



8.11.2018

DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Budgetary Control

on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutors' Office and the effectiveness of OLAF investigations

(COM(2018)0338 – C8-0214/2018 – 2018/0170(COD))

Rapporteur for opinion: Jean-Marie Cavada

PA_Legam

SHORT JUSTIFICATION

Following the establishment of the European Public Prosecutors' Office (EPPO), the existing Regulation No 883/2013, governing currently the investigations by the European Anti-Fraud Office (OLAF) needs to be revised in order to adapt the collaboration between both institutions, in order to enhance the effectiveness of OLAF's investigation function, to clarify and simplify the provisions laid down in Regulation No 883/2013.

Both, EPP and OLAF – within their respective remits – are entrusted with the mandate to protect the Union's financial interests.

The EPPO, once operational, will have the power to conduct criminal investigations and prosecute before national courts as regards crimes affecting the Union budget. OLAF investigates administrative irregularities as well as criminal behaviour. However, its administrative powers are limited compared to criminal investigations. Therefore, the proposal envisages that the two bodies cooperate as closely as possible together leading to more prosecution, convictions and a higher level of recovery.

In order to allow for a smooth transition into the new framework, the amended Regulation 883/2013 should enter into force before the EPPO becomes operational which is foreseen for the end of 2020.

Your rapporteur supports the Commission's endeavour to foresee for the time being only a limited number of changes, which are essential, according to the analytical Staff Working document accompanying the Commission proposal, which is based on the evaluation report, external studies and the result of the stakeholder consultation. He therefore supports the proposal by the Commission to focus on three areas: the relationship between EPPO and OLAF, enhancing the effectiveness of OLAF investigations and clarifications and simplifications.

I. Relationship between EPPO and OLAF

The proposal introduces the following necessary provisions to regulate the relationship between OLAF and the EPPO:

- OLAF's obligation to report without undue delay to the EPPO any conduct over which the latter may exercise its competence; the information provided to the EPPO shall be sufficiently substantiated and contain the necessary information;
- non-duplication of investigations: OLAF shall not open an unnecessary parallel investigation into facts identical to those under investigation by the EPPO;
- the specific procedural rules applicable to requests from the EPPO to OLAF to support or complement the work of the EPPO.

II. Enhancing the effectiveness of OLAF investigations

In order to implement Court ruling T-48/16, Sigma Orionis SA v European Commission, it is important to clarify that OLAF conducts **on-the-spot-checks** and inspections based on

Regulation N°883/2013 and Regulation N° 2185/1996, unless the economic operator opposes (Art. 3). Union law suspends national law when a matter is regulated by Regulation N° 883/2013 and N° 2185/1996. The Court further stated that the opposition of the economic operator does not entail a “*right to oppose*” but simply has the consequence that the check might be imposed through the assistants of national authorities, following national law. As regards procedural guarantees, OLAF must respect fundamental rights as laid down in Union law, namely the Charter of Fundamental Rights.

Your rapporteur welcomes the proposed amendments as regards **bank account information** which reflect the 5th Anti-Money laundering Directive (Art. 7(3)), exchange of **VAT** information on the basis of Regulation N° 904/2010 (Art. 12(5)), the introduction of a **principle of admissibility of collected evidence** by OLAF (Art. 11(2)), the role of the **anti-fraud coordination service in the Member States** (Art. 12a) and the provision specifying the **coordination activities** that OLAF can conduct (Art. 12b).

Your rapporteur suggests amendments, which are meant to further enhance transparency and efficiency. Your rapporteur also suggests a reference to the protection of whistle blowers in the context of OLAF investigations.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Budgetary Control, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a regulation Recital 4

Text proposed by the Commission

(4) In view of their common goal to preserve the integrity of the Union budget, the Office and the EPPO should establish and maintain a close relationship based on sincere cooperation and aimed at ensuring the complementarity of their respective mandates and coordination of their action, in particular as regards the scope of the enhanced cooperation for the establishment on the EPPO. Ultimately, the relationship should contribute to ensuring that all means are used to protect the financial interests of the Union and avoiding unnecessary duplication of efforts.

Amendment

(4) In view of their common goal to preserve the integrity of the Union budget, the Office and the EPPO should establish and maintain a close relationship based on sincere **and efficient** cooperation and aimed at ensuring the complementarity of their respective mandates and coordination of their action, in particular as regards the scope of the enhanced cooperation for the establishment on the EPPO. Ultimately, the relationship should contribute to ensuring that all means are used to protect the financial interests of the Union and avoiding unnecessary duplication of efforts.

