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**COMMISSION STAFF WORKING DOCUMENT**

**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**

**Accompanying the document**

**Commission report to the European Parliament and the Council**

{COM(2017) 589 final}

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## **ACRONYMS AND ABBREVIATIONS**

ACA	Administrative Cooperation Arrangement
AFCOS	Anti-Fraud Coordination Service
CAFS	Commission Anti-Fraud Strategy
CJEU	Court of Justice of the European Union
COCOLAF	Advisory Committee for the Coordination of Fraud Prevention
CONT	European Parliament, Budgetary Control Committee
DG	Directorate General (of the Commission)
EDES	Early Detection and Exclusion System
EDPS	European Data Protection Supervisor
EPPO	European Public Prosecutor's Office
FPDNet	Fraud Protection and Detection Network
GIPs	Guidelines on Investigation Procedures
IBOAs	Institutions, Bodies, Offices and Agencies of the European Union
IDOC	Investigation and Disciplinary Office, DG for Human Resources
IPP	Investigation Policy Priority
ISRU	Investigation Selection and Review Unit
ISSG	Inter-Service Steering Group
OLAF	European Anti-Fraud Office
PIF	Protection of the EU Financial Interests
SC	Supervisory Committee
SPE	Single Point of Entry
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

## 1. INTRODUCTION

### 1.1. Purpose of the evaluation

This Commission Staff Working document (SWD) accompanies the Commission report on the Evaluation of the application of Regulation (EU, EURATOM) No 883/2013 (the 'report'). The SWD was supported by an external study<sup>1</sup>.

**The evaluation is required by Article 19 of Regulation 883/2013<sup>2</sup>** ('the Regulation'), which provides that "by 2 October 2017, the Commission shall submit to the European Parliament and the Council an evaluation report on the application of this Regulation. That report shall be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend this Regulation".

### 1.2. Scope of the evaluation

The scope of the evaluation, as set out in the **evaluation roadmap<sup>3</sup>**, is the assessment of the operation of the key elements of the Regulation, their impact on the general and specific objectives pursued by the Regulation, and the extent to which these objectives have been met and remain relevant. Although the evaluation covers the Regulation as a whole, it focuses in particular on the changes introduced in 2013 compared to the 1999 legal framework.

The evaluation addresses four key areas – **effectiveness** and **efficiency** in the application of key elements of the Regulation, as well as **coherence** and **relevance** of the Regulation to accomplish its objectives and in the context of evolving anti-fraud policies and fraud trends. The **future outlook regarding in particular the establishment of the European Public Prosecutor's Office (EPPO)**, requested by the evaluation roadmap, is addressed in the report as it is not a subject to retrospective evaluation. The further criterion required by the Better Regulation Guidelines<sup>4</sup>, the **EU added value**, is considered as addressed and is not covered by the evaluation as the European Anti-Fraud Office (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.

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

The Regulation requires that the results of the evaluation are used to assess the need to amend it. The evaluation findings, in section 5 below, identify certain shortcomings in the application of the Regulation that could result in a legislative change to address them. In addition, the evaluation has considered the possible need to amend the Regulation in the context of a changing anti-fraud landscape at EU level. Without pre-empting the Better Regulation principles, the possible need to amend the

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<sup>1</sup> Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), Final Report, ICF Consulting Services Limited, 2017 (hereafter "ICF report").

[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>2</sup> 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, pp. 1–22, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0883>.

<sup>3</sup> The roadmap for the evaluation of the Regulation was open to stakeholders' feedback during the life time of the evaluation on the following website: [http://ec.europa.eu/smart-regulation/roadmaps/docs/2017\\_olaf\\_001\\_evaluation\\_of\\_regulation\\_883\\_2013\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_olaf_001_evaluation_of_regulation_883_2013_en.pdf).

<sup>4</sup> Better Regulation Guidelines [http://ec.europa.eu/smart-regulation/guidelines/toc\\_guide\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/toc_guide_en.htm).

Regulation and the intended **follow-up** by the Commission to the evaluation results is outlined in the report.

## 2. BACKGROUND TO THE INITIATIVE

### 2.1. Objectives of the Regulation in historical context

In 1999, the Commission set up OLAF to carry out administrative investigations concerning fraud, corruption and any other illegal activity affecting the EU financial interests, and to help Member States fight fraud. OLAF investigates matters concerning all areas of EU expenditure (the main spending categories are structural funds, agricultural policy and rural development funds, direct expenditure and external aid); some areas of EU revenue (mainly customs duties); and suspicions of serious misconduct by EU staff and members of the EU institutions. Section 5 provides illustrative examples of the scope of the work carried out by OLAF and amount of EU funding (recommended to be) recovered.

OLAF's investigative mandate for the protection of the EU financial interests was initially regulated by Regulations 1073/1999<sup>5</sup> and 1074/1999<sup>6</sup>. The 2013 Regulation replaces them, and is the result of lengthy inter-institutional negotiations based on proposals by the Commission in 2004<sup>7</sup>, 2006<sup>8</sup> and 2011<sup>9</sup>.

To achieve the ultimate objective of stepping up the fight against fraud, corruption and any other illegal activity affecting the EU financial interests, Regulation 883/2013 was adopted with the **objectives** to (see also Figure 1):

- improve the effectiveness, efficiency and accountability<sup>10</sup> of OLAF while safeguarding its independence;
- strengthen the procedural guarantees and fundamental rights of persons subject to investigation<sup>11</sup>;
- strengthen cooperation with Member States, EU institutions, bodies, offices and agencies (IBOAs), third countries and international organisations; and to
- reinforce the governance of OLAF.

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<sup>5</sup> Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999, pp. 1–7, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404400470487&uri=CELEX:31999R1073>.

<sup>6</sup> Regulation (EC) No 1074/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OCAF), OJ L 136, 31.5.1999, pp. 8–14, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404400545577&uri=CELEX:31999R1074>.

<sup>7</sup> COM(2004) 103 final, 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), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1499163149081&uri=CELEX:52004PC0103>.

COM(2004) 104 final, Proposal for a Council Regulation amending Regulation (Euratom) No 1074/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1499163236604&uri=CELEX:52004PC0104>.

<sup>8</sup> COM(2006) 244 final, 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), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1499163871683&uri=CELEX:52006PC0244>.

<sup>9</sup> COM(2011) 135 final, 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0135>.

<sup>10</sup> Throughout this report, the issues relating to accountability are addressed as part of the assessment of governance in sections dealing with effectiveness and efficiency of the application of the Regulation.

<sup>11</sup> Throughout this report, the issues relating to procedural guarantees and fundamental rights are dealt with under the single heading of "procedural guarantees".

## 2.2. Intervention logic

Regulation 883/2013 governs the conduct of OLAF's investigations for the purpose of fighting fraud, corruption and any other illegal activity affecting the EU financial interests<sup>12</sup>. The following types of investigations are regulated separately:

- External administrative investigations in Member States and in third countries and on the premises of international organisations<sup>13</sup>;
- Internal administrative investigations within the Union IBOAs<sup>14</sup>;

In addition, OLAF opens coordination cases to assist the Member States in organising close and regular cooperation between their competent authorities aimed at protecting the EU financial interests against fraud<sup>15</sup>.

The intervention logic developed in the context of the evaluation (Figure 1) aims to retrace the cause and effects chains through which the provisions of the Regulation generate intended outputs, results and impacts (which correspond to the objectives of the Regulation spelled out in the section above). Provisions that should allow achievement of the objectives are:

- Investigative function (Articles 3, 4, 5, 7, 11);
- Safeguards (Articles 8, 9, 10 and 17);
- Cooperation and coordination (Articles 1, 3, 4, 5, 7, 11, 12, 13, 14);
- Governance and control mechanisms (Articles 15, 16, 17).

The provisions surrounding the investigative function allow OLAF to fulfil its mandate and use its powers to obtain results in its investigations; they cover the selection phase for the opening of investigations, the investigative tools and powers, the procedure to be respected, as well as the follow-up to investigations. They are complemented by the provisions concerning safeguards, which are intended to protect the persons involved in the investigations, by defining the rules on procedural guarantees, confidentiality and data protection. Throughout the investigations, OLAF cooperates with its sources of incoming information, including whistle-blowers, IBOAs, Member States or third countries authorities and international organisations. The relevant provisions regulate this cooperation depending on the specificities of each of those categories. The governance and control mechanisms ensure OLAF's independence and the monitoring of its investigative function.

The key elements of the Regulation and related implementing rules are further detailed in Annex 5.

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<sup>12</sup> Article 1(1) of the Regulation.

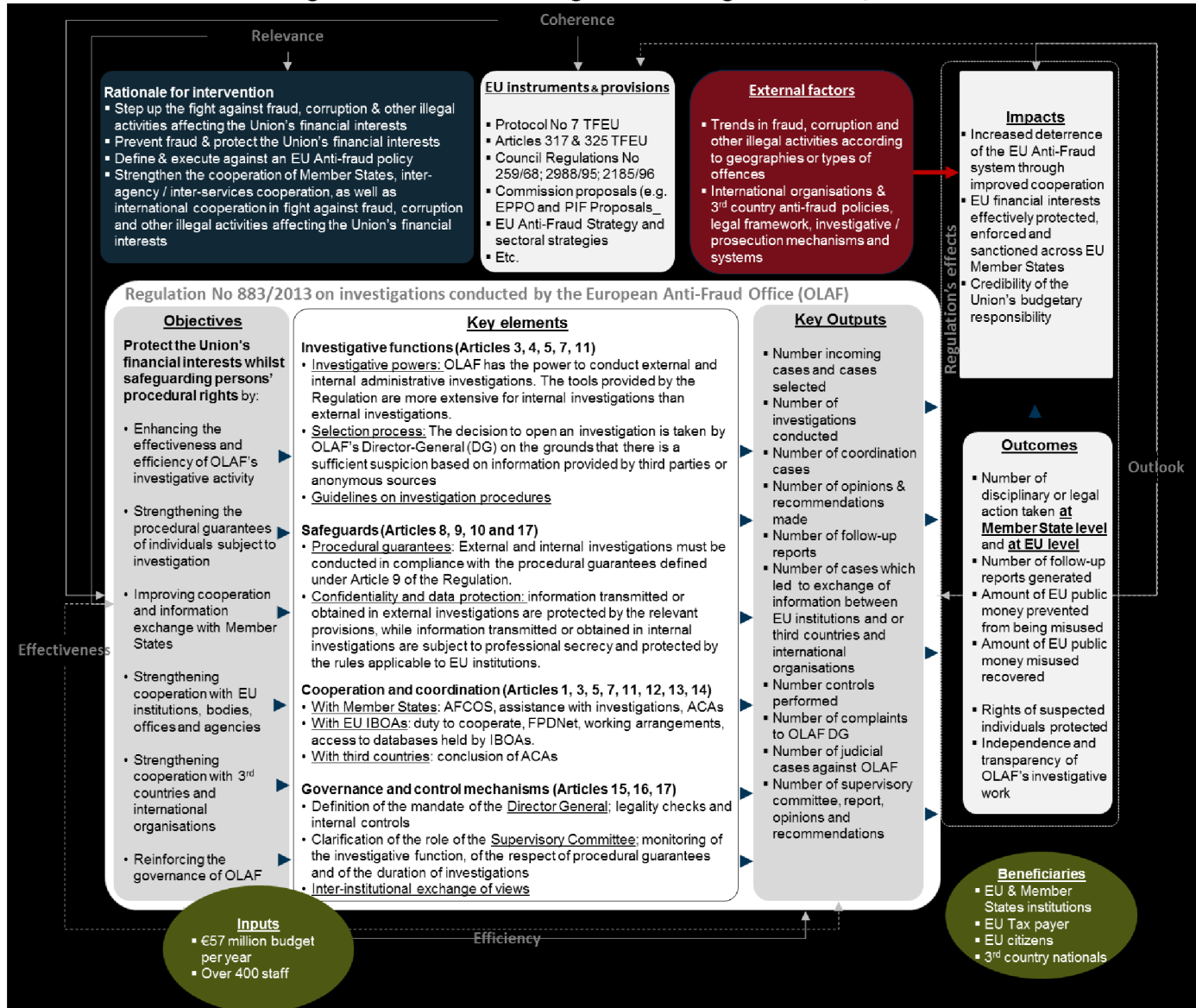
<sup>13</sup> Article 3 of the Regulation.

<sup>14</sup> Article 4 of the Regulation.

<sup>15</sup> Article 1(2) of the Regulation.



Figure 1 - Intervention logic for the Regulation 883/2013



Source: ICF report, section 2.2.1

### 2.3. Baseline

The legal baseline is provided by **Regulations 1073/1999 and 1074/1999**. Their evaluation in 2003<sup>16</sup> pointed to a number of shortcomings which were in turn reflected in the objectives for the revision of the legislative framework. Among these were: the need for OLAF to establish internal rules for the conduct of the investigations; the necessity to conclude memoranda of understanding with the IBOAs and with third countries authorities; the need to develop standardised practices in relation to national authorities and institutions and bodies, as well as in relation to the persons involved in the investigations; and the need to develop detailed rules to ensure respect of fundamental rights. The evaluation also pointed to other issues impacting on the effectiveness and efficiency of OLAF, which were not addressed in the revised Regulation, for example certain challenges posed by the references to national law in the provisions on OLAF powers in external investigations, or the possible need to include an obligation of the Member States to inform OLAF of the actions taken in the follow up to its investigations.

The evaluation was accompanied by an opinion of the **OLAF Supervisory Committee**<sup>17</sup> which emphasised the need for internal rules of procedure, in particular for the protection of the fundamental rights of persons under investigation.

As a follow-up to the evaluation, the **European Parliament** adopted a report in November 2003<sup>18</sup>.

The **European Court of Auditors** made a number of recommendations for improving the organisation and working methods of OLAF, the governance framework, the rights of the persons concerned by an investigation, relations between OLAF and the Member States' competent authorities and cooperation with Eurojust and Europol<sup>19</sup>.

An impact assessment that would provide for a comprehensive picture of the baseline situation at the time of the adoption of Regulation 883/2013 is not available. However, the yearly **OLAF reports** give a good idea how the situation evolved since the 2003 evaluation both in terms of activities carried out by OLAF and operational changes introduced to improve the effectiveness and efficiency of OLAF operations. In section 5, a number of figures and tables provide a comparison for pre- and post-Regulation periods.

The **organisational structure** of OLAF changed in 2012 with the arrival of the new Director-General and in anticipation of the Regulation, to enable it to focus on core activities and to improve the management and supervision of its operational work. In order to enhance efficiency, OLAF refined performance indicators and improved operational

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<sup>16</sup> COM(2003) 154, Commission Report - Evaluation of the activities of the European Anti-fraud Office (OLAF) - Parliament and Council Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 (Article 15), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0154:FIN>.

<sup>17</sup> Opinion 2/03 on the Commission report, Evaluation of the activities of the European Anti-Fraud Office (OLAF), Luxembourg 18.6.2003, [http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/reports/opinion\\_2003\\_en.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/reports/opinion_2003_en.pdf).

<sup>18</sup> Report on the Commission report on the evaluation of the activities of the European Anti-Fraud Office (OLAF), (COM(2003) 154 - (2002/2237(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2003-0393+0+DOC+XML+V0//EN&language=en>.

<sup>19</sup> Special Report No 1/2005, followed by Special Report No 2/2011. Recommendations included: increasing the number and speed of investigations by increasing the proportion of time spent on the investigative function; improving the efficiency (planning and monitoring) of investigations, in order to reduce their duration; developing the reporting on OLAF's performance; revising the legal framework, notably to consolidate anti-fraud legislation and to better protect the rights of persons investigated. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005SA0001> (Special Report No 1/2005); <http://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=1049> (Special Report No 2/2011).

statistical data and final reporting. Actions were also taken to reduce the average duration of investigations.

## 2.4. Current policy and legislative developments

On 26 October 2016, the Regulation was amended<sup>20</sup> as regards the **secretariat of the Supervisory Committee**, previously provided by OLAF. This amendment responded to calls for a strengthened independent functioning of the Committee's secretariat, and aims at avoiding any appearance that the Committee's independence might be impaired. From 1 January 2017, the Committee's secretariat is provided by the Commission, and its budgetary appropriations have been moved from the budget line and the establishment plan of OLAF to that of the Commission.

The Commission proposed in 2014 to amend the Regulation to establish a **Controller of procedural guarantees**<sup>21</sup>. The Controller would review complaints lodged by persons subject to OLAF investigations as regards the respect of procedural guarantees, and authorise certain investigative measures related to members of the EU institutions. In the legislative discussions, the Council raised doubts about the need for such an initiative, as well as about its timing in view of the negotiations on the EPPO and the need to evaluate the Regulation<sup>22</sup>. The European Parliament has so far not adopted a report on the proposal.

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<sup>23</sup>. The EPPO, once established as an enhanced cooperation, will be the first EU body equipped with the power to conduct criminal investigations and prosecute crimes affecting the EU budget, such as fraud, corruption or serious cross-border VAT fraud in the participating Member States. 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.

A number of additional changes to the legal framework and on-going policy developments have been considered in this evaluation, primarily from the perspective of the future coherence and relevance of OLAF's mandate and investigative function. These cover, in particular, the Directive on the fight against fraud to the EU financial interests by means of criminal law (the '**PIF Directive**')<sup>24</sup>, which provides for minimum rules on the definition of criminal offences, sanctions and limitation periods, and replaces the previous legal

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<sup>20</sup> Regulation (EU, Euratom) 2016/2030 of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF), OJ L 317, 23.11.2016, pp. 1–3, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R2030>.

<sup>21</sup> COM(2014) 340 final, 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:0340:FIN>.

<sup>22</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 - Outcome of proceedings, <http://data.consilium.europa.eu/doc/document/ST-14075-2014-INIT/en/pdf>.

<sup>23</sup> Based on Article 86 TFEU, the Commission adopted the proposal on the establishment of the European Public Prosecutor's Office in July 2013 (Interinstitutional File 2013/0255 (APP)). 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. All references in this document to the draft EPPO Regulation are to the document 9941/17 (text of the general approach, after revision by the lawyer-linguists), available at <http://data.consilium.europa.eu/doc/document/ST-9941-2017-INIT/en/pdf>.

<sup>24</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the EU financial interests by means of criminal law, OJ L 198, 28.7.2017, pp. 29–41, to be transposed by the Member States by 6 July 2019, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32017L1371>.

framework based on the 1995 Convention and its protocols<sup>25</sup>; the **Early Detection and Exclusion System ('EDES')** introduced by the Financial Regulation; and the **Commission's Action Plan on VAT**<sup>26</sup>.

### 3. IMPLEMENTATION, STATE OF PLAY AND RESULTS

Regulation 883/2013 entered into force on 1 October 2013 and was directly applicable. Certain provisions have been subject to concrete implementation measures, as described below. The effects of their implementation and relevant data are discussed in section 5. Further (monitoring) information is available in the annual OLAF Reports<sup>27</sup>, annual Reports on the protection of the EU's financial interest<sup>28</sup>, OLAF's Strategic and Management Plans<sup>29</sup> and Annual Activity Reports<sup>30</sup>.

#### *Opening and conduct of investigations*

- The Director-General adopted Guidelines on Investigation Procedures (GIPs) for OLAF Staff<sup>31</sup>, as required by the Regulation. They entered into force on 1 October 2013.
- As part of a reorganisation of OLAF in 2012 anticipating the Regulation, a new Investigation Selection and Review Unit (ISRU) was created. It reports directly to OLAF's Director-General, and advises on whether to open or dismiss an investigation or coordination case on the basis of the Regulation's selection criteria. As part of this unit a single point of entry (SPE) was established to centralise incoming information of investigative interest and filter input relating to other activities of the Office.
- Investigation policy priorities (IPPs), required by the Regulation, are determined each year by the Director-General and included in the Annual Management Plan since 2014.

#### *Procedural guarantees*

- The ISRU performs the legality check mandated by the Regulation prior to certain investigation activities, and the overall review of final reports, draft decisions and draft recommendations. Complementary internal controls are carried out by the Advisers to the investigative Directorates, by OLAF's Legal Advice Unit and by the Director-General.
- The GIPs implement the procedural guarantees as well as the internal control procedures. They are complemented by other instructions to staff.
- OLAF's Data Protection Officer<sup>32</sup> is in charge of monitoring compliance of OLAF with data protection requirements. In April 2013, the OLAF Director-General adopted Instructions to staff on data protection for investigative activities<sup>33</sup>.
- Beyond the explicit requirements of the Regulation, OLAF has followed the recommendation of its Supervisory Committee to better formalise its internal

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<sup>25</sup> Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, pp. 48–57, and Protocols of 27 September 1996, 29 November 1996 and 19 June 1997, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.1995.316.01.0048.01.ENG&toc=OJ:C:1995:316:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1995.316.01.0048.01.ENG&toc=OJ:C:1995:316:TOC).

<sup>26</sup> COM(2016) 148, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT Towards a single EU VAT area - Time to decide

<sup>27</sup> [https://ec.europa.eu/anti-fraud/about-us/reports/olaf-report\\_en](https://ec.europa.eu/anti-fraud/about-us/reports/olaf-report_en).

<sup>28</sup> <https://ec.europa.eu/anti-fraud/reports/>.

<sup>29</sup> [https://ec.europa.eu/anti-fraud/about-us/mission\\_en](https://ec.europa.eu/anti-fraud/about-us/mission_en).

<sup>30</sup> [https://ec.europa.eu/info/publications/annual-activity-report-2016-european-anti-fraud-office\\_en](https://ec.europa.eu/info/publications/annual-activity-report-2016-european-anti-fraud-office_en).

<sup>31</sup> [https://ec.europa.eu/anti-fraud/investigation-guidelines-olaf-staff\\_en](https://ec.europa.eu/anti-fraud/investigation-guidelines-olaf-staff_en).

<sup>32</sup> [http://ec.europa.eu/anti-fraud/olaf-and-you/data-protection/olaf-data-protection-officer\\_en](http://ec.europa.eu/anti-fraud/olaf-and-you/data-protection/olaf-data-protection-officer_en).

<sup>33</sup> [http://ec.europa.eu/anti-fraud/olaf-and-you/data-protection/olaf-instructions-staff-data-protection-investigative-activities\\_en](http://ec.europa.eu/anti-fraud/olaf-and-you/data-protection/olaf-instructions-staff-data-protection-investigative-activities_en).

complaints procedure. In January 2014, OLAF made public on its internet site modalities for persons involved in OLAF investigations to complain to the Director-General of OLAF about the respect of the procedural guarantees applicable in OLAF investigations<sup>34</sup>.

#### *Cooperation and information exchange with Member States*

- Anti-fraud coordination services (AFCOS) are established in all Member States as required by the Regulation. In addition to bilateral cooperation with OLAF, OLAF and the AFCOS also meet in the context of the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF).
- OLAF has signed 14 administrative cooperation arrangements (ACAs) with national authorities in 8 Member States<sup>35</sup> (situation on 1 September 2017).
- In the area of fraud prevention policy, OLAF works with Member States in the framework of the COCOLAF and its sub-groups<sup>36</sup>.

#### *Cooperation with EU IBOAs*

- Administrative arrangements for the conduct of investigations have been agreed with several IBOAs<sup>37</sup>.
- Administrative arrangements for operational cooperation have been agreed with Europol and Eurojust<sup>38</sup>. Revised arrangements are under discussion with Europol, based on Regulation 883/2013 and the recently adopted Europol Regulation<sup>39</sup>.
- OLAF cooperates with the Commission services to facilitate the exchange of best practices and to provide guidance and assistance, in the framework of the Fraud Prevention and Detection Network (FPDNet), established pursuant to the Commission Anti-Fraud Strategy (CAFS)<sup>40</sup>.

#### *Cooperation with third countries and international organisations*

- OLAF has signed ACAs with 27 third country authorities and with 12 international/regional organisations.

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<sup>34</sup> [http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations\\_en](http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en)

<sup>35</sup> ACAs are administrative instruments of a technical and operational nature which establish the practical modalities for operational cooperation within OLAF's mandate. They are not a prerequisite for OLAF cooperation with Member States. Most of the ACAs with national authorities in place predate the Regulation, which clarified obligation for cooperation for Member States.

<sup>36</sup> Commission Decision 94/140/EC of 23 February 1994 setting up an advisory committee for the coordination of fraud prevention, OJ L 61, 4.3.1994, pp. 27-28, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31994D0140>, and Commission Decision 2005/223/EC of 25 February 2005 amending Decision 94/140/EC, OJ L 71, 17.3.2005, pp. 67-68, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505829846008&uri=CELEX:32005D0223>.

<sup>37</sup> European Commission, European Parliament, Council, European External Action Service, European Economic and Social Committee, Committee of the Regions, European Central Bank, European Investment Bank, European Investment Fund. The administrative arrangements with the European Parliament were signed in 2013 before the Regulation entered into force.

<sup>38</sup> Practical Agreement on arrangements of cooperation between Eurojust and OLAF signed on 24 September 2008 and published in OJ C 314, 9.12.2008, pp. 3-4, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_2008.314.01.0003.01.ENG&toc=OJ:C:2008:314:FULL](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2008.314.01.0003.01.ENG&toc=OJ:C:2008:314:FULL). Administrative arrangement between the European Police Office (Europol) and the European Anti-Fraud Office (OLAF) signed on 18 April 2004, [https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/administrative\\_arrangement\\_olaf\\_europol\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/administrative_arrangement_olaf_europol_en.pdf).

<sup>39</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, pp. 53-114, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0794>.

<sup>40</sup> COM(2011) 376 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Courts of Auditors on the Commission Anti-Fraud Strategy, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:0376:FIN>.

