

The protection of the procedural rights of persons concerned by OLAF administrative investigations and the admissibility of OLAF Final Reports as criminal evidence

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IN-DEPTH ANALYSIS

Abstract

This paper provides an analysis of two crucial and interconnected aspects of the current legal framework on the investigations conducted by the European Anti-Fraud Office (OLAF): the procedural safeguards for the individuals subject to the administrative investigations conducted by OLAF and the admissibility in evidence of OLAF Final Reports in national criminal proceedings. The state of the art and its shortcomings are analysed in the double perspective of the coherent protection of the EU's financial interests and of the respect of fundamental rights provided by the EU Charter of Fundamental Rights.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECA	European Court of Auditors
EU	European Union
EU CFR	Charter of Fundamental Rights of the European Union
GC	General Court
GDFs	Guidelines on Digital Forensic Procedures for OLAF Staff
GIPs	Guidelines on Investigation Procedures for OLAF Staff
IBOAs	Institutions, bodies, offices and agencies
ISRU	Internal Selection and Review Unit
OLAF	European Anti-Fraud Office
PIF	Protection of the Financial Interests
SC	OLAF Supervisory Committee
UCLAF	Unit for the Coordination and Fraud Prevention

EXECUTIVE SUMMARY

Background

The European Anti-Fraud Office (OLAF) was established in April 1999, under the pressure of a political crisis at EU level which culminated in the resignation of the Santer Commission in March of the same year¹.

In a context where frauds against the Community budget, financial irregularities in the management of Community funds and conflicts of interests were denounced and put in the limelight of public debate, the predecessor of OLAF - the Unit for the Coordination of Fraud Prevention (UCLAF) established in 1987 - was subject to an articulated critical analysis in a special report by the European Court of Auditors (ECA) in 1998. The weaknesses of the Unit were highlighted and, in particular, the limitation of its mandate to investigate irregularities and frauds only within the European Commission was pointed out as a major problem for the fight against fraud. In October 1998² the European Parliament, following up on the findings of the ECA special report, adopted a resolution calling for a reform of UCLAF and, in particular, an extension of its competence to conduct internal investigations in all European institutions. In April 1999 the European Commission adopted a decision establishing the European Anti-fraud Office (OLAF), as an office functionally independent from the Commission.

Shortly after the establishing decision, in May 1999, specific rules for OLAF investigations were provided in two Regulations (1073/1999³ and 1074/1999⁴) and an interinstitutional agreement was signed between the Parliament, the Council and the Commission laying down the terms and conditions for internal investigations within the EU institutions (Interinstitutional Agreement)⁵. These two regulations have been subsequently replaced by Regulation 883/2013⁶ which constitutes the current legal framework of OLAF's mandate, powers and procedural safeguards concerning persons under OLAF investigations.

The number of OLAF investigations has considerably grown over the years of existence of the Office leading to the opening of 219 investigations⁷ and the recommendation to recover 631 million euros⁸ in 2016. Ever since the establishment of the Office, several criticisms have been levelled at its functioning including the procedural rights of persons under investigation by OLAF⁹, judicial control of the activities of OLAF¹⁰, the efficiency of administrative investigations carried out by OLAF and the

¹ See J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, Europa Law Publishing, 2011, p. 47 ff.

² See the Resolution on 7 October 1998 on the independence, role and status of the Unit for the Coordination of Fraud Prevention, OJ 26.10.98 C 328/95.

³ Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

⁴ Regulation (Euratom) 1074/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

⁵ See the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF).

⁶ See the Regulation EU 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 and Regulation (Euratom) 1074/1999.

⁷ See the 2016 OLAF Annual Report, p. 12.

⁸ See the 2016 OLAF Annual Report, p. 12.

⁹ See S. Gleß and H. E. Zeitler, *Fair Trial Rights and the European Community's Fight Against Fraud*, in *European Law Journal*, 2001, p. 219 ff; V. Stojanovski, *Procedural Rights of Persons under Investigation by OLAF*, in *Eucrim* 3/2017, p. 127 ff.

¹⁰ See J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, *cit.*, p. 230.

quality of its Final Reports¹¹, and in particular the judicial follow-up of OLAF's recommendations in the Member States¹².

Aims

EU Citizens, as taxpayers, have an essential interest in the efficient and effective protection of the EU budget. However, those same EU citizens have fundamental rights – today recognised in the Charter of Fundamental Rights (EU CFR) - that must be protected also in the context of an efficient and effective protection of the EU budget.

At the time of writing, an evaluation of the application of Regulation No 883/2013 is ongoing. The purpose of the briefing paper is twofold:

- to assess the current framework of procedural rights as stipulated in Reg. 883/2013 and highlight the main improvements and potential lacunae;
- to assess the status of OLAF Final Reports as stipulated in Reg. 883/2013 and highlight the main legal and practical challenges in relation to the evidentiary status of OLAF Final Reports in national judicial proceedings.

Main findings

The introduction of Article 9 constituted one of the main innovations of Regulation 883/2013. It codified and clarified procedural safeguards of persons under OLAF investigations and thereby strengthened the level of protection of defence rights in administrative investigations conducted by the Office. This overall positive assessment of Art. 9 of Regulation 883/2013 must however be qualified by the partly uncertain scope of application of the rights contained therein. In order to ensure the coherence of OLAF investigations, the rights contained in Article 9 should be, therefore, further detailed. In particular, the threshold for invoking the privilege against self-incrimination, the minimum information provided to the interviewee prior to the interview by the Office as well as external control over the restriction of the right to be heard could be specified.

In addition to the rights already contained in Art. 9, the analysis identified digital forensics and the right to access the case file as particularly important. Digital forensic measures are essential for OLAF investigations. Since these measures are sensitive from the viewpoint of the right to privacy, the scope and conditions for OLAF to conduct digital forensics should be set out in EU secondary law. Concerning access to the OLAF case file, neither Regulation 883/2013 nor the case law of the CJEU allow for a right to such access. Access to the file is, nonetheless, crucial to ensuring both the effective exercise of the right to be heard and equality of arms in subsequent follow-up proceedings.

In order to ensure the proper application of the safeguards laid down in Art. 9 of Regulation 883/2013, effective and independent control of OLAF investigations remains essential. The analysis showed, however, that the proposed Controller for Procedural Safeguards would represent only an additional layer of non-binding control that is questionable both in terms of coherence and effectiveness.

¹¹ See the Special Report n. 1/2005 of the European Court of Auditors. pt. 37; H. Xanthaki, *What is EU fraud? And can OLAF really combat it?* in *Journal of Financial Crime*, 2010, p. 133 ff.; S. White, *EU anti-fraud enforcement: overcoming obstacles*, in *Journal of Financial Crime*, 2010 p. 81 ff.

¹² See A. Weyembergh, I. Armada, C. Brière, *The Inter-Agency Cooperation and the Future Architecture of the EU Criminal Justice and Law Enforcement Area*, Study for the LIBE Committee of the European Parliament, 2014, p. 37.

The analysis revealed the strong connection between, on the one hand, the level of protection of procedural safeguards and the use of the OLAF Final Reports in national criminal proceedings and, on the other, the admissibility in evidence of OLAF Final Reports in national courts and the effective follow-up of OLAF investigations. Accordingly, an adequate level of procedural safeguards in the course of OLAF administrative investigations enhances the admissibility of OLAF Final Reports before national courts.

Nevertheless, procedural safeguards are only one factor influencing admissibility. The manifold asymmetries (vertical and sectoral) in the prerogatives and powers of OLAF seriously jeopardise the future use of the findings of the Office. Currently, the assimilation rule conserves national differences and ultimately leaves the admissibility of OLAF Final Reports to the variable geometry of the criminal procedural laws of the Member States. Due to the uncertainties about the admissibility of the OLAF Final Report, national judicial authorities often repeat investigative acts already performed by OLAF. This duplication of efforts is detrimental to both procedural economy and the rights of the person under investigation.

Recommendations and Conclusions

The introduction of Art. 9 of Regulation 883/2013 had a clearly positive impact: the express provision of procedural safeguards in EU secondary law not only enhances the protection of persons subject to OLAF investigations, but also contributes to gaining further acceptance and legitimacy for OLAF activities. This being said, several aspects of the rights contained in Art. 9 should nevertheless be further detailed such as the threshold to invoke the privilege against self-incrimination, the minimum information to be provided to the interviewee and the regime for carrying out digital forensic operations. Furthermore, the analysis highlights the importance of the right of access to the file for the effective exercise of the right to be heard. Further reflection is required in order to strike an adequate balance between this right and the confidentiality of OLAF investigations.

The safeguards currently provided in Art. 9 Regulation 883/2013 do not seem excessive or disproportionate in comparison to the powers of the Office. On the contrary, clarifying and strengthening procedural safeguards in OLAF investigations fosters the further use of OLAF Final Reports in national judicial proceedings. However, the above analysis has shown that enhancing procedural guarantees in OLAF investigations will not on its own be sufficient to resolve the problems related to the admissibility of OLAF Final Reports in national criminal proceedings. Due to the strong national and sectoral fragmentation of OLAF powers, the admissibility gap would necessitate a greater legislative effort aiming at the – at least minimal – harmonisation of the Office's investigative powers. This would ensure a true balance between efficiency and effectiveness of enforcement, on the one hand, and respect of the rights of the defence on the other.

1. PROCEDURAL SAFEGUARDS IN OLAF INVESTIGATIONS

KEY FINDINGS

- Art. 9 of Regulation 883/2013 has codified and clarified procedural safeguards of persons under OLAF investigations and thereby strengthened the level of protection of defence rights in administrative investigations conducted by the Office and contributed to gaining further **acceptance and legitimacy** for its investigations.
- In order to ensure the coherence of OLAF investigations the rights contained in **Article 9 should be further clarified**. In particular, the threshold for invoking the privilege against self-incrimination, the minimum information provided to the interviewee prior to the interview by the Office as well as external control over the restriction of the right to be heard could be specified.
- **Digital forensic measures** proved to be essential for OLAF investigations. Since these measures are particularly sensitive from the viewpoint of the right to privacy, the scope and conditions for OLAF to conduct digital forensics should be provided for in EU secondary law.
- Neither Regulation 883/2013 nor the case law of the CJEU allow for the **right to access the OLAF case file**. Access to the file is, however, crucial to ensuring the effective exercise of the right to be heard and the equality of arms in subsequent follow-up proceedings.
- Effective and independent control of OLAF investigations is crucial for the legitimacy of the Office. The proposed **Controller for Procedural Safeguards** would, however, represent only an additional layer of non-binding control that is questionable both in terms of coherence and effectiveness.

