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**COMMISSION STAFF WORKING DOCUMENT**

**Analysis of Impacts**

*Accompanying the document*

**Proposal for a Regulation of the European Parliament and of the Council**

**Amending Regulation No 883/2013 as regards the establishment of a Controller of  
procedural guarantees**

{COM(2014) 340 final}

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## 1. INTRODUCTION

After years of intensive negotiations, the EU institutions have agreed on a new legal framework for OLAF investigations: a political agreement was reached on 3 July 2013 and Regulation 883/2013 on OLAF's investigations entered into force on 1 October 2013. It brought substantial changes to OLAF's organisation and investigative activities, in particular the reinforcement of OLAF governance and the strengthening of procedural safeguards of persons concerned by OLAF investigations. These changes are currently being implemented.

Meanwhile however, the Commission has adopted on 17 July 2013 a legislative proposal on the establishment of the European Public Prosecutor's Office<sup>1</sup>. Once established, the EPPO would bring about a substantial change in the way investigations concerning fraud and other illegal criminal activities affecting the EU financial interests are carried out in the Union: the EPPO would take over from OLAF the responsibility for investigating suspicions of criminal activities affecting the financial interests of the EU<sup>2</sup>. OLAF would continue to carry out administrative investigations concerning those illegal activities which would not fall under the competence of the EPPO (e.g. irregularities)<sup>3</sup>. As a *judicial* body, investigating serious offences (crimes) and benefiting from investigative powers typical of judicial investigations (including the power to enforce its investigative measures), the EPPO will also benefit from reinforced procedural guarantees typical of judicial investigations.

Against this backdrop appears the need to maintain coherence in the legal framework of the protection of the EU financial interest and to preserve the balance between the investigative powers and the procedural safeguards attached to these powers within the different EU investigative bodies acting in this area. Therefore, there is a need to reflect on whether and how the legal frameworks of OLAF and the EPPO can be bridged, and to assess whether and under which conditions further strengthening procedural safeguards of the persons concerned by OLAF investigations could be achieved while maintaining a high level of protection of the EU financial interests.

As announced in its Communication of 17 July 2013 on Improving OLAF's governance and reinforcing procedural safeguards<sup>4</sup>, accompanying the legislative proposal on the EPPO, the Commission services have reflected on possible further systemic improvements of the OLAF Regulation. This Analysis of Impacts is the result of this reflection. It analyses the different possible policy options to achieve the objectives of reinforcing procedural safeguards in OLAF while maintaining OLAF's efficiency and independence in its investigative function. It also analyses the benefits, costs and other potential impacts of such initiative.

## 2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

An Impact Assessment Steering Group (IASG) was set up in December 2013 and met on 2 April 2014. The following services were consulted by OLAF: Secretariat General, Legal Service, DG Human Resources, DG Budget, DG Justice and the Hearing Officers for competition proceedings.

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<sup>1</sup> Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (COM(2013)534 final).

<sup>2</sup> Regarding criminal activities, OLAF will only provide preliminary evaluation of allegations and provide assistance to the EPPO on its request (as it already does today to national prosecutors).

<sup>3</sup> OLAF will also remain competent for those Member States not participating in the EPPO.

<sup>4</sup> Communication of 17 July 2013 on "Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office (COM(2013)533).

This initiative has been included in the Commission Work Programme (Reference number 2014/OLAF+/001).

The Council has been consulted in the framework of the working party on Combatting Fraud (GAF) which held two meetings, on 8 November and 4 December 2013, on the follow up to the Communication. The Council expressed concerns about a possible new legislative initiative, regarding in particular timing and impacts on administrative burden and efficiency of the Office<sup>5</sup>. A political group of the European Parliament (European People's Party - EPP) has organised a public hearing on 3 October 2013 where speakers expressed the view that OLAF's investigative powers were far reaching and that independent external control over OLAF's investigative acts should be increased.

