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**COMMISSION STAFF WORKING DOCUMENT**

**ASSESSMENT**

*Accompanying the document*

**Proposal for a Regulation amending 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) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations**

{COM(2018) 338 final}

## Table of Contents

Acronyms and abbreviations.....	2
1. Policy Context.....	3
2. Regulation 883/2013.....	5
3. Issues at stake.....	6
3.1. Establishment of the EPPO.....	6
3.2. Effectiveness of OLAF's Investigative Function .....	8
3.3. Clarification and Simplification.....	15
4. Objectives of the initiative.....	15
5. Stakeholder Consultation and Other Sources of Information .....	16
5.1. Stakeholder consultation.....	16
5.2. Other Sources of Information .....	17
6. Solutions Explained .....	17
6.1. EPPO-OLAF .....	17
6.2. Enhancing the effectiveness of OLAF investigative function .....	22
6.3. Clarification and Simplification.....	28
Annexes: .....	29
Annex 1 : Procedural information .....	29
Annex 2 : Synopsis report of stakeholder consultation .....	31

## ACRONYMS AND ABBREVIATIONS

ACER	Agency for the Cooperation of Energy Regulators
AFCOS	Anti-Fraud Coordination Service
CEDEFOP	European Centre for the Development of Vocational Training
CJEU	Court of Justice of the European Union
CoR	European Committee of the Regions
COREPER	Committee of the Permanent Representative of the Governments of the Member States to the European Union
CPVO	Community Plant Variety Office
EASA	European Aviation Safety Agency
EASME	Executive Agency for Small and Medium-sized Enterprises
EASO	European Asylum Support Office
EBA	European Banking Authority
ECA	European Court of Auditors
ECB	European Central Bank
ECDC	European Centre for Disease Prevention and Control
ECHA	European Chemicals Agency
ECSEL JU	Electronic Components and Systems for European Leadership Joint Undertaking
EDA	European Defence Agency
EDPS	European Data Protection Supervisor
EESC	European Economic and Social Committee
EFSA	European Food Safety Authority
EIB	European Investment Bank
EIGE	European Institute for Gender Equality
EIT	European Institute of Technology
EMA	European Medicines Agency
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EPPO	European Public Prosecutor's Office
ERA	European Union Agency for Railways
ETF	European Training Foundation
EU	European Union
EU-OSHA	European Agency for Safety and Health at Work
Eurofound	European Foundation for the Improvement of Living and Working Conditions
Eurojust	The European Union's Judicial Cooperation Unit
EUROPOL	European Union Agency for Law Enforcement Cooperation
F4E	Fusion for Energy
FPDNet	Fraud Protection and Detection Network
FRA	European Union Agency for Fundamental Rights
Frontex	European Border and Coast Guard Agency
GSA	European Global Navigation Satellite Systems Agency
IAS	Internal Audit Service
IBOAs	Institutions, Bodies, Offices and Agencies of the European Union
ILAN	Inter-Agency Legal Network
IMI JU	Innovative Medicines Initiative Joint Undertaking
ISSG	Inter-Service Steering Group
OHIM	Office for Harmonisation in the Internal Market
OLAF	European Anti-Fraud Office
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

## 1. POLICY CONTEXT

The Union and the Member States are required by Article 325 of the Treaty on the Functioning of the EU (TFEU)<sup>1</sup> to counter fraud and any other illegal activities affecting the financial interests of the Union. To this end, the European Parliament and the Council should adopt the necessary measures with a view to affording **effective protection of the EU's financial interests throughout the Union**. In addition, the Commission – responsible for the implementation of the EU budget in accordance with Article 317 TFEU – should ensure that there is a framework in place to enable the effective prevention and detection of fraud.

The protection of the EU financial interests is thus an important element of the Commission's political agenda. **The European Anti-Fraud Office (OLAF)** was set up in 1999 by a Commission Decision<sup>2</sup> with the task, in particular, of conducting administrative investigations against fraud and any other illegal activity affecting the EU financial interests, as well as of assisting Member States in the fight against fraud. OLAF's investigative mandate is currently **governed by Regulation 883/2013 concerning investigations conducted by OLAF**<sup>3</sup> (hereinafter "the Regulation").

On 2 October 2017, the Commission adopted the Commission Report on the **Evaluation of the application of Regulation 883/2013**<sup>4</sup>, accompanied by an evaluation Staff Working Document<sup>5</sup>. The Commission report was based on an external independent study<sup>6</sup>. The report was also accompanied by the OLAF's **Supervisory Committee's Opinion 2/2017** on the application of the Regulation<sup>7</sup>.

Although the evaluation concludes that the Regulation has allowed OLAF to deliver concrete results in the protection of the EU budget, it identified some shortcomings which impact on

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<sup>1</sup> Consolidated version of the Treaty on the Functioning of the European Union; OJ C 326, 26.10.2012, p. 47–390; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

<sup>2</sup> 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC(1999) 802); OJ L 136 , 31/05/1999 P. 0020 – 0022; <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1515760374249&uri=CELEX:31999D0352>

<sup>3</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, p. 1–22; <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0883>

<sup>4</sup> Report from the Commission to the European parliament and the Council on 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, COM/2017/0589 final; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:589:FIN>

<sup>5</sup> Commission Staff Working Document on 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; SWD/2017/0332 final; <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2017:332:FIN>

<sup>6</sup> Evaluation of the application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) by ICF Consulting Services Limited; ISBN 978-92-79-73511-0; <https://publications.europa.eu/en/publication-detail/-/publication/d6926554-b2e6-11e7-837e-01aa75ed71a1/language-en/format-PDF/source-65845507> [hereby 'ICF report']

<sup>7</sup> OLAF Supervisory Committee Opinion No 2/2017 Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19); [http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion\\_2\\_2017.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2_2017.pdf)

the effectiveness and efficiency of investigations. The Commission Report announces a possible **amendment of Regulation 883/2013**.

Moreover, on 12 October 2017, the Council adopted the Regulation implementing enhanced cooperation on the establishment of **the European Public Prosecutor's Office (EPPO)**<sup>8</sup>. 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. The EPPO will change the EU institutional anti-fraud landscape significantly. It will have the power to conduct criminal investigations and prosecute before national courts of the currently participating Member States as regards criminal offences affecting the EU's financial interests. 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.

This will impact on the operation of OLAF and the relationship between the two bodies needs to be regulated. Provisions to regulate the relationship between the EPPO and OLAF already exist in the EPPO Regulation. They need to be reflected and complemented by rules in Regulation 883/2013, with the overall objective to reinforce the fight against fraud affecting the Union budget through an integrated policy of criminal and of administrative investigations. The intention to adapt the OLAF legal framework by the time the EPPO becomes operational was acknowledged by the Commission already in 2013<sup>9</sup>, and is the main driver for the amendment of Regulation 883/2013. To ensure a smooth transition into the new institutional framework, **the amended Regulation should enter into force before the EPPO becomes operational** (envisaged end 2020)<sup>10</sup>.

These are not the only developments in the anti-fraud area since the adoption of Regulation 883/2013. The Directive on the fight against fraud to the Union's financial interests by means of criminal law<sup>11</sup> entered into force on 17 August 2017 and should be transposed into the national legislation of the Member States by 6 July 2019. The Directive strengthens the protection of the Union's financial interests by harmonising the definition of offences affecting them (offences of fraud, corruption, money laundering and misappropriation), as well as harmonising sanctions and time limitations for such cases. It covers cross-border value added tax (VAT) fraud cases with a total damage of at least EUR 10 million. The EPPO will be competent for the set of offences defined in the Directive.

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<sup>8</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'); OJ L 283, 31.10.2017, p. 1–71; <http://eur-lex.europa.eu/eli/reg/2017/1939/oj>

<sup>9</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office, COM (2013) 533 final; <http://eur-lex.europa.eu/procedure/EN/1041109>

<sup>10</sup> Article 120(2) of Regulation 2017/1939. The EPPO will assume its investigative and prosecutorial competences at a date determined by a Commission decision, and not earlier than three years after the entry into force of the EPPO Regulation.

<sup>11</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law; OJ L 198, 28.7.2017, p. 29–41; [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.198.01.0029.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.198.01.0029.01.ENG)

The Commission has also taken a number of initiatives to fight intra-Community VAT fraud to the national and EU budgets. In its **Action Plan** "towards a single EU VAT area" presented in April 2016, the Commission announced a set of key measures to be adopted in the short and medium term to modernise the EU VAT system and make it simpler, business friendly and more fraud-proof<sup>12</sup>.

The Commission has already adopted several measures to follow up on this Action Plan. In particular, on 30 November 2017, it tabled a proposal to amend **Regulation 904/2010 as regards measures to strengthen administrative cooperation in the field of VAT**<sup>13</sup>. It aims at providing new tools to make the EU VAT system more fraud-proof and close loopholes in the system of importation of goods into the EU which can lead to large-scale VAT fraud. The proposal contains provisions to strengthen cooperation among Member States, reinforce the cooperation between national tax authorities and the European law enforcement bodies (OLAF, Europol and EPPO), and to improve information sharing between tax and customs authorities in the Member States. OLAF has a role to play in this area and the proposal provides a legal base enabling the transmission by **Eurofisc**<sup>14</sup> of information to OLAF (and Europol), at its own initiative or on request, as well as for the transmission by Member States to OLAF of "any available information about offences against the common VAT system to enable it to consider appropriate action in accordance with its mandate".

In 2014, the Commission proposed to establish a **Controller of procedural guarantees**<sup>15</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. The proposal is pending.

## 2. REGULATION 883/2013

**Regulation 883/2013 governs the conduct of OLAF's investigations** to fight fraud, corruption and any other illegal activity affecting the EU financial interests<sup>16</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>17</sup>;

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<sup>12</sup> 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; COM(2016) 148; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A148%3AFIN>

<sup>13</sup> Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax; COM(2017) 0706 final; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0706>

<sup>14</sup> Eurofisc is a network of Member States for the exchange of targeted information on fraud trends, cases or traders under monitoring, intended to combat certain types of VAT fraud.

<sup>15</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees, COM(2014) 340 final; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:0340:FIN>

<sup>16</sup> Article 1(1) of the Regulation.

<sup>17</sup> Article 3 of the Regulation.

- **internal administrative investigations** within the Union institutions, bodies, offices and agencies (IBOAs)<sup>18</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>19</sup>.

**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: IBOAs, Member States or third countries authorities and international organisations, as well as private sources (including whistle-blowers). The relevant provisions regulate **cooperation** depending on the specificities of each of those categories of partners. **The governance and control mechanisms** ensure OLAF's independence and the monitoring of its investigative function.<sup>20</sup>

### 3. ISSUES AT STAKE

The evaluation report announced a **possible two step amendment of the Regulation**. The first amendment should **target primarily the impact of the establishment of the EPPO on the operation of OLAF**. It should also address the most unambiguous findings of the evaluation, aiming at **improving the effectiveness of investigations, and simplification or clarification** of certain provisions. The evaluation report already indicated that a **more far-reaching process** to modernise the framework for OLAF investigations focused also on aspects that call for further reflection and discussions could be launched **later on taking into account also the experience gained in the cooperation between the EPPO and OLAF**.

The issues at stake for the first step are explained below. Section 3.1 presents the relevant articles of the EPPO Regulation, and the central issues in the future EPPO-OLAF relationship that need to be reflected in the revised Regulation. Sections 3.2 and 3.3 summarise the findings of the evaluation that this proposal aims to address.

#### 3.1. ESTABLISHMENT OF THE EPPO

Today, **OLAF** contributes to preserving the integrity of the Union budget through its **administrative investigations into fraudulent and non-fraudulent irregularities in all**

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<sup>18</sup> Article 4 of the Regulation.

<sup>19</sup> Article 1(2) of the Regulation.

<sup>20</sup> The relevant provisions 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).

**Member States.** It issues financial recommendations facilitating administrative recovery or the prevention of revenue from being lost, disciplinary recommendations in internal investigations, and administrative recommendations. Finally, with its administrative investigations ending in judicial recommendations it also acts with a view to preparing and supporting possible national criminal indictments and prosecutions. **The establishment of the EPPO will impact on the operation of OLAF in the participating Member States as regards the investigations into fraudulent irregularities** that, today, lead to judicial recommendations.

The creation of **the EPPO** complements and strengthens the current system for the protection of the EU financial interests by establishing **an EU body with the power to carry out criminal investigations and bring cases to judgment before the national courts of the participating Member States.** This is a substantial improvement to the current situation. Today, OLAF carries out administrative investigations using administrative powers which are limited compared to criminal investigations. When it uncovers elements pointing to possible criminal offences in the course of its investigations, it can only address a recommendation to national judicial authorities, but with no guarantees as to whether a criminal investigation will be opened as a consequence. In future, in the participating Member States, it will report such suspected offences to the EPPO, and collaborate with it in the context of its investigations.

