12. POLICY RECOMMENDATIONS

K. Ligeti and F. Giuffrida

INTRODUCTION

ADCRIM is the third of a cycle of Hercule III research projects examining potential improvements of OLAF's legal framework. The project draws insights by making a comparison with three other EU entities involved in the enforcement of EU law, namely the European Central Bank (ECB), the European Securities and Markets Authority (ESMA), and the European Commission's Directorate General for Competition (DG COMP). Coordinated by Utrecht University, the first two studies dealt with, respectively, investigatory powers and procedural safeguards,[1] and exchange of information between the above EU bodies and national enforcement authorities.[2] ADCRIM was coordinated by the University of Luxembourg and tackled the admissibility of evidence collected by OLAF in national punitive administrative and criminal proceedings, with a stronger focus on the criminal law setting.

OLAF's mission is to 'step up the fight against fraud, corruption and any other illegal activity'[3] affecting the Union budget. Despite its nature as an administrative body, OLAF is very close to the criminal law domain. In particular, legal and/or practical issues arise when evidence collected by OLAF according to the rules and standards of administrative procedure 'migrates' to criminal proceedings. The starting point of our analysis is, therefore, Article 11(2) of Regulation 883/2013, according to which:

> In drawing up such reports and recommendations [ie reports and recommendations adopted upon completion of an OLAF investigation],[4] account shall be taken of the

[1] Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017).

[2] Michele Simonato, Michiel Luchtman and John Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities* (*ECN/ESMA/ECB)* (Utrecht University 2018).

[3] Art 1 of Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L 248/1.

[4] Art 11(1) of Regulation 883/2013 states:

> On completion of an investigation by the Office, a report shall be drawn up, under the authority of the Director-General. That report shall give an account of the legal basis for the investigation, the procedural steps followed, the facts established and their preliminary classification in law, the estimated financial impact of the facts established, the respect of the procedural guarantees in accordance with Article 9 and the conclusions of the investigation.
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> The report shall be accompanied by recommendations of the Director-General on whether or not action should be taken. Those recommendations shall, where appropriate, indicate any disciplinary,

> national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.

This provision, which replaces the analogous rule of Regulation 1073/1999 (repealed by Regulation 883/2013) and which is worded in a very similar fashion as Article 8(3) of Regulation 2185/96 on OLAF on-the-spot checks and inspections, has three key components. First, it requires OLAF to draft its reports by taking into account national law. Second, it provides for an assimilation rule, ie OLAF reports shall be considered – for the purposes of admissibility in national proceedings and assessing their evidentiary value – as if they were reports drawn up by national administrative inspectors. Third, such reports can be used in national 'administrative or judicial proceedings', which include administrative proceedings, criminal proceedings, and the in-between category of punitive administrative proceedings. The latter refers to proceedings aiming to issue administrative sanctions that would qualify as having a criminal nature according to the *Engel* criteria set out by the European Court of Human Rights (ECtHR),[5] which the Court of Justice of the European Union (CJEU) recently endorsed.[6]

The application of Article 11(2) of Regulation 883/2013, and of its predecessors, turned out to be unsatisfactory. The Commission itself, when tabling a Proposal for the amendment of the OLAF Regulation, acknowledged that

> the most important factor affecting the follow-up to OLAF recommendations … relates to the rules on the admissibility of OLAF-collected evidence in national judicial proceedings. … in some Member States [the assimilation rule] does not sufficiently ensure the effectiveness of OLAF's activities.[7]

According to OLAF's own analysis of the follow-up to OLAF recommendations between 2008 and 2015, about half of these recommendations (169 out of 317) did not lead to any proceedings at the national level, and the most common reason for the dismissal of cases was 'insufficient evidence'[8] (94 out of 169 dismissals). The same analysis revealed that

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administrative, financial and/or judicial action by the institutions, bodies, offices and agencies and by the competent authorities of the Member States concerned, and shall specify in particular the estimated amounts to be recovered, as well as the preliminary classification in law of the facts established.

[5] *Engel and Others v The Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).

[6] See, for instance, Case C-489/10 *Bonda*, EU:C:2012:319; Case C-524/15 *Menci*, EU:C:2018:197.

[7] Commission, 'Proposal for a regulation amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations' COM(2018) 338 final, 23 May 2018, 5.

[8] OLAF, 'Analysis on Member States Follow-Up to OLAF's Judicial Recommendations Issued between 1 January 2008 and 31 December 2015', Ref Ares(2017)461597 – 27/01/2017 (2017) 1.

