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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Evaluation of the application 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

{SWD(2017) 332 final}

1 Introduction

The Commission is pursuing an ambitious agenda to strengthen the protection of the Union's financial interests, and important milestones have been reached in 2017. In July, the Directive on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive") has been adopted by the Parliament and the Council[1]. It is furthermore expected that the Council will soon adopt, in enhanced cooperation among 20 Member States, the Regulation establishing the European Public Prosecutor's Office ("the EPPO")[2].

These measures complement the institutional and legal landscape for the protection of the Union's budget, which relies today, at EU level, on the work of the European Anti-Fraud Office ("OLAF"), the European Court of Auditors, other Union institutions, bodies, offices and agencies ("IBOAs") and, at Member State level, on various national administrative and judicial authorities. They all carry out necessary actions to protect the Union budget in line with the obligation stemming from Article 325 TFEU. OLAF was established in 1999 by the Commission to conduct administrative investigations against fraud, corruption and any other illegal activity affecting the EU financial interests, and to assist Member States in the fight against fraud[3].

All these components are important as the Union moves towards the next Multiannual Financial Framework. The Commission is currently conducting a reflection on what kind of budget is needed for the Europe of the future[4]. An efficient and proper spending of the Union budget is a key element in building trust of the EU citizens and to boost the strength and added value of the European project. Fraud and corruption diminish the resources available for the benefit of EU citizens, and may be at the source of other criminal activities (such as terrorism and organised crime); they must therefore be fought vigorously and effectively. The ultimate goal is an equivalent and high level of protection of the EU budget in the whole territory of the EU.

In this context, this report presents the results of the evaluation of the application of Regulation No 883/2013 concerning investigations conducted by OLAF[5] ("the Regulation"), required by its Article 19. Furthermore, it sets out possible avenues how to adapt and strengthen, where necessary, the legal framework for OLAF investigations, in the light of the expected adoption of the Council Regulation on the establishment of the EPPO, and in the light of the main findings of the evaluation.

This report is accompanied by an opinion of the Supervisory Committee of OLAF on the application of the Regulation, adopted pursuant to Article 19 of the Regulation[6]. The

[1] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29–41.
[2] Interinstitutional File 2013/0255 (APP). On 8-9 June 2017, the Justice and Home Affairs Council reached a general approach on a Regulation implementing enhanced cooperation on the establishment of the EPPO. The draft Regulation was subsequently transmitted to the European Parliament for its consent. All references in this document to the draft EPPO Regulation are to the document 9941/17 (text of the general approach), available at http://data.consilium.europa.eu/doc/document/ST-9941-2017-INIT/en/pdf
[3] Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136, 31.5.1999, p. 20–22.
[4] European Commission, Reflection Paper on the Future of EU Finances, COM(2017) 358 of 28 June 2017.
[5] 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, p. 1–22.
[6] Supervisory Committee of OLAF, Opinion No 2/2017 of 28 September 2017.

evaluation report of the Commission and the opinion of the Committee are independent documents and were drafted in parallel.

2 The evaluation of Regulation 883/2013

The evaluation focused on **four key areas**: effectiveness, efficiency, coherence, relevance. The EU added value was not covered by the evaluation as OLAF ensures the protection of the EU financial interests, in the framework of Articles 317 and 325 TFEU, by performing specific tasks at EU level which cannot be performed at national level. Aspects related to the future outlook of the Regulation to accomplish its objectives, and in the context of evolving anti-fraud policies and fraud trends, have also been addressed.

The evaluation is based on a **wide-ranging consultation** of a high number of stakeholders. As part of the evaluation process, on 1-2 March 2017 OLAF organised a conference on the evaluation of the Regulation[7] involving close to 250 participants from the anti-fraud coordination services of Member States, Member State administrative authorities for the management of EU funds, law enforcement, prosecutorial and judicial authorities, IBOAs, international organisations, academics, and non-governmental organisations. These stakeholder groups, as well as OLAF staff, were also consulted through interviews and surveys.

The time period covered by the evaluation is 1 October 2013 (when the Regulation entered into force) to December 2016.

The evaluation's detailed findings and the methodology employed are described in the Commission staff working document accompanying this report. The preparation of the staff working document was supported by a study by an external contractor[8].