## *Governance of OLAF*

- Working arrangements between the Supervisory Committee and OLAF, implementing the Regulation, were adopted on 14 January 2014<sup>41</sup>, replacing earlier arrangements of September 2012. At the end of March 2017, these working arrangements were discontinued at the Supervisory Committee's request. The new Committee has expressed willingness to restart discussions to adopt new working arrangements.

## **4. METHOD/PROCESS FOLLOWED**

### **4.1. Procedural aspects of the evaluation**

Work on the evaluation started in mid-2015. An **Inter-Service Steering Group (ISSG)** of Commission services was set up<sup>42</sup> to follow the evaluation process at every step. It reviewed the roadmap, the terms of reference for the external contract, and all external deliverables. The ISSG was also closely involved in the preparation of the report and this SWD.

An **OLAF internal working group** was set up to support the evaluation with expertise and experience on the conduct of investigations and knowledge of the investigative processes.

An **external contract** for a study to support the Commission evaluation was signed with ICF International Ltd (ICF)<sup>43</sup>. ICF's report is a crucial contribution to this staff working document, although other sources have been also used (and are referenced as appropriate in the relevant sections). ICF also carried out consultation of stakeholders as discussed and agreed with the ISSG. ICF's final evaluation report expresses the views of ICF and, unless stated otherwise in this SWD, the Commission neither endorses these findings nor can it be held responsible for its content.

On 1-2 March 2017 OLAF organised a **conference** on the evaluation of Regulation 883/2013<sup>44</sup> involving close to 250 participants from various groups of stakeholders.

Annex 1 provides more detail related to the procedural aspects of the evaluation. Annex 2 provides a synopsis of the stakeholder consultation.

### **4.2. Evaluation methodology**

This staff working document answers questions (Annex 4) identified in the evaluation roadmap. These questions were further detailed in the terms of reference for the external contract and operationalised by the contractor using judgement criteria, indicators and means of verification. The evaluation framework is presented in detail in Annex 3.

The evaluation built on a number of research tools to generate the intended evidence.

**Desk research** was used to collect, structure and analyse relevant documentation related to the implementation of the Regulation. A comprehensive **legal analysis** of the Regulation and other relevant legal instruments assessed the clarity of provisions, the internal and external coherence and their impact on the functioning of the Regulation.

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<sup>41</sup> [http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/working\\_arrangements\\_olaf\\_supervisory\\_committee\\_en.pdf](http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/working_arrangements_olaf_supervisory_committee_en.pdf).

<sup>42</sup> The ISSG was composed of representatives of the Directorates General for Human Resources and Security, for Budget and for Justice and Consumers, and by the Secretariat General, the Legal Service and OLAF.

<sup>43</sup> The open call for tender was launched on 23 March 2016 with a deadline for offers by 10 May 2016. The contract was signed on 26 July 2016. The contract was entered in ABAC with the number: SI2.735723, <http://ted.europa.eu/udl?uri=TED:NOTICE:097025-2016:TEXT:EN:HTML>

<sup>44</sup> 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](https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation/conference_en).

The **stakeholder consultation** was organised by way of a survey to around 170 respondents and 160 interviews with key stakeholders<sup>45</sup>. Five **case studies** were used to develop the key findings using evidence from the stakeholder interviews and the online survey. In addition to the OLAF conference on the evaluation, the external contractor's team attended two other conferences and expert meetings, and organised two internal validation workshops of evaluation findings<sup>46</sup>.

### 4.3. Evaluation challenges and limitations

The evaluation work was based on about **three years of application of the Regulation**, which means that very limited evidence was available on the impacts of its application. Certain provisions of the Regulation may not have yielded their full results yet. While this limitation could not be addressed, given the requirement of the Regulation to complete the evaluation by a certain date, the research and consultation tools were designed so as to capture comprehensive information on the application of the Regulation on the three years after entry into force.

A number of challenges arose throughout the evaluation by the external contractor, which impacted the nature and extent of the analysis and the strength of the conclusions drawn.

First, as it was not possible for reasons of confidentiality of investigations to give the contractor access to the files of individual cases, they worked on **aggregated data** provided by OLAF on a set of agreed indicators. The lack of disaggregated case-level data prevented the benchmarking and advanced quantitative analysis originally planned by the contractor, and led to a greater emphasis on qualitative data and analysis. The lack of disaggregated/granular data meant, for example, that it was not possible to link outcomes to specific investigations or specific provision under the Regulation. However, the findings from the contribution analysis provided some evidence of the links between provisions of the Regulation and outcomes, while data on recoveries, prosecution, etc. provide some additional contextual evidence that allowed the contractor to build conclusions.

Second, it proved challenging to limit the length/detail of the **stakeholder consultation tools** (interview topic guides and survey questionnaire) which lengthened the duration of the stakeholder consultation activities. Despite this, all planned interviews were completed and the response rate to the online survey was positive. Third, the results of the survey analysis may suffer from a slight positive bias given that around one-third of respondents were OLAF staff or divergent opinions were expressed per type of stakeholders. To take this circumstance into account, the external contractor reported the results by stakeholder type throughout their final report, although this has not been done systematically.

In summary, a combination of the mitigating actions taken, and the diversity of the evidence gathered and the types of analysis undertaken (not overly reliant on one approach over another), helped to ensure overall sound evaluation conclusions.

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<sup>45</sup> It is estimated that 61 stakeholders were consulted via both interviews and the online survey. A detailed breakdown is provided in the stakeholder consultation report, Annex 2.

<sup>46</sup> ICF report, section 2.2.3, and annex 4.

## 5. ANSWERS TO THE EVALUATION QUESTIONS

### 5.1. Relevance

This section focuses on the relevance of the Regulation for the overarching objective of protecting the EU financial interests.

#### ***To what extent have the specific objectives of Regulation 883/2013 proven to be relevant for the overarching objective of protection of the EU financial interests?***

The specific objectives of the Regulation (section 2.1.) aim at improving the effectiveness, efficiency and accountability of OLAF and at strengthening procedural guarantees, governance and cooperation with partners. The evaluation has shown that these objectives have proven to be, and remain, relevant for the overarching objective of protection of the EU financial interests.

#### *Improving the effectiveness and efficiency of investigations*

The relevance of OLAF's investigative mandate and role in the protection of the EU financial interests was confirmed already by the evaluation in 2003. The revision of the previous legislative framework targeted issues linked to the conduct of investigations, but its relevance has never been put in question. This is also closely linked to the fact that OLAF ensures the protection of the EU financial interests through specific tasks performed at EU level which could not be carried out at the national level alone.

The **specific role that OLAF plays** was confirmed during the consultation process of national stakeholders and IBOAs. Some AFCOS representatives highlighted the scope of the Regulation as particularly relevant, given OLAF's mandate covering all illegal activity affecting the EU financial interests compared to the more limited competence of certain national authorities. AFCOS, as well as judicial and managing authorities, also highlighted the relevance and added value of the investigations governed by the Regulation in the detection of, and fight against, transnational fraud. National authorities referred to the relevance and positive impact of the Regulation on national awareness and activities for the protection of the EU financial interests.

At the same time, the evaluation revealed that the relevance of OLAF investigative actions varies across Member States. Interviews with national stakeholders<sup>47</sup> and OLAF staff suggest that the main limitation to the relevance of OLAF's investigations in the Member States is linked to the limited follow-up to judicial recommendations (see section 5.2, effectiveness). Finally, the evaluation showed that certain investigation tools should be further adapted to the changing landscape of cross-border crime and technical progress to remain relevant.

#### *Strengthening procedural guarantees and control mechanisms*

Procedural rights and controls are central to any robust system of law enforcement. Their relevance has not been questioned by any stakeholder consulted. The inclusion of Article 9 of the Regulation on procedural guarantees was generally recognised as a positive development (see section 5.2 on effectiveness). The specific issue of the balance between the procedural guarantees and controls and the powers of OLAF to investigate is discussed in section 5.4 on coherence.

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<sup>47</sup> Representatives of AFCOS, judicial and managing authorities.



### *Strengthening cooperation and information exchange with partners*

The implementation of the EU budget by multiple actors at EU and national level, as well as the nature of OLAF investigations – conducted in the territory of the Member States or third countries or in EU IBOAs, and relying on the subsequent follow-up to recommendations – makes cooperation with partners indispensable. It is therefore not surprising that the Regulation's specific objective to strengthen cooperation mechanisms was not questioned during the evaluation.

Several provisions in the Regulation have been highlighted by consulted stakeholders as particularly relevant to promote cooperation with partners. This concerns in particular the creation of the "anti-fraud coordination services" (**AFCOS**) to facilitate the cooperation between OLAF and the Member States, and the basis provided by the Regulation to enter into **ACAs** with different partners to establish concrete modalities for cooperation.

### *Strengthening the governance of OLAF*

The hybrid model of OLAF - independent in its investigative function and a Commission service responsible for anti-fraud policy - motivated the creation of external controls to guarantee its independence in the performance of the investigative function. This has not been disputed by any consulted stakeholders, which agreed that the role performed by the Supervisory Committee to ensure OLAF's independence is relevant and necessary. The Regulation also reinforced aspects of accountability by introducing the annual inter-institutional exchange of views<sup>48</sup>.

### *Relevance of the Regulation's specific objectives in the context of the EPPO*

The future EPPO will be competent for criminal investigations and prosecutions in the participating Member States as regards the offences harmonised by the PIF Directive. The mandate of OLAF under Regulation 883/2013 encompasses administrative investigations into both fraudulent and non-fraudulent irregularities in all Member States.

There is no need here to consider the impact of the establishment of the EPPO on areas of OLAF's investigative mandate outside the remit of the EPPO<sup>49</sup>. In the area of investigations into suspected fraudulent irregularities, where OLAF will maintain its mandate for the conduct of administrative investigations, the draft EPPO Regulation governs the future relationship between the EPPO and OLAF on the basis of the assumption that both bodies will act in a complementary way, and avoid undue duplication.

The creation of the EPPO therefore does not put into question the continued relevance of the objectives of Regulation 883/2013. The EPPO and OLAF will deal with distinct aspects of the fight against fraud affecting the EU financial interests (criminal and administrative, respectively) and their activities will be largely complementary.

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<sup>48</sup> Article 16 of Regulation 883/2013 provides for the organisation of an exchange of views at political level to discuss the Office's policy relating to methods of preventing and combating fraud, corruption or any other illegal activity affecting the financial interests of the Union once a year between OLAF's Director General and the European Parliament, the Council and the Commission with participation of the Supervisory Committee. Representatives of the Court of Auditors, Eurojust and/or Europol may be invited to attend on an ad hoc basis upon request of the European Parliament, the Council, the Commission, the Director-General or the Supervisory Committee.

<sup>49</sup> Irregularities which do not involve criminal behaviour, investigations in Member States which will not participate in the EPPO, and serious misconduct by EU staff and members of the institutions where the EU financial interests are not at stake.

## 5.2. Effectiveness

This section presents the evaluation findings regarding the effectiveness of the Regulation: the extent to which it has achieved its objectives and any significant factors that have contributed to or inhibited progress towards those objectives. The objectives are reflected in the sub-headings of this section.

The three questions below guided the research carried out by the external contractor. Given that their answers considerably overlap, to avoid repetitions the answer is provided jointly in the sections below. In particular concerning the second question, the external factors are identified as such in the different sub-sections of this section.

***How have the Regulation and, more specifically, its different elements contributed to the specific objectives of Regulation 883/2013 (in particular, reinforced procedural guarantees of persons concerned and better information and cooperation between OLAF and Institutions, bodies, agencies and other competent authorities) and to an improved protection of the EU financial interests (recovery, prosecution, indictment and deterrence)?***

***Which are the external factors (in particular the follow-up responsibilities – once OLAF concludes an investigation - of Member States and other Commission services and EU institutions, bodies, offices and agencies) that have contributed to or influenced the achievement of the objectives of Regulation 883/2013, and how?***

***Can shortcomings be identified in the different elements of Regulation 883/2013 which negatively affect the achievements of its objectives?***

### **5.2.1. Improve the effectiveness and efficiency of OLAF's investigative activity**

The effectiveness of OLAF investigations is linked to various provisions in the Regulation, concerning the selection and opening of cases, the procedure and tools for the conduct of investigations, and the duration, output of and follow-up to investigations, as discussed below. Efficiency aspects of this objective are dealt with in section 5.3.

The Regulation should allow OLAF to conduct administrative investigations into corruption, fraud and any other illegal activity affecting the EU financial interests that lead to the successful recovery of EU funds, or to disciplinary or judicial action. Over time, OLAF has adapted to the changing nature and increasing complexity of fraud with EU funds<sup>50</sup>. In this context, the evaluation has also looked at the adequacy and sufficiency of OLAF's tools and powers to deal with fraud in the context of current challenges and fraud trends.

#### **5.2.1.1. Opening of investigations**

The **case selection criteria** for the opening of investigations are one of the innovations of the Regulation<sup>51</sup>. Once a sufficient suspicion of fraud, corruption or any other illegal activity affecting the Union's financial interests is established, the following criteria are taken into account: the investigation policy priorities (IPPs) and the annual management plan of the Office, the efficient use of the Office's resources and the proportionality of the means employed, and – for internal investigations - whether another IBOA is best placed to act. The Regulation does not establish a hierarchy of these other criteria.

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<sup>50</sup> 2016 OLAF report, pp. 15 and following.

<sup>51</sup> Article 5(1) of the Regulation.

An analysis of the effectiveness of the application of each of the criteria individually was not possible since there is no available quantifiable data. The contractor looked in particular into the application of the **IPPs**, which were introduced by the Regulation to allow OLAF to concentrate on priority actions<sup>52</sup>. Evidence collected<sup>53</sup> shows that they play a certain role in case selection, but have only partially served to concentrate OLAF's activity around a set of priority areas (e.g. in 2016, 30% of opened cases fell under the IPPs<sup>54</sup>). This can be explained by a number of factors. Habitually OLAF performs its case selection on incoming information from public and private sources, rather than opening cases on its own initiative on the basis of a pro-active data analysis. Moreover, the rate of dismissal based on the absence of a sufficient suspicion of fraud is on average 50% of the cases dismissed by OLAF<sup>55</sup>, which results in the fact that OLAF performs its case selection on a relatively limited number of cases.

As regards precisely the IPPs, this shows that OLAF manages to handle all cases where the application of all selection criteria points towards the opening of an investigation and does not need to discard cases only because they do not fall under the IPPs. Therefore, even though the IPPs only partially lead to concentrating on selected priority areas, this does not appear as a shortcoming of the Regulation or its application.

Various stakeholders shared a common view that the **application of the criteria** and impact on the selection of cases was unclear<sup>56</sup>. The contractor concluded that the perceived lack of clarity of the case selection criteria by stakeholders may be caused by the fact that the Regulation is not specific about how they should apply and/or by the limited level of the information provided by OLAF on the reasons for opening or dismissing a case<sup>57</sup>. However, it should also be noted that, while the selection criteria must be taken into account, they leave a margin of discretion for the Director-General to decide on the opening of cases. It is also often the case that the criteria (in particular efficiency, proportionality and – in internal investigations – which IBOA is best placed to act) are considered in conjunction.

#### **5.2.1.2. Conduct of investigations**

The range of powers and tools available to OLAF under the 1999 Regulations, and further developed in Regulation 883/2013, have allowed OLAF to deliver concrete results in the protection of the EU financial interests<sup>58</sup> and to significantly increase the number of opened and concluded investigations (Table 1). At the same time, the evaluation has shown some limitations in the available powers and tools or in their application. These limitations are outlined below, and some were already identified in the 2003 evaluation of the previous legislative framework.

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<sup>52</sup> See the 2006 proposal, COM(2006) 244 final. The Supervisory Committee has also analysed the IPPs in several instances: Opinions 1/2014, 2/2014 and 3/2015, available at <http://europa.eu/supervisory-committee-olaf/opinions>.

<sup>53</sup> OLAF annual reports and interviews for the evaluation.

<sup>54</sup> OLAF (2015), Note for the attention of Mr Tuomas Pöysti, Chairman of the OLAF Supervisory Committee, Subject: Supervisory Committee comments on OLAF 2015 Investigation Policy Priorities, [http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/olaf-reply-sc-opinion/olaf\\_reply\\_sc\\_analysis\\_ipp\\_2015\\_en.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/olaf-reply-sc-opinion/olaf_reply_sc_analysis_ipp_2015_en.pdf).

<sup>55</sup> According to an internal study of the selection process conducted in OLAF, from a sample of 1902 cases dismissed during the period between January 2015 and October 2016, 929 were dismissed for insufficiency of suspicions alone.

<sup>56</sup> AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations, ICF report, section 4.1.1.3.

<sup>57</sup> ICF report, section 4.1.2.4.

<sup>58</sup> The OLAF annual reports illustrate the role played by OLAF to combat fraud to EU funds.

**Table 1: OLAF's investigative activities**

	2009	2010	2011	2012	2013	2014	2015	2016
Investigations opened	160	152	146	431 <sup>59</sup>	253	234	219	219
Investigations concluded	140	136	154	266	293	250	304	272
Recommendations issued	194	172	175	199	353	397	364	346

Source: OLAF 2016 report

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

Among OLAF's most important investigative tools and powers are the on-the-spot checks and inspections, as set out in Article 3 of Regulation 883/2013 and in Regulation 2185/96. These Regulations provide OLAF with its own autonomous power to conduct controls "subject to the Union law applicable" and "in compliance with [...] the procedural guarantees of Regulation 883/2013"<sup>60</sup>. At the same time, both Regulations refer to compliance with applicable national law ("and practices", in Regulation 883/2013).

In this context, the evaluation has shown that different interpretations of the **extent to which national law applies**, as well as differences in national law, result in fragmentation in the conduct of on-the-spot-checks in the Member States.

The external contractor reports that the application of the reference to national laws in the Regulation has been identified by both OLAF staff and stakeholders<sup>61</sup> as the major challenge influencing the effectiveness of the conduct of on-the-spot checks and, in the end, potentially delaying investigations and compromising their completeness and/or quality. The evaluation findings show that this can hinder OLAF's ability to use on-the-spot checks as an investigative tool consistently across Member States. This can limit OLAF's ability to ensure an equivalent protection of the EU financial interests across Member States, as required by Article 325 TFEU.

This issue has also been raised by other independent reports, such as an Ecorys 2013 report<sup>62</sup> and a recent Utrecht University study comparing OLAF's powers to those of three other EU authorities exercising competences of administrative investigation under Union law<sup>63</sup>. The authorities compared to OLAF were DG Competition in the European Commission, the European Central Bank and the European Securities and Markets Authority. This study considers the application of Regulation 883/2013 suffers from a "variable geometry" concerning the exact extent of OLAF's investigative powers, and that these divergences in the application of EU law powers is greater than for the other authorities considered.

<sup>59</sup> The figures for 2012 include 219 investigation cases, already under evaluation, opened as a result of the reorganisation of 1.2.2012.

<sup>60</sup> Article 3(3) of the Regulation reads: "During on-the-spot checks and inspections, the staff of the Office shall act, subject to the Union law applicable, in compliance with the rules and practices of the Member State concerned and with the procedural guarantees provided for in this Regulation."

<sup>61</sup> ICF report, section 4.2.

<sup>62</sup> "Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests", JUST/A4/2011/EVAL/01, Project coordinator Ecorys NL Project partner ECLAN (subcontractor), Rotterdam, 11 February 2013; see in particular its point 4.2.

<sup>63</sup> "Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)", Michiel Luchtman & John Vervaele (eds), April 2017, [https://www.ris.uu.nl/ws/files/32039338/Report\\_Investigatory\\_powers\\_and\\_procedural\\_safeguards\\_Utrecht\\_University\\_1\\_.pdf](https://www.ris.uu.nl/ws/files/32039338/Report_Investigatory_powers_and_procedural_safeguards_Utrecht_University_1_.pdf). While the authorities compared have different mandates, which may justify differences in their legal framework and the nature of their powers, the comparative analysis provides very useful insights into the way that the powers of EU administrative bodies may be defined in EU law.

Furthermore, the Regulation does not provide OLAF with **tools to enforce its powers** in the case of refusal or obstruction by persons concerned by investigations<sup>64</sup>. When an economic operator subject to investigation resists an on-the-spot-check or inspection, OLAF inspectors have to rely on the assistance of national authorities for coercive measures. In this regard, the competent authorities of the Member States are required by the Regulation to, in conformity with national rules, give the necessary assistance to enable OLAF staff to fulfil their tasks effectively<sup>65</sup>. There are substantial divergences in the way this is applied, as a result of different national rules. In comparison, other EU authorities that rely on assistance by national authorities for coercive measures, benefit from a more specific legal framework<sup>66</sup>. In this regard, the Utrecht University study noted that other EU bodies with administrative investigative competencies have themselves the power to impose penalties for lack of cooperation<sup>67</sup>.

To illustrate the above, information collected by OLAF through a questionnaire among Member States on the conduct of on-the-spots-checks, in 2015, reveals the variety of scenarios that OLAF is confronted with when applying its power to conduct on-the-spot checks. The possibility to use coercive powers to assist OLAF in the conduct of a check was possible, at the time of the questionnaire, in around half of the Member States as regards both revenue and expenditure. In the remaining Member States, coercive powers to support OLAF were available only in revenue cases, or only in expenditure cases, or not at all.

#### *Digital forensic operations*

The issues arising from the **references to national law** in Regulations 883/2013 and 2185/96, are specifically relevant to the use of digital forensic operations<sup>68</sup> in the framework of on-the-spot checks. While the Regulation specifically provides for access by OLAF to computer data, the impact of the general reference, for on-the-spot checks, to “the same conditions as national administrative inspectors and in compliance with national legislation”<sup>69</sup> is particularly felt in this area<sup>70</sup>.

A questionnaire among Member States on the conduct of on-the-spots-checks carried out by OLAF in 2015 collected information on the access to electronic communications by national administrative inspectors. In around one third of Member States, access was not possible in administrative investigations; in another third, access could only be granted by a court or authority different from the administrative inspector; in the remaining Member States, access was possible by the administrative authority, or only with the agreement of the economic operator. This illustrates not only the divergences that OLAF may face, but also that, in some instances, OLAF’s equivalent access to that of national inspectors does not ensure the effective application of the power to collect computer data granted by EU law.

A number of consulted stakeholders have also raised questions surrounding aspects of the interpretation, and the possible need to clarify, the provisions allowing OLAF to carry out

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<sup>64</sup> Difficulties of implementation had already been noted, related to the refusal of economic operators to cooperate in terms of access to buildings or documentation, already in the evaluation of Regulation 2185/96, SEC(2000)844; see also the 2003 evaluation of the 1999 Regulations preceding the Regulation, COM(2003) 154, point 1.1.2.

<sup>65</sup> Article 7(3) of the Regulation.

<sup>66</sup> For instance, in Commission antitrust proceedings, Article 20 (4) to (8) of Regulation 1/2003.

<sup>67</sup> Utrecht University study, chapter "Comparison of the legal frameworks", pp. 247 and following.

<sup>68</sup> Digital forensic activities concern identification, acquisition, imaging, collection, analysis and preservation of digital evidence.

<sup>69</sup> Article 7 of Regulation 2185/96.

<sup>70</sup> ICF report, section 4.2.2.4.

digital forensic operations in both internal and external investigations. The evaluation showed that the ambiguity surrounding digital forensic operations under different scenarios involving a mix of private devices can hinder OLAF's ability to gather digital forensic evidence as part of its investigations.<sup>71</sup>

### *Internal investigations*

In internal investigations, OLAF conducts inspections of premises and digital forensic operations within the IBOAs. The conduct of internal investigations is not based solely on the Regulation, but depends also on the terms of **individual internal decisions** adopted by the IBOAs pursuant to the Interinstitutional Agreement concerning internal investigations by OLAF<sup>72</sup>. These decisions can (and do) deviate from the model decision attached to the Agreement, based on the institutional autonomy and the specificities of each IBOA. The resulting differences mainly concern the duty to cooperate with OLAF and the duty to supply information<sup>73</sup>. Moreover, OLAF has entered administrative arrangements on cooperation and exchange of information with a number of IBOAs, further specifying the modalities of cooperation on investigations<sup>74</sup>.

To ensure that the system established by the Interinstitutional Agreement, at a time where the number of individual decisions has gone from the three original signatories to above 60, allows the conduct of internal investigations in equivalent conditions in all IBOAs, it has been suggested during the evaluation (in particular by OLAF investigative staff consulted) that the main rules concerning internal investigations should be laid down and further clarified in the Regulation itself so as to apply uniformly in all IBOAs.

There are, in particular, divergent interpretations between institutions with regard to the possibility of OLAF to access the offices of Members of an institution. To address this, OLAF investigative staff have suggested that the **right to inspect premises** should be more clearly spelled out in the Regulation, which refers to the "right of immediate and announced access to any relevant information"<sup>75</sup> held by IBOAs, together with clearer conditions for the immediate and announced access<sup>76</sup>.

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<sup>71</sup> Article 4(2)(a) of the Regulation provides that the Office "may take a copy of, and obtain extracts from, any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearance" (emphasis added). The increasing use of privately owned devices for work purposes in the IBOAs has brought up new questions regarding the extent of OLAF's powers to access/assume custody of such devices when their contents may be relevant to the investigation. Article 7 of Regulation 2185/96 enables OLAF (inter alia) to access "computer data" in the framework of on-the-spot-checks. Technological development and the emergence of new forms of data storage and new forms of hardware can lead to the contestation of OLAF's powers. See also ICF report, section 4.2.2.4.