1.1. PROCEDURAL SAFEGUARDS IN THE CONTEXT OF OLAF INVESTIGATIONS

According to OLAF's mandate, the Office conducts administrative investigations¹³ into irregularities, fraud, corruption and other illegal activities affecting the EU budget. OLAF's investigative powers are defined in Regulation 883/2013, in Regulations 2988/95¹⁴ and 2185/96¹⁵ and further specified in the 2013 Internal Guidelines on Investigation Procedures (GIPs)¹⁶ and in the 2016 Guidelines on Digital Forensics (GDFs)¹⁷. It follows from the administrative nature of OLAF investigations that the

¹³ Regulation 883/2013 defines investigations as "any inspection, check or other measures undertaken by the Office [...] with the view to achieving [its] objectives and establishing, where necessary, the irregular nature of the activities under investigation" (Article 2(4) of Regulation 883/2013). Regulation 883/2013 in its Articles 3 and 4 further differentiates between external and internal investigations. According to Article 4 internal investigations are conducted within the EU institutions, bodies, offices and agencies and cover serious cases of "discharge of professional duties constituting a dereliction of the obligations of officials and other servants of the Union liable to result in disciplinary or, as the case may be, criminal proceedings" as well as "an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or staff members of institutions, bodies, offices or agencies not subject to the Staff Regulations". According to Article 3 OLAF conducts external investigations in Member States and third countries, and on the premises of international organisations. OLAF conducts such checks and inspections in cases where there is a need to establish whether the EU's financial interests have been affected in connection with a grant agreement or decision, or a contract concerning EU funding.

¹⁴ Regulation (EC) 2988/95 on the protection of the European Communities financial interests.

¹⁵ Regulation (EC) 2185/96 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.

¹⁶ The GIPs are publicly available at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/gip_en.pdf. They also indicate which investigative activities may be performed in the context of an investigation but do not distinguish between external and internal cases. See Article 11.2 GIPs.

¹⁷ The GDFs are publicly available at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/guidelines_en.pdf. These powers include collecting documents and information in any format which can be used as evidence, taking statements from any

investigative powers of OLAF are limited and do not allow for the use of coercive powers. Accordingly, OLAF has no power to summon witnesses or to sanction witnesses in case of false statements; nor has it powers to intercept communications, to access or monitor bank accounts or to conduct surveillance¹⁸.

Notwithstanding the administrative nature and the limited scope of OLAF's powers, OLAF investigations can interfere with or even violate the fundamental rights of those subject to such investigations. The adequate level of procedural guarantees for those subject to OLAF investigations has been, therefore, at the centre of legislative and scholarly debate since the early years of the establishment of the Office¹⁹.

1.1.1. Legislative history on procedural safeguards applicable for OLAF investigations

Originally, Regulation 1073/1999²⁰ itself was silent on procedural safeguards. Its Preamble made only a general reference to the need to conduct the investigations "with full respect for human rights and fundamental freedoms, in particular the principle of fairness, [and] the right of the person involved to express their views on the facts concerning them"²¹. The Interinstitutional Agreement adopted following Regulation 1073/1999 as well as the then newly-introduced Annex IX of the Staff Regulations were meant to fill this gap and provided for a set of procedural safeguards such as the right to be informed of the investigation as long as this would not jeopardise the investigation itself and the right to be heard before the adoption of the Final Report. The guarantees introduced by the Interinstitutional Agreement and Annex IX of the Staff Regulations were, however, limited to internal investigations. No similar provisions were put in place for external investigations. Only the OLAF Manual – an internal instrument "purely explanatory in nature" without binding legal effects²² referred to procedural safeguards for the conduct of external investigations.

In order to remedy this asymmetry and "in light of a number of questions that have arisen in connection with OLAF's practices" the Commission presented a Proposal in 2004²³ to amend Regulation 1073/1999

person able to provide relevant information, taking samples for scientific examination, fact-finding missions in Member States, interviews with persons concerned and witnesses, inspections of premises, on-the-spot checks, digital forensic operations; and undertaking investigative missions in third countries.

¹⁸ Regulation 883/2013 distinguishes those investigative measures that need prior authorisation by OLAF's Director-General, thereby implying that these powers – even if non-coercive in nature - are regarded as more intrusive and therefore need more guarantees. These include interviews with persons concerned or witnesses; inspections of premises, on-the-spot checks, digital forensics operations and investigative missions in Third States (Article 11 (2) of the 2013 GIPs). According to Regulation 883/2013, prior to authorisation the legality, necessity and proportionality of the measure are assessed by an internal legality check that is carried out by the Internal Selection and Review Unit (ISRU) (Article 12 of the 2013 GIPs). The ISRU operates under the responsibility of OLAF's Director-General and provides him/her with non-binding opinions in the context of both the *ex ante* legality check of the investigative measures that need his/her authorisation and the *ex post review* of the Final Report and recommendations (Article 20 and 21 of the GIPs).

¹⁹ See f.i., V. Stojanovski, *Procedural Rights of Persons under Investigation by OLAF*, in *Eucrim*, 3/2011, p. 128.

²⁰ And the same goes for its "twin", Regulation 1074/1999 adopted under the EURATOM framework. See J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor's Office*, 2011, Europa Law Publishing, p. 167.

²¹ Recital 10 of Regulation 1073/99 provided that: "[...] these investigations must be conducted in accordance with the Treaty and [...] and with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value; [...]".

²² In the (no longer in force) 2009 version of the OLAF Manual of Operational Procedures, p. 121, it was provided that: "In external investigations, OLAF investigators enable the person concerned to express his views on all the facts that concern him before drawing any final conclusions. Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority".

²³ COM (2004) 103 final; and a parallel proposal COM (2004) 104 final aimed at amending Regulation 1074/1999.

and to insert a set of procedural safeguards covering both internal and external investigations. The 2004 Proposal contained provisions on the right to be informed, on the right to be heard and to comment before the adoption of the Final Report, on the privilege against self-incrimination and on the role of the Supervisory Committee (SC). Following the observations of the ECA spelled out in a special report in 2005²⁴, the 2004 Proposal was put on hold and subsequently replaced by a new Proposal in 2006²⁵ which reproduced the contents of the previous initiative and added provisions on the establishment of the Review Adviser and on the Supervisory Committee.

After the first reading in Parliament in 2008²⁶, also this second proposal failed to advance in the legislative process. It was later used as a basis for further reflection and to form the third Proposal which was presented in 2011²⁷. This 2011 Proposal was finally adopted in 2013 as part of Regulation 883/2013, which represents the main framework of reference for procedural safeguards in OLAF investigations.

1.1.2. The current legal framework

According to Regulation 883/2013, external and internal investigations must be conducted in compliance with the procedural guarantees defined in Article 9 of the Regulation²⁸. The introduction of this article constituted one of the main innovations of Regulation 883/2013.

Prior to Regulation 883/2013, in the absence of specific EU secondary legislation on procedural safeguards in OLAF investigations, it was argued that the general principles of EU law provided for the rights of the defence²⁹. Indeed, the presumption of innocence³⁰, the privilege against self-incrimination³¹, the right to be heard³², the right to access the case file³³ and the right to be assisted by a lawyer³⁴ are part of the general principles of EU law. These rights have been elaborated in the case law of the European Court of Justice in competition and staff disciplinary cases and are today codified in the EU CFR. When it came to the applicability of these rights to OLAF investigations, the European Court of Justice took, however, a relatively restrictive stance, adapting the protection granted under its previous case law to the nature of the outcomes of OLAF investigations³⁵.

²⁴ Special Report of the European Court of Auditors n. 1/2005.

²⁵ COM (2006) 244 final.

²⁶ See the European Parliament Resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) n. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), P6_TA(2008).

²⁷ COM (2011) 135 final.

²⁸ Recital 23 of Regulation 883/2013.

²⁹ Already in the case *Alvis v. Council*, a staff disciplinary case, the Court of Justice acknowledged that the respect of the rights of defence – and, in particular, the possibility to reply to allegations before a disciplinary decision is taken – constituted a generally accepted principle in the Member States and served the “requirements of sound justice and good administration” See CJEU, 4 July 1963, C-32/62, *Alvis v. Council*. See T. Tridimas, *The General Principles of EU Law*, 2nd Ed., 2006, p. 370 ff.

³⁰ C-199/92, 8 July 1999, *Huls AG v. Commission*, par. 149; C-235/92, 8 July 1999, *Montecatini Spa v. Commission* par. 175.

³¹ CJEU, 18 October 1989, C-374/87, *Orkem v. Commission*; GC, 20 February 2001, T-112/98, *Mannesmannröhren-Werke v. Commission*.

³² Beyond the *Alvis* case (supra nt. 35), see CJEU, 23 October 1974, C-17/74, *Transocean Marine Paint v. Commission*; CJEU, 13 February 1979, C-85/76, *Hoffmann-La Roche v. Commission*.

³³ See GC, 17 December 1991, T-7/89, *Hercules Chemicals v. Commission*; GC, 18 December 1992, T-10-11-12-15/92 (joined cases) *Cimenteries CBR (“Cement case”)* and, in particular CJEU, 7 January 2004, C-204/00 P (joined cases), *Aalborg Portland*.

³⁴ CJEU, 17 October 1989, C-85/87 *Dow Benelux v. Commission*.

³⁵ See, in particular, GC, 12 September 2007, T-259/03, *Nikolau v. Commission*, par. 246 where the General Court held that “*le principe du respect des droits de la défense, tel que formulé dans la jurisprudence rappelée au point 243 ci-dessous, ne trouve pas à s’appliquer en l’espèce. Il convient de considérer, en effet, que le principe du contradictoire doit être respecté vis-à-vis d’une personne avant l’adoption d’un acte lui faisant grief pour éviter que cette personne ne subisse un préjudice du fait que son point de vue n’a pas été utilement entendu. En revanche, dans la mesure où une procédure d’enquête ne donne pas lieu à un tel acte, l’absence d’application pleine et entière de ce principe à ce stade ne porte pas préjudice aux personnes concernées*”. As will be explained under 1.3.3., the European Courts have dealt with the procedural safeguards in OLAF investigations mostly in the context of actions for damages under Articles 268 and 340 (2) TFEU.

Against this background, Article 9 codifies and clarifies general principles of EU law³⁶ and has an important legitimating function. Article 52 (1)³⁷ of the EU CFR requires that any limitation of a Charter right must be provided for “by law”. Article 9 fulfils this essential EU constitutional legality requirement and serves as the legal basis limiting certain rights by setting conditions for their respective exercise. Accordingly, Article 9 spells out four important guarantees: (i) the privilege against self-incrimination, (ii) the right to be informed, (iii) the right to be assisted and (iv) the right to be heard before conclusions are drawn up. Whereas the first three safeguards apply in the context of interviews, the right to be heard, instead, represents an autonomous defence right which must be granted whether or not the person is interviewed in the course of the investigation.