The Supervisory Committee has issued two analyses on the issues relevant for this analysis of impacts, which have been duly examined<sup>6</sup>. The OLAF's Director-General and the President of the Supervisory Committee have also discussed these issues during several bilateral meetings.

### **3. POLICY CONTEXT, PROBLEM DEFINITION AND SUBSIDIARITY**

#### **3.1. Policy context**

As mentioned above, the current reflection on further strengthening procedural safeguards in OLAF takes place against the background of recent policy developments in this area, notably the new Regulation 883/2013 on OLAF investigations and the adoption of the legislative proposal on the EPPO. Discussions between the Commission and the European Parliament had been triggered by certain cases where concerns were voiced about the way OLAF had conducted the investigations. To reply to these new elements and concerns, the Commission adopted a Communication on 17 July 2013 announcing further reflection on the need to strengthen procedural safeguard in OLAF investigations.

This Communication considers ways to improve OLAF's governance and reinforce procedural safeguards in investigations, as a step-by-step approach to accompany the establishment of the European Public Prosecutor's Office (the EPPO would be responsible for investigating and prosecuting criminal offences against EU financial interests and the Commission's proposal is currently under discussion in the Council and the European Parliament).

The Communication on OLAF's governance was also linked to the legislative reform of OLAF (the revision of Regulation 1073/1999) finally adopted on 11 September 2013, after nine years of discussions between the three EU institutions. The creation of a Controller of procedural safeguards which is envisaged in the Communication needs to be considered against the background of the past legal discussions on a review adviser which took place in the framework of these negotiations. The intensive discussions and divergent positions of the Council and the European Parliament, which the Commission tried to reconcile in a reflection paper of 2010, illustrate the difficulty of reaching a political agreement on this issue.

The Communication considers in particular two key elements: creating a "Controller of procedural safeguards" to perform a legality review of investigative measures and to provide for enhanced procedural safeguards where OLAF intends to carry out acts "similar" to searches and seizures in EU institutions, bodies, offices and agencies.

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<sup>5</sup> A note reflecting the results of these discussions (ST 17494/2013 INIT) has been adopted by 2478<sup>th</sup> Coreper of 12 December 2013 without debate.

<sup>6</sup> Opinion No 2/2013 on OLAF' Internal Complaints procedure; Working paper of the 8 October 2013 on "Reinforcing procedural safeguards in OLAF-in view of the monitoring experience of the Supervisory Committee".

*OLAF 2013 reform and the past discussions about a review adviser:*

In its **first proposal to reform OLAF, adopted in 2004**, the Commission had envisaged to enhance external control over the respect of procedural guarantees in investigations through an increased role of the Supervisory Committee. The Supervisory Committee would have delivered opinions concerning procedural guarantees at the request of the persons concerned and would have been given a copy of any complaint lodged against OLAF by EU staff. One member on the Committee in particular, the "avocat des libertés", would have been responsible for dealing with complaints and procedural guarantees in general. This proposal gained no support. The Council in particular was of the opinion that the role of the Supervisory Committee should be strictly limited to the general monitoring of OLAF's activity, in order to identify systemic problems in its functioning and should therefore not include any involvement in individual cases.

In a **new legislative proposal in 2006**, the Commission proposed the creation of an office of an independent review adviser, exclusively in charge of ensuring real time ex-post control over activities and ensuring the respect of procedural guarantees in individual cases: on his own motion or on requests by person implicated personally in the investigation, he would have delivered opinions relating to procedural guarantees. He would have been appointed by OLAF's Director-General, on a proposal from the Supervisory Committee, for a non-renewable term of five years<sup>7</sup>. Reactions to this proposal were not very positive either because of concerns relating to the costs and of potential negative impacts on the duration of the investigations.

In its 2008 Resolution, the **European Parliament** lent support to the idea of a Review Adviser who would have been an expert in law and investigative procedures, qualified to hold judicial office in a Member State and who would perform this task exclusively. The complaint by a person concerned against alleged violation of procedural guarantees would have been first lodged with the Supervisory Committee. In addition, a request was made for a systematic legality review, which would have been carried out before the opening and before the closure of an investigation and the opinion would be annexed to the final investigation report (opinions would have been delivered to the complainant, the Supervisory Committee and OLAF's Director-General). The new OLAF Regulation provides for the creation of an internal advisory and control procedure, including a legality check.

