

The Role of an AFCOS in a New Anti-fraud Architecture

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ABSTRACT

It goes without saying that the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) form the heart of the protection of the EU's financial interests. However, the national authorities of the EU Member States are in the frontline when it comes to fighting fraud, bearing in mind that achievements in the field of the protection of the EU's financial interests also depend on the readiness and capacity of OLAF's and EPPO's partners in the Member States, (potential) candidate countries, and other non-EU countries, all of which cooperate to this end.

While the EPPO facilitates the achievement of its objectives in many ways through delegated prosecutors, OLAF, lacking a possibility to delegate its function, mainly relies on the anti-fraud coordination services (AFCOSes). These are established in each EU Member State to ensure effective cooperation and exchange of information with OLAF. In the absence of a stable legal framework for the role and mandate of an AFCOS, the challenges for cooperation with OLAF and also with other partner institutions are even greater.

This article tackles the issue of why it is necessary to better define the role and mandate of an AFCOS in the area of the protection of the EU's financial interests. A strengthened structure would enable the AFCOS to play a more significant role in the new anti-fraud architecture and in this way ensure, with improved capacities, better and more effective cooperation and partnership with the EU and relevant national authorities.

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I. Introductory Remarks

The EU is currently facing great challenges. Next to general developments, such as post-pandemic recovery, inflation, the war of aggression on Ukraine, etc., challenges are also evident in the context of financial crime: transactions have become digital, cross-border schemes are increasingly frequent and complex, and organised crime has continuously expanded its business into fraud against EU funds. Such threats put an enormous strain on the EU budget and require constant adaptation of the anti-fraud authorities to the changed modus operandi of fraudsters in order to stay ahead of the game. Therefore, certain adjustments in the anti-fraud architecture are called for.

While protecting the EU budget is a shared responsibility between the EU and its Member States, the European Commission plays a leading role in setting the standards and creating the (legal) framework for this shared responsibility. The time is ripe to review the efforts made by the European Commission in the area of the protection of the EU's financial interests and to give a new impetus to reform efforts.

The establishment of the EPPO aimed to improve the fight against crimes affecting the EU's financial interests and increase the effectiveness of the criminal law response to fraud in the participating Member States. OLAF's objective is to be a strong partner to the EPPO while maintaining its operational independence. Concretely, OLAF continues to act by conducting (administrative) investigations, with the possibility of issuing a judicial recommendation if the EPPO has no jurisdiction, e.g., OLAF is at the forefront of anti-fraud action in cases not taken by the EPPO but requiring administrative action.

However, the achievement of goals in the area of the protection of the EU's financial interests requires much stronger cooperation, both with EU institutions and partner authorities in the Member States as well with players outside the European Union. In other words: in order to ensure that all available means are being used to fight fraud and corruption detrimental to the EU's financial interests in the future anti-fraud landscape, it is necessary to establish close relations with all players involved, both at the EU and national levels, while ensuring that their individual roles and mandates in this regard are clearly prescribed.

In this context, it is useful to consider where in the fight against fraud and the protection of the EU's financial interests the capacities of the anti-fraud coordination services (AFCOSes) could and should be used. Such considerations are all the more problematic in light of the currently rather limited mandate of the AFCOSes and also their insufficiently clear role in terms of purpose and added value for the national systems. The role of an AFCOS is still overshadowed by the importance of a number of other OLAF partner institutions and in relation to other EU and national institutions.

Against this background, this article will illustrate the role, mandate, and importance of designating AFCOSes as OLAF's partners in Member States for the purpose of the protection of the EU's financial interests. Recommendations will be made for the future evolution of AFCOSes within a sufficient legal framework.

II. Development of AFCOS and its Role and Mandate in the Protection of the EU's Financial Interests

Initially, Member States had no legal obligation to establish an anti-fraud coordination system or an anti-fraud coordination service. The legal obligation for Member States to "designate" an AFCOS was assigned to the Member States in 2013 with the adoption of the OLAF Regulation (Regulation 883/2013).¹ In 2020, within the framework of the most recent amendments to the OLAF Regulation, the AFCOS provision required im-

provement in terms of a better understanding of the mandate of an AFCOS in relation to its cooperation with OLAF. In this regard, Art. 12a of Regulation 2013/883, as amended by Regulation 2020/2223,² stipulates that EU Member States are required to designate an AFCOS to facilitate effective cooperation and exchange of information with OLAF, including information of an operational nature, and to provide or coordinate the necessary assistance for OLAF to be able to carry out its tasks effectively.³

However, the Union legislator also clarified that the organisation and powers of the AFCOS are left to each Member State.⁴ Thus, the EU legal framework gives the Member States autonomy in deciding where to designate the AFCOS within their national administrative structures. The Union legislative framework is quite general and insufficiently clear in respect of the Member States' obligation to protect the financial interests of the EU and the tasks of an AFCOS, which can be interpreted in different ways in each Member State. This has led to significantly different AFCOS models and thus to major differences in the national legal frameworks that regulate both the protection of the financial interests of the EU as well as the structure, role, and mandate of an AFCOS. Consequently, the current situation also leads to different working results by AFCOSes, i.e. outputs and deliverables.