The new legal framework will reinforce the fight against fraud affecting the Union budget through **an integrated policy of criminal and of administrative investigations**<sup>21</sup>. Both bodies will need to act in a complementary and non-duplicative way within their respective mandates to ensure that all available means are used to protect the Union's financial interests. The EPPO will conduct criminal investigations aimed at investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, offences affecting the financial interests of the Union. OLAF will continue conducting administrative investigations with a particular emphasis on facilitating administrative recovery of sums unduly subtracted from the EU budget, to prevent further harm to the EU finances and to take administrative measures to prevent future instances of fraud, corruption or other illegal activities affecting the financial interests of the Union. On the other hand, OLAF should not duplicate the work of the EPPO by conducting investigations with a view to preparing and supporting possible indictments and prosecutions; it should report such cases to the EPPO without delay.

The legal instruments setting out the respective legal frameworks under which the EPPO and OLAF operate should contain provisions articulating this cooperation and complementarity in the Member States participating in the EPPO, and in the area of fraud. It should be noted that OLAF will continue fulfilling its mandate in accordance with Regulation 883/2013, as it does today, as regards the investigation of non-fraudulent irregularities (for which the EPPO will

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<sup>21</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'On the protection of the financial interests of the European Union by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers' money', COM(2011) 293 final of 26.5.2011; <http://eur-lex.europa.eu/procedure/EN/200478>



not be competent) in all Member States, as well as regards the investigation of fraudulent irregularities in the Member States not participating in the EPPO.

The EPPO Regulation lays down the main principles for the future relationship between the EPPO and OLAF, requiring that both bodies act in a complementary way to ensure that all available means are used to protect the Union's financial interests. It contains main **provisions on relations with OLAF that have to be reflected in Regulation 883/2013**, and complemented by working arrangements:

- **Article 24**, on the obligation to report to the EPPO "without undue delay" any criminal conduct on which it could exercise its competence. This applies to OLAF as to any other IBOA and competent national authorities.
- **Article 101**, specifically on EPPO-OLAF relations, which stipulates:
  - The high-level principles governing the relationship (close relationship based on mutual cooperation within their respective mandates and on information exchange, to ensure that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO);
  - The principle whereby OLAF shall not open parallel administrative investigations into the same facts which are the object of an EPPO investigation;
  - The manner in which OLAF can "support and complement" the EPPO's activity on request of the latter, in particular by providing information and analysis, facilitating coordination of specific actions of national and EU bodies and conducting complementary administrative investigations;
  - The possibility for the EPPO to refer information to OLAF for it to consider appropriate administrative action in accordance with its mandate.
- **Article 103**, on relations between the EPPO and IBOAs, is also relevant.

**The respective roles and operation of OLAF and of the EPPO need to be clarified, in order to maximise the system's output in terms of fraud prevention and enforcement, ensure effective cooperation and complementarity of action, and avoid any undue duplication of activities.**

### **3.2. EFFECTIVENESS OF OLAF'S INVESTIGATIVE FUNCTION**

#### **Evaluation results**

The evaluation concluded that the Regulation allowed OLAF to deliver concrete results in the protection of the EU budget. The 2013 changes brought clear improvements, as regards the conduct of investigations, cooperation with partners and the rights of persons concerned. At the same time, the evaluation also unveiled a number of shortcomings that impact to different degrees the effectiveness of OLAF investigations. These are linked to various provisions in the Regulation (and their application) concerning the different stages of investigations including selection and opening of cases, the procedure and tools for the conduct of

investigations, the duration, output of and follow-up to investigations. The evaluation pointed also to some shortcomings with a potential to affect effectiveness of investigations in the areas of cooperation and information exchange with different partners and governance. It identified several factors affecting the coherence of the current legal framework in which OLAF operates and which can lead to legal uncertainty. This concerns in particular certain inconsistencies identified between Regulation 883/2013 and Regulations 2185/96<sup>22</sup> and 2988/95<sup>23</sup>, which are the legal base for OLAF's main investigative tool – the on-the-spot checks and inspections.

However, to ensure a timely adoption of the amended Regulation allowing an effective cooperation and complementarity with the EPPO once it is operational, only the most unambiguous evaluation findings should be targeted at this stage. These are essential changes necessary in the short term to **strengthen the framework for OLAF investigations, in order to maintain a strong and fully-functioning OLAF that complements the EPPO's criminal law approach with administrative investigations**, but which do not entail a change to its mandate or powers.

The focus is on areas where, today, the lack of clarity of certain provisions in the current Regulation results in obstacles which hinder OLAF's effective operations in a coherent manner across Member States, regarding, notably, on-the-spot-checks and inspections and access to bank account information. The amendments proposed aim to clarify and reduce ambiguity in the current provisions for the economic operators concerned, for the Member States, and for OLAF, thus enhancing legal certainty.

### **On-the-spot checks and inspections and assistance of national authorities**

As regards the **conduct of investigations**, the evaluation noted that the range of tools and powers available to OLAF remained largely unchanged compared to those available under the framework of Regulations 1073/1999<sup>24</sup> and 1074/1999<sup>25</sup>, even after the adoption of Regulation 883/2013. The evaluation looked also at the adequacy and sufficiency of the tools and powers to deal with fraudulent and non-fraudulent irregularities in the context of current challenges and fraud trends and identified a number of limitations, some of which were already mentioned in the evaluation of the previous legislative framework<sup>26</sup>.

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<sup>22</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>23</sup> Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests; OJ L 312, 23.12.1995, p. 1–4; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995R2988>

<sup>24</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,

<sup>25</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,

<sup>26</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/legalcontent/EN/TXT/?uri=COM:2003:0154:FIN>

OLAF's investigative powers stem from various acts of Union law, including the Regulation. Its main tool is the **on-the-spot check or inspection**, which allows OLAF to access premises and documentation of economic operators in the framework of investigations into suspected fraud, corruption or other illegal conduct affecting the financial interests of the Union. These checks are the centre-piece of OLAF's powers and vitally important to uncover evidence to prove or disprove suspected illegal conduct. OLAF also conducts **digital forensic operations** for the identification, acquisition, imaging, collection, analysis and preservation of digital evidence (from economic operators as well as IBOAs).

Although Regulation 883/2013 and Regulation 2185/96 contain detailed provisions on the conduct of on-the-spot checks and inspections, and of digital forensic operations in the territory of the Member States in the context of those checks, these acts also make reference to **the application of national law**<sup>27</sup>. The current wording of the Regulation leads to uncertainty given the simultaneous reference to Union law, to national law and to the procedural guarantees of the Regulation.

It follows from the evaluation that different interpretations of the relevant provisions (which do not specify concretely the circumstances and extent of the application of national law), and differences in national law, hinder OLAF's ability to conduct its investigations effectively in all Member States, lead to fragmentation in the exercise of OLAF's powers in the Member States, and impact on the treatment of economic operators depending on their location (e.g. participants in the same research project located in different Member States can be investigated to different extents depending on national laws). OLAF's practical experience shows it is often difficult to identify the applicable national laws. Member States are not required either to notify them or adapt them to the specificity of OLAF. At times, national authorities themselves are not sure which laws should apply to OLAF's action. Most Member States do not have a body comparable to OLAF, and national laws are frequently specific to concrete areas of revenue and expenditure or refer to concrete national authorities. This is to the detriment also of investigated persons, who have difficulty identifying on rules they can rely.

The **anti-fraud coordination services (AFCOS)** were created in each Member State to facilitate an effective cooperation and exchange of information, including information of an operational nature, between OLAF and the Member States. The evaluation concludes they were a very positive development in Regulation 883/2013 to foster cooperation between OLAF and national counterparts. However, the evaluation has also identified various instances in the cooperation with national authorities where it was difficult for OLAF to identify the authority competent to cooperate with OLAF or to obtain the necessary assistance.

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<sup>27</sup> OLAF's powers to conduct on-the-spot checks and inspections are set out in Article 3 of Regulation 883/2013 and in Regulation 2185/96. These Regulations provide OLAF with its own power of Union law to conduct controls "subject to the Union law applicable" and "in compliance with [...] the procedural guarantees of Regulation 883/2013". At the same time, both Regulations refer to compliance with applicable national law ("and practices", in Regulation 883/2013).

The **difficulties OLAF faces during the on-the-spot checks and inspections** can be broadly divided into the categories below. The difficulties encountered are often a combination of these categories:

- situations where it is not clear **what national authority is competent to cooperate with OLAF** in the preparatory phase and during the on-the-spot check or inspection;
- situations where it is difficult to **identify an authority to be considered equivalent to OLAF** when the Regulation provides that the rules applicable to national administrative inspectors shall apply to OLAF;
- situations where it is not clear **what national law applies to OLAF or the extent to which OLAF's powers should apply subject to conditions of national law** (e.g. only in the context of assistance by the national authorities or in other instances);
- situations where there is uncertainty concerning the **extent of the duty of national authorities to assist OLAF investigators**, especially in case of resistance of the economic operator concerned.

*Examples of difficulties encountered during on-the spot-checks and inspections, based on concrete cases:*

- Before an on-the-spot check or inspection, OLAF contacted the AFCOS of a Member State to enquire about the national rules applicable and possible assistance during the check. The AFCOS was not able to provide assistance, as based on the applicable national legislation a favourable opinion on the planned on-the-spot check or inspection could not be given (a requirement not foreseen in the Regulation).
- No competent national authority could be identified to assist OLAF unless a parallel criminal investigation was opened.
- A similar issue was encountered in performing on-the-spot check or inspection in another Member State, where OLAF was accompanied by national police officers as observers. However, they could not provide any substantial support in case of resistance of the economic operator concerned since the police had no open investigation concerning this economic operator, which is not a requirement for assistance under Regulation 883/2013.
- An on-the-spot check or inspection was not performed because the AFCOS did not have competence to assist OLAF in the context of an internal investigation.

### **Admissibility of OLAF-collected evidence**

As regards the **follow-up to investigations**, the evaluation pointed to large differences in the follow-up to OLAF recommendations across recipients. The possible causes for recommendations not to be followed included a range of factors, including issues related to the timeliness and quality of OLAF reports, or the discretion enjoyed by the recipients whether to or not to take appropriate action as follow up to the recommendations. However, the most important factor affecting the effectiveness of the follow-up to recommendations identified by the evaluation relates to the rules on the **admissibility of OLAF-collected evidence in national proceedings**. The Regulation provides that OLAF reports constitute admissible evidence in such proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.

The evaluation suggests that in some Member States this rule does not sufficiently ensure the effectiveness of OLAF's activities. Some of the difficulties highlighted above apply in this context too (difficulty to identify the national administrative inspectors to be considered equivalent to OLAF, in Member States where there is no national authority with a mandate equivalent to that of OLAF; differences in the rules applicable across Member States, with impact on the follow-up to transnational cases). In criminal proceedings, in many instances OLAF collected evidence cannot be used and aspects of the investigation have to be repeated to comply with procedural law requirements of criminal investigations.

### **Access to bank account information**

The evaluation concluded that the need for and possibility of better access to bank account information under appropriate conditions, which could be central to uncovering many cases of fraud or irregularity, should be assessed.

In the framework of its investigations, **OLAF can inspect the accounts of the IBOAs**<sup>28</sup>. Such power does not exist explicitly 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 and inspections, OLAF can have access to the bank statements held by economic operators (limited to what is in their possession). To have full access to the relevant bank information, OLAF relies on the duty of cooperation of national competent authorities, which does not refer explicitly to providing bank information. It is dependent on its national counterparts (administrative or judicial bodies) and their own powers under national law to provide bank data to OLAF. Today, this leads to a situation where OLAF has access to banking information in certain Member States but not in others, and to different degrees.

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. This concerns 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.

The need to access bank account information should also be seen in the context of new trends resulting from strengthened rules on money laundering. As it becomes more difficult to operate with high amounts in cash without being identified, **there is a tendency to create more sophisticated financial structures to hide the benefit of fraud**. In this context, without access to bank account information, it is difficult for OLAF to follow complex and sophisticated money flows just by conducting on-the-spot checks and inspections (for instance, the information might not be found in the premises of the operator, or the chain of companies concerned may have ceased to exist when the check takes place). The following

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<sup>28</sup> Article 4 of the Regulation.

examples illustrate how access to banking information can prove decisive to conclude an investigation successfully, and how conversely the absence of such information may be an insurmountable obstacle to uncovering a case of fraud.

***Access to bank account information – examples of OLAF cases where EU fraud or irregularity could be evidenced based on bank account information:***

- In the context of an EU-funded project for the purchase of goods in a third country, some indications were found in communications that an EU economic operator had bribed key persons in the project to win the contract. These indications of corruption grew into serious suspicion when OLAF acquired access to the bank accounts of the economic operator. This allowed OLAF to identify the recipient's bank account details in the third country and to coordinate its ongoing investigative activities with the third country judicial authorities. OLAF was provided access to the bank account of the economic operator by the national judicial authorities who had seized this information.
- An OLAF investigation revealed a fraudulent scheme set up in a third country by the contractor (EU economic operator); during the project implementation, this company used several entities based in the third country as its purported subcontractors to syphon the EU funds from the project and use them for possible payment of bribes to local government officials. OLAF issued a financial recommendation to a Commission service that was not implemented due to the lack of evidence demonstrating the money flow and payment of bribes. Had OLAF been granted with the bank account access, both in the third country and the Member State of origin of the operator, the gap could have been bridged and better results in terms of financial recovery could have been achieved.
- Another case concerned fraud concerning funding by the European Agricultural Fund for Rural Development in a Member State, with the involvement of companies in five other Member States. Thanks to the access to the bank accounts, OLAF was able to uncover a fraud system perpetrated through an inflation of prices up to 400% by a criminal organisation. The access to bank account information was obtained from the national authorities in certain Member State, and in another Member State following an on-the-spot check or inspection. Such information allowed OLAF to identify the transnational fraud scheme put in place by the criminal association, involving also money-laundering and self-laundering. The case led to a financial recommendation of several million EUR.