> Member States' authorities repeatedly take the view that art. 11§2 of Regulation 883/20132 is not always a sufficient legal basis to allow Member States' judicial authorities to use OLAF reports as evidence in trial. Therefore, in numerous Member States, after receiving the OLAF final report, prosecutors perform investigation activities again in order to acquire admissible evidence.[9]

Such duplication is detrimental both to individuals, who are subject to multiple investigations (by OLAF and by national authorities) based on the same facts, and to the EU, as the (often complex and long) OLAF investigations are in essence considered to merely justify the opening of national investigations into the same facts.[10] Furthermore, repetition of investigative acts could at times not be possible or effective (eg because the suspected person destroyed the relevant evidence) and prolongs the time elapsed since the commission of potential crimes, increasing the risks of their becoming statute-barred before any final decision can be taken.

Against this backdrop, the ADCRIM project studied how the rule enshrined in Article 11(2) of Regulation 883/2013 plays out in seven national systems (France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom),[11] and whether and to what extent duplication occurs. The outcomes of this study have been summarised in the comparative report, which has also examined whether the suggested amendments to the OLAF Regulation, proposed by the Commission in May 2018 and by the European Parliament in April 2019,[12] could repair some existing shortcomings. On this basis, we have come up with policy recommendations to strengthen the admissibility of OLAF final reports in criminal proceedings. These recommendations are grouped into recommendations that do not require a legislative change (best practice recommendations) and proposals for legislative amendments.

I. PROPOSED BEST PRACTICES

RECOMMENDATION NO 1: Ensure there is enough expertise within OLAF itself, or if need be by liaising with national authorities, Eurojust and/or the EPPO, to take adequately into account national law when drafting OLAF reports

Article 11(2) of Regulation 883/2013 and Article 8(3) of Regulation 2185/96 require OLAF to take account of the national law of the Member State concerned when drafting the final OLAF report or the on-the-spot checks and inspections report. This obligation

[9] ibid 2.
[10] Katalin Ligeti, 'The Protection of the Procedural Rights of Persons Concerned by OLAF Administrative Investigations and the Admissibility of OLAF Final Reports as Criminal Evidence' (Study for the European Parliament's Committee on Budgetary Control 2017) 27–28.
[11] Any reference to the UK should be understood as referring to the English and Welsh legal system.
[12] European Parliament, 'Legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations (COM(2018)0338 – C8-0214/2018 – 2018/0170(COD))'.

remains unchanged in the text of the Commission's Proposal for an amended OLAF Regulation and in the European Parliament's resolution of April 2019.[13] Especially in a context where the principle of assimilation applies, it is crucial that OLAF pays adequate attention to national rules. Even if and when the principle will be set aside,[14] OLAF cannot shy away from considering national law when drafting its reports, which are to be eventually used by national courts acting in accordance with national law.

Within OLAF, the Judicial and Legal Advice Unit, which was also known as the 'Magistrates Unit' since it was composed of national magistrates, gave advice to OLAF officials on national law concerning evidentiary issues until it was dismantled in 2012. As its support was highly valued, it would be appropriate to give further thought to whether such a unit should be reintroduced, as the European Parliament seems to suggest when it requires the internal OLAF legality check to be entrusted to 'experts in law and investigative procedures who are qualified to hold judicial office in a Member State'.[15] Having the necessary 'in-house' expertise for each of the 28 Member States would indeed represent an added value for OLAF activities, as it could help to increase the quality of its reports and their compliance with national requirements, thus reducing the risks of duplication of investigative activities. As an alternative, OLAF should explore the possibility to consult, when needed, with national Desks at Eurojust, or, in the future, with the competent European Delegated Prosecutor or European Prosecutor of the Member State where it carries out its investigations. OLAF could also get in touch with competent national authorities, as further explained below.

RECOMMENDATION NO 2: Ensure that the investigative measures carried out by the Office (interviews, inspections, forensic analysis, etc) are adequately documented in OLAF final reports and especially in their annexes

Some national reports noted that, in practice, admissibility issues in national criminal proceedings do not arise vis-à-vis OLAF reports as such but rather with respect to the annexes to these reports. It is indeed in the annexes that OLAF mostly includes (or should include) copies of the documents it consulted, interview recordings, findings of forensic analysis or inspections, etc. Therefore, to increase the probative value of OLAF-collected evidence, adequate attention should also be paid to these annexes and their quality, as they are of the essence for national investigations and prosecutions.