The **Council**, in its Conclusions of December 2010, expressed concerns about the proportionality of administrative costs of a Review Adviser exclusively entrusted with this function and the increased duration of the investigations. As a possible compromise it suggested a Review panel composed of OLAF's Directors exercising the review function on an ad-hoc basis.

In its **2010 reflection paper**, the Commission accordingly discussed, in addition to a permanent ex ante legality review by OLAF's experts, these possible options for a review of complaints by an internal independent review adviser (an independent Review Adviser appointed by OLAF's Director-General on the proposal of the Supervisory Committee or a Review panel composed of OLAF directors without connection with the investigation).

Therefore, the **Commission's amended proposal of 2011** put forward the idea of an internal but independent review function exercised by independent OLAF officials to be chosen from a list. This approach was negotiated with some support in the Council working party but ultimately not carried forward in the trilogue discussions because it was considered unsatisfactory and of limited added value in comparison to the existing complaints mechanism (Ombudsman, European Data Protection Supervisor, EU Court of Justice).

In July 2013, second reading amendments on an increased role of the Supervisory Committee tabled by the rapporteur were rejected by the plenary of the European Parliament.

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<sup>7</sup> The Supervisory Committee should have based its proposal on a list of several candidates drawn up following a call for applications.

Against this background, the revised OLAF Regulation (Regulation 883/2013 on OLAF investigations) entered into force on 1 October. It brought some substantial changes to OLAF organisation and statutory procedural framework, in particular as regards reinforcing OLAF's governance and strengthening the procedural safeguards of persons concerned by OLAF's investigations (further description is provided in section 3.2).

### Recent OLAF's investigations which prompted discussions on procedural guarantees

Recent OLAF's investigations concerning Members of the EU institutions were subject to interest in the media and to discussions in the European Parliament (EP), prompting discussions among on the scope of the mandate of OLAF, on OLAF's investigations and on the procedural guarantees of persons concerned by the investigations. OLAF and the Commission were faced with public and EP requests for more transparency about the conduct of some investigation, which needed to be reconciled with the obligation of confidentiality about the individual investigations to which OLAF and the Commission are bound. OLAF's investigations on several Members of the EU institutions on suspicions of corruption also led to controversy with the European Parliament about the scope of OLAF's mandate and OLAF's right of access to its premises, in particular those of its Members<sup>8</sup>. OLAF's investigations in these cases highlighted institutional issues which need to be reflected upon (see section 3.2.2).

## **3.2. Problem definition**

### *3.2.1. Introduction:*

The necessity of an efficient and independent Anti-Fraud Office derives from Article 325 of the Treaty on the Functioning of the European Union which provides the duty of the European Union (and of Member States) to protect the EU financial interests against fraud, corruption and any other illegal activity affecting them. Article 16 of this Treaty, Article 6 of the Treaty on the EU and Article 7, 8, 41 and 48 of the Charter of Fundamental Rights also set up the obligation to protect fundamental rights of EU citizens.

### *3.2.2. What is the problem?*

The institutional issues highlighted by certain recent investigations, the perspective of the EPPO, and further concerns related to the way complaints are dealt with, raise issues which need to be carefully analysed.

### Controversy over institutional issues (immunities and specificity of Members of the EU institutions):

Certain OLAF's recent investigations cases, in particular in the European Parliament, have highlighted institutional issues which are linked to the specific nature and functions of Members of the institutions (e.g. the MEPs, the Commissioners, the Heads of State and of government). So far, the EU legislator had not opted for a legal framework of OLAF's investigations providing for procedural requirements aimed at reflecting the specificity of the Members of the EU institutions. OLAF's current legal framework treats them in an equal manner as all other persons concerned by OLAF's investigations. OLAF's Director-General is responsible for ordering the conduct of investigative measures concerning them (such as the inspection of their professional offices).