3 Main findings of the evaluation

Regulation 883/2013 is the centrepiece of the legal framework governing OLAF's mandate to conduct administrative investigations concerning fraud, corruption and any other illegal activity affecting the EU financial interests. It was adopted after extensive inter-institutional discussions, replacing two regulations dating from 1999, in order to:

- improve the effectiveness, efficiency and accountability of OLAF while safeguarding its independence;
- strengthen the procedural guarantees and fundamental rights of persons subject to investigation;
- strengthen cooperation with Member States, EU IBOAs, third countries and international organisations; and to
- reinforce the governance of OLAF.

The evaluation has shown that these **specific objectives** have proven to be, and remain, **relevant** for the overarching objective of the protection of the Union's financial interests. To this end, OLAF performs specific tasks at EU level which could not be carried out at the national level alone. The added value of OLAF investigations was confirmed during the

[7] All available presentations from the conference are available on the Commission website at https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation/conference_en

[8] ICF Consulting Services Limited, 2017, 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

consultation process of national and Union stakeholders. The evaluation has also confirmed the continued relevance of these objectives in the context of the establishment of the EPPO.

The Regulation has allowed OLAF to deliver on its mandate with concrete results. The evaluation showed a clear improvement in the **effective conduct of investigations** as a result of several specific provisions of the Regulation. **Cooperation and information exchange** between OLAF and its partners has been reinforced through the introduction of provisions enabling structured collaboration. The creation of the anti-fraud coordination services in the Member States, for example, was identified as a significant development to strengthen links between OLAF and the Member States.

Evidence has shown that the **efficiency of OLAF's case selection and investigations** has considerably increased with the Regulation, combined with internal organisational measures. This is illustrated by the increased numbers of investigations handled by investigative staff, and the increase in the number of recommendations and amounts recommended for recovery.

However, the assessment also unveiled several shortcomings related **to the conduct of investigations** that impact the effective and efficient application of the Regulation.

(1) OLAF exercises investigative powers stemming from various acts of Union law, including the Regulation. However, in various instances these acts make the **application of these powers subject to conditions of national law**, notably as regards on-the-spot checks and inspections of economic operators and digital forensic operations conducted in the territory of the Member States. It follows from the evaluation that the extent to which Regulation 883/2013 makes national law applicable is not completely clear. Today, different interpretations of the relevant provisions, and differences in national law, lead to a fragmentation in the exercise of OLAF's powers in the Member States, in some cases hindering OLAF's ability to successfully conduct investigations and ultimately to contribute to the Treaty objective of an effective protection of the financial interests across the Union.

(2) The Regulation does not provide OLAF with **tools to enforce** its powers in the case of refusal or obstruction by persons concerned by investigations and witnesses. This in turn can limit the effectiveness of OLAF investigations, with divergences across Member States depending on the ability of national competent authorities to support OLAF with their own enforcement tools; a matter where there are also divergences in the applicable national law.

(3) The evaluation pointed to the need to consider certain changes to the investigative powers available to OLAF based on the input from some stakeholders. The need for and possibility of better access to **bank account information** under appropriate conditions, which could be central to uncovering many cases of fraud or irregularity, should be assessed. This power is linked also to the possibility to investigate **VAT**, an area where the evaluation has shown that OLAF's mandate should be clarified and strengthened.

(4) In the area of **internal investigations**, the Regulation applies in conjunction with the internal decisions adopted by each IBOA, which sometimes leads to divergent possibilities for OLAF to act. The evaluation found that further clarity in the Regulation about the conditions for the conduct of internal investigations applicable in all IBOAs could help better ensuring a uniform protection, and provide a framework in which to assess specific arrangements contained in the internal decisions. Moreover, the rules applicable to internal and external investigations could

be further aligned (where divergent rules are not justified) to ensure a more coherent framework for investigations.

(5) The evaluation identified scope to make further use of the possibilities for the **early transmission of information** by OLAF to other IBOAs, in cases where parts of the facts of an investigation in progress might have already been established and could necessitate immediate precautionary measures without waiting for the completion of the investigation.

As regards the **follow-up to investigations**, there are large differences in the follow-up to OLAF recommendations across recipients, and sometimes important gaps between recommendations and follow-up. The evaluation pointed to the quality and timeliness of OLAF final reports as a factor impacting on the rate of follow-up to recommendations, and - as regards the follow-up to financial recommendations - also identified discrepancies in assessing the prejudice to the EU budget by OLAF and by the IBOAs.

