not to be a criminal offence, not supported by evidence or supported by insufficient evidence, or were time-barred.

This makes it all the more necessary to set out in the Regulation clear rules on time-barring thorough the investigation lifecycle and to put in place follow-up teams with experts in judicial follow-up and in checks of evidence gathering. This is of particular importance in view of the establishment of the EPPO and the quality of assistance that OLAF will need to provide in compliance with the national rules on admissibility of evidence.

## CHAPTER III

### Respect for fundamental rights and procedural guarantees during investigations led by OLAF. The right to effective judicial review

#### Respect for fundamental rights and procedural guarantees: initial considerations

34. Since OLAF’s ability and willingness to respect fundamental rights and procedural guarantees when conducting its investigations is linked to the independence of the Office, the SC has always taken a keen interest in ensuring that there is sufficient respect for fundamental rights and guarantees, as required by the Charter and by EU legislation. The Committee will always maintain this keen interest.

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<sup>40</sup> See Articles 12 and 21 of the "guidelines on investigation procedures for OLAF Staff" of 1 October 2013 on legality check and final review.

<sup>41</sup> See supra "Legal instruments available to OLAF" point 10.



The SC dealt with this question in number of documents in the past<sup>42</sup>. As early as its first progress report (2010) the Committee emphasised the need to respect the right to be heard, the right to be informed, the right of persons concerned to receive instructions on their rights, the right to be informed and to have the opportunity to state their case, and the right to an impartial investigation. Also in SC Opinion 5/2010, the Committee voiced the need for the protection of individuals over the processing of personal data (privacy rights) and for guarantees of the transparency and objectivity of investigations.

35. The Committee is also concerned about the lack of remedies against administrative actions and decisions adopted by OLAF. These actions and decisions form the output to be sent to the national authorities responsible for following up on the facts established by the administrative investigation<sup>43</sup>.

The SC is of the opinion that the standard of protection of fundamental rights and procedural guarantees of the persons concerned has a direct influence on admissibility of evidence in subsequent proceedings before national authorities. Special attention should be paid to avoiding differences in standards, especially if the standards of relevant national proceedings or the standards applied by the EPPO are higher. This would avoid situations where OLAF investigations and the evidence collected within become devalued.

## **The need to strengthen procedural rights and guarantees in the new OLAF Regulation No 883/2013: Article 9 of the OLAF Regulation and its impact on internal and external investigations**

36. One of the specific objectives of Regulation No 883/2013 was to strengthen the procedural guarantees of individuals subject to prosecution. This was achieved by setting out these guarantees in Article 9<sup>44</sup>. Regardless of their being explicitly listed in the Regulation, the fundamental rights of individuals and their procedural guarantees derive directly from the Charter of Fundamental Rights of the EU. This means that Article 9 of Regulation No 883/2013 is not the source of those rights but a statement of them. Therefore the rights and guarantees may be subject to certain limitations set out in Article 52(1) of the Charter but they cannot be entirely excluded. It is not necessary to provide a full and exhaustive list of rights

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<sup>42</sup> Especially in Opinion No 5/2010 'Respect for fundamental rights and procedural guarantees in investigations by the European Anti-Fraud Office', Opinion No 3/2010 on the Reflection Paper on the Reform of OLAF, Opinion No 2/2011 'Powers of the European Anti-Fraud Office (OLAF) for the independent conduct of internal investigations within the EU institutions', Opinion No 2/2013 'Establishing an internal OLAF procedure for complaints and Report No 2/2014 on the implementation by OLAF of the SC's recommendations'.

<sup>43</sup> This has been a constant issue in opinions concerning respect for fundamental rights and procedural guarantees in investigations and on the Reflection paper on the Reform of OLAF (2010), on the powers of the office to conduct internal investigations within EU Institutions (2011), opinion on the complaints procedure (2013) and the Report on the follow-up of the SC recommendations (2014).

<sup>44</sup> Other expressions strengthening procedural guarantees may be seen in the possibility to designate a data protection officer in accordance with Article 24 of Regulation (EC) No 45/2001 and in the obligation to carry out internal legality checks on OLAF's investigative measures (Article 17(7)).

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and guarantees in the Regulation itself as the general provisions of the Charter concerning rights and procedural guarantees are well stated in existing jurisprudence<sup>45</sup>.

Although a general reference to the Charter is made in Recital 51 of Regulation No 883/2013, more detailed provisions relating to the most relevant rights and guarantees are to be included in the OLAF Regulation.

Since the Charter is the common source of fundamental rights and guarantees there is no reason to limit or fundamentally distinguish between rights of persons concerned or witnesses in internal or external investigations or in actions performed at the request of the EPPO. The SC is aware that OLAF needs to respect the rules of each Member State when conducting external investigations and that due to the different legal conditions in internal and external investigations OLAF's powers may differ. However, the standard of fundamental rights and procedural guarantees should be as close as possible in both internal and external investigations.

37. The fundamental rights and guarantees should be specified and reflected in specific procedural measures in the same way as in investigations led by the EPPO. This is especially important given OLAF's new role of assisting the EPPO, as put forward in the EPPO Proposal. The proposal for the EPPO Regulation provides for a general specification of the scope of rights of suspects and accused persons, thereby delimiting minimal standards guaranteed in the (criminal) proceedings.