Or. en

Amendment 2

Proposal for a regulation Recital 4 a (new)

Text proposed by the Commission

Amendment

(4a) The cooperation between the EPPO, the Office and the participating Member States is essential. The exchange of information between them being critical, it is necessary that this cooperation is regular and respects their respective purviews.

Or. en

Amendment 3

Proposal for a regulation Recital 9

Text proposed by the Commission

Amendment

(9) In conformity with Regulation (EU) 2017/1939, the Office should in principle not open an administrative investigation parallel to an investigation conducted by the EPPO into the same facts. **However**, in certain cases, the protection of the Union's financial interests may require that the Office carry out a complementary administrative investigation before the conclusion of criminal proceedings initiated by the EPPO with the purpose of ascertaining whether precautionary measures are necessary, or financial, disciplinary or administrative action should be taken. These complementary investigations may be appropriate, *inter alia*, when necessary to recover amounts due to the Union budget subject to specific time-barring rules, when the amounts at risk are very high, or where there is the need to avoid further expenditure in risk

(9) In conformity with Regulation (EU) 2017/1939, the Office should in principle not open an administrative investigation parallel to an investigation conducted by the EPPO into the same facts, **except**, in certain cases, **where** the protection of the Union's financial interests may require that the Office carry out a complementary administrative investigation before the conclusion of criminal proceedings initiated by the EPPO with the purpose of ascertaining whether precautionary measures are necessary, or financial, disciplinary or administrative action should be taken. These complementary investigations may be appropriate, *inter alia*, when necessary to recover amounts due to the Union budget subject to specific time-barring rules, when the amounts at risk are very high, or where there is the need to avoid further expenditure in risk

situations through administrative measures.

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Or. en

Amendment 4

Proposal for a regulation Recital 10

Text proposed by the Commission

(10) Regulation (EU) 2017/1939 provides that the EPPO may request such complementary investigations to the Office. In cases where the EPPO does not request it, such a complementary investigation should also be possible on the initiative of the Office, under certain conditions. In particular, the EPPO should be able to object to the opening or continuation of an investigation by the Office, or to the performance of specific acts of investigation by it. ***The reasons for this objection should be based on the need to protect the effectiveness of the EPPO's investigation and should be proportionate to this aim. The*** Office should refrain from performing the action on which the EPPO raised an objection. If the EPPO does not object, the Office investigation should be conducted in close consultation with the EPPO.

Amendment

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Or. en

Amendment 5

Proposal for a regulation Recital 12 a (new)

Text proposed by the Commission

Amendment

(12a) This exchange of information should provide for the possibility to exchange the full procedure files to

ensure that cooperation between the EPPO and the Office is efficient.

Or. en

Amendment 6

Proposal for a regulation Recital 15

Text proposed by the Commission

(15) These changes do not affect the procedural guarantees applicable in the framework of investigations. The Office is bound to apply the procedural guarantees of Regulation (EU, Euratom) No 883/2013, Council Regulation (Euratom, EC) No 2185/967 and those contained in the Charter of Fundamental Rights of the Union. This framework requires that the Office conducts its investigations objectively, impartially and confidentially, seeking evidence for and against the person concerned, and carries out investigative acts on the basis of a written authorisation and following a legality check. **The** Office must ensure the respect of the rights of persons concerned by **its** investigations, including the presumption of innocence and the right to avoid self-incrimination. When interviewed, persons concerned have inter alia the rights to be assisted by a person of choice, to approve the record of the interview, and to use any of the official languages of the Union. Persons concerned also have the right to comment on the facts of the case before conclusions are drawn.

Amendment

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Or. en

Amendment 7

Proposal for a regulation

Recital 16 a (new)

Text proposed by the Commission

Amendment

(16a) The participating Member States should agree to cooperate with the EPPO and the Office in order to facilitate the efficient conduct of the investigations.

Or. en

Amendment 8

Proposal for a regulation

Recital 19

Text proposed by the Commission

Amendment

(19) In situations where the Office needs to rely on the assistance of the national competent authorities, particularly in cases where an economic operator opposes an on-the-spot check and inspection, Member States should ensure that the Office's action is effective, and should **provide** the necessary assistance in accordance with the relevant rules of national procedural law.

(19) In situations where the Office needs to rely on the assistance of the national competent authorities, particularly in cases where an economic operator opposes an on-the-spot check and inspection, Member States should ensure that the Office's action is effective, and should **guarantee** the necessary assistance in accordance with the relevant rules of national procedural law.