<sup>72</sup> Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF), OJ L 136, 31.5.1999, p. 15–19, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999Q0531>. See Model Decision in Annex; there are currently more than 60 such decisions adopted by EU IBOAs.

<sup>73</sup> These differences have already been pointed out in the past, including in the evaluation of the 1999 Regulations conducted in 2003, COM(2003)154, p. 7-8. See also in this respect J.F.H. Inghelram, "Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public prosecutor's Office", Europa Law Publishing, 2011, p. 99, where the author mentions the decisions according to which officials are not permitted to convey information directly to OLAF, contrary to what is provided for by the model decision, but are obliged to pass it through an internal authority.

<sup>74</sup> ICF report, section 6.2.1.3.

<sup>75</sup> Article 4(2)(a) of the Regulation.

<sup>76</sup> For example, the current Practical Arrangements with the European Parliament, dating from 19.07.2013, provide in point 5.4 that OLAF must inform the European Parliament of its intention to access its premises at least 48 hours in advance, whereas Article 4(2)(a) of the Regulation provides for the right to "immediate and unannounced access" to information detained by the IBOAs. See also ICF report sections 4.2.1.3 and section 4.2.1.4.

### *Access to bank account information*

In the framework of its investigations, OLAF can inspect the **accounts of the IBOAs**<sup>77</sup>. Such power does not exist in Regulation 883/2013 as regards the private bank accounts of EU staff or economic operators and their staff who are under investigation. In the framework of on-the-spot checks, OLAF can have access to the bank statements held by economic operators<sup>78</sup> (limited to what is in their possession). In order to have full access to bank information, OLAF is dependent on its national counterparts (administrative or judicial bodies) and their own powers under national law to provide bank data to OLAF, which naturally creates inconsistencies across Member States.

Some OLAF staff consulted during the evaluation have stressed that access to bank data, with at least the ability to identify the accounts of persons investigated, is necessary to identify the money flow in various types of fraud in both internal and external investigations<sup>79</sup>. They have also indicated that access to bank data appears necessary in order to enable OLAF to fulfil its mandate in the fight against VAT fraud as well (see section 5.4.5)<sup>80</sup>.

#### **5.2.1.3. Final reports and follow-up to recommendations**

OLAF provides financial, disciplinary, judicial and administrative recommendations to IBOAs and Member States. The extent of the follow-up by their recipients determines the impact of OLAF's investigations in the protection of the EU financial interests.

Table 1 above indicates increasing numbers of OLAF investigations concluded and recommendations issued every year. Table 2 below provides a break-down of the issued recommendations by type.

**Table 2: OLAF recommendations**

Type of recommendation	2009	2010	2011	2012	2013	2014	2015	2016
Financial	76	62	63	116	233	253	220	209
Judicial	61	67	73	54	85	101	98	87
Disciplinary	18	10	16	25	24	15	16	18
Administrative <sup>81</sup>	39	33	23	4	11	28	30	32
<b>Total</b>	<b>194</b>	<b>172</b>	<b>175</b>	<b>199</b>	<b>353</b>	<b>397</b>	<b>364</b>	<b>346</b>

Source: 2016 OLAF report

OLAF monitors the follow-up to its judicial, financial and disciplinary recommendations on the basis of information submitted to it by Member States and IBOAs<sup>82</sup>. The **monitoring** is

<sup>77</sup> Article 4(2)(a) of the Regulation.

<sup>78</sup> Article 7 of Regulation 2185/96.

<sup>79</sup> E.g. when the fraud is suspected of being committed by misappropriations of funds, chain of shell companies, or is linked with corruption, or when fraudsters try to divert payments from IBOAs due to contractors by providing the IBOA with a "new" bank account number, on the letter head of the contractor; in such cases, OLAF has no possibility to check this new bank account and has to rely on Member States to find out the identity of the owner of the account.

<sup>80</sup> ICF report, sections 5.3.2 and 9.3.2.

<sup>81</sup> The administrative recommendations issued by OLAF are of two types: case-related administrative recommendations, arising in a concrete case and destined to address a specific issue related to that case, and systemic administrative recommendations, where the investigation identifies weaknesses in management or control systems or in the legal framework. They are not monitored currently, therefore their effectiveness cannot be assessed; they have thus not been included in the analysis of this section.

<sup>82</sup> The Regulation introduced the obligation for Member States to send to OLAF, at its request, information on the action taken following transmission of the final reports and recommendations (Article 11(6)). The 2003 evaluation of the 1999 Regulations (see Recommendation

done at OLAF's initiative and concerns all the judicial, financial and disciplinary recommendations issued. OLAF systematically requests information on the implementation of its recommendations from the competent authorities of the Member States (for judicial recommendations and financial recommendations in the area of revenue) and from IBOAs (for disciplinary recommendations and financial recommendations in the area of expenditure).

There are some limitations to the monitoring of recommendations, and consequently to the analysis below. There is not an obligation to provide reasons for a decision not to follow-up, and the information transmitted to OLAF greatly varies in its level of detail. There is not always information available to assess the explanations behind the different rates of follow-up.

Moreover, there is a **time lag** between the issuing of OLAF recommendations and their implementation by the recipients, which can take several years. Given the timeframe for the evaluation, which considers only the first three years after entry into force of the Regulation, the data currently available on follow-up by recipients of recommendations relate to investigations for the most part concluded before the entry into force of the Regulation. The evaluation timeframe does not, therefore, allow to assess the possible impacts of new provisions in the Regulation on the follow-up to recommendations in terms of rate of indictments, amounts recovered and for disciplinary measures taken.

The evaluation has identified, as a factor impacting on the rate of follow-up to recommendations, the **quality and timeliness of OLAF final reports**, with some reported instances of lack of clarity, inconsistency between conclusions and evidence, and factual mistakes<sup>83</sup>. On the other hand, the survey results were more optimistic with around 60% of the respondents (including OLAF respondents) agreeing or strongly agreeing that the OLAF reports are overall clear and comprehensive and clearly formulated<sup>84</sup>. In addition, OLAF interviewees suggested that the Regulation has led to the improvement of the quality of OLAF's reports (due to higher standards linked, for instance, to the internal controls and legality checks and reviews which contribute to the respect of procedures and to the quality and comprehensibility of the final reports<sup>85</sup>). Further improvement of the quality of OLAF's reports could be achieved by internal measures in OLAF and is not directly depending on the effectiveness of the relevant provisions in Regulation 883/2013.

Furthermore, the differences between the extent of the **discretion enjoyed by the recipients** on whether or not to take appropriate action following OLAF's recommendations leads to wide differences in the responses and to frequent lack of follow-up to recommendations (as illustrated by the subsections below). While maintaining the non-binding nature of OLAF recommendations, it has been suggested by OLAF staff

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No 6) and the Commission's Reflection paper of 2010 on the future of OLAF (point 2.4) refer to the need for Member States to report on the follow-up to cases transmitted to them by OLAF. For internal investigations, the IBOAs recipients of the reports and recommendations are bound to take action as the result of the investigation warrants, and to report to OLAF (Article 11(4)). The Regulation is, however, silent on the follow-up by IBOAs in the framework of external investigations.

<sup>83</sup> ICF report, section 4.4.3.1; see also European Parliament Resolution of 11 March 2015 on the Annual Report 2013 on the protection of the EU financial interests – Fight against fraud (2014/2155(INI)), OJ C 316, 30.8.2016, pp. 37-47, point 60, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2016.316.01.0037.01.ENG&toc=OJ:C:2016:316:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.316.01.0037.01.ENG&toc=OJ:C:2016:316:TOC).

<sup>84</sup> ICF report, section 4.4.3.1.

<sup>85</sup> In addition, internal Guidelines and Instructions on several investigative aspects contribute to a greater consistency and quality of OLAF final reports; a collection of Best Practices of the Office stemming from the legality checks and reviews performed by the ISRU aims at ensuring coherence in the analysis of the various elements of the legal framework for the investigations, based on case experience.



consulted that the effectiveness of the recommendations could be strengthened by extending the obligation to report on all cases (Member States and IBOAs in both external and internal investigations) and introducing the duty to state reasons should there be no follow-up, as well as by codifying existing case-law by clarifying the duty to take the recommendations into account<sup>86</sup> when deciding whether to take action in a certain matter or not.

- *Follow-up to judicial recommendations*

On average, only around half of the cases submitted by OLAF to national judicial authorities lead to indictments, and the situation varies considerably across Member States<sup>87</sup>. The low rate of follow-up to OLAF's judicial recommendations has been repeatedly highlighted as a key problem by the European Parliament<sup>88</sup>.

An OLAF internal analysis<sup>89</sup> of the reasons behind this, points to a number of issues. OLAF identified as the main factor hindering the follow-up to judicial recommendations the fact that the Regulation does not sufficiently ensure the use of OLAF reports as evidence in trial in the Member States (see next subsection). Other possible factors were also considered. Despite OLAF's investigative efforts, its investigation powers and tools are not sufficient in all cases to collect strong evidence of a criminal offence. For internal investigations, the OLAF analysis considers that, whereas for OLAF any infringement committed by EU staff is generally regarded as a serious matter, the priorities of the national judiciaries - in Member States where the principle of opportunity applies - may be different.

The external contractor pointed out how early transmission of the information and evidence collected is also essential for the judicial follow-up<sup>90</sup>.

- *Admissibility of OLAF reports as evidence in trial*

OLAF final reports constitute admissible evidence in administrative or judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors<sup>91</sup>. This rule ensures the **equivalence with national reports** of a similar nature, but not the effectiveness of OLAF reports accompanied by judicial recommendations. In Member States not having rules providing for the admissibility of evidence, in judicial proceedings, of similar administrative reports drawn up by national administrative inspectors, evidence collected by OLAF will be inadmissible. In various Member States, after receiving the OLAF final report, prosecutors carry out all the investigation activities once again in order to acquire admissible evidence. This raises also efficiency issues, and may also lead to offences becoming time barred.

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<sup>86</sup> Case T-193/04, Hans-Martin Tillack v Commission, paragraph 72. The Court established an obligation of the national judicial authorities "to examine carefully" the information forwarded to them by OLAF and to draw the appropriate consequences from it in order to comply with Community law.

<sup>87</sup> According to the OLAF Report 2016, the indictment rate following OLAF's recommendations issued between 1 January 2009 and December 2016 is on 50%; see figure 12, p. 33.

<sup>88</sup> See inter alia European Parliament Resolution of 16 May 2017 on the Annual Report 2015 on the protection of the EU financial interests – Fight against fraud (2016/2097(INI)), points 95 to 97 and 102, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0206+0+DOC+XML+V0//EN>.

<sup>89</sup> Analysis on Member States follow-up to OLAF's judicial recommendations issued between 1 January 2008 and 31 December 2015 - OLAF Report 2016, point 4.2, p. 32.

<sup>90</sup> ICF report, section 4.4.3.3.

<sup>91</sup> Article 11(2) of the Regulation.

This assessment was confirmed by stakeholders consulted by the external contractor for this evaluation, in particular by AFCOS and judicial authorities<sup>92</sup>. A study commissioned by the Budgetary Control (CONT) Committee of the European Parliament underlined how the asymmetries in the prerogatives and powers of OLAF jeopardise the future use of its findings. In addition, the rule that leaves the admissibility of OLAF final reports to the variable geometry of the national criminal procedural law creates uncertainties and a duplication of efforts that is detrimental to both procedural economy and the rights of the persons under investigation<sup>93</sup>.

- *Follow-up to financial recommendations*

Financial recommendations are addressed to the IBOAs or national authorities providing or managing EU funds. They seek to recover the defrauded EU funds to the EU budget. The evolution of amounts recommended for recovery, and the amounts recovered according to monitoring information collected by OLAF, are captured in tables 3 and 4. However **no correlation can be established between the amounts recommended and the amounts recovered in the same financial year**, as the amounts recovered in one given year relate also to cases closed in previous years.

**Table 3: Amounts recommended by OLAF for financial recovery (million Euro)**

Year of recommendation	2012	2013	2014	2015	2016
Amounts recommended	284.0	402.8	901.0	888.1	631.1

Source: 2016 OLAF Report

The evidence collected for the evaluation identified as a key factor influencing the follow-up to OLAF's financial recommendations, the **amounts recommended for recovery**, which several stakeholders (IBOAs, Member States' judicial and managing authorities) considered to be often unduly overestimated<sup>94</sup>. The decision on the final amount recovered is the responsibility of the IBOAs, which have underlined that the calculations done follow the applicable legal framework and internal rules.

From the IBOAs experience, it results that other factors could also influence the recovery, as bankruptcy of the economic operators concerned which often arises in direct expenditure cases. In addition, the use of OLAF's reports for financial follow-up purposes can be problematic in practice, for confidentiality reasons, when at the same time a judicial follow-up has been recommended. Some consulted stakeholders called for a better collaboration between OLAF and the responsible IBOA prior to issuing the recommendations<sup>95</sup>, and also in the follow-up phase.

**Table 4: Amounts recovered (million Euro)**

Year of recovery	2012	2013	2014	2015	2016
Amounts recovered	94.5	117	206.4	186.3	196.2

Source: 2013-2016 OLAF Annual Activity Reports

<sup>92</sup> ICF report, annex 9.

<sup>93</sup> "The protection of the procedural rights of persons concerned by OLAF administrative investigations and the admissibility of OLAF Final Reports", author Prof. Dr. Katalin Ligeti, July 2017, available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_IDA\(2017\)603790](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2017)603790).

<sup>94</sup> ICF report, section 4.4.3.2.

<sup>95</sup> ICF report, section 4.4.3.2.

The European Parliament has underlined in the past the uneven level of financial recovery object of OLAF recommendations<sup>96</sup>. OLAF's monitoring data does not allow a more comprehensive analysis of the factors behind this discrepancy, as OLAF is not provided with detailed reasons to explain the follow-up or dismissal of recommendations. OLAF has undertaken an internal assessment in order to clarify terminology, improve the quality of its financial recommendations and to promote as far possible (taking into account the different areas of EU expenditures and revenues, and the fact that the typology of cases can widely vary within a specific area) a harmonised approach throughout OLAF. Following the internal assessment, in October 2016, OLAF issued **internal instructions on financial recommendations**<sup>97</sup>. They provide guidance to staff notably on the determination of relevant estimated amounts and on the content of OLAF financial recommendations and relevant sections of the final report. The new instructions distinguish between the different fields of expenditure and revenues, and take into account the relevant financial principles and specific rules per each of these fields. They also address the usefulness for OLAF to hold bilateral contacts with the relevant services of the Commission or other IBOAs for the determination of the relevant amounts, without jeopardising OLAF's independence. These instructions already respond to some extent to the recommendations formulated by the contractor in its report<sup>98</sup>. As the instructions have been adopted only in October 2016 it is too early to evaluate their practical impact.

- *Follow-up to disciplinary recommendations*

Disciplinary recommendations concern misconduct of EU staff or members of the EU institutions and are directed at the authority having disciplinary powers in the IBOA concerned. In the last three years 2014-2016, OLAF has issued 48 disciplinary recommendations. IBOAs have taken measures in 22 cases, in 11 cases no measures were taken, and in 15 cases no decision has been taken yet<sup>99</sup>.

Stakeholders consulted<sup>100</sup> indicated that for a better follow-up, discrepancies in the recommendations could be avoided by a better interplay between OLAF and their service during the investigations, and mentioned also a particular difficulty in the cases where an OLAF final report is accompanied by recommendations for both judicial and disciplinary actions; this resides in the obligation, provided for in the EU Staff Regulation, to suspend the disciplinary proceedings until the judicial proceedings are finalised<sup>101</sup>.

## **5.2.2. Improving cooperation and information exchange with partners**

### **5.2.2.1. Improving cooperation and information exchange with IBOAs**

The IBOAs are a key partner of OLAF in its investigative function. They share the responsibility for the protection of the EU financial interests and their role is essential in both internal and external investigations. The extent of the cooperation between OLAF and IBOAs, however, differs from internal to external investigations. Some provisions in

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<sup>96</sup> European Parliament Resolution of 8 March 2016 on the Annual Report 2014 on the protection of the EU financial interests – Fight against fraud (2015/2128(INI)), point 80, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2FTA%2BP8-TA-2016-0071%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>.

<sup>97</sup> Instructions on drafting Financial Recommendations and related sections of the Final Report, 7.10.2016.

<sup>98</sup> ICF report, annex 8.

<sup>99</sup> OLAF Report 2016, figure 13, p. 34.

<sup>100</sup> In particular IDOC staff, as indicated in the ICF report, annex 10; see also IDOC presentation at the OLAF conference.

<sup>101</sup> Annex IX to the EU Staff Regulation. In such situations, the IBOAs have however the possibility to open a case, conduct a complementary investigation or even suspend the person concerned.

Regulation 883/2013 establish more explicit duties for IBOAs and their staff in internal investigations<sup>102</sup>.

The majority of stakeholders consulted in the evaluation process expressed a positive view about the cooperation between OLAF and IBOAs<sup>103</sup>. Cooperation with the European Commission is particularly relevant given the important role played by the so-called 'spending DGs' in the management of EU funds. Stakeholders from these DGs highlighted positive cooperation with OLAF. Overall, the consulted Commission stakeholders considered that ACAs contributed to an even better exchange of information<sup>104</sup>.

An important aspect of cooperation during the investigations concerns the adoption of administrative precautionary measures by the IBOAs<sup>105</sup>. There are no statistics available on the extent of use of **precautionary measures**, but results of the consultation of stakeholders suggest that their use is not very frequent. The external contractor points out to the lack of clarity of the interplay between precautionary measures and procedural guarantees that might explain in part the reluctance of some stakeholders to adopt on precautionary measures. IBOAs have mentioned in particular the difficulty to assess the need of precautionary measures given the inconclusive nature of evidence at the early stage of an investigation, and resulting risk to the legality of the precautionary measures. OLAF staff raised concerns regarding the confidentiality of the investigations and the amount of information that can be communicated early. There were suggestions that a closer cooperation between OLAF and the Commission DGs concerned could help develop clearer procedures surrounding precautionary measures<sup>106</sup>.

During the assessed period, and on the basis of the specific provision newly introduced by the Regulation<sup>107</sup>, OLAF and **Eurojust** cooperated effectively, in particular regarding counterfeit goods. The future working arrangements should allow enhancing cooperation between the two bodies (as the current legal framework for OLAF and Eurojust allows for the exchange of operational, strategic and technical information, including personal data, between the two bodies, not foreseen in the current administrative arrangements).

**Eurojust** and OLAF collaborate effectively through the exchange of information of investigative interest and mutual involvement in common cases<sup>108</sup>. Since 2005, OLAF and Eurojust exchanged information in relation to 66 cases. Also, since 2015 OLAF participates in joint investigation teams coordinated by Eurojust.

#### ***5.2.2.2. Improving cooperation and information exchange with Member States***

The effectiveness of OLAF investigations (in particular external) relies heavily on its partnership with the Member States at all stages of the investigative cycle, in particular as various provisions of the Regulation make OLAF's investigative work subject to national law,

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<sup>102</sup> For example, OLAF's powers to access relevant information in IBOAs are stronger in internal compared to external investigations (Articles 4(2)(a) and 3(5), respectively). Equally, the duty of IBOAs' staff to cooperate with OLAF (Article 4(7)) is only provided for in the Regulation in relation to internal investigations; the Staff Regulations establish, however, the obligation of the staff to report (whistleblowing).

<sup>103</sup> ICF report, section 4.3.2.4.

<sup>104</sup> ICF report, section 4.3.2.4, and also section 7.

<sup>105</sup> Article 7(6) (b) and (c) of the Regulation. Precautionary measures can also be adopted by the Member States, according to Article 7(7) of the Regulation.

<sup>106</sup> ICF report, section 4.2.3.3.

<sup>107</sup> Article 13 of the Regulation.

<sup>108</sup> See OLAF report 2016, p. 27 and Eurojust Annual Report 2016, p. 41, <http://eurojust.europa.eu/doclibrary/corporate/Pages/annual-reports.aspx>.

and that OLAF has to request the assistance of national authorities for the conduct of certain investigative measures. Improving cooperation with Member States was thus among the main objectives of Regulation 883/2013, which introduced new rules on the AFCOS, administrative arrangements, information exchange, and follow-up after an investigation.

The data collected for the evaluation shows a clear improvement in the cooperation and exchange of information between OLAF and the Member States after the **creation of the AFCOS**<sup>109</sup>. However, although the Regulation requires the Member States to designate AFCOS<sup>110</sup>, it leaves at their discretion what competences and powers to grant them. This results in a considerable diversity in the role, profile and effectiveness of cooperation with the AFCOS.

An OLAF survey of AFCOS<sup>111</sup> showed that over 80% of the AFCOS are of limited size with only one central office, with the remaining operating with both a central office and local units. More than half of AFCOS cooperates with a wide range of national authorities (notably anti-corruption, anti-fraud, customs, EU fund managing authorities and tax administrations), offering OLAF an indirect access to these. Almost a third has criminal or administrative investigative powers. More than half are either already cooperating with other Member States' AFCOS or would be open to do so in future.

This diversity was the main factor identified by the external contractor as inhibiting the effectiveness of the AFCOS. However, there were diverging views as regards further alignment of their role and powers: OLAF staff and certain AFCOS tended to agree, while other AFCOS supported the legal provisions as they currently stand.

The positive role of the AFCOS has also been underlined by the European Parliament, although it has also raised concerns regarding discrepancies between the functions, tasks and powers that Member States have entrusted to AFCOS<sup>112</sup>.

Several AFCOS referred to the lack of 'horizontal' administrative cooperation possibilities between AFCOS as a limitation to the current framework<sup>113</sup>. In this regard, a recent cooperation project in the area of structural funds, designed and coordinated by the Italian AFCOS and involving AFCOS from other Member States (hereinafter, the Italian cooperation project), concluded that improving the flow of information between Member States would be conducive to better prevention and combatting of transnational fraud in structural funds, and that the naturally identifiable channel for this could be the AFCOS<sup>114</sup>.

OLAF respondents highlighted that the role of the AFCOS was relevant both in external and internal investigations, and that this should be further clarified in the Regulation.

OLAF can also cooperate directly with **administrative, police and judicial authorities**. The Regulation contains a general obligation for all relevant Member States' authorities to

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<sup>109</sup> According to the ICF report, 75 per cent of the respondents agreed/strongly agreed that the establishment of AFCOS strengthened cooperation between OLAF and the Member States' authorities, while no respondent disagreed; see section 4.3.1.3 and annex 11.

<sup>110</sup> Article 3(4) of the Regulation.

<sup>111</sup> OLAF survey on AFCOS, July 2016, unpublished; see ICF report, section 4.3.1.3.

<sup>112</sup> European Parliament Resolution of 11 March 2015 on the Annual Report 2013 on the protection of the EU financial interests – Fight against fraud (2014/2155(INI)), point 56. See also European Parliament Resolution of 8 March 2016 on the Annual Report 2014 on the protection of the EU financial interests – Fight against fraud (2015/2128(INI)), point 43.

<sup>113</sup> ICF report, section 7.2.3.1.

<sup>114</sup> The project was conducted during 2016, by way of two conferences and several round tables, and its results were published under "Progetto di cooperazione nel settore antifrode. Cooperation project in the anti-fraud sector", Gangemi Editore International, February 2017.

cooperate with OLAF within the limits permitted by national law<sup>115</sup>. Administrative arrangements may also be established<sup>116</sup>. In turn, OLAF investigators cooperate with national authorities during the follow-up to recommendations; they may, for instance, be called to testify in national judicial proceedings as witnesses or experts<sup>117</sup>. According to OLAF staff consulted in the evaluation<sup>118</sup>, the cooperation and exchange of information with national authorities is overall effective, and is assessed as more effective with Member States' authorities with whom ACAs are signed. However, the references to national law in the Regulation result in considerable differences across the Member States, in particular as regards cooperation with judicial authorities<sup>119</sup>, and it can lead to one way exchanges from OLAF to the judicial authorities which do not share information in return.

### ***5.2.2.3. Improving cooperation and information exchange with third countries and international organisations***

The Regulation bases OLAF's powers to investigate in third countries and international organisations on the cooperation and mutual assistance agreements concluded by the Union with these partners, such as association agreements<sup>120</sup>. The power of OLAF to investigate is also frequently laid down in financing programmes and conventions. OLAF may also enter into administrative arrangements with these partners.

Based on information provided by OLAF investigators and by representatives of national authorities in third countries<sup>121</sup>, the external contractor concluded that the cooperation with third countries is more effective when **ACAs** are signed. ACAs are not, however, a prerequisite for cooperation. OLAF investigators consulted during the evaluation have indicated that the Regulation<sup>122</sup> should be clarified as it is sometimes interpreted by partners as not allowing the exchange of information with third countries authorities or international organisations in the absence of an administrative arrangement.

### ***5.2.3. Strengthening the procedural guarantees of individuals subject to investigation***

Article 9 of the Regulation codified and clarified procedural safeguards of persons under OLAF investigations<sup>123</sup>. It is generally recognised as an improvement for protecting the rights of individuals subject to an OLAF investigation<sup>124</sup>. The evaluation has not shown a need to substantially revise existing provisions, although the following specific elements were highlighted during the evaluation as potentially affecting effectiveness of OLAF investigations:

- It has been suggested that the scope of Article 9, which focuses particularly on the conduct of **interviews**, could be clarified to apply also to other powers of OLAF that

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<sup>115</sup> Article 8(2) and (3) and Article 12(3) of the Regulation.

<sup>116</sup> Article 1(5) of the Regulation.

<sup>117</sup> Article 12(4) of the Regulation.

