OLAF's New Amended Legal Framework

Thomas Wahl

eucrim
European Law Forum: Prevention • Investigation • Prosecution

News

The European Parliament and the Council adopted Regulation 2020/2223 amending the so-called OLAF Regulation (EU, Euratom) No 883/2013. It was published in the Official Journal L 437 of 28 December 2020, pp. 49-73. The respective legislative proposal was presented by the Commission in May 2018 (--> eucrim 1/2018, 5-6). The new legislation pursues a threefold objective:

- Adapting the operation of OLAF to the establishment of the EPPO;
- Enhancing the effectiveness of OLAF's investigations;
- Clarifying and simplifying certain provisions of Regulation 883/2013.

New Articles 12c-12g regulate the cooperation between OLAF and the EPPO which includes the following issues:

- OLAF's obligations to report criminal conduct to the EPPO;
- Possibilities of OLAF to conduct preliminary evaluations of the allegations and their effects on EPPO investigations;
- Discontinuance of ongoing OLAF investigations where the EPPO is conducting an investigation into the same acts;
- EPPO's obligation to provide relevant information to OLAF with a view to take appropriate administrative action if the EPPO has decided not to conduct an investigation or has dismissed a case;
- Clear rules on the way OLAF supports the EPPO in accordance with Art. 101(3) of Regulation 2017/1939;
- Framework enabling OLAF to conduct complementary investigations.

OLAF and the EPPO are also to agree on formal working arrangements setting out mainly the exchange of information. Both the EPPO Regulation and the new OLAF Regulation provide for the possibilities that the two bodies can consult their case management systems on a hit/no-hit basis, so that non-duplication of investigations and a smooth flow of information can be ensured. Ultimately, the new rules foresee an annual high-level meeting between the Director-General of OLAF and the European Chief Prosecutor to discuss matters of common interest.

As regards *external investigations*, Regulation 2020/2223 codifies CJEU case law by clarifying that Union law alone governs on-the-spot checks and investigations carried out by OLAF if the economic operator does not resist. It also introduces a duty on the part of economic operators to cooperate with OLAF and OLAF will be able to require economic operators to supply relevant information where they may have been involved in the matter under investigation or may hold such information. On the other hand, the Regulation strengthens the rights of economic operators, e.g. by establishing the right to be assisted by a person of their choice, including external legal counsel, during on-the-spot checks and inspections.

AUTHOR

Thomas Wahl
Senior Researcher
Max Planck Institute for the Study of Crime, Security and Law

Published in
2020, Vol. 15(4) eucrim pp 276 – 277
ISSN: 1862-6947
https://eucrim.eu

CC BY ND

As regards *internal investigations*, it is clarified that OLAF has access to any relevant information held by the institutions, bodies, offices and agencies (IBOAs) and that such access is possible irrespective of the type of medium on which that information or data are stored. In the course of internal investigations, OLAF is able to request access to information held on privately owned devices used for work purposes in situations where the Office has reasonable grounds to suspect that their content might be relevant for the investigation. OLAF is also empowered to inspect the accounts of the IBOAs and, if necessary, assume custody of the relevant documents or data in this context.

Other provisions aiming to increase the effectiveness of investigations include:

- OLAF will now have access to bank account information under the same conditions that apply to national competent authorities;
- The anti-fraud coordination services in each EU Member States will get a more important role, being able, for instance, to support OLAF in external and internal investigations as well as in coordination cases;
- The evidentiary value of OLAF reports is strengthened: in all procedures before the CJEU, in proceedings of a non-criminal nature before national courts and in national administrative proceedings, OLAF reports and the evidence attached to them shall constitute admissible evidence – in criminal proceedings, the current rule remains, i.e. OLAF reports are admissible in the same way as the reports of national administrative inspectors;
- OLAF will now have the possibility to set time limits in its recommendations accompanying the final reports, within which the competent authorities of the Member States concerned, and, if applicable, the IBOAs must reply on the actions taken. Member States are also obliged to send the final decision of national courts on the cases submitted by OLAF.

Alongside the strengthened rules on OLAF's investigations, the new Regulation entails improvements in the individuals' procedural safeguards. Accordingly, an independent "*controller of procedural guarantees*" is established. He/she will administratively be attached to the OLAF Supervisory Committee and appointed by the Commission after consulting the European Parliament and the Council. The controller will be tasked with reviewing complaints lodged by persons concerned regarding OLAF's compliance with procedural guarantees and with the rules applicable to investigations, in particular infringements of procedural requirements and fundamental rights. The new regulation details the complaints mechanism in Art. 9b. Next to the new guarantees established in the context of external investigations (see above), the person concerned by an investigation will have access, under certain conditions, to the conclusions of OLAF's investigations in cases where the Office issues judicial recommendations.

The way forward: the new OLAF Regulation requires the Commission to evaluate the new rules no later than five years from the date of commencement of the operational activities of the EPPO. On the basis of this evaluation report, the Commission must consider a further reform of the OLAF Regulation, including additional or more detailed rules on the setting up of the Office, its functions or the procedures applicable to its activities.

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and "criministrative" law.
All news items are freely accessible at: https://eucrim.eu/news/
Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.

The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



Co-funded by
the European Union