

The Commission Proposal Amending the OLAF Regulation

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Article

ABSTRACT

On 23 May 2018, the Commission published its Proposal for a Regulation amending Regulation (EU, Euratom) 883/2013 and the accompanying Staff Working Document. This brief article sets out (I) the main outcomes of the evaluation of Regulation 883/2013 completed in late 2017, (II) the objectives and scope of the Commission proposal, and (III) the main proposed changes and their rationale.

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I. Outcome of the Evaluation of Regulation 883/2013

The proposal is based on the evaluation carried out by the Commission from 2015 until 2017.¹ The evaluation was necessary due to recent changes in the institutional and legal landscape for the rules on the protection of the Union's financial interests:²

- The adoption of the PIF Directive in 2017;³
- The adoption of the EPPO Regulation in the same year;⁴ and
- The move towards a new Multiannual Financial Framework.⁵

With the above in mind, the Commission evaluation identified the following shortcomings in the OLAF legal framework.

1. Shortcomings related to the establishment of the EPPO

The establishment of the EPPO requires OLAF to adapt its investigative activities. While the EPPO Regulation does not alter OLAF's mandate or competence to conduct administrative investigations, OLAF will need to work in close cooperation with the EPPO in order to allow both authorities to perform their tasks efficiently and effectively. The EPPO Regulation already lays down the main principles for the future cooperation between the EPPO and OLAF.⁶ These principles should be mirrored in the OLAF legal framework. The following issues require particular attention: (a) the handling by OLAF of incoming information and the swift transmission of information to the EPPO, (b) the handling by OLAF of cases referred to it by the EPPO for administrative follow-up, and (c) EPPO requests for operational support from OLAF.⁷

2. Shortcomings related to the effectiveness of OLAF's investigative function

Although the changes brought about by Regulation 883/2013 have proven to be a clear improvement in the effective conduct of OLAF investigations, the evaluation revealed a number of shortcomings that hamper the effectiveness of OLAF's investigatory work. First, OLAF's powers, and their enforceability by national authorities, are subject to conditions of national law (notably on-the-spot inspections and digital forensic operations). This results in a fragmentation of OLAF's powers and their enforceability in the Member States.⁸ Second, OLAF does not have full access to bank account information, particularly in external investigations. This is problematic because such information is often crucial in unveiling fraud and irregularities with EU monies.⁹ Third, OLAF's investigatory powers in the field of valued-added tax (VAT) are unclear.¹⁰ According to some, the PIF Regulation applies only to traditional own resources (excluding VAT).¹¹ All the while, the Court of Justice ruled that VAT is definitively part of the Union's financial interests, which OLAF is to protect.¹² Fourth, the OLAF Regulation leaves it up to national law to decide on the competences and powers of national anti-fraud coordination services (AFCOS). This results in a considerable diversity in the role, profile, and effectiveness of cooperation between OLAF and the Member States' AFCOS.¹³ Fifth, OLAF's rules on the admissibility of evidence hamper the effectiveness of its activities. The current OLAF Regulation provides that OLAF reports constitute admissible evidence in national judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. This equivalence rule constitutes an obstacle to the effective follow-up of OLAF investigations in some Member

States.¹⁴ Last, OLAF's modalities for its coordination activities are unclear. Coordination cases allow OLAF and Member States to coordinate their action in protection of the Union's financial interests. The OLAF Regulation does not specify the role and tasks of OLAF in such coordination cases. This results in a lack of legal certainty for OLAF and for the Member States that depend on OLAF's assistance.¹⁵

3. Other evaluation findings

The evaluation also pointed out a number of other shortcomings requiring improvement. The rules on internal investigations (in particular, the inspection of premises), digital forensic operations, and the transmission of information to third countries and international organisations require clarification. Furthermore, the mandate of OLAF's supervisory committee is ambiguous. In addition, measures to ensure closer cooperation between OLAF and the Union's institutions, bodies, offices, and agencies must be put in place with regard to the early transmission of information by OLAF and the follow-up to financial recommendations. Lastly, the Guidelines on Investigation Procedures should be revised, and internal measures should be taken to ensure the quality of final reports and recommendations.¹⁶

