

JUDICIAL PROTECTION AGAINST OLAF'S ACTS: IN SEARCH OF EFFECTIVENESS

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I. INTRODUCTION

The Union's financial interests are harmed by irregularities in the funds' management of the EU budget at a threatening high rate. This mismanagement might result either from fraudulent behaviour or from other irregularities. The need to combat these harmful behaviours, following the financial scandal that led to the resignation of the Santer commission¹, led to the establishment of the European Anti-Fraud Office (OLAF)². OLAF's legal nature is hybrid, in the sense that it constitutes, on the one hand, an independent authority; while on the other hand, it forms an executing branch (Service Directorate General) of the European Commission³.

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1. V. PUJAS, The European Anti-Fraud Office (OLAF): A European policy to fight against economic and financial fraud, *Journal of European Public Policy*, 2003, p. 792; J.A. VARVAELE, Towards an independent European agency to fight fraud and corruption in the EU?, *European Journal of Crime, Criminal law and criminal Justice*, 1999, pp. 331-346; P. CRAIG, The fall and renewal of the Commission: Accountability, contract and administrative organization, *ELJ*, 2000, pp. 981-116. See Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing OLAF.
2. From its French name: Office de Lutte Anti-Fraude.
3. Although OLAF belongs administratively to the Commission, it enjoys full operational independence. OLAF's Director-General has a right of action against the Commission before the CJEU, for every measure the Commission adopts that might jeopardise this independence.

OLAF's mission is threefold. It consists in a) protecting the financial interests of the European Union by investigating fraud and other illegal activities, b) detecting and investigating serious matters relating to the discharge of professional duties by staff of the EU institutions that could result in disciplinary or criminal proceedings and c) supporting in general the EU in the development and implementation of anti-fraud legislation and policies⁴.

While OLAF is not a prosecuting authority, it is empowered to conduct internal investigations, i.e. inside any European institution or body funded by the EU budget, and external investigations, i.e. at national level, wherever and whenever the EU budget is at stake. For this purposes, OLAF may conduct on-the-spot checks and inspections on the premises of economic operators, in close cooperation with the member state at issue. OLAF may acquire access to confidential information, to photocopy documents, to invite employees to testify and in general, to conduct all the investigatory acts, similar to those that national authorities are allowed to conduct⁵.

On completion of an investigation carried out by OLAF, the latter completes a report, under the authority of the Director, containing, in particular, the findings of the investigation, including the recommendations of the Director on the action that should be taken. The report that follows the internal investigation and the related documents is then sent to the institution, body, office or agency concerned, which is responsible to take, where appropriate, any disciplinary or legal actions based on the results and recommendations of the investigation.

The perfectly legitimate goal of the investigation of fraudulent behaviours might, however, undermine the protection of human rights and fundamental freedoms. According to Art. 2 TEU, "*the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*". It is, thus, necessary that the relevant legal framework on the combat of fraud achieves a fair and proportionate balance between the

4. C. STEFANOY / S. WHITE / H. XANTHAKI, OLAF at the crossroads – action against EU fraud, Hart publishing, 2011.

5. Regulations No 1073/1999 and No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) define the Office's main role and set the framework for OLAF's administrative investigations, especially arts 9 and 10 of Regulation No 1073/99.

public interest of safeguarding the Union's financial interests and the rights of the suspect who is accused of financial crime⁶.

Judicial access and the existence of effective legal means of judicial protection constitute the cornerstone of the right to effective judicial protection⁷. The present article aims to examine the possibilities of judicial protection enjoyed by the suspects who are investigated by OLAF⁸. The article will attempt to show that the Court's case-law concerning the admissibility conditions for actions for annulment deprives in practice the applicant from effectively challenging any illegal activities of OLAF. The first part will deal with the remote possibility of an action for annulment (I), while the second part will demonstrate that the legal remedy of the action for damages can only tackle a minor part of OLAF's activities, rendering its actions practically free from judicial control (II)⁹. The expectation of "a complete system of legal remedies and procedures"¹⁰ in the case of OLAF is proven to be particularly ambitious. The goal of this article is to shed some light in the lacuna of the judicial control of OLAF's actions and to identify appropriate ways to ensure that the rights of the persons under investigation are being fully respected.

II. ACTION FOR ANNULMENT: A REMOTE POSSIBILITY TO CHALLENGE OLAF'S ACTIONS

a) The general jurisprudential framework

6. M. RODOPOULOS in V. Christianos, TEU and TFEU, Interpretation by Article, ed. Nomiki Bibliothiki, 2012, p. 1292 [in Greek].

7. Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, 25.07.2002, ECR I-6677, paras 38-39. See further K. LENAERTS, The rule of law and the coherence of the judicial system, CML Rev., 2007, p. 1625 et seq.

8. The legal means of the administrative appeal – in the course of a purely administrative procedure – or the complaints to the European Ombudsman do not fall under the scope of the present study. It should, however, be noted that, in practice, a positive decision by the Ombudsman could prove to be much more efficacious than the judicial protection, because of the great political significance the Ombudsman's decision bear. In this respect, see A. TSADIRAS, The position of the European Ombudsman in the community system of judicial remedies, EL.Rev., 2007, pp. 607-626.