The opinion of the SC is that adopting the high standard of procedural safeguards as given in Article 41 of the EPPO Proposal<sup>46</sup> and relevant legislation<sup>47</sup> would not impede OLAF in any way in the independent exercise of the mission conferred upon it but it would add value to its final reports and accompanying evidence.

<sup>45</sup> For example, in the *Kadi* Case of 18 July 2013, the CJEU listed rights in paragraphs 11-132.

<sup>46</sup> Council Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), as of 30 June 2017 (Doc. No 9941/17).

<sup>47</sup> Namely:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to translation and interpretation in criminal proceedings (OJ L 280, 26.10.2010, p. 1);
- Directive 2012/13 of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1);
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1);
- Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings (OJ L 65, p. 1);
- Directive 2016/1919/EU of the European Parliament and of the Council on the right to provisional legal aid for citizens suspected or accused of a crime and for those subject to a European Arrest Warrant (OJ L 132, 21.5.2016, p. 1).

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The higher standards under which evidence would be obtained would definitely reflect in their admissibility (as well as in admissibility of OLAF final reports) in trials at national courts. Adopting the EPPO standard of procedural safeguards would also help dispel doubts about admissibility or value of evidence originating from (administrative) investigations performed ‘on request’ of the EPPO, as envisaged in Article 101 of the EPPO proposal.

The SC believes that unification of these standards would facilitate transfer of evidence from administrative to criminal proceedings and the transfer of evidence between jurisdictions<sup>48</sup>. It would not prevent situations in which evidence has been obtained under the law of one Member State but contrary to the law of another in which the final (or, in the case of OLAF, subsequent) proceedings take place and the case is resolved.

38. In particular, and unless a reasoned decision to defer proceedings has been taken, the right of the persons concerned to be informed of their personal involvement in an investigation and of all allegations should be reflected in their being able to comment on the allegations, file complaints, bring evidence and make proposals for evidence to be taken<sup>49</sup>.

The persons concerned should be able to avail themselves of this right before, during and after their first interview in the proceedings. They should be also allowed to access the evidence gathered by OLAF not later than before the final report is sent to national authorities with recommendations. This possibility is particularly important when the final report contains recommendations to take action in criminal proceedings. To guarantee objectivity and impartiality of investigation, the persons concerned should have the possibility to make comments on the final report, while their comments should accompany the final report and recommendations sent to national authorities.

39. The SC is aware that a balance will need to be struck between access to OLAF documents and the protection of both confidentiality of investigation and the protection of personal data contained in the documents. Therefore, exceptions from giving access to evidence (i.e. to documents gathered during an investigation) should be duly substantiated and reasoned. Persons concerned whose access to the documents has been denied should have the possibility to appeal against such a decision, at least under OLAF’s internal complaints procedure.

40. The right to be informed should be extended to the legal representative of the person concerned (the person of the person’s concerned choice as in Article 9(2) *in fine*) in order to guarantee their right to a proper defence. The legal representative should receive the same information at the same time as the person concerned.

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<sup>48</sup> The SC finds it particularly important in transnational cases of VAT fraud/irregularities.

<sup>49</sup> See Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraph 58, and M., paragraph 88.



41. Consideration should be given to extending the right to avoid self-incrimination so that it would cover the involvement in criminal prosecution proceedings of someone with a close personal connection to a witness or the person concerned. It is necessary to specify this right in the Regulation for situations in which e.g. a witness is a representative of a legal entity and he/she would incriminate the legal entity by a testimony. At the same time, the Regulation should establish a duty for witnesses to appear and give testimony, with consequences for those who fail to do so. The right to avoid self-incrimination should be a part of a set of rights guaranteed to any person interviewed by OLAF, including persons interviewed during on-the-spot checks.

### **The right to effective judicial review**

42. Since its establishment, the SC is aware of deficiencies in the exercise of the right to effective judicial review. The SC has argued for a judicial body which would permanently supervise OLAF activities, especially the use of coercive and other measures restricting individual rights<sup>50</sup>. Only a judicial body could properly verify whether an investigation was conducted within the due process of law so that the evidence adduced is admissible in the court with jurisdiction for the case.

The extent to which respect for fundamental rights is examined in the judicial review of an administrative investigation body can serve as a yardstick to measure its effectiveness

At the same time, the extent of involvement of fundamental rights can be a measure of extent of the necessary judicial review of the action of an administrative investigation body<sup>51</sup>.

The Regulation does not provide for effective scrutiny of the legality of OLAF investigations, except in the case of internal investigations and solely where officials or agents are concerned. Officials and agents may file a complaint with the Director of OLAF in accordance with the procedure laid down in Article 90 of the Staff Regulations, under which appeals may be filed retrospectively before the Court of First Instance.

43. The fundamental issue of an effective judicial review, together with supervision of the Office, gave grounds to uncertainties concerning the Office's independence, as well to complaints about the legitimacy of OLAF's investigations that have been filed with the Court of Justice of the European Union in the past.

The Court of Justice has consistently rejected applications for annulment of OLAF final reports forwarded to national authorities or to the competent EU organisation. The main reasoning behind the rejections was that the contested acts did not bring about a distinct

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<sup>50</sup> The SC called for a solution as early as 2000 (See the SC progress report of 2000); see also the Second Report (1999) of the Committee of Independent Experts, Vol. II, p. 178, para 5.12.8, and p. 185 para 5.14.4.

