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COURT OF AUDITORS

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## III

*(Preparatory Acts)*

## COURT OF AUDITORS

**OPINION No 8/2018***(pursuant to Article 325(4), TFEU)*

**on the Commission's proposal of 23 May 2018 on amending OLAF Regulation (EU, Euratom) No 883/2013 as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations**

(2019/C 42/01)

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THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 325(4) thereof,

Having regard to the proposal of 23 May 2018 for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations (hereafter 'the proposal'),

Having regard to the Council's request of 7 July 2018 for an opinion on the above-mentioned proposal,

Having regard to the European Parliament's request of 10 July 2018 for an opinion on the abovementioned proposal,

Having regard to previous opinions and special reports of the European Court of Auditors (see *Annex I*),

HAS ADOPTED THE FOLLOWING OPINION:

#### SUMMARY

I. The Commission's proposal to amend the OLAF Regulation is supposed to meet two objectives: to adapt the functioning of OLAF to the establishment of the European Public Prosecutor's Office (EPPO) before this new EU body becomes operational and to enhance the effectiveness of OLAF's investigative function.

II. Given that the EPPO will be empowered to investigate and prosecute crimes against the EU's financial interests in (currently) 22 Member States, the establishment of the EPPO significantly changes the legal and institutional setting. Although OLAF remains the EU body responsible for protecting the EU's financial interests through administrative investigations and for supporting the Commission's anti-fraud policy, its work will change and its role will vary since not all Member States have joined the EPPO.

III. Since the EPPO Regulation already set out the framework for OLAF's relations with the EPPO, the proposal aims to set out *detailed* rules. The proposal reflects well the principles which govern the cooperation between OLAF and the EPPO: close cooperation, exchange of information, complementarity and non-duplication of work. However, we found certain weaknesses in this respect.

IV. Our work and the Commission's own evaluation have shown that OLAF needs to increase the effectiveness of its investigations; timeliness and the recovery of funds are major challenges. The proposal includes a limited number of targeted measures which we welcome because they should help improve effectiveness:

- (a) Clarification as to when national and European law applies during OLAF on-the-spot checks, with the duty for national authorities to assist OLAF;
- (b) Access for OLAF to bank account information, although this will largely depend on the assistance provided by national authorities;
- (c) Strengthened admissibility of evidence collected by OLAF, albeit only in non-criminal cases.

In addition, the proposal clarifies that investigations into Value Added Tax (VAT) matters are included in OLAF's mandate.

V. The above changes do not resolve the overall issue of the effectiveness of OLAF's administrative investigations. Recognising this, the Commission plans to have a more comprehensive modernisation of the OLAF framework. However, there is currently neither a time-plan for such further reform of OLAF nor a clear identification of which issues would be addressed.

VI Given the proposal's limitations as regards the overall effectiveness of OLAF's investigations, we not only recommend amendments, but also stress the need for further action:

- (a) in the **short term**, the Commission should address the overall issue of OLAF's effectiveness. This should involve reconsidering OLAF's role and responsibilities in combating fraud in EU spending. In this regard, OLAF could be given a strategic and oversight role in EU anti-fraud actions;
- (b) in the **medium term**, the Commission should evaluate the cooperation between OLAF and the EPPO and, where appropriate, propose further legislative actions.

## INTRODUCTION

### Background

1. The Commission established the European Anti-Fraud Office OLAF (*Office européen de lutte antifraude*) as a directorate-general of the Commission in 1999. OLAF's mission is to contribute to the protection of the EU's financial interests by carrying out two main tasks: conducting independent administrative investigations into fraud, corruption and other illegal activities affecting the EU's financial interests, and contributing to the design and implementation of the Commission's anti-fraud policy <sup>(1)</sup>. In its investigative remit, OLAF is functionally independent of the Commission. It conducts external investigations (in all areas of EU expenditure and revenue) and internal investigations into suspicions of serious misconduct by EU staff or members of the EU institutions.