9. EU officials must follow an administrative procedure before introducing an action in Court. See articles 90 and 91 of the Staff Regulation. See also K. LENAERTS / D. ART / I. MASELIS, Procedural Law of the European Union, Sweet & Maxwell, 2006, Chapter 4.

10. Case C-294/83, *Les Verts v. Parliament*, 23.04.1986, ECR 1339, para. 23.

Article 263 TFEU constitutes the legal basis of the Court's competence to review the legality of acts by the European Union's institutions. One major condition for the admissibility of the actions brought before the CJEU is that the act at issue produces legal results against third parties. It should, therefore, be enforceable and not merely a simple recommendation or opinion. The origins of the concept of the enforceable administrative act are found in the French theory and jurisprudence. Accordingly, a "décision faisant grief" (decision exécutoire) is defined as a decision that can be enforceable and is subject to judicial review¹¹. Consequently, if the contested act is not enforceable, the relevant legal remedy will not even meet the admissibility requirement.

Indeed, it is settled case-law that only measures with binding legal effects and capable of affecting the interests of the applicant, by bringing about a distinct change in his legal position, are acts or decisions which may be the subject of an action for annulment¹². According to the same case-law, regarding the admissibility of actions for annulment, it is necessary to look into the substance of the contested acts, as well as the intention of those who drafted them, in order to classify those acts. In that regard, it is in principle those measures that definitively determine the position of the Commission upon the conclusion of an administrative procedure and are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge. In contrast, intermediate measures that serve as preparatory means towards the final decision, do not have those effects¹³. Consequently, any measure of a preparatory nature falls outside the scope of the judicial review provided for in article 263 TFEU.

b) OLAF's acts as preparatory measures

OLAF's investigations end with the production of a conclusion on the case at issue, which is embodied in the final report. It follows that if there is evidence that a criminal offence may have occurred in a Member State, OLAF forwards the data it has collected to the national authorities, so that

11. E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, 1896, t. 2, p. 427.

12. Case C-117/91, *Bosman v. Commission*, 04.10.1991, ECR I-4837, para. 13; Case C-123/03 P, *Commission v. Greencore*, 09.12.2004, ECR I-11647, para 44; Case 60/81, *IBM v. Commission*, 11.11.1981, ECR-2639.

13. Case C-521/06 P, *Athinaiki Techniki v. Commission*, 17.07.2008, ECR I-5829, para. 42.

they initiate the relevant procedures, in accordance with their national law, as provided in Art. 10(2) Reg. 1073/1999. At the same time, it forwards this data to the competent EU organization, so that it initiates the relevant disciplinary procedures. Thus, the question arising in this framework is, whether the final report drawn up by OLAF and OLAF's forwarding of the final report prescribing an internal investigation to an EU institution or to the national prosecuting authorities constitute acts that are subject to annulment according to Article 263 TFEU.

The Court dealt with this issue for the first time in the *Gomez-Reino* case and, since then, it has been consistently rejecting applications for annulment against these acts, by reason of that the contested acts do not bring about a distinct change in the applicant's legal position¹⁴.

The act by which OLAF forwards the relevant information to national judicial authorities, in accordance with the obligation laid down in Article 10(2) of Regulation No 1073/1999, represents a preparatory act which, in itself, does not change the legal position of the applicant. It is for the national judicial authorities alone to decide what it is to be done with the forwarded information and to decide, in accordance with their national law, whether or not to initiate a judicial inquiry, to carry out investigative measures and to commence criminal proceedings. Thereafter, the national court is competent to decide whether the person concerned is guilty or not. Consequently, both the findings of the final report as well as the forwarding information are considered by the Court as simple internal measures, unable to have any legal effect¹⁵.

The Court, furthermore, considers that the duty of cooperation has no binding legal effect on the national legal authorities or the applicant. The duty of cooperation provides that the national judicial authorities only have to examine the forwarded information carefully in order to comply with Union's law. The initiation of any further legal proceedings is left exclusively to the wide discretionary power of the competent national authorities. National judicial authorities remain free, in the context of their own powers, to assess the content and significance of that information and the actions to be taken, if necessary. Consequently, the possible initiation of

14. Case T-215/02, *Gomez-Reino v. Commission*, 18.12.2003, ECR-345, paras 50-56 and Case C-471/02 P, *Gomez-Reino v. Commission*, 08.04.2003, ECR I-3207.

15. Case T-193/04, *Tillack v. Commission*, 04.10.2006, ECR II-3995, paras 66-70.

legal proceedings following the forwarding of information by OLAF and the subsequent legal acts remain the national authorities' sole and entire responsibility.

In the *Tillack* case, the Court rejected the plaintiffs' argument that the strict admissibility conditions, as interpreted in the case-law, deprive the applicant from the only effective means of judicial protection he has in his disposal when OLAF conducts illegal investigations. The Court ruled that "*this argument is not, in itself, sufficient to justify the admissibility of an action*"¹⁶. This ruling was premised on the idea that the effective legal protection should not be examined in a fragmented way, as if it was directly connected to one and only legal remedy, but, in contrast, it should be considered as the legal product of many complementary legal remedies in successive legal orders.

