OLAF Investigations in a Multi-Level System

Legal obstacles to Effective Enforcement

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I. Introduction

The protection of the EU budget is a shared responsibility between the EU – namely the Commission – and the Member States.[1] In principle, the national (administrative or judicial) authorities conduct investigations and sanction those violations of EU law that are detrimental to EU financial interests, both when they concern expenditure (e.g., structural funds) and revenue (e.g., customs duties). The readers of *eucrim* are certainly familiar with the developments in EU law that have taken place since the 1970s, which have entailed increasing EU intervention on the punitive aspects of the enforcement of EU policies. Such intervention mainly consists of attempts to harmonise national laws,[2] on the one hand, and to establish an office within the Commission, the European Anti-Fraud Office (OLAF), which is independent and entrusted with investigative tasks throughout the EU territory, on the other.[3]

OLAF's objective is to step up the fight against fraud, corruption, and any other illegal activity affecting the EU budget.[4] For this purpose, it has been granted some tasks during the investigative phase: while OLAF has neither adjudicatory powers (i.e., it does not determine or apply any sanctions) nor prosecutorial tasks (i.e., it does not bring suspects before courts), it can carry out investigations both within the EU institutions, bodies, offices and agencies (internal investigations)[5] and in the territory of the Member States (external investigations). The nature of OLAF investigations is expressly labelled as administrative. Investigations conclude with a report that is sent to the competent authorities of the Member States concerned (or to the EU "institution, body, office or agency concerned"[6] in case of an internal investigation). The report may be accompanied by recommendations (which are, as such, non-binding) on the appropriate follow-up that should be taken at the national level.[7]

Due to the lack of sanctioning powers, at first glance, OLAF may appear to be a "toothless tiger" compared with the weight of its objectives. However, one should bear in mind that the consequences of such administrative investigations may be quite severe. OLAF's reports can be used as evidence in national administrative and judicial proceedings and, in any case, OLAF's action can be helpful for national authorities in gathering further evidence. The question of whether OLAF's powers are sufficient to step up the fight against illegal activities affecting the EU budget depends, therefore, on the understanding of the extent of such powers and of their use in such a multi-level context. In other words: what are the powers available to OLAF, and how is its cooperation with national authorities regulated?[8]

As a matter of fact, such an apparently plain question is actually extremely complex, especially when dealing with external investigations.[9] The EU legal framework does not contain an exhaustive code of OLAF's powers; instead, it is the multi-layered result of different provisions. The protection of EU financial interests ("PIF area") is of horizontal nature covering different EU policy areas (agriculture, structural funds, customs, etc.). The horizontal instruments adopted in the PIF field (namely those concerning OLAF's investigations) have not replaced the sectoral instruments previously adopted in every policy area: instead, they make some references to the existing instruments in order to specify the content of the general horizontal provisions. Furthermore, OLAF's powers are not fully determined by EU law, but often refer back to national provisions. In this context, it has been observed that OLAF is still a "prisoner of national laws."[10]

For these reasons, the analysis of the powers that can effectively be exerted by OLAF has become the subject of academic interest, inasmuch as it triggers further questions concerning the architecture of the enforcement mechanisms of the EU, their consistency across different policy fields, and their impact on citizens' rights. Drawing from some research projects currently conducted at the Utrecht centre for Regulation and Enforcement in Europe, which involve experts from several Member States, this contribution aims to

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highlight some of the problems inherent in the current OLAF framework, as well as to indicate where some possible solutions may be found.

II. A Look across Countries: A Challenging Interaction between EU and National Law

The establishment of OLAF has conferred a new vertical dimension to EU law enforcement: a supranational body has been entrusted with operations across national borders in order to overcome the obstacles inherent to any domestic response to transnational offences. In particular, OLAF can conduct its task in a threefold way:

(a) OLAF can provide assistance to the Member States "in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud" (*coordination cases*);[11]

(b) OLAF can join national administrative investigations that may be opened on OLAF request. In this case, OLAF acts as a seconded expert or joint investigator, vested with the same powers as the national authorities (such joint investigations are foreseen in CAP, fisheries, customs union): national law, therefore, applies (*mixed inspections*);[12]

(c) OLAF can conduct proper *autonomous investigations*.

As regards external investigations, OLAF can conduct on-the-spot checks and inspections pursuant to Regulation (EC, Euratom) No. 2988/95 and Regulation (Euratom, EC) No. 2185/96.