2. OLAF operates under a legal framework that has evolved over time, but its core features have not been significantly modified since 1999. In 2017, two key regulatory changes affected the legal and institutional framework for the protection of the EU's financial interests:

- The Directive on the fight against fraud to the Union's financial interests by means of criminal law (the 'PIF Directive') <sup>(2)</sup>, adopted on 5 July 2017, harmonises the definition of four criminal offences (fraud, corruption, money laundering and misappropriation) as well as sanctions and limitation periods. It also clarifies that serious offences against the common VAT system are to be considered offences affecting the EU's financial interests <sup>(3)</sup>. Member States have until 6 July 2019 to transpose it into their national law;
- In October 2017, the Council adopted Regulation (EU) 2017/1939 <sup>(4)</sup> setting up the European Public Prosecutor's Office (EPPO), which will be responsible for investigating, prosecuting and bringing to judgement criminal offences affecting the EU's financial interests within the meaning of the PIF Directive. The EPPO has been established under the model of enhanced cooperation between Member States. So far, 22 Member States are participating in EPPO <sup>(5)</sup>. The EPPO is expected to start operating in 2020 (or early 2021 at the latest).

3. The establishment of the EPPO will have an impact on OLAF. The *Figure* shows which of OLAF's activities will be affected.

<sup>(1)</sup> Article 1 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 ('the OLAF Regulation') (OJ L 248, 18.9.2013, p. 1).

<sup>(2)</sup> 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).

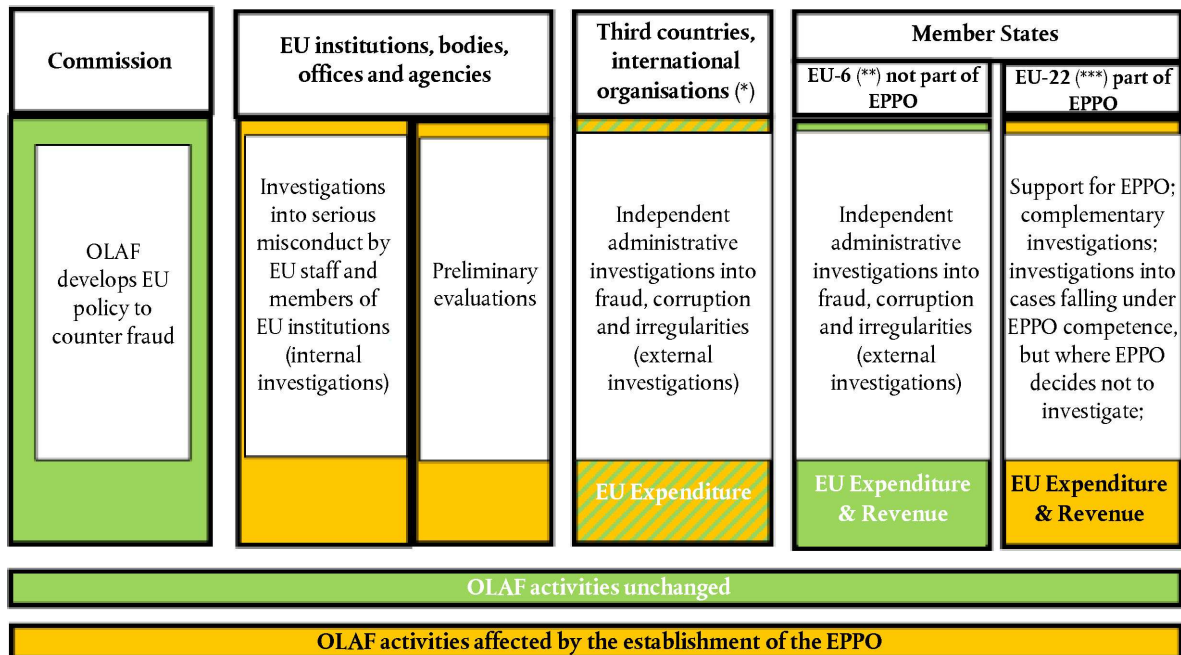
<sup>(3)</sup> Article 2(2) of the PIF directive.

<sup>(4)</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO Regulation') (OJ L 283, 31.10.2017, p. 1).

<sup>(5)</sup> Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia and Spain. The Member States which have opted out of the EPPO may join at any time in the future.

Figure

## OLAF activities affected by the establishment of the EPPO



(\*) See Article 23 of the EPPO Regulation.

(\*\*) Denmark, Ireland, Hungary, Poland, Sweden, United Kingdom.

(\*\*\*) Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain.

### The Commission's proposal

4. The proposal has three specific objectives:

- to adapt the operation of OLAF to the establishment of the EPPO;
- to enhance the effectiveness of OLAF's investigative function;
- to clarify and simplify selected provisions of the OLAF Regulation.