<sup>51</sup> See: the US Constitution, Fifth Amendment, Annotation 12.

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change in the applicants' legal positions<sup>52</sup> and that effective legal protection is to be considered not as a separate legal remedy but as the legal product of many complementary remedies in successive legal orders<sup>53</sup>.

### CHAPTER IV

#### Supervision and control of OLAF's investigations; the role of the Supervisory Committee and its interaction with other bodies

##### General remarks

44. The SC continues to be of the opinion that a readily available control<sup>54</sup> of interference with fundamental rights exercised by an independent judicial authority needs to be established even under the present circumstances. However, this has become a matter of urgency with the establishment of the EPPO and the intention that OLAF should provide assistance to the EPPO.

The current possibilities for remedies against OLAF actions<sup>55</sup> are limited to such an extent that they cannot stand alone in the future changed institutional and procedural system in which: (i) the link between administrative and criminal investigations will be made stronger; and (ii) the admissibility of evidence collected by OLAF in administrative proceedings launched at the request of the EPPO is envisaged.

45. The Regulation did not entrust the task of judicial supervision to the SC, which is not supposed to interfere in the conduct of investigations in progress. Also, the fact that the SC members occupy senior posts in their respective countries complicates their possible position as reviewers of OLAF investigations.

##### The role of the Court of Justice

46. The Court of Justice of the European Union has the decision-taking power on subject matters which are relevant from the perspective of supervision. The Court is a fully

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<sup>52</sup> Case T-215/02, *Gomez-Reino v. Commission*, 18.12.2003, ECR-345, paras 50-56 and Case C-471/02 *P, Gomez-Reino v. Commission*, 08.04.2003, ECR I-3207. As for non-investigative acts, an action of annulment relating to access to information held by OLAF was declared admissible (Joined Cases T-391/03, T-70/04, *Franchet and Byk v. Commission*).

<sup>53</sup> Case T-193/04, *Tillack v. Commission*, 04.10.2006, ECR II-3995.

<sup>54</sup> See *Société Canal Plus and Others v. France*, no. 29408/08, ECHR 2010.

<sup>55</sup> Including, a) the possibility of the EU officials to file an action to the Court (after following an administrative procedure under Articles 90 and 91 of the Staff Regulation);  
b) the possibility to request that the national courts send a reference for preliminary ruling to the Court of Justice, which is the only competent court to annul EU acts;  
c) the possibility to file an action for restitution of damages.

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independent body that would have the possibility to intervene, if necessary, in the course of investigation<sup>56</sup>.

In spite of these features, the SC is of the opinion that the TFEU has given the Court of Justice different tasks which are distant from the continuous supervision of particular actions in administrative investigation. Under the current mandate of the Court of Justice, the SC can see obstacles to having the Court provide continuous supervision of OLAF. 'The position of the Court of Justice, namely that OLAF final reports sent to national judicial authorities 'do not constitute an act adversely affecting an official as it does not bring a distinct change in the legal position of the person concerned', will continue to apply unless, for example:(i) OLAF were able to impose a sanction at the end of an investigation that would bring about such a change (ii) there is a duty to initiate national proceedings on the basis of the final report or at the request of OLAF

47. If the judicial supervision of all OLAF actions were to be made the responsibility of the Court of Justice<sup>57</sup>, it would bring considerable workload and would require additional resources for the Court. The SC also finds the average duration of proceedings before the Court of Justice<sup>58</sup> to be inadequate for supervising OLAF as a decision of the Court would, in most cases, arrive either after a case is already closed or after the final report is sent to national authorities. In other words, it would have no immediate effect on the course of investigation; it would not be possible to correct an investigation measure in an ongoing investigation or to benefit from those corrections in subsequent proceedings before national authorities.

At the same time, the SC finds advantages in potentially involving the Court of Justice in judicial supervision of OLAF. Of particular benefit would be the core set of procedural rules applicable before the Court, which is therefore the same for all parties coming from various Member States. If the question of the Court's competence is resolved, the SC calls on the European Parliament the Council, the Commission and the Court of Justice to explore the possibilities of Article 257 TFEU in this regard.

### **The role of national judicial authorities**

48. The SC is of the opinion that the national judicial authorities are best placed to guarantee the due process of law in investigation and collecting evidence, including nationally-specific aspects of the interpretation of fundamental rights and procedural

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<sup>56</sup> *J. F. H. Inghelram*, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF) – An Analysis with a Look Forward to a European Public Prosecutor's Office* (Europa Law Publishing, 2011), p. 200, 216, 230-233.

<sup>57</sup> The SC is aware of different views on whether changes in the TFEU are preconditioning the establishment of such a competence.

<sup>58</sup> The average duration of proceedings before the Court of Justice usually exceeds 12 months (for further details see the Annual Report (2016) of the Court of Justice of the EU, p. 15).

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guarantees. Having OLAF external investigatory acts reviewed by national courts could bring stability to the evidence collected. Early involvement of national authorities in earlier stages of an investigation would ensure admissibility of evidence in subsequent proceedings and in trials before national courts. The national judicial authorities would then not be required to repeat investigative steps already taken by OLAF during its investigation. They could also benefit from corrections resulting from remedies available at national level.