Indeed, as the Court noted in the case at issue, the applicant brought an action before the Belgian courts and then before the European Court of Human Rights, against measures taken by the Belgian judicial authorities in response to the forwarding of information by OLAF¹⁷. As settled case-law demonstrates, however, while national courts do not have the power to annul EU acts, the applicant has always the possibility to request the national courts to send a reference for a preliminary ruling to the Court of Justice, which remains competent in that regard¹⁸. Finally, as it will be analysed under section (II), even if the applicant does not have the possibility to ask for the annulment of the allegedly illegal act, he can – in the action for damages framework – ask for restitution for the damage he has suffered¹⁹.

c) A critique on the general trend of inadmissibility

16. Case T-247/04, *Aseprofar and Edifa v. Commission*, 19.09.2005, ECR II-3449, para 59.

17. Case T-193/04, *Tillack v. Commission*, 04.10.2006, ECR II-3995, para 80.

18. National courts do not have the power to annul EU acts but even non last instance courts are obliged to send a reference for a preliminary ruling to the CJEU, which is the only competent Court to do so. See to that effect Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 22.10.1987, ECR 4199, para 20.

19. Case T-215/02, *Gómez Reino v. Commission*, 18.12.2003, ECR FP-I-A-345, FP-II-1685.

The Court's justification of its persistent denial to examine the acts and omissions of OLAF under the prism of Article 263 TFEU, has been heavily criticized in theory, for not being adequately convincing²⁰.

First of all, it should be noted that the argument that neither the final report nor the forwarding of information by OLAF have a catalytic impact in the legal position of the applicant seems rather formalistic. Indeed, some investigative acts, to the extent that they undermine defence rights and procedural rights in general, such as the right of representation by a lawyer, the right to a prior hearing, the personal data protection etc., constitute separate, well established, rights in the Union's rights' protection regime and as such their deprivation can be understood as deteriorating the applicant's legal situation²¹. Furthermore, although the final report is not binding for the institutions it addresses, it can include assessments that undermine the honour, the reputation and the dignity of the listed persons. This moral damage is a real consequence in the legal world, which has a negative impact on the applicant's legal situation, even if it is not accompanied by further judicial or disciplinary acts. In this case, the transformation of the legal interests is not a hypothetical or potential future transformation, but rather a direct transformation in the moral personality of the applicant, which is recognized as an independently protected legal right, without a need to establish further (potential) material damage.

Secondly, regarding the argument that the general system of legal protection, in its most comprehensive design, which includes European and international legal orders, is sufficient and effective, it has to be noted that the CJEU held in the UPA judgment that the right to effective judicial protection is a general principle of law, common to the constitutional traditions of the Member States and enshrined in articles 6 and 13 ECHR²². As a consequence, the system of protection of the applicants' rights has to

20. J. INGHERLAM, Judicial Review of investigative acts of the European anti-fraud office (OLAF): a search for a balance, CML Rev., 2012, pp. 601-628, 607; H.-J. PRIEB / H. SPITZER in H. von der Groeben / J. Schwarze, Kommentar zum Vertrag über die EU, NOMOS, p. 1224; J. WAKEFIELD, annotation in Tillack, CML Rev., 2008, pp. 199-221; W. HETZER, Fight against fraud and protection of fundamental rights in the European Union, European Journal of crime, criminal law and criminal justice, 2006, pp. 20-45.

21. T-16/91, *Rendo and Others v. Commission*, 18.11.1992, ECR II-2417.

22. Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 03.09.2008, ECR I-6351, para 335.

be complete and effective in fact and not only in theory. The path of the reference for a preliminary ruling, which is suggested by the Court as a sufficient alternative, seems particularly uncertain and hypothetical. The national court has the obligation to send a reference for a preliminary ruling only in cases where arises a question of interpretation of EU law or of validity of an EU act that will have a real impact in the adjudication of the case at issue in the national court. If the information supplied by OLAF has no binding legal effect and the prosecution takes place by the national authorities acting *proprio motu*, then any matter raised will be strictly a matter of national law, thus depriving the Court of Justice of any competence to interfere in the case.

In addition, it is completely uncertain whether in the end there will be a national judicial process that will allow examining issues of validity of OLAF's acts, since, as the Court accepts, the forwarding of the OLAF report to national authorities does not have a binding effect on their judicial discretion and, as a consequence, no further proceedings might be initiated²³. The result will be that the final report and the irregularities during the investigations remain in force, unable to be challenged incidentally in the framework of national judicial review, since it is likely that the latter will never be initiated.