[13] cf COM(2018) 338 final, Art 1(10)(b), which however adds to the current text that account should be taken also of the relevant provisions of Union law. There are no amendments to this provision in the European Parliament's resolution of April 2019.
[14] See section 5.3 of the comparative report.
[15] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendment 135.

RECOMMENDATION NO 3: More training at the national level on EU rules and procedures to fight PIF crimes is needed

A certain degree of what could be called 'physiological' duplication seems inherent to how OLAF works and its nature as an administrative body whose actions have criminal law ramifications. However, the comparative report also brought to light cases of, so to say, 'pathological' duplication of OLAF investigative activities. A glaring example is when national authorities repeat OLAF activities because they are unaware of EU legal instruments and principles regulating the matter, as some interviewees contacted in the framework of this study reported. In this respect, increasing national authorities' knowledge of, and familiarity with, EU rules, bodies, and instruments for fighting PIF crimes, eg by more specific training on these matters, could repair the current situation.

II. PROPOSED LEGISLATIVE AMENDMENTS

RECOMMENDATION NO 4: Enhance contacts between OLAF and national competent authorities at the beginning of OLAF investigations, by considering the introduction of an obligation for OLAF to promptly inform these authorities before the Office carries out investigative measures at the national level and/or when it becomes aware of cases having potential criminal law implications

The national reports have demonstrated that sometimes OLAF and national authorities do not have any contact until the moment OLAF transmits its final reports and recommendations in accordance with Article 11(2) of Regulation 883/2013.[16] The OLAF Supervisory Committee's Opinion No 2/17 touches upon the issue as well, calling for an '[e]arly involvement of national authorities in earlier stages of an investigation'.[17] We share this view, because early contacts would allow both OLAF and competent domestic authorities to plan their activities accordingly.

Especially if OLAF promptly informs national authorities before carrying out investigative measures at the national level, they not only could advise OLAF on rules for ensuring admissibility of evidence, as noted above, but also embark on intrusive investigative measures that OLAF could not undertake, if specific pieces of evidence must be secured. The early involvement of national authorities could also help to solve some time-related problems plaguing OLAF investigations and their follow-up. Fraud and other activities affecting the EU budget are often difficult to discover in the first place, and complex to investigate in the second. Hence, when OLAF completes its investigations and transmits its reports in accordance with Article 11(2) of Regulation 883/2013, the crimes at hand are sometimes already, or on the brink of being, statute-barred.[18] Early

[16] See comparative report, section 5.1.
[17] OLAF Supervisory Committee, 'Opinion 2/2017 Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19)' (2017), para 48.
[18] OLAF, 'Analysis on Member States Follow-Up' (n 8) 6.

contacts between OLAF and national authorities could therefore allow them to coordinate their activities in a better way.

The introduction of an OLAF obligation to promptly report to national authorities cases having (potential) criminal law implications could also be considered. The current OLAF legal framework provides for some rules on information exchange, yet almost none of them lays down an obligation for OLAF to inform domestic authorities of cases where a criminal offence seems to have been discovered.[19] The ECB and ESMA legal frameworks require instead that these two bodies, when they become aware of potentially criminal conduct, promptly inform competent domestic (criminal law) authorities, either directly (ESMA) or indirectly (the ECB informs central banks, which should then pass the information on to public prosecutors). For the above-mentioned reasons, and despite the clear differences in mission and powers between these two bodies and OLAF, it would not be inconceivable to apply similar rules to the latter as well.

Furthermore, the EPPO Regulation now requires that OLAF – as well any other EU institution, body, office and agency – report without undue delay to the EPPO any potential case falling within the competence of the European prosecution authority.[20] Since the EPPO will be competent to investigate and prosecute PIF crimes, it should be able to promptly decide whether to embark upon the investigation of a given case as soon as there is a suspicion that a PIF offence has been committed. The same rationale could therefore apply with respect to the relationships between OLAF and national authorities, which are currently competent to investigate and prosecute PIF crimes as well. After all, late contacts between OLAF and national authorities have turned out to yield poor results and it would be thus worth exploring whether the status quo may improve by creating synergies and collaboration between OLAF and national authorities at an earlier stage. Even when the EPPO will have started its activities, such early contacts would be needed, at least in the Member States that do not participate in the EPPO; in all others, they are also likely to be needed with respect to criminal cases beyond the EPPO's competence.