49. However, supervision of national courts over OLAF individual acts brings the danger of fragmentation and the need (for OLAF) to deal with 28 different systems. This solution would also require: (i) subjecting OLAF investigations to the supervision of specific courts or other judicial authorities as part of specific proceedings recognised by national law; or (ii) the creation of autonomous proceedings for OLAF.

50. A precondition for giving national courts' jurisdiction over the supervision of OLAF would be to require national administrative authorities to initiate national proceedings at OLAF's request. OLAF would then either: (i) follow its own autonomous procedural rules together with the rules and practices<sup>59</sup> of the Member State concerned (this is partly the current situation); (ii) follow an autonomous procedure set by an EU regulation; or (iii) be active in a particular type of national proceedings followed. This solution would make judicial control over individual OLAF acts in external investigations immediately available, while the admissibility of evidence collected in OLAF investigations would be significantly improved.

If OLAF investigations were to become part of national proceedings, this would make them subject to the control of national courts. As a result, national courts could refer a question to the CJEU for a preliminary ruling on the interpretation of the provisions of EU law before delivering their judgments in such cases<sup>60</sup>

### **The controller of procedural guarantees**

51. However, in internal investigations, supervision of OLAF's individual actions could not be placed under the jurisdiction of national judicial authorities. It could only be under the jurisdiction of an EU judicial authority.

To strengthen the procedural guarantees of persons under investigation by OLAF, the Commission has proposed establishing a Controller of procedural guarantees<sup>61</sup> of the persons concerned. The Controller would: (i) review complaints concerning violations of the procedural guarantees and issue non-binding recommendations to the Director-General of OLAF on these complaints; (ii) monitor compliance with the procedural guarantees applicable to OLAF investigations; (iii) ensure prompt handling of investigations to avoid undue delay;

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<sup>59</sup> See Article 3(3) of Regulation No 883/2013.

<sup>60</sup> See the Order of 19 April 2005 in *Tillack v Commission*, C- 521/04 P(R), EU C/2005/240, paragraphs 38 and 39.

<sup>61</sup> COM (2014) 340 final of 11 June 2014; the proposal is still pending in the European Parliament.

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(iv) authorise inspections and certain procedural acts to be taken at the premises of EU institutions.

However, even if the Controller could be composed of judges, it would lack the necessary status of an independent court as it would lack the necessary separation of powers. Moreover, the intention was that the Controller would be administratively attached to the Commission, one of the institutions involved in appointing the body. Given that the Controller could also advise on investigative measures against other institutions, positioning it among the executive institutions and making it administratively dependent on the Commission could affect the inter-institutional balance.

52. The SC is of the opinion that the proposed office of the Controller of procedural guarantees would lack the necessary status of a court, which would raise doubts about its independence and mean that it could not satisfactorily guarantee the right to effective judicial review unlike in the situation in which this role would be given to the European Court of Justice or the national courts. Finally, the competences of the Controller concerning monitoring of compliance with procedural guarantees and duration of investigations would overlap in substance with the same competences of the SC, fragmenting supervision of OLAF and risking contradictions in work of the supervisory bodies. Therefore, the SC recommends finding ways to exercise the right to effective judicial control by placing this task under the jurisdiction of a truly judicial body, either at national or EU level.

53. Furthermore, there are obvious overlaps between the Controller's mandate and the work of the SC. The daily work – in the separate secretariats of the two bodies – would be very similar and would consist in examining individual case files to check for respect of procedural rights and the duration of investigation. There could be cases where the SC would be examining, coincidentally and even unknowingly, the same case as the Controller as part of his individual review. This could lead not only to duplication of work, but also to the two bodies issuing diverging or even conflicting recommendations to the Director-General of OLAF<sup>62</sup>.

54. Furthermore, the Commission has proposed to establish an office of 'judicial reviewer' to authorise OLAF's intrusive investigative measures concerning Members of EU Institutions<sup>63</sup>. As a result, the judicial reviewer's work would also involve examining the respect of fundamental rights and procedural guarantees (although the judicial reviewer would act before the measures were taken, not afterwards).

Serious concerns over OLAF's independence could be raised depending on the reviewer's powers, what sort of action it would take in individual cases and whether the office of the

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<sup>62</sup> Note of the SC to the Director-General of OLAF, Brussels, 27 May 2014, JD/ICL/aw D (2014-OSC-0081).

<sup>63</sup> Communication on Improving OLAF's governance and reinforcing procedural safeguards in investigations. (COM(2013)533 final, 17.07.2013).

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reviewer would be made part of the Commission or attached to it in some way or another. Depending on where in the administrative hierarchy the reviewer is placed, his competence to advise on investigative measures against Members of the Commission but also with regard to other institutions could affect the interinstitutional balance.

In addition, as the Controller would be similarly placed and separate from the SC, there could be concerns about his independence and the cost effectiveness of him having a separate secretariat with the same agenda as that of the SC's Secretariat.

55. Creating two additional offices controlling OLAF but separate from the SC would lead to a multiplication of independent supervising bodies, probably resulting in confusion or conflict of competences and duplication of work.