However, the most important shortcoming identified as regards the follow-up to recommendations relates to the rules on the **admissibility of OLAF-collected evidence in national judicial proceedings**. The Regulation provides that OLAF reports constitute admissible evidence in such proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. The evaluation suggests that in some Member States this rule does not sufficiently ensure the effectiveness of OLAF's activities.

The inclusion of a **new provision on procedural guarantees** introduced in 2013 was generally recognised during the evaluation as an improvement for protecting the rights of individuals subject to an OLAF investigation. The **legality review function** introduced by the Regulation and the new **internal complaint procedure** have further strengthened procedural guarantees of individuals subject to investigation. Whilst a number of consulted stakeholders raised concerns about the added value of the new provisions, others argued that the balance between OLAF powers and procedural rights is appropriate, and yet again others called for a reinforcement of the procedural rights. Overall, the evaluation does not provide evidence that the procedural guarantees in the Regulation are insufficient in the context of OLAF's current investigative powers and tools. As regards the Regulation's provisions on **supervision and control**, the evaluation suggests that divergent views and practices with regard to these provisions, in particular of the Supervisory Committee's role and mandate, and of its access to case-related information held by OLAF, impacted the work of the Committee and its cooperation with OLAF.

The evaluation has also identified several issues from the perspective of the **internal and external coherence** of the Regulation.

(1) The Regulation provides a legal basis for OLAF to provide the Member States with assistance in organising close and regular cooperation between their competent authorities to coordinate their action for the protection of the EU financial interests. This is a key element of OLAF's mandate to support cross-border cooperation among the Member States. However, the Regulation does not contain detailed provisions on the modalities of coordination or the procedures applicable in these so-called **'coordination cases'**. This results in a lack of legal certainty for OLAF and for the Member States that rely on OLAF's assistance. This is particularly limiting in areas (such as, for example, structural funds) where no other acts of EU law provide for a supporting and coordinating role for OLAF. In those areas where such provisions do

exist (for instance, in the area of customs and intellectual property[9]), the relationship between Regulation 883/2013 and these other legal acts can lead to practical difficulties of application.

(2) Regulation 883/2013 applies in conjunction with other acts of EU law, on which the effective exercise of OLAF's mandate depends. **Regulations 2185/96 and 2988/95**, on which one of OLAF's main investigative tools – the on-the-spot checks and inspections – is based, predate the adoption of Regulation 883/2013 and its predecessors in 1999. The evaluation has identified certain inconsistencies between these closely linked legal acts, which in some cases may lead to uncertainty and divergent interpretations.

Finally, the staff working document attached to this report and the report of the external contractor identify a number of provisions in the Regulation which could benefit from **clarification or simplification** in the Regulation or from **improved application** through implementation measures. Some of these are referred in section 5.3 below as particularly deserving attention.

Possible ways forward as regards the follow-up to the evaluation are spelled out in section 5. They should rely, on the one hand, on the experience with the application of the Regulation, assessed by the evaluation. On the other hand, they should also consider the future establishment of the EPPO which will substantially reinforce and change the mechanisms for the protection of the EU's financial interests at EU level.

4 The creation of the European Public Prosecutor's Office and its impact on OLAF's mandate and investigations

The establishment of the EPPO is one of the Commission's key priorities in the area of criminal justice and part of the overall strategy to combat fraud against the EU budget. At the Justice and Home Affairs Council of 8 June 2017, 20 Member States reached a general approach on the Regulation establishing the EPPO under enhanced cooperation. The EPPO will be the first EU body equipped with the power to prosecute crimes affecting the EU budget, as defined in the PIF Directive, such as fraud, corruption or serious cross-border VAT fraud. It is expected to bring a more consistent and effective prosecution policy for crimes affecting the EU budget, leading to a greater number of prosecutions, convictions and a higher level of recovery of fraudulently lost Union funds. It will also have a potential to address some of the shortcomings identified in the evaluation as far as the participating Member States are concerned.

The Commission has already highlighted in the past the need to reinforce the fight against fraud affecting the Union budget through an integrated policy of criminal and of administrative investigations[10]. This approach remains valid today. With the creation of the

[9] Council Regulation (EC) 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, OJ L 82, 22.3.1997, pp. 1–16, as last amended by Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015, and Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, OJ L 181, 29.6.2013, pp. 15–34.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '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 of 26.5.2011.