As already mentioned, these regulations do not lay down an exhaustive EU-law-based procedure for autonomous investigations by OLAF, but rather refer to sectoral regulations[13] and to national law.[14] According to these regulations, OLAF's checks and inspections shall be prepared and conducted in close cooperation with the Member States concerned; Member States' authorities may participate in them under OLAF's authority. In this case, the national law dimension comes into play at two points in time: as regards the investigative powers as such and as regards the assistance to be provided in order to use coercive powers.[15]

With respect to the investigative powers available to OLAF, EU law provides that its staff shall act, "subject to the Union law applicable," in compliance with the rules and practice of the Member State concerned and with the procedural safeguards provided in the Regulation. OLAF exercises these powers in the Member States upon the production of written authorisation specifying their identity and capacity. The Director General issues such authorisations indicating the subject matter and the purpose of the investigation, the legal basis for conducting the investigation, and the investigative powers stemming from that legal basis.[16] However, OLAF should be granted access to information and documents under the same conditions as the competent authorities of the Member States concerned,[17] and such conditions may differ in the Member States.

Furthermore, OLAF cannot use force or coercion when conducting its investigations. The assistance of national authorities may therefore be necessary, for example if business operators are not willing to grant OLAF staff access to their premises. Regulation (EU, Euratom) No. 883/2013 specifies that Member States "shall give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively."[18] In this regard, it is worth mentioning that OLAF has experienced difficulties in identifying the national authority competent to provide assistance to its staff. For this reason, Regulation No. 883/2013 provides that the Member States shall "designate a service ('the anti-fraud coordination service') to facilitate effective

cooperation and exchange of information, including information of an operational nature, with the Office" (AFCOS).[19]

Looking in more detail at one specific investigative measure – namely the right to enter businesses' premises – may help to elucidate the complex interaction between the EU and national dimensions. Art. 3 of Regulation No. 883/2013 refers to Art. 9 of Regulation No. 2988/95[20] and to Regulation No. 2185/96. These instruments specify the targets of such investigative measures.[21] Nevertheless, they provide that on-the-spot checks and inspections of economic operators shall be conducted "in compliance with the rules and practices of the Member States concerned."[22] In this context, the national authorities assist OLAF and ensure, "in accordance with Regulation No 2185/96, that the staff of the Office are allowed access, under the same terms and conditions as its competent authorities and in compliance with its national law, to all information and documents relating to the matter under investigations which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently."[23] In addition, EU law does not provide OLAF with the power to seal premises. If necessary, "it shall be for the Member States, at the Commission's request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence."[24]

A similar interaction between EU and national law is apparent with respect to the exchange of information. In addition to the possibility to autonomously gather information through its investigations, and in order to conduct them effectively, OLAF needs to receive the pre-existing information that is in the hands of the national authorities. In particular, OLAF needs to access this information for the following reasons:

- In order to detect suspected behaviours in view of opening an investigation;
- In order to decide whether an OLAF investigation should be opened, namely whether there is a "sufficient suspicion," whether the investigation would fall within the "policy priorities" established by OLAF, and whether it would be "proportionate;"[25]
- In order to share information during an ongoing investigation (following an official request or by spontaneous initiative).[26] However, also this obligation provided for by the EU legal framework is formulated in a way that refers back to national law.[27] Art. 8(2) of Regulation No. 883/2013, for example, provides that the national authorities are requested to transmit documents and information to OLAF only "in so far as their national law allows."

Even from this cursory overview, it is evident that, in order to assess the full scope of OLAF's investigative powers, as well as the obligation of the national enforcement authorities to exchange information with OLAF, it is necessary to examine national laws. Substantial differences are indeed expected, for example as regards the scope of procedural safeguards (such as the privilege against self-incrimination or the right to a lawyer) or as regards the approach toward multi-disciplinary cooperation (i.e., the exchange of information between different types of authorities): since OLAF is considered an administrative authority, such cooperation may encounter several obstacles.[28]