In the *Violetti* case, the General Court deviated from the settled case-law regarding the actions' admissibility condition²⁴. The case concerned OLAF's investigation in the Joint Research Centre in Ispra, Italy, which is the European Commission's in-house science service. 230 employees of this Centre were suffering from partial disability and, as such, they were receiving the relevant benefits, raising suspicions of fraud against the EU budget because of the unusually high percentage of disability. Although OLAF's director forwarded the information obtained in the course of the internal investigation to the Public Prosecutor in Varese (Italy), in accordance with the first sentence of Article 10 (2) of Regulation No 1073/1999, the expert forensic

23. W. HETZER, National criminal prosecution and European tendering of evidence. Perspectives of the European Anti-Fraud Office (OLAF), *European journal of crime, Criminal and criminal Justice*, 2004, pp. 166-183.

24. Case F-5/05 and F-7/05, *Violetti and Others v. Comission*, 28.04.2009, FP-I-A-1-83, FP-II-A-1-473. For a detailed casenote on *Violetti* see X. GROUSSOT / Z. POPOV, What's wrong with OLAF? Accountability, due process and criminal justice in European anti-fraud policy, *CML Rev.*, 2010, pp. 605-642.

report concluded that the medical evidence was not sufficient to prove the existence of fraudulent accident reports. Consequently, after receiving an application to that effect from the Public Prosecutor in Varese, the judge in charge of preliminary investigations at the District Court in Varese decided to terminate the proceedings. As a result, by complaining that the final report was neither reasoned in form nor well founded in substance and that it damaged their honour, the applicants did not have *locus standi* before the Italian courts that would allow them to request the annulment of OLAF's harmful administrative act.

After paying serious consideration to the aforementioned concerns, the European Union Civil Service Tribunal ruled that decisions taken pursuant to the first sentence of Article 10(2) of Regulation No 1073/1999 should be awarded the status of an act adversely affecting an official, within the meaning of Article 90a of the Staff Regulations, taking into account that a decision to forward information, such as the decision at issue, has immediately negative effects on the interests, career and reputation of the persons concerned. However, on appeal, the General Court rejected the Civil Service Tribunal's argumentation, upholding the existing settled case-law²⁵.

Third, as regards the alternative way of remedy through the action for damages, it should be observed that such an action certainly enables the suspect to obtain compensation for damage allegedly suffered by him on the occasion of an OLAF investigation. However, as it will be demonstrated later in this paper, the possibility of remedy through such an action for damages is restricted, due to strict conditions and the fact that the burden of proof rests with the plaintiff. In contrast, in cases of moral damage, without the implication of further material damage, the annulment of an act that has been challenged may, in itself, constitute appropriate and, in principle, sufficient reparation for any non-material harm the applicant may have suffered²⁶.

Lastly, the approach that the EU courts adopt leaves in essence OLAF's actions free from judicial control²⁷. While OLAF is equipped with broad powers of investigation and control, it seems that its potential drift towards

25. Case T-261/09 P, *Commission v. Violetti and Others*, 20.05.2010, not yet published.

26. Case T-136/03, *Schockaert v. Council*, 08.07.2004, FP-I-A-215, FP-II-957, para. 34.

27. H. XANTHAKI, *Fraud in the EU: Review of OLAF's regulatory framework*, in I. Ben-tekas / G. Keramidis, *International and European financial criminal law*, Butterworths, 2006, pp. 120-153.

arbitrariness is not subject to judicial review and, as any power which is not subject to restrictions and controls, OLAF's acts may constitute a threat to the peoples' rights and freedoms. Consequently, even if the citizen, whose rights have been violated, achieves eventually remedy, either before national courts or in the framework of an action for damages, there will still remain a lacuna between the illegal act and the judicial control, as the latter will not have as a direct subject the relevant illegal act. If we add to this that, because of its hybrid nature, OLAF is represented before the courts by the Commission, it is highly unlikely that many decisions that proclaim its acts illegal will come to its knowledge²⁸.

As a result the case-law should take a turn in the aim of submitting the activities of that Office to effective judicial review. Such a turn could be effectuated by considering that the final report brings about changes in the legal rights of the person in case. Indeed, OLAF enjoys superior powers and its reports bear special gravity, which is not reflected accurately in the legal texts that undergo OLAF's actions. This gap between the legal world and the reality has to be bridged by the EU Courts in a way that no power is exercised without respecting the EU citizens' procedural rights.

d) The *Planet* case: The birth of a judicial shift?

The *Planet* case concerns the Early Warning System (EWR) for the use of authorising officers of the Commission and the executive agencies, which was adopted by the Commission Decision 2008/969/EC, Euratom on 16 December 2008²⁹. The EWS's purpose is to ensure, within the Commission and its executive agencies, the circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities. According to Article 10 of the Decision, under the title 'W1 warnings', OLAF shall request the activation of a W1a warning where its investigations at an early stage give sufficient reason to believe that findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds.

28. T-435/09 R, *GL 2006 Europe v. Commission*, 16.09.2010, ECR II-32, paras 13-16. See also J. INGHERLAM, Judicial Review of investigative acts of the European anti-fraud office (OLAF): a search for a balance, CML Rev., 2012, p. 603.