EPPO, the Union will dispose of bodies able to conduct both types of investigations strengthening the overall possibilities for action at EU level, to complement and reinforce the action taken by the Member States within their own responsibility to protect the EU budget.

Once the EPPO is established, OLAF's overall mandate will not change, but its operation will need to adapt in several ways to the existence of the EPPO.

OLAF will remain competent for the administrative investigation of suspected fraudulent and non-fraudulent irregularities within the Union IBOAs and in all Member States, with a view to issuing recommendations to launch judicial, disciplinary, financial or administrative procedures.

In the area of suspected fraud, the EPPO and OLAF will be called to cooperate closely. Today, when an OLAF investigation points to the possible existence of a criminal offence, OLAF cooperates with the national prosecution and judicial authorities. With the creation for the first time of an EU-level body for criminal investigations and prosecutions, strong synergies need to be created between the EPPO and OLAF in order to allow both to perform their tasks in the most efficient and productive manner, and to give cases of suspected fraud in the whole EU a swift and effective response.

In this context, adaptations to the framework for OLAF investigations will have to be considered to avoid any risk of duplication of investigations into the same facts, and to provide for the necessary mechanisms for OLAF to perform its role of operational support.

In various cases, the activities of OLAF and the EPPO will not need to be coordinated due to their distinct mandates, with the EPPO conducting criminal investigations and OLAF administrative investigations focusing on financial, disciplinary and administrative follow-up. OLAF will also continue its investigations in the Member States not participating in the EPPO at this stage. In these Member States, the national authorities as well as OLAF should contribute to creating the conditions to ensure an effective and equivalent level of protection of the Union's financial interests in the whole EU. The establishment of the EPPO should in no way lead to an ineffective protection of the budget in Member States which do not participate in the EPPO.

5. The way forward

Regulation 883/2013 has allowed OLAF to continue delivering concrete results in the protection of the EU budget. The 2013 changes have brought clear improvements, as regards the conduct of investigations, cooperation with partners and the rights of persons concerned. At the same time, the evaluation has highlighted some shortcomings which impact on the effectiveness and efficiency of investigations. Moreover, the creation of the EPPO will be a game-changer and call for swift adaptations in the operation of OLAF, to ensure synergies and the efficient use of resources at EU level.

In response to this, the Commission will prepare an assessment in line with Better Regulation principles which may lead to a proposal for the amendment of Regulation 883/2013 in the first half of 2018, which should be in force by the time the EPPO becomes operational[11], ensuring a seamless transition into the new institutional framework. This assessment will also take into account the opinion of the Supervisory Committee of OLAF accompanying this report.

[11] Article 120(2) of the draft EPPO Regulation. The EPPO will assume its investigative and prosecutorial competences at a date determined by a Commission decision, and not earlier than three years after the entry into force of the EPPO Regulation.

The assessment will primarily consider changes which would respond to the establishment of the EPPO on the role and operation of OLAF. It could also include possible additional targeted changes, where necessary, based on the most unambiguous findings of the evaluation. These would strengthen the framework for OLAF investigations to maintain a strong and fully-functioning OLAF that complements the EPPO's criminal law approach with administrative investigations.

The assessment, conducted in line with Better Regulation principles, to prepare the potential 2018 proposal, and other measures to follow-up to the evaluation, will particularly cover the following areas.

5.1 Adaptation to the establishment of the EPPO

The draft EPPO Regulation already lays down the main principles for the future relationship between the EPPO and OLAF, requiring that both bodies act in a complementary way to ensure that all available means are used to protect the Union's financial interests[12]. The assessment will consider how these could be mirrored in Regulation 883/2013 with the introduction of concrete procedures for cooperation, and complemented by working arrangements.

One aspect which could be addressed regards the **handling by OLAF of incoming information and the swift transmission of information to the EPPO** of any criminal conduct in respect to which the latter may exercise competence[13]. Given its mandate, OLAF will be an important source of incoming information for the EPPO. Moreover regarding the **case selection** in OLAF, the relevant provisions should avoid simultaneous investigations by OLAF and the EPPO, with OLAF refraining from conducting an administrative investigation as soon as the EPPO is carrying out a criminal investigation into the same facts[14].