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<sup>8</sup> OLAF's mandate includes suspicions of serious breach of obligations by EU staff and Members of EU institutions (see Article 2(b) of Decision 1999/352 establishing the OLAF and the Inter-institutional Agreement between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by OLAF adopted on 25 May 1999 and the subsequent decisions adopted by the institutions to implement the inter-institutional agreement). There were some controversy with the EP first about OLAF's competence to investigate EP staff and Members and then about its right to access offices of MEPs.

Yet, it could be argued that their political mandate, special responsibilities, independent status and mode of election or appointment distinguish them from staff members and other persons concerned by OLAF investigations (including EU staff). This specificity is for example reflected by the fact that they enjoy a “full” parliamentary immunity (whereas EU staff only enjoys a functional immunity as members of an international organization). In the case of the Members of the European Parliament, their Statute provides for the freedom of the mandate (Article 2(1) of the Statute) and for the protection against prosecution or arrest on the territory of a Member State. They enjoy, in addition, the national parliamentary immunity which exists in the Member State of their residence<sup>9</sup>. Members of government may also benefit from immunities and special Courts in some Member States.

There is consequently a need to reflect on whether these specificities should have a repercussion on OLAF’s legal framework<sup>10</sup>. It should nevertheless be recalled that the objective of these immunities is not to protect the individual himself but to protect the institution and the political mandate from obstructions to its exercise. They consequently apply to a body which does not itself belong to the institution. OLAF, as an administrative body internal to the EU institutions and common to all of them, derives its investigative powers from the EU institutions themselves, which on the basis of their administrative autonomy have delegated the task of investigating suspicions of corruption of their staff and Members to it<sup>11</sup>. OLAF is therefore tasked with exercising the investigative powers of the relevant institutions.

#### *The perspective of the EPPO:*

Once established, the EPPO and no longer OLAF would be responsible for investigating suspicions of criminal activities affecting the financial interests of the EU. Accordingly, the OLAF Regulation would need to be amended at that time. OLAF would continue to carry out administrative investigations concerning those illegal activities which would not fall under the competence of the EPPO (e.g. non-fraudulent irregularities). As an external judicial body, investigating penal offences and crimes and having investigative powers typical of judicial investigations (including the power to enforce its investigative measures), the EPPO investigations would benefit from reinforced procedural guarantees typical of judicial investigations. In order to see if these procedural safeguards should and could be transposed to OLAF’s administrative investigations, OLAF’s investigative powers as compared with those of the EPPO need to be carefully analysed. As already mentioned before, the comparison between OLAF and the EPPO bears substantial limitations (OLAF is an administrative inter-institutional body deriving its power from the EU institutions themselves, with limited administrative

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<sup>9</sup> National regimes of immunities of Members of the Parliament vary according to the Member States: some regimes are less generous than the EU regime (e.g. judicial investigation and prosecution of the MEP are possible without lifting of the immunity by the Parliament; only arrest and detention are subject to the immunity); or more protective in some other Member States (e.g. the MP cannot be the subject of an investigation). These immunities have generally been created in Member States at times where European Democracies were not as stable as today and when the legislative power needed to be protected from interferences- real at that time- from the executive and judicial power.

<sup>10</sup> In case C-167/02 P *Rothley and others vs. European Parliament*, where some Members of the European Parliament requested annulment of the EP decision of 18.11.1999 regarding cooperation with OLAF, the Court of Justice considered the action to be non-admissible on the ground that the decision was a measure of general application not individually affecting the legal situation of the Members for the purposes of Article 230 EC. It also considered that the Members avail themselves to effective judicial protection and legal remedies provided for by the Treaty.