The most obvious risk behind the "variable geometry" of OLAF's legal framework concerns the effectiveness of its action. The EU Commission itself pointed out a series of disadvantages of this system in 2011,[29] and it seems that the problems highlighted at that time were not overcome by the reform of 2013.[30] Furthermore, this scenario may also be alarming from the perspective of the persons subject to the investigations. The information gathered by OLAF in one Member State may later be used in another Member State and may lead to severe sanctions; different levels of safeguards provided in every Member State may therefore undermine the position and legal protection of the persons under investigation. For this reason, the transfer of investigative tasks for enforcement purposes from the national to the supranational level is not only a

matter of shared sovereignty between the Member States and the EU, but also needs to be analysed from the perspective of EU citizens.[31]

III. A Look across EU Policy Fields: An Internal Asymmetry?

The approach of the OLAF legal framework entails that the content of the investigative measures provided by EU law is, in the end, fully defined by national provisions. Therefore, different investigative powers can ultimately be exercised by OLAF in the Member States. In addition to this aspect, however, another question arises: are the measures available to OLAF adequate and sufficient for it to perform its tasks?

This issue is particularly relevant when regarded from the broader perspective of EU law enforcement. Although the enforcement of EU policies was originally entrusted to the national authorities, an increasing number of EU authorities has recently been given direct enforcement tasks, i.e., powers that can be exercised directly against (natural or legal) persons. These tasks may consist of monitoring markets, investigating alleged infringements, or even punishing those infringements (e.g., through administrative fines, public notices, and withdrawal of licenses). Such a "verticalisation" of tasks (the shift from the national to the EU level) can be observed in many areas. One may think, for example, of the role played by the EU Commission in the field of competition law or – to a more limited extent – in the context of food safety.[32] Moreover, various and, in some cases, more incisive enforcement powers have also been conferred to independent bodies such as the European Central Bank (ECB), the European Securities and Markets Authority (ESMA), and the European Aviation Safety Agency (EASA).[33]

Looking transversally across the different areas helps to elucidate whether there are substantial differences in how the transfer of enforcement tasks from the national to the supranational level has occurred and, most importantly, whether such differences are justified – in other words, whether there is any coherence behind this (relatively) recent trend.[34] Such a quest for consistency is not a mere theoretical exercise that is helpful, at most, in analysing the (political and legal) phenomenon of the "verticalisation" of powers. It can also have a normative effect on recalibrating the EU's legal framework in order to afford adequate protection to EU citizens. Even if it consists only of investigative tasks, the action of any enforcement authority may have a deep impact on several fundamental rights, including, for example, the right to privacy, the right to a fair trial, and the right to property. The transfer of such tasks to the EU level may therefore raise concerns, both as regards the accountability of the enforcement authorities, on the one hand, and the protection against their acts, on the other.

Adopting this broader perspective, one might be quite surprised to observe the extent of the (administrative) powers accorded to the Commission in competition law. First of all, not only does the Commission have the power to apply substantive fines for the violation of Art. 101 TFEU and Art. 102 TFEU, but it can also impose procedural sanctions against "undertakings" in order to ensure the possibility of conducting the investigations provided for by Regulation No. 1/2003.[35] In other words, although the Commission does not have direct coercive powers, it may impose fines if private companies (undertakings) do not comply with its requests. Furthermore, the powers to carry out inspections of undertakings are fully defined by EU law: the assistance of national authorities is only needed in some cases; hence, the recourse to national law is only rarely necessary.[36] In addition, the powers enjoyed by the Directorate-General for Competition are much broader than those accorded to OLAF. For example, in competition law, the Commission can seal business premises and books or records "for the period and to the extent necessary for the inspection."[37] It can also conduct inspections of private premises – "including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned" – if there is a "reasonable

suspicion" that documents are kept there and if those documents may be relevant to prove a "serious violation" of EU competition law.[38]

Looking, for example, at the ESMA legal framework, one may further observe that this authority has the possibility to directly access telephone and data traffic records.[39] OLAF is precluded from such powers, even after the recent recast of its regulation, thereby making the availability of this kind of information dependant on the possibility (and willingness) of the national authorities to share it with their EU counterpart. One may ask, therefore, whether such a different extent of powers is related to the objectives and actual needs of the different EU authorities; whether it is determined by legitimate concerns related to the protection of fundamental rights; or whether it is just the result of negotiations on each specific instrument, which creates an indecipherable agglomeration of EU enforcement authorities. In other words, why is the possibility – for example – to seal business premises or to conduct an inspection of non-business premises recognised by the Commission only in the field of competition law and not in the PIF area? What are the reasons for granting the power to access communication data only to ESMA and not to other EU enforcement authorities?