29. Case T-320/09, *Planet v. Commission*, 13.04.2011, ECR II-1673.

Planet is a Greek company, which provides advisory services in the field of the administration of companies and in 2007 was the subject of an inquiry carried out by OLAF because of suspected irregularities in Planet's management of EU funds. The findings that emerged from OLAF's investigation led it to request Planet's registration in the EWS. As a result of Planet's registration in the system, the company was notified that it was not allowed to sign a contract with the Commission, namely that the contract had been suspended until a further condition would be satisfied, i.e. the opening by Planet of a blocked bank account, through which it would have access only to the part of the advance payment which was due under the contract.

Following this development, Planet brought an application before the General Court for the annulment of OLAF's decisions. The General Court rejected the Commission's argument that Planet's application was inadmissible because of the nature of the contested measures, which were merely internal precautionary informative measures, unable to be the subject of a review of legality under Article 263 TFEU. The General Court concluded that the contested measures affected Planet's room for negotiation and the organisation within the consortium of which it was part and, therefore, Planet's ability to actually conclude the project that concerned the contract at issue. The General Court added that to refuse Planet the right to any judicial review would be incompatible with a European Union governed by the rule of law, particularly since Decision 2008/969 does not provide for any right for natural and legal persons to be informed or heard before they are registered in the EWS by the activation of the relevant warnings. The CJEU rejected the Commission's appeal and upheld the General Court's decision, pointing out that the contested measures could not be regarded as intermediate and preparatory measures not subject to review. Insofar as the registration of an entity on a warning list has further repercussions for the company, such as the imposition of additional burdens and conditions upon it, then the measures at issue concentrate the legal characteristics of reviewable measures³⁰.

The Court's argumentation demonstrates a small but significant judicial shift in comparison to the previous settled case-law, which persistently accepted that the forwarding of information by OLAF to the national authorities or other EU institutions was inadmissible. Indeed, in the *Planet* case

30. Case C-314/11 P, *Commission v. Planet*, 09.12.2012, not yet published, paras 48-60.

the Court adopted a more pragmatic approach in relation to the repercussions that the forwarding of OLAF's 'findings' might have in the legal situation of the people under investigation. The Court, hence, refused to adhere to the Commission's opinion that any deterioration of the plaintiff's legal situation was a result of other institutions' and authorities' subsequent acts. On the contrary, it rightly acknowledged that the transmission of information is the *causa efficiens*, which triggers a domino effect that might deteriorate the plaintiff's legal position. As such, the OLAF's harmful act cannot remain immune to judicial control under the formalistic justification that it does not constitute a harmful act subject to an action for annulment according to Article 263 TFEU. The final report, the information forwarding and any harmful action that might follow are inextricably linked with each other, thus constituting an indivisible natural unit of acts. It follows that OLAF's acts must be considered as acts that affect the legal situation of the plaintiff for the purpose of applying Article 263 TFEU. Future case-law of the Court rests to show whether this 'on the right track' approach, that attaches to the right for effective judicial protection, will endure.

III. ACTION FOR DAMAGES: INSUFFICIENT SCOPE THAT LEADS TO ONLY PARTIAL REMEDY FOR THE PLAINTIFF

a) Admissibility of the actions but poor results

The legal remedy of an action for the EU's non-contractual liability might prove to be more effective for the applicant. Accordingly, the EU, following the general principles common to the laws of the member states, shall make good any damage caused by its institutions or by its servants in the performance of their duties. Even if the act that causes the damage cannot be annulled, the action for damages still arises and can be pursued in any case³¹. Individuals who, by reason of the admissibility conditions laid down in Article 263 TFEU, cannot contest directly EU acts or measures, have, nonetheless, the opportunity to challenge the alleged wrongful acts of OLAF by bringing an action for non-contractual liability where its conduct is of such a nature as to entail liability for the EU³². In brief, the action

31. Case 4/69, *Lütticke v. Commission*, 28.04.1971, ECR 325.

32. Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International and Others v. Commission*, 15.01.2003, ECR II-1, para. 123. See also A. BIONDI / M. FARLEY, *The right to damages in European Law*, Kluwer Law International, 2009, p. 87.

for damages remains independent of any action for annulment³³. The rejection of the latter as inadmissible does not necessarily lead to a rejection of the former as inadmissible as such³⁴. As a consequence, in the action for damages it remains open to individuals to challenge unlawful acts which have been committed during the drafting and adoption of an administrative report, even though that report is not a decision directly affecting the rights of the persons mentioned therein³⁵.

However, even if the action for damages passes the admissibility test, in order for it to be successful, the conditions for the establishment of the relevant claim should be met. According to settled case-law on the liability of the Community for damage caused to an individual by a breach of Union's law for which an institution or organ is responsible, a right to reparation is conferred where three conditions are met:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious and
- there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties³⁶.

33. See Case C-234/02 P, *Ombudsman v. Lamberts*, 23.03.2004, ECR I-2803, para. 59, where it is stated that action for damages “*is an independent form of action, with a particular function to fulfil within the system of legal remedies and subject to conditions for its use conceived with a view to its specific purpose*”. Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to a Community institution or body. See Case C-234/02 P, *Médiateur v. Lamberts*, para. 59.