The scope of the procedural safeguards provided for in Article 9 is further detailed both for internal and external investigations by the GIPs and the GDFs. In addition, Regulations 2988/95 and 2185/96 contain specific rules with regard to on-the-spot checks and inspections, whilst the Interinstitutional Agreement and the Decisions adopted by the EU IBOAs on the basis of the Model Decision attached thereto together with Annex IX of the EU Staff Regulations contain specifications in the context of internal investigations.

Beyond the above legal sources detailing the scope of application of procedural safeguards in OLAF investigations, Article 9 has to be interpreted also in the light of the EU CFR. Since the Lisbon Treaty reforms, the Charter is legally binding and holds the same value as the Treaties³⁸. It therefore constitutes both a standard for reviewing and interpreting EU secondary law³⁹. The key fundamental rights in this context are the right to an effective remedy⁴⁰ and to a fair trial⁴¹, the rights of the defence⁴², including the right to be heard⁴³, the right to access the case file⁴⁴, the right to information and interpretation, legal professional privilege, the right not to incriminate oneself, the right to access a lawyer, and the right to examine and present witnesses⁴⁵. Specifically relevant to this analysis, the fundamental rights of investigated persons or entities are further protected by Article 41 of the Charter, which sets out the right to good administration entailing the right to have one’s affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Article 41(2) also partially codifies the proclaimed protection of defence rights in the Union actor context by enshrining the right to be heard, the right to access one’s file, and the obligation on the administration to give reasons for its decisions.

³⁶ See the remarks made by J. Inghelram at the Workshop on the Future of OLAF, organised by the Parliamentary Committee on Budgetary Control, Brussels, 29 May 2017.

³⁷ Article 52 (1) EU CFR provides a “horizontal clause” for the limitation of the exercise of Charter rights. It establishes that “any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

³⁸ Article 6(1), TEU.

³⁹ See K. Lenaerts and J.A. Gutierrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers, T. Hervey, J. Kenner, A. Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, p. 1575.

⁴⁰ Inherently bound up with the principle of effective judicial protection, a general principle of EU Law stemming from the constitutional traditions common to the Member States and enshrined in Artt. 47 (1) EU CFR and 6 and 13 of the ECHR: see cases CJEU, 15 May 1986, C-222/84, *Johnston*; CJEU, 15 October 1987, C-222/86, *Unectef v. Heylens*; CJEU, 16 October 2001, C-429/99, *Commission v. Austria*; CJEU, 13 March 2007, C-432/05, *Unibet*; CJEU, 22 December 2010, C- 279/09, *DEB*.

⁴¹ Entailing “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” according to Art. 47 (2) EU CFR and Art. 6 ECHR.

⁴² See Art. 48 (2) EU CFR.

⁴³ See *infra* 1.1.6.

⁴⁴ See *infra* 1.1.7.

⁴⁵ In accordance with Art. 52 (3) EU CFR, Art. 48 EU CFR has the same meaning and scope as the right guaranteed in Art. 6 (2) and (3) ECHR; see the Explanations relating to the Charter of Fundamental Rights.

1.1.3. The privilege against self-incrimination

Article 9 of Regulation 883/2013 provides for the “right to avoid self-incrimination” for any person interviewed by the Office in any capacity. It is evident from the wording of Article 9 that this provision mirrors the respective fair trial right elaborated in the jurisprudence of the ECtHR⁴⁶. The case law of the ECtHR considers the privilege against self-incrimination as a requirement lying at the heart of a fair trial under Article 6 ECHR. In two landmark judgments, in *Funke v. France*⁴⁷ and in *Saunders v. UK*⁴⁸, the ECtHR interpreted the content of the right as a right for the person charged with a criminal offence to remain silent and not to contribute to incriminating himself before an authority questioning him/her⁴⁹.

According to Article 9(2) the privilege against self-incrimination applies both to witnesses and to “persons concerned” irrespective of a formal qualification as person concerned or witness at the time of the interview. However, Article 9 (2) subparagraph 4 expressly requires that, if in the course of a witness interview “evidence” emerges indicating that that same person may be a “person concerned”, the interview must be terminated, the person must be informed of his/her rights and the previous statements released by that person cannot be used by OLAF “without giving him first the opportunity to comment on those statements”.

The literal reading of Article 9 (2) subparagraph 4 seems to suggest that Regulation 883/2013 does not contain an absolute exclusionary rule with regard to statements made previously. Instead it provides for a compromise solution that allows the person interviewed by OLAF to comment on previous statements made as a witness. Article 9 (2) subparagraph 4 does not explicitly forbid OLAF from using the statement if the person gave comments or declined the invitation to do so. Article 16 (6) of the GIPs endorses, however, a more protective approach in that it specifies that where a person concerned was previously interviewed as a witness, the investigation unit shall not use his or her past statements “in any way”⁵⁰.

Defining the moment when the witness becomes a person concerned is central for the protective scope of the privilege against self-incrimination. The text of Article 9 (2) subparagraph 4 speaks of the emergence of “evidence” suggesting that the witness is “a person concerned” instead of referring to mere suspicion or indications. The GIPs do not clarify further the applicable threshold. They simply

⁴⁶ Article 9 proclaims that OLAF has to carry out its investigations “in accordance with the principle of the presumption of innocence”. The presumption of innocence represents a fundamental right under Article 6 (2) ECHR and is also expressly foreseen by Article 48 (1) EU CFR. Even before the adoption of the EU CFR, the presumption of innocence had already been recognised as part of the general principles of EU Law by the case law of the ECJ in the context of competition law proceedings, see, f.i., C-199/92, 8 July 1999, *Huls AG v. Commission*, par. 149; C-235/92, 8 July 1999, *Montecatini Spa v. Commission* par. 175. With regard to OLAF investigations, the need to respect the presumption of innocence was reiterated in the case *Franchet and Byk v. Commission*, 8 July 2008, T-48/05, par. 209 ff.

⁴⁷ ECtHR, 25 February 1993, *Funke v. France*.

⁴⁸ ECtHR, 17 December 1996, *Saunders v. United Kingdom*.

⁴⁹ The interpretation of the right to silence provided by the ECtHR is deemed broader than that recognised by the CJEU in its case law on competition matters. In particular, in the *Orkem* case and in its later judgements delivered after landmark decisions from Strasbourg, the CJEU found that the privilege against self-incrimination would not entail an absolute right to remain silent, but a more limited right not to be compelled to provide answers which might involve the admission of an infringement on the part of the requested person. This interpretation, in the context of competition law proceedings, allows the Commission to ask (and compel answers) about “purely factual questions” as long as they do not involve an admission of the infringement. See T. Tridimas, *The General Principles of EU Law*, cit., p. 378; According to N. Khan, *Kerse & Khan on EU Antitrust Procedure*, 6th Edition, 2012, Sweet & Maxwell, p. 121., the ECtHR in *Funke* and *Saunders* seemed to endorse a broader (and more protective approach) with regard to the nature of the statements which benefit from the privilege “extending this to even factual statements falling short of admissions of wrongdoing”. From a criminal law perspective, the ECtHR approach appears preferable – also for the difficulty of concretely identifying when a question is “purely factual” in the context of an investigation. See S. Lamberigts, *The Privilege Against Self-incrimination: a Chameleon of Criminal Procedure*, in *New Journal of European Criminal Law*, 2016, p. 418 ff.

⁵⁰ See Article 16 (6) of the GIPs.

reiterate that the interview with the witness must be terminated when “it becomes apparent” that he or she is in fact a person concerned⁵¹.

By referring to “evidence”, Regulation 883/2013 sets a rather high threshold that may fall short of providing adequate protection to the interviewed person. Such a high threshold contradicts furthermore the definition of a “person concerned” in Regulation 883/2013. According to the latter it is “any person or economic operator” who is “suspected” of “having committed fraud, corruption or any other illegal activity affecting the financial interests of Union and who is therefore subject to investigation by the Office”⁵². A clearer wording of Article 9 (2) subparagraph 4 would enhance the coherence and clarity of the scope of application of the privilege against self-incrimination in OLAF investigations.

1.1.4. The right to be informed

In order to enable them to exercise the privilege against self-incrimination, Regulation 883/2013 now provides that witnesses and persons concerned shall be notified in advance of the interview and of their rights, namely the right not to incriminate oneself and to be assisted by a person of one’s choice⁵³. Regulation 883/2013 spells out different notice periods: a longer period of at least 10 working days has to be granted to the person concerned, while a witness may be invited to an interview at shorter notice: at least 24 hours. Derogations to the notice periods are possible, either with the consent of the person or on the basis of duly reasoned grounds of urgency.

Article 9 does not contain any further specification as to the minimum content of information that OLAF needs to give to the interviewee about the subject of the interview. The lack of explicit provisions on the requirement of information prior to the interview is remarkable, because the same matter received explicit attention in relation to the privilege against self-incrimination. Whereas Article 9 (2) subparagraph 4 requires the Office to provide the person concerned with a “summary of the facts concerning him”, no similar provision can be found in relation to the right to be informed. It seems, however, that in practice, OLAF provides some information about the subject matter of the interview in the letter of invitation. The detail of the information, however, varies greatly depending on the stage of development of the investigation⁵⁴.

⁵¹ See Article 16 (4) GIPs.

⁵² See Article 2 (5) of Regulation 883/2013.

⁵³ It is important to recall that in the context of criminal proceedings, the EU adopted in 2012 a Directive on the right to information in criminal proceedings (Directive 2012/13/EU). Furthermore, the right to information has also been recognised by the ECtHR under art Art. 6 (3) (a) ECHR as a precondition to the effective exercise of the rights of defence: see ECtHR, 19 December 1989, *Kamasinski v. Austria*; ECtHR, 10 August 2006, *Padalov v. Bulgaria*; ECtHR, 27 March 2007, *Talat Tunç v. Turkey*; ECtHR, 11 December 2008, *Panovits v. Cyprus*.

⁵⁴ As explained by OLAF representatives in the course of the interviews conducted in preparation of this briefing note.

1.1.5. The right to be assisted

The right to be assisted by a person of one's choice is expressly granted to the person concerned under Article 9 (2) subparagraph 1. The person of choice may be – and often is – a defence lawyer. This provision of Regulation 883/2013 gives effect to Article 47 (2) of the EU CFR which proclaims the “possibility of being advised, defended and represented” in the context of a fair trial⁵⁵.

The right to be assisted has been recognised by the ECtHR as an essential fair trial right that applies, according to the *Salduz* jurisprudence⁵⁶, also to the pre-trial stage and in particular, from the first questioning of a suspect. The ECtHR stressed that the principle of equality of arms requires that a suspect, from the time of the first police questioning, must be afforded the whole range of interventions that are inherent to legal advice⁵⁷. In the reasoning of the ECtHR, especially in the early stages of the criminal investigation it is the task of the lawyer, amongst other things, to ensure respect for the right of the accused not to incriminate himself or herself.