## **VAT**

The Court of Justice has confirmed on several occasions that **VAT is a financial interest of the Union**<sup>29</sup>. This is now explicitly acknowledged also in EU legislation (Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law). It is therefore part of OLAF's mandate to fight fraud, corruption and any other illegal activity affecting the EU's financial interests.

However, **OLAF rarely carries out investigations into irregularities concerning VAT**. This is the result of several factors. OLAF lacks the instruments available to national

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<sup>29</sup> Most recently see case C-105/14, Taricco.

administrations which operate in this field, such as the possibility to access data collected by Eurofisc or a uniform access to bank account information. The on-the-spot checks and inspections of Regulations 2185/96 and 2988/95 apply only to revenue collected directly on behalf of the European Union, which can be interpreted to exclude VAT. 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>30</sup>.

The evaluation report announced that the legal proposal for the revision of Regulation 883/2013 would consider the clarification of OLAF's mandate and tools as regards VAT. Addressing some of the limitations described would allow OLAF to fulfil its mandate in the area of VAT in support of the Member States and the future EPPO. For example, when it conducts customs investigations or coordination activities, OLAF should be able to deal also with any VAT aspects. This is the case in particular under the so-called customs procedure 42, when goods imported into the EU under this procedure are not declared or are undervalued, and this leads to the evasion of customs duties and VAT at the same time<sup>31</sup>. OLAF can also bring an inter-disciplinary approach and help cooperation between customs and tax administrations, in line with the objective of improving the cooperation and sharing of information between different administrations to fight customs procedure 42 custom fraud. More generally, OLAF obtains relevant VAT information in the context of its investigations (e.g. information on suspicious companies or transactions, new fraud trends, sectors under risks), which could be shared with the Member States and acted on if the appropriate mechanism for such cooperation is put in place.

### **Coordination activities**

The Regulation provides a 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's financial interests<sup>32</sup>. 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**. This results in a lack of legal certainty for OLAF and for the Member States that rely on OLAF's assistance. This is particularly limiting in areas where no other acts of EU law provide for a supporting and coordinating role for OLAF such as, for example, structural funds. In those areas where such provisions do exist (for instance, in the area of customs and intellectual property<sup>33</sup>), the relationship between Regulation 883/2013 and these other legal acts can lead to practical difficulties of application.

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<sup>30</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>31</sup> Customs procedure 42 is a mechanism an EU importer uses in order to obtain a VAT exemption. It is applied when goods imported from outside the EU into a Member State will be transported to another. In such cases, the VAT is due in the latter - the Member State of destination. There is a risk that imports may remain in the Member State of importation without payment of VAT. Imports may be also consumed in the Member State of destination without VAT being collected there.

<sup>32</sup> Article 1(2) of the Regulation.

<sup>33</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

### 3.3. CLARIFICATION AND SIMPLIFICATION

The evaluation identified a number of provisions in the Regulation which could benefit from **clarification or simplification**. The following provisions have been identified in particular.

The evaluation showed that certain aspects surrounding **digital forensic operations** can hinder OLAF's ability to gather digital forensic evidence as part of its investigations. In particular, Article 7 of Regulation 2185/96 enables OLAF (inter alia) to access “computer data” in the framework of on-the-spot checks and inspections. 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, as the current provisions of the Regulation may be interpreted as excluding the access to information stored, for example, in clouds.

The evaluation also concluded that the **rules applicable to internal and external investigations** could be further aligned (where the divergences are not justified) to ensure a more coherent framework for investigations.

In addition, the evaluation identified need to further clarify **the provision of the Regulation on the early transmission of information** to IBOAs to allow for the maximum cooperation where precautionary measures without waiting for the completion of the investigation may be necessary to protect the Union's financial interests.

### 4. OBJECTIVES OF THE INITIATIVE

In response to the issues explained in the previous section, the **overall objective** of the initiative is to **strengthen the protection of the EU's financial interests**.

The **specific objectives** are:

1. To adapt the operation of OLAF to the establishment of the EPPO;
2. To enhance the effectiveness of OLAF's investigative function;
3. To clarify and simplify selected provisions of Regulation 883/2013.

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customs and agricultural matters, OJ L 82, 22.3.1997, pp. 1–16, as last amended by Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015; <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1525005882143&uri=CELEX:01997R0515-20160901>. 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/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0015:0034:en:PDF>.



## 5. STAKEHOLDER CONSULTATION AND OTHER SOURCES OF INFORMATION

### 5.1. STAKEHOLDER CONSULTATION

The stakeholder consultation process accompanying this initiative **complied with the Commission's stakeholder consultation principles and minimum standards taking into account proportionality** as required by the Better Regulation Guidelines<sup>34</sup>. **The results of the stakeholder consultation were fed into this Staff Working Document and into discussions on the proposal to amend the Regulation** and are summarised in Annex 2.

#### 5.1.1. Open public consultation and roadmap

Regulation 883/2013 regulates the conduct of OLAF investigations 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 is needed for the revision. Therefore, **an open public consultation was not carried out**. However, **the roadmap<sup>35</sup> for the initiative stayed open for 4 weeks to public feedback** (no feedback was received).

#### 5.1.2. Targeted stakeholder consultation

In addition, a **targeted stakeholder consultation** was carried out through a **survey of relevant authorities in Member States** (AFCOS, judicial and enforcement authorities, managing authorities) and **EU IBOAs**. In total 44 replies were received from 21 different Member States and 28 from IBOAs<sup>36</sup>. The results of the surveys are reported in the following sections and presented in more detail in Annex 2.

**A dedicated expert meeting** was also organised with representatives of the Network of Associations for European Criminal Law and the Protection of the Financial Interests of the EU, which represents academics and practitioners in the area of the protection of the Union's financial interests, and the European Criminal Bar Association. The workshop was dedicated to the discussion of three distinct topics – adaptation to the establishment of the EPPO; enhancing effectiveness of OLAF's investigative function as regards investigative powers and their enforcement; and admissibility of OLAF reports in national proceedings. Detailed explanation is in Annex 2.

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<sup>34</sup> Better Regulation Guidelines; SWD (2017) 350; [https://ec.europa.eu/info/files/better-regulation-guidelines\\_en](https://ec.europa.eu/info/files/better-regulation-guidelines_en)

<sup>35</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5676334\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5676334_en)

<sup>36</sup> Out of the 28 responses received from IBOAs, 10 were from different European Commission services.

## 5.2. OTHER SOURCES OF INFORMATION

In addition to the results of the targeted consultation for the proposal, this document is based on:

- Results of the evaluation of the application of Regulation 883/2013 (which comprised also a wide consultation of stakeholders);
- Supervisory Committee Opinion 2/2017 accompanying the Commission evaluation report on the application of Regulation 883/2013;
- OLAF internal data related to investigations;
- Data collection from OLAF staff in investigative and analytical/investigative support functions;
- Desk research of court rulings with a relevance to OLAF, Council proceedings, parliamentary resolutions, academic studies and other relevant documents.

## 6. SOLUTIONS EXPLAINED

This section provides the reasoning for the suggested modifications in the Regulation reflecting the issues explained above. Annex 2 provides a detailed overview of the targeted consultation results in relation to each of these topics.

### 6.1. EPPO-OLAF

Provisions to regulate the relationship between the EPPO and OLAF already exist in the EPPO Regulation. They are based on the principles of close cooperation, exchange of information, complementarity and non-duplication. The proposal introduces several new provisions (Articles 12c-12g) to reflect those principles of the EPPO Regulation and acknowledges the creation of the EPPO in several current provisions of Regulation 883/2013. The changes are limited to what is necessary to render the EPPO Regulation operational as regards the cooperation EPPO-OLAF.

#### 6.1.1. General principles and cooperation mechanisms

The **general principles** applying to the relationship between OLAF and the EPPO are set out in Articles 1(4a) and 12g. The relationship between OLAF and the EPPO should be close, as both bodies are entrusted with the mandate to protect the financial interests of the Union in their respective remit. The proposal furthermore mirrors the principle of complementarity set out in the EPPO Regulation, whereby the combined action of OLAF and the EPPO should ensure that all available means are used to protect the Union budget.

**Working arrangements** are provided for as they will be necessary to specify the concrete modalities of cooperation and exchange of information (Article 12g(1)). The exchange of information at the stage of receipt and verification of incoming allegations by both offices will be of particular importance in the drawing up of the arrangements: both offices will

receive allegations of suspected fraud; both will need to consider possible action in accordance with their mandates; OLAF will need to report to the EPPO if it has a suspicion of a criminal offence and the EPPO may decide to refer to OLAF cases which it dismisses. In such circumstances, the possibility of a continuous dialogue between the two at their case opening stages should facilitate the necessary decisions on the most appropriate course of action to protect the Union's financial interests.

The proposal also contains a provision on **indirect access of OLAF to the EPPO's case management system**, through a hit/no hit mechanism (Article 12g(2)). This will allow to obtain an initial indication that the EPPO may be conducting a criminal investigation, allowing OLAF to trigger the coordination mechanisms outlined below. The provision mirrors that contained in Article 101(5) of the EPPO Regulation, which concerns the indirect access of the EPPO to OLAF's case management system.

### **6.1.2. Obligation to report to the EPPO**

Article 24 of the EPPO Regulation imposes on OLAF (as on all IBOAs and competent authorities of the Member States) the **obligation to report to the EPPO without undue delay any conduct in respect of which the EPPO may exercise its competence**. Article 12c of the proposal contains provisions specifying the concrete application of this obligation to the activity of OLAF.

The EPPO Regulation, in Article 24(4), specifies the **information that should be reported**. The report should contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification and any available information about potential victims, suspects and any other involved persons. This minimum content is reproduced in the proposed new Article 12c(2).

The reporting by OLAF may arise at different moments, starting with the reception of initial information up to the moment when the possible criminal conduct is discovered in the course of the actual administrative investigation (which OLAF can open on suspicion of a mere administrative irregularity). If the initial information received by OLAF points straightaway to possible criminal conduct and is already sufficiently substantiated in the sense of Article 24(4) of the EPPO Regulation, it will be immediately reported to the EPPO, in order to allow the EPPO to decide whether to open an investigation and consider all necessary initial measures to preserve the effectiveness of its enquiry.

In certain circumstances, however, it may be necessary to conduct a **preliminary evaluation of allegations** (Article 12c(3)) in order to assess whether the information supplied to the EPPO is sufficiently substantiated, thus contributing to the effectiveness of the EPPO's own case selection process. Any preliminary evaluation should be carried out expeditiously and through procedures which do not risk jeopardising a possible future criminal investigation.

OLAF, by virtue of its mandate as well as its experience, is ideally placed to conduct this preliminary evaluation using its expertise and operative tools in investigations for the

protection of the EU's financial interests. This special position is recognized by the EPPO Regulation when it indicates (recital 51) that OLAF may be asked by other IBOAs to perform this preliminary evaluation on their behalf. A corresponding provision has been added in the amendment of Regulation 883/2013 (Article 12c(5)). Results of the targeted consultation as presented in Annex 2 illustrate that half of the IBOAs' respondents welcomed the possibility to turn to OLAF for the preliminary evaluation on their behalf.

Following this report, if the EPPO opens an investigation on the basis of such information, the opening or continuation by OLAF of an investigation into the same facts, other than on request of the EPPO, will require notification of this intention to the EPPO which may object when necessary to preserve its own investigative activity (Article 12c(4); see section 6.1.3 below).

### **6.1.3. Non-duplication of investigations and specific situations of complementary investigations by OLAF**

The EPPO Regulation sets out in Article 101(2) a **non-duplication rule between investigations of the EPPO and of OLAF**. According to this rule, OLAF shall not open a parallel investigation into the same facts which are the object of an investigation by the EPPO; the EPPO may however request support from OLAF in the course of a specific investigation (Article 101(3) of the EPPO Regulation; see section 6.1.4). The non-duplication rule is mirrored in Article 12d of the proposal. The provision also establishes a mechanism for OLAF to consult the EPPO if necessary to ascertain whether it is conducting an investigation.

The EPPO Regulation (Article 101(1)) further specifies that all available means should be used to protect the Union's financial interests and that the non-duplication rule should be without prejudice to the power of OLAF to start an administrative investigation on its own initiative, in close consultation with the EPPO (recital 103).

Indeed, in certain cases, **OLAF's administrative investigations focused at ensuring recovery, or at preparing the ground for administrative or disciplinary action, maintain their specific added value** to the benefit of the overall protection of the Union budget. They can usefully complement the EPPO's activity. Examples include the need to recover EU funds when there is a risk of time-barring<sup>37</sup>, or when the amounts at stake are very high, or the need to avoid further expenditure in risk situations through administrative measures.

OLAF's experience illustrates the importance of coordinated and complementary action through criminal and administrative investigations. Examples illustrating the benefits of this approach can be found already nowadays in situations where OLAF conducts administrative investigations in parallel to the national criminal investigations.