5. The proposal was preceded by an evaluation of the application of the OLAF Regulation <sup>(6)</sup>. This was accompanied by a staff working document <sup>(7)</sup> supported by an external study <sup>(8)</sup> and by the opinion of OLAF's Supervisory Committee <sup>(9)</sup>. The Commission did not perform an impact assessment <sup>(10)</sup>. Instead, it carried out a targeted stakeholder consultation <sup>(11)</sup>.

6. This opinion takes account of relevant recommendations in previous ECA opinions and special reports (see *Annex I*).

### GENERAL REMARKS

7. In this section, we follow-up implications of our previous opinions, highlighting issues which were not included in the proposal. Under the 'specific remarks' section, we analyse the individual provisions of the proposal and which show several weaknesses.

<sup>(6)</sup> Report from the Commission to the European Parliament and the Council, Evaluation of the application of Regulation (EU, Euratom) No 883/2013.

<sup>(7)</sup> SWD(2017) 332, 2.10.2017.

<sup>(8)</sup> Evaluation of the application of Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), Final Report, ICF Consulting Services Limited, September 2017. See [https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation\\_of\\_the\\_application\\_regulation\\_883\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation_of_the_application_regulation_883_en.pdf)

<sup>(9)</sup> OLAF Supervisory Committee Opinion No 2/2017 accompanying the Commission evaluation report on the application of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council (Article 19); [http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion\\_2\\_2017.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2_2017.pdf)

<sup>(10)</sup> According to the Better Regulation Guidelines (SWD(2017) 350 final of 7 July 2017), an impact assessment is required when the expected economic, environmental or social impacts of EU action are likely to be significant (p. 15).

<sup>(11)</sup> The stakeholder consultation was carried out through a survey of relevant Member State authorities, a survey of EU Institutions, bodies, offices and agencies (IBOAs) and a meeting of experts. The results were included in the Staff Working Document (SWD(2018) 251).

### Cooperation with the European Public Prosecutor's Office

8. A key objective of the proposal is to adapt the operation of OLAF to the establishment of the EPPO. Provided the EPPO is adequately resourced <sup>(12)</sup>, its establishment should be an important step in strengthening protection of the EU's financial interests.

9. The EPPO Regulation mainly entrusts national authorities with the task of providing support to the EPPO, rather than making OLAF the main investigating body for its work. OLAF remains an independent EU body responsible for protecting the EU's financial interests through administrative investigations in areas outside the EPPO's competence, in cases where the EPPO decides not to investigate and in Member States not participating in the EPPO.

10. The proposal reflects well the principles which govern the cooperation between OLAF and the EPPO: close cooperation, exchange of information, complementarity and non-duplication of work. In addition to weaknesses we identified in the proposal (see paragraphs 19 to 27), we note that the Commission did not propose any provisions addressing OLAF's role in investigating offences affecting the EU's financial interests when both EPPO participating and non-participating Member States are concerned (cross-border cases). A key for effective cooperation will be constant and constructive engagement of both parties.

### Effectiveness of OLAF investigations

11. The proposal's second key objective is to improve OLAF's effectiveness. In previous special reports and opinions on OLAF, we have made several observations and recommendations linked to the efficiency and effectiveness of its investigations (see *Annex I*).

12. However, the proposal puts forward only a limited number of targeted changes based on what the Commission itself considers to be the 'most unambiguous findings' of its evaluation in relation to the effective functioning of OLAF <sup>(13)</sup>. While welcoming these targeted improvements, we consider that they will not be sufficient to lead to a significant increase in the effectiveness of OLAF's investigations. Not all findings of the Commission's evaluation, nor our previous audits and opinions, have been addressed by the proposal.

13. According to the Commission, the proposed changes would be followed by a more comprehensive modernisation of the OLAF framework. There is currently neither a time-plan for such further reform of OLAF, nor a clear identification of which issues would be addressed. The Commission could not provide us with an action plan, demonstrating a systematic follow-up of to all evaluation findings with precise deadlines. In our view, it is important for the Commission to address without delay the overall effectiveness of OLAF investigations, and in particular the timeliness of OLAF's work and the recovery of funds.