34. Following this reasoning, it is suggested in theory that the possibility of taking interim measures in the framework of actions for damages arises. According to this interesting view, interim relief by way of suspension of the operation of a measure, ordered in the framework of an action for damages, does not seem entirely impossible, considering that the suspension of the contested act prevents future damage which might be serious and impairable. See J. INGHERLAM, Judicial Review of investigative acts of the European anti-fraud office (OLAF): a search for a balance, CML Rev., 2012, pp. 619-620.

35. Case C-315/99 P, *Ismeri Europa v. Court of Auditors*, 10.07.2001, ECR I-5281, paras 29 and 30. See further P. CRAIG, EU Administrative Law, 2009, Oxford, pp. 765-766.

36. Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, 05.03.1996, ECR I-1029, para. 51; Case C-352/98 P, *Bergaderm and Goupil v. Commission*, 04.07.2000, ECR I-5291, paras 41 and 42.

Starting from the premise that the plaintiff has the burden of proof of all the aforementioned conditions³⁷ and taking into account that the Court interprets relatively narrowly these conditions³⁸, it should not come as a surprise that, in the very few cases this legal remedy has been successful, the compensations that have been awarded were so small, that stray very far from being considered as satisfactory³⁹. Based on the argument that the damage is caused by other authorities' subsequent acts and not by OLAF, OLAF remains most of the times in the 'legal underground' since its illegal acts are not most of the times a direct causa of the damage incurred.

b) Directly and individually concerned

The first condition for the establishment of non-contractual liability of Member States provides that the violated rule must confer rights to natural or legal persons. The fact that the violated rule has been laid out for the protection of some general and not necessarily individual interest does not preclude the possibility that the rule has been established for the protection of natural persons' rights in the context of an action for damages⁴⁰. For instance, the Court ruled in the *Camos Grau* case that the obligation of impartiality constitutes such a rule. More specifically, in the case at issue, Camos Grau, the person under investigation, drew attention to the fact that one of OLAF's investigators did not possess the objectivity needed for carrying out the investigation. Although OLAF decided to remove this person from the investigation, the actions in which the investigator had been involved were left intact. The violation of the obligation of objectivity led finally to the award of damages to the applicant for non-material damage⁴¹.

In general, the fundamental rights of protection of family life, press freedom, the principle of the presumption of innocence and the right to a fair trial, confer rights upon individuals, enforced by the Union's Courts. In brief, all the procedural guarantees included in Regulation 1073/1999 or

37. Case T-48/05, *Franchet and Byk v. Commission*, 08.07.2008, ECR II-1585, paras 182 and 397.

38. G. ANAGNOSTARAS, Not as unproblematic as you might think: the establishment of causation in governmental liability actions, *EL.Rev.*, 2002, p. 663 et seq.

39. Compensations vary between EURO 3.000 and 56.000.

40. Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 C-190/94, *Dillenkofer and Others v. Federal republic Germany*, 08.10.1996, ECR I-4845, paras 36-38.

41. Case T-309/03, *Camos Grau v. Commission*, 06.04. 2006, ECR II-1173, paras 46-51.

the rights provided in the EU Charter of Fundamental Rights, such as the right of information, the right to be heard, the right to be assisted by a person of one's choice at an interview and the right not to incriminate oneself are generally considered to confer rights on individuals for the purposes of Article 340 TFEU⁴².

The cases of 'acts of maladministration' remain more complex, in particular if the Ombudsman has previously ruled on the matter within the limits of its own jurisdiction⁴³. In that regard, it has been adjudicated that an alleged breach of the principle of sound administration does not in itself confer rights upon individuals⁴⁴. This happens because the Treaty, via the Ombudsman, has provided to EU citizens, and more particularly officials and other servants of the EU, an alternative remedy to that of an action before the Union's Courts in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings⁴⁵. However, it is not unlikely that the violation of the principle of sound administration entails simultaneously a violation of a more special right, which is the ultimate right upon which the individual can base his claims for damages. In other words, the infringement of the principle of sound administration does not confer rights upon individuals, except where it constitutes the expression of specific rights, such as the right to have their affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union. The case of information leakage is a conduct which is not only incompatible with the principle of sound administration but also violates the right of the applicant to protect her personal data according to Article 16 TFEU and the relevant secondary legislation⁴⁶.

42. Case C-555/07, *Kukukdeveci*, 19.01.2010, paras 21-22. See W. HETZER, *Fight against fraud and protection of fundamental rights in the European Union*, *European Journal of Crime, Criminal Law and Criminal Justice*, 2006, pp. 20-45.

43. G. KRATSAS, *A case for OLAF: The place and role of the Anti-Fraud Office in the European Union context*, *EPL*, 2012, pp. 65-97.