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<sup>37</sup> For example, time-barring kicks-in fast in relation to customs duties (3 years). There are similar temporal deadlines on the expenditure side (4 years or less for national authorities and beneficiaries to conserve documents).

***Examples of added value OLAF investigation carried out in parallel to criminal proceedings:***

- OLAF opened an investigation upon allegations for conflict of interest, fraud and breach of public procurement rules supposedly perpetrated in the framework of an EU funded project in a Member State. Before OLAF opened its investigation, a criminal investigation had existed and been dismissed at national level. Nevertheless, following the receipt of OLAF's Final Report the national judicial authorities re-opened their case. Currently, the national criminal investigation is still ongoing. On the basis of its administrative findings OLAF recommended financial recovery for over a million EUR.
- As a result of another administrative investigation, OLAF identified widespread irregularities in the managing of agricultural funds in a Member State and closed its case with recommendation for financial recovery and for possible judicial action. The national judicial authorities eventually dismissed the file as the crime could not be substantiated; however, on the basis of OLAF's administrative findings a financial correction for over EUR 150 million was launched. The recovery would not have been possible if only a criminal investigation, which resulted in a dismissal, would have been conducted.
- OLAF opened an investigation into allegations of conflict of interest, breach of public procurement rules and misappropriation of EU funds supposedly perpetrated by the beneficiary of an EU funded project. OLAF's investigation started after a national criminal investigation had already started. In the course of OLAF's investigation it exchanged information and documentation with the national judicial authorities. The latter requested OLAF's assistance with regard to the examination of particular aspects of the alleged fraud and for providing clarification of the applicable eligibility rules. While the national investigation is currently still continuing to determine if criminal acts were committed at national level, OLAF already finalised its administrative investigation and on the basis of its results recommended financial recovery of over EUR 500 000.

To achieve this result, the proposal introduces in Regulation 883/2013 a new Article 12f which **allows OLAF, in duly justified cases, to open or carry on an administrative investigation to complement a criminal investigation** being carried out by the EPPO.

**To allow the EPPO to protect the integrity of its investigations**, OLAF should inform the EPPO in writing of this decision and the EPPO should have a period of 30 days to object to the opening or continuation of such complementary investigation by OLAF, or to certain investigative measures, if they entail the risk of prejudice to the ongoing criminal investigation: for example, EPPO may request that OLAF does not carry out certain specific activities (e.g. an on-the spot check or inspection) which may put the suspected person or persons on notice. Furthermore, even if no objections were initially raised by the EPPO in respect to the decision of OLAF to carry out a complementary investigation, this may be done at any stage in the later course of the proceedings, should the need arise.

Lastly, Article 12f introduces a general obligation on OLAF to conduct any complementary investigation in close consultation with the EPPO, in conformity with the EPPO Regulation.

This approach is coherent with the Commission's intention to devise a system of complementary criminal and administrative investigations, already outlined under Section

3.1. It is furthermore supported by the findings of the stakeholder consultation, as set out in Annex 2.

#### **6.1.4. OLAF support to the EPPO**

The proposal sets out, in a new Article 12e, specific procedural rules applicable to requests from the EPPO to OLAF to support or complement the EPPO's activity in accordance with Article 101(3) of the EPPO Regulation. The proposal further details the content of such requests and the reporting and follow-up by OLAF.

In addition to opening administrative investigations on its own initiative, **OLAF may be requested to support or complement a criminal investigation by the EPPO**. The EPPO Regulation makes reference to several types of support or complementary measures (Article 101(3)) which are clearly framed within OLAF's administrative investigation powers: information, expertise and analysis; coordination of specific actions of the competent national administrative authorities and EU bodies; and administrative investigations. The results of the targeted consultation of stakeholders presented in Annex 2 illustrate support to these measures.

OLAF would perform these operations acting within the limits of its **administrative powers and within its framework of procedural guarantees**; it would act as independent administrative authority and not as part of a criminal investigation. The EPPO Regulation, indeed, specifies that support from OLAF to the EPPO should always be carried out in accordance with the OLAF Regulation (recital 104).

#### **6.1.5. Other provisions linked to EPPO-OLAF cooperation**

Several adaptations of existing provisions of Regulation 883/2013 are proposed, in order to reflect the establishment of the EPPO.

The **obligation for IBOAs to report to OLAF** information related to possible cases of fraud, corruption or other illegal activities affecting the financial interests of the Union, set out in Article 8(1), has been specified for those cases when that information has to be reported to the EPPO in conformity with Article 24 of the EPPO Regulation. In such cases, to avoid unnecessary burden, IBOAs may discharge their obligation towards OLAF by forwarding to it a copy of the report submitted to the EPPO.

The scope of application of the provisions on the **opportunity to comment of the person concerned** when OLAF transmits information to a judicial authority (Article 9(4)), on the content of **OLAF's final report** (Article 11) and on **information to the Supervisory Committee** of cases in which information has been transmitted to judicial authorities (Article 17(5)) has been adapted to the establishment of the EPPO.

The provision on the **exchange of views with the institutions** (Article 16(1)) has been amended to take into account the creation of the EPPO, including it in the list of bodies and agencies which may in specific cases participate in the exchange of views.

Lastly, the provision concerning the power of the Director-General to adopt **guidelines on investigation procedures** (Article 17 (8)) has been complemented with a reference to such guidelines concerning relations with the EPPO.

## **6.2. ENHANCING THE EFFECTIVENESS OF OLAF INVESTIGATIVE FUNCTION**

Considering the need for the amended Regulation to be in force by the time the EPPO becomes operational, **the modifications proposed are targeted** to the key issues as explained in section 3.2.

The amendments proposed aim in particular to clarify and reduce ambiguity in the current provisions and allow OLAF to operate in an effective and coherent manner in all its investigations. This is directly related to the objective of a high level of protection of the budget across the Union.

### **6.2.1. Conduct of on-the-spot checks and inspections and assistance of national competent authorities**

As explained in section 3.2, the evaluation has shown that the extent to which Regulation 883/2013 makes national law applicable is not completely clear, which hinders the effectiveness of investigations and leads to fragmentation in the exercise of OLAF's powers in the Member States. The proposal aims at removing ambiguities by better framing the references to national law to ensure an effective and more coherent application of OLAF's powers to conduct on-the-spot-checks and inspections in the Member States, without however changing the powers available to OLAF or substantially amending the way the Regulation operates in relation to the Member States. It also aims at further clarifying the framework of procedural guarantees applicable in the context of on-the-spot-checks and inspections.

To this end, Article 3 concerning external investigations, which includes the provisions of Regulation 883/2013 on conduct on-the-spot-checks and inspections, has been revised as follows:

- The conduct by OLAF of **conduct on-the-spot-checks and inspections, in situations where the economic operator submits to the check and the assistance of the Member States is not necessary, is subject to Union law alone** (Regulations 883/2013 and 2185/1996, Article 3(2)). In such cases, the references to the application of national law in Regulations 2988/1995 and 2185/1996 should not apply (Article 3(7)).

- A **duty to cooperate of economic operators** in external investigations is introduced in the Regulation (Article 3(3)). This reflects the duty already contained in Regulation 2185/1996 as regards cooperation in on-the-spot-checks and inspections, as well as the obligation on beneficiaries of EU funds to fully cooperate in the protection of the Union's financial interests, including OLAF investigations (Article 129 of the Financial Regulation<sup>38</sup>).
- To ensure **transparency**, when carrying out on-the-spot checks and inspections OLAF should provide economic operators with appropriate information on their duty to cooperate and the consequences of a refusal to do so, and the procedure applicable to the check, including the applicable procedural safeguards (Article 3(4)).
- In the situations where the check is carried out in accordance with Union law, this includes the relevant **provisions concerning procedural guarantees**, as laid down in Regulations 883/2013 and 2185/1996 and resulting also from the Charter of Fundamental Rights of the Union. Several clarifications of the applicable procedural guarantees in the specific context of on-the-spot checks and inspections have been introduced in Article 3(5) (the right against self-incrimination, the possibility to use a language of the Member State where the check is performed, and to be assisted by a person of choice, including legal counsel).
- On the other hand, **where the economic operator resists the check and the assistance of national authorities is necessary, this assistance is provided in accordance with national law**, including applicable procedural guarantees (Article 3(7)), in the context of the Member States' general duty to ensure that OLAF's action is effective. The same principle is reflected in the general duty of Member States to assist OLAF in its investigations (Article 7(3)).

The clarification of the instances where Union law and national law applies – depending on whether or not the operator concerned resists the check and the assistance of national authorities is necessary - corresponds to a known model of administrative investigations by Union bodies. In the investigations conducted by the Commission's Directorate-General for Competition, the European Securities and Markets Authority and the European Central Bank, checks are a matter of EU law, and national law is only relevant in the case of assistance by national authorities.

This approach has also now been confirmed by the General Court (First Chamber) as applying in OLAF investigations in the context of Regulation 883/2013 and Regulation 2185/1996 as they stand today. In its ruling of 3 May 2018 in case T-48/16, *Sigma Orionis SA v European Commission*<sup>39</sup>, the Court has ruled that, in the absence of opposition by the economic operator, on-the-spot checks and inspections are conducted by OLAF on the basis of Regulation 883/2013 and Regulation 2185/1996, and of the written authorisation of the Director-General of OLAF. Union law supersedes national law when a matter is regulated by

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<sup>38</sup> Article 129 will be inserted in Regulation (EU) 2018/XX of the European Parliament and the Council (new Financial Regulation), on which a political agreement has been reached and which is expected to be adopted in the coming months.

<sup>39</sup> Not yet reported. See paragraphs 73-118.



Regulations 883/2013 or 2185/1996. Moreover, the judgment finds that the provisions (in Regulation 2185/1996) concerning the possible opposition of the economic operator concerned to a check do not entail the existence of a 'right to oppose' but simply provide for the consequence that the check may be imposed on them through the assistance of national authorities (on the basis of national law).

These changes concerning the extent of application of national law do not affect the procedural guarantees applicable in the framework of OLAF investigations. Already today, OLAF is bound to apply the procedural guarantees of Regulation 883/2013, Regulation 2185/96 and those contained in the Charter (see box below). In addition, procedural guarantees of national law also apply in cases where the economic operator resists an investigative measure by OLAF and national competent authorities assist OLAF to counter that opposition.

This set of provisions and controls sets a standard for the safeguard of procedural guarantees and fundamental rights of persons involved in OLAF investigations that is appropriate and in line with the fact that OLAF conducts administrative investigations using administrative powers. Moreover, OLAF investigations are completed by a report and recommendations that are followed up, where appropriate, by other authorities. Where such other authorities prepare a decision affecting the legal position of the persons concerned, further procedural rights and guarantees apply in accordance with the applicable legal framework.

The **duties of Member States authorities to exchange information with OLAF** are also addressed in the proposal, with modifications proposed to Articles 8(2) and (3) and 12(3) in order to ensure a consistent approach throughout the Regulation as regards the references to national law.

***Current legal framework of procedural safeguards in OLAF investigations:***

- Rights of persons involved are protected in the framework of OLAF investigations by provisions on procedural guarantees in Regulation 883/2013, as well as in Regulation 2185/1996 applicable to on-the-spot-checks and inspections. In addition, OLAF must ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights of the European Union.
- **Article 9 of Regulation 883/2013 on procedural guarantees** includes:
  - the duty of OLAF to seek evidence for an against the person concerned,
  - the right to an objective and impartial investigation,
  - the right to the presumption of innocence and to avoid self-incrimination,
  - the right of persons concerned and witnesses to prior notice before being interviewed/heard,
  - for persons concerned, the right to comment on the facts of the case once the investigation has been completed and before conclusions are drawn up, and the duty of OLAF that the final investigation report makes reference to any such comments,

- for witnesses, the right that an interview is ended and to be informed of her/his rights if evidence emerges that a witness may be a person concerned,
  - the right of persons interviewed to use any of the official languages of the institutions of the Union (officials or other servants of the Union may be required to use an official language of the institutions of which they have a thorough knowledge) and to approve or make comments on the record of the interview; for persons concerned, these are complemented by the right to be assisted by a person of the individual's choice and to receive a copy of the record of the interview,
  - the right of officials, other servants, members of a Union institution or body, head of office or agency, or staff members to be informed that an investigation reveals they may be a person concerned by an investigation, and the right to comment where OLAF informs national authorities before opening or during an internal investigation.
- This provision is complemented by provisions on confidentiality, professional secrecy and data protection (Article 10). OLAF is also subject to Regulation 45/2001 concerning **data protection**, and to Regulation 1049/2001<sup>40</sup> on public access to documents. In addition, for on-the-spot-checks and inspections, Regulation 2185/96 provides itself for the respect of fundamental rights, professional secrecy and protection of personal data (recital 12).
  - The procedural guarantees are underpinned by OLAF **internal and external controls**. Internally, OLAF has put in place a **legality check** of the investigative activities in accordance with Article 17(7) of the Regulation. This translates in practice in a system which includes the review and verification of legality (including respect of procedural guarantees and fundamental rights), proportionality and necessity of the investigative activities, prior to their conduct, and overall review of final reports. The legality check is carried out by the Investigation Selection and Review Unit, a dedicated, specialised unit reporting directly to OLAF's Director-General. The opinions of the Investigation Selection and Review Unit are submitted to OLAF's Director-General for him to make a decision or to authorise an investigative act (a **written authorisation** issued in accordance with Article 7(2) is necessary for the carrying out of the investigative tasks).
  - The authority required corresponds to EU law standards in other areas. It has to set out:
    - The identity and capacity of the investigating staff,
    - The subject matter and purpose of the investigation,
    - The legal bases for conducting the investigation and the investigative powers stemming from those bases.
  - If the economic operator opposes the check, OLAF may request the national authorities to assist it – such assistance will be governed by national law and may be subject to a

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<sup>40</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents; OJ L 145, 31.5.2001, p. 43–48; <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523972761716&uri=CELEX:32001R1049>

judicial authorisation (if required by national law). An equivalent approach has been used in other areas and has been confirmed by the EU courts as compliant with fundamental rights.