<sup>11</sup> OLAF has been established by the Commission in 1999 to exercise the Commission’s powers to fight fraud to the EU budget as well as to investigate serious breaches of their obligations by its staff. Through the inter-institutional agreement of 25 May 1999, the EU institutions (EP, Council,..) as well as EU offices, bodies and agencies have delegated this task of fighting fraud and serious breaches of professional obligations to OLAF. OLAF is consequently an administrative body, internal and common to all the EU institutions (regarding minor breaches, not covered by the remit or priorities of OLAF, IDOC – a service belonging to DG Human Resources- has competence over staff of the Commission and, through service-level agreements, of the EEAS and of the executive agencies. Other EU institutions have their own service competent for minor breaches, equivalent to IDOC).

investigative powers (which it cannot enforce) and with no decision making power (such as the power to launch disciplinary sanctions, to impose penalties or to prosecute).

It also needs to be reminded that the proposed EPPO Regulation is still under negotiations and the outcome of this negotiation is still awaited. Structure and competences of the EPPO may be substantially modified as compared with the Commission's proposal. The Commission Work Programme for 2014 provides for the adoption of the EPPO regulation before the end of this year.

Concerns voiced by certain stakeholders, as regards the procedural safeguards of all persons concerned by OLAF's investigations:

Regulation 883/2013 has introduced an important set of procedural guarantees in OLAF administrative investigations. Although this led to a considerable strengthening of Regulation 883/2013 in this regards, some Members of the **European Parliament** think that procedural safeguards applied by OLAF are not yet sufficient and therefore call for enhanced safeguards and increased external and independent control over OLAF. These demands have been voiced in particular in light of developments surrounding some prominent cases which concerned Members of EU institutions.

Those stakeholders consider that the recent reform of OLAF's legal framework did not go far enough. The legislative proposal, which has now become Regulation 883/2013, was adopted by the EP plenary of 3 July 2013 with a limited majority<sup>12</sup>. One EP political group organised a public hearing on 3 October 2013, where several speakers, including academics and professionals, presented the view that OLAF's investigative powers were so far reaching that independent external control over OLAF's investigative acts should be increased. The duration of OLAF's investigations was also criticized for being too long, thus violating a fundamental right of the person concerned.

Most recently, in 2014, discussions on OLAF in the Parliament in the framework of the discharge to the Commission, the EPPO and the annual PIF report show the interest of the EP on the issue of procedural safeguards<sup>13</sup>. While none of these reports call for a revision of Regulation 883/2013 to strengthen these safeguards, at least not before the EPPO is established, the EP 2012 Resolution on the Protection of the EU's Financial Interests welcomes the adoption of the Commission Communication of July 2013 "Improving OLAF's governance and reinforcing procedural safeguards in investigations" and attaches particular importance to monitoring the observance of procedural safeguards and fundamental rights of the persons affected by investigations. The EP Decision on the 2012 budgetary discharge for the Commission addresses certain aspects of the Dalli investigation. The EP interim report on the EPPO calls for including sufficient procedural safeguards among the changes to the OLAF Regulation which would come as a result of the establishment of the EPPO.

Concerns were also voiced about the way complaints are dealt with in OLAF. In particular, the **Supervisory Committee** (see its Opinion No 2/2013 of 30 December 2013) is of the opinion that persons concerned do not have sufficient and immediate remedies to redress potential violations of their rights and that the recent reform has not solved this problem: the redress mechanisms offered by EU or national courts, the European Data Protection Supervisor, the European

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<sup>12</sup> In second reading, the EP rapporteur had proposed amendments to the Council's position which have been rejected by the EP plenary by a majority of only two votes. Adoption of the Council's position in plenary enabled the signature of the new OLAF Regulation (Regulation 883/2013) on 11 September 2013.

<sup>13</sup> EP Resolution on the Annual Report 2012 on the Protection of the EU's Financial Interests – Fight against fraud, adopted by the EP plenary on 3 April 2014 (2013/2132(INI), rapporteur I. Ayala Senders); EP Decision on the Discharge to be given to the Commission in respect of the implementation of the general budget of the European Union for the financial year 2012, adopted on 3 April 2014 (