44. Case T-196/99, *Area Cova and Others v. Council and Commission*, 06.12.2001, ECR II-3597, para. 43.

45. Case T-209/00, *Lamberts v. Ombudsman*, 10.04.2002, ECR II-2203, para. 65.

46. T-259/03, *Nikolaou v. Commission*, 12.09.2007, ECR II-99, paras 193-200. See also Directive 95/46/EC on the protection of individuals with regard to the processing of

c) Sufficiently serious breach

With regard to the requirement that the breach must be sufficiently serious, the decisive test for determining whether that requirement is met is whether the institution concerned has manifestly and gravely disregarded the limits of its discretion. Where that institution has only a considerably reduced or even no discretion, the mere infringement of Union's law may be sufficient to establish the existence of a sufficiently serious breach⁴⁷. As such, the decisive criterion is whether the deciding institution/organization is endowed with discretionary powers. No problem arises in cases where an explicitly protected/established right is violated, as the Union does not have any discretion regarding the respect or violation of these rights⁴⁸.

However, the press releases of OLAF raise a more problematic issue. In this framework, the two conflicting rights are the OLAF's "right to communicate" against the individual's procedural rights. On the one hand, the Court in *Giraudy* recognized "*that a culture of accountability has grown up within the Community institutions, responding in particular to the concern of the public to be informed and assured that malfunctions and frauds are identified and, as appropriate, duly eliminated and punished. The consequence of that requirement is that officials and other servants who hold posts of responsibility within an administration such as the Commission must take into account the possible existence of a justified need to communicate a degree of information to the public*"⁴⁹. Accordingly, a fair and proportionate balance has to be struck between the public's legitimate interest in access to information and to the procedural rights of the person under investigation.

personal data and on the free movement of such data, 24.10.1995 and Regulation No 45/2001, 18.12.2001, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and of the free movement of such data.

47. Case C-312/00 P, *Commission v. Camar and Tico*, 10.12.2002, ECR I-11355, para. 54 and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, *Comafrika and Dole Fresh Fruit Europe v. Commission*, 12.07.2001, ECR II-1975, para. 134.

48. A. BIONDI / M. FARLEY, *The right to damages*, 2009, Kluwer Law International, pp. 48-53.

49. Case F-23/05, *Giraudy v. Commission*, 02.05.2007, FP-I-A-1-121, FP-II-A-1-657, para. 165. According to the European Commission (European Governance: A white paper, COM 2001(428) final, accountability is seen as a principle that obligates the EU institutions to explain and take responsibility for what they do in Europe.

Consequently, in view of the autonomy granted to OLAF by Regulation 1073/1999 and by virtue of the general objective of press releases, i.e. providing information to the public, OLAF enjoys discretion as regards the appropriateness and content of its press releases in respect of its investigatory activities. If, nevertheless, in the relevant press release the person under investigation is explicitly mentioned as “liable” or “guilty”, there is a manifest transgression of OLAF’s discretionary powers, as the latter violates the presumption of innocence as stipulated under Article 6 (2) of the ECHR and, thus, the condition of the “manifest and grave disregard of the limits of one’s discretion” should be considered as fulfilled⁵⁰.

d) Direct causal link

In relation to the condition concerning the causal link, the EU may be held responsible only for a damage which constitutes a sufficiently direct consequence of the misconduct of the institution concerned. By contrast, compensation for every harmful consequence caused by the conduct of its bodies, let alone a remote one, does not lie within the responsibility of the EU⁵¹.

Establishing a causal link between OLAF’s illegal acts and the damage of the investigated person remains complicated⁵². As it has already been mentioned, OLAF’s findings do not constitute binding guidelines towards the national authorities or the EU’s institutions they address.

As a result, any damage incurred is considered to have been caused from the competent national authorities. Indeed, the sovereign and discretionary acts of the intervening national authorities break any causal link since they constitute the only direct and determining cause of the damage claimed⁵³. The strict jurisprudential approach in relation to the condition of the causal link may lead, under certain circumstances, to particularly unjust results. The *Nikolaou* case is demonstrative of such unfairness. The Court, in this case, after shifting the burden of proof to the Commission, concluded that

50. Case T-48/05, *Franchet and Byk II v. Commission*, 08.07.2008, ECR II-1585, paras 208-209.

51. Joined cases 64-76 and 113-76, 167-78 and 239-78, 27-79, 28-79 and 45-79, *Dumortier v. Council*, 04.10.1979, ECR 3091, para. 21 and Case T-333/01, *Meyer v. Commission*, 13.02.2003, ECR II-117, para. 32.

52. A.G. TOTH, The concepts of damage and casualty as elements of non-contractual liability, in T. Heukels / A. McDonnell, The action for damages in Community Law, 1997, Kluwer Law International, p. 71 et seq.

53. Case T-193/04, *Tillack v. Commission*, 04.10.2006, ECR II-3995, para. 110.

the Commission was responsible for the information leakage and that OLAF was responsible only for an insignificant part of the total damage of the applicant. The Court considered, thus, that the material and moral damage the applicant suffered was not caused by OLAF itself but rather by the press and journalists' broadcasts that contained derogatory characterizations. It failed, however, to recognize that the starting point of the damage was the initial leakage to the press by OLAF, an act that, in the Court's view, brought about only an insignificant damage to the applicant. As such, from the Euro 900.000 compensation that was requested by the applicant, only Euro 3.000 was awarded by the Court⁵⁴.