II. Objectives and Scope of the Commission Proposal

Based on the shortcomings identified in the evaluation, the proposal aims to achieve three specific objectives:¹⁷ (1) *adapt* the operation of OLAF to the establishment of the EPPO, (2) *enhance* the effectiveness of OLAF's investigative functions, and (3) *clarify* and simplify selected provisions of Regulation 883/2013 (not discussed in this article). The Commission clarifies that the current proposal does not aim to remedy all shortcomings identified by the evaluation: it is a targeted proposal. The Commission addresses only the most unambiguous findings of the evaluation, aimed at improving the effectiveness of investigations and cooperation with OLAF and at simplifying or clarifying certain provisions. A more far-reaching process to modernise the framework for OLAF investigations, including aspects that call for further and more fundamental reflection and discussion, will be launched later.¹⁸

III. Proposed Changes

1. Proposed amendments on the relationship with the EPPO

The proposal requires OLAF to establish and maintain a close relationship with the EPPO, based on mutual cooperation and on information exchange in order to ensure that all available means are used to protect the Union's financial interests.¹⁹ To this end, the Commission proposes a working relationship based on reporting obligations to the EPPO, non-duplication of investigations, and support provided to the EPPO by OLAF.

Under the proposed regulation, OLAF is obliged to report to the EPPO any criminal conduct over which the EPPO could exercise its competence.²⁰ Such a report is to contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification, and any available information about potential victims, suspects, and any other involved persons.²¹ OLAF does not have to report to the EPPO in case of manifestly unsubstantiated allegations.²²

The Commission's proposal sets out a non-duplication rule. Under this rule, OLAF may not open a parallel investigation if the EPPO is conducting an investigation into the same facts,²³ unless the EPPO requests OLAF's support in the course of an investigation (see below) or if an OLAF investigation complements an

EPPO investigation.²⁴ The latter is the case when an OLAF investigation facilitates the adoption of precautionary measures or of financial, disciplinary, or administrative action.²⁵

During an investigation, the EPPO can request OLAF to support or complement its activity, in particular by (i) providing information, analyses (including forensic analyses), expertise, and operational support, (ii) facilitating coordination of specific actions on the part of the competent national administrative authorities and bodies of the Union, and (iii) conducting administrative investigations.²⁶

To facilitate the cooperation with the EPPO, OLAF should agree with the EPPO on working arrangements. Such arrangements establish practical details for the exchange of operational, strategic, technical, and classified information. Furthermore, they should include detailed arrangements on the continuous exchange of information during the receipt and verification of allegations by both OLAF and the EPPO.²⁷

2. Proposed amendments to enhance the effectiveness of OLAF's investigative functions

The proposal clarifies, but does not do away with, references to national law.²⁸ With regard to the OLAF's conduct during on-the-spot checks and inspections, where economic operators submit to a check by OLAF, inspections are subject to Union law alone. This includes the procedural guarantees provided for in the OLAF legal framework, the application of which is clarified in the context of on-the-spot checks and inspections in the new Article 3(5). This provision holds that the economic operator concerned has the right not to incriminate him- or herself and to be assisted by a person of his/her choice. Furthermore, when making statements during on-the-spot checks, the economic operator has the possibility to use any of the official languages of the Member State in which he/she is located. However, when the economic operator does not cooperate and – consequently – OLAF needs to rely on national authorities or receives their assistance for other reasons, the proposal maintains the principle that such assistance be provided in compliance with national law.²⁹ This proposal is in line with the other Union bodies' modalities of conducting administrative investigations.

In order to ensure that OLAF has access to bank account information, the Commission proposes that Member States' duty to assist OLAF in the conduct of its investigations should include the transmission of certain bank account information. According to the Commission, OLAF should be given information on account holders held by central bank and payment account registers or automated retrieval mechanisms established by Member States pursuant to the Anti-Money Laundering Directive. When strictly necessary for the purpose of the investigation, OLAF should also be given the record of transactions. This cooperation could take place through Member States' Financial Intelligence Units, without prejudice to the cooperation with other authorities. The Commission envisages that the national authorities act in compliance with their respective national laws.³⁰

The Commission's proposal also aims to end the discussion on OLAF's mandate in the area of VAT once and for all. Article 3 clarifies that on-the-spot inspections are now available to OLAF in all areas, including VAT.³¹ In addition, OLAF is also allowed to exchange information on VAT within the Eurofisc network.³²