IV. Conclusion

The legal framework concerning OLAF investigations is often (rightly) described as complex. This is mainly due to the interaction between the different (national and EU) levels. Even the most recently revised OLAF Regulation is far from an exhaustive code to regulate the powers to investigate irregularities and fraud against the EU budget, since it contains many references to other EU regulations and to national law. In addition, when OLAF's powers are compared with those accorded to other EU enforcement authorities, they seem to be less incisive, since OLAF has fewer possibilities to directly adopt certain investigative measures without the assistance of national authorities. As a result, the effectiveness of OLAF's investigations depends on national law, on how it is applied in practice, and on the national authorities' approach to the cooperation with OLAF.

The research currently being conducted at Utrecht University aims to clarify the extent of the increasing enforcement powers bestowed upon EU actors, as well as the remedies that are available to citizens against the arbitrary exercise of such powers. Furthermore, by analysing the phenomenon of "verticalisation" in two directions, looking both at national differences and at the EU dimension, it pursues the ambitious objective of offering a more solid foundation for future policy choices, with a view to recalibrating the legal framework on direct EU enforcement powers in a more consistent way.

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1. See Arts. 310 and 325 TFEU.↩
2. See, among others, J.A.E. Vervaele, The European Union and harmonization of the Criminal law enforcement of Union policies: in search of a criminal law policy?, in: U. Magnus and I. Cameron (eds.), *Essays on criminalization & sanctions*, Uppsala 2014, p. 185; J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF),* Groningen 2011, p. 7; V. Covolo, *L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraud*, Baden-Baden 2015, p. 38.↩
3. See Regulation (EU, Euratom) No. 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999 (2013) O.J. L 248, 18.9.2013, 1. See also J.A.E. Vervaele, Towards an Independent European Agency to Fight Fraud and Corruption in the EU?, *European Journal of Crime, Criminal Law and Criminal Justice* Vol. 7 (1999), 331; V. Mitsilegas, *EU Criminal Law,* Oxford et. al. 2009, p. 210; M. Wade, OLAF and the Push and Pull Factors of a European Criminal Justice System *eucrim* 3-4/2008, 128; V. Covolo, The new OLAF Regulation: a missed opportunity for substantial reforms (manuscript submitted to the *Common Market Law Review*).↩
4. Art. 1 of Regulation No. 883/2013.↩
5. Art. 1(4) of Regulation No. 883/2013.↩
6. Art. 11(4) of Regulation No. 883/2013.↩
7. Art. 11(3) of Regulation No. 883/2013.↩
8. The Commission, in the proposal for the Establishment of the European Public Prosecutor's Office, COM(2013) 534, p. 2, observed: "Coordination, cooperation and information exchange face numerous problems and limitations owing to a split of responsibilities between authorities belonging

to diverse territorial and functional jurisdictions. Gaps in the judicial action to fight fraud occur daily at different levels and between different authorities and are a major impediment to the effective investigation and prosecution of offences affecting the Union's financial interests."↩