### External review of the respect of procedural safeguards

14. According to the proposal, OLAF would remain an administrative body without coercive powers (such as the power to sanction witnesses in case of false statements or to intercept communications), relying on administrative tools such as on-the-spot checks to conduct its investigations. Procedural guarantees, which OLAF has to respect in all its investigations, were introduced in 2013 <sup>(14)</sup>.

15. These procedural guarantees are generally considered to correctly reflect the general principles applicable to administrative investigations <sup>(15)</sup>. However, the external review of the implementation of those procedural guarantees remains insufficient. This is due to the fact that EU Courts have consistently held that no actions for annulment can be introduced against OLAF's investigative acts, including its final reports <sup>(16)</sup>.

<sup>(12)</sup> We were not asked to provide an opinion on the Commission's proposal for setting up the EPPO. In our forthcoming special report 'Fighting fraud in EU spending: action needed', we highlight certain risks relating to the EPPO's resource allocation and internal work, which, if not appropriately addressed, could adversely affect the effective functioning of the EPPO.

<sup>(13)</sup> These targeted changes relate to on-the-spot checks and inspections and assistance by national authorities, OLAF's access to bank account information, OLAF's mandate as regards VAT fraud, the admissibility of evidence collected by OLAF, and anti-fraud coordination services and activities.

<sup>(14)</sup> Article 9 of the OLAF Regulation.

<sup>(15)</sup> A need for clarification has, nevertheless, been identified, in particular regarding the right of access to investigation files. See the Evaluation of the application of Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), Final Report, ICF Consulting Services Limited, September 2017, pp. 168-172; also see K. Ligeti, 'The protection of the procedural rights of persons concerned by OLAF administrative investigations and the admissibility of OLAF final reports as criminal evidence', IF/D/CONT/IC/2017-066, July 2017, p. 20.

<sup>(16)</sup> The EU Courts' reasoning for disallowing actions for annulment is that the competent authorities remain entirely free whether or not to act on an OLAF report. See K. Ligeti, 'The protection of the procedural rights of persons concerned by OLAF administrative investigations and the admissibility of OLAF final reports as criminal evidence', IF/D/CONT/IC/2017-066, July 2017, p. 22.

16. Introducing a judicial review of OLAF's investigative acts would ensure an effective and independent control of such acts. In 2014, the Commission proposed to establish a Controller of procedural guarantees <sup>(17)</sup>. However, that proposal, which is still pending, only provided for a non-binding control of OLAF's investigative acts.

17. We therefore consider it necessary that OLAF's main investigative acts can be submitted to a review of the Court of Justice of the European Union (CJEU) to ensure that procedural safeguards have been applied.

#### **SPECIFIC REMARKS**

18. The following section sets out our comments on the two key objectives of the proposal: adapting the operation of OLAF to the establishment of the EPPO, and enhancing the effectiveness of OLAF's investigative functions. It covers only those articles of the proposal on which we have specific comments to make.

#### **Adapting the operation of OLAF to the establishment of the EPPO**

19. Four principles govern cooperation between OLAF and the EPPO: close cooperation, exchange of information, complementarity and non-duplication of work <sup>(18)</sup>. Our opinion took these principles into account when reviewing the proposal's suggested mechanisms of cooperation between OLAF and the EPPO.

##### *Reporting to the EPPO and OLAF's preliminary evaluations (Article 12c(5))*

20. Institutions, bodies, offices and agencies (IBOAs), OLAF and Member States need to report to EPPO any information relating to cases falling under its competence <sup>(19)</sup>. To do so effectively, IBOAs may ask OLAF to carry out an evaluation on their behalf to ensure that this information is sufficiently substantiated and of good quality <sup>(20)</sup>.

21. Even though smaller EU bodies, offices and agencies could benefit from OLAF's evaluation because they do not have comparable expertise in this area. However, this additional step increases the time needed for information to reach the EPPO. Because time is critical to the success of a criminal investigation, the success of any subsequent action could be jeopardised if these bodies ask too frequently for a preliminary evaluation. By stipulating a maximum of two months for OLAF to conduct preliminary evaluations, the proposal mitigates this risk.

##### *OLAF's support to the EPPO (Article 12e)*

22. The proposal stipulates that, if the EPPO so requests in the course of an investigation, OLAF would have to provide it with information, analyses (including forensic analyses), expertise and operational support, facilitate the coordination of action by national administrative authorities and EU bodies, and conduct administrative investigations to support the EPPO <sup>(21)</sup>.