What is also striking: The provisions within OLAF Regulation 883/2013 regulating the obligation for Member States to designate an AFCOS significantly deviate from the criteria for the designation of an AFCOS that the acceding EU Member States – concretely, Romania, Bulgaria, and Croatia – had to fulfil with respect to specific benchmarks in the accession negotiation chapters. The EU requested the acceding Member States to establish a “strong” legal and institutional framework for their AFCOSes while at the same time not imposing the same standards on the long-standing Member States.⁵ Therefore, the model, role, and mandate of the established AFCOSes in these recently joined Member States are significantly different than those of the established Member States, which were not required to meet such criteria. This also resulted in greater administrative burdens and workload in the new Member States (Croatia, Bulgaria, and Romania).⁶

For example, during the accession process, Croatia received benchmarks from the European Commission to fulfil through Chapter 32 – Priority 4. These benchmarks were based on recommendations provided to Croatia by OLAF, following a thorough analysis of mechanisms that Croatia's competent institutions had for the protection of the EU's financial interests. In this sense, the analysis was not conducted only at the level of the authorities responsible for the financial management and control system but also at the level of bodies with “repressive functions” (in Croatia, these bodies are referred to as AFCOS network bodies: State Attorney's Office, Ministry of Interior, Customs and Tax Administrations, Sector for Financial and Budget Supervision, etc.). Upon finalisation of the analysis, Croatia received very clear recommendations and benchmarks to be fulfilled in order to successfully close the negotiation chapter. As a result, the Croatian AFCOS unit has a much broader scope of mandate and tasks than it would have had taking into consideration only Art. 12a of the above-mentioned Regulation 883/2013 as amended by Regulation 2020/2223.⁷

Another aspect in the discussion is that OLAF's potential efforts in terms of harmonising the role and mandate of AFCOSes at the level of the Member States have unfortunately not been clearly visible since 2013. In this context, it was for instance not visible at any level that the European Commission and OLAF consider an AFCOS to be an important and serious partner in the protection of the EU's financial interests and denote an improvement in anti-fraud policies. An AFCOS was instead seen as a provider of necessary information and a contact point or connector to the competent national institutions. This is corroborated by the fact that the amendments to the OLAF Regulation have not made any significant contribution to a better understanding of the possible role and mandate of an AFCOS and its positioning in the new anti-fraud architecture, as outlined above. In the period from 2011 to 2017, the anti-fraud policies advocated by OLAF were primarily aimed towards the establishment of the EPPO. Key future actions to improve OLAF's mandate and

capacities were far less visible and recognized, including the importance of AFCOSes in the changing anti-fraud landscape.

The considerable discrepancy between the roles and mandate of AFCOSes in the various Member States, ranging from “very ambitious” AFCOSes to AFCOSes that were granted only a minimal competence, became even more obvious in 2020 after the adoption of amendments to the 2013 OLAF Regulation and the start of implementation of the provisions of Art. 12a. On the one hand, observers had the impression that anti-fraud coordination services exclusively work for OLAF and provide no added value to national systems. On the other hand, the question arose as to why OLAF imposed much larger obligations on the candidate countries (within the negotiation chapters related to the protection of EU financial interests) than to long-standing Member States, even though an adequate EU legal framework for the designation and mandate of AFCOS is non-existent.

Thus, it is important to assess:

- whether or not the Member States have regulated the role and mandate of their AFCOSes in accordance with OLAF’s expectations;
- whether or not cooperation between AFCOSes and OLAF is satisfactory and
- what the weaker areas are in which OLAF sees room for improvement.

In addition, the increasing assumption of additional tasks by OLAF beyond the protection of the EU’s financial interests (e.g., the protection of the environment)⁸ have opened up a discussion on the need for a clearer description of OLAF’s mandate as well as the obligations of Member States in this regard, including the obligations of AFCOSes.

III. Challenges and Open Issues

Having worked as an expert in the field of the protection of the EU’s financial interests for many years, I have noticed that the EU position on the role, model, mandate, and importance of AFCOSes has changed with each change in OLAF’s Director-General and the different priorities laid down by them during their mandates. An example of this is the approach towards the “Guidance note on main tasks and responsibilities of an Anti-Fraud Co-ordination Service (AFCOS)” promoted by OLAF’s first Director-General, which was updated in 2002, 2011, and 2013.⁹ This document was considered to be OLAF’s political vision according to which direction the role, model, and mandate of an AFCOS was to be developed. However, it was never properly transposed into binding provisions within EU legislation for the protection of the EU’s financial interests. OLAF’s activities on the need to harmonise the model and role of an AFCOS with those Guidelines at the level of the Member States ceased in 2013; today, we can look back on a long period of different approaches and policies that each succeeding Directors-General pursued during his mandate, leading to different interpretations on AFCOSes for many years.