9. Art. 4 of Regulation No. 883/2013 lays down more detailed and homogeneous rules on internal investigations. See V. Covolo, op. cit. (n. 2), p. 291.↩
10. See K. Ligeti and M. Simonato, Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept, in: F. Galli and A. Weyembergh, *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU,* Brussels 2014, p. 82.↩
11. Art. 1(2) of Regulation No. 883/2013.↩
12. See e.g., Art. 18(4) of Council Regulation No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, O.J. L 82, 22.3.1997, 1; Art. 98 of Council Regulation No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, O.J. L 343, 22.12.2009, 1.↩
13. Art. 9(2) of Council Regulation No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, O.J. L 312, 23.12.1995, 1.↩
14. Art. 8 of Regulation No. 2988/95.↩
15. Of course, national law comes into play again in the following phase of the admissibility and use as evidence of information gathered by OLAF. Art. 11(2) of Regulation No. 883/2013 states that OLAF's reports "shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors." However, in criminal proceedings, each Member State attributes a different value to information gathered during administrative investigations. See K. Ligeti and M. Simonato, op. cit. (n. 10), *p.* 91; V. Covolo, op. cit. (n. 2), p. 310.↩
16. Art. 7(2) of Regulation No. 883/2013.↩
17. Art. 7(1) of Council Regulation No. 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, O.J. L 292, 15.11.1996, 2.↩
18. Art 3(3) of Regulation No. 883/2013.↩
19. Art. 3(4) of Regulation No. 883/2013.↩
20. Art. 9(2) of Regulation No. 2988/95 refers again to other sectoral rules.↩
21. Art. 7 of Regulation No. 2185/96 specifies that on-the-spot checks and inspections may concern, in particular: "- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators, – computer data, – production, packaging and dispatching systems and methods, – physical checks as to the nature and quantity of goods or completed operations, – the taking and checking of samples, – the progress of works and investments for which financing has been provided, and the use made of completed investments, – budgetary and accounting documents, – the financial and technical implementation of subsidized projects."↩
22. For example, Art. 14 of the Guidelines on Investigation Procedures for OLAF Staff (1 October 2013) provides that the economic operator shall be notified of the on-the-spot check only "[w]here required by national legislation."↩
23. Art. 3 of Regulation No. 883/2013.↩
24. Art. 7 of Regulation No. 2185/96.↩
25. Art. 5(1) of Regulation No. 883/2013.↩
26. Art. 8(2) and (3) of Regulation No. 883/2013.↩
27. See also Art. 7(2) of the Second Protocol to the Convention on the protection of the European Communities financial interests. Also, sectoral regulations often refer to national law: see, e.g., Art. 3(4) of Commission Regulation No. 1848/2006 (common agricultural policy).↩
28. See R. Panait, Information Sharing between OLAF and National Judicial Authorities, *eucrim* 2/2015, 64; M. Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities,* Antwerp 2008; A. Klip and J.A.E. Vervaele, *European Cooperation Between Tax, Customs and Judicial Authorities,* The Hague et. al., 2002.↩
29. See the Communication from the EU Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations, "An integrated policy to safeguard taxpayers' money", COM(2011) 293 final.↩
30. The aspect to further strengthen the procedural safeguards of persons under OLAF investigation through the establishment of an external "controller of procedural guarantees" is still under negotiation (see COM(2014) 340 final).↩
31. The CJEU recently stressed again that the EU is "a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals" (CJEU, Opinion 2/13 on the draft agreement concerning the accession of the EU to the ECHR, ECLI:EU:C:2014, §157).↩
32. In the context of food safety, the EU Commission's role is to conduct audits of the official controls carried out at the national level. Nevertheless, if there is a serious failure in a national control system, the Commission can directly adopt enforcement measures ("safeguard" or "emergency" measures), such as suspension of placing on the market certain products (see Art. 56 of Regulation No. 882/2014 and Art. 53 of Regulation No. 178/2002). See B. van der Meulen and A. Freriks, Millefeuille. The emergence of a multi-layered controls system in the European food sector, *Utrecht Law Review*, Vol. 2 (2006), 156.↩
33. A thorough analysis of the role played by these bodies is presented in the project "Verticalisation of enforcement" coordinated by Michiel Luchtman and Mira Scholten (for further information see: http://renforce.rebo.uu.nl/en/bouwsteenprojecten/verticalisering-en-toezich-thouders/).↩
34. See L. Kuhl, Cooperation between Administrative Authorities in Transnational Multi-Agency Investigations in the EU: Still a Long Road Ahead to Mutual Recognition?, in: K. Ligeti and V. Franssen (eds.), *Challenges in the field of economic and financial crime in Europe* (Hart Publishing, forth-coming 2016).↩
35. See Art. 23 of Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. L 1, 4.1.2003, 1.↩

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36. For example, in order to obtain the assistance of the police or an equivalent enforcement authority when an undertaking opposes an inspection ordered by the Commission (see Art. 20(6), (7) of Regulation No. 1/2003).↩
37. This power has been accorded to the Commission to prevent the possible destruction of relevant documents overnight. Recital 25 specifies that seals "should normally not be affixed for more than 72 hours."↩
38. It is worth noting that, before executing this measure, the Commission needs to obtain judicial authorisation from a national judicial authority.↩
39. Art. 62 (1)(e) of 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, O.J. L 201, 27.7.2012, 1; and Art. 23c of Regulation No. 513/2011 of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies, O.J. L 145, 31.5.2011, 30. See M. Scholten and A. Ottow, Institutional Design of Enforcement in the EU: The Case of Financial Markets, *Utrecht Law Review,* Vol. 10 (2014), 80.↩

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