The SC's preferred solution is to establish direct access to an independent court which could review individual actions of OLAF and recognise the legitimate expectations of persons affected by OLAF investigations. Only a judicial body could adequately verify whether an investigation was conducted within the due process of law and thereby guarantee the high standard of evidence required (mainly) in subsequent criminal proceedings in a Member State.

56. The SC believes that the direct possibility to exercise the right to an effective judicial review would enhance admissibility of evidence collected in OLAF investigations in national administrative or criminal proceedings. As it is envisaged that OLAF and EPPO will work together in close collaboration, standards of procedure, including the possibility of judicial review, are crucial for compatibility and the smooth exchange of evidence between the two institutions.

## CHAPTER V

### **The role, status and competences of the Supervisory Committee and its Secretariat: Regulation No 883/2013 and Regulation No 2016/2030**

#### **The mission of the Supervisory Committee: general remarks**

57. The mission of the SC of OLAF is to strengthen OLAF's independence in the proper exercise of the competences conferred upon it by Regulation No 883/2013<sup>64</sup>. The SC is the supervisory body of OLAF and guardian of OLAF's independence. It plays an advisory role with regard to the Director-General of OLAF, whom it assists in the discharge of his responsibilities. It is also a dialogue partner of the EU institutions<sup>65</sup>.

<sup>64</sup> Article 15 of Regulation No 883/2013.

<sup>65</sup> Article 15(2) and 16 of Regulation No 883/2013

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The SC is a unique independent body with a very strong mandate. The selection of the Committee's members requires agreement of the Council, the Commission and Parliament, as well as of an ad hoc body composed of all three institutions.

The scope of the SC's competences was extended by Regulation No 883/2013. This was mainly because of questions concerning how to inform the Committee about documents sent to national authorities and about the SC's competence to deal with cases in which investigation is still in progress<sup>66</sup>, and also because of the need to strengthen procedural rights and guarantees.

### **The remit of the Supervisory Committee in the new Regulation and its amendment by Regulation 2016/2030**

58. The main changes brought by Regulation No 883/2013 relating to the SC relate to the following:

- the SC's competences in monitoring the duration of investigations and the respect of procedural guarantees<sup>67</sup>;
- informing and consulting the SC in cases of internal investigations exceptionally requiring absolute secrecy<sup>68</sup>;
- the possibility for the Committee to ask OLAF for additional information on investigations<sup>69</sup>;
- receiving the investigation policy priorities prior to their publication in the annual management plan from the Director-General;
- receiving periodic information from the Director-General<sup>70</sup>;
- consultation before adoption of the "guidelines on investigation procedures"<sup>71</sup>.

Regulation No 883/2013 also clarified that the opinions of the SC to the Director-General of OLAF may include recommendations. The Regulation also prolonged the period before reporting to the SC on cases lasting over 12 months and introduced an annual inter-institutional exchange of views with the institutions, with the participation of the SC<sup>72</sup>.

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<sup>66</sup> Judgment of the Court of First Instance (Third Chamber) of 8 July 2008, Case T-48/05 *Yves Franchet and Daniel Byk v Commission of the European Communities*.

<sup>67</sup> Articles 7(8) and 15(1) of Regulation No 883/2013

<sup>68</sup> Article 4(6) of Regulation No 883/2013

<sup>69</sup> Article 15(1) of Regulation No 883/2013

<sup>70</sup> Article 17(5) of Regulation No 883/2013

<sup>71</sup> Article 17(8) of Regulation No 883/2013

<sup>72</sup> Articles 15(1), 7(8) and 16(7) of Regulation No 883/2013

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59. After further discussions, mainly in the Council, the Commission and Parliament, the autonomy and independence of the SC was reconfirmed by separating the administrative responsibility for the Committee's secretariat and the SC's budget from OLAF<sup>73</sup>. Close cooperation between the SC and the Commission to implement this new Regulation was required.

### **The role of the Supervisory Committee: subject to interpretation under Regulation No 883/2013**

60. The SC notes that details of its competences, its position and independence, as well as the extent of its supervisory role, have been subject to interpretation since its establishment. Regulation No 883/2013 brought new competences to the SC but did not introduce many clarifying details on them, while the lack of clarity in how the Director General of OLAF is to interpret the SC's role and powers led to multiple discussions and exchanges, mainly between the Committee and OLAF.<sup>74</sup>

61. The SC also notes that in contrast to its strong mandate, which is the result of the complex selection procedure, it has been given powers only to receive information, give opinions, recommendations and take part in certain processes; however, it has no power to ensure, by legal means, that the duties set by Regulation No 883/2013 are performed. Non-performance of the duties by OLAF has no legal consequences. This has been seen, for instance, in discussions concerning the scope of the SC competences and access to information.<sup>75</sup>

62. Given that challenges to the independence of OLAF were the main reason for establishing the SC, the Committee finds that its current competences are not sufficient to fulfil its role of safeguarding OLAF's independence. The SC's opinion is that if the independence of the Office or the Director-General is in question, the EU institutions, especially those which gave the Committee its mandate, should have corresponding duties to at least provide the SC with relevant information. The SC values a strong role in processes relating to the selection of the Director-General of OLAF.