With regard to the assistance to be provided by AFCOS, upon OLAF's request – before a decision has been taken as to whether or not to open an investigation, as well as during or after an investigation – the AFCOS must provide, obtain, or coordinate the necessary assistance for OLAF to carry out its tasks effectively. The proposal leaves it up to the Member States to decide on the organisation and powers of their AFCOS. Furthermore, provision is made for the possibility for OLAF to request the assistance of the AFCOS in the

context of internal and external investigations and coordination activities as well as for the AFCOS to cooperate among themselves.³³

In order to improve on the follow-up of OLAF reports and recommendations in the Member States, the proposal distinguishes between two situations. On the one hand, the equivalence rule will remain applicable to OLAF reports and recommendations in cases of national criminal proceedings (including punitive administrative proceedings). As national law on the use of reports by administrative inspectors in criminal proceedings varies, the Commission deems it appropriate that conditions of national law should apply. On the other hand, the Commission introduces a principle of admissibility of OLAF reports in administrative proceedings and in judicial proceedings of an administrative, civil, and commercial nature in the Member States. In these cases, admissibility should only be subject to a simple verification of authenticity. The proposal also provides for the admissibility of the reports in administrative and judicial proceedings at the Union level.³⁴

Lastly, the Commission specifies OLAF's role in coordination cases. The proposal states that OLAF may organise and facilitate cooperation between the competent authorities of the Member States, institutions, bodies, offices, agencies, third countries' authorities, and international organisations. To this end, the participating authorities and OLAF may collect, analyse, and exchange information, including operational information. OLAF investigations may accompany competent authorities carrying out investigative activities upon request of these authorities³⁵ OLAF may also participate and exchange information in Joint Investigation Teams.³⁶

IV. Summary

The Commission's proposal does not tackle all problems that the OLAF investigative framework faces today and will face in the coming future, as identified by the evaluation on Regulation 883/2013. However, that was never the object or purpose of the tabled proposal. The commission targets only the most pressing issues, namely the future cooperation with the EPPO, the effectiveness of OLAF's investigative activities, and the clarification and simplification of its legal framework. The amendments do not venture beyond the short term. It is only at a later stage, when OLAF has gained experience in working together with the EPPO, that more fundamental and far-reaching changes are to be made in OLAF's legal framework.

1. Art. 19 of Regulation 883/2013 stipulates that, by 2 October 2017, the Commission must submit to the European Parliament and the Council an evaluation report on the application of Regulation 883/2013. Said report must state whether there is a need to amend this Regulation. The Evaluation Roadmap set the wheels in motion in late 2015 and clarified the scope of the evaluation (see European Commission, "Evaluation of the application of Regulation (EC, Euratom) No 2018/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)", http://ec.europa.eu/smArt-regulation/roadmaps/docs/2017.olaf_001_evaluation_of_regulation_883_2013_en.pdf). The time period covered by the evaluation is 1 October 2013 to the end of 2016. The output consists of: European Commission Report, "Evaluation of Regulation 883/2013", COM(2017) 589 final, supported by a European Commission Staff Working Document, SWD(2017) 332 final, OLAF Supervisory Committee, "Opinion No 2/2017", (Ref.

Ares(2017)4762494). In support of the European Commission's evaluation, ICF, an independent consultancy, was contracted to conduct an external evaluation (see ICF, "Evaluation of the Application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Final report", https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation_of_the_application_regulation_883_en.pdf). For an overview of the evaluation carried out, see M. Janda and R. Panait, "The OLAF Regulation – Evaluation and Future Steps", (2017) *eucrim*, 182 and K. Bovend'Eerdt, "Learning Lessons – Reflecting on Regulation 883/2013 through Comparative Analysis", (2017) *eucrim*, 188, 189-190. ↵

2. SWD(2017) 332 final, 6; COM(2018) 338 final, 1; SWD(2018) 251 final, 4. ↵

3. Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198/29, 27.7.2017. ↵

4. Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283/1, 31.10.2017 (hereinafter the EPPO Regulation). ↵

5. Communication from the Commission, "A modern budget for a Union that protects, empowers and defends. The Multiannual Financial Framework for 2012-2027", COM(2018) 321 final. ↵

6. For a detailed analysis of the (future) cooperation between OLAF and the EPPO, see A. Weyembergh and C. Briere, "The Future Cooperation between OLAF and the European Public Prosecutor's Office", 2017, (In-depth analysis for the CONT committee) and A. Venegoni, "The New Frontier of PFI Investigations – The EPPO and its Relationship with OLAF", (2017) *eucrim*, 193. ↵