23. The added value of the evidence gathered or analysed by OLAF to support a criminal investigation will depend on whether the EPPO is able to use that evidence in criminal proceedings. Therefore, we consider that it is crucial to state expressly in the proposal that the standards of the procedural guarantees stipulated in the EPPO Regulation <sup>(22)</sup> would also apply to evidence collected by OLAF. This would ensure that evidence collected by OLAF on behalf of the EPPO would be admissible in national courts in the same way as evidence collected by the EPPO itself. Moreover, as regards the judicial review of procedural acts conducted by OLAF on behalf of the EPPO, the proposal should clarify that the CJEU remains competent to review procedural acts conducted by OLAF on behalf of the EPPO, if those acts are intended to produce legal effects vis-à-vis third parties.

24. The proposal does not deal with the possible administrative follow-up to investigations carried out by OLAF on the EPPO's behalf. There is no provision which would require OLAF to forward evidence proving an irregularity without undue delay to the IBOAs to ensure the swift recovery of funds unduly disbursed from the EU budget, unless EPPO considers that this information interferes with its investigation.

<sup>(17)</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees, COM(2014) 340 final.

<sup>(18)</sup> Article 101 of the EPPO Regulation.

<sup>(19)</sup> Article 24(1) of the EPPO Regulation.

<sup>(20)</sup> See Recital 51 of the EPPO Regulation and Article 12c(5) of the proposal.

<sup>(21)</sup> Article 12e, which mirrors Art. 101 (3) of the EPPO Regulation, provides the basis for OLAF's support to EPPO.

<sup>(22)</sup> For example, Article 41 of the EPPO Regulation provides the right to information and access to case materials, as provided for in Directive 2012/13/EU.



*Complementary investigations (Article 12f)*

25. To avoid duplication of work between OLAF and the EPPO, OLAF shall not open a parallel investigation into circumstances that are already the object of an EPPO investigation <sup>(23)</sup>. However, 'in duly justified cases' OLAF may open a complementary investigation with the aim to adopt precautionary measures or financial, disciplinary or administrative action. Since administrative procedures to recover funds paid out unduly from the EU budget can be more efficient and less costly than criminal proceedings, there might be a number of cases for OLAF to act rapidly.

26. The effectiveness of complementary investigations will depend on their timeliness and on the availability of sufficient information to prove an irregularity <sup>(24)</sup>.

*Exchange of information (Article 12g)*

27. The proposal and the EPPO Regulation foresee two separate case management systems with a hit/no hit link between them. The proposal currently does not contain sufficient details on the kind of information the Commission and OLAF would receive from EPPO on suspected PIF offences reported, dismissed cases and cases resulting in an indictment. Such information is, however, key for an effective anti-fraud strategy and should therefore be specified in the proposal <sup>(25)</sup>.

**Enhancing the effectiveness of OLAF's investigative function**

28. The proposal puts forward targeted changes to increase the effectiveness of OLAF investigations.

*On-the-spot checks and inspections (Article 3) and assistance from national authorities (Articles 3(7) and 7(3))*

29. In line with several studies <sup>(26)</sup>, the Commission's evaluation found that differing interpretations of the extent to which national law applies, together with differences between bodies of national law, result in OLAF's powers to be fragmented <sup>(27)</sup>.

30. Taking into account a recent judgment of the General Court of the European Union <sup>(28)</sup>, the proposal clarifies that national law applies when an economic operator objects to OLAF's on-the-spot checks and inspections, and European law applies when there is no such opposition. The proposal would also oblige national authorities to assist OLAF in cases where an economic operator does not cooperate with OLAF <sup>(29)</sup>.

31. The proposal does not state clearly whether OLAF has the power to enter without prior notice in the offices of the economic operator concerned, whereas it does have the right of access to the premises of IBOAs in case of internal investigations <sup>(30)</sup>. In order to avoid the matter of access rights being interpreted differently depending on national rules, we suggest clarifying that OLAF has such power for on-the-spot checks and inspections at an economic operator's premises in both internal and external investigations, provided that OLAF's investigative acts are submitted to sufficient judicial review <sup>(31)</sup>.

<sup>(23)</sup> Article 12d of the proposal, which mirrors Article 101(2) of the EPPO Regulation.