Defining the role and mandate of AFCOS as well as its position in cooperation with EU and national authorities should not, however, be left to the approaches/policies pursued by OLAF’s Director-Generals. Instead, a consistent EU legal framework that guarantees clear and stable provisions for an AFCOS must be created. Against this background, the question emerges as to whether or not the comprehensive EU legislative framework relevant for the protection of the EU’s financial interests should be further amended in order to

significantly improve AFCOS issues in areas of perceived weaknesses. I wish to point out three requirements:

- We need a clear vision on the part of the European Commission and OLAF on what exactly is expected from AFCOSes and whether or not the existing AFCOS models meet their expectations, taking into account the existing, significantly different AFCOS models and, consequently, significant differences in the quality and quantity of their deliverables.
- It is necessary to duly assess the justification of the establishment of an AFCOS in order to answer the question of whether it only exists for the purpose of providing logistical assistance to OLAF and possibly also some other EU institutions/bodies in the future, or whether it also provides added value to the national administrative structure (in light of the fact that AFCOS employees are not employees of OLAF but of relevant national institutions).
- We must use the experiences gained in the process of establishing the EPPO and in view of its functioning, which includes the delegation of its functions to the delegated prosecutors in the Member States. In doing so, we can see whether or not the AFCOSes can appropriately play a more significant role in the new anti-fraud architecture and ensure better cooperation and partnership with the EU and national authorities with enhanced capacities.

IV. Conclusion

In order to strengthen the architecture designed to effectively fight fraud to the detriment of the EU's financial interests and to develop new tools for this purpose, further development of the anti-fraud policies at the EU level is of utmost importance. In the process, it is important that the European Commission, among other things, takes a clear political position on the future role and mandate of each AFCOS as one of OLAF's key partners and its possible positioning in the new anti-fraud architecture. This position will not only contribute to strengthening the capacity of OLAF but also guarantee more effective cooperation and partnership with the EU and national authorities.

This is the only way to improve the institutional and legal framework for the protection of the EU financial interests at the level of the Member States. Given the evaluation process for the administrative and criminal legal framework for the protection of the EU's financial interests, we currently have the opportunity to significantly improve anti-fraud policies and, in turn, the entire legal framework for the protection of the EU's financial interests. This approach would also greatly contribute to re-gaining citizen's trust in EU and national institutions and their genuine political will to fight fraud and corruption at all levels.

There is no alternative to clearly setting political goals and striving towards a consistent, clear, and stable EU institutional and legal framework in the future. Getting out of the comfort zone is important for all institutions and players involved if they wish to make significant strides in this area.

1. Art. 3(4) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, 1.↩

2. See Art. 1(13) of Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, OJ L 437, 28.12.2020, 49.↩

3. See also Recital 37 of Regulation 2020/2223.↩

4. Ibid.↩

5. On the different development of obligations to designate AFCOSes between "new" and "old" Member States, see also L. Jellinek and C. Kreith, "Protecting EU Taxpayer Money together with Global Partners - 25 Years of International Relations of the European Anti-Fraud Office", (2024) *eu-crim*, 324, 330-1.↩

6. One example is that Croatia invested much more human and financial resources in its AFCOS than the “established” Member States.↵
7. For example, the tasks of the Croatian AFCOS include the following:
- Coordinating drafting the national anti-fraud strategy;
 - Initiating amendments to the legal framework related to the protection of the EU's financial interests;
 - Coordinating irregularity and fraud risk assessment at the level of the AFCOS system;
 - Ensuring timely reporting of irregularities to OLAF by implementing irregularity management procedures, administering the irregularity management system at the national level (including user support), and ensuring the technical accuracy of irregularity reports;
 - Planning and organising training activities related to the protection of EU funds;
 - Facilitating the exchange of information with OLAF;
 - Providing support to OLAF during on-the-spot checks on the territory of the Republic of Croatia;
 - Conducting administrative checks on EU-funded projects.↵
8. See, for instance, OLAF's tasks for waste management as introduced through Regulation (EU) 2024/1157 of the European Parliament and of the Council of 11 April 2024 on shipments of waste, amending Regulations (EU) No 1257/2013 and (EU) 2020/1056 and repealing Regulation (EC) No 1013/2006, OJ L, 2024/1157, 30.4.2024. For OLAF's role in this context, see S. Grassin and L.I. Garruto, “Fighting Waste Trafficking in the EU: A Stronger Role for the European Anti-Fraud Office”, (2024) *eucrim*, 143-145.↵
9. For the 2013 version, see ARES(2013)3403880, available at: <[https://poise.portugal2020.pt/documents/10180/19827/Guide+Note+on+Main+Tasks+and+Responsibilities+of+an+Anti-Fraud+Coordination+Service+\(AFCOS\).pdf/0c438f5b-8056-4aa7-ae37-f13fe-f5f4ba8](https://poise.portugal2020.pt/documents/10180/19827/Guide+Note+on+Main+Tasks+and+Responsibilities+of+an+Anti-Fraud+Coordination+Service+(AFCOS).pdf/0c438f5b-8056-4aa7-ae37-f13fe-f5f4ba8)>, accessed 12 February 2025.↵

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