This analysis demonstrates that as long as the influence of the *de lege* power of OLAF's actions in the legal position of the applicants is not recognized, the results in case of an action for damages will be minimal. Any caused damage will be most of the times an "effet cumulatif", which will be attributed to an illegal act's spillover. In other words, while OLAF's illegal act is the one that activates the causal link chain so that the final damage is induced, the interference or interposition of a series of other factors and causes leads, thereby, to the inability to spot the direct source that causes the damage. Consequently, although the action for damages constitutes in theory one of the legal remedies in the toolbox of the applicant, it has been proven to be hardly efficient and effective in practice; contributing, thus, to the fact that OLAF's illegal acts, one way or another, are not finally subject to any effective judicial protection.

IV. CONCLUSIONS

The preceding analysis demonstrated how the challenge of OLAF's alleged unlawful acts is not subject to the broad spectrum of the "available" remedial choices, but rather remains confined to the residual choice of the action for damages.

The action for damages does not function as a last resort remedy, but rather as the 'only resort' remedy. Taking into account the high proof hurdles this legal remedy entails, both on grounds of establishing a "sufficiently serious breach" and a causal link, the action for damages is far from being characterized as an effective legal remedy. Indeed, the CJEU's denial to acknowledge that OLAF's final report and the forwarding of the informa-

54. Case T-259/03, *Nikolaou v. Commission*, 12.09. 2007, ECR II-99, paras 301-325.

tion to the national authorities constitute the triggering effect that is liable for bringing a distinct change in the legal position of the applicant, not only has deprived the applicant of his procedural rights, but has also left him without the possibility to annul OLAF's acts that damage his honour and dignity. While effective judicial protection implies that the parties are given a genuine opportunity to raise their claim before a Court, the high standards of admissibility in the action of annulment should be perceived as infringing this general principle of EU Law.

Having realized this problem, the CJEU adopted in the *Planet* case a more functional approach with regard to the admissibility requirements. The present article recommends that in its future case-law the CJEU should consolidate this looming shift, so that the applicants start enjoying an effective judicial protection of their rights.

On the other hand, on the level of the managerial administrative structure of the Union's services, although the need to combat fraud directed against the interests of the Union is undeniable, the invocation of the aforesaid purpose by no means grants OLAF the right to act without restraint. Starting from the premise that the EU is a Union of laws, a union of rules that cannot tolerate any elements of arbitrariness within its operations⁵⁵, OLAF's extensive powers of investigation as well as the wide latitude conferred to it by the law should fall under full judicial control⁵⁶.

De lege ferenda it would be desirable that OLAF becomes a part of the European Public Prosecutor's Office as stipulated under Article 86 TFEU⁵⁷. The potential of OLAF becoming the "bras armé" of EPL would consolidate the democratic legitimization in the actions of the supervisory authorities of the Commission and would render transparent the limits of action of the EU prosecuting authorities⁵⁸.

55. V. CHRISTIANOS, Transparency, fundamental rights and OLAF's notification system, *Europeon politeia*, 2010, p. 507-520 (in Greek).

56. Special Report of The European Court of Auditors, 2/2011, Follow-up of special report 1/2005, concerning the management of the European Anti-Fraud Office, paras 38-39.

57. C. STEFANOEU / S. WHITE / H. XANTHAKI, OLAF at the Crossroads – action against EU fraud, *European Journal of Law and Economics*, 2012, p. 201; M. RODODOULOS, *op.cit.*, p. 1293.

58. J. INGHELRAM, Legal and institutional aspects of the European Public Anti-Fraud Office, 2011, Europa Law Publishing; V. MITSILEGAS, *EU Criminal Law*, 2009, Hart Publishing, p. 218.

Another solution would be that OLAF remains a specialized body dealing in its entirety with cases of administrative offences. Such a solution would presuppose a sharp distinction between cases that investigate criminal offences and administrative irregularities. The former should be exclusively investigated under the guidance of EPL. In contrast, for the latter, OLAF could potentially remain competent for their investigation – equipped even with the power of imposing direct sanctions such as administrative fines – in an analogous way to what happens within the Regulation 1/2003 regime in the anti-trust field of law⁵⁹. This way, OLAF would stop being an authority with the mere purpose of forwarding information and would take over the investigations, thus being subject to the relevant judicial control. The ‘*acquis communautaire*’ relating to the judicial control in the antitrust area will be particularly useful for the guarantee of the procedural rights of the persons under investigation. In any case, any legislative or judicial solutions put forward to mitigate OLAF’s powers should have clear dedication to the fact that the EU is a Union of principles, institutions and rules that attributes to its citizens broad control powers of the supranational power structures⁶⁰.

59. 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. See W. WILS, Powers of investigation and procedural rights and guarantees in EU antitrust enforcement: The interplay between European and national legislation and case law, *World Competition*, 2006, pp. 3-24; L. GARZANITI / J. GUDOFISKY / J. MOFFAT, Dawn of a new era? Powers of investigation and enforcement under regulation 2003, *Antitrust Law Journal*, 2004, p. 159.

60. S. GLESS / H. ZEITLER, Fair trial rights and the European Community’s fight against fraud, *ELJ*, 2001, pp. 219-237.