Although OLAF interviews are in no way equivalent to questioning by police, from the viewpoint of the privilege against self-incrimination as guaranteed by Article 9 of Regulation 883/2013, extending the right to assistance to OLAF interviews facilitates the admissibility of OLAF Final Reports as evidence in national judicial proceedings⁵⁸.

1.1.6. The right to be heard before adverse measures are taken

The right to be heard was recognised as a general principle of EU law in the early case law of the Court of Justice in staff disciplinary proceedings⁵⁹ and extended to administrative proceedings which are liable to culminate in a measure adversely affecting a person⁶⁰. Furthermore, the right to be heard is expressly stipulated in Article 41 (2) first indent EU CFR in the more general context of good administration as “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken”.

Beyond mere good administration, the right to be heard in time is of vital importance in the context of a fair trial. As such, it forms a prominent part of the various international human rights conventions and instruments such as Article 10 of the Universal Declaration of Human Rights, Article 14 (1) of the International Covenant on Civil and Political Rights, or Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although the idea of a fair trial might

⁵⁵ Art. 47 (2) EU CFR and (3) reproduces the contents of Art. 6 (3) (d) ECHR. In this regard, it is also worth mentioning the 2013 Directive on the right of access to a lawyer in criminal proceedings (Directive 2013/48/EU); although the scope of application of the Directive seems restricted to “proceedings before a court having jurisdiction in criminal matters” (Art. 2 (4) second subparagraph), it accords the right of access to a lawyer also to “persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons” (Art. 2 (3)).

⁵⁶ ECtHR, 27 November 2008, *Salduz v. Turkey*.

⁵⁷ These include the discussion of the case, instructions by the lawyer, the investigation of facts and search for favourable evidence, preparation for interrogation, support of the suspect and control of the conditions under which a suspect is detained.

⁵⁸ J. Inghelram, *cit.*, p. 156 considers that even beyond the possibility of a national criminal follow-up of an OLAF investigation, the right to be assisted must be granted on the basis of the general principle of the respect of the rights of the defence. The Author recalls that the CJEU has already recognised the right to legal representation in the preliminary enquiry stage in competition proceedings. See in this regard CJEU, 17 October 1989, C-85/87 *Dow Benelux v. Commission*, affirming that the right to legal representation has to be respected from the preliminary enquiry stage of competition proceedings (par. 27).

⁵⁹ See CJEU, 4 July 1963, C-32/62, *Alvis v. Council*.

⁶⁰ See CJEU, 23 October 1974, C-17/74, *Transocean Marine Paint v. Commission*; CJEU, 13 February 1979, C-85/76, *Hoffmann-La Roche v. Commission*; CJEU, 27 June 1991, C-49/88, *Al Jubail Fertilizer v. Council*; CJEU, C-32/95, 24 October 1996, *Commission v. Lisrestal*. In literature see T. Tridimas, *The General Principles of EU Law*, *cit.*, p. 378 and more recently P. Craig, *Article 41 – Right to Good Administration*, in S. Peers, T. Hervey, J. Kenner, A. Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, p. 1078.

originally be rooted in proceedings before a court or a tribunal, it is widely acknowledged today that also preliminary investigations carried out by, e.g., the public prosecutor must involve a hearing of the accused prior to any adverse decision being taken.

Prior to 2013, the right to be heard was provided expressly only for internal investigations by virtue of Article 4 (1) of the Model Decision as attached to the Interinstitutional Agreement of 25 May 1999 and in Article 1 (1) of Annex IX to the Staff Regulations. The relevance of the right to be heard in the context of OLAF internal investigations was also recognised by the case law of the Court of Justice⁶¹. For external investigations, the right to be heard was not expressly granted in EU secondary law but only in the OLAF Manual⁶². However, the General Court acknowledged that the right to be heard applies in OLAF external investigations on the basis of the general principle of the respect of the rights of the defence⁶³.

Today, Article 9 (4) of Regulation 883/2013 proclaims that, "once the investigation has been completed and before conclusions referring by name to a person concerned are drawn up, that person shall be given the opportunity to comment on the facts concerning him." Although this provision speaks of an "opportunity to comment" instead of using the traditional designation of the "right to be heard", it allows the person concerned to submit his/her observations either in writing or at an interview with OLAF officials "once the investigation has been completed". This is comparable to the right to be heard in criminal proceedings, where the public prosecutor will hear the accused before completion of investigations in order to safeguard his or her procedural rights.

This "opportunity" shall be given by the Office along with "a summary of the facts concerning the person concerned" in both internal and external investigations. Article 9 (4) further stipulates that the time span of "opportunity to comment" shall be less than 10 working days, i.e. two weeks, with exceptions applicable in cases of urgency. The comments provided by the concerned person must be referred to in the Final Report.

Article 9 (4) also specifies the conditions under which the right to be heard may be deferred by means of a decision of OLAF's Director-General; such an exception is allowed in "duly justified cases" when necessary to preserve the confidentiality of the investigation and/or a national investigation falling within the remit of a national judicial authority. The exact meaning and/or limitations of such "deferral" is not defined in Regulation 883/2013 and thus remain unclear. Article 9 (4) only stipulates that in cases referred to in Article 1 (2) of Annex IX to the Staff Regulations, i.e., "cases that demand absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority", any failure to respond within one month to the request of the Director-General for deferral "shall be deemed to constitute a reply in the affirmative", i.e., leading, as the case may be, to a deferral beyond the duration of one month.

A difference in view of the limitation is made between internal and external investigations. In internal investigations, the deferral of the right to be heard always requires the previous consent of the Secretary General or the equivalent authority of the IBOA to which the member or official concerned

⁶¹ See GC, 8 July 2008, *Franchet et Byk v. Commission*, T-48/05 par. 14.

⁶² In the no longer in force 2009 version of the OLAF Manual of Operational Procedures, p. 121, it was provided that: "In external investigations, OLAF investigators enable the person concerned to express his views on all the facts that concern him before drawing any final conclusions. Whenever the person cannot be heard, the investigator records what steps were taken to meet this requirement. Compliance with the obligation to invite the person concerned may be deferred in cases necessitating the maintenance of absolute secrecy for the purpose of the investigation or at the request of a judicial authority".

⁶³ General Court, 20 July 2016, *Oikonomopoulos v. Commission*, T-483/13, par. 231.

belongs⁶⁴. In the latter case, such “external” consent has been considered by the case law of the Court of Justice not as a mere formality but as an essential requirement “to ensure that the rights of defence of the officials concerned are respected” and that the assessment of the exceptional nature of the deferral “is not a matter solely for OLAF”⁶⁵.

In the context of external investigations, however, an external review of the decision to defer the right to be heard does not exist to date. An equivalent of such external control over the restriction of the right to be heard should be provided also for external investigations, f.i. by requiring the agreement of the SC.

1.1.7. The right of access to the file

In the context of criminal proceedings, the right of access to the file is of paramount importance. It is essential for preparing the defence; only a timely access to the file allows the effective exercise of defence rights. In the context of a fair trial, prior access to the file is seen as a precondition of the principle of equality of arms.

For OLAF investigations, the applicability of the right of access to the file remains one of the most debated issues relating to procedural safeguards⁶⁶. While OLAF must before adopting the Final Report provide the person concerned with a “summary of the facts” in order to allow him or her to express his or her views and to comment, Regulation 883/2013 does not contain any provision on the right of access to the file. The silence of Regulation 883/2013 is surprising since the right of access to the file was addressed and developed by the case law of the Court of Justice in the context of competition cases⁶⁷ prior to the formal introduction of Article 27 of Regulation 1/2003⁶⁸ and has been gradually extended to other fields of administrative law, such as customs⁶⁹. In fact, the Court has highlighted, in competition and customs cases, the right of access to the file as an integral part of the rights of the defence and, in particular, as a guarantee for the effective exercise of the right to be heard⁷⁰.

Nowadays, the right of access to the file is expressly provided by primary EU law under Article 41 (2)(b) EU CFR as a component of the right to good administration: according to the Charter, every person has the right to have access to his or her file, “while respecting the legitimate interests of confidentiality and of professional and business secrecy”. Article 41 EU CFR provides a horizontal - although not unconditional - right of access to the file which applies across the different EU policy fields. The provision stresses confidentiality and professional business secrecy as legitimate reasons to limit the access to the file, thus reflecting the established case law of the Court of Justice⁷¹.

⁶⁴ See Article 4 (2) of the Model Decision attached to the 1999 Interinstitutional Agreement, Article 1 (2) of Annex IX to the Staff Regulations and Article 18 (3) of the 2013 GIPs.

⁶⁵ In these terms, GC, 8 July 2008, *Franchet and Byk v. Commission*, T-48/05 par. 151. See also J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, cit., p. 144.

⁶⁶ The main voices of the debate are: O. Jansen and P.M. Langbroek (Eds.), *Defence Rights During Administrative Investigations*, 2007, Intersentia, p. 30; S. White, *Rights of the Defence in Administrative Investigations: Access to the File in EC Investigations*, in *Review of European Administrative Law*, 2009, p. 57 ff.; J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, cit., p. 140.

⁶⁷ See the cases GC, 17 December 1991, T-7/89, *Hercules Chemicals v. Commission*; GC, 18 December 1992, T-10-11-12-15/92 (joined cases) *Cimenteries CBR* (“Cement case”) and, in particular CJEU, 7 January 2004, C-204/00 P (joined cases), *Aalborg Portland v. Commission*. See N. Khan, *Kerse & Khan on EU Antitrust Procedure*, 6th Edition, 2012, Sweet & Maxwell, p. 214 ff.

⁶⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ No. L 1/1–25 of 4.1.2003.

⁶⁹ See the case GC, 19 February 1998, T-42/96, *Eyckeler and Malt AG v. Commission*.

⁷⁰ See the cases GC, 29 June 1995, T-30/91, *Solvay v. Commission*; GC, 29 June 1995, T-36/91, *ICI v. Commission*. In literature, see T. Tridimas, *The General Principles of EU Law*, cit., p. 398 and P. Craig, *Article 41 – Right to Good Administration*, cit., p. 1082.

⁷¹ See, e.g., T-10-11-12-15/92 (joined cases) *Cimenteries CBR* (“Cement case”) and CJEU, 7 January 2004, C-204/00 P (joined cases), *Aalborg Portland v. Commission*.