If lifting the immunity of the DG is to be considered by the Commission, the SC finds it necessary to monitor the decision-making process and to have access to relevant information.

If the challenges to the independence of OLAF or its Director-General come from actions of the Director-General himself/herself, consideration should be given for the SC to have the

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<sup>73</sup> Regulation (EU, Euratom) of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the SC of the European Anti-Fraud Office (OLAF).

<sup>74</sup> See also Joint Opinion of the Legal Services of the three institutions.

<sup>75</sup> See "Memo on the SC's monitoring of OLAF's investigative function covering the period from 1999 to 2012" for a practical approach on SC's access to OLAF casework related information.

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power to trigger the disciplinary proceedings before the Commission and take part in the proceedings.

### **The regular monitoring of OLAF's investigatory function**

63. Monitoring and supervision in general require access to all relevant information. Their availability is reflected in the objectivity of the outcome of the supervisory body's work. The SC, as an independent body, is supposed to provide objective reports and opinions, which should not be based exclusively on information received from OLAF, but also on: (i) its own analysis of any OLAF documentation the SC deems necessary for the assessment of OLAF's independence; and (ii) the due process of law in relation to application of procedural guarantees and the duration of investigations.

64. The SC pointed out difficulties in obtaining case-related information and access to case files and stated that this situation undermined the effectiveness of its supervisory role<sup>76</sup>. Dependence on OLAF for access to information has been a common denominator of SC opinions and reports going as far back as 2010<sup>77</sup> and beyond. Even if the mandate of the SC was changed by Regulation No 883/2013, efficient, unfiltered and undisturbed access to case data has not been established by setting clear rules and corresponding duties.

65. Selection of information given to the SC must not depend on decision of the supervised Office itself or on an external authority. The current version of the Regulation provides redundant space for interpretation and is not clear enough in provisions on the information flow between OLAF and the SC.

66. If the SC keeps its current mandate, it is necessary to give the Committee the power to decide on which documents or information it deems necessary to carry out its functions. The Committee's requests for information should be binding on OLAF staff and there should not be a possibility to challenge or overturn them, or delay getting the information. In this respect all relevant parts of the regulation should be amended<sup>78</sup>. The SC's right to full access to information should involve possibility to authorise its Secretariat to request or access OLAF information on its behalf. The full responsibility for selection and protection of information requested or accessed would lie with the SC, which is directly responsible, as per its mandate, to the Commission, the European Parliament and the Council.

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<sup>76</sup> E.g. in the SC Report No 1/2014 on Safeguarding OLAF's Independence and in the SC's Activity Reports of 2014 and 2015.

<sup>77</sup> Among many other documents, e.g. Opinion No 4/2011 on the Amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999.

<sup>78</sup> For example, the words 'In duly justified situations' should be deleted from the first sentence of Article 15(1) and (5).

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The Regulation should also provide for a mechanism to resolve situations in which the duties to provide information are not respected, in order to restore the flow of information.

67. It is necessary to provide for continuous access for the SC Secretariat and SC members to general and specific case-related data in OLAF's databases and to information on OLAF's intranet. In this way the SC will be able to carry out the regular monitoring of the investigative function of OLAF with the purpose of reinforcing its independence in the proper exercise of its competences

### **The Supervisory Committee's assistance to the OLAF Director General in discharging his duties: the investigation policy priorities, the Guidance for Investigative Procedures and the annual management plan**

68. The Regulation should provide the SC with sufficient time to comment on the draft investigative policy priorities prior to their publication and on the preliminary draft budget prior to its sending to the Director-General for Budgets. Similarly, any guidelines on investigation procedures and their amendments should be sent to the SC within a set period of time so that the SC can give its opinion<sup>79</sup>.

69. If any doubts arise concerning the investigative independence of OLAF or its Director-General, the information on such situation shall be sent to the SC immediately<sup>80</sup>. An amendment to Regulation No 883/2013 should also set fixed time periods for sending reasoned decisions to defer information to an institution, body, office or agency to which a person concerned belongs<sup>81</sup>.

70. The broad access to information in the Regulation should include also access to OLAF premises for the SC members and members of the SC Secretariat in order to safeguard continuous exchange of information and personal contact between the two bodies. Such provision would also make it easier for OLAF personal to file complaints to the SC.

If the SC requests additional information on investigations, including reports and recommendations on closed investigations, the Regulation should set a time limit in which access to such information and documents in a case file should be provided by OLAF, as well as a resolution mechanism if the access is not provided or denied. The same procedure should apply to information and data concerning investigations in progress, but without the SC interfering with the conduct of such investigations.

<sup>79</sup> Articles 17(5) and (8) of Regulation (EU) No 883/2013 and Article 6(2) of the Commission's Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), (1999/352/EC, ECSC, Euratom).

<sup>80</sup> Articles 15(1) and 17(3) of Regulation No 883/2013.

<sup>81</sup> Article 4(6) of Regulation No 883/2013.

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### Status of the Members of the Supervisory Committee

71. An amendment to Regulation No 883/2013 should appropriately set and unify the status of the SC members by including a provision that declares SC members a *sui generis* type of Special Advisors appointed for a non-renewable duration of 5 years. This would mean that the members would have guaranteed independence and at the same time a clear framework of duties and responsibilities, as well as privileges and immunities related to their tasks as SC members.