- Any person affected by an investigation may address a complaint directly to OLAF in the framework of an internal **complaint procedure**.

As regards the **external controls**, the Supervisory Committee monitors developments concerning the application of procedural guarantees in OLAF investigations in accordance with Article 15(1) of the Regulation. 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.

### 6.2.2. Access to bank account information

To ensure that OLAF has access to bank account information to ensure the effectiveness of its investigations across Member States, the proposal provides (Article 7(3)) that the Member States' **duty to assist OLAF** in the conduct of its investigations (already enshrined in Regulation 883/2013) should include the transmission of certain bank account information. The targeted consultation showed support for such an indirect access by OLAF (via national competent authorities), over no access or direct access. This in practice means that the national authorities will act in compliance with national law, as in other instances of assistance by Member States to OLAF, including as regards any applicable procedural steps or guarantees for the person concerned.

OLAF should be provided with a set of **information on account holders** held by central bank and payment account registers or automated retrieval mechanisms established by Member States pursuant to the Anti-Money Laundering Directive<sup>41</sup> as well as, when strictly necessary for the purpose of the investigation, the **record of transactions**. This cooperation could take place through the Financial Intelligence Units established in the Member States, given their relevant mandate in this field, without prejudice to the cooperation with other authorities which may access such information and be in a position to assist OLAF in the Member States.

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<sup>41</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC; OJ L 141, 5.6.2015, p. 73-117; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>.

### 6.2.3. VAT

The amendments proposed aim at providing the necessary clarifications to Regulation 883/2013 to allow OLAF to provide the support and assistance needed to Member States and to the EPPO in the context of the fight against VAT fraud.

To remove any ambiguities about OLAF investigative powers, Article 3(1) is clarified to ensure that **on-the-spot checks and inspections** are available to OLAF in all areas of its mandate, including VAT.

In addition, to allow for an efficient cooperation with Member States, the proposal enables OLAF to **exchange information with the Eurofisc network** established by Regulation 904/2010 (Article 12(5)). This reflects the provision introduced in the Commission proposal to amend Regulation 904/2010, which provides a legal base enabling the transmission by Eurofisc of information to OLAF. This will allow OLAF and Eurofisc to cross check the information obtained in the context of their respective activities, such as information on suspicious economic operators or fraud trends.

### 6.2.4. Admissibility of OLAF-collected evidence in national proceedings

To clarify the rules on the use of OLAF reports and to improve follow up to OLAF recommendations in the Member States, the proposal makes a distinction between different situations (Article 11(2)). On the one hand, the proposal keeps the principle of equivalence to the rules applicable to administrative reports drawn up by national administrative inspectors in the case of **national criminal proceedings**. National law as regards the use of reports of administrative inspectors in criminal proceedings varies and it is appropriate that the conditions of national law apply in the context of the criminal law procedure. On the other hand, the proposal introduces a principle of admissibility of OLAF reports in **administrative proceedings and in judicial proceedings of administrative, civil and commercial nature in the Member States**. In such cases, the reports should only be subject to a verification of authenticity. Finally, the proposal clarifies the admissibility of the reports in **administrative and judicial proceedings at Union level**.

### 6.2.5. Anti-fraud coordination services (AFCOS)

The evaluation acknowledged the positive impact of the creation of the AFCOS, while identifying various instances in the cooperation with national authorities where it was difficult for OLAF to identify the authority competent to cooperate with OLAF or to obtain the necessary assistance.

The proposal addresses this issue inter alia by further clarifying the role of the AFCOS in the Regulation. The relevant provision is amended to spell out clearly that the **AFCOS should be able to provide, obtain or coordinate the necessary assistance to OLAF to carry out its tasks effectively, at all stages before, during or at the end of investigation**. Making more

explicit the minimum requirements for AFCOS was requested by a significant number of national respondents in the targeted consultation (see Annex 2). In accordance with the principle of subsidiarity and the results of the consultation, the proposal leaves for the decision of each Member State the organisation and the actual powers of the AFCOS. Member States can therefore decide whether to give the AFCOS operational powers, or else a coordination role, as long as they are endowed with the necessary tools to ensure that the necessary assistance is provided to OLAF in their Member State.

Furthermore, a provision is made for the possibility for OLAF to request the assistance of the **AFCOS in the context of coordination activities, as well as for the AFCOS to cooperate among themselves**, in order to further reinforce the available mechanisms for cooperation in the fight against fraud.

Given that the role of the AFCOS is relevant not only in **external but also in internal investigations** (as in both types of investigations OLAF may need to conduct investigative activities in the territory of the Member States), the relevant provision has been moved from Article 3 on external investigations to a new Article 12a on AFCOS.

#### **6.2.6. Coordination activities**

The duty of OLAF to provide the Member States with assistance in order to coordinate their action for the protection of the financial interests of the Union is a key element of its mandate to support cross-border cooperation among the Member States. To address the risk of legal uncertainty in the absence of more specific provisions, as identified, by the evaluation, the proposal introduces a **new provision on coordination activities** (Article 12b). It specifies the coordination activities that OLAF can conduct, in relation to the collection, analysis and exchange of information in this framework, including when OLAF is participating in joint investigation teams.

### **6.3. CLARIFICATION AND SIMPLIFICATION**

To bring the relevant provisions of the Regulation concerning the conduct of **digital forensic operations** up to date with technological progress, Article 3 on external investigations and Article 4 on internal investigations now specify that in the course of an investigation OLAF may have access to any relevant information 'irrespective of the medium on which it is stored' by IBOAs.

The amendments to Articles 11(3) and 12(1) further increase **coherence of the rules on internal and external investigations**.

The evaluation identified scope to clarify cooperation with IBOAs, for the purposes of the early transmission of information to OLAF where **precautionary measures** may be necessary. Article 7(6) gives the IBOAs the possibility to consult OLAF at any time with a view to deciding on any appropriate precautionary measures, including measures for the safeguarding of evidence.

## ANNEXES:

### **Annex 1: Procedural information**

This annex provides information of the procedure and timeline in the preparation of the proposal.

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

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

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

An Inter-Service Steering Group (ISSG) was set up to support the development of the proposal and this Staff Working Document, including also stakeholder consultation process. The ISSG was composed of the Secretariat-General of the Commission, the Legal Service, the Investigation and Disciplinary Office of the Commission (part of the Directorate-General for Human Resources and Security), the Directorate-General for Justice and Consumers and the Directorate-General for Budget. The ISSG was consulted at key steps of the process and its comments were reflected both in the proposal and the Staff Working Document. This covered in particular a roadmap for the initiative, stakeholder consultation strategy, questionnaires for the stakeholder consultation and different drafts of the provisions subject to the amendment. The work of the ISSG was particularly important as all the preparatory work was carried out internally by the Commission services (without any support from an external contractor).

The roadmap<sup>42</sup> for the amendment of Regulation 883/2013 set the initiative in a policy context, indicated the objectives of the initiative, outlined its scope and explained the preparatory process including the stakeholder consultation. The roadmap was published for feedback between 21 November and 19 December 2017 once agreed with the ISSG. No feedback was received.

The stakeholder consultation strategy was agreed with the ISSG early in the process. The consultation strategy outlined which stakeholders would be consulted for the initiative, on what topics and by what means. The consultation strategy was published on a dedicated Europa website<sup>43</sup>. A detailed description of the stakeholder consultation is provided in Annex 2.

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<sup>42</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5676334\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5676334_en)

<sup>43</sup> [https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation\\_en](https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation_en)

### A1.3 Timetable:

Table A1.1: Timetable

Date	Description
06/10/2017	Establishment of the Steering Group
27/10/2017	1 <sup>st</sup> ISSG Meeting: Roadmap; Consultation strategy
21/10/2017	Roadmap published for feedback
04/12/2017	2 <sup>nd</sup> ISSG Meeting: Concept papers for the stakeholder consultation; Draft questionnaires for the stakeholder consultation surveys
14/12/2017	Launch of the survey of Member States' authorities
15/12/2017	Workshop with lawyers' associations
19/12/2017	End of the feedback period on the roadmap
21/12/2017	Launch of the survey of IBOAs
25/01/2018	1 <sup>st</sup> Drafting Meeting of the ISSG
04/02/2018	Closure of the surveys
20/02/2018	2 <sup>nd</sup> Drafting Meeting of the ISSG
22/02/2018	3 <sup>rd</sup> Drafting Meeting of the ISSG
26/02/2018	4 <sup>th</sup> Drafting Meeting of ISSG
06/03/2018	5 <sup>th</sup> Drafting Meeting of ISSG
23/03/2018	Inter-service consultation – launch
05/04/2018	Inter-service consultation – meeting
17/04/2018	Inter-service consultation – closure

Source: OLAF

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

An **impact assessment was not considered necessary and was not carried out**. It was replaced by this analytical staff working document supported by an extensive use of the evaluation report, external studies and other sources, and the results of the consultations mentioned above.

Given the scope of the Regulation and the well-defined group of stakeholders, a **targeted stakeholder consultation** was considered as an appropriate and proportional means of consultation rather than an open public consultation.

## Annex 2: Synopsis report of stakeholder consultation

This annex provides a synopsis of the stakeholder consultation that was carried out for the proposal to amend Regulation 883/2013. 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>44</sup>.

The stakeholder consultation addressed a broad range of issues, based on the findings of the evaluation of the application of Regulation 883/2013. Considering the targeted nature of this proposal, not all issues have been included in the proposed amendments. However, the consultation results could be used for the assessment of future proposals and for non-legislative measures.

The stakeholder consultation was carried out in accordance with Regulation 45/2001<sup>45</sup>. Information on data protection was also available on a dedicated OLAF Europa website<sup>46</sup>.

The stakeholder consultation was carried out in English. Answers in other EU languages were accepted.

**The results of the stakeholder consultation have fed the preparation of this staff working document and the revision of the relevant provisions of the Regulation.**

### A2.1 Feedback on evaluation roadmap

The roadmap was opened for 4 weeks between 21 November 2017 and 19 December 2017 for feedback from stakeholders. **No feedback was received.**

### 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 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 preparation of the proposal and/or the accompanying Staff Working Document. 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.

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<sup>44</sup> Better Regulation Guidelines; SWD (2017) 350; [https://ec.europa.eu/info/files/better-regulation-guidelines\\_en](https://ec.europa.eu/info/files/better-regulation-guidelines_en)

<sup>45</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data; OJ L 8, 12.1.2001, p. 1–22; <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R0045>

<sup>46</sup> [https://ec.europa.eu/anti-fraud/olaf-and-you/data-protection\\_en](https://ec.europa.eu/anti-fraud/olaf-and-you/data-protection_en)



### **A2.3 Targeted consultation**

A targeted consultation was carried out in the form of a survey of relevant Member State authorities, a survey of EU IBOAs and a dedicated expert meeting that brought together academics and practitioners in the area of the protection of the Union's financial interests.

#### **A2.3.1 Survey of Member State authorities – overview of respondents**

To reach out to the relevant Member State authorities, OLAF approached the Anti-Fraud Coordination Services (AFCOS) via email with a request not only to fill in the questionnaire, but also to further disseminate the survey link to the relevant national judicial, enforcement and managing authorities. The initial consultation period was planned between 14 December 2017 and 25 January 2018. It was prolonged until 4 February 2018. In total 44 replies were received from 21 Member States (in several Member States, different authorities replied to the questionnaire), no response was received from any authority in 7 Member States<sup>47</sup>.

The survey also offered the opportunity to upload documents to express further views on the amendment of the Regulation. This option was taken by only one Member State respondent. One other Member State respondent provided a position without filling in the survey. Two IBOAs took part in the Member States' survey. Table A2.1 provides an overview of the national authorities that participated.

From the total number of 44 replies, 19 responded on behalf of AFCOS, 6 on behalf of an authority managing and/or implementing EU funds, 2 from authorities investigating fraud and corruption in relation to EU funds, 2 from authorities responsible for the development of anti-fraud policies and strategies, 4 on behalf of judicial authorities and 3 on behalf of an audit body and 8 survey replies were from other organisations.