<sup>118</sup> See the results of the survey run during the evaluation, as quoted in the ICF report, section 4.3.1.3 and annex 11.

<sup>119</sup> ICF report, section 4.2.1.3.

<sup>120</sup> Article 1(1)(b) of the Regulation.

<sup>121</sup> ICF report, section 4.3.3.3.

<sup>122</sup> Articles 11 and 14 of the Regulation.

<sup>123</sup> Article 9 of the Regulation provides for the right to an objective and impartial investigation in accordance with the principle of the presumption of innocence; the right to avoid self-incrimination; the right to be informed of the intention of OLAF to interview the person concerned/witness; the right to be assisted by a person of the individual's choice; and for the person concerned the right to comment on the facts of the case.

<sup>124</sup> ICF report, section 5.4.

could raise procedural rights concerns, such as collection of statements, on-the-spot checks<sup>125</sup> and digital forensic operations<sup>126</sup>.

- The **opportunity to comment**<sup>127</sup>, that has to be provided once the investigation has been completed and before conclusions referring by name to a person concerned are drawn up, was questioned by OLAF investigators and a number of national judicial authorities. They considered it may represent a risk to the confidentiality of the investigation where judicial action may follow, given in particular that the Regulation allows for it to be deferred but not waived. Further legal uncertainty exists in relation to internal investigations, where the right to comment is provided for by the Regulation even in situations where the investigation has not yet been completed<sup>128</sup>.
- Some of the consulted stakeholders pointed out that the Regulation does not address the **right of access to the file**<sup>129</sup>. It must be noted that, based on existing legislation, the case law of the CJEU has systematically refused the right to access the OLAF case file as OLAF final reports have been considered preparatory acts<sup>130</sup>. In accordance with the same case-law, access to documents in OLAF's files takes place in the context of the possible follow-up procedure. OLAF's final recommendations are submitted to the competent Union and/or national authorities. If those authorities intend to adopt measures or penalties against a person concerned by an OLAF investigation, they must give that person the opportunity to exercise his or her rights of defence in accordance with the applicable procedural rules<sup>131</sup>.

The procedural guarantees are underpinned by OLAF internal and external controls.

Internally, OLAF conducts **legality checks** of investigative activities<sup>132</sup> and has in place an **internal complaint procedure**. The review function introduced by the Regulation and the internal controls were mentioned by OLAF staff as strengthening procedural guarantees of individuals subject to investigation. Despite the large number of investigations carried out every year, their sensitive nature and the fact that OLAF deals with cases involving the integrity and reputation of natural persons, relatively few complaints based on procedural guarantees have been submitted to OLAF. During the three years of application of the Regulation, 15 complaints were filed against OLAF<sup>133</sup>; of these, 4 were declared inadmissible and 9 deemed unfounded.

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<sup>125</sup> These were in particular mentioned during the workshop with the experts' panel organised by the contractor.

<sup>126</sup> See the study by Prof. Ligeti commissioned by the CONT Committee, for ex. p. 6; see also ICF report, sections 6.1.2.4 and 6.1.2.5.

<sup>127</sup> Article 9(4) first subparagraph of the Regulation; the external contractor in its report has particularly identified the opportunity to comment as an area where further clarity would be needed in the Regulation – ICF report, section 4.5.4.

<sup>128</sup> Articles 4(8) second subparagraph and 12(2) third subparagraph of the Regulation provide for the right to comment in case of transmission of information to national authorities even prior to the opening of a case or during an investigation.

<sup>129</sup> See the study by Prof. Ligeti commissioned by the CONT Committee, point 1.1.7, p. 17, and J. Inghelram, "Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF) Analysis with a Look Forward to a European Public Prosecutor's Office", Europa Law Publishing, 2011. Furthermore, the study commissioned by the CONT Committee suggests to further develop Article 9 on procedural guarantees, in particular as regards: the threshold for invoking the privilege against self-incrimination, the minimum information provided to the interviewee prior to the interview by OLAF as well as external control over the restriction of the right to be heard, as well as the scope and conditions for OLAF to conduct digital forensics from the perspective of the right to privacy.

<sup>130</sup> Case T-215/02, Gomez Reino v. Commission, paragraph 65; case T-259/03, Nikolaou v. Commission; case T-48/05, Franchet and Byk v. Commission, and case T-447/11, Catinis v. Commission, paragraphs 63-64.

<sup>131</sup> Case T-447/11, Catinis v Commission, paragraph 64.

<sup>132</sup> Based on Article 17(7) of the Regulation.

<sup>133</sup> 5 in 2014, 4 in 2015 and 6 in 2016.

As regards the **external controls**, the Supervisory Committee monitors developments concerning the application of procedural guarantees in OLAF investigations<sup>134</sup>. It has recommended the establishment of an internal complaint mechanism (implemented by OLAF)<sup>135</sup>, and its recent evaluation of the legality check and review in OLAF was overall positive<sup>136</sup>.

Other external controls include the European Data Protection Supervisor (concerning data processing by OLAF), the European Ombudsman (complaints about maladministration) and the European Court of Auditors (external audits). Those concerned may also raise issues related to OLAF investigations before the European Court of Justice, usually in the context of litigation against measures taken as a follow-up to OLAF recommendations, or in the context of an action for damages allegedly caused by OLAF<sup>137</sup>.

The Commission's proposal concerning the Controller of procedural guarantees, currently pending, aims at tasking an external and independent structure with reviewing OLAF's compliance with the procedural guarantees of the persons concerned by OLAF investigations; it also takes into account the special status of members of EU institutions by submitting certain investigative activities concerning them to prior authorisation by the Controller. During the consultation of stakeholders, there were different views on the Commission proposal<sup>138</sup>. A number of EU control bodies and several AFCOS were of the view that there is indeed a need to strengthen the current mechanisms by appointing a Controller of Procedural Guarantees, as proposed by the Commission<sup>139</sup>. In contrast, a number of other EU control bodies<sup>140</sup> and certain OLAF staff suggested that the existing control mechanisms are sufficient to ensure compliance with procedural rights given the administrative nature of OLAF investigations. The study on procedural guarantees commissioned by the CONT Committee concluded that, whilst an effective and independent control of OLAF investigations is undoubtedly needed, the added value of an additional layer of non-binding control appears questionable both in terms of coherence and effectiveness<sup>141</sup>.

#### **5.2.4. Reinforcing the governance of OLAF**

Ensuring the appropriate governance of OLAF as well as its accountability, guaranteeing its independence while providing for adequate controls, was among the objectives that the legislative proposals to amend OLAF's former legal framework tried to address.

Regulation 883/2013 introduced in particular new provisions aimed at clarifying the role and mandate of the **Supervisory Committee**, responsible for monitoring the implementation by OLAF of its investigative function, in order to reinforce its independence. In addition, it monitors developments concerning the application of procedural guarantees and the duration of investigations<sup>142</sup>. The relevant provisions were amended in 2016 to ensure a strengthened independent functioning of the Committee's secretariat from OLAF; the Committee's secretariat is now provided by the Commission.

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<sup>134</sup> Article 15(1) of the Regulation.

<sup>135</sup> Opinion No 2/2013, Establishing an internal OLAF procedure for complaints.

<sup>136</sup> Opinion No 2/2015, Legality check and review in OLAF.

<sup>137</sup> See, as a recent example, case T-483/13 Oikonomopoulos v. Commission, where the General Court reviewed a broad range of procedural steps carried out by OLAF.

<sup>138</sup> ICF report, section 8.

<sup>139</sup> ICF report, section 7.2.2.2 – the report does not specify which EU control bodies expressed the view.

<sup>140</sup> ICF report, section 7.2.2.2 – the report does not specify which EU control bodies expressed the view.

<sup>141</sup> Point 1.3.4, p. 25, and also pp. 6 and 8.

<sup>142</sup> Article 15 of the Regulation.



A contribution analysis performed by the external contractor on the available outputs of the Supervisory Committee concluded that the new provisions of the Regulation related to the Supervisory Committee did not reinforce the governance of OLAF by the regular monitoring of the implementation by OLAF of its investigative function<sup>143</sup>. The external contractor considered that the definition of the Supervisory Committee's role and mandate as contained in Article 15 of the Regulation is not clear enough and open to interpretation. Among those consulted in OLAF, the Supervisory Committee and external stakeholders, many expressed the view that divergent interpretations on the Regulation's provisions on the Supervisory Committee's impacted the effectiveness and efficiency of the work of the Committee and its cooperation with OLAF. Two issues were typically identified as problematic: the exact nature of the Supervisory Committee's role, and the Committee's access to case-related information.

However, it is sufficiently clear from the terms of the Regulation that the Supervisory Committee carries out a role of general and systemic supervision of the investigative activity of OLAF with the purpose of reinforcing its independence. The Regulation does not empower the Supervisory Committee to review individual investigations or to interfere with on-going investigations. In this context, some of the outstanding issues of interpretation between OLAF and its Supervisory Committee as regards access to case-related information were addressed by a common interpretation of the legal services of the Commission, the Parliament and the Council in September 2016.

The Supervisory Committee's role as regards procedural rights and the duration of investigations are also part of its general and systemic supervision role, and do not entail the control of individual investigations. However, these additional functions, introduced in 2013, seem to have contributed to the different interpretations on the nature of the Committee's mandate. The consultation by the external contractor showed that OLAF staff regarded the Supervisory Committee primarily as a control body rather than a guardian of OLAF's independence.

As regards the inter-institutional exchange of views, the external contractor's report considered that the evidence gathered was too limited to derive robust findings on its effectiveness, but pointed to the fact that it contributes to the transparency of the work of OLAF<sup>144</sup>.

### **5.3. Efficiency**

***To what extent has the implementation of Regulation 883/2013 impacted on OLAF's resources and the use of those resources? Did OLAF use the possibility to open an investigation taking into account the need for efficient use of its resources or the subsidiarity principle?***

This section considers the extent to which the implementation of the Regulation had an impact on OLAF resources and the use of those resources, as well as whether the provisions in the Regulation for the conduct of investigations are efficient for the achievement of the Regulation's overarching objective. To provide general background to the efficiency assessment, it starts by describing the general evolution of financial and human resources in OLAF before and during the evaluation period.

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<sup>143</sup> ICF report, section 4.7.4.

<sup>144</sup> ICF report, section 4.8

Due to the limited data availability, the majority of the assessment is of a qualitative character.

### 5.3.1. Resources

The efficiency considerations discussed below should be read in the context of **decreasing human resources** and a relatively **stable budget** over the analysed period.

The number of posts in OLAF's establishment plan declined by 5.5 % between 2009 (384)<sup>145</sup> and 2016 (363)<sup>146</sup> mainly in the context of general reductions in staff and budgets in the EU public service; the total workforce including service providers remained however stable over the same period. This decrease concerned mainly staff in policy functions. The challenges which OLAF faces in maintaining its current level of professional expertise are also linked to the ageing workforce, as investigative staff recruited from national services in the early days of OLAF retire<sup>147</sup>.

Since 2009, the OLAF budget has been stable in absolute numbers ranging between EUR 57 million to EUR 59 million a year. The proportion of the budget spent on staff has also been relatively stable, ranging from 65.8% in 2011 to 68.7% in 2016, with an additional 4.5% spent on external agents (contract staff, seconded national experts and interims).

**Table 5: OLAF administrative budget (in EUR million)**

	2009	2010	2011	2012	2013	2014	2015	2016
Staff costs			38.3 65,8 %	67.1 %	67 %	38.5 67,3 %	39 67,5 %	40,5 68,7 %
External agents			2.5 4,3 %	4,5 %	4,5 %	2.6 4,5 %	2.6 4,5 %	2.6 4,4 %
Total budget	57.8	57.1	58.2	57.4	57.7	57.2	57.7	58.9

Source: The 2009-20016 OLAF reports

### 5.3.2. Application of the Regulation

#### *Single point of entry, case selection and opening of investigations*

The evaluation has shown that the operational efficiency of the selection phase has increased under the Regulation, due to several factors.

A **single point of entry (SPE)** filters incoming information in OLAF. As a result, only information of potential investigative interest reaches the selection stage, allowing a better use of staff resources in the ISRU to assess information of true potential investigative interest and contributing to the expeditious case selection process. The external contractor concluded that the SPE made the selection process more efficient<sup>148</sup>.

<sup>145</sup> Technical annexes to the Communication on the Allocation of human resources and decentralised administrative appropriations for 2009, SEC(2008) 3053/3.

<sup>146</sup> Technical annexes to the Communication to the Commission on the Allocation of human resources and decentralised administrative appropriations for 2016, SEC(2015) 501 final.

<sup>147</sup> The OLAF report 2016, p. 44.

<sup>148</sup> ICF report, section 9.2.2.

The table below illustrates that the **case selection criteria** introduced by the Regulation<sup>149</sup>, alongside the **reorganisation** after the arrival of the new Director-General in 2012 anticipating the Regulation<sup>150</sup>, contributed to shaping a coherent policy on openings and dismissals across OLAF and allowed to effectively track all information coming in and its treatment, has become more efficient after the entry into force of the Regulation in processing a higher number of incoming information; opening a higher proportion of incoming cases; and selecting or dismissing incoming cases much faster than in the previous period.

Interviews with OLAF investigators carried out for the evaluation confirmed that the new case selection process had a positive impact on investigators' work as they were now spending more time on investigations, rather than on the evaluation of incoming information and case selection.

**Table 6: Number of incoming information and investigations opened**

	2009	2010	2011	2012	2013	2014	2015	2016
Incoming information	959	975	1041	1264	1294	1417	1372	1136
- from public sources	436	381	274	375	405	458	439	380
- from private sources	523	584	767	889	889	959	933	756
Investigations opened	160	152	146	431	253	234	219	219
Selections completed	1007	886	926	1770	1247	1353	1442	1157
Average duration (in months) of selection phase	5.8	6.3	6.8	1.4	1.8	2.0	1.7	1.7

*Source: The OLAF 2016 report*

*Note: OLAF reorganisation took place in 2012 in anticipation of Regulation 883/2013*

However, the table also shows a high and stable **rate of dismissal at the selection stage** since 2013, of around 80-85% of the incoming information<sup>151</sup>. In particular, the sufficient suspicion of fraud test led to the dismissal of an average of 50% of the cases<sup>152</sup>. OLAF staff have raised in this context the fact that the Regulation does not contain a duty of national competent authorities to cooperate with OLAF at the selection stage. Thus, in many cases where the incoming information on its own may be insufficient to open a case, OLAF lacks tools to collect further information.

### *Investigative process*

In terms of human resources, the average number of OLAF investigative staff declined from 163 in 2009 to 148 in 2011 to rise again to 168 in 2016 (see figure 5). The number of

<sup>149</sup> Article 5(1) of the Regulation.

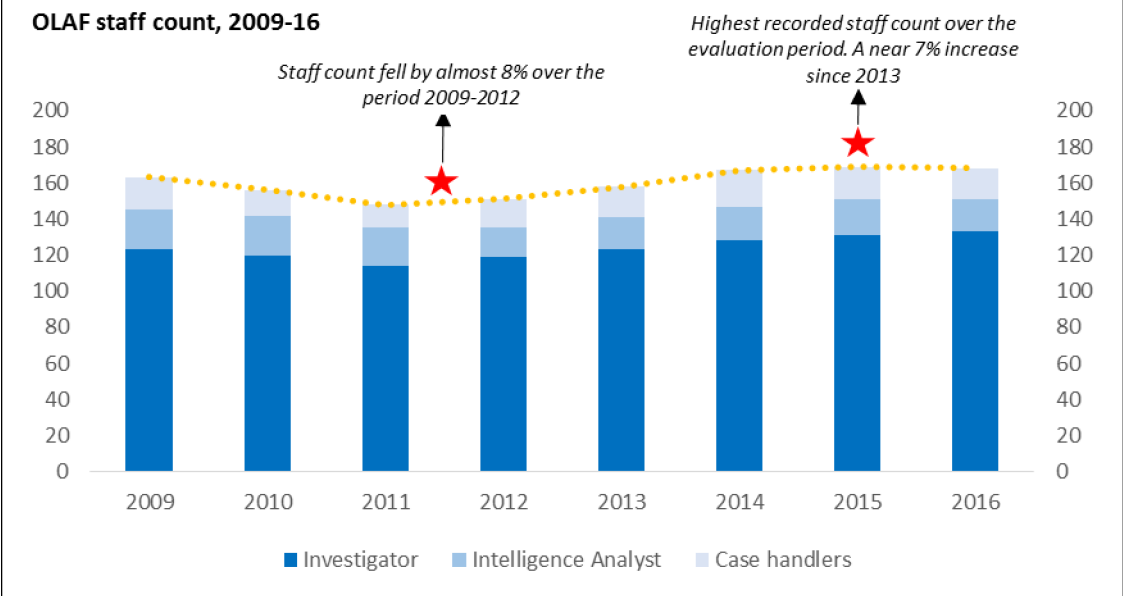
<sup>150</sup> Previously, the assessment of incoming information was carried out by the investigative staff. For each case, the responsible unit submitted their proposal to an Investigations and Operations Executive Board who would then issue a recommendation to the Director-General. Also, prior to the application of the Regulation, no selection criteria were defined for selection and opening of cases. De minimis thresholds were applied in practice to focus on more significant cases. The activity of the ISRU created after the reorganisation has also been assessed by the Supervisory Committee, regarding both its tasks of selection, on the one hand, and legality check and review, on the other hand; see in this respect Opinions 2/104 – Case selection in OLAF and 2/2015 – Legality check and review in OLAF.

<sup>151</sup> OLAF Report 2016, figure 17, p. 60. For example, in 2016, 219 cases were opened following assessment of 1136 pieces of incoming information.

<sup>152</sup> According to an internal study of the selection process conducted in OLAF, from a sample of 1902 cases dismissed during the period between January 2015 and October 2016, 929 were dismissed for insufficiency of suspicions alone.

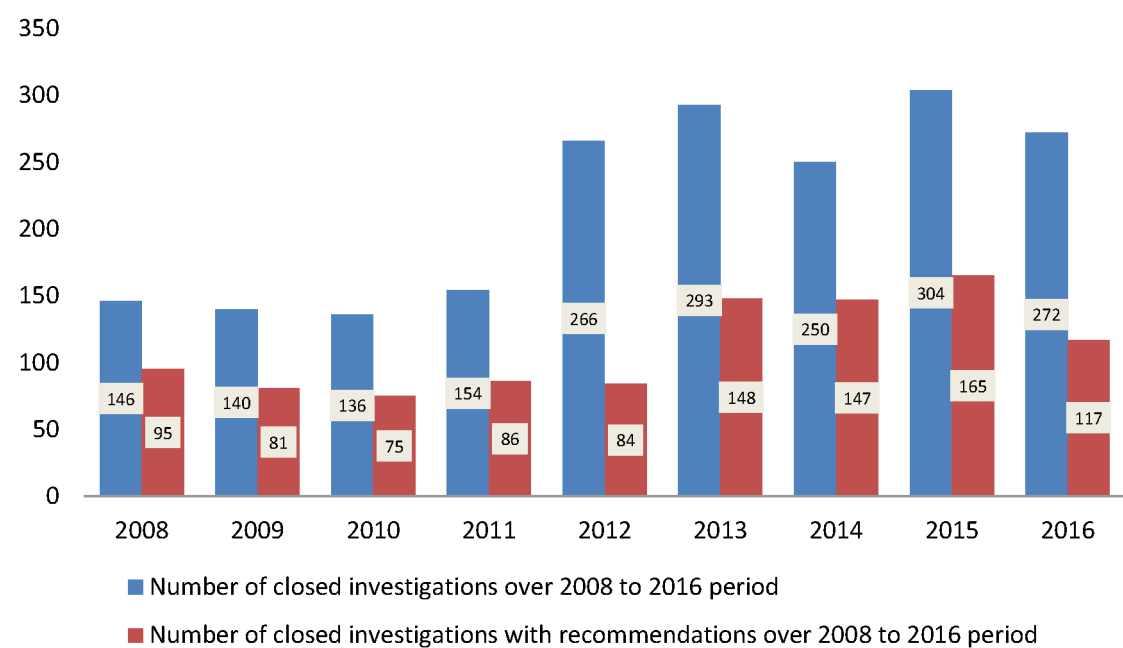
investigative staff from 2013 to 2016 increased by 7% compared to the period 2009 to 2012. In comparison, the total number of cases opened increased by 32% between the two periods (see table 1 above). The figures below illustrate the evolution between 2009 and 2016. They all show a substantial **increase in investigation work** from 2013 to 2016 compared to the previous three-year period. When compared to the period before 2013, the number of closed investigation cases has almost doubled in the period from 2013 to 2016. The same can be said about the number of cases closed with recommendations.

**Figure 5: Allocation of OLAF investigative staff by role, 2009-2016**



Source: ICF report, section 5.2, based on calculations on OLAF unpublished data

**Figure 6: Number of closed investigations, 2008-2016**



Source: combined figures from ICF report, section 5.3.1, based on ICF calculations and OLAF Annual Reports

Table 7 presents the main **indicators for measuring the efficiency of the investigative function** in producing its outputs<sup>153</sup>. All indicators confirmed that investigative staff conducted more investigations in the period of implementation of the Regulation than before. The overall duration of investigations has tended to remain stable and or slightly decrease, depending on whether only cases closed or cases closed and on-going cases are considered, respectively.

**Table 7: Indicators for assessing the efficiency of OLAF investigative function before and after the entry into force of Regulation 883/2013**

Period	2008-2011	2013-2016
Average number of selection cases opened per investigative staff	1.3	1.6
Average number of ongoing cases per investigative staff	2.2	3.4
Average number of closed cases per investigative staff	0.9	1.7
Average number of closed cases with recommendations per investigative staff	0.5	0.9
Average duration (months) of closed case vs. closed and ongoing cases	Period from 2008 to 2011	Period from 2013 to 2016
	Closed cases only	Closed cases only
	Max = 27	Max = 25.1
	Median = 24.4	Median = 23.3
	Min = 22.2	Min = 22.3
	Closed & ongoing cases	Closed & ongoing cases
	Max = 22.4	Max = 18.7
	Median = 20.5	Median = 17.8
	Min = 18.9	Min = 17.2

**Source:** ICF report, section 5.3.1 - **Note:** ICF calculations based on OLAF unpublished data and OLAF Annual Reports. The number of investigative staff for 2008 has been estimated on the basis of the year 2009 to enable comparisons between the two periods. The number of cases per investigative staff reflects the number of cases per 'lead investigator', which provides a skewed picture as in a majority of cases there is a lead investigator and an associated investigator(s).

### *Investigative tools and powers*

The external study supporting this evaluation concludes that efficiency challenges mainly stem – similarly as for effectiveness – from the divergences resulting from the **reference to national rules** in the case of external investigations, in particular as regards on-the-spot checks. OLAF limited **access to forensic data and bank accounts** were also cited as factors limiting the efficiency of the investigation process<sup>154</sup>.

### *Cooperation and information exchange*

Overall, the external contractor considered the cooperation and information exchange between OLAF and its partners as efficient, in particular as regards IBOAs. Enhanced cooperation with IBOAs, in particular Commission services through **FPDNet** meetings, led to a clarification of OLAF's expectations and has contributed to an improvement in investigative practices and cooperation. The IBOAs' readiness and ability to provide OLAF with high quality

<sup>153</sup> The year 2012 when OLAF was reorganised has been disregarded so as to compare the period prior to the implementation of the Regulation with the period after implementation.

<sup>154</sup> ICF report, section 5.3.2.

information, and sectorial specific anti-fraud provisions, were identified by the contractor as additional factors positively affecting the efficiency of the cooperation<sup>155</sup>.

The evaluator concluded that the level of efficiency related to cooperation and information exchange with **AFCOS** depends on the ability to establish structured cooperation and communication channels, and that this is based on a clear role and tasks of AFCOS at national level, an appropriate scale and nature of the powers of the AFCOS and, to a lesser extent, the presence of administrative arrangements. As AFCOS' competences and powers differ from one country to another so does their efficiency in cooperating and exchanging information with OLAF<sup>156</sup>.

The external evaluation concludes, based on interviews, that cooperation and level of information exchange between OLAF and third countries and international organisations is more efficient when **ACAs** are in place<sup>157</sup>.

### *Supervisory Committee*

The differences in interpretation of the provisions of the Regulation governing the Committee (see section 5.2.4) hindered the efficiency of the Committee and its cooperation with OLAF.

Doubts have been expressed by OLAF staff consulted as regards the efficiency of the provision in the Regulation providing that, if an investigation cannot be closed within 12 months after it has been opened, the OLAF Director-General must report to the Committee and indicate the reasons and any remedial measures envisaged<sup>158</sup>. The Regulation does not prescribe a maximum duration of 12 months for OLAF investigations, and remedial measures may actually not be necessary. For this reason, the Supervisory Committee itself has considered that this provision does not necessarily correspond to the reality of OLAF's investigations<sup>159</sup>.

## **5.4. Coherence**

This section focuses on the extent to which the Regulation provides OLAF with a coherent legal framework to accomplish its tasks and achieves an appropriate balance between its specific objectives (**internal coherence**). It also explores the extent to which the Regulation is coherent with other EU anti-fraud instruments (**external coherence**). It will further examine the extent to which the Regulation has achieved a balance between investigative powers and procedural rights, as well as between independence, on the one hand, and supervision and control, on the other. Lastly, it will examine the coherence of the Regulation in relation to wider EU policies for the protection of the EU financial interests.

### **5.4.1. Internal coherence**

The evaluation has identified several factors affecting the internal coherence in the application of the Regulation.