<sup>(24)</sup> Forthcoming special report 'Fighting fraud in EU spending: action needed'. A specific recital could therefore be added to the OLAF Regulation.

<sup>(25)</sup> Further details could then be specified in working arrangements as provided for in the proposal (Article 12g(1)).

<sup>(26)</sup> M. Luchtman and J. Vervaele (eds.), 'Investigatory powers and procedural safeguards; Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities' (ECN/ESMA/ECB), 2017; K. Ligeti, 'The protection of the procedural rights of persons concerned by OLAF administrative investigations and the admissibility of OLAF final reports as criminal evidence', IF/D/CONT/IC/2017-066, July 2017.

<sup>(27)</sup> Report from the Commission to the European Parliament and the Council, Evaluation of the application of Regulation (EU, Euratom) No 883/2013.

<sup>(28)</sup> Case T-48/16, *Sigma Orionis v Commission*.

<sup>(29)</sup> Articles 3(7) and 7(3).

<sup>(30)</sup> Article 4(3).

<sup>(31)</sup> See paragraphs 14 to 17 above.

*VAT (Articles 3(1) and 12(5))*

32. We welcome the clarification that OLAF's mandate also encompasses VAT in line with our previous recommendations<sup>(32)</sup> and with the recent CJEU's judgment, which clarified that VAT fraud falls within the scope of Article 325 TFEU and, as a result, affects the financial interests of the EU<sup>(33)</sup>. The proposal also provides OLAF with the possibility to exchange information with the Eurofisc network<sup>(34)</sup>.

*Access to bank account information (Article 7(3))*

33. The proposal foresees the duty for national authorities — in particular the Financial Intelligence Units (FIUs) established pursuant to the fifth Anti-Money Laundering Directive<sup>(35)</sup> and other relevant national competent authorities — to transmit bank account information to OLAF in compliance with national law. This could encompass information on bank account holders registered in the national centralised bank account registries or national data retrieval systems or, in duly justified cases, the record of transactions.

34. Access to data, and in particular information on money flows, is key for any investigative body focusing on economic crimes such as fraud or corruption<sup>(36)</sup>. Under the current proposal, however, OLAF's access to bank account information will largely depend on the assistance provided by national authorities in line with national law as is the case currently. This means that OLAF's access to bank account information could be limited in those Member States where national law restricts the release of such information to administrative bodies.

*Admissibility of evidence collected by OLAF (Article 11(2))*

35. Under the OLAF Regulation, the basic principle for the admissibility of OLAF's final reports in national administrative and judicial proceedings was the assimilation rule. The proposal aims to raise the value of OLAF's final reports by introducing the principle of admissibility: OLAF's final reports should only be subject to a verification of authenticity. In judicial proceedings of non-criminal nature, this approach replaces the assimilation rule, which provides that OLAF's final reports constitute evidence in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. The key reason for this proposal is to increase the follow-up given to the recommendations included in these reports by avoiding that national judicial authorities repeat investigative work already done by OLAF.

36. While we welcome the aim of the proposal to clarify the status of OLAF's final reports in non-criminal judicial proceedings, we note that the proposal omits to expressly specify the status of evidence collected by OLAF. We therefore recommend to clarify that all evidence supporting an OLAF report and annexed to it must be considered admissible in national and EU court proceedings.

*Anti-fraud coordination services (Article 12a)*

37. National anti-fraud coordination services (AFCOS) were established under the OLAF Regulation<sup>(37)</sup> to facilitate effective cooperation and information-sharing with OLAF. Member States have wide discretion in deciding the organisation, role and responsibilities of these services<sup>(38)</sup>.

38. The proposal is insufficient as it only addresses the cooperation of the services with OLAF. While the proposal cannot impose requirements in terms of organisation to the Member States, it could provide clarity on the minimum functions to be fulfilled by these services. This would contribute to a more harmonised and effective implementation of anti-fraud coordination services across all Member States.

<sup>(32)</sup> Special Report No 24/2015 — 'Tackling intra-Community VAT fraud: More action needed'. We recommended that the Commission and Member States should remove legal obstacles preventing the exchange of information between administrative, judicial and law enforcement authorities; that OLAF and Europol should have access to the VAT information exchange system (VIES) and Eurofisc data; and that OLAF has clear competence and tools to investigate intra-community VAT.

<sup>(33)</sup> See C-105/14 Tarrico (and also C-617/10 Åkerberg Fransson).