However, with regard to OLAF investigations, the findings of the case law of the Court of Justice have not yet been extended. On the contrary, while reaffirming the importance of the right to be heard, the Court has consistently reiterated that OLAF is under no obligation to grant to a person concerned access to the file⁷². This conclusion has been based on two related arguments: the consideration that the OLAF Final Report has no binding legal effect upon its addressees (national authorities or EU IBOAs) and the fact that the decision actually bringing about a distinct change in the legal position of the person concerned is eventually taken by the authority in charge of the follow-up (at the EU or national level) of OLAF recommendations⁷³. In this perspective, the right of access to the file should be granted by the authority following up in the subsequent disciplinary, administrative or judicial proceedings and according to the procedural rules applicable therein⁷⁴.

The argument that access at a later stage in the follow-up procedure may constitute an equivalent to or a substitute for the access to the OLAF file is not entirely convincing: first of all, rules of access at national level may vary greatly; secondly and most importantly, OLAF is not required to transmit its complete file to the follow-up authority but only the Final Report, the recommendations and a selection of "relevant related documents"⁷⁵. Hence, in the national file, the person concerned may well find less information than in the original file that had been used to draw up the OLAF Final Report. Documents not forwarded having been considered irrelevant or simply not assessed in the drafting of the Final Report may still prove useful to the defence, for instance for contesting the conclusiveness of other inculpatory documents considered in the Final Report and forwarded to the national authorities. Granting access to the OLAF file, therefore, might prove crucial to ensuring the equality of arms in the subsequent national follow-up proceedings.

More than that, it seems that the silence of Regulation 883/2013 on the access to OLAF files does not fulfil the requirements of the EU CFR. Although it is understandable that OLAF investigations may require a higher degree of confidentiality than for instance customs cases, on the other hand, there is a lack of express provisions of EU secondary law (i) regulating the right of access to the file and (ii) substantiating what is to be understood, in this specific context, as the "legitimate interests of confidentiality" in the meaning of Article 41 (2)(b) EU CFR. This may result in a conflict with the EU CFR in view of Article 52 (1) thereof, stipulating, in particular, that any limitation of a Charter right must be "prescribed by law".

In practice, access to OLAF files has also been frequently sought by the person concerned through Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁷⁶, and the right to access documents as protected by Article 15 (3) TFEU and Article 42 EU CFR, respectively. Both rights are conceptually linked to the right to good administration and their exercise ultimately aims at having access to information. However, they serve different rationales and are submitted to different regimes of exceptions⁷⁷. On the one hand, as has been initially pointed out, the right of access to the file is an essential part of the rights of the defence and aims at a disclosure of the information only to the person concerned. On the other hand, the right of access to

⁷² See GC, 18 December 2003, T-215/02, *Gomez Reino v. Commission*, par. 65; GC, 12 September 2007, T-259/03, *Nikolaou v. Commission*; GC, 8 July 2008, T-48/05, *Franchet and Byk v. Commission* and, more recently, GC, 21 May 2014, T-447/11, *Catinis v. Commission*, par. 63-64.

⁷³ On these arguments see J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, p. 63; *cit.*, p. 144; S. White, *Rights of the Defence in Administrative Investigations*, *cit.*, p. 63.

⁷⁴ See GC, 21 May 2014, T-447/11, *Catinis v. Commission*, par. 64.

⁷⁵ See Article 11 (3) and (4) Regulation 883/2013.

⁷⁶ Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents

⁷⁷ See D. Curtin and J. Mendes, Article 42 – Right of Access to Documents, in in S. Peers, T. Hervey, J. Kenner, A. Ward (Eds.), *The EU Charter of Fundamental Rights. A Commentary*, Hart, p. 1102.

documents as provided for by Regulation 1049/2001 is intended to “secure a more significant role for [all] citizens”⁷⁸ and aims at disclosing to the general public the information held by the IBOAs requested. The disclosure to the general public of an OLAF investigative act, however, entails a completely different situation to the disclosure of preparatory documents belonging to a legislative procedure. This is why the respective case law of the European Court of Justice on Regulation 1049/2001 concerning OLAF is particularly restrictive.

Regulation 1049/2001 provides a set of exceptions⁷⁹ to the right of access to documents that substantiate and specify the “limits on grounds of public or private interest governing this right” referred to in Article 15 (3) TFEU. These exceptions allow IBOAs to refuse access to documents when the disclosure would, *inter alia*, undermine the protection of “the purpose of inspections, investigations and audits”, unless an overriding public interest in the disclosure is proven by the individual seeking the access. The possibility for OLAF to invoke such an exception has been recently restated by the European Court of Justice and extended to the case where an OLAF investigation is already closed but a reasonable period for the follow-up of its recommendations has not yet elapsed⁸⁰. Furthermore, this latest judgment seems to relieve OLAF of the need to carry out an individual assessment of the applicability of the exception to the documents specifically requested, by allowing OLAF to resort to a general presumption of non-disclosure and a global evaluation of the request⁸¹. This conclusion might be looked at as a certain deviation from the previously established line of case law on Regulation 1049/2001 requiring a specific examination of the request and an assessment of the concrete risk for the public interest protected by the exception with regard to the individual document⁸².

1.1.8. The procedural safeguards in the context of inspections and on-the-spot checks

Inspections and on-the-spot checks in external investigations are subject to a complex legal framework. Article 3 of Regulation 883/2013 provides that inspections and on-the-spot checks are to be carried out according to the rules established in Regulations 2185/96⁸³ and 2988/95⁸⁴, the sectoral rules recalled in the latter instruments, and in compliance with the “rules and practices of the Member State concerned and the procedural guarantees provided for in the OLAF Regulation”⁸⁵ itself. Therefore, OLAF’s powers in this specific context have been found uncertain⁸⁶ and problematic, due to the “patchy” nature of the applicable legal framework and its extensive reliance on national law⁸⁷. This assessment seems valid both in the perspective of OLAF powers and of the applicable procedural guarantees: whilst it is true that the reference to national law and practices raises the prospect of the application of additional national safeguards, on the other hand, in the case of transnational

⁷⁸ *Ibid.*

⁷⁹ See Article 4 (1) and (2) of Regulation 1049/2001.

⁸⁰ See GC, 26 May 2016, T-110/15, *International Management Group v. Commission*, par. 35.

⁸¹ See GC, 26 May 2016, T-110/15, *International Management Group*, par. 39.

⁸² See GC, 21 May 2014, T-447/11, *Catinis v. Commission*, p. 42 and GC, 13 April 2005, T-2/03, *Verein für Konsumenteninformation v. Commission*, par. 69 and see also D. Curtin and J. Mendes, Article 42 – Right of Access to Documents, p. 1112.

⁸³ Council Regulation (EC, Euratom) 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 No. L 292/2–5 of 15 November 1996.

⁸⁴ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ No. L 312/1 of 23 December 1995.

⁸⁵ See Article 3 (3) Regulation 883/2013.

⁸⁶ See M. Scholten and M. Simonato, *EU Report* in M. Luchtman and J.A.E. Vervaele (Eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, Report for the OLAF Hercule III Project.

⁸⁷ See the Impact Assessment accompanying the Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274 final, p. 14.

investigations this may also create inconsistencies and a lack of foreseeability also on the side of the defence.

From the perspective of procedural safeguards, inspections and on-the-spot checks need a written authorisation of the OLAF Director General, which is adopted on the basis of an opinion of the OLAF Internal Review and Selection Unit (IRSU) on the legality, necessity and proportionality of the measure⁸⁸. Regulation 2185/96 lays down one basic procedural safeguard establishing that inspectors must exercise their powers on production of the written authorisation “together with a document indicating the subject matter and purpose of the on-the-spot check or inspection”. Therefore, the economic operator or person concerned before the beginning of the on-the-spot check or inspection must receive at least a minimum of basic information on the subject matter of the investigation.

As mentioned above, however, Article 3 (3) of Regulation 883/2013 invokes compliance with the procedural safeguards it provides under Article 9 during on-the-spot checks. Art. 9 (4) of Regulation 883/2013, however, expressly excludes the application of its second and third subparagraphs to the “taking of statements” during on-the-spot checks conducted by OLAF. This exception must be interpreted strictly: therefore, the “taking of statements” will not be subject to the notice periods provided for in the subparagraphs referred to, but the other guarantees – namely, the right for the person concerned to be informed of his/her rights, including the right to avoid self-incrimination and to be assisted – will remain applicable.

As concerns the conduct of so-called digital forensic operations in the context of on-the-spot checks and inspections, such operations must be carried out “in compliance with national legal provisions”⁸⁹. The GDFs adopted in 2016⁹⁰ introduced here certain procedural safeguards⁹¹. With regard to external investigations and on-the-spot checks, e.g., Article 6 (3) GDFs establishes a procedural mechanism to deal with data of a legally-privileged nature. If the economic operator claims that data of such a nature are contained in a device subject to digital forensic operations, the data shall be acquired and placed in a sealed envelope and a meeting must be held with OLAF to resolve the issue. At the meeting the person concerned may be assisted by a lawyer.

Although the GDFs are helpful, they represent only a self-regulatory instrument without binding effects. Since digital forensic operations interfere with the right to privacy, the lack of specific provisions on such operations in Regulation 883/2013 seems questionable⁹².

⁸⁸ See footnote n. 18.

⁸⁹ It has been pointed out that in many countries such forensic powers are not available in the context of administrative investigations, and therefore is unclear whether OLAF may conduct such operations. See M. Scholten and M. Simonato, *EU Report, cit.*, p. 41.

⁹⁰ Guidelines on Digital Forensic Procedures for OLAF Staff of 15 February 2016, published, in accordance with its Article 15.2.

⁹¹ See Article 5. 5 and 5.6 with regard to the assessment of the exclusively personal nature of the data contained in a device and in regard to digital forensic operations conducted when the EU official is absent. See also Article 9 relating to “data requiring particular attention” and Article 10 on the re-acquisition procedure.

⁹² Art. 7 of Regulation 2185/96 generically provides that on-the-spot checks “may concern, in particular: [...] computer data”. For internal investigations, Art. 3 (2) (a) simply states the right for OLAF to “make copy of, and obtain extracts from, any document or the contents of any data medium held” by IBOAs.

1.2. BALANCE BETWEEN PROCEDURAL SAFEGUARDS AND OLAF INVESTIGATIVE POWERS

Procedural safeguards aim to ensure the fairness of law enforcement and to prevent excessive or arbitrary use of powers by public authorities. Criminal investigations, due to the particularly intrusive nature of the powers attributed to public authorities in the criminal justice domain, demand a high level of safeguards and guarantees. Conversely, administrative investigations represent a lower level of interference with the rights of individuals and for this reason traditionally do not require the same level of procedural guarantees as criminal investigations.

OLAF investigations are sui generis in this context. Although OLAF investigations are administrative investigations they aim at countering offences such as fraud, corruption or other illegal activities to the detriment of the EU budget. Therefore, OLAF investigations may give rise to a (criminal) judicial follow-up by the national authorities.