#### **A2.3.2 Survey of IBOAs – overview of respondents**

A survey among the EU IBOAs was initially planned to be open for the period between 21 December 2017 and 28 January 2018. It was prolonged until 4 February 2018. Commission services and executive agencies were invited to the online survey through the Fraud Prevention and Detection Network (FPDnet) contacts' list. Agencies that are not part of the FPDnet were approached via the Inter-Agency Legal Network (ILAN) list<sup>48</sup> and other EU IBOAs<sup>49</sup> were contacted via usual OLAF's contact points.

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<sup>47</sup> No authorities from the following Member States participated in the stakeholder consultation survey: Belgium, Denmark, Hungary, Italy, Ireland, Malta and United Kingdom.

<sup>48</sup> This concerned the following agencies: ACER, CEDEFOP, CPVO, EASA, EASO, EBA, ECDC, ECHA, ECSEL JU, EDA, EFSA, EIGE, EIT, EMA, EMCDDA, ERA, ETF, EU-OSHA, Eurofound, F4E, FRA, FRONTEX, GSA, IAS, IMI JU, OHIM, Eurojust, Europol

<sup>49</sup> This concerned the following IBOAs: EESC, ECA, EDPS, ECB, EIB, EU Ombudsman, CJEU, CoR, the European Parliament and the Council.

From the total of 28 replies received from the IBOAs, 14 came from different decentralised agencies<sup>50</sup> and 10 from different services of the European Commission. In addition, replies were received from Eurojust, the European Ombudsman, and the European Committee of the Regions. The European Data Protection Supervisor (EDPS) and one Commission service informed that they had no opinion to offer to answer the survey questions. The EDPS did not take part in the online survey and submitted its views separately in writing. Table A2.2 provides an overview of the IBOAs that participated in the survey.

*Table A2.1: Overview of Member States respondents*

<b>MS</b>		<b>name of the organisation</b>
1	Austria	Ministry of Finance
2	Austria	Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft
3	Austria	Federal Ministry of Finance
4	Bulgaria	Ministry of Labour and Social Policy
5	Bulgaria <sup>51</sup>	AFCOS
6	Bulgaria	Ministry of the Regional Development and Public Works Directorate General “Strategic Planning and Regional Development Programmes”, MA of the Operational Programme "Regions in Growth"
7	Croatia	Service for Combating Irregularities and Fraud
8	Cyprus	Treasury of the Republic of Cyprus
9	Czech Republic	Ministry of Finance
10	Czech Republic	General Prosecutor’s Office
11	Czech Republic	Ministry of Finance
12	Estonia	Agricultural Registers and Information Board
13	Estonia	Ministry of Finance
14	Finland	Ministry of Finance
15	Finland	National Police Board
16	France	Secrétaire général des affaires européennes
17	Germany	Federal Ministry of Justice and Consumer Protection
18	Greece	Ministry of Finance, Financial & Economic Crime Unit
19	Greece	AFCOS
20	Greece	Certifying authority
21	Greece	Ministry of Finance, State General Accounting Office, General Directorate of Financial Audits Planning and Evaluation of Audits Directorate
22	Latvia	Ministry of Finance, AFCOS and Audit Authority
23	Latvia	State Revenue Service
24	Latvia	Ministry of Justice of the Republic of Latvia
25	Lithuania	The Ministry of Agriculture of the Republic of Lithuania
26	Lithuania	Financial Crime Investigation Service under the Ministry of the Interior
27	Luxembourg	Inspection générale des finances
28	Luxembourg	AFCOS Luxembourg
29	Netherlands	Netherland Douane
30	Poland	Ministry of Finance, Department for Audit of Public Funds (AFCOS)
31	Romania	DGAF - Directia Generala Antifrauda Fiscala
32	Romania	National Anticorruption Directorate

<sup>50</sup> 2 replies were received by respondents indicating to be decentralised agencies without further specifying which agency they represented.

<sup>51</sup> Bulgaria uploaded a document containing its position

33	Romania	Fight Against Fraud Department - DLAF
34	Romania	National Agency for Fiscal Administration
35	Slovakia	Financial Administration
36	Slovakia	General Prosecutor's Office, Special Prosecutor's Office
37	Slovakia	Ministry of environment of the Slovak Republic
38	Slovakia	Criminal Office of the Financial Administration
39	Slovakia	Government Office of the Slovak Republic
40	Slovenia	Budget Supervision Office of the Republic Slovenia (AFCOS)
41	Spain	Servicio Nacional de Coordinación Antifraude (AFCOS)- Intervención General de la Administración del Estado (Ministry of Finance)
42	Sweden	Swedish Economic Crime Authority /Swedish AFCOS
43		DG GROW <sup>52</sup>
44		Executive Agency for Small and Medium-sized Enterprises <sup>53</sup>

Source: Survey of Member States authorities

Table A2.2: Overview of respondents to IBOAs' questionnaire

	Organisation
1	Body of European Regulators for Electronic Communications
2	Eurojust
3	European Agency for Safety and Health at Work
4	European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
5	European Aviation Safety Agency
7	European Border and Coast Guard Agency
8	European Chemicals Agency
9	European Commission – DG Budget
10	European Commission – DG Communication
11	European Commission – DG Environment
12	European Commission – DG Human Resources and Security
13	European Commission – DG Internal Market, Industry, Entrepreneurship and SMEs
14	European Commission – DG Justice and Consumers
15	European Commission – DG Neighbourhood and Enlargement Negotiations
16	European Commission – Infrastructures and Logistics - Brussels
17	European Commission – Secretariat-General
26	European Commission – Service for Foreign Policy Instruments
18	European Committee of the Regions
19	European Maritime Safety Agency
20	European Medicines Agency
6	European Monitoring Centre for Drugs and Drug Addiction
21	European Ombudsman
22	European Parliament
23	European Union Agency for Law Enforcement Training
24	European Union Intellectual Property Office
25	Single Resolution Board
27	Decentralised Agency (unknown)
28	Decentralised Agency (unknown)

<sup>52</sup> DG GROW is a DG of the European Commission and its contact was not in the initial contacts list.

<sup>53</sup> EASME is an agency and its contact was not in the initial contacts list.

### A2.3.3 Results of the surveys

The presentation of the surveys' results follows the sequence of headings as presented in the questionnaire. A number of questions was the same for the survey targeting the national respondents and the IBOAs respondents. For these questions, the results are presented together with clear distinction of position of national authorities and IBOAs respondents.

#### OLAF-EPPO relationship

Table A2.3 provides an overview of respondents' position on which of the **general principles** should apply **as guidelines for the establishment of a close cooperation between OLAF and the EPPO**.

Table A2.3: General principles that should be applied as guidelines for the establishment of a close cooperation between OLAF-EPPO

	Agree	Slightly agree	Slightly disagree	Disagree	No opinion / no answer
first row Member State representatives, N=44 second row IBOA, N= 28					
Mutual cooperation based on a principle of sincere cooperation	86.36 %	9.09 %	2.27 %	0 %	2.27 %
	89.29 %	7.14 %	0 %	0 %	3.57%
Need to ensure complementarity of action so that all available means are used to protect the EU's financial interests	81.82 %	13.64 %	0 %	0 %	4.55 %
	78.57 %	17.86%	0 %	0 %	3.57%
Need to coordinate the respective activities to ensure maximum added value for the protection of the EU financial interests and to avoid jeopardising the respective investigations	79.55 %	13.64 %	4.55 %	0 %	2.27 %
	92.86 %	3.57 %	0 %	0 %	3.57 %
Reciprocal and timely information about circumstances on which OLAF and EPPO may exercise their respective mandate	72.73 %	15.91 %	4.55 %	2.27 %	4.55 %
	82.14 %	7.14 %	0 %	7.14 %	3.57 %
Need to protect the independence of each body	61.36 %	22.73 %	4.55 %	0 %	11.36 %
	57.14 %	17.86 %	0 %	7.14 %	17.86 %
Exchange of information and strategic analysis	79.55 %	13.64 %	2.27 %	2.27 %	2.27 %
	78.57 %	14.29 %	0 %	0 %	7.14 %
Operative cooperation in specific investigations	70.45 %	18.18 %	0 %	4.55 %	6.82 %
	78.57 %	7.14 %	3.57 %	0 %	10.71 %

Source: Survey of IBOAs; survey of Member States authorities

According to 86.36 % (38) respondents from the Member States and 60.71 % (17) respondents from IBOAs, the **establishment of the EPPO requires amendment of Regulation 883/2013**, the remaining 13.64 % and 39.29 % respectively did not recognise the need to amend the Regulation. From the respondents who did not see the need for the amendment, only one substantiated the position by indicating that 'the relations between EPPO and OLAF do not need to be further specified except establishing a link to the EPPO Regulation. The focus should be on clarifying the role of OLAF and avoiding overlaps with the EPPO.'

One Member State respondent pointed out that, although being in favour of amending Regulation 883/2013 to mirror the EPPO Regulation, the EPPO Regulation does not provide for a reciprocal flow of information between OLAF and the EPPO. Another Member State respondent clarified that he agrees to the 'need of coordination in the respective activities to ensure maximum added value for the protection of the Union's financial interests and to avoid jeopardising the respective investigations' and to 'reciprocal and timely information about circumstances on which OLAF and EPPO may exercise their respective mandate' principles only to a limited extent, as OLAF is obliged to refrain from uncoordinated parallel investigations.

The 60.71 % of IBOA and 86.36 % of Member State respondents that agreed to the need to amend the Regulation indicated **which provisions should be introduced in the Regulation:**

- On the forwarding information by OLAF to the EPPO (89.47 % of Member State respondents / 47.06 % of IBOA respondents have chosen this option);
- On the preliminary evaluation by OLAF on allegations report by IBOAs (34.21 % Member State respondents / 58.82 % IBOA respondents);
- To ensure complementarity between OLAF and the EPPO (63.16 % Member State respondents / 64.71 % IBOA respondents);
- Mirroring provisions of the EPPO Regulation on non-duplication of investigation without prejudice to the possibility of OLAF's complementary or supporting investigations to the ones of the EPPO (71.05 % Member State respondents / 70.59 % IBOA respondents);
- To give effect to the EPPO Regulation enabling the EPPO to request operational support from OLAF (65.79 % Member State respondents / 64.71 % IBOA respondents);
- On handling by OLAF of cases referred to it by the EPPO for administrative follow up (47.37 % Member State respondents / 35.29 % IBOA respondents);
- On exchange of information, allowing reciprocal flow between OLAF and the EPPO (65.79 % Member State respondents / 52.94 % IBOA respondents);
- Other (13.16 % Member State respondents / 17.65 % IBOA respondents).

There was strong support from a vast majority of respondents to setting up a strong **coordination mechanism between OLAF and the EPPO** as reflected in the share of agreement to the following types of coordination mechanisms:

- Ensuring that OLAF and the EPPO can verify, via hit-no-hit access to the respective case management systems, whether the other body is already looking at the case – 79.55 % of Member State respondents / 82.14 % of IBOA respondents agreed or slightly agreed, while 13.64 % Member State respondents/ 10.71 % IBOA respondents disagreed or slightly disagreed;
- Ensuring that there is a consultation mechanism in place for the exchange of information with the EPPO about cases being considered and for consultation on how to best coordinate possible investigative activities – 86.36 % of Member State respondents / 92.86 % of IBOA respondents agreed or slightly agreed, while 4.55 % Member State respondents / no IBOA respondent disagreed or slightly disagreed (7.14 % of them had no opinion);
- Provide for mechanisms to refer cases to OLAF for action in accordance with its mandate – 88.64 % of Member State respondents / 82.14 % of IBOA respondents agreed or slightly agreed, while 6.82 % Member State respondents / 3.57 % IBOA respondents disagreed or slightly disagreed.

Stakeholders' agreement to **different forms of support that OLAF could provide to the EPPO** on its request differed across the proposed activities. The Member State respondents were on average more in favour of the different proposed options in comparison to the positions expressed by IBOAs. The following position was expressed by the respondents:

Table A2.4: Forms of support that OLAF could provide to the EPPO

first row Member State representatives, N=44 second row IBOA, N= 28	Agree	Slightly agree	Slightly disagree	Disagree	No opinion / no answer
Expertise and document analysis in complex cases	81.82 %	2.27 %	6.82 %	2.27 %	6.82 %
	57.14 %	10.71 %	3.57 %	3.57 %	25.00 %
Digital forensic operations	61.36 %	9.09 %	9.09 %	4.55 %	15.91 %
	42.86 %	17.86 %	3.57 %	3.57 %	32.14 %
Strategic analysis, including identification of risk situations and 'hot-spots' for possible criminal investigations	59.09 %	11.36 %	11.36 %	0 %	18.18 %
	28.57 %	32.14 %	7.14 %	0 %	32.14 %
Facilitating coordination of competent national administrative and EU bodies in performing specific actions contributing to an EPPO investigation	43.18 %	25.00 %	9.09 %	6.82 %	15.91 %
	28.57 %	25.00 %	3.57 %	7.14 %	35.71 %
Facilitating coordination of specific actions contributing to an EPPO investigation involving Member States not participating in the EPPO	38.64 %	36.36 %	4.55 %	11.36 %	9.09 %
	39.29 %	17.86 %	7.14 %	3.57 %	32.14 %
Facilitating cooperation with authorities outside EU Member States or in international organisations	43.18 %	27.27 %	6.82 %	6.82 %	15.91 %
	50.00 %	17.86 %	0 %	0 %	32.71 %
Conducting administrative investigations aimed, in particular, at allowing recovery of EU funds or preventing further undue expenditure through administrative measures	65.91 %	20.45 %	0 %	4.55 %	9.09 %
	50.00 %	14.29 %	7.14 %	3.57 %	25.00 %

Source: Survey of IBOAs; survey of Member States authorities

An important aspect of the consultation covered the **need for complementary investigations** (while avoiding duplication) by OLAF in cases where an EPPO investigation was carried out. The stakeholders were asked to indicate their agreement with the possibility to complement an EPPO investigation with an OLAF investigation in the following cases (with indicated response rate, more answers were possible).