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<sup>155</sup> ICF report, section 5.5.2.

<sup>156</sup> ICF report, section 5.5.1.

<sup>157</sup> ICF report, section 5.5.3.

<sup>158</sup> Article 7(8) of the Regulation.

<sup>159</sup> SC opinion No 4/2014 on duration of investigations, point 31: "The SC adheres to OLAF's position that the first 12-month period following the opening of an investigation, after which Regulation 883/2013 requires OLAF to indicate remedial measures to speed it up, does not necessarily correspond to the reality of OLAF's investigations. In many of them, their complexity and the need to carry out a number of investigative steps may indicate from the beginning that it is expected that certain investigations last more than 12 months and no particular remedial measures are needed when an investigation follows its normal course."

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 in order to coordinate their action aimed at protecting the EU financial interests against fraud ('**coordination cases**')<sup>160</sup>. However, the Regulation does not contain any concrete provisions on the modalities of coordination or the procedures applicable. The legal analysis conducted in the context of the evaluation identified the absence of specific provisions in the Regulation as a source of legal uncertainty, and this was also confirmed in interviews with OLAF staff and in the survey<sup>161</sup>.

Conversely, the evaluation has shown that the provisions of the Regulation concerning the adoption of the **GIPs and the creation of an internal legality check** have positively contributed to the internal coherence in the application of the Regulation. The evaluation (interviews with OLAF investigative staff and legal analysis) has identified a few inconsistencies between the Regulation and the GIPs that could impact on the coherent application of the Regulation. In view of these findings, OLAF is already taking steps to address any inconsistencies<sup>162</sup>.

#### **5.4.2. External coherence**

##### *Relationship between Regulations 883/2013, 2988/95 and 2185/96*

Regulation 883/2013 has to be read in conjunction with Regulations 2988/95 on the protection of the European Communities' financial interests<sup>163</sup> and 2185/96 concerning on-the-spot checks and inspections<sup>164</sup>, to which the Regulation makes a number of references.

OLAF investigative staff and AFCOS, as well as the legal analysis conducted in the context of the evaluation, revealed certain **inconsistencies between Regulation 883/2013 and the other two regulations**<sup>165</sup>. For instance, Regulation 883/2013 governs OLAF's investigations concerning any illegal activity affecting the EU financial interests, whereas Regulations 2185/96 and 2988/95 do not apply to all sources of Union revenue (but only to revenue collected directly on behalf of the European Union, which is interpreted to exclude revenue based on VAT). These differences can lead to legal uncertainty and divergent interpretations. The Utrecht University study has shown that this situation differs from that of the other European authorities analysed by that study, which benefit from a more coherent framework for their investigations<sup>166</sup>.

##### *Coordination cases and mutual administrative assistance*

As explained above, Regulation 883/2013 tasks OLAF with providing Member States with assistance in organising close and regular cooperation, without further regulating these tasks. In addition, in the areas of **customs and intellectual property rights**, OLAF has specific competence to engage in mutual administrative assistance activities, including by coordinating Member States' competent authorities, on the basis of Regulations 515/97 on

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<sup>160</sup> Article 1(2) of the Regulation.

<sup>161</sup> ICF report, section 4.3.1.3.

<sup>162</sup> ICF report, section 6.1.1.

<sup>163</sup> Council Regulation (Euratom, EC) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, OJ L 312, 23.12.1995, pp. 1–4, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31995R2988>.

<sup>164</sup> 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, OJ L 292, 15.11.1996, p. 2–5, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996R2185>.

<sup>165</sup> ICF report, section 6.2.1.1, table 9.

<sup>166</sup> Utrecht University study, p. 311.

mutual administrative assistance in customs and agricultural matters<sup>167</sup> and 608/2013 on the customs enforcement of intellectual property rights<sup>168</sup>. Contrary to Regulation 883/2013, this framework governs in detail the tasks performed to support administrative cooperation.

There are no references in Regulation 883/2013 to Regulations 515/97 and 608/2013 or vice versa. The **unclear relationship between the different legal acts on the basis of which OLAF coordinates the activities of national authorities** in the areas of customs and intellectual property creates uncertainty and can lead to practical difficulties<sup>169</sup>, also highlighted by the Utrecht study<sup>170</sup>.

From a broader perspective, the detailed provisions on mutual administrative assistance in specific areas (customs, intellectual property), coupled with the absence of specific provisions on coordination cases in Regulation 883/2013, lead to **varying levels of available tools for transnational cooperation in the fight against fraud**. The Italian cooperation project referred to in section 5.2.2.2 concludes that a common denominator of many of the problems relating to the prevention and combatting of transnational fraud in the area of structural funds - the largest item of expenditure within European funding, and particularly exposed to certain risks of fraud - is the absence of legal provisions on mutual administrative assistance. This position has also been expressed by the European Parliament, which has on several occasions invited the Commission to create mechanisms for the exchange of information between national competent authorities with regard to structural and investments funds<sup>171</sup>.

#### ***5.4.3. Has the Regulation achieved a proper balance between investigative powers and procedural rights?***

**Conflicting views** have been collected during the evaluation concerning the relationship between OLAF's investigative powers and the procedural safeguards in the Regulation.

- OLAF investigative staff in general considered that the guarantees were disproportionate, in the light of OLAF's current powers, the absence of a means to enforce them, the fact that OLAF investigations end in recommendations and do not as such affect the position of persons concerned, and that the cooperation of the person concerned with OLAF investigators remains voluntary in external investigations. A common perception shared among OLAF staff and a number of consulted stakeholders in IBOAs was that, while OLAF's powers are designed for the conduct of administrative investigations, the procedural guarantees and safeguards introduced by the Regulation are commensurate with those guaranteed in national

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<sup>167</sup> 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, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:31997R0515>.

<sup>168</sup> 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, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0608>.

<sup>169</sup> ICF report, section 6.2.1.2.

<sup>170</sup> Utrecht University study, p. 250.

<sup>171</sup> European Parliament Resolution of 11 March 2015 on the Annual Report 2013 on the protection of the EU financial interests – Fight against fraud (2014/2155(INI)), point 47; European Parliament Resolution of 8 March 2016 on the Annual Report 2014 on the protection of the EU financial interests – Fight against fraud (2015/2128(INI)), point 42; European Parliament Resolution of 16 May 2017 on the Annual Report 2015 on the protection of the EU financial interests – Fight against fraud (2016/2097(INI)), point 50.



criminal procedures or set a higher standard than those prescribed in similar administrative investigations in Member States<sup>172</sup>.

- A number of consulted stakeholders in EU IBOAs, EU control bodies and national judicial authorities suggested that the Regulation achieves an appropriate and coherent balance between the level of procedural guarantees and OLAF's investigative powers<sup>173</sup>.
- A number of stakeholders in EU control bodies, Commission services, and former Supervisory Committee members expressed the view that the procedural guarantees as provided for in the Regulation are not sufficient in the light of the alleged intrusive investigation powers of OLAF<sup>174</sup>.

The question of balance between investigative powers and procedural rights was also addressed by the Utrecht University study and by the study on procedural guarantees commissioned by the CONT Committee in the European Parliament, mentioned above. The Utrecht study considered that, in order to assess the full scope and competences of OLAF's investigatory powers and procedural safeguards, an analysis of the interaction between EU and national law is essential<sup>175</sup>. The study commissioned by the CONT Committee underlined the close connection of OLAF investigations with criminal law and criminal law follow-up, which requires the existence of adequate safeguards in the context of OLAF investigations; it concluded that the safeguards in the Regulation do not seem excessive or disproportionate and that clarifying and strengthening procedural safeguards in OLAF investigations fosters the further use of OLAF final reports in national judicial proceedings<sup>176</sup>.

The view was also expressed that, since the procedural guarantees applicable to OLAF investigations stem from the general principles of EU law and the Charter of Fundamental Rights, their codification in Article 9 of the Regulation actually clarifies their application in the context of OLAF investigations<sup>177</sup>.

On the basis of the above, the evaluation does not provide conclusive evidence that the procedural guarantees in the Regulation are disproportionate to the available investigative powers, nor does it suggest that the guarantees are insufficient in the light of those powers. Certain concrete suggestions to further clarify or complement the relevant provision in the Regulation have been discussed in section 5.2.3. on effectiveness.

#### **5.4.4. To what extent has Regulation 883/2013 achieved a proper balance between independence, on the one hand, and cooperation, supervision and control, on the other?**

As discussed in section 5.1 on relevance, the existence of external controls to guarantee OLAF's independence in the performance of its investigative function has not been disputed by the consulted stakeholders. The evaluation has not identified conclusive evidence suggesting a lack of balance between the Regulation's provisions on independence and control.

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<sup>172</sup> ICF report, section 6.1.2.1.

<sup>173</sup> ICF report, section 6.1.2.3.

<sup>174</sup> ICF report, section 6 Findings and point 6.1.2.

<sup>175</sup> Utrecht University study, p. 2.

<sup>176</sup> Prof. Ligeti study for the CONT committee, "Main findings" and "Recommendations and Conclusions", pp. 6-7.

<sup>177</sup> Presentations at the evaluation conference on 1-2 March 2017 and at the workshop organised by CONT Committee of the European Parliament on "The future of OLAF", 29 May 2017.

OLAF is also subject to **other mechanisms of external controls** as regards the rights of individuals, in particular by the European Data Protection Supervisor and the European Ombudsman (within their respective fields of competence). Several OLAF staff as well as EU control bodies mentioned<sup>178</sup> that the various external controls, provided for in the Regulation and in other acts of EU law, may lead to overlaps as an individual can bring cases through these different channels simultaneously<sup>179</sup>. This would not only impact on coherence, but also on efficiency and effectiveness of these controls.

#### **5.4.5. To what extent does Regulation 883/2013 fit into the wider EU policies (and the various elements of these policies) for the protection of the EU financial interests?**

##### **5.4.5.1. Early Detection and Exclusion System**

The Early Detection and Exclusion System (EDES) aims at reinforcing the protection of the EU's financial interests. It was introduced by the 2015 revision of the Financial Regulation<sup>180</sup> and entered into force on 1 January 2016<sup>181</sup>. EDES ensures the early detection of economic operators representing risks to the EU's financial interests; the exclusion of unreliable economic operators from obtaining EU funds and/or the imposition of a financial penalty; and the publication, in the most severe cases, on the Commission's website of information related to the exclusion and/or the financial penalty, in order to reinforce the deterrent effect.

This new system represents a significant improvement in the application of rules on administrative sanctions with respect to fundamental rights, independence and transparency.

EU IBOAs can now only decide to impose sanctions on unreliable economic operators after obtaining a recommendation<sup>182</sup> from a new centralised Panel<sup>183</sup>. The Panel assesses cases where there is no final judgment or final administrative decision. It has no investigative powers. In principle, the panel bases its assessment on facts and findings resulting from audits performed under the responsibility of the competent Commission service and/or investigations conducted by OLAF.

According to the external contractor, OLAF staff reported successful cooperation with the EDES panel since it was set up. Commission services involved in early detection and exclusion procedures have indicated that most of the elements for use in EDES are communicated by OLAF only once the investigation is closed. They consider that this may lead to delays in identifying and taking appropriate measures against economic operators

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<sup>178</sup> These issues were raised at a panel on Governance at the OLAF conference on evaluation of the Regulation.

<sup>179</sup> ICF report, section 6.1.3.

<sup>180</sup> Regulation (EU, Euratom) No 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union, OJ L 286, 30.10.2015, pp. 1-29, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AAOJ.L.2015.286.01.0001.01.ENG>.

<sup>181</sup> Also see COM(2017) 351 final, Report from the Commission to the European Parliament, the Council and the Court of Auditors 2016 Annual Management and Performance Report for the EU Budget, Part 2/2, p. 79-80, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505833296394&uri=CELEX:52017DC0351>. EDES does not apply to shared management.

<sup>182</sup> For the situations referred to in Article 106(1)(c) to (f) of the Financial Regulation (i.e. grave professional misconduct, fraud, serious breaches of contractual obligations, or irregularities).

<sup>183</sup> Panel referred to in Article 108(5) to (10) of the Financial Regulation: Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L 298, 26.10.2012, pp. 1-96, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505833505493&uri=CELEX:32012R0966>; last amended by Regulation (EU, Euratom) No 2015/1929 of the European Parliament and of the Council of 28 October 2015.

concerned and called for more sharing of information during investigations<sup>184</sup>. This would, however, need to be balanced with the need to preserve the confidentiality of the investigation. The latter may come into conflict with the requirement that the economic operator concerned is heard before certain of the measures available under the EDES procedures are taken, where it can prejudice on-going investigations. While the Financial Regulation provides for the possibility to defer notification to the person or entity concerned in exceptional cases<sup>185</sup>, the short period of experience with the EDES procedures does not yet permit a robust assessment of the effectiveness of the possibility to defer.

Experience drawn in the first year of the functioning of this new procedure shows the importance of OLAF

- informing the Panel and authorising officers, as far as possible, of the state of play of national judicial proceedings, the reasons of the closure of national proceedings without further actions, or all other ongoing investigations concerning the economic operator subject to an administrative sanction procedure;
- helping identify which parts of a final report may not be suitable for disclosure to the economic operator concerned so as to preserve the confidentiality of on-going investigations or judicial proceedings.

Finally, where there is a financial impact, OLAF plays an important role in assisting the responsible authorising officer in the accurate calculation of the financial damage, since the financial impact on the EU financial interests is key for the application of the principle of proportionality in deciding on the extent of administrative sanctions.

#### **5.4.5.2. OLAF role and powers in relation to VAT**

According to the Regulation, OLAF's mandate extends to fraud, corruption and any other illegal activity affecting the EU's financial interests. The Court of Justice has confirmed on several occasions that VAT is a financial interest of the Union<sup>186</sup>. However, OLAF very rarely carries out investigations into irregularities concerning VAT. This is the result of several factors. OLAF lacks the instruments available to national administrations which operate in this field, such as access to Eurofisc, VIES or bank account information. The on-the-spot checks of Regulations 2185/96 and 2988/95 do not apply only to revenue collected directly on behalf of the European Union, interpreted to exclude VAT<sup>187</sup>. This lack of tools has been noted by the European Court of Auditors, that has called for granting to OLAF clear competences and tools to investigate intra-Community VAT fraud<sup>188</sup>.

The policy and legal framework as regards VAT has evolved since the adoption of Regulation 883/2013, with an increased emphasis on the fight against VAT fraud. The Commission adopted an Action Plan on VAT "Towards a single EU VAT area" on 7 April 2016<sup>189</sup>. The

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<sup>184</sup> ICF report, section 8.2.

<sup>185</sup> See Article 108 of Regulation (EU, Euratom) No 966/2012, in particular the second subparagraph of paragraph 1 and point (d) of paragraph 8 thereof.

<sup>186</sup> Most recently, see case C-105/14, Taricco.

<sup>187</sup> Art. 1(2) of Regulation 2988/95 links the definition of 'irregularity' to infringements "prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources *collected directly on behalf of the Communities*, or by an unjustified item of expenditure" (emphasis added).

<sup>188</sup> European Court of Auditors, Special Report No 24/2015, "Tackling intra-Community VAT fraud: More action needed", Recommendation 14 (b), <http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=35308>.

<sup>189</sup> COM(2016) 148 final, Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT: Towards a single EU VAT

Action Plan sets out, inter alia, immediate and urgent actions to tackle the VAT gap, including actions to enhance cooperation between different authorities, and invites to explore possible cooperation and a partnership between Member States, Europol and OLAF on exchange of information. The European Parliament has also recently stressed the need to tackle the VAT gap, taking note of the Commission's Action Plan and inviting Member States, in this respect, to improve information exchange also with OLAF<sup>190</sup>.

The PIF Directive has clarified that VAT is part of the EU financial interests<sup>191</sup>. Until its adoption some Member States have questioned this and, as a result, shown reluctance to cooperate with OLAF on the matter. The future EPPO will be competent for VAT fraud connected with the territory of two or more Member States that involves a total damage of at least EUR 10 000 000.

Against this background, the current legal framework appears insufficient to enable OLAF to fulfil its mandate in the area of VAT, and its duty to cooperate with and support the future EPPO. Customs duty fraud is in fact intrinsically linked with VAT and excise duty fraud at importation into the EU. In the experience of OLAF investigations, investigating one type of fraud involves investigating also the other. OLAF staff consulted have highlighted the need to give OLAF the necessary capabilities to investigate in the field of VAT, to coordinate activities in complex investigations of a transnational nature, and to perform intelligence and strategic analysis activities. This would allow it to provide elaborated information to other actors involved in countering VAT fraud including national authorities and, within its competence, the EPPO.

To achieve this, Regulation 883/2013 would need to be clarified and supported by new provisions awarding OLAF the means to act in the area of VAT fraud. The Commission is currently considering providing access to VAT data to EU bodies, such as OLAF and Europol, in its on-going revision of Regulation (EC) No 904/2010 on administrative cooperation between Member States in the field of VAT<sup>192</sup>. The effective use of these VAT data by OLAF in the fight against VAT fraud would call for the introduction of powers of investigation in this field (e.g. to conduct on-the-spot checks as it currently does in its investigations concerning expenditure and other sources of revenue).

## 6. CONCLUSIONS

### *Relevance*

- The evaluation has shown that the specific objectives of Regulation 883/2013 have proven to be, and remain, **relevant** for the overarching objective of protection of the EU financial interests.
- The creation of the EPPO does not put into question the continued relevance of the objectives of Regulation 883/2013. The EPPO and OLAF will deal with distinct aspects of the fight against fraud affecting the EU financial interests (criminal and administrative, respectively) and their activities will be largely complementary.

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area — Time to decide, OJ C 389, 21.10.2016, pp. 43-49, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505833617776&uri=CELEX:52016AE2343>.

<sup>190</sup> European Parliament Resolution of 16 May 2017 on the Annual report 2015 on the protection of the EU financial interests – Fight against fraud (2016/2097(INI)), points 14. – 17.

<sup>191</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the EU financial interests by means of criminal law. Definition of “EU financial interests” in Article 1(1)(a).

<sup>192</sup> Inception impact assessment available at [http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1072511\\_en](http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1072511_en).

## Effectiveness

- The **range of powers and tools** available to OLAF under the 1999 Regulations, and further developed in Regulation 883/2013, have allowed OLAF to deliver concrete results in the protection of the EU financial interests. The evaluation has, however, also confirmed or unveiled a number of shortcomings in the available powers and tools for investigations that hinder the effectiveness of the Regulation.
  - 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. The Regulation does not specify the extent to which national law should apply. As a result, different interpretations of the relevant Union law 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.
  - 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. OLAF relies on the assistance of national authorities, required by the Regulation to assist OLAF, in conformity with their national law. This 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.
  - The absence of access or the limited access to **bank account information**, which could be central to uncovering many cases of fraud or irregularity, can limit OLAF's ability to fulfil its mandate. This power is also linked to the possibility to investigate **VAT**, where the evaluation has shown that OLAF's mandate should be clarified and strengthened.
  - As regards **internal investigations**, the evaluation found that the current framework based not only on the Regulation itself, but also on the internal decisions adopted by each IBOA, leads sometimes to divergent possibilities for OLAF to act in different IBOAs. The evaluation found that further clarity in the Regulation about the conditions for the conduct of internal investigations (in particular inspection of premises) 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.
- The actual impact of OLAF's investigations is de facto defined by the actual **follow-up to its recommendations**. The main internal factors identified as critical for the uptake of the recommendations are the quality and timeliness of the OLAF's reports and – as regards financial recommendations – the discrepancies in assessing the prejudice to

the EU budget by OLAF and the IBOAs. As an external factor, the follow-up to all types of recommendations is affected by the discretion of the recipients to follow-up or not, and (in the case of Member States) the absence of a duty in the Regulation to take recommendations into account. This leads to differences in the response across recipients and to at times significant gaps between recommendations and follow-up.

- The most important external factor hindering the follow-up to judicial recommendations relates to **the admissibility of OLAF-collected evidence in national judicial proceedings**. The Regulation provides that OLAF reports constitute admissible evidence in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. However, this does not sufficiently ensure the effectiveness of OLAF's activities, in particular in those Member States that do not have rules providing for the admissibility of evidence, in judicial proceedings, of similar administrative reports drawn up by national administrative inspectors.
- **Cooperation and exchange of information** with EU, national and international partners is overall effective, and is assessed as more effective with authorities with whom ACAs are signed.
- The evaluation pointed to a positive cooperation between OLAF and **IBOAs**. Cooperation with the European Commission is particularly relevant given the important role played by the so-called spending DGs in the management of EU funds. The extent of the cooperation between OLAF and IBOAs, however, differs from internal to external investigations. Some provisions in Regulation 883/2013 establish more explicit duties for IBOAs and their staff in internal investigations.
- **Eurojust** and OLAF collaborate effectively through the exchange of information of investigative interest and mutual involvement in common cases. Collaboration with **Europol** currently takes places primarily regarding counterfeit goods. Future working arrangements - established on the basis of the new Europol regulation - should allow enhancing information exchange between the two bodies.
- Cooperation and exchange of information between OLAF and the **Member States** has been strengthened, in particular after the creation of the **AFCOS**. However, the discretion that the Regulation leaves Member States to decide the competences and powers of the AFCOS does not ensure for a uniform impact of this new provision in the Regulation.
- Cooperation with **national administrative, police and judicial authorities** is overall effective, and is assessed as more effective with Member States' authorities with whom ACAs are signed. However, the fact that the possibilities to cooperate are made subject to conditions of national law in the Regulation results in considerable differences across the Member States, in particular as regards cooperation with judicial authorities.
- The inclusion of **Article 9 on procedural guarantees** is generally recognised as a positive improvement for protecting the rights of individuals subject to an OLAF investigation. The **legality review function** introduced by the Regulation and **the internal complaint procedure** are considered to have strengthened procedural guarantees of individuals subject to investigation. The evaluation has not shown a

conclusive need to substantially revise existing provisions, although concrete suggestions to further clarify or strengthen the relevant provision in the Regulation have been made by various stakeholders.

- The evaluation suggests that divergent views and practices with regard to the provisions on the **Supervisory Committee's** role and mandate, and as a result on its access to case-related information held by OLAF, impacted the work of the Committee and its cooperation with OLAF in the past.

### *Efficiency*

- Given the available data and the time lag between the entry into force of the Regulation and the evaluation of its application, the extent to which Regulation 883/2013 was efficient in generating its intended results could not be ascertained exactly. However, the increased numbers of investigations handled with more restricted resources, and the increase in the number of recommendations and amounts recommended for recovery suggest that the changes introduced by the Regulation, alongside various organisational changes since 2012, allowed OLAF to deliver on its mandate efficiently.
- The evaluation has shown that the efficiency of the **selection phase** has increased with the Regulation and related organisational changes (creation of the single point of entry, case selection criteria of the Regulation and creation of the ISRU). However, as a result of the absence of a duty of national competent authorities to cooperate with OLAF at the selection stage, in many cases where the incoming information on its own may be insufficient to open a case, OLAF lacks tools to collect further information. This leads to a high rate of dismissal at the selection phase.
- Overall, the evaluation suggests that the **cooperation and information exchange between OLAF and its partners** is efficient, in particular where there are specific arrangements for structured collaboration in place (AFCOS, FPDNet, ACAs).

### *Coherence*

- 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 could rely on OLAF's assistance.
- The **GIPs and the creation of an internal legality check**, both based on provisions of the Regulation, have positively contributed to the internal coherence in the application of the Regulation.
- When considering Regulation 883/2013 in the larger context of existing legislation on the protection of the EU financial interests, the evaluation has identified several factors affecting the overall coherence of the current legal framework.
  - Regulation 883/2013 applies in conjunction with **Regulations 2185/96 and 2988/95**, on which OLAF's main investigative tool – the on-the-spot checks

and inspections – is based. These 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 can lead to uncertainty and divergent interpretations.

- As regards OLAF's mandate to engage in mutual administrative assistance and assist Member States coordinate its activities, the **unclear relationship between the different legal acts in the areas of customs and intellectual property** (Regulations 515/97, 608/2013 and 883/2013) creates uncertainty and can lead to practical difficulties. Moreover, the detailed provisions on mutual administrative assistance in specific areas (customs), coupled with the absence of specific provisions on coordination cases in Regulation 883/2013, lead to varying levels of available tools for transnational cooperation in the fight against fraud.
- Overall, the evaluation does not provide conclusive evidence that the **procedural guarantees** in the Regulation are disproportionate to the available investigative powers, nor does it suggest that the guarantees are insufficient in the light of those powers.
- The evaluation has not identified evidence of a lack of **balance between the Regulation's provisions on independence and control**.
- The first experience with the **Early Detection and Exclusion System (EDES)**, introduced on 1 January 2016, points to the relevant role of OLAF informing the EDES Panel and authorising officers on the state of proceedings, helping identify which parts of a final report may not be suitable for disclosure to the economic operator concerned, and assisting in the accurate estimation of financial damage. This collaboration needs to be balanced with the need to preserve the confidentiality of on-going investigations or judicial proceedings.

The external contractor provided a number of recommendations that will be duly taken into account in preparation of the follow-up to the evaluation.



## **Annex 1 : Procedural information**

This annex provides procedural information. It explains how the evaluation managed was both in terms of organisation and time. It provides information about external expertise used.

### **A1.1 Lead DG:**

European Commission, European Anti-Fraud Office (OLAF).

### **A1.2 Organisation:**

The evaluation roadmap was published in December 2015 and set out the context, scope and aim of the exercise. The roadmap presented the questions to be addressed under the five categories of effectiveness, efficiency, relevance, coherence and future outlook. The future outlook is discussed in the report which this Commission Staff Working Document (SWD) accompanies.