Or. en

Amendment 9

Proposal for a regulation

Recital 21

Text proposed by the Commission

Amendment

(21) As part of this duty of cooperation, the Office should be able to require economic operators who may have been involved in the matter under investigation, or who might hold relevant information, to supply **relevant** information. When

(21) As part of this duty of cooperation, the Office should be able to require economic operators who may have been involved in the matter under investigation, or who might hold relevant information, to supply **such** information. **Directive (EU)**

complying with such requests, economic operators are not obliged to admit that they have committed an illegal activity, but they are obliged to answer factual questions ***and to provide documents, even if this information may be used to establish against them or against another operator the existence of an illegal activity.***

2018/... [reference to Directive on the protection of persons reporting on breaches of Union law] applies as regards the protection of persons reporting breaches of Union law. When complying with such requests, economic operators are not obliged to admit that they have committed an illegal activity, but they are obliged to answer factual questions.

Or. en

Amendment 10

Proposal for a regulation

Recital 26

Text proposed by the Commission

(26) The Office should dispose of the necessary means to follow the money trail in order to uncover the modus operandi typical of many fraudulent conducts. Today, it is able to obtain banking information relevant for its investigative activity held by credit institutions in a number of Member States, through cooperation with and assistance by the national authorities. To ensure an effective approach throughout the Union, the Regulation should specify the duty of competent national authorities to provide information on bank and payments accounts to the Office, as part of their general duty to assist it. This cooperation should, as a rule, take place through the Financial Intelligence Units in the Member States. When giving this assistance to the Office, the national authorities should act in compliance with the relevant provisions of procedural law provided for in the national legislation of the Member State concerned.

Amendment

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Amendment 11

Proposal for a regulation Recital 27 a (new)

Text proposed by the Commission

Amendment

(27a) To avoid undue delays that could have detrimental consequences to other investigations, such as some waiver of immunity cases, both the EPPO and the Office should conduct their investigations in a timely manner;

Or. en

Amendment 12

Proposal for a regulation Article 1 – paragraph 1 – point 3 Regulation (EU, Euratom) No 883/2013 Article 3 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. The participating Member States shall ensure that their respective national authorities guarantee the proper and efficient conduct of the EPPO and Office investigations;

Or. en

Amendment 13

Proposal for a regulation Article 1 – paragraph 1 – point 3 Regulation (EU, Euratom) No 883/2013 Article 3 – paragraph 7 – subparagraph 2

Text proposed by the Commission

Where the staff of the Office finds that an economic operator resists an on-the-spot check or inspection authorised pursuant to this Regulation, the Member State concerned shall **afford** them the necessary assistance of law enforcement authorities so as to enable the Office to conduct its on-the-spot check or inspection effectively and without undue delay.

Amendment

Where the staff of the Office finds that an economic operator resists an on-the-spot check or inspection authorised pursuant to this Regulation, the Member State concerned shall **guarantee** them the necessary assistance of law enforcement authorities so as to enable the Office to conduct its on-the-spot check or inspection effectively and without undue delay.

Or. en

Amendment 14

Proposal for a regulation

Article 1 – paragraph 1 – point 6 – point e

Regulation (EU, Euratom) No 883/2013

Article 7 – paragraph 8

Text proposed by the Commission

"8. If an investigation cannot be closed within 12 months after it has been opened, the Director-General shall, at the expiry of that 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and, **where appropriate**, the remedial measures envisaged with a view to speeding up the investigation.";

Amendment

"8. If an investigation cannot be closed within 12 months after it has been opened, the Director-General shall, at the expiry of that 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and the remedial measures envisaged with a view to speeding up the investigation.";

Or. en

Amendment 15

Proposal for a regulation

Article 1 – paragraph 1 – point 11 – point a

Regulation (EU, Euratom) No 883/2013

Article 12 – paragraph 1

Text proposed by the Commission

"It may also transmit information to the institution, body, office or agency concerned.";

Amendment

"In order to avoid undue delays that could have detrimental consequences to other investigations, such as some waiver of immunity cases, it may also transmit, upon request, information to the institution, body, office or agency concerned.";

Or. en

Amendment 16

Proposal for a regulation

Article 1 – paragraph 1 – point 12

Regulation (EU, Euratom) No 883/2013

Article 12 c – paragraph 3 – subparagraph 1

Text proposed by the Commission

The Office shall ***not be bound to*** report to the EPPO manifestly ***unsubstantiated*** allegations.

Amendment

The Office shall ***only*** report to the EPPO manifestly ***substantiated*** allegations.

Or. en