Imposing “quasi-criminal law” safeguards for OLAF investigations as laid down in Article 9 of Regulation 883/2013 has been seen by some practitioners interviewed for this briefing paper as being disproportionate. Since OLAF has no coercive powers and OLAF Final Reports have no binding legal effect, it is maintained that there are excessively strong safeguards applicable to OLAF investigations⁹³. However, in light of the special character of OLAF investigations, it is submitted that the procedural safeguards laid down in Article 9 of Regulation 883/2013 do not seem to be out of balance. They play an important role in contributing to the acceptance and legitimacy of OLAF investigations and ensuring the admissibility of OLAF Final Reports as evidence in national judicial proceedings.

1.3. RESPECT FOR PROCEDURAL SAFEGUARDS, CONTROLS AND ACCOUNTABILITY

OLAF’s investigative acts are subject to internal and external means of control. In relation to procedural guarantees, the ISRU reviews and verifies the legality, proportionality and necessity of the proposed investigative measures. Furthermore, any person affected by an investigation may address a complaint directly to OLAF⁹⁴ or to external and independent institutions or bodies (European Ombudsman, European Data Protection Supervisor, the Court of Justice of the European Union).

In addition, the OLAF SC represents a general accountability and monitoring mechanism provided under Article 15 of Regulation 883/2013 concerning investigations conducted by OLAF. In particular, the SC shall “monitor developments concerning the application of procedural guarantees and the duration of investigations”⁹⁵, but without interfering with ongoing investigations⁹⁶. In its more general accountability function, the SC adopts annual activity reports to be forwarded to the European

⁹³ See, f.i. the speech by OLAF Director General at the OLAF Conference on the evaluation of Regulation 883/2013 held on 1-2 March 2017 in Brussels. The text of the speech is available at: https://ec.europa.eu/anti-fraud/media-corner/news/03-03-2017/speaking-points-giovanni-kessler-olaf-director-general-stakeholder_en.

⁹⁴ The Legal Advice Unit deals with all complaints according to the procedure available on OLAF’s website: http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en (Part A).

⁹⁵ Article 15 (1), 2nd paragraph of Regulation 883/2013.

⁹⁶ *Ibid.* 3rd paragraph, at the end. Thus, the SC has mere advisory powers to provide opinions and recommendations to the Director-General; it was not designed as a complaints body. In practice, however, the dividing line between systemic supervision and review of individual cases is not always clear. See K. Ligeti and G. Robinson, *Transversal Report on Judicial Protection*, in M. Luchtman and J.A.E. Vervaele (Eds.), *Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework*, cit., p. 243, referring to M. Luchtman and M. Wasmeier, *The Political and Judicial Accountability of OLAF*, 2017, forthcoming, p. 7.

Parliament, the Council, the Commission and the European Court of Auditors. The SC, however, has addressed and provided Opinions on procedural safeguards on several occasions⁹⁷.

1.3.1. The legality check and review by the Internal Review and Selection Unit

The legality check of the IRSU was introduced following the reforms in Regulation 883/2013. Article 17 (7) of Regulation 883/2013 stipulates that the "Director-General shall put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Member States concerned". Accordingly, the IRSU operates two forms of control:

- *ex ante* check on the legality, necessity and proportionality of the investigative measures requiring the authorisation of the OLAF Director-General⁹⁸, on the extension of the scope of an existing investigation and on the split or merging of cases⁹⁹;
- *ex post* review, before the closure of an investigation or coordination case, of the Final Report and recommendations¹⁰⁰.

The IRSU operates under the responsibility of the Director-General and addresses its non-binding opinions to him or her both in the context of the *ex ante* check and the *ex post* review.

The legality check and review activities of the IRSU were the object of an Opinion of the OLAF SC in 2015¹⁰¹ which contained a series of recommendations regarding, inter alia, the need to improve the justification of the IRSU opinions and to ensure the systematic follow-up of IRSU comments.

1.3.2. The European Ombudsman and the European Data Protection Supervisor

As every other IBOA of the European Union, OLAF is subject under Article 228 TFEU to the scrutiny of the European Ombudsman. The Ombudsman can conduct enquiries upon a complaint submitted by individuals in regard to instances of maladministration and address its findings to the IBOA concerned. The supervisory role of the Ombudsman does not, however, entail binding powers. In practice, the European Ombudsman has dealt with a number of complaints against OLAF in the past¹⁰². The major part of those cases, in recent years, has related to issues of public access to documents under Regulation 1049/2001 requested by both third parties (journalists or private citizens¹⁰³) or persons concerned¹⁰⁴.

OLAF's data processing activities also fall under the regime of Regulation 45/2001 and under the scrutiny of the European Data Protection Supervisor. In recent years, the EDPS has received several

⁹⁷ See the Opinion n. 5/2010 of OLAF SC on the Respect for Fundamental Rights and Procedural Guarantees in Investigations by the European Anti-Fraud Office; the Opinion n. 2/2012 dealing with the analysis of an individual and sensitive case (OF2012/0617) and Opinion n. 2/2013 on the establishment of an internal OLAF procedure for complaints. All the documents can be accessed at: <http://europa.eu/supervisory-committee-olaf/opinions-and-reports>.

⁹⁸ Those measures are: a) interviews with person concerned or witnesses; b) inspections of premises, c) on-the-spot checks, d) digital forensics operations; e) investigative missions in Third States.

⁹⁹ The *ex ante* control by the IRSU is regulated under Article 12 of the 2013 GIPs

¹⁰⁰ According to Artt. 20 and 21 of the 2013 GIPs. According to Article 20 (2) the purpose of this review is to ensure the legality, necessity and proportionality of the activities undertaken during the investigation and the respect of the right of the persons concerned throughout the investigative procedure.

¹⁰¹ See the OLAF Supervisory Committee, Opinion 2/15 on the *Legality Check and Review in OLAF* of 15 December 2015.

¹⁰² For the years 2014 and 2015 a specific section on citizens' complaints has been included in the OLAF Annual Report.

¹⁰³ See the Ombudsman cases 363/2011/JAS concluded on 7 April 2016; and the Ombudsman case 598/2013/OV concluded on 16 December 2013 (complaint rejected).

¹⁰⁴ See, f.i., the Ombudsman cases 790/2005/OV and 723/2005/OV concluded on 18 December 2009 with a proposal for a friendly solution of partial disclosure, accepted by OLAF.

complaints against OLAF in relation to data processing activities¹⁰⁵. In some cases, the decisions of the EDPS acknowledged certain failures in the data processing and consequently addressed recommendations to OLAF¹⁰⁶.

1.3.3. The (limited) judicial control by EU Courts¹⁰⁷

Since the creation of OLAF, the EU Courts have systematically construed the wording in Article 263 TFEU to the effect that any natural or legal person may “institute proceedings against an act addressed to that person or which is of direct and individual concern to them” in order to reject as inadmissible actions for annulment in relation to the Office’s investigative procedures which are deemed not to bring about a distinct change in the applicant’s legal position¹⁰⁸. The reasoning at the core of this consistent interpretation is that the forwarding of OLAF’s findings, in the shape of a final report, to national competent authorities does not lead automatically to the opening of judicial or disciplinary proceedings: the recipient competent authorities remain entirely free to decide whether or not to act upon the report – and thus whether or not to alter the legal position of the person(s) concerned by OLAF’s investigations¹⁰⁹. As such, investigations carried out by OLAF represent a preliminary stage of proceedings which may or may not lead to a decision establishing the liability of the person concerned¹¹⁰.

Nor have actions for annulment against investigative acts carried out by OLAF prior to the delivery of any final report met with success before the EU courts. Settled case law provides that acts or decisions adopted in the course of preparatory proceedings would be open to review only if they “were themselves the culmination of a special procedure distinct”¹¹¹ from the final decision on liability – in the OLAF context, that taken at national level. This reasoning has been applied in rejecting as inadmissible actions for annulment brought against an OLAF decision to open an investigation¹¹², acts performed by OLAF in the course of an investigation¹¹³, the drawing up by the Office of a Final Report¹¹⁴, decisions by OLAF to close an investigation¹¹⁵ and not to annul investigative acts allegedly

¹⁰⁵ The 2015 OLAF Annual Report, p. 21 refers to five complaints filed with the EDPS in 2015 and three decisions adopted by the EDPS in cases opened in previous years.

¹⁰⁶ For instance, in 2015 the EDPS scrutinised the procedures for digital forensic re-acquisition based on the previous version of the OLAF GDFs. Forensic re-acquisition is the procedure by which a digital forensic image already in the possession of OLAF from a previous specific investigation, is subsequently examined in the context of a different investigation. In the context of a complaint procedure the EDPS found that OLAF had failed to inform in a timely manner the complainant about the re-acquisition. The new version of OLAF GDFs from 2016 seems to have taken into account the issue, providing under Article 10 (3) and 10 (4) for an obligation to inform both the person and the economic operator concerned by the investigation in which the forensic image was initially acquired and the person concerned by the new investigation.

¹⁰⁷ The discussion in this Section is partly based on a more detailed analysis by K. Ligeti and G. Robinson, *Transversal Report on Judicial Protection*, in M. Luchtman and J. Vervaele (Eds.), *Report on Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, Utrecht University / RENFORCE, p. 219 ff.

¹⁰⁸ See J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, *cit.*, p. 203 ff. and K. Ligeti and G. Robinson, *Transversal Report on Judicial Protection*, *cit.*, p. 219 ff.

¹⁰⁹ Case GC, 13 July, 2004 (order), T-29/03, *Comunidad Autónoma de Andalucía v. Commission*, par. 37; GC, 6 April 2006, T-309/03, *Camós Grau*, par. 51; Case GC, 4 October 2006, T-193/04, *Tillack v. Commission*, paras 69 and 70

¹¹⁰ See CJEU, 11 November 1981, C-60/81, *IBM v Commission*, par. 10 (emphasis added). “...[I]n principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a *provisional measure intended to pave the way for the final decision*.” In *Tillack*, the CJEU thus held that the possible initiation of legal proceedings subsequent to the forwarding of information by OLAF, and the possible legal acts capable of affecting the legal position of the applicant, belonged to the sole and entire responsibility of the national authorities. *Tillack*, *cit.*, para 70.

¹¹¹ *IBM*, *cit.*, para. 11.

¹¹² Case CJEU, 8 April 2003 (order), C-471/02 P(R), *Gómez-Reino v. Commission*

¹¹³ *Ibid.*

¹¹⁴ *Comunidad Autónoma de Andalucía*, *cit.*

¹¹⁵ Case CJEU, 2 October 2014, C-127/13 P, *Strack v. Commission*,

compromised by a conflict of interest¹¹⁶, OLAF's refusal to inform an investigated person of certain acts taken against that person in order to allow for a defence in the context of the investigation¹¹⁷, and OLAF's forwarding of a report concluding an internal investigation to an EU institution¹¹⁸.