An Inter-Service Steering Group (ISSG) was set up to support the evaluation. The tasks of the ISSG were to check the key elements of the external study, to support and monitor the evidence gathering and stakeholder consultation process, to review all external deliverables for the evaluation as well as the SWD and to assist with the quality assessment of the consultant's evaluation report.

The ISSG was composed of the Secretariat-General of the Commission, Legal Service and DGs HR, JUST and BUDG. Given the scope of the evaluated Regulation and the tight timetable, the standing ISSG decided to involve other DGs affected by the application of the Regulation in the next steps prior to the launch of an inter-service consultation (ISC) during the last ISSG meeting. The DGs invited to join the standing ISSG were (8) DGs AGRI, CNECT, DEVCO, EMPL, NEAR, REGIO, RTD and TAXUD. (6) DGs AGRI, CNECT, EMPL, REGIO, RTD and TAXUD took part at the meeting.

In parallel, an OLAF internal working group was set up and consulted to support the evaluation with expertise and experience on the conduct of investigations and knowledge of the investigative processes.

The Commission contracted out an external study in support to the evaluation (see below), which provided the basis for this SWD.

### **A1.3 Timetable:**

<b>Date</b>	<b>Description</b>
September 2015	Establishment of the Steering Group
30 September 2015	1 <sup>st</sup> Steering Group Meeting: Evaluation roadmap
19 February 2016	2 <sup>nd</sup> Steering Group Meeting: ToR
23 March 2016	Launch of call for tender for study contract to support the evaluation
01 July 2016	Award of a study contract to ICF
26 July 2016	Signature of the contract with ICF
29 July 2016	3 <sup>rd</sup> Steering Group Meeting: Kick off meeting with the external contractor
28 September 2016	4 <sup>th</sup> Steering Group Meeting: Inception report meeting
November – April 2017	Targeted stakeholder consultation – targeted surveys, interviews, expert panels
21 February 2017	5 <sup>th</sup> Steering Group Meeting: Progress report meeting
1-2 March 2017	Conference on the evaluation of Regulation 883/2013
07 April 2017	6 <sup>th</sup> Steering Group Meeting: Interim report meeting
18 April 2017	ICF's expert panel workshop
12 June 2017	7 <sup>th</sup> Steering Group Meeting: External Draft final report meeting
25 July 2017	8 <sup>th</sup> Steering Group Meeting: 1 <sup>st</sup> draft Staff Working Document
5 September 2017	9 <sup>th</sup> Steering Group Meeting: 2 <sup>nd</sup> draft Staff Working Document
October 2017	Adoption of the report accompanied by the SWD

*Source: OLAF*

### **A1.4 Exceptions to the Better Regulation Guidelines:**

The evaluation criterion 'EU added value' was excluded from the scope of the evaluation as OLAF carries out a specifically European task for the protection of the EU's financial interests in the framework of Articles 317 and 325 TFEU which cannot, in the same way, be carried out at national level, the EU added value was considered as addressed.

Targeted consultations, given the scope of the Regulation and the well-defined group of stakeholders, were considered as an appropriate and proportional means of consultation rather than an open public consultation. Considering that the public at large could not be considered as directly impacted by the provisions of the Regulation, or responsible for their application, or possessing specific evidence needed for the evaluation, an open public consultation was not carried out.

### **A1.5 Consultation of the Regulatory Scrutiny Board:**

The evaluation has not been selected for scrutiny by the Regulatory Scrutiny Board.

## **A1.6 External Expertise:**

### *External evaluation study*

An external independent study is the basis for the conclusions presented in this document. A contract was signed on 26 July 2016 with ICF International Ltd.

The external contractor carried out targeted consultations for the evaluation as explained in Annex 2.

The contractor was supported by an external expert panel composed of academics and enforcement law practitioners that provided a critical input to the evaluation.

### *Conference on the evaluation of Regulation 883/2013*

On 1-2 March 2017, OLAF organised a conference to discuss the preliminary evaluation findings of the external study as regards the key evaluation topics. The conference brought together stakeholders from a wide range of anti-fraud backgrounds, such as the Anti-Fraud Coordination Services of Member States (AFCOS), Member State administrative authorities for the management of EU funds, law enforcement, prosecutorial and judicial authorities, EU institutions, bodies, offices and agencies (IBOAs), international organisations, academics, non-governmental organisations etc. Conference participants brought (new) insights on the application of the Regulation, discussed the preliminary evaluation findings and/or provided further evidence. The conference was also an opportunity to discuss how the EPPO would impact on the current framework of OLAF and the anti-fraud landscape in general and what changes to the Regulation might need to be considered. Results of the conference were taken on board for the external evaluation report as part of the consultation process.

The external contractor took part at a number of other conferences and meetings that fed into their report (see Annex 2).

## Annex 2 : Synopsis report of stakeholder consultation in the context of the Study

This annex provides a synopsis of the stakeholder consultation that was carried out for this evaluation by an external contractor as part of the external support study. It presents the main steps and findings of the consultation of interested parties and stakeholders. It shows that the stakeholder consultation process **complied with the Commission's stakeholder consultation principles and minimum standards taking into account proportionality** as required by the Better Regulation Guidelines<sup>193</sup>.

### A2.1 Feedback on evaluation roadmap

The evaluation roadmap was opened for feedback to stakeholders during the course of the evaluation. **One piece of feedback was received** with a generally positive assessment of the evaluated Regulation highlighting the importance of OLAF.

### A2.2 Open public consultation

Regulation 883/2013 regulates the conduct of OLAF's investigations against fraud, corruption and other illegal activity affecting the EU's financial interest. Its scope does not cover the anti-fraud policy in general, it rather introduces specific instruments/powers and cooperation mechanisms with institutional partners. The groups of stakeholders it targets and impacts are well-defined, for the most part within the EU institutional framework and relevant Member States' authorities. The public at large cannot be considered as directly impacted by the provisions of the Regulation or responsible for their application or possessing specific evidence that would usefully contribute to the evaluation of the application of the Regulation. Moreover, the different stakeholders are affected by different distinct elements of the Regulation in different ways. Therefore, an **open public consultation was not carried out and stakeholders were consulted in targeted consultations** as explained below.

### A2.3 Targeted consultations – overview of stakeholders consulted

This section presents an overview of different stakeholder groups consulted via in-depth interviews and a survey. Other consultation activities are covered in the following sections.

**A total of 267 stakeholders** were consulted through interviews and survey: **160 were consulted through interviews** and **168 through the online survey**. It is estimated that **61 stakeholders were consulted via both interviews and the online survey**. At least 29 of the interviews informed the development of five case studies.

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<sup>193</sup> Better Regulation Guidelines, p. 70.

**Table A2.1: Overview of stakeholders consulted**

Category	Total stakeholders consulted <sup>194</sup>	Stakeholders consulted via interviews				Stakeholders consulted via survey
		Consulted	Targeted	Difference (actual & target)	Conducted or used for the case studies	
OLAF staff in Investigative or investigative-support or management functions <sup>195</sup>	100	53	30	23	12	37
OLAF staff in policy related and other functions (non-investigative or management-related) <sup>196</sup>		13	30	-17		23
Supervisory Committee	3	3	4	-1		0
EU control bodies	6	5 <sup>197</sup>	5	0		2 <sup>198</sup>
Commission services and EU executive agencies	49	28 <sup>199</sup>	20	8	10	32 <sup>200</sup>
Other EU institutions, bodies, offices	12	9 <sup>201</sup>	10	-1	1	5 <sup>202</sup>
Member State stakeholders	69	35 <sup>203</sup>	42	-7		54 <sup>204</sup>
Third countries	12	3 <sup>205</sup>	9	-6	6	9 <sup>206</sup>
International organisations	11	10 <sup>207</sup>	6	4		2 <sup>208</sup>
Membership organisations, EU & national associations of lawyers and prosecutors	5	1 <sup>209</sup>	5	-4		4 <sup>210</sup>
<b>Total</b>	<b>267</b>	<b>160</b>	<b>160</b>	<b>-1</b>	<b>29</b>	<b>168</b>

**Source:** ICF report, Annex 4 (ICF listed the EP as a control body, while this table places it under the EU IBOAS. The numbers of targeted EU control Bodies and EU IBOAS however reflect the ICF's planning with understanding the EP might be counted in as a control body.)

<sup>194</sup> Stakeholders consulted several times, i.e. via the survey and the interviews have been removed from the total figure.

<sup>195</sup> Including staff from Directorate C - Investigation support services, the DPO, Advisors to the DG, and from Unit 0.1 – ISRU.

<sup>196</sup> Including staff from Unit 0.2 - Human Resources and Budget.

<sup>197</sup> EU Ombudsman (1); EDPS (2); European Court of Auditors (1); CJEU (1).

<sup>198</sup> Ombudsman (1); Court of Auditors (1).

<sup>199</sup> DG DEVCO (4) (incl. 1 EU DEL); BUDG (2); DG CONNECT (2); DG HR. IDOC.1 (2); DG JUST (1); EASME (2); REA (2); SG (2); EACEA (1); AGRI (1); DG EAC (1); DG EMPL (1); DG GROW (1); DG NEAR (1); DG REGIO (1); DG RTD (1); ECHO (1); IAS (1); SJ (1);

<sup>200</sup> DG HR (3); DG SG (3); DG ECHO (2); DG DEVCO (2); DG TAXUD (2); DG AGRI (1); DG BUDG (1); DG EAC (1); DG EMPL (1); DG ENV (1); DG SCIC (1); DG JRC (1); DG JUST (1); DG NEAR (1); DG RTD (1); DG FPI (1); European Policy Strategy Centre (EPSC) (1); Infrastructures and Logistics - Brussels (OIB) (1); Internal Audit Service (IAS) (1). EU executive agencies: Non-specified Executive Agency (2), EACEA (1), EASME (1), INEA (1), REA (1).

<sup>201</sup> European Parliament (3); European Investment Bank (2); EEAS (1); Council of the EU (1); Eurojust (1); EUROPOL (1).

<sup>202</sup> European Parliament (1); European Investment Bank (2); EEAS (1), European Research Council (1).

<sup>203</sup> 21 AFCOS (AT; BE; BG; CY; DE; EE; EL (2); ES, FR, HR, IT, LT (2), PL, RO, SE (2), SI, SK); 9 national managing authorities (BG; DE; EL; FR; HU; LT; NL (2), RO); 6 national judicial authorities (BG, CZ, HU, NL, RO, SK).

<sup>204</sup> BG (7); SK (6); CZ (5); EE (5); ES (4); HU (3); UK (3); CY (2); IT (2); LT (2); NL (2); RO (2); SE (2); AT (1); BE (1); DK (1); DE (1); EL (1); LV (1); LU (1); MT (1).

<sup>205</sup> Serbia (2) and Senegal (1).

<sup>206</sup> Bosnia and Herzegovina (2); the Occupied Palestinian Territories (1); and 6 unspecified.

<sup>207</sup> African Union; Council of Europe (2); EBRD (2); Global fund to Fight Aids, Tuberculosis & Malaria; United Nations Headquarters; United Nations Development Programme; World Bank (2).

<sup>208</sup> The African Union Commission and one other, unspecified International Organisation.

<sup>209</sup> European Partners Against Corruption (EPAC).

<sup>210</sup> Bulgarian Supreme Cassation Prosecutor Office; Legal Interaction Alliance; one unspecified organisation from Lithuania and the Centre for Criminal Tax Law (CDPT).

**OLAF staff were the most represented within the stakeholder consultation (100 in total).** The table A2.2 below provides a breakdown of categories of OLAF staff consulted by consultation activity. 26 OLAF staff were consulted twice, via an interview and participation to the survey.

**Table A2.2:** Categories of OLAF staff consulted by consultation activity

	# interviewed	# consulted via the survey
Dir A	19	21
Dir B	10	
Dir C	13	5
Dir D	13	22
ISRU	7	8
Other	4 <sup>211</sup>	4 <sup>212</sup>
<b>Total</b>	<b>66</b>	<b>60</b>

*Source: ICF report, Annex 4*

OLAF staff in investigative functions were consulted on all aspects of Regulation 883/2013, as well as internal and external factors which have influenced how the Regulation is being applied. Investigative support staff were consulted to understand the tools and support (legal support; ICT support) at OLAF’s disposal to conduct its investigative functions and their appropriateness. Legal issues raised over the interpretation of some of the Regulation’s provisions, complaints to control bodies and issues dealt with by the Data Protection Officer were also discussed.

OLAF staff in policy-related functions were consulted to understand how the Directorate’s policy work supports fraud prevention and detection, as well as OLAF’s investigative function, including the future outlook in a changed policy and institutional landscape, e.g. with the establishment of the EPPO. Relations with the Supervisory Committee and its role in supervising OLAF’s investigative function were also discussed.

Staff in ISRU were consulted on the review of incoming information and on the process of supporting OLAF’s Director-General in selecting cases for opening of an investigation or a coordination case. HR & budget staff were consulted on OLAF’s capacity – in terms of human and financial resources – to conduct its investigative function.

The Director-General, his Adviser, one of his assistants, OLAF’s Internal Auditor and the Data Protection Officer were also consulted on high-level issues related to Regulation 883/2013, its application, and related management and organisational issues.

**National stakeholders from EU Member States were the second most consulted group.** Overall, 69 national stakeholders from 25 EU Member States were consulted (see Table A2.3). 20 stakeholders took part in interviews and 22 took part in the online survey. 20 national stakeholders took part in both the survey and interviews. The rest participated through a separate workshop with AFCOS on 26 April. Three Member States did not take

<sup>211</sup> Internal Auditor; DG Assist; DG DPO; DG PA.

<sup>212</sup> Unit 0.2 - Human Resources and Budget; Advisor; DG Team; DPO.

part neither in the interviews nor survey (FI, IE, PT)<sup>213</sup>. The most participation came from BG, SK, CZ, ES and EE, and HU. This corresponds to Member States with a large number of concluded investigations in 2014 and 2015<sup>214</sup> - 30 in BG, 30 in HU, 15 in SK, ten in CZ. It also covers a diversity of AFCOS.

**Table A2.3:** National stakeholders consulted by consultation activity

	# stakeholders interviewed		# stakeholders consulted via the survey	
		Target	Difference	
BG	3	2	1	7
SK	2	2	0	6
CZ	1	2	-1	5
EE	1	2	-1	5
ES	2	3	-1	4
HU	2	2	0	3
UK	0	0	0	3
CY	1	1	0	2
IT	1	3	-2	2
LT	3	2	1	2
NL	3	2	1	2
RO	3	3	0	2
SE	2	1	1	2
AT	1	1	0	1
BE	1	0	1	1
DE	2	2	0	1
DK	0	0	0	1
EL	2	3	-1	1
LU	0	1	-1	1
LV	0	0	0	1
MT	0	0	0	1
PL	1	3	-2	1
FR	2	3	-1	0
HR	1	1	0	0
SI	1	1	0	0
<b>Total</b>	<b>35</b>	<b>42</b>	<b>-7</b>	<b>54</b>

Source: ICF report, Annex 4

Consulting the **AFCOS** allowed to gather information on how well cooperation between OLAF, the AFCOS and other national stakeholders has been structured. Consulting **national authorities managing EU funds** allowed to gather information on (1) the detection of fraud

<sup>213</sup> They declined participation in a group interview for AFCOS and did not take part in the online survey.

<sup>214</sup> Figure 18 of OLAF's 2014 and 2015 Annual Report. Note: Only external investigations in the following reporting sectors are counted: agricultural funds, external aid, new financial instruments, structural funds.

and irregularities and the provision of incoming information, and the role of supporting tools such as the Irregularities Management System, (2) cooperation in the case of an OLAF investigation and the role of the AFCOS, (3) policy work supporting OLAF investigations, (4) level of engagement and consultation in the course of an investigation and in its aftermath. Consulting **national judicial authorities** allowed to gather information on cooperation with OLAF investigators in the course of investigations, and also when following-up on judicial recommendations. Issues covered were level of communication and sequencing or lack thereof of OLAF and national investigations. The **EU & national associations of lawyers and prosecutors**<sup>215</sup> consulted shared information on how they perceived OLAF and national efforts to protect and investigate harm against the EU's financial interests and how cooperation at both levels worked. They were rather distant from Regulation 883/2013, however, and views were general overall.

**Overall, 49 stakeholders from services of Commission DGs and EU executive agencies** were consulted. 11 took part both in the survey and interviews. They have been distinguished between those managing and controlling (including auditing) EU funds and developing policies and anti-fraud strategies, and those involved in governance, legal and disciplinary issues.

Within the first group, Commission DGs and EU executive agencies were consulted to understand their role vis-a-vis OLAF on channelling incoming information to OLAF, supporting OLAF investigators in their investigative process, the level of communication which occurred in the process and their role in following-up OLAF recommendations at the end of the process. Stakeholder coverage of the Commission DGs and executive agencies is presented in the table A2.4 below.

In terms of data coverage, the mix of stakeholders consulted reflects the core sectors of OLAF's ongoing investigative work<sup>216</sup> in 2014, i.e. structural funds<sup>217</sup> (153 ongoing investigations in 2014<sup>218</sup>), external aid (79), agricultural funds<sup>219</sup> (60), customs and trade (56), centralised expenditure (49), EU staff (43), tobacco and counterfeit goods (23), new financial instruments (13). The mix also covers well the three modes of management of EU funds (direct, shared and indirect). This was important to understand the division of responsibility between the Commission, relevant EU Member States and OLAF to detect, prevent and investigate fraud cases. Sectoral legislation (governing different EU funds) was discussed in those consultations.

Within the second group, Commission staff were consulted on certain provisions of the Regulation and accompanying measures, e.g. internal investigations, EDES, the clearing house, the use of precautionary measures, and disciplinary measures following an OLAF investigation. The following were consulted: SG; DG HR; BUDG; IAS; SJ; DG SCIC; European

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<sup>215</sup> European Partners Against Corruption (EPAC); Bulgarian Supreme Cassation Prosecutor Office; Legal Interaction Alliance; one unspecified organisation from Lithuania and the Centre for Criminal Tax Law (CDPT).

<sup>216</sup> Data on number of ongoing investigations by sector at the end of 2014, source: OLAF Annual Report 2014.

<sup>217</sup> As per the terminology used in OLAF Annual Report 2014, the term 'Structural Funds' covers the following: European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF) and European Maritime and Fisheries Fund (EMFF, and its predecessors EFF and FIG), as well as the EAGGF Guidance Section.

<sup>218</sup> Of which 42 concerned the European Social Fund. Source: OLAF Annual Report 2014.

<sup>219</sup> As per the terminology used in OLAF Annual Report 2014, the term 'Agricultural Funds' covers the following: European Agricultural Fund for Rural Development (EAFRD), European Agricultural Guarantee Fund (EAGF), European Agricultural Guidance and Guarantee Fund (EAGGF — except the EAGGF Guidance Section) and pre-accession funding, including through the IPA, Phare and Sapard programmes.



Policy Strategy Centre (EPSC); Infrastructures and Logistics - Brussels (OIB); Internal Audit Service (IAS).

**Table A2.4:** Table 21. Overview of the Commission DGs and executive agencies consulted by consultation activity

	# stakeholders consulted through interviews	# stakeholders consulted through survey
DG DEVCO	4, incl. 1 EU delegation	2
DG ECHO	1	2
DG JUST <sup>220</sup>	1	1
DG AGRI	1	1
DG EAC	1	1
EASME	2	1
REA	2	1
DG EMPL	1	1
DG NEAR	1	1
DG RTD	1	1
DG CONNECT	2	
DG TAXUD		2
EACEA	1	1
INEA		1
Non-specified Executive Agencies		2
DG GROW	1	
DG REGIO	1	
DG ENV		1
DG JRC		1
DG FPI		1
<b>Total</b>	<b>21</b>	<b>21</b>

Source: ICF report, Annex 4

**Stakeholders from third countries (12) and international organisations (11)** were also consulted. They were from accession countries Serbia and Bosnia and Herzegovina and from Senegal and the occupied Palestinian Territories. Six survey participants were from unspecified countries. Stakeholders representing international organisations were from the African Union (one stakeholder consulted via the survey and an interview); Council of Europe; EBRD; the World Bank; Global fund to Fight Aids, Tuberculosis & Malaria; United Nations Headquarters; United Nations Development Programme; and one other, unspecified, international organisation.

Consulting third countries and international organisations allowed to understand the level of cooperation of these organisations with OLAF. Although less familiar with OLAF's investigative powers and tools, these interviews shed light on the exchange of information between these institutions and OLAF, as well as the possible follow-up actions based on OLAF investigations.

**Three former members of the Supervisory Committee** were interviewed to understand their views on their mandate, according to Regulation 883/2013, and their effective ability to

<sup>220</sup> DG JUST was also consulted on the future outlook of the EU anti-fraud landscape.

exercise their mandate. They discussed difficulties in interpreting provisions in the Regulation on their role, and their access to information on cases. Capacity issues faced were also discussed. They were not consulted via the survey on account of the limited number of members.

**Eight members of staff of several EU control bodies** (EU Ombudsman; EDPS; European Court of Auditors; CJEU) were consulted to collect their views on problems that Regulation 883/2013 sought to address; improvements introduced by Regulation 883/2013 and issues with practical implementation, e.g. interpretation of certain legal provisions. They were mainly consulted on their ability to control and supervise OLAF's investigations. Two took part in both the survey and interviews.

**Ten stakeholders from other EU institutions, bodies, offices and agencies (IBOAs)** were consulted. They were from the European Parliament; European Investment Bank; Council of the EU; Eurojust; EUROPOL; the EEAS; and the European Research Council. One took part in both the survey and an interview. They were consulted mainly on law enforcement cooperation with OLAF; governance issues; and on OLAF's future outlook and current and future legislative proposals. The EIB, as an institution administering EU funds, was interviewed on the same issues as Commission spending DGs and executive agencies.

#### **A2.4 Evolution of the stakeholder engagement plan**

Initially, the external contractor **planned 161 interviews, 160** were carried out with some **changes in the mix of stakeholders interviewed**<sup>221</sup>. Those changes did not modify data coverage in any substantial manner, nor introduce bias.

Considering the focus of Regulation 883/2013 on OLAF's investigative function, it was agreed between the external consultant and the Inter-Services Steering Group (ISSG) to focus interviews with OLAF staff involved in investigative functions, investigative-support functions, or management functions rather than interviewing staff (+23 against the initial planning) in policy related functions (-17). Similarly, having in mind the importance of Commission services and EU executive agencies in managing EU funds, and also preventing, detecting, and supporting OLAF staff during investigations, it was agreed that additional interviews were conducted with them (+8). The number of interviews with other IBOAs (-1), Member State stakeholders (-7), third countries (-6) and membership organisations/EU & national associations of lawyers and prosecutors (-4) was modified as (i) some of them declined to be interviewed for their limited availability and (ii) the difficulty to identify the right stakeholders in third countries. This was partially compensated by increase in the number of interviews with the international organisations (+4).

#### **A2.5 Targeted consultations – overview of consultation activities**

The targeted consultation of stakeholders was carried out through **in-depth interviews; an online survey; workshops; and conferences and meetings**. These tools allowed for collecting information from various stakeholder groups and were complementary, allowing data triangulation.

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<sup>221</sup> Detailed description can be found in ICF report, Annex 4.

### **A2.5.1 Interviews**

**Fifteen scoping interviews were conducted and 145 in-depth interviews**, of which at least 29 were used or conducted for informing the case studies. 15 scoping interviews were conducted with a diverse range of stakeholders to better understand the needs and expectations of the users of this evaluation and to enhance the study team's understanding of OLAF's functioning and performance to date. The findings from these scoping interviews informed the contextual analysis and the evaluation approach in particular, as well as the research tools. Detail on the focus of the interviews with individual stakeholder groups is explained above.

### **A2.5.2 Online survey**

The survey was launched on 30 January to all respondents other than OLAF staff and third countries. The survey was sent to 186 contacts within this group. Following this initial launch, the survey was also sent to 95 OLAF staff contacts on 3 February, 9 third country stakeholders on 31 March (1 bounced) and 6 EU delegation contacts on 21 April (none responded), thus bringing the total number of contacts directly invited to complete the survey to 295. As the invited respondents were asked to forward the survey to other relevant/interested stakeholders who also filled the questionnaire out, it is not possible to indicate the response rate based on the number of direct recipients and responses received (as illustrated in Table A2.1).

The survey was relatively long for some stakeholders. However, *prima facie*, this did not appear to have a material impact (if any) on the response rate. Another challenge related to specific aspects of the design/routing of the survey. For instance, some respondents highlighted that the survey left insufficient space and opportunities to comment on their answers or add other options than those specified in the questions. Furthermore, some concerns were raised as to whether certain questions were sufficiently tailored and that some respondents were asked to answer certain questions outside their functions or their knowledge of the application of the Regulation.

Certain questions were asked to specific stakeholder groups only, which resulted in some questions with low numbers of responses. For example, two questions which were only asked of OLAF's ISRU unit received a total of 8 responses each. Another example relates to a small number of questions which were only asked of specific OLAF staff (as it was felt they would be best placed to respond), resulting in around 30 responses only to these questions.

As a result of the survey design where many questions were targeted at certain sub-groups of stakeholders only, small bases do occur among a number of survey questions<sup>222</sup>. Nevertheless, there are no specific themes or types of questions where this issue is specifically concentrated.

Finally, some of the open text comments provided by respondents were insufficiently detailed or clear, making interpretation challenging.