<sup>(34)</sup> Eurofisc is a decentralised network of officials from the Member States' tax and customs administrations, who use it to swiftly exchange information about suspected fraudulent companies and transactions. It was established under Council Regulation (EU) No 904/2010 (OJ L 268, 12.10.2010, p. 1), as also amended by Article 1(12) of Council Regulation (EU) 2018/1541 of 2 October 2018 amending Regulations (EU) No 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of value added tax (OJ L 259, 16.10.2018, p. 1).

<sup>(35)</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

<sup>(36)</sup> See report from the Commission to the European Parliament and the Council, Evaluation of the application of Regulation (EU, Euratom) No 883/2013.

<sup>(37)</sup> Article 3(4).

<sup>(38)</sup> Evaluation of the application of Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), final report, ICF Consulting Services Limited, September 2017, page 102.

## CONCLUSION AND RECOMMENDATIONS

39. The setting up of the EPPO significantly changes the legal and institutional setting and, while OLAF remains an autonomous independent body responsible for protecting the EU's financial interests through administrative investigations, its work in this area will change. A main objective of the proposal that is the subject of this opinion is to set out *detailed* rules for the functioning of the relationship between OLAF and EPPO. We found several weaknesses in this respect.

40. Firstly, the proposal stipulates that when supporting the EPPO, OLAF would apply its own procedural safeguards in respect of persons under investigation, and not those laid down in the EPPO Regulation. OLAF is an administrative body, whereas EPPO uses criminal procedures to which higher standards of procedural safeguards apply. As a result, there is a risk that evidence collected by OLAF at the EPPO's request (as opposed to that collected by the EPPO itself) would not be admissible in national courts.

41. Secondly, the proposal does not address OLAF's role in investigating criminal offences affecting the EU's financial interests when both EPPO participating and non-participating Member States are concerned (cross-border cases). The EPPO Regulation left some uncertainties as regards cooperation between the EPPO and the judicial authorities of non-participating Member States, which could affect the cooperation between EPPO and OLAF.

42. Finally, the proposal provides that, in duly justified cases, OLAF could carry out complementary investigations with a view to the adoption of precautionary measures or financial, disciplinary or administrative action. The effectiveness of such measures would itself depend on actions to increase OLAF's overall effectiveness.

43. Our work and the Commission's own evaluation have shown that OLAF needs to increase the effectiveness of its investigations — timeliness and recovery of funds are major challenges. The proposal includes a limited number of targeted measures, which we welcome, but they do not solve the overall issue of effectiveness of OLAF's administrative investigations. The Commission recognizes it too, and plans to have a comprehensive modernisation of the OLAF framework. However, there is no time-plan for such reform nor a clear identification of which issues would be addressed.

44. Based on the above, we make recommendations on the proposal, on short-term actions, and on medium-term actions.

45. We recommend that the legislative bodies amend the proposal to:

- Clarify that in cases when OLAF carries out administrative investigations on behalf of the EPPO, the standards of procedural guarantees foreseen in the EPPO Regulation apply and that the CJEU will remain competent to review OLAF's procedural acts in this context <sup>(39)</sup>;
- Specify the kind of information the Commission and OLAF need to receive from EPPO in order to properly fulfil their task of developing EU policies to counter fraud <sup>(40)</sup>;
- Ensure that when OLAF works on behalf of the EPPO, and it gathers sufficient evidence to prove an irregularity, OLAF forwards the information gathered without undue delay to the IBOAs to ensure the swift recovery of funds, unless the EPPO considers that the information would interfere with its investigation <sup>(41)</sup>;
- Expressly specify the status in national and EU courts of evidence collected by OLAF, and include an obligation for OLAF to forward all evidence supporting its final reports and recommendations to the bodies responsible for follow-up <sup>(42)</sup>;
- Provide more clarity on the minimum functions to be fulfilled by AFCOS, in particular as regards their role in coordinating Member States' anti-fraud action in relation to the EU's financial interests <sup>(43)</sup>;
- Provide that OLAF's reports constitute acts that might 'adversely affect the persons concerned' and are therefore submitted to a review of the CJEU;
- Clarify OLAF's role in cases involving EPPO-participating and non-participating Member States, taking into account any forthcoming legal instrument covering the subject of judicial cooperation between EPPO-participating and non-participating Member States.

<sup>(39)</sup> Article 12e.