RECOMMENDATION NO 5: Replace the assimilation clause with a rule providing for the admissibility of OLAF reports as such, clarifying that national courts will still have the power to freely assess OLAF-collected evidence; at the same time, higher procedural safeguards should be ensured or, alternatively, the option of subjecting the admissibility of OLAF reports to the respect of the minimum standards laid down in the Directives on procedural safeguards can be explored

The Commission and the European Parliament intend to remove the assimilation principle from the OLAF Regulation, which is convenient, since the ADCRIM project confirmed

[19] See more in comparative report, section 5.1.

[20] Art 24(1) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] OJ L 28/1.

that the principle can lead to unsatisfactory results. The Commission would however keep it for national criminal proceedings, while the European Parliament would not make any distinction between criminal and administrative procedures. The European Parliament suggests replacing Article 11(2) of Regulation 883/2013 with the following provision:

> Upon simple verification of their authenticity, reports drawn up on that basis including all evidence supporting and annexed to these reports shall constitute admissible evidence in judicial proceedings before national courts and in administrative proceedings in the Member States. The power of the national courts to freely assess the evidence shall not be affected by this Regulation.[21]

This proposed wording of Article 11(2) of Regulation 883/2013 would have the merit of clarifying that OLAF reports and the annexes thereto will have to be admitted as such in national criminal proceedings, even if national provisions on admissibility of evidence gathered by national administrative authorities are unclear or altogether non-existent. It goes without saying that the question remains as to whether such a new provision will be truly able to improve the current situation, as it will have to apply in a context where there is no harmonisation of national rules on criminal proceedings. If each national court continues to follow its own code of criminal procedure and to exercise the powers bestowed upon it by non-harmonised national legislation, the possibility that even an amended OLAF Regulation will not solve most of the problems related to OLAF-collected evidence looms large. Yet the fact that the admissibility of OLAF-collected evidence will no longer depend on the rules applying to comparable national administrative authorities, but only on the reports' authenticity that domestic competent authorities will have to verify, would arguably represent a step forward.

While the Commission and the European Parliament agree on the removal of the assimilation rule for administrative proceedings, the issue becomes less straightforward when it comes to encroaching upon criminal justice systems. In section 5.3 of the comparative report, it has been argued that Article 325(4) TFEU would not be an obstacle to the adoption of a text as that suggested by the European Parliament. However, while this change in the OLAF legal framework would not be contentious as far as its legal basis is concerned, it should go hand in hand with two further amendments.

a) First, it is to be welcomed that the European Parliament suggests specifying that – along the lines of Article 37 of the EPPO Regulation – national courts remain free to assess OLAF-collected evidence. The study of the seven national systems demonstrated that some of the issues connected with OLAF reports do not concern the *admissibility* as such, but rather the *use* that national prosecutors and courts make (or do not make) of these reports. In other words, even when OLAF reports are admissible, which in national criminal proceedings they usually are, domestic authorities could still need to search for further evidence or even to repeat some of the investigative activities previously carried out by the Office.[22] As some national reports noted, OLAF investigations have indeed different aims and standards than national criminal

[21] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendment 85.
[22] See more in section 5 of the comparative report.

investigations, so that in some cases there is no real alternative to carrying out further, or even repeating, investigative activities (eg reinterrogating the suspects and asking them new questions that OLAF did not pose). These risks of, so to speak, 'physiological' duplication are inherently related to the nature of OLAF as an administrative authority carrying out investigations with effects that extend to criminal proceedings, and there seems to be little room to entirely avoid them in the future if the nature itself of OLAF will not change.

The European Parliament's proposal could however improve the status quo, as it would create, on the one hand, a level playing field among Member States, leaving behind the complexities and fragmentation following from the assimilation rule. On the other hand, by specifying that national courts would remain free to assess OLAF-collected evidence along the lines of the similar EPPO Regulation provision, it would clarify that 'admissibility' of OLAF reports means that a national court will have the 'ability to consider'[23] them when taking its decisions. It will be eventually for this court to decide on the reliability and usefulness of the reports, taking into account the principles of *effet utile* of EU law and of sincere cooperation (Article 4(3) TEU), the obligation to protect the Union budget (Article 325 TFEU), and, last but not least, fundamental principles and standards of national criminal procedure.