A "tentative exception"¹¹⁹ to the EU courts' refusal to admit actions for annulment against OLAF investigative acts appeared in *Violetti*¹²⁰ where the Civil Service Tribunal found, pursuant an OLAF investigation into high rates of invalidity pensions granted to personnel at the Commission's site in Ispra (Italy), in favour of the plaintiffs who argued inter alia that they had had no opportunity to be heard before the transmission of the Office's Final Report on the matter to the Italian judicial authorities. Having first accepted, in contrast to the ECJ judgment in *Tillack*, that the decision to forward the information contained in that report met the criterion of an "act adversely affecting"¹²¹ the officials¹²², the Tribunal went on to insist that the fundamental principle of the rights of the defence (in this case, the right to be heard) could not be effectively protected "in sufficient time" were it not to carry out a review of legality in relation to that decision, since the national court would retain before it information received from OLAF which it should be barred from acting upon¹²³.

The decision of the Civil Service Tribunal in *Violetti*, nonetheless, was later reversed in appeal by the the General Court¹²⁴ in a return to the established *Tillack* jurisprudence.

Notwithstanding the criticisms addressed to the *Tillack* case law, to date, OLAF acts are excluded from the possibility of a direct judicial review in annulment. The possibility of resorting to actions for damages against OLAF, on the other hand, does not seem a suitable equivalent in terms of ensuring an effective remedy: actions for damages have no effect on the validity of the acts which caused the damage; the awarding of compensation does not per se render an illegal investigative act void.

1.3.4. The proposal on the Controller for Procedural Safeguards

Less than one year after the adoption of Regulation 883/2013, on 11th June 2014, the Commission tabled a proposal¹²⁵ for amending the OLAF Regulation in order to provide for the establishment of a Controller for Procedural Safeguards; i.e. a new body to be entrusted with the control of the respect for procedural safeguards in OLAF investigations.

The Proposal, in substance, would task the new Controller with both an ex post review of OLAF investigative acts in relation to any person concerned by such acts¹²⁶ and an ex ante authorisation mechanism in relation to certain investigative measures taken against members of EU institutions¹²⁷. The Controller would exercise his functions "in complete independence and shall neither seek nor take instructions from anyone in the performance of [his] duties"¹²⁸ and would complement, but not replace

¹¹⁶ *Camós Grau, cit.*

¹¹⁷ *Gómez-Reino, cit.*

¹¹⁸ *Ibid.*

¹¹⁹ J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, cit., p. 206.

¹²⁰ Civil Service Tribunal, 28 April 2009, joined Cases F-5/05 and F-7/05, *Violetti and Others v. Commission*, esp. paras 56-58. For the appeal decision: GC, 20 May 2010, T-261/09 P, *Violetti and Others v. Commission*

¹²¹ Article 90a Staff Regulations.

¹²² *Violetti* (Civil Service Tribunal), cit., para 77. The Tribunal also stressed at par. 75 that such a decision "is liable to have significant consequences for the career of the persons concerned".

¹²³ *Ibid.*, para. 78.

¹²⁴ See GC, 20 May 2010, T-261/09 P, *Violetti and Others v. Commission*.

¹²⁵ COM(2014) 340 final.

¹²⁶ Article 9a of COM (2014) 340 final.

¹²⁷ Article 9b of COM (2014) 340 final.

¹²⁸ See Article 9c (2) of COM (2014) 340 final.

the other internal and external instances of control already existing. In regard to this latter aspect the Proposal has been subject to criticism¹²⁹.

The envisaged ex post complaints mechanism is limited to a review by the Controller of the respect by the Office of the procedural guarantees set out in Article 9 of the OLAF Regulation. Subject to short time-limits, the Controller would examine the complaint in an adversarial procedure in the course of which he could ask witnesses to provide written or oral explanations¹³⁰. The Controller's ex post review would be non-binding. Where the Director-General decides not to follow a recommendation, he will be bound only to provide reasons for doing so to the Controller and (where this would not affect an ongoing investigation) the complainant¹³¹.

In contrast, the envisaged ex ante authorisation of the Controller is required by the Director-General before the Office exercises its power to inspect the professional office of a member of an EU institution at the premises of an EU institution during an internal investigation or to take copies of documents or of any data support located in that office. Within 48 hours of receiving a request for authorisation, the Controller is to carry out an objective assessment of the legality of the investigative measures at hand, and examine whether the same objective could be achieved with less intrusive investigative measures¹³².

To date, the state of the legislative process is on hold¹³³: on 27 October 2014, the Council issued a note¹³⁴ essentially deeming the Proposal on the Controller to be premature and calling for a postponement of reflections on the matter until after the conclusion of the evaluation of Regulation 883/2013. Whilst effective and independent control of OLAF investigations is undoubtedly needed, the added value of an additional layer of non-binding control appears questionable, both in terms of coherence and effectiveness.

¹²⁹ See Note from the Presidency of 27 October 2014.

¹³⁰ Article 9a (6); the provision specifies "without interfering with the conduct of the investigation underway"

¹³¹ See Article 9a (7) of COM (2014) 340 final.

¹³² Article 9b (2) and (3) of COM (2014) 340 final.

¹³³ The Interinstitutional file number is 2014/0173 (COD), Ordinary Legislative Procedure.

¹³⁴ Note from the Presidency, Council Doc. 14075/14 of 27 October 2014.

2. ADMISSIBILITY OF THE OLAF FINAL REPORT AS EVIDENCE IN CRIMINAL PROCEEDINGS

KEY FINDINGS

- The **admissibility** in evidence of OLAF Final Reports in national criminal proceedings is essential to ensuring **the effective follow-up of OLAF investigations**.
- The manifold **asymmetries** (vertical and sectoral) in the prerogatives and powers of OLAF seriously **jeopardise the future use** of its findings. Currently, the **assimilation rule** conserves national differences and ultimately leaves the admissibility of OLAF Final Reports to the variable geometry of the criminal procedural law of the Member States.
- Due to the uncertainties about the admissibility of the OLAF Final Report, national judicial authorities often repeat investigative acts already performed by OLAF. This **duplication of efforts is detrimental to both procedural economy and the rights of the person under investigation**.
- An **adequate level of procedural safeguards** in the course of OLAF administrative investigations is crucial to enhancing the admissibility of OLAF Final Reports before national courts.

Once the investigation is completed, OLAF adopts a Final Report which may be accompanied by recommendations as to actions that should be taken following the investigation including the amounts to be recovered and a preliminary legal classification of the facts established¹³⁵. The Final Report and the recommendations are addressed to EU IBOAs for the disciplinary follow-up of internal investigations. They are directed to the competent national administrative or judicial authorities for the follow-up of external and internal investigations when the established facts could give rise to administrative or criminal proceedings¹³⁶.

Due to the nature of the conducts investigated by the Office, there is a possibility of a criminal follow-up in the Member States. OLAF recommendations are, however, not binding on their addressees and their judicial follow-up in the Member States still represents the “Achilles heel” of the protection of the EU’s financial interests¹³⁷. The most recent statistics show that after the transmission of OLAF Reports the national judicial authorities of the Member States take action only in about 50% of cases¹³⁸. The remaining half of the cases are dismissed on various grounds, including - in a non-negligible proportion - for lack of (admissible) evidence¹³⁹. This clearly indicates that there is an enforcement gap in the system of protection of the EU’s financial interests questioning the coherence of OLAF’s framework for evidence-gathering. In particular, three aspects impact the admissibility of OLAF Final Reports as evidence in national judicial proceedings: the fragmented investigative powers of OLAF, the

¹³⁵ See Art 11 (1) Regulation 883/2013

¹³⁶ See Art. 11 (3), (4) and (5) of Regulation 883/2013.

¹³⁷ See A. Weyembergh, I. Armada, C. Brière, *The Inter-Agency Cooperation and the Future Architecture of the EU Criminal Justice and Law Enforcement Area*, Study for the LIBE Committee of the European Parliament, 2014, p. 37

¹³⁸ See the OLAF Annual Reports for 2013, 2014 and 2015. The rate of indictment following an OLAF judicial recommendation (calculated over a time span of 7 preceding years) was 54% in (2006-)2013, 53% in (2007-) 2014 and 52% in (2008-) 2015.

¹³⁹ Statistics previously disclosed by the Commission in 2011 (collected over the previous 12 years) presented a fairly high rate of dismissal on the basis of lack of evidence (46%). See the Commission Staff Working Paper SEC (2011) 621, accompanying the 2009 Commission Annual Report on the Protection of the Financial Interests – Fight Against Fraud at p. 9.

assimilation rule provided by Regulation 883/2013 and the level of protection of procedural safeguards in OLAF investigations.

2.1. THE FRAGMENTED INVESTIGATIVE POWERS OF OLAF AND THE ADMISSIBILITY OF THE FINAL REPORT

As described above¹⁴⁰, OLAF conducts internal and external investigations, whereby the respective OLAF powers have different legal sources. As far as internal investigations are concerned, the investigative powers of OLAF are contained in Regulation 883/2013 and detailed in the decisions adopted by the different IBOAs on the model provided by the Interinstitutional Agreement of 25 May 1999.

With a view to external investigation, Regulation 883/2013 refers to Regulations 2988/95 and 2185/96 for the investigative powers of OLAF which then refer to respective national laws and (also) national practices¹⁴¹. This complex legal framework leads to the fragmentation of the powers of OLAF. Since administrative investigative powers vary greatly from one Member State to another, the investigative powers of OLAF in external investigations differ from Member State to Member State. It may happen in transnational cases that OLAF is entitled to undertake certain investigative measures – for instance digital forensic operations – in one Member State that it may not in another even when investigating the same case.

In addition, the general framework of Regulation 883/2013 coexists with the sectoral regulations¹⁴², such as the common agricultural policy, the common fisheries policy and the customs union¹⁴³. In these policy areas, OLAF does not act autonomously, but has the right to participate in “mixed inspections” conducted - upon request of the Commission or *proprio motu* - by the national authorities in charge of enforcement in the specific policy area concerned¹⁴⁴. Mixed inspections are subject to the application of the national law of the respective Member State and the powers available in that context are not harmonised¹⁴⁵. Depending on the powers conferred, by national law, on the specialised enforcement authority, OLAF will experience different powers even within the same Member State across the different policy fields¹⁴⁶.

This sectoral and national fragmentation is further aggravated by the different status of the national enforcers with whom OLAF liaises in a given policy field and Member State. Some national administrative authorities enjoy a double status and function at the same time as a unit of *police*

¹⁴⁰ See *retro* 1.1, footnote 13.