<sup>(40)</sup> Article 12g.

<sup>(41)</sup> Article 12e.

<sup>(42)</sup> Article 11(2).

<sup>(43)</sup> Article 12a.

46. In the **short term**, the Commission should go forward with their planned second step towards modernising OLAF and address the overall issue of its effectiveness. This involves reconsidering OLAF's role and responsibilities in combating fraud in EU spending. In this respect, OLAF could be given a strategic and oversight role in EU anti-fraud actions <sup>(44)</sup>.

47. Finally, in the **medium term**, the cooperation between OLAF and EPPO should be evaluated and, where appropriate, followed by legislative action. This evaluation should at least cover:

- An analysis whether the EU's fight against offences affecting the EU's financial interests could be enhanced by restructuring the EU bodies in charge of administrative and criminal investigations;
- The need to simplify and consolidate all legal instruments to combat fraud into a single regulatory framework.

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 15 November 2018.

*For the Court of Auditors*

Klaus-Heiner LEHNE

*President*

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<sup>(44)</sup> See also forthcoming special report 'Fighting fraud in EU spending: action needed'.

## ANNEX I

**Relevant ECA opinions and special reports****Opinions**

Opinion No 8/2005 on a proposal for a Regulation of the European Parliament and the Council on mutual administrative assistance for the protection of the financial interests of the Community against fraud and any other illegal activities (*presented pursuant to Article 280(4) of the EC Treaty*) <sup>(1)</sup>

Opinion No 7/2006 on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (*pursuant to Article 280(4), EC*) <sup>(2)</sup>

Opinion No 6/2011 (*pursuant to Article 325 TFEU*) on the amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999 <sup>(3)</sup>

Opinion No 8/2012 on the proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (*pursuant to Article 325 TFEU*) <sup>(4)</sup>

Opinion No 6/2014 (*pursuant to Article 325 TFEU*) on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees <sup>(5)</sup>

Opinion No 1/2016 (*pursuant to Article 325 TFEU*) concerning a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF) <sup>(6)</sup>

**Special reports**

Special Report No 1/2005 concerning the management of the European Anti-Fraud Office (OLAF), together with the Commission's replies (*pursuant to the second subparagraph of Article 248(4) of the EC Treaty*) <sup>(7)</sup>

Special Report No 2/2011 'Follow-up of Special Report No 1/2005 concerning the management of the European Anti-Fraud Office'

Special Report No 24/2015 — 'Tackling intra-Community VAT fraud: More action needed' (*pursuant to Article 287(4), second subparagraph, TFEU*)

Forthcoming special report 'Fighting fraud in EU spending: action needed' (*pursuant to Article 287(4), second subparagraph, TFEU*)

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<sup>(1)</sup> OJ C 313, 9.12.2005, p. 1.

<sup>(2)</sup> OJ C 8, 12.1.2007, p. 1.

<sup>(3)</sup> OJ C 254, 30.8.2011, p. 1.

<sup>(4)</sup> OJ C 383, 12.12.2012, p. 1.

<sup>(5)</sup> OJ C 419, 21.11.2014, p. 1.

<sup>(6)</sup> OJ C 150, 27.4.2016, p. 1.

<sup>(7)</sup> OJ C 202, 18.8.2005, p. 1.

## ANNEX II

**Main legislation concerning OLAF's activities****Decision setting up the OLAF**

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

**Protection of the EU's financial interests**

Article 325 TFEU

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 (the PIF Directive)

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests <sup>(1)</sup>

**On-the-spot checks and inspections**

Council Regulation (Euratom, EC) 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 <sup>(2)</sup>

**Rules on data protection**

Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data <sup>(3)</sup>

**Cooperation with EPPO**

Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

**Internal investigations within EU institutions, bodies, offices and agencies**

Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community <sup>(4)</sup>

Further information can be found on OLAF's website: [https://ec.europa.eu/anti-fraud/about-us/legal-framework\\_en](https://ec.europa.eu/anti-fraud/about-us/legal-framework_en)

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<sup>(1)</sup> OJ L 312, 23.12.1995, p. 1.

<sup>(2)</sup> OJ L 292, 15.11.1996, p. 2.

<sup>(3)</sup> OJ L 8, 12.1.2001, p. 1.

<sup>(4)</sup> OJ 45, 14.6.1962, p. 1385/62.



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