b) The 'upgrade' of OLAF reports' admissibility calls indeed for the enhancement of procedural safeguards. Those listed in Article 9 of Regulation 883/2013 are overall rather robust when compared to the usual ones applying to administrative investigations, yet there are still some shortcomings when one looks at them through the lens of criminal law. It is therefore to be welcomed that the European Parliament, while providing for a stronger admissibility rule in criminal proceedings, suggests bridging some existing gaps in the OLAF legal framework regarding the position of individuals concerned by the Office's investigations. The European Parliament would introduce a provision on the *right of access* to the case file and another on the *jurisdiction of the Court of Justice* to review OLAF reports.[24] As argued in a previous study, the right of access to the file is of the essence, especially with a view to criminal proceedings, as only timely access to the file allows the effective exercise of defence rights and ensures equality of arms.[25] Likewise, the rule on judicial review would be beneficial to persons concerned by OLAF activities, as it would allow the CJEU to control the validity of OLAF reports and OLAF's compliance with EU fundamental rights during investigations. The European Parliament also suggests introducing a body that the Commission proposed a few years ago, the 'Controller of procedural guarantees'. If the provision on the Court of Justice is agreed upon, however, the creation of this further body may be redundant, as respecting procedural guarantees may be arguably better controlled by the combination of OLAF internal and CJEU external review.

[23] Recital 73 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.
[24] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendments 75 and 94.
[25] See more in Ligeti (n 10) 16–18.

Another option to consider to ensure the admissibility of OLAF reports and avoid that national courts refuse to use them because of alleged differences with national safeguards would be to establish a link between OLAF activities and the Directives on procedural safeguards in criminal proceedings. Since these Directives crystallise the minimum protection that should be ensured to persons involved in criminal proceedings throughout the EU, they could represent a benchmark for the evaluation of the admissibility of OLAF reports by national authorities. In other words, OLAF's legal framework could be amended in a way that requires national courts to assess whether OLAF investigations respected the minimum safeguards laid down in the Directives. Should this be the case, OLAF reports should be admissible in national criminal proceedings, and national courts could not refuse to take them into account on the basis of potentially higher national standards. This would represent a sort of 'codification' of the *Melloni* principles and would arguably strengthen the effectiveness of OLAF's activities.

RECOMMENDATION NO 6: Clarify the relationships between OLAF and the EPPO, especially with respect to the 'complementary' and 'supplementary' role of OLAF envisaged by Article 101(3) of the EPPO Regulation; ensure that, in any case, EPPO does not 'outsource' its investigations to OLAF to the detriment of the individuals' safeguards

When the EPPO is dealing with a case, in principle OLAF should not open any parallel administrative investigations into the same facts. When the EPPO decides instead not to take on board a given case, it could refer the case to OLAF if there is still room for administrative follow-up or recovery.[26] What can be gleaned from these provisions is that OLAF and the EPPO will be distinct bodies with different mandates which should coordinate their activities to avoid duplication.[27] Nothing however suggests that – as things stand now – OLAF will become the *police judiciaire* of the EPPO. While there was some discussion about this hypothesis before the creation of the EPPO, the negotiators have clearly ruled out such a transformation of OLAF.

Nonetheless, according to Article 101(3)(c) of the EPPO Regulation, the EPPO, in the course of its investigations, may request OLAF to support or complement its activity by conducting administrative investigations.[28] The scope of this provision is not entirely clear. If the EPPO can request OLAF to conduct administrative investigations in 'support' of its own, one would be inclined to think that the outcome of OLAF's activities will eventually be used by the EPPO in the framework of criminal investigations, as if OLAF were, on an *ad hoc* basis, the EPPO's police arm. The risk looming large in this scenario is that the EPPO may delegate tasks to OLAF with the 'aim of circumventing'[29] the EPPO Regulation rules on procedural safeguards. If this is the right understanding of

[26] Recitals 103 and 105, and Art 101(2) of the EPPO Regulation.
[27] See Recital 103.
[28] Art 101(3)(c) of the EPPO Regulation.
[29] European Parliament, 'Legislative resolution of 16 April 2019' (n 12), amendment 110.

the provision at hand, the full respect of criminal law rules and guarantees by OLAF is imperative, as the European Parliament rightly suggests: it would be untenable to allow OLAF to be – in essence – the *police judiciaire* of the EPPO and to comply at the same time with rules affording individuals less protection than those provided for by criminal procedural law.