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<sup>222</sup> Overall, 50 questions have at least one sub-question with 40 or fewer responses. Of these, 22 questions have 30 or fewer responses and 17 questions have 20 or fewer responses.

### A2.5.3 Validation workshops

The external contractor consulted (1) **its internal high level experts**, (2) **OLAF** and (3) **the AFCOS via four separate validation workshops**. The purpose of those workshops was to test emerging findings. They were useful to critically reflect on emerging findings and provide strategic steer to the external evaluation team.

Two workshops were organised with external contractor's high level experts panel during the evaluation. A first workshop was held on 14 September to gather the experts' views on the overall scope of the assignment; discuss the key points for the contextual analysis; identify key issues to be explored as part of the evaluation; and invite comments on the evaluation framework. The second workshop was held on 18 April and focused on, amongst other things, the analysis of possible future scenarios for OLAF.

Two separate workshops were held by the external contractor with OLAF staff and the AFCOS, both on 26 April. Findings on various key evaluation issues<sup>223</sup> and OLAF's future outlook were discussed. At the OLAF workshop, members of all Directorates and the Principal Advisor participated. Countries represented at the AFCOS workshop were BG, EE, FI, EL, IE, IT, MT, PT, SK. Two staff of OLAF were also present.

### A2.5.4 Conferences and meetings

The external contractor attended the following events during which further information of use to the evaluation was collected:

OLAF organised a high level **“Conference on the Evaluation of Regulation 883/2013”** in Brussels on 1-2 March 2017. The conference brought together stakeholders from a wide range of anti-fraud backgrounds, such as the Anti-Fraud Coordination Services of Member States (AFCOS), Member State administrative authorities for the management of EU funds, law enforcement, prosecutorial and judicial authorities, EU institutions, bodies, offices and agencies (IBOAs), international organisations, academics, non-governmental organisations etc. The conference was divided into two parts different in concept and format. The first morning was of a general character and set the scene in broad policy lines. The speakers provided strategic and political input to the evaluation of Regulation 883/2013. The second part of the conference was built around four discussion panels covering key topics for the evaluation of Regulation No 883/2013, at a more technical level. This part of the conference was interactive, addressing the core elements of the Regulation in more detail. The panels covered the following topics: OLAF external investigative activities, OLAF internal investigative activities, governance and the future relationship between OLAF and the EPPO. Results of the discussion were fed into the (external) evaluation report<sup>224</sup>.

The external contractor also took part at **the Conference on “Cooperation project in the Anti-fraud sector”** held in Brussels on 9 November 2016 by the Italian AFCOS (Guardia di Finanza). The conference notably provided information on existing best practices in

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<sup>223</sup> Opening investigations; investigative powers & tools; cooperation & information exchange; investigative recommendations & follow-up; procedural rights & safeguards; Supervisory Committee.

<sup>224</sup> For more information about the Conference follow the link [https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation/conference\\_en](https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation/conference_en).

administrative cooperation in the sector of structural and investment funds, and on the evolving legislative EU anti-fraud landscape.

A “**lunch debate on the revised Regulation 45/2001**” organised by OLAF’s DPO and DG JUST on 24 January 2016 to present the recent Commission proposal to revise this Regulation and align it with the EU Data Protection reform and the adoption of the General Data Protection Regulation explained the new features of the Commission proposal and to what extent it could impact OLAF’s work if adopted.

## **A2.6 Results across consultation activities**

Table A2.5 presents key results per consultation activity, organised by evaluation theme, as well as the level of (1) consistency of results across consultation activities and (2) complementarity of results across consultation activities.

Overall, there was a large degree of convergence in results from the different consultation activities.

**Table A2.5:** Overview of consultation results across the consultation activities

Evaluation issue	Headline results				Consistency of results across consultation activities	Complementarity of results across consultation activities
	Interviews	Survey	Workshops	Conferences		
Opening investigations	<p>Selection criteria considered overall helpful for OLAF investigative staff, yet lack of clarity on the impact of case selection criteria on selection decisions amongst non-OLAF stakeholders<sup>225</sup>.</p> <p>The introduction of selection criteria overall improved consistency in the cases selected for investigation, yet some OLAF staff reported potential inconsistencies in application of the selection criteria.</p> <p>IPPs play a marginal role in case selection, being used only when one or more of the selection criteria set out in the Regulation would suggest a dismissal of the case.</p> <p>Lack of information communicated to relevant stakeholders on case selection decisions.</p> <p>Some scope for improving the knowledge/experience of ISRU staff.</p>	<p>Most respondents - aside from those from the EC and other EU IBOAs - agreed that the case selection criteria and their application are transparent overall, while almost 30 per cent (n=16) disagreed.</p> <p>Most survey respondents – aside from those from the EC and other EU IBOAs - agreed or strongly agreed that the information <a href="#">provided by OLAF on the reasons for opening an investigation</a> was comprehensive and most also agreed it was transparent.</p>	<p>Some stakeholders (e.g. AFCOS and IBOAs) reported lack of information on opening of cases and lack of clarity on how the selection criteria were effectively applied.</p> <p>Discussion on whistleblowing status of informants.</p>	<p>Lack of clarity of case selection criteria was raised indicating that this creates some challenges and potential inconsistencies in application.</p>	High	High
Investigative tools and powers	<p>Agreement that OLAF’s investigative powers and tools were largely unchanged with the introduction of the Regulation and that it mainly clarified its role in</p>	<p>OLAF respondents were generally more likely to agree that specific powers and tools (surrounding inspections, interviews and on-</p>	<p>The issue of the legal basis for conducting on-the-spot checks in the framework of internal investigations was</p>	<p>Challenges in interpreting/applying the external investigatory tools and</p>	High	High

<sup>225</sup> AFCOS representatives, Commission services, national judicial and managing authorities, other EU IBOAs and international organisations.

Evaluation issue	Headline results				Consistency of results across consultation activities	Complementarity of results across consultation activities
	Interviews	Survey	Workshops	Conferences		
	<p>internal investigations.</p> <p>Lack of agreement amongst stakeholders (even those within the same group / organisation) on whether the Regulation provides OLAF with sufficient tools and powers to conduct administrative investigations.</p> <p>Challenges for OLAF investigators in navigating national law and practices, e.g. to conduct digital forensic operations, or access <a href="#">bank accounts/statements</a> of beneficiaries.</p> <p>OLAF investigative staff and AFCOS referred to certain inconsistencies between Regulation 883/2013 and Regulations 2185/96 and 2988/95 also impacting the consistency and the legal basis OLAF's investigative tools.</p> <p>Issues around some specific provisions were reported: the authorisation necessary to conduct interviews (e.g. of witnesses) and the burden this can create for investigators; need to improve clarity surrounding the timing and legality of precautionary measures; length of "on-the-spot" checks due to the notification of national authorities and OLAF's internal approval procedures.</p>	<p>the-spot checks) were clear/sufficient in the context of internal rather than external investigations.</p> <p>OLAF investigators, ie. 'closer' to these powers and tools were less likely to agree that these powers and tools are clear compared to survey respondents who are not directly involved in interpreting and applying these powers and tools (e.g. ISRU staff).</p> <p>Most respondents agreed that OLAF's powers to inspect premises are clear in relation to inspections of the premises of EU IBOAs. A far lesser proportion agreed in relation to inspections within Member States, third countries and/or international organisations, e.g. to undertake digital forensic operations.</p> <p>Only 45 % of survey respondents from OLAF investigative units agreed that OLAF provides information to IBOAs and Member States with regard to precautionary measures that is exhaustive and in line with the requirements set by Art. 7. Only</p>	<p>raised at a workshop with OLAF heads of units and other staff.</p> <p>Challenges associated with the dependency on national rules and practices was also discussed at length at a workshop with OLAF heads of units and other staff.</p> <p>At the OLAF evaluation conference, the legal basis for on-the-spot checks and inspections (Regulation 883/2013) was reported as unclear due to references made to other tools/regulations as well as 'rules and practices' of Member States.</p> <p>An issue related to the authorisation necessary to conduct interviews was raised at workshop involving external expert panel, as well as need to clarify the legal basis for statements vis-à-vis interviews.</p>	<p>powers set out in Regulation 883/2013 given the reference within the Regulation to national rules and practices and in identifying what the 'competent authority' in each Member State is.</p> <p>Issues related to the authorisation necessary to conduct interviews and the burden this can create for investigators and lack of clarity surrounding digital forensic operations under certain scenarios and difficulties accessing bank accounts/statements – were raised at the OLAF conference.</p>		

Evaluation issue	Headline results				Consistency of results across consultation activities	Complementarity of results across consultation activities
	Interviews	Survey	Workshops	Conferences		
	<p>Key added value - OLAF investigators can collect evidence and information in several Member States.</p> <p>Regulation 883/2013 does not provide sufficient detail on OLAF's role in coordination cases.</p>	<p>1/3 of respondents from EC, other EU IBOAs, Member State stakeholders and third countries agreed with this statement.</p> <p>Regulation 883/2013 does not provide sufficient detail to know with certainty what OLAF's role is in coordination cases.</p>				
Cooperation and information exchange	<p>Stakeholders had mixed views on the level of cooperation and information exchange between OLAF and national authorities.</p> <p>AFCOS strengthened cooperation and the exchange of information between OLAF and Member States' authorities, yet agreement that some AFCOS had insufficient staff, powers or knowledge to fulfil this support role.</p> <p>While OLAF has strong cooperation with administrative authorities – or at least these authorities have an obligation to cooperate with OLAF (Art. 3), the level of cooperation with judicial authorities is lower, notably regarding the follow-up to OLAF judicial recommendations and the level of indictment.</p> <p>Improved cooperation and exchange of information between OLAF and Member States' authorities, leads to reduced</p>	<p>Most OLAF investigative survey respondents considered that cooperation and exchange of information with Member States' authorities and IBOAs during investigation had been overall effective.</p> <p>This was not the case in the case of cooperation and exchange of information with between OLAF and third countries' authorities in the context of investigations (10 per cent (n=2) agreed it had been overall effective).</p> <p>A majority of survey respondents agreed that the creation of the AFCOS strengthened cooperation and the exchange of information between OLAF and Member States' authorities, although</p>	<p>Shortcomings in practice regarding the role of the AFCOS were highlighted.</p> <p>At a workshop involving AFCOS representatives, it was apparent that the suggestion to introduce greater specificity in Regulation 883/2013 regarding the AFCOS (profile, size, powers, etc.) is contentious and relatively polarising.</p> <p>At a workshop of OLAF heads of unit and other staff, there was a clear consensus that Regulation 883/2013 should be amended to specify the role and obligations of the</p>	<p>At the OLAF evaluation conference, the OLAF Director-General noted that OLAF requires the cooperation of EU IBOAs and this varies in practice.</p> <p>Shortcomings in practice regarding the role of the AFCOS were highlighted.</p>	High	High



Evaluation issue	Headline results				Consistency of results across consultation activities	Complementarity of results across consultation activities
	Interviews	Survey	Workshops	Conferences		
	investigation duration, increased criminal investigations and prosecutions, increased recovery of misused public funds and increased deterrence.	<p>improvements to AFCOS powers and capacity would be helpful.</p> <p>The vast majority of Member State respondents agreed that the activities organised in the context of COCOLAF led to a more effective cooperation.</p>	<p>AFCOS.</p> <p>The provisions of the Regulation are not sufficient to guarantee the effectiveness of cooperation in third countries and ACAs are considered by OLAF as particularly important to facilitate international cooperation.</p>			
Investigative recommendations and follow-up	<p>Agreement that the quality and comprehensiveness of OLAF's final reports is mixed.</p> <p>Concerns relate more to shortcomings in OLAF's application/execution of the Regulation rather than Regulation itself.</p> <p>The lower level of <a href="#">cooperation between OLAF and judicial authorities</a>, notably regarding the follow-up to OLAF judicial recommendations, was detrimental to the level of indictment.</p> <p>Positive impact of the Regulation 883/2013 and its application on the design of national anti-fraud legislation and practices.</p>	<p>Almost 2/3 of respondents agreed that OLAF's investigation reports are overall clear and comprehensive, with 40-70 per cent of non-OLAF stakeholders agreeing, while around 80 per cent of OLAF respondents agreed.</p> <p>More than half agreed that OLAF's recommendations are clearly formulated with a well-defined description of the actions to be taken, with 40-56 per cent of non-OLAF stakeholders agreeing, and around 80 per cent of OLAF respondents agreed.</p> <p>The vast majority of survey respondents (EC, other EU IBOAs and Member States) suggested</p>	<p>The follow-up to judicial recommendations varies in practice depending on factors such as Member States' rules on the admissibility of evidence and national authorities.</p> <p>AFCOS representatives expressed a desire to receive OLAF's final reports.</p> <p>Representatives at the OLAF workshop were uniformly against as this would extend AFCOS' role/remit beyond that which is specified in Regulation 883/2013 when the reports and recommendations are</p>	<p>Differences across MSs as to how they value OLAF reports were discussed.</p> <p>Drivers for follow-up reported were: quality of OLAF reports; right to be heard not deferred; timely reports; information provided by OLAF to facilitate precautionary measures.</p>	Medium	High

Evaluation issue	Headline results				Consistency of results across consultation activities	Complementarity of results across consultation activities
	Interviews	Survey	Workshops	Conferences		
		<p>that OLAF's financial recommendations were followed-up upon within the reporting period (12 months), while 90 per cent (n=35) agreed that OLAF's financial recommendations led to recovery proceedings.</p> <p>A minority of survey respondents agreed that national judicial authorities followed up on OLAF judicial recommendations and IBOAs followed up on administrative and disciplinary recommendations.</p>	intended for judicial authorities.			
Procedural rights and safeguards	<p><a href="#">Art. 9 introduced rights and safeguards that were disproportionate</a> to the administrative nature of OLAF's investigations.</p> <p>Whilst the clarification of procedural guarantees was welcome, it had a negative effect on the efficiency of the investigative function, according to OLAF investigative staff.</p> <p>The Regulation has made OLAF more compliant with data protection and fundamental rights although some issues remain.</p>	<p>The majority of respondents agreed that procedural guarantees under Art. 9 are clear and contributed to strengthening the procedural guarantees of individuals subject to investigations.</p> <p>The majority of survey respondents agreed that the confidentiality and data protection provisions in the Regulation had contributed to <a href="#">strengthening the protection of personal data</a> of individuals subject to investigations.</p>	<p>The Regulation strengthened and in some cases introduced procedural rights.</p> <p><a href="#">Rights and safeguards, are somewhat commensurate to those of persons subject to criminal investigations, and as such can be considered as disproportionate</a> to the administrative nature of OLAF's investigations.</p> <p>A number of external controls exist which OLAF</p>	<p>OLAF's Director-General indicated that procedural guarantees, whilst having strengthened the transparency and accountability of OLAF, were disproportionate – (OLAF has no powers to conduct criminal investigations but must respect the rights of persons as if they were subjected to one).</p>	High	High

Evaluation issue	Headline results				Consistency of results across consultation activities	Complementarity of results across consultation activities
	Interviews	Survey	Workshops	Conferences		
			has to comply with.			
Supervisory Committee and other control mechanisms	<p>Difference in opinion between the SC on whether the SC should be entitled to information on individual, ongoing cases to allow it to fulfil its mandate, solved by the Joint Opinion of the Legal Services of the EP, the Council and the EC, of 12 September 2016.</p> <p>While stakeholders interviewed highlighted the necessity of external controls and complaints mechanisms, they agreed that they had proliferated and were somewhat overlapping and had created administrative burden on OLAF to respond.</p>	<p>A larger portion of survey respondents (OLAF<sup>226</sup> and the EC) disagreed that:</p> <ul style="list-style-type: none"> <li>the <b>role and tasks of the SC</b> (Art. 15),</li> <li>clarifications regarding <b>modalities for OLAF to report to the SC</b> on investigations, and</li> <li>the definition of working arrangements between the SC and OLAF,</li> </ul> <p>had led to a more effective and efficient cooperation between the SC and OLAF.</p>	At a workshop involving ICF's expert panel, the main points were that the Regulation is unclear as to the SC's mandate and powers, especially in relation to OLAF's conduct in undertaking investigations and what the SC should have access to.	The clarity of the SC's role and mandate was discussed at the OLAF evaluation conference – the legislator left some issues unresolved and never decided whether the SC should be an advising or a supervising body.	Medium	High
Inter-institutional exchange of views	Stakeholders consulted had mixed views as regard to the effectiveness of the inter-institutional exchange of views. The evidence gathered was limited.				Medium	Low

Source: ICF report, Annex 4 (shortened)

<sup>226</sup> OLAF respondents constituted the bulk of the sample for this question (27 of 30 respondents) and so the data for these questions will disproportionately reflect the views of OLAF staff.

### **Annex 3 : Methods and analytical approach**

This annex provides a description of the methodological approach to the evaluation taken by the external contractor that supported this SWD. It summarises the main methodological elements and cross-references to the more detailed methodological annex of the external report supporting this SWD.

#### **A3.1 Logic of intervention**

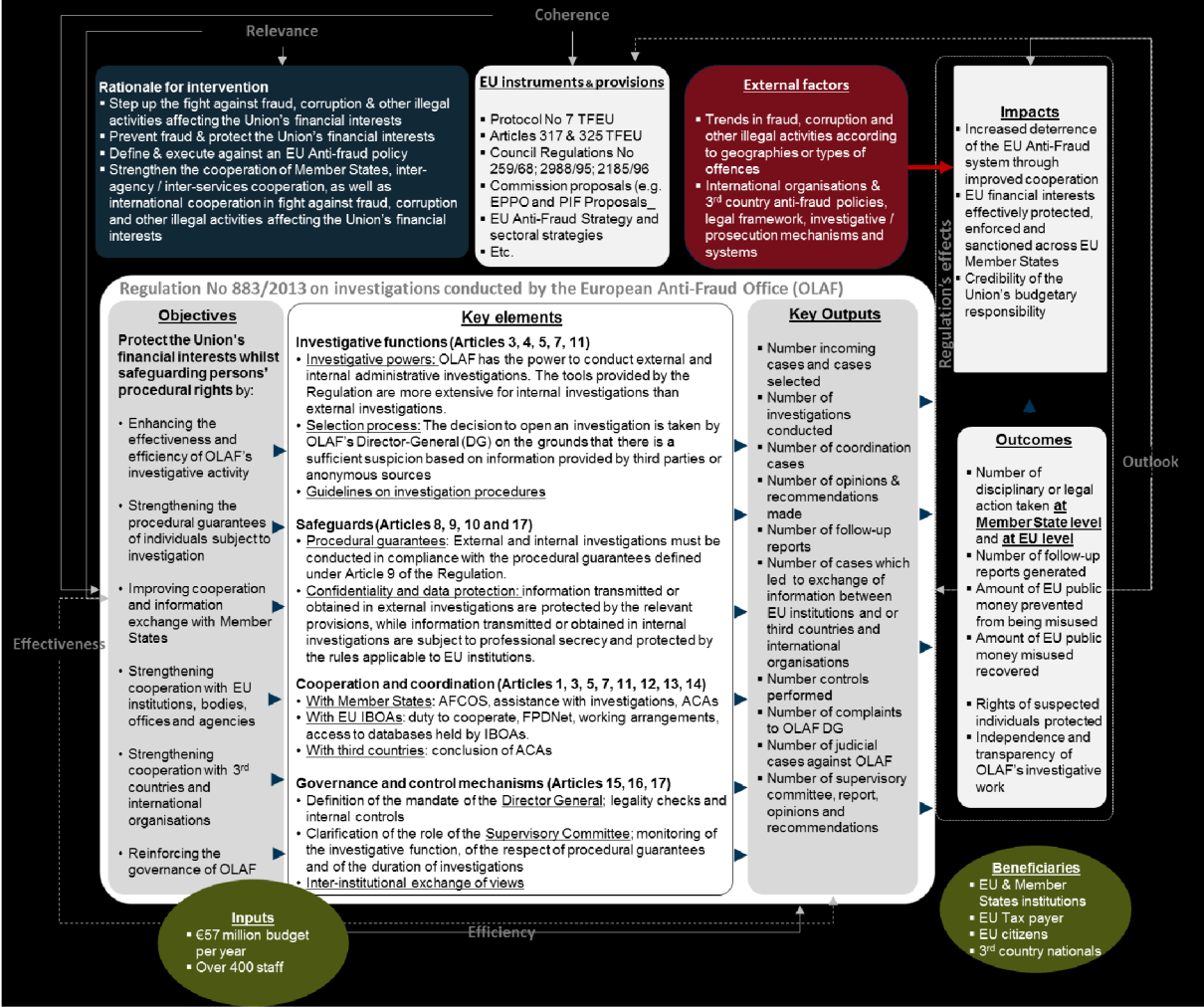
The intervention logic developed in the context of the evaluation (Figure A3.1) aimed to retrace the cause and effects chains through which the provisions of the Regulation generate intended outputs, results and impacts (which correspond to the objectives of the Regulation spelled out in Section 2.1). Provisions that should allow achievement of the objectives are:

- Investigative function (Articles 3, 4, 5, 7, 11);
- Safeguards (Articles 8, 9, 10 and 17);
- Cooperation and coordination (Articles 1, 3, 4, 5, 7, 11, 12, 13, 14);
- Governance and control mechanisms (Articles 15, 16, 17).

The provisions surrounding the investigative function allow OLAF to fulfil its mandate and use its powers to obtain results in its investigations; they cover the selection phase for the opening of investigations, the investigative tools and powers, the procedure to be respected, as well as the follow-up to investigations. They are complemented by the provisions concerning safeguards, which are intended to protect the persons involved in the investigations, by defining the rules on procedural guarantees, confidentiality and data protection. Throughout the investigations, OLAF cooperates with sources, including whistleblowers, IBOAs, Member States or third countries authorities and international organisations, and the relevant provisions regulate this cooperation depending on the specificities of each of those categories. The governance and control mechanisms ensure OLAF's independence and the monitoring of its investigative function. The key elements of the Regulation and related implementing rules are further detailed in Annex 5.

Ultimately, the Regulation is expected to directly or indirectly contribute to the effective protection and enforcement of the EU's financial interests across EU Member States and beyond, and enhance the credibility of the Union's budgetary responsibility. Expected results are to recover a greater proportion of misused EU public money, to better enforce laws designed to combat fraud or other illegal activities affecting the Union's financial interest, and to increase deterrence through improved cooperation. These results should be achieved while affording the necessary procedural guarantees to persons concerned as well as by respecting the independence of OLAF.

**Figure A3.1: Intervention logic of the Regulation**



Source: ICF report, section 2.2.1

**A3.2 Evaluation Framework**

The evaluation framework operationalised the evaluation criteria and questions by using judgement criteria, indicators and means of verification. Judgment criteria, expressed in the form of statements are used to answer the various evaluation questions. They can be then confirmed and/or rejected by the research. A comprehensive set of indicators were developed against these judgment criteria and were populated by the evidence generated by the evaluation. The evaluation framework also included means of verification, that is the research methods and tools that were used to collect data and to run the analytical exercises to inform the indicators put forward.

**A3.3 Data collection and analytical exercises**

The evaluation built on the following research to generate the intended array of evidence:

- Desk research was used to collect, structure and analyse all relevant documentation related to Regulation 883/2013 and its implementation.
- Stakeholder consultations were organised by way of a survey reaching out to around 170 respondents and more than by way of 160 interviews with key respondents. It is

estimated that 61 stakeholders were consulted via both interviews and online survey. In addition, the evaluation team attended three high level conferences and expert meetings, as well as organised two internal validation workshops of evaluation findings (see Annex 2 for detail).

- Five case studies were used to further deepen the insights into key findings using evidence from the stakeholder interviews and the online survey.

The evidence collected was used to run the following analytical exercises:

- Descriptive qualitative analysis, which consisted of extracting from and structuring the evidence contained in key documents in order to validate or reject specific judgment criteria.
- Descriptive quantitative analysis of monitoring and administrative data informed the quantitative indicators related to effectiveness and efficiency in the evaluation framework.
- A comprehensive legal analysis of key provisions of the Regulation and key relevant legal instruments in the area of anti-fraud assessed the clarity of key provisions, internal and external coherence and potential impact on the functioning of the Regulation.
- Four contribution case studies formed the basis for the contribution analysis. The method involved defining the link between variables as well as the influence of explanatory variables on impact variables relating to specific cause and effect chains of the Regulation.
- The stakeholder consultation analyses involved analysing inputs from stakeholders interviewed and stakeholders surveyed via the online survey.

### **A3.4 Evaluation challenges and limitations**

This section describes the main challenges encountered and the associated limitations of the evaluation results and mitigation measures put in place. In doing so it provides an overall assessment of the robustness of the methodology applied and the reliability of the available data.

- The evaluation work was based on about **three years of application of the Regulation**, which means that **very limited evidence was available on the impacts of its application**. Certain provisions of the Regulation may not have yielded their full results yet. While this limitation could not be addressed, given the requirement of the Regulation to complete the evaluation by a certain date, the research and consultation tools were designed so as to capture comprehensive information on the application of the Regulation on the three years after entry into force.
- Desk research (qualitative information) – the evidence base gathered through desk research informed the qualitative indicators of all evaluation questions. Desk research generated evidence supporting findings for all evaluation criteria although evidence from desk research was quite limited on the relevance criteria. This limitation had little bearing on the findings on relevance as other research tools were used to generate evidence on the needs and issues faced by stakeholders.
- Desk research (quantitative information) – the quantitative research designed initially intended to rely on case level data. However, it was not possible for reasons of confidentiality of investigations to give the contractor access to the files of individual

cases, they worked on aggregated data provided by OLAF on a set of agreed indicators. The lack of disaggregated case-level data prevented the benchmarking and advanced quantitative analysis originally planned by the contractor, and led to a greater emphasis on qualitative data and analysis. The lack of disaggregated/granular data meant, for example, that it was not possible to link outcomes to specific investigations or specific provision under the Regulation. However, the findings from the contribution analysis provided some evidence of the links between provisions of the Regulation and outcomes, while data on recoveries, prosecution, etc. provide some additional contextual evidence that allowed the contractor to build conclusions.