Furthermore, the **handling by OLAF of cases referred to it by the EPPO** for administrative follow-up[15] should also be analysed.

Lastly, the assessment will look at ways to give effect to the provision in the draft EPPO Regulation enabling the **EPPO to request operational support from OLAF**[16]. This might include examination of options for procedures for the handling of the requests, as well as procedures which OLAF should follow in carrying out the tasks in order to ensure that the results of the activity may be used by EPPO in its investigations and for the subsequent use of any evidence.

5.2 Enhancing the effectiveness of OLAF's investigative function

The Commission will also examine possible solutions to certain shortcomings identified by the evaluation. The focus should be on targeted changes aimed at improving the effectiveness of investigations. The following issues will be considered in particular in the assessment.

Possible solutions to increase the **coherent application of the investigative tools** available to OLAF across the Member States and IBOAs will be examined, in order to ensure a consistent level of protection across the Union. The current references to national law should be considered in this light, as well as the provisions on internal investigations.

[12] Article 101(1) of the draft EPPO Regulation.
[13] Article 24(1) of the draft EPPO Regulation.
[14] Article 101(2) of the draft EPPO Regulation.
[15] Articles 39(4) and 101(4) of draft EPPO Regulation.
[16] Article 101(3) of draft EPPO Regulation.

Possible changes to the rules on the **admissibility of OLAF reports as evidence** in judicial proceedings in the Member States should be considered, in order to ensure their effectiveness and avoid inefficiencies resulting from the duplication of investigations.

The Commission will also assess ways in which to reinforce the **enforcement of OLAF's existing powers**. Linked to this, a revision of the **duties to cooperate** enshrined in the Regulation could be analysed in order to ensure a coherent and effective framework at the various stages in an investigation.

Furthermore, the assessment will consider clarification of OLAF's mandate and investigative tools in the area of **VAT,** as well as the need for and possibility of better access to **bank account** information.

Finally, new provisions regulating the conduct of **coordination cases** could be assessed to fill the current gap in the Regulation.

5.3 Other evaluation findings

In addition to those mentioned above, the evaluation identified a number of issues that could benefit from further clarification or simplification in the Regulation, or which could be addressed either by legislative measures or by improved application of the Regulation.

In particular, the Commission will consider how to better address practical difficulties resulting from diverging views on the provisions on the role and mandate of the **Supervisory Committee**. In this regard, the Commission recommends that working arrangements between OLAF and its Supervisory Committee are concluded swiftly.

Possible areas of further clarification of the Regulation identified in the evaluation include the provisions on **internal investigations** (in particular the inspection of premises), **digital forensic operations** and the transmission of information to **third countries and international organisations**. Targeted changes could also address perceived inconsistencies and further align the rules applicable to internal and external investigations (where divergent rules are not justified).

The Commission may also examine measures to ensure closer cooperation between OLAF and IBOAs concerning the possible **early transmission of information by OLAF** where the adoption of precautionary measures might be necessary, as well as to reduce discrepancies with regard to the follow-up to **financial recommendations**.

The Commission recommends that OLAF take internal measures to ensure the consistent **quality of final reports and recommendations**, and consider whether there is a need to revise the **Guidelines on Investigation Procedures**, to address any possible inconsistencies with the Regulation.

5.4 Outlook

At a later stage, a proposal potentially presented in 2018 could be followed by a more far-reaching process to modernise the framework for OLAF investigations, which in its core aspects dates from the creation of OLAF in 1999 (and even before). This would be the opportunity to consider more fundamental changes in the context of 21st century fraud trends and should take account of the experience gained in the cooperation between EPPO and OLAF. It would also allow focusing on other aspects of the legal framework where further reflection and discussion may be needed. This might include the institutional governance of OLAF and the controls on its activity. The evaluation has not shown a clear need to substantially revise the relevant provisions of the Regulation at this stage. It should also be

noted that the Commission proposal for the establishment of a controller of procedural guarantees[17] is still pending, and has not been taken forward by the co-legislator. Larger issues relating to the overall coherence of the EU anti-fraud legal framework beyond Regulation 883/2013, as revealed by the evaluation, could also be part of this second step in the possible revision of the legal framework.

[17] COM(2014) 340 final.