## CHAPTER VI

### The establishment of the European Public Prosecutor's Office and its impact on OLAF investigations

72. On 8 June 2017 the Council agreed on a general approach on the regulation on the creation of the EPPO. The aim of the regulation is to create the Office with the authority, under certain conditions, to investigate and prosecute EU fraud and other crimes affecting the EU's financial interests. It will bring together European and national law-enforcement efforts to counter EU fraud<sup>82</sup>. The political agreement on the establishment of the new EPPO was reached between 20 Member States under enhanced cooperation.

73. As a guardian of the independence of OLAF and its effective functions, the SC is highly concerned about this greatest change in the Office's history and its impact on the ability of the Office to continue fulfilling its mandate. Since all methods of achieving this and technical arrangements have not been agreed yet, the institutions have only indicated that a considerable number of posts will be transferred from OLAF (and not only) to the EPPO<sup>83</sup>. Together with the posts, transfer of the corresponding agenda from OLAF to the EPPO is envisaged. The EPPO will be responsible for investigation and prosecution of criminal offences affecting the financial interests of the EU<sup>84</sup>, which covers a large part of the current agenda of OLAF. Contrary to assumptions that the agenda of OLAF will decrease after establishment of the EPPO, the opinion of the SC is that the current workload of OLAF will either be similar to the current one or may even increase.

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<sup>82</sup> Outcome of the Council meeting, 3546th Council meeting JHA, Luxembourg, 8 and 9 June 2017, 10136/17, PR CO 33.

<sup>83</sup> See for instance the explanatory memorandum (budgetary implications) to the Commission's Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final, 17 July 2013.

<sup>84</sup> Article 4 of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Consolidated text as of 30.6.2017), together with Article 2(3) defining 'financial interests of the Union' as 'all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them'.

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74. The SC is not fully convinced that the time element of investigation of irregularities or fraudulent actions was fully taken into consideration when assessments and plans of the future workload of the EPPO and OLAF were made. In the current system OLAF opens a case on the basis of grounded suspicion of occurrence of irregularities or more serious facts, but only after a period of time (which is different from case to case) in which the suspicion is either confirmed or disproved. During this period the national authorities are sometimes informed and asked for cooperation, while sometimes they open their parallel (criminal or administrative) investigation. After the EPPO becomes fully operational, only cases with elements of a criminal offence affecting the EU's financial interests will be reported and possibly transferred to the EPPO, while subsequent initiation of criminal proceedings will depend on the EPPO's evaluation of each case. However, it may take considerable time for such cases to be transferred to the EPPO. This is because of the considerable time involved in preliminary evidence gathering to determine whether there are indeed elements of crime. The time before transfer to the EPPO may be equal to the current time needed for investigation before the final report is sent to national authorities under Regulation No 883/2013.

75. Moreover, the EPPO may request that OLAF provide information, analyses, expertise, operational support and/or to conduct administrative investigations, either in the same case in which OLAF was active before the transfer, or in other cases which OLAF has never dealt with. The SC is convinced that this new competence of the EPPO<sup>85</sup>, together with the necessity to evaluate a case before its transfer to OLAF, may equalize the current and the future workload of OLAF. Furthermore, in relation to the future workload of OLAF, the SC notes that the majority of cases dealt by OLAF will not fall within the EPPO's competence and that the Office will have to deal with such cases, finalise them or monitor their follow-up until they are resolved. OLAF will still keep the competence over (criminal) cases when a criminal offence falls within the competence of the EPPO<sup>86</sup> but caused or is likely to cause damage to the EU's financial interests of less than EUR 10 000<sup>87</sup>. OLAF will therefore have to keep its current structures, a fact which is reinforced by the fact that eight Member States will not take part in the EPPO. In relation to those countries, OLAF will keep its current position and competences.

76. The SC therefore presumes that the aim of the EPPO proposal to avoid duplication of work may be achieved by an intensive exchange of information<sup>88</sup>. However, in reality, the Office's workload will be the same or heavier than today. This is because OLAF will still have to evaluate each case before its transfer to the EPPO, due to: (i) the need to refer

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<sup>85</sup> Article 101 of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Consolidated text as of 30.6.2017

<sup>86</sup> In the sense of Article 22 (1) of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Consolidated text as of 30.6.2017

<sup>87</sup> Ibid Article 25(2), with exceptions under a) and b)

<sup>88</sup> Recitals 100, 103 and 105 of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Consolidated text as of 30.6.2017

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information from the EPPO to OLAF in cases where the EPPO has decided not to conduct an investigation or has dismissed a case; (ii) due to the EPPO's competence to task OLAF; and (iii) due to the fact that OLAF will keep current competences in the Member States not participating in the EPPO project.

The SC is convinced that crucial issues concerning the nature of investigations, type of proceedings, opening and closing cases or even duties of exchange of information should not be left to interpretation and should not depend on future working arrangements concluded between the EPPO, OLAF and other institutions. All these basic elements of procedure should be clearly specified by the regulations concerning OLAF and the EPPO, which should also contain provisions on their relationship.