7. COM(2017) 589 final, p. 7; COM(2018) 338 final, pp. 1-2; SWD(2018) 251 final, pp. 6-8. ↵
8. COM(2017) 589 final, p. 3; SWD(2017) 332 final, pp. 15-16; COM(2018) 338 final, pp. 4-5; SWD(2018) 251 final, pp. 9-10. ↵
9. COM(2017) 589 final, p. 3; SWD(2017) 332 final, p. 18; COM(2018) 338 final, p. 4; SWD(2018) 251 final, p. 12. ↵
10. COM(2017) 589 final, p. 8; SWD(2017) 332 final, pp. 38-39, 40; COM(2018) 338 final, p. 4; SWD(2018) 251 final, pp. 13-14. ↵
11. For instance J. 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*, 2011, p. 77. ↵
12. ECJ, 8 September 2015, case C-105/14, *Tarrico*. ↵
13. SWD(2017) 332 final, pp. 23-24; SWD(2018) 251 final, p. 10. ↵
14. COM(2017) 289 final, p. 4; SWD(2017) 332 final, pp. 18-22; COM(2018) 338 final, p. 5; SWD(2018) 251 final, p. 11. ↵
15. COM(2017) 589 final, p. 4; SWD(2017) 332 final, p. 34; COM(2018) 338 final, p. 5; SWD(2018) 251 final, p. 14. ↵
16. COM(2017) 289 final, p. 8; SWD(2017) 332 final, pp. 42-43; SWD(2018) 251 final, p. 15. ↵
17. COM(2017) 589 final, pp. 7-8; COM(2018) 338 final, p. 2; SWD(2018) 251 final, pp. 6-15. ↵
18. COM(2017) 589 final, pp. 8-9; COM(2018) 338 final, p. 4; SWD(2018) 251 final, p. 6. ↵
19. Art. 1(4a) of the Proposal, which mirrors Art. 101(1) of the EPPO Regulation. For the rationale, see COM(2018) 338 final, p. 8; SWD(2018) 251 final, p. 17. ↵
20. Art. 12c(1) of the Proposal, which mirrors Art. 24 of the EPPO Regulation. For further rules on what information needs to be provided and under what conditions, see Art. 12c(2) through (6) of the Proposal. For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, pp. 18-19. ↵
21. Art. 12c(2) of the Proposal. ↵
22. Art. 12c(3) of the Proposal. ↵
23. Art. 12d of the Proposal, which mirrors Art. 101(2) of the EPPO Regulation; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, pp. 19-20. ↵
24. With regard to OLAF's support action, see Art. 12e of the Proposal, which mirrors Art. 101(3) of the EPPO Regulation; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, p. 21. With regard to OLAF complementary investigations, see Art. 12f of the Proposal; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, p. 21. ↵
25. For the procedure, see Proposal Art. 12f(1) and (2), which has no mirroring provision in the EPPO Regulation. ↵
26. Art. 12e of the Proposal, which mirrors Art. 101(3) of the EPPO Regulation; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, p. 21. ↵
27. Art. 12g(1) of the Proposal. ↵
28. Art. 3. For the rationale, see COM(2018) 338 final, pp. 9-10; SWD(2018) 251 final, pp. 22-26. ↵
29. Art. 3(7) and 7(3) of the Proposal. The amendments to Article 3 are in conformity with the interpretation given by the General Court in its recent ruling GC, 3 May 2018, case T-48/16, *Sigma Orionis SA v European Commission*, paras. 81-82. ↵
30. Art. 7(3) of the Proposal. For the rationale, see COM(2018) 338 final, p. 10; SWD(2018) 251 final, p. 26. ↵
31. Art. 3(1) of the Proposal. For the rationale, see COM(2018) 338 final, p. 10; SWD(2018) 251 final, p. 27. ↵
32. Art. 12(5) of the Proposal. ↵
33. Art. 12a of the Proposal. For the rationale, see COM(2018) 338 final, p. 11; SWD(2018) 251 final, pp. 27-28. ↵
34. Art. 11(2) of the Proposal. For the rationale, see COM(2018) 338 final, p. 11; SWD(2018) 251 final, p. 27. ↵
35. Art. 12b(1) of the Proposal. For the rationale, see SWD(2018) 251 final, p. 28. ↵
36. Art. 12b(4) of the Proposal. For the rationale, see SWD(2018) 251 final, p. 28. ↵

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