- Consultations with stakeholders were delayed for a number of reasons (e.g. identification of key stakeholders, approval to interview them, linguistic issues) all of which were successfully mitigated against. Due to the length of the evaluation questions, the questionnaires proved to be too long and this led to partial coverage of the interview questions in some cases. The consequence was that at times the triangulation of evidence was limited to a couple of sources (e.g. desk research and survey) because some of the questions were left unanswered by the majority of interviewed stakeholders. Whenever this took place, contradictory evidence on the basis of a few sources was not always reported and evidence pointing in the same direction was reported with the necessary caveats.
- The online surveys covered all stakeholder groups as intended. The results of the survey analysis may suffer from a slight bias in the responses provided due to the fact that more than one third of the respondents were OLAF staff. The sensitivity analysis performed on a number of key questions demonstrated that weighting the responses of this stakeholder group would not have changed the overall direction of the results.
- Case studies were mainly focused on gathering evidence of good practices. At times, interviewers found it difficult to obtain illustrative examples of “bad” practices because stakeholders were reluctant to name other stakeholders that have not adopted best practices. This limited the extent to which the case studies could inform recommendations on effective and efficient working practices.
- Analysis and triangulation of evidence throughout the revised ICF's Final Report sought to provide greater explanation and analysis of stakeholders' views collected through interviews and the survey, and to ensure evidence-based links to all conclusions and recommendations drawn in the report. However, this has not been done systematically and therefore also this SWD could not reflect the typology of stakeholder presenting certain positions.
- The length of the draft final report has been shortened to reduce the length of the overall report without being able to fully conform to the page limitation of 100 pages set in the ToR.

Overall, the contractor declared that the planned data collection and analytical exercises could be implemented as planned. Most of the challenges were overcome and/or mitigated against. The robustness of the evidence base gathered was judged satisfactory by the evaluators. The ISSG carried out a Quality Assessment of the external report before accepting the final product.

## Annex 4 : Evaluation questions

This annex provides an overview of evaluation questions as presented in the evaluation roadmap. Questions in section E are addressed in the report which this SWD accompanies.

### **A. Relevance:**

- To what extent have the specific objectives of Regulation 883/2013 proved to be relevant for the overarching objective of protecting the financial interests of the EU?
- To what extent have the tools and control mechanisms introduced by Regulation 883/2013 proved to be relevant to achieve the specific objectives?
- To what extent are the specific objectives of Regulation 883/2013 relevant in the context of wider EU policies and current policy developments (in particular as referred to in sections 1.4 and 1.6) for the protection of the EU's financial interests?

### **B. Effectiveness:**

- To what extent have the specific objectives of Regulation 883/2013 been met so far? To what extent have the different components of the Regulation contributed to achieving the specific objectives of Regulation 883/2013 and to an improved protection of EU financial interests (recovery/financial corrections, prosecution, indictment and deterrence)?
- Which are the external factors beyond the influence of OLAF (including the follow-up responsibilities – once OLAF concludes an investigation - of Member States and other Commission services and EU institutions, bodies, offices and agencies) that have contributed to or influenced the achievement of the objectives of Regulation 883/2013, and how?
- To what extent do the legal instruments contained in Regulation 883/2013 provide OLAF with sufficient tools to accomplish its mandate?
- What are the shortcomings that can be identified in the different components of Regulation 883/2013 or in their implementation, which negatively affect the achievement of the Regulation's objectives?

### **C. Efficiency:**

- To what extent has the implementation of Regulation 883/2013 impacted on OLAF's resources and the use of those resources? And on the resources of other actors in the application of Regulation 883/2013?
- To what extent are the tools available in Regulation 883/2013 for the conduct of OLAF administrative investigations, their follow-up and the successful cooperation with other entities efficient for the achievement of the overarching objective of protecting the financial interests of the EU?

### **D. Coherence:**

- To what extent does the current set of rules in Regulation 883/2013 provide OLAF with a coherent legal framework to accomplish its tasks? In particular, to what extent has the Regulation achieved a proper balance between investigative powers and procedural rights? And to what extent has Regulation 883/2013 achieved a proper balance between independence, cooperation, supervision and control?



- To what extent does Regulation 883/2013 fit into the wider EU policies and current policy developments (in particular as referred to in sections 1.4 and 1.6) for the protection of the EU's financial interests?

**E. Outlook:**

- In the current institutional and legal framework, and in the light of current policy developments described in particular in sections 1.4 and 1.6, if shortcomings regarding the protection of the financial interests of the Union are identified in Regulation 883/2013 or its application, how could they be addressed?
- To what extent should Regulation 883/2013 be reviewed in the new institutional context emerging from the negotiations on the EPPO Regulation?

## Annex 5 : Key elements of Regulation 883/2013 and related implementing rules

This section introduces the key elements of Regulation 883/2013 and related implementing rules that were subject to the evaluation.

### A5.1 Investigative functions (Art. 3, 4, 5, 6, 7, 11)

#### A5.1.1 Investigative powers

OLAF's investigative powers were initially defined in Regulations 1073/99 and 1074/99, which were replaced by Regulation 883/2013. Investigations are defined as "any inspection, check or other measures undertaken by the Office [...] with the view to achieving [its] objectives and establishing, where necessary, the irregular nature of the activities under investigation"<sup>227</sup>. Regulation 883/2013 further defines OLAF's powers during external and internal investigations in its Articles 3 and 4, respectively.

As part of **external investigations** OLAF can carry out on-the-spots checks and inspections<sup>228</sup> in Member States and third countries, and on the premises of international organisations<sup>229</sup>, the Regulation refers to national rules and practices for application of these investigative powers. In turn, national authorities must assist the Office with its investigative tasks and ensure that OLAF investigators are allowed access to information and documents relating to the subject of the investigation under the same conditions as equivalent national authorities<sup>230</sup>. In addition, OLAF may interview a person concerned or a witness at any time during an investigation. At all stages of the investigations, procedural guarantees as defined in the Regulation must be respected.

As part of **internal investigations within IBOAs**, OLAF carries out administrative investigations in accordance with the provisions of Regulation 883/2013, with the Inter-institutional agreement and with decisions adopted by the relevant IBOA, which lay down the terms and conditions for internal investigations concerning them<sup>231</sup>. OLAF has the right to:

- immediate and unannounced access to relevant information (including in databases) and to the IBOA's premises and accounts<sup>232</sup>;
- request oral information, including through interviews, and written information<sup>233</sup>; and
- carry out on-the-spot checks and inspections at the premises of economic operators in order to obtain access to relevant information<sup>234</sup>.

In addition to investigations, OLAF can open **coordination cases** to provide assistance and contribute to investigations carried out by competent national authorities. In these cases, OLAF cannot conduct investigative activities and its role is limited to supporting Member

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<sup>227</sup> Article 2(4) of the Regulation.

<sup>228</sup> Such on-the-spot checks and inspections are carried out in accordance with the provisions of 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, on economic operators to whom Community, and with the relevant provisions of Regulation (Euratom, EC) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

<sup>229</sup> In accordance with relevant cooperation and mutual assistance agreements and any other legal instruments in force.

<sup>230</sup> Article 3(3) of the Regulation.

<sup>231</sup> Article 4(1) of the Regulation.

<sup>232</sup> Article 4(4) of the Regulation.

<sup>233</sup> Article 4(2)(b) of the Regulation.

<sup>234</sup> Article 4(3) of the Regulation.

States' competent authorities. Coordination cases can be reclassified as investigation cases upon request by OLAF's Director-General (upon request of the investigation unit and a positive opinion from the ISRU).

### **A5.1.2 Selection of investigations**

The decision to open an investigation is taken by OLAF's Director-General on the grounds that there is a sufficient suspicion that there has been fraud, corruption or other illegal activities affecting the EU's financial interests based on information provided by public or private sources. As part of the internal reorganisation of OLAF in 2012, a new **Investigation Selection and Review Unit (ISRU)** was created. It is an independent unit reporting directly by OLAF's Director-General, which advises him on whether an investigation or coordination case should be opened, or whether the case should be dismissed.

The criteria as well as the general principles of the procedure to open an investigation are defined in Article 5 of Regulation 883/2013. The introduction of selection criteria is one of the innovations of Regulation 883/2013. OLAF's Director-General can open **an external or internal investigation on his own initiative**, or upon request of a Member State concerned or any IBOA. Such a decision is taken within **two months** from receiving such request.

### **A5.1.3 Investigation procedure**

The main rules applicable to the investigation procedure are defined in Article 7 of the Regulation. Investigations are conducted by staff designated by OLAF's Director-General, acting under his direction via instructions and written authorisations<sup>235</sup>. For each investigative activity, investigators receive a written authorisation featuring their identity and capacity, the subject and purpose of the investigation, its legal bases, and its related powers<sup>236</sup>.

The context of an investigation can justify the adoption of administrative precautionary measures to protect the financial interests of the Union. On the basis of information provided by the Office, IBOAs and/or EU Member States decide whether to take such measures<sup>237</sup> in accordance with national/EU law<sup>238</sup>.

OLAF's powers to investigate in third countries and international organisations are based on the cooperation and mutual assistance agreements concluded by the Union with these partners, such as association agreements<sup>239</sup>. The power of OLAF to investigate is also frequently laid down in financing programmes and conventions. OLAF may also enter into administrative arrangements with these partners.

### **A5.1.4 Reporting and monitoring**

Once an investigation is completed, a **Final Report** on the investigation is drafted under the authority of the Director-General<sup>240</sup>. The report is sent to the competent authorities of the Member State(s) and/or the IBOA concerned<sup>241</sup>. This report may be **accompanied by**

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<sup>235</sup> Article 7(1) of the Regulation.

<sup>236</sup> Article 7(2) of the Regulation.

<sup>237</sup> Article 7(6) of the Regulation.

<sup>238</sup> Article 7(7) of the Regulation.

<sup>239</sup> Article 1(1)(b) of the Regulation.

<sup>240</sup> Article 11(1) of the Regulation.

<sup>241</sup> Article 11 (3)-(5) of the Regulation.

**Recommendations** for actions to be taken following the investigation, which must specify the preliminary legal classification of the facts established. Recommendations may be **financial, judicial, administrative or disciplinary**<sup>242</sup>.

OLAF reports must constitute **admissible evidence** before national courts under the same conditions as equivalent national reports<sup>243</sup>.

According to the GIPs, the **ISRU (Review) reviews the Final Report and the Recommendations including the accompanying draft notes and letters** in order to provide an opinion to the Director-General<sup>244</sup>. It analyses whether the investigation unit complied with rights and procedural guarantees, data protection requirements, and the legality, necessity and proportionality of the investigation, as well as whether the preliminary qualification of the facts under national criminal law is correct. In addition, the ISRU must check whether the Recommendations and the case closure decision are justified in line with the findings of the case<sup>245</sup>.

In the event no evidence has been found against the person concerned, the investigation is closed regarding that person, who is informed of this decision **within 10 working days**<sup>246</sup>.

## **A5.2 Safeguards (Art. 4, 9, 10, 12)**

### **A5.2.1 Procedural guarantees**

External and internal investigations must be conducted in compliance with the procedural guarantees defined in Article 9 of the Regulation. The introduction of Article 9 constitutes **one of the main innovations** of Regulation 883/2013. The guarantees offered include the right to an objective and impartial investigation, the right to avoid self-incrimination, the right to be interviewed/heard (once prior notice has been provided), including the right to be assisted by a person of the individual's choice, and the right for the person concerned to comment on the facts of the case.

In relation to procedural guarantees, the ISRU (Review) reviews and verifies the **legality, proportionality and necessity** of the proposed investigative measures. All ISRU opinions are submitted to OLAF's Director-General for him to make a decision or to authorise an investigative act.

In addition, any person affected by an investigation may address a complaint directly to OLAF<sup>247</sup> or to external and independent institutions or bodies (European Ombudsman, European Data Protection Supervisor).

### **A5.2.2 Confidentiality and data protection**

Article 10 of the Regulation defines general rules on confidentiality of information and data protection applicable to the Office, while IBOAs have an obligation to establish internal

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<sup>242</sup> Article 11(2) of the Regulation and Article 19 of the GIPs.

<sup>243</sup> Article 11(2) of the Regulation.

<sup>244</sup> Article 20 of the GIP.

<sup>245</sup> Article 21 of the GIP.

<sup>246</sup> Article 11(7) of the Regulation.

<sup>247</sup> The Legal Advice Unit deals with all complaints according to the procedure available on OLAF's website: [https://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations\\_en](https://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en) (Part A).

procedures to ensure the confidentiality of internal investigations at all stages<sup>248</sup>. OLAF is also subject to Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies<sup>249</sup> and is under the supervision of the EDPS. Data protection rules also apply to exchanges with third countries.

In 2008, a **Data Protection Officer** was appointed by a Decision of OLAF's Director-General.

### **A5.3 Cooperation and coordination (Art. 1, 8, 12, 13, 14)**

#### **A5.3.1 Cooperation and coordination with Member States**

##### **Investigation-related cooperation**

Member States have an obligation to assist OLAF in the context of **internal and external investigations**. Member States must assist OLAF's staff as necessary for them to carry out their tasks effectively, and to ensure they have access to all relevant information and documents relating to the investigated matter under the same conditions as national authorities<sup>250</sup>. In addition, they are required by Article 3(4) of the Regulation to set up an Anti-Fraud Coordination Service (AFCOS) to facilitate cooperation and the exchange of information.

There are 14 Administrative Cooperation Arrangements (ACAs) in force between OLAF and Member States' authorities establishing some practicalities for the exchange of information with the partner authorities of 8 Member States and the conduct of (internal and external) investigations. ACAs do not constitute a prerequisite for conducting investigations in Member States, but provide some practical modalities for cooperation where there is an identified need.

##### **Selection and safeguard of evidence**

**Before a decision is taken on whether to open an investigation**, OLAF informs the authorities of the Member States concerned in case information suggests that there has been illegal activity affecting the financial interests of the Union, who shall ensure that appropriate action is taken; in turn, the authority will inform OLAF, upon request, of any action taken pursuant to the receipt of the information<sup>251</sup>. **Where investigations show it might be appropriate** and if so requested by OLAF, it is the responsibility of national competent authorities to decide on appropriate **precautionary measures** to protect the financial interests of the Union, including measures for the safeguarding of evidence<sup>252</sup>.

In cases where OLAF's DG decides **not to open an external investigation**, he may send any relevant information to the Member State concerned for the competent authorities to take appropriate action<sup>253</sup>.

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<sup>248</sup> Article 4(5) and 10(3) of the Regulation.

<sup>249</sup> Regulation (EC) 45/2001 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, OJ L 8, 12.1.2001, pp. 1-22, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0045>.

<sup>250</sup> Articles 3(3) and 7(3) of the Regulation.

<sup>251</sup> Article 3(6) of the Regulation.

<sup>252</sup> Article 7(7) of the Regulation.

<sup>253</sup> Article 5(6) of the Regulation.

## Follow-up and monitoring

OLAF may provide the competent authorities with the information obtained in the course of **external investigations** in due time, so that they can take appropriate action in application of their national law, following the investigation. Such information must also be transmitted by OLAF's Director-General to any IBOA concerned. In addition, OLAF's Director-General has an obligation to transmit information obtained in the course of an **internal investigation** on facts falling under the jurisdiction of a Member State to its judicial authorities. OLAF can provide evidence in national proceedings, in accordance with national law and the EU Staff Regulations<sup>254</sup>.

In addition, Regulation 883/2013 requires OLAF's partners to provide information on follow-up actions at the Office's request in accordance with national law and Regulation 883/2013<sup>255</sup>.

## Policy-related cooperation

In addition to bilateral cooperation between OLAF and the AFCOS in Member States, OLAF and the AFCOS cooperate as a network in the AFCOS group of the Advisory Committee for the Coordination of Fraud Prevention (COCOLAF).

### A5.3.2 Cooperation and coordination with EU IBOAs

#### Investigation-related cooperation

Article 4 of the Regulation regulates the exchanges of information between OLAF and IBOAs targeted by an (envisaged or ongoing) investigation, as well as the modalities of their cooperation, OLAF's powers and obligations and the IBOAs' duty to cooperate.

In addition, Article 1(5) of the Regulation provides that IBOAs may conclude administrative arrangements with OLAF. A number of administrative arrangements are in force between OLAF and IBOAs. These are:

- Practical Arrangements between the European Parliament and the European Anti-Fraud Office (2013, before Regulation 883/2013 entered into force);
- Administrative arrangements between OLAF and the European Commission (2015);
- Administrative arrangements with the European External Action Service (2015);
- Administrative arrangements with the European Investment Bank and the European Investment Fund (2016);
- Administrative arrangements with the Economic and Social Committee (2016);
- the European investment Bank (2016);
- the European Central Bank (2016);
- the Council of the European Union (February 2017) and
- the Committee of the Regions (May 2017).

Another arrangement is currently being negotiated with the Court of Auditors.

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<sup>254</sup> Article 12(4) of the Regulation.

<sup>255</sup> Article 11 of the Regulation.

## Selection

Before a decision to open an **investigation** is taken, and when OLAF handles information suggesting that fraud has taken place within an IBOA, OLAF has the option to inform the IBOA. If OLAF chooses to do so, the IBOA must inform it of any action taken internally on the basis of the information communicated<sup>256</sup>.

While OLAF's Director-General considers whether to open an **investigation** following a request by an IBOA concerned or a Member State, and while the investigation is conducted, the IBOA shall not open parallel inquiries on the same facts without OLAF's consent<sup>257</sup>. In cases where OLAF's Director-General decides not to open an internal investigation, he may send any relevant information to the IBOA concerned for it to take appropriate action<sup>258</sup>.

## Investigation

OLAF has an obligation to inform the IBOA concerned when an investigation is conducted on its premises and when OLAF consults documents or information held by it<sup>259</sup>. In addition, OLAF must inform IBOAs when an investigation reveals that one of their officials, other servants of offices or agencies, members, heads, or staff members may be concerned. IBOA staff have a duty to cooperate with and supply information to OLAF in the context of internal investigations<sup>260</sup>. During external investigations, OLAF also may have access to any relevant information held by IBOAs, including information on databases. In cooperation with OLAF, the IBOA concerned may decide to take appropriate precautionary measures to protect the financial interests of the Union, including measures for the safeguarding of evidence<sup>261</sup>.

## Cooperation with Eurojust and Europol

A specific provision of the Regulation governs the cooperation with Eurojust and Europol. It provides basis to conclude administrative arrangements with them to regulate exchanges of operational, technical and strategic information, including personal data and classified information, and progress reports<sup>262</sup>.

Administrative arrangements with Europol date from 2004, and were based on Art. 9(2) of the Administrative Agreement on Co-operation between the European Commission and Europol. Revised arrangements are currently under discussion. The revision results Regulation 883/2013, which allows the exchange of information between the two bodies, currently not foreseen in the administrative arrangements, and the recently adopted new Europol Regulation<sup>263</sup>.

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<sup>256</sup> Article 4(8) of the Regulation.

<sup>257</sup> Article 5(3) of the Regulation.

<sup>258</sup> Article 5(5) of the Regulation.

<sup>259</sup> Article 4(4) of the Regulation.

<sup>260</sup> Article 4(7) of the Regulation.

<sup>261</sup> Article 7(6) of the Regulation.

<sup>262</sup> Article 13(1) of the Regulation.

<sup>263</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0794>.

A Practical Agreement on arrangements of cooperation between Eurojust and OLAF was adopted in 2008<sup>264</sup>. It was not considered necessary to update it after the adoption of Regulation 883/2013, as it already covers the exchange of information between the two bodies. The on-going revision of the new Eurojust legal framework may, however, have an impact on the further cooperation.

### **A5.3.3 Cooperation and coordination with third countries and international organisations**

Article 1(1)(b) of the Regulation states that in order to achieve its objectives, OLAF must exercise its power of investigation conferred on the Commission by relevant EU acts as well as cooperation and mutual assistance agreements with third countries and international organisations. In addition, Article 14 provides that administrative arrangements may be concluded with relevant third country authorities and international organisations concerning operational, strategic, or technical information.

In addition, Article 17 of the GIPs specifies that investigative missions can be conducted by investigation units in cases where the evidence needed to establish the existence of fraud, corruption or other illegal activities is not available in the Member States. Such missions can relate to illegal activities in the fields of customs, traditional own resources, expenditure of EU funds, including through international organisations or financial institutions, or other bodies funded by the EU.

OLAF has ACAs in force with 27 third country authorities and with 12 international/regional organisations. ACAs are considered by OLAF as particularly important to facilitate international cooperation.

## **A5.4 Governance and control mechanisms (Art. 15, 16, 17)**

### **A5.4.1 Director-General**

The mandate and powers of OLAF's Director-General are defined in Article 17 of Regulation 883/2013. He acts independently in the performance of his duties<sup>265</sup>, which include:

- opening external and internal investigations;
- carrying-out external and internal investigations;
- drafting reports following investigations;
- reporting findings of investigations to the European Parliament, the Council, the Commission and the Court of Auditors;
- determining the IPPs each year and communicating them to the Supervisory Committee;
- informing the Supervisory Committee about cases where his recommendations were not followed, cases where information was transmitted to Member States authorities, and about the duration of cases;
- adopting guidelines on investigation procedures.

OLAF's Director-General is appointed by the European Commission for seven years, non-renewable.

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<sup>264</sup> Available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Practical%20Agreement%20on%20arrangements%20of%20cooperation%20between%20Eurojust%20and%20OLAF%20\(2008\)/Eurojust-OLAF-2008-09-24-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Practical%20Agreement%20on%20arrangements%20of%20cooperation%20between%20Eurojust%20and%20OLAF%20(2008)/Eurojust-OLAF-2008-09-24-EN.pdf)

<sup>265</sup> Articles 17(3), 17(4), 17(5), 17(8) of the Regulation.



## A5.4.2 Supervisory Committee

The Supervisory Committee (SC) is a body composed of external experts, created to reinforce and guarantee OLAF's independence<sup>266</sup>. Working Arrangements between the SC and OLAF were adopted on 14 January 2014, replacing earlier arrangements adopted in September 2012. In March 2017, the working arrangements were discontinued at the request of the SC. The new Committee has expressed willingness to restart discussions to adopt new working arrangements.

### Mandate

Article 15(1) of Regulation 883/2013 provides that the SC should “monitor the implementation by OLAF of its investigative function, in order to reinforce the Office's independence in the proper exercise of the competences conferred upon it by this Regulation”, and in particular “developments concerning the application of procedural guarantees and the duration of investigations”.

In practice, SC's mandate is three-fold:

1. **Advisory role:** The SC addresses opinions to OLAF's Director-General on its own initiative or at the request of the DG or of any IBOA<sup>267</sup>. In its opinions, the SC issues a number of recommendations, which are then discussed between the Office and the SC. It also delivers a yearly opinion on the draft budget submitted by OLAF.
2. **Supervisory role:** The SC is regularly informed by OLAF's Director-General of the Office's activities<sup>268</sup>, especially concerning its investigative function and follow-up actions. It protects the independence of OLAF's Director-General and is informed in cases where the latter decides to bring an action before the CJEU after identifying a suspected breach of his independence by the Commission<sup>269</sup>.
3. **Reporting role:** Finally, the SC reports on its activities once a year to the European Parliament, the Council, the Commission and the Court of Auditors, where it assesses the Office's independence, the application of procedural guarantees and the duration of investigations.

### Secretariat

The SC is supported by a secretariat in its work. The secretariat was provided by OLAF in application of Article 15(8) of the Regulation, and its budget featured within the budget line of OLAF according to Article 18 of the Regulation.

However, after the SC raised concerns on potential conflicts of interest<sup>270</sup>, the Regulation was amended<sup>271</sup>. From 1 January 2017 the secretariat of the SC is provided by the

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<sup>266</sup> OLAF Annual Report 2015, p. 40.

<sup>267</sup> Article 15(1) of the Regulation.

<sup>268</sup> The OLAF DG has to report to the Supervisory Committee information about cases lasting more than 12 months.

<sup>269</sup> Article 17(3) of the Regulation.

<sup>270</sup> Annual Activity Report 2013 [http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/annual-reports/scan\\_2013\\_FINAL\\_en.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/annual-reports/scan_2013_FINAL_en.pdf);

Annual Activity Report 2014 [http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/annual-reports/scar\\_2014\\_supcom\\_en.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/annual-reports/scar_2014_supcom_en.pdf).

<sup>271</sup> Regulation (EU, Euratom) 2016/2030 of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF).

Commission, independently from OLAF, and its budgetary appropriations have been moved from the budget line and the establishment plan of OLAF to that of the Commission.

#### **A5.4.3 Institutional exchange of views**

Article 16 of Regulation 883/2013 provides for the organisation of an exchange of views at political level to discuss the Office's policy relating to methods of preventing and combating fraud, corruption or any other illegal activity affecting the financial interests of the Union once a year between OLAF's Director-General and the European Parliament, the Council and the Commission with participation of the SC, representatives of the Court of Auditors, Eurojust and/or Europol may be invited to attend on an ad hoc basis upon request of the European Parliament, the Council, the Commission, the Director-General or the Supervisory Committee.