77. The question of the nature of investigation is, in opinion of the SC, most significant in situations in which OLAF will be acting at the request of the EPPO, which means in the course of criminal proceedings initiated in a Member State and for the purpose of giving evidence in such proceedings, including a criminal trial. Even if OLAF will not take initiative and open any parallel administrative investigation into the same facts already investigated by the EPPO<sup>89</sup>, it will <sup>90</sup> act at the request of the EPPO and conduct administrative investigations<sup>91</sup>.

78. The 'administrative nature' of such investigations raises a lot of questions which may subsequently give grounds to complaints with regard to the rights and guarantees given in criminal proceedings. OLAF's performance of administrative investigations in accordance with Article 101(3)(c) of the EPPO Proposal would be free of any judicial or prosecutorial supervision. Since these administrative actions of the Office would be based on Regulation No 883/2013, the procedural safeguards given by the EPPO Regulation would not be applicable even if the results of those actions would be assessed as evidence by national courts. The SC therefore repeatedly emphasises that the amendment of Regulation No 883/2013 should contain the same procedural safeguards as given in the EPPO Proposal in order to avoid failures in future criminal trials before national courts.

79. If OLAF is to act as an assisting body to EPPO the SC considers that the supervision of prosecutors or investigative judges based on national procedural law should also be kept over actions of OLAF. The acts performed at the EPPO's request should be considered actions of the EPPO itself and as such be subject to judicial review by the Court of Justice of the European Union<sup>92</sup>. The SC points out the fact the Office conducting administrative investigation at the EPPO's request may come in conflict with interpretation of jurisdiction

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<sup>89</sup> Ibid Article 101(2)

<sup>90</sup> The duty of OLAF to act on request has not been provided for. The SC presumes that it should not be left up to OLAF to decide whether or not to meet the EPPO's request.

<sup>91</sup> Article 101(3)(c) of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office - Consolidated text as of 30.6.2017

<sup>92</sup> Ibid-In the sense of Article 42

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over the investigation of criminal matters, especially in the Member States not participating in the EPPO project and in non-EU countries.

80. The SC stresses the importance of cooperation with national authorities and compliance with national law at the earliest stage of investigations led by OLAF. It will be needed most in situations in which the Office will be conducting administrative investigation at the EPPO's request and gathering evidence for the purpose of criminal proceedings. The SC is of the opinion that the requirements of foreseeability and guarantees of effective safeguards against arbitrary decisions, including via judicial review, should be applicable in the described situations, to the same extent as in criminal proceedings<sup>93</sup>. The emerging paradox is that in cases where OLAF were to take action as provided for in Article 101(3) of the EPPO, it could have more powers than national law enforcement and judicial authorities, which are bound by strict criminal law procedural provisions relating to fundamental rights and guarantees<sup>94</sup>. The revised regulation should therefore reflect the new situation, as well as the fact OLAF will, in fact, be investigating body officially collecting evidence for the purpose of criminal proceedings (acting at the request of the EPPO). As such, OLAF actions should be considered actions of the EPPO and should be subject to same supervision rules, guarantees and rights of persons concerned (as is the case with the actions of the European delegated prosecutors<sup>95</sup>).

81. In order to be able to assist the EPPO, OLAF should have appropriate competences, so that OLAF's assistance would not become an obstacle to proceedings run by the EPPO. If the EPPO will also be dealing with cases of, for example, infringement of intellectual property rights in relation to imports to the EU single market, OLAF's powers should be reconsidered and strengthened accordingly<sup>96</sup>. The SC finds strengthening of OLAF's powers necessary, but emphasises that in such a case the control of the Office's powers should be increased at the same time.

### **The role of the Supervisory Committee in relations with the EPPO**

82. The SC also finds that its role in monitoring and taking part in the dialogue between OLAF and the EPPO makes it possible to avoid overusing the EPPO competences set out in Article 101 of the EPPO Proposal in order to guarantee fulfilment of the main tasks conferred upon the Office by Regulation No 883/2013.

<sup>93</sup> Compare: ECtHR, *Camilleri v. Malta*, No 42931/10, 22 January 2013.

<sup>94</sup> Compare: E.g. CJEU, Joined cases T-289/11, T-290/11 and T-521/11, *Deutsche Bahn and Others v. Commission*, 6 September 2013; ECtHR *Stratégies et Communications et Dumoulin v. Belgium*, No 37370, 97 15 July 2002.

<sup>95</sup> Article 2(5) of the Draft Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (as set out in Council document 9941/17 of 2017-06-30)

<sup>96</sup> The SC refers also to the chapters of this Opinion dealing with extension of OLAF's powers.

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The revision of Regulation No 883/2013 should set clear rules for OLAF, either by imposing on it a duty to act at the request of the EPPO with no exceptions, or by setting out the exceptions in a closed list of grounds for refusal. The SC considers leaving this question to working arrangements between OLAF and EPPO inappropriate because of the possibility of various interpretations of Article 101 of the EPPO Proposal, which would be contrary to the EU's concern about effective and timely protection of its financial interests.

Since the SC has a strong mandate from all three institutions, it would also like to play a significant role in creating structural, operational and competence links between OLAF and its partners, namely the EPPO, European Court of Auditors, Europol, Eurojust and other partners in the new system of protection of the EU's financial interests. As the new institutional system for the protection of the EU's financial interests will require certain monitoring and supervision, the SC also offers its long-lasting experience to discussions about their establishment and application.