- Investigations aimed at recovery of EU funds when there is a risk of time-barring (81.82 % of Member State respondents / 71.43 % of IBOA respondents agreed or slightly agreed, while 11.36 % Member State respondents / 3.57 % IBOA respondents disagreed or slightly disagreed);
- Investigations aimed at recovery of EU funds if amounts at risk are very high (77.27 % Member State respondents / 57.14 % IBOA respondents agreed or slightly agreed, while

11.36 % Member State respondents / 10.71 % IBOA respondents disagreed or slightly disagreed);

- Investigations aimed at preventing further undue expenditure of EU funds through administrative measures (79.55 % Member State respondents / 64.29 % IBOA respondents agreed or slightly agreed, while 11.36 % Member State respondents / 3.57 % of IBOA respondents disagreed or slightly disagreed);
- Investigations aimed at proposing disciplinary follow up when EU staff is involved (84.09 % Member State respondents / 67.86 % IBOA respondents agreed or slightly agreed, while 9.09 % Member State respondents / 7.14 % IBOA respondents disagreed or slightly disagreed);
- Conduct strategic analysis to assess the possibility that other cases may be connected to that on which the EPPO is carrying out its investigation (77.27 % of Member State respondents / 53.57 % of IBOA respondents agreed or slightly agreed, while 15.91 % Member State respondents / 10.71 % IBOA respondents disagreed or slightly disagreed).

In addition to these questions, the IBOAs' respondents were asked specific questions related to the possibility of **IBOAs' to request assistance of OLAF for preliminary evaluation** of information, **OLAF's support to IBOAs** in their action following transmission of information to the EPPO and possible **channels of communication between IBOAs and the EPPO via OLAF**.

The IBOA respondents supported in particular the possibility of turning to OLAF to run **preliminary evaluation** of facts raising suspicions of criminal conduct (50%) and where the incoming information is comprehensive but not as such conclusive to assess a possible criminal conduct (35.71 %). A further 28.57 % of IBOA respondents indicated the option to turn to OLAF for preliminary evaluation would be useful when it would be necessary to conduct a verification of the quality of the incoming information and credibility of the source; the same proportion judged it useful always; 25 % of IBOA respondents considered it useful when it would be necessary to collect or complement available information as required by Article 24 of the EPPO Regulation. Four of them further substantiated their choice by clarifying that IBOAs should be able to turn to OLAF for such a support, but it should not be an obligation.

As regards the possibility of **OLAF acting as intermediary between them and the EPPO** for the purpose of preliminary evaluation, 32.14 % of IBOA respondents considered establishing OLAF as an intermediary for the communication between IBOAs and the EPPO, while 17.86 % disagreed with such a suggestion and 39.29 % suggested that it should remain an option for IBOAs but should not be obligatory.

As regards **OLAF's support to IBOAs in their action following transmission of information from the EPPO to IBOAs**, the IBOA respondents considered such assistance useful in cases as follows (2 IBOAs did not answer this question, which corresponds to 7.14 %):



- Advise or assist with fact-finding to clarify the need for possible precautionary or other administrative measures to be taken to protect the financial interest of the Union – 46.43%;
- Opening an administrative investigation for the purpose of assisting IBOAs in the recovery of sums, in determining administrative measures or with a view to initiate disciplinary action – 32.14 %;
- Other – 14.29 %.

As regards establishing a **communication channel between IBOAs and the EPPO via OLAF for the purpose of the possible measures to be taken by IBOAs following information communicated by the EPPO**, 53.57 % of IBOAs' respondents agreed this should be the case, 39.29 % disagreed, while 7.14 % did not answer.

### **Improved effectiveness of OLAF's investigations**

According to 47.73 % (21) of the Member State respondents **OLAF's ability to conduct, and where necessary enforce, investigative activities, in particular on-the-spot checks and inspections and digital forensic operations, in a coherent manner across the Member States should be improved**. 25 % (11) of the respondents replied that there is no need for change of the current provisions; 27.27 % (12) of the respondents did not express an opinion. The Member State respondents who thought there was no need to change the current provisions guiding OLAF's investigative activities argued that the established system works well under the current provisions, which are appropriate and sufficient. One of the Member State respondents suggested that, to address the issue of on-the-spot checks and inspections, Regulation 2185/96 should be amended rather than Regulation 883/2013. A Member State respondent also pointed out that OLAF should not have more powers in administrative investigations than national administrative authorities, indicating that extended OLAF's powers could cause infringements to its Constitution. Another Member State respondent highlighted that respecting the rights and guarantees of individuals in accordance with national legislation enhances the probative value of OLAF collected evidence. Four respondents out of those who did not see a need for changing the current provision stated that there were no shortcomings in the conduct of on-the-spot checks and inspections on their national territory and that national provisions are sufficient.

Those Member State respondents that held the view that OLAF's **ability to conduct, and where necessary enforce, investigative activities** in a coherent manner across the Member States should be improved considered that this could be achieved through the following options:

- Granting powers to OLAF which are not dependent on the national law of the Member State concerned (52.38 % of Member State respondents from those who agreed to the need to improve the current situation);
- Confining the references to national law to cases in which coercion is required to perform an investigative activity (23.81 %);

- Clarifying the duties of national authorities to assist OLAF to ensure a level of assistance that enables OLAF to conduct on-the-spot checks and inspections and digital forensic operations on their territory (85.71 %);
- Granting OLAF sanctioning powers in the form of fines/penalties vis-à-vis economic operators in the case of refusal or obstruction during on-the-spot checks and inspections and digital forensic operations (47.62 %).

The Member State respondents that indicated that the ability to **enforce OLAF's powers in on-the-spot checks and inspections and digital forensic operations should be improved (18)** by clarifying the duties of national authorities to assist OLAF considered the following possibilities:

- To ensure access to premises of the economic operators (77.78 %);
- To obtain judicial warrant where necessary (72.22 %);
- To impose penalties for opposing enforcement measures in breach of national law (50 %)
- To seal the premises, books, records, electronic data (55.56 %);
- To ensure the same level of assistance is provided for all areas of expenditure/revenues (44.44 %);
- To require the assistance of an(other) enforcement authority (as police or equivalent) if the authority assisting OLAF does not have itself the necessary mandate (83.33 %);
- To require Member States to notify to OLAF the competent enforcement authorities and any relevant provisions of national law in order to facilitate the assistance (61.11 %);
- Other (5.56 %).

To complement the above listed options for Member State assistance during on-the-spot checks and inspections and digital forensic operations, imposing certain **duties on OLAF** were considered by the Member State respondents (9.09 % (4) did not answer):

- To notify in advance the competent national authorities – 56.82 %;
- To cooperate with the national authorities in the preparation phase of on-the-spot checks and inspections – 84.09 %;
- Other – 4.55 %.

As regards **the admissibility of OLAF's reports as evidence in national proceedings**, 50 % of the Member State respondents agreed that it should be improved, while 34.09 % did not see the need to change the current situation and 15.91 % of the respondents had no opinion. Two respondents did not see the need to change the current provision as OLAF reports are fully admissible in national judicial proceedings of their country. It was also argued that the national prosecutor is independent in its decisions and can renew an investigation depending on the needed evidence.

Among the 50% of Member State respondents that considered the admissibility of OLAF's reports as evidence in national proceedings should be improved the following options were considered as appropriate:

- Require Member States to clarify to the administrative report of which national authority OLAF's reports are assimilated (9.09 %);
- Require Member States to provide a minimum standard of evidence for the admissibility of OLAF reports in administrative and judicial proceedings (31.82 %);
- Further regulate the use as evidence in national proceedings of all information collected by OLAF during investigations (in on-the-spot checks and inspections and digital forensic operations, in interviews, in statements etc.) (31.82 %);
- Provide for the automatic admissibility of OLAF's reports in all national proceedings other than criminal proceedings (i.e. administrative and civil law proceedings) (27.27 %).

The Member State respondents were also asked about their opinion whether **the cooperation and information exchange between OLAF and national judicial authorities** could be improved. While 52.27 % agreed, 20.45 % did not agree and 27.27 % did not have any opinion. Those who agreed that the cooperation and information exchange should be improved further indicated that this could be done by:

- Introducing in the Regulation specific provisions for the exchange and use of information, by OLAF, with judicial authorities of Member States – 73.91 %;
- Introducing an obligation for the Member States to ensure that the exchange of information with OLAF is possible in the framework of ongoing national proceedings and OLAF investigations – 65.22 %;
- Other – 4.35 %;
- No opinion – 8.7 %.

### **Internal investigations**

IBOAs respondents were asked if **OLAF's ability to conduct investigative activities (in particular inspection of premises) in internal investigations** should be further detailed in the Regulation. 32.14 % agreed, 17.86 % disagreed, 39.29 % did not have an opinion and 10.71 % did not answer.

One IBOA respondent that was in favour of clarification asked for provision on the procedure of inspection, forensic operations and IT aspects. It was also suggested by one respondent to clarify the terms "immediate" and "unannounced" access. Three representatives of IBOAs explained that there is a need for further clarification of the protection of fundamental rights of the person that is subject of an investigation. Further, an introduction of a complaints mechanism and clarification of the role of the Supervisory Committee was suggested by one respondent.

A similar question on the need to further detail in the Regulation **OLAF's ability to carry out digital forensic operations in internal investigations** was answered positively by 28.57 % of IBOA respondents, while 21.43 % did not see the need, 39.29% had no opinion and 10.71 % did not answer.

35.71 % (10) of IBOA respondents thought that the **cooperation and information exchange between IBOAs and OLAF** should be submitted to more coherent rules as regards internal and external investigations. 10.71 % disagreed, 46.43 % had no opinion and 7.14 % did not answer. One of the IBOAs which was not in favour of further alignment explained that nature of internal and external investigations is different. Another IBOA elaborated that also the obligations of the persons concerned differ depending on the investigation.

**OLAF's powers to access information in IBOAs differ from internal compared to external investigation.** The IBOA respondents that agreed to the need to apply more coherent rules for internal and external investigations (10) were therefore asked if powers should be aligned. 30 % (3) of IBOAs respondents agreed, 30% disagreed and 40 % had no opinion. At the same time, 60 % (6) of IBOAs respondents believed that, for a more coherent and effective legal framework for internal and external investigation, the **duty of IBOAs' staff to cooperate with OLAF** should be extended to external investigations, while it currently applies only in internal investigations. 20 % (2) of IBOAs respondents disagreed, the same percentage had no opinion and did not answer the question.

Similarly, the duty of IBOAs **to report on follow-up to OLAF's recommendations** is only provided for in internal investigations. 50 % (5) of IBOAs respondent agreed that this duty should be extended to external investigations. 30 % (3) did not agree, 20 % (2) did not have an opinion.

From the total number of 28 IBOAs respondents, 39.29 % of the respondents considered the current cooperation between OLAF and IBOAs for the purpose of **precautionary measures** as sufficient. 21.43 % of the respondents held the view that the rules are not sufficient and 39.29 % of the respondents had no opinion. It was suggested by one IBOA representative to enhance cooperation between OLAF and IBOAs to define the scope of these measures and to introduce stricter deadlines in the cooperation.

21.43 % of the respondents deemed the current cooperation between OLAF and IBOAs as regards the **calculation of the financial damage to the EU budget and the follow-up to OLAF's financial recommendations as sufficient.** 17.86 % of the respondents had the opposite view and 60.71 % of the respondents held no opinion. As further measures, a post-investigation meeting was suggested. Further, IBOAs would need to access OLAF evidence on a need-to-know basis in order to motivate the actions taken based on an OLAF recommendation.

Similarly, **cooperation between OLAF and IBOAs prior to issuing disciplinary recommendations and during their follow up** was considered sufficient by 21.43 % of IBOA respondents. The same percentage of respondents considered it insufficient, while 46.43 % held no opinion and 10.71 % did not respond. Cooperation prior to issuing administrative recommendations and during their follow up was assessed as sufficient by 17.86 % of IBOA respondents, insufficient by 14.29 %. 60.71 % held no opinion and 7.14 % did not answer the question.

## **Anti-fraud Coordination Services (AFCOS)**

Half of the Member State respondents indicated that **the role and mandate of AFCOS should be further clarified in order to allow strengthening cooperation and improving homogeneity of the assistance AFCOS provide to OLAF in the Member States.** 27.27 % of the Member State respondents did not see a need to change the current provision and 22.73 % of the respondents had no opinion.