¹⁴¹ See Art. 3 (3) Regulation 883/2013; Art. 2 (4) of Regulation 2988/95; Art. 6 (1) third subparagraph, 7 (1) and 9 of Regulation 2185/96.

¹⁴² Art. 3 (1) of Regulation 883/2013 and Art. 9 (2) of Regulation 2988/95 expressly recall the applicability of sectoral rules in OLAF external investigations.

¹⁴³ On this point see M. Simonato, *OLAF Investigations in a Multi-Level System*, in *Eucrim*, 3/2016, p. 137

¹⁴⁴ See Art. 6 (1) and (4) of Regulation (EC) 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Common Agricultural Policy; Art. 18 (4) of Regulation (EC) 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission on customs and agricultural matters; Art. 97 and 98 of Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy; in this latter case, however, Art. 99 of the Regulation enables the Commission to carry out “autonomous inspections” but without any coercive or police enforcement power (see Art. 97 (3)).

¹⁴⁵ On the contrary, certain limits to the participation of Commission officials are expressly spelled out in sectoral legislation. Art 6 (4) of Regulation 595/91 on mixed inspections in the Common Agricultural Policy field states that Commission officials shall not take part in searches or in the formal questioning of persons conducted by national authorities following the national provisions on criminal proceedings. They shall, however, have access to the information obtained through these measures.

¹⁴⁶ In this sense see K. Ligeti and M. Simonato, *Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept*, in F. Galli and A. Weyembergh, *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, ED. ULB, p. 92.

judiciaire. National authorities with such double status may be in the position to apply immediately and directly the rules of the code of criminal procedure where the suspicion of a criminal offence emerges in the course of the mixed inspection. If OLAF participates in mixed inspections led by a national administrative authority having such a “double hat”, it enhances the future admissibility of the OLAF Final Report and the judicial follow-up at the national level. In most of the cases, however, OLAF does not have the benefit of working with national authorities of a dual nature. The manifold asymmetries (vertical and sectoral) in the prerogatives and powers of the Office therefore seriously jeopardise the future use of its findings.

2.2. THE SHORTCOMINGS OF THE ASSIMILATION RULE

Art. 11 (2) of Regulation 883/2013¹⁴⁷ lays down the general rule on the admissibility of OLAF Final Reports as evidence in national administrative and judicial proceedings. Like its predecessor¹⁴⁸, Regulation 883/2013 provides for an assimilation rule stating that OLAF Final Reports must be admitted in evidence in the same way and under the same conditions as the administrative reports drawn up by the national administrative authorities. The Regulation then specifies that this implies the application of the evaluation rules applicable to reports drawn up by national administrative authorities. Moreover, the OLAF Final Report shall be granted “the same evidentiary value”¹⁴⁹. For this purpose, OLAF is required take into account the national law in drawing up the reports and the recommendations¹⁵⁰.

In practice, the assimilation rule conserves national differences and ultimately leaves the admissibility of OLAF Final Reports to the “variable geometry of the criminal procedural law of the Member States”¹⁵¹. National rules on admissibility of administrative reports in criminal proceedings do greatly differ¹⁵²: whereas some Member States generally accept the admissibility of national administrative reports as documentary evidence, several others only allow their admission under certain conditions¹⁵³.

In view of the fragmented investigative powers of OLAF as well as the extensive reliance on national law, the assimilation rule may limit the admissibility of the OLAF Final Report, especially in transnational investigations which were carried out in accordance with different national procedural rules. More importantly, the assimilation rule under Art. 11 (2) Regulation 883/2013 presupposes the existence at national level of an administrative authority comparable, in its functions and powers, to OLAF. If there is no such administrative actor at national level, the assimilation provision will remain an empty box leading to the potential inadmissibility of the OLAF Final Report.

The uncertainty as to the admissibility of the OLAF Final Report has led to a situation where in several cases the national judicial authorities repeat, according to their national rules of criminal procedure, the investigative acts already performed by OLAF¹⁵⁴. Such duplication of investigations (the supranational administrative investigation of OLAF and the national criminal investigation) has a

¹⁴⁷ And in the same terms provides Art. 8 (3) of Regulation 2185/96 for the reports of inspections and on-the-spot checks

¹⁴⁸ Art. 9 (2) of Regulation 1073/99 contained an analogous provision on the admissibility as evidence of OLAF case reports in national administrative and judicial proceedings

¹⁴⁹ Art. 11 (2) Regulation 883/2013

¹⁵⁰ *Ibid.*

¹⁵¹ See K. Ligeti and M. Simonato, *Multidisciplinary investigations, cit.*, p. 91.

¹⁵² An interesting overview on the restrictions on the admissibility of administrative inspection reports at national level is provided in the Staff Working Document SEC (2010) 897 accompanying the 2009 Commission Annual Report on the Protection of the Financial Interests – Fight Against Fraud.

¹⁵³ See K. Ligeti and M. Simonato, *Multidisciplinary investigations, cit.*, p. 92.

¹⁵⁴ See the 2013 OLAF Annual Report, p. 22 ff. and the Staff Working Paper SEC (2011) 621 accompanying the Commission Communication on the Protection of the Financial Interests of the European Union by criminal Law and Administrative Investigations: An Integrated Policy to Safeguard Taxpayers’ Money.

twofold detrimental effect. On the one hand, it contradicts procedural economy. On the other hand, it negatively impacts the rights of persons under OLAF investigations who need to undergo the ordeal of an investigation a second time.

Besides, the repetition of the investigative act already performed by OLAF has also a practical drawback: it may no longer be possible to perform the investigative act or it may be less effective than it was the first time (e.g. the suspect is warned by the OLAF investigation and destroys the evidence or prepares the answers). Practical drawbacks may work as a disincentive for national authorities to engage in the judicial follow-up of OLAF Final Reports at national level and thereby reinforce and even widen the “enforcement gap” in the protection of the EU’s financial interests¹⁵⁵.

2.3. THE ROLE OF PROCEDURAL SAFEGUARDS IN ENHANCING ADMISSIBILITY

The problem of fragmented admissibility casts also a light on the importance of having adequate procedural safeguards for OLAF investigations, in view of their potential criminal law follow-up and of the further use of their results.

Granting adequate procedural safeguards already at the stage of administrative investigations, in this perspective, may contribute to overcoming objections to further use due to potential prejudice to the rights of the defence, thereby justifying a more stringent regime than the current assimilation rule for OLAF Final Reports¹⁵⁶.

In an ideal scenario, nonetheless, the enhancement of procedural safeguards in OLAF administrative investigations should be part of a greater legislative effort aiming at the – at least minimal – harmonisation of the Office’s investigative powers: this would keep balance between efficiency and effectiveness of enforcement, on the one hand, and respect of the rights of the defence on the other.

Moreover, this would more generally enhance the foreseeability of the powers vested in the Office, also for the benefit of the defence. The current state of fragmentation of OLAF powers in the context of external investigations, on the contrary, represents a source of unbalance, which is liable to compromise both coherent enforcement in the PIF field and – especially when OLAF investigative acts have to be repeated by national authorities in order to have admissible evidence for the judicial follow-up – the rights of the person concerned.

¹⁵⁵ Preventing duplication of efforts is also an objective of the establishment of a European Public Prosecutor’s Office (EPPO). See, in particular, Recitals 95 and 98 of the agreed text: Council, 2 June 2017, Doc. 9545/2/17 REV 2

¹⁵⁶ In a similar perspective, M. Luchtman and J. Vervaele, *Main Findings and Conclusions*, in M. Luchtman and J.A.E. Vervaele (Eds.), *Investigatory powers and procedural safeguards: Improving OLAF’s legislative framework*, cit, p. 328, consider already striking the combination between the “overprotective” rule on assimilation and the safeguards included under Art. 9 of Regulation 883/2013.

3. CONCLUSIONS

In almost twenty years of existence, OLAF has significantly contributed to the protection of the EU's financial interests through a steadily-growing number of investigations and increasing amounts recovered. However, OLAF is not a sanctioning body but has in fact remained, throughout the years, truly *sui generis*. Conducting only administrative investigations, it does not have any powers to prosecute or discipline but rather to make recommendations.

There can hardly be any denying the fact that OLAF has now repeatedly triggered criminal proceedings and other measures at Member State level, severely affecting individuals. This fact led to codifying and clarifying procedural safeguards in Regulation 883/2013. Although Article 9 of Regulation 883/2013 has an important constitutional function in specifying the conditions – and potential limitations – of Charter rights, the above analysis clearly demonstrates that several aspects of the rights contained in Article 9 require further clarification.

It follows from the nature and mandate of OLAF that criminal proceedings, if any, are bound to take place at Member State level – though often triggered by the Office. As has been pointed out above, also the Court of Justice has embraced that evolutionary view on OLAF, refusing to rule that its actions entail ultimate external effect. It is basically this observation that has prompted the Court also to deny those individuals that have found themselves indirectly affected by the administrative investigations and recommendations of the Office access to the case file of OLAF. The Tillack case appears as a landmark in that respect. Triggered by OLAF's recommendations, the home and office facilities that the German journalist Hans-Martin Tillack had in Belgium were searched by the competent Belgian authorities with criminal proceedings at least being opened - and subsequently dismissed - in Germany. At the end of the day, however, it turned out that Mr Tillack was entirely innocent. Perhaps, much of the burden and strain that he experienced could have been avoided from the outset, or at least greatly alleviated, if more than a meagre report or recommendation – namely, the entire file – had been forwarded to all parties involved.

Clarifying and strengthening procedural safeguards in OLAF investigations will therefore ultimately contribute to boosting the further acceptance and legitimacy of OLAF investigations. Simultaneously, it will also foster the further use of OLAF Final Reports in national judicial proceedings. However, the above analysis has shown that enhancing procedural guarantees in OLAF investigations will not on its own be sufficient to resolve the problems related to the admissibility of OLAF Final Reports in national criminal proceedings. Due to the strong national and sectoral fragmentation of OLAF powers, the admissibility gap would necessitate a greater legislative effort aiming at the – at least minimal – harmonisation of the Office's investigative powers. This would ensure a balance between efficiency and effectiveness of enforcement, on the one hand, and respect of the rights of the defence on the other.

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This paper provides an analysis of two crucial and interconnected aspects of the current legal framework on the investigations conducted by the European Anti-Fraud Office (OLAF): the procedural safeguards for the individuals subject to the administrative investigations conducted by OLAF and the admissibility in evidence of OLAF Final Reports in national criminal proceedings. The state of the art and its shortcomings are analysed in the double perspective of the coherent protection of the EU's financial interests and of the respect of fundamental rights provided by the EU Charter of Fundamental Rights.

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