Some of the Member State respondents further substantiated their position on the need to further clarify the role and mandate of AFCOS:

- From those who agreed to the need to clarify AFCOS-related provisions, 10 suggested specifying the minimum requirements of the competences and responsibilities of AFCOS in the Regulation and/or provided examples of what these could cover. One of the respondents acknowledged the need to further specify the relevant provisions, however, pointed out to the difficulties such modifications are likely to face when negotiating the proposal.
- A respondent stated that AFCOS powers should be broadened and deepened as regards 'the mutual administrative assistance and exchange of information between Member States on fraud suspected EU funds related cases' to better grasp the cross-border cases. The respondent pointed out that, in comparison to the mutual assistance framework for criminal investigations, the mutual assistance legal framework for administrative investigation is weak, which leads to difficulties when requesting in particular banking information from other Member States.
- One respondent pointed out that 'appropriate personnel should be available to AFCOS'.
- Two Member State respondents called for more cooperation between AFCOS, one of them suggesting this should be done with support by OLAF. Three further respondents stated that the existing provisions on AFCOS are sufficient and the existing differences among the AFCOS would be better solved through a close network. There was also the view expressed that an administrative cooperation arrangement could be a tool for more clarifications.
- A Member State respondent suggested that the AFCOS-related issues could be solved through soft law rather than in the amended Regulation.
- One Member State respondent noted that the structure of AFCOS is adjusted towards the existing administrative structure of the respective Member State. These are different in every Member State and the competences of AFCOS depend on the structure to which AFCOS are affiliated. To accommodate these differences, the Regulation should be sufficiently broad. The objective should rather be that AFCOS mobilise their partners and facilitate the cooperation with OLAF.
- A Member State respondent indicated that AFCOS' powers laid down in national law are limited by the Constitution in the concerned Member State.
- A Member State respondent called for adding a reference to the Regulation that OLAF should forward to the AFCOS the reports and recommendation adopted by OLAF at the end of its investigations.

- A Member State respondent called for specifying a role for AFCOS vis-à-vis the EPPO.

### **Coordination activities**

As regards the modalities of coordination by OLAF of Member States' activities or the procedures applicable in the so called '**coordination cases**', 25 % of Member State respondents recognised the need to further specify the provisions, while 34.09 % did not see the need to change the current situation and 40.91 % had no opinion or did not answer the question.

### **VAT**

On the question how **OLAF's role and mandate as regards VAT** should be clarified, the following responses from Member State respondents were collected:

- Align the definition of the financial interests of the Union across Union instruments (40.91 % Member State respondents / 39.29 % IBOA respondents);
- Align OLAF's investigative powers in the field of VAT with its powers in other areas (e.g. allow the conduct by OLAF of on-the-spot checks on VAT) (36.36 % Member State respondents / 46.43 % IBOA respondents );
- Provide OLAF with cooperation tools with partners currently not mentioned in the OLAF Regulation (e.g providing a clear legal base for cooperation with Eurofisc) (38.64 % Member State respondents / 42.86 % IBOA respondents);
- There is no need to change the current situation/provisions (15.91 % Member States respondents / 10.71 % IBOA respondents);
- No opinion (34.09 % Member State respondents / 39.29 % IBOA respondents);
- Other (2.27 % of Member State respondents / 7.14 % IBOA respondents).

Two respondents were of the opinion OLAF was not competent to investigate VAT. One further respondent indicated that 'change of current situation is politically not acceptable'.

### **Access to bank account information**

Table A2.5 provides an overview of Member State respondents' position on **what kind of bank account information** should be available to OLAF. Two Member State respondents specified that OLAF should not receive more extensive powers (under conditions that provide fewer safeguards) than national judicial authorities. One respondent held the view that OLAF should access information that it needed while ensuring secrecy.

While 34.09 % of Member State respondents agreed or slightly agreed that OLAF should be able to request and obtain the **bank account information directly** from banks or from national centralised bank account registries, 63.64 % of Member State respondents agreed or slightly agreed the access should be **indirect via national authorities**, 25 % thought that

OLAF should not be provided with access to any bank account information<sup>54</sup>. However, it is not clear from the responses why the percentage of respondents differs in granting no access to bank account information for OLAF under this and previous question.

*Table A2.5: Type of bank account information that OLAF could access*

(N = 44)	Agree	Slightly agree	Slightly disagree	Disagree	No opinion / no answer
Information on the bank account holder and persons having a right on it	43.18 %	13.64 %	6.82 %	22.73 %	13.64 %
Information on the opening and closing dates of the account	40.91 %	9.09 %	11.36 %	20.45 %	18.18 %
Information on transactions	47.73 %	6.82 %	9.09 %	22.73%	13.64%
Information on bank accounts of individuals/economic operators already held by EU IBOAs	38.64 %	6.82 %	9.09 %	22.73 %	22.73 %
No access to any bank account information should be provided	20.45 %	11.36 %	6.82 %	38.64 %	22.73 %

*Source: Survey of IBOAs; survey of Member State authorities*

#### **A2.3.4 Workshop**

A **dedicated expert meeting** was also organised with representatives of the Network of Associations for European Criminal Law and the Protection of the Financial Interests of the EU, which represents academics and practitioners in the area of the protection of the Union’s financial interests, and the European Criminal Bar Association on 15 December 2017. The workshop was dedicated to the **discussion of three distinct topics – adaptation to the establishment of the EPPO; enhancing effectiveness of OLAF's investigative function** as regards investigative powers and their enforcement; and **admissibility of OLAF reports in national proceedings**.

- **Adaptation to the establishment of the EPPO**

On the first topic, the experts agreed on the need to amend the Regulation in order to ensure that OLAF and EPPO can exercise their respective mandates. The workshop explored possibilities for OLAF to support the EPPO while not duplicating its work.

Different possibilities were discussed for the smooth cooperation between OLAF and the EPPO. The participants agreed generally on the importance of guaranteeing an open, continuous, reciprocal and flexible channel of communication between OLAF and the EPPO, especially at the case selection stage, to exchange information and ensure non-duplication.

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<sup>54</sup> Note that the answers were not mutually exclusive, so the respondents were able to agree both with giving OLAF direct and indirect access to the bank account information, therefore the sum of the positive responses is not 100%).

There was agreement on the need for legal certainty through permanent structures. For instance, the creation of an ad-hoc task force that would decide on the nature of an investigation was suggested by a participant. There was also agreement that the Regulation should establish high level principles for the cooperation, while maintaining sufficient flexibility for the EPPO and OLAF to find the best modalities of cooperation and of deciding the best handling of a given case (through criminal or administrative action, or both).

There was a general understanding between the participants for the need of complementary administrative investigations by OLAF in specific circumstances, in particular for a different purpose than judicial proceedings (financial recovery and other administrative measures) or in cases where the criminal aspect represents only a fraction of the investigated case. It was suggested to create a mechanism allowing such complementary investigations, while respecting the principles enshrined in Article 101 of the EPPO Regulation.

The issue of procedural guarantees in criminal proceedings was highlighted in cases where OLAF would support the EPPO with administrative investigations. The participants agreed that OLAF could contribute to the EPPO investigations only in the context of its mandate and that the value of its contribution would remain at the level of administrative investigations.

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

Concerning the second topic, the experts considered the effectiveness of OLAF investigations and the different possibilities to strengthen the conduct and the enforcement of OLAF's investigative powers. It was suggested to make the power to conduct on-the-spot checks and inspections subject to EU law and reducing the impact of national law. In the case of non-cooperation, several possible solutions were suggested: the possibility of penalty payments, the strengthening of the obligation of assistance by the national authorities, or the exclusion of the beneficiary from future payments in case of non-cooperation during an on-the-spot checks and inspections.

- **Admissibility of OLAF reports in national proceedings**

Finally, the participants exchanged views on possible ways of improving the admissibility of OLAF's reports as evidence in national judicial proceedings. The issue of existing procedural safeguards in criminal proceedings against the safeguards applied in OLAF's administrative investigations was highlighted. A number of possible solutions was suggested:

- Introducing a European minimum standard for the report that would enclose minimum standards and safeguards;
- Administrative cooperation could establish interlocutors that would facilitate meeting the national standards required for the report to be approved for national proceedings;
- There was also reference to the "magistrates" unit that OLAF had in the past that provided information how OLAF reports could be used in national proceedings.

#### **A2.4 Views of other interested parties and inter-institutional discussions**

The following discussions were taken into account in the preparation of the proposal.



#### **A2.4.1 Opinion 2/2017 of the Supervisory Committee of OLAF**

The Supervisory Committee Opinion 2/2017 accompanied the Commission evaluation report on the application of Regulation 883/2013. A brief summary of the opinion, which was taken into account in the preparation of the proposal, follows.

An amendment to the Regulation should unify grounds for all OLAF investigations, including a code of OLAF's powers, in order to avoid fragmentation and interpretation difficulties, and to strengthen clarity of law and procedural guarantees. National administrative authorities should be obliged to provide immediate assistance to OLAF if coercive measures are needed to enforce OLAF competences.

The Supervisory Committee asks for tools enabling OLAF to investigate online crime, for access to bank accounts and money transfers, as well as access to Eurofisc and VIES data in the area of VAT. Provision should also be made for the exchange of information with Financial Intelligence Units.

The Commission should explore the possibility of expanding OLAF's competences, especially into the closely related field of protection of intellectual property rights in relation to imports into the EU single market.

The Supervisory Committee believes that the possibility to exercise the right to an effective judicial review and strengthening the procedural guarantees would enhance admissibility of evidence collected in OLAF investigations in national administrative or criminal proceedings. The Committee questions the need of the Controller of procedural guarantees. It asks for the appointment of a fundamental right and procedural guarantees officer for OLAF or to expand the Committee from 5 to 7 members.

The Supervisory Committee considers that the details of the interactions between OLAF and the EPPO should not be left for bilateral working arrangements but be set out clearly in the revised OLAF Regulation. The Committee raises some concerns about the practical implementation of the provision that allows the EPPO to ask for OLAF's assistance, given that OLAF's assistance would be administrative in nature, while the EPPO will conduct criminal investigations. The Committee proposes an alignment of the procedural guarantees for OLAF's investigations to those of the EPPO, including judicial oversight.

The Supervisory Committee considers it should play a significant role in creating structural, operational and competence links between OLAF and its partners in the new system of protection of the EU's financial interests.

The Supervisory Committee calls for clarification of its role and mandate. The Opinion calls for continuous access for the Committee and its secretariat to general and specific case-related data in OLAF's databases and to information on OLAF intranet. This should include access to OLAF premises for the members. If the Supervisory Committee requests additional information on investigations, the Regulation should set a time limit in which access to such information and documents in a case file should be provided by OLAF, as well as a resolution mechanism if the access is not provided or denied.

The Supervisory Committee calls for reconsidering the wide discretion granted to the Director General of OLAF to apply criteria for opening of investigations to prevent any potential abuse of discretion or undue external pressure on the OLAF. It asks for balancing it by the obligation of regularly inform the Supervisory Committee of his reasoned decision when the Director General decides not to open an investigation.

#### **A2.4.2 Council Outcome of Proceedings**

Following discussions in the Council working party on combatting fraud (GAF), the Council has expressed its position on the revision of the Regulation through an ‘outcome of proceedings on the Commission's report on the evaluation of the application of Regulation (EU, Euratom) No 883/2013’, endorsed by COREPER on 16 February 2018. It asks the Commission to focus primarily on the topics that are necessary to enable OLAF to cooperate smoothly with EPPO without, however, extending the competences and powers of OLAF. In addition, it lists a number of topics that certain delegations would wish to see addressed in the proposal: AFCOS; the preparation and implementation of on-the-spot checks; the rules on admissibility of evidence; the right of access for the Supervisory Committee to information held by OLAF; and the dismissal of the Director-General.

#### **A2.4.3 Justice and Home Affairs Council**

The issue of EPPO’s cooperation with partner agencies and offices, in particular with OLAF and Eurojust, was the subject of discussions by the Justice Ministers of the Member States, first at their Informal meeting in Sofia on 26 January 2018, then in the Justice part of the Justice and Home Affairs Council in Brussels on 8-9 March 2018.

In particular for what concerns cooperation with OLAF, Ministers broadly underlined that this cooperation is essential and should be based on a clear division of competences and responsibilities, on equality and on complementarity without any kind of competition or duplication of work; it was also underlined how the EPPO should conclude in full transparency service level agreements/working arrangements in this respect. Several Member States warned that the EPPO should not have a negative impact or diminish the role of OLAF or Eurojust, which should be treated as privileged partners and not as an executive branch of EPPO.

As regards the revision of the OLAF Regulation, several Ministers recalled that the provisions of the EPPO Regulation should now be mirrored in the revision of Regulation 883/2013. This revision should also prevent any duplication of procedures and deal with the information and reporting obligations, access to and exchange of information and the scope of the OLAF supporting role.

The revision of Regulation 883/2013 was also discussed during a meeting of the Coordinating Committee in the area of police and judicial cooperation in criminal matters on 19 February 2018. Some delegations highlighted the need for OLAF to report immediately to EPPO cases on which the latter may exercise competence, while others stressed the need to allow OLAF to discern the available information. Questions were also raised concerning the

admissibility, in criminal proceedings by the EPPO, of evidence collected by OLAF prior to reporting a case to the EPPO. Emphasis was also placed by some delegations on the importance of a proper system for exchange of information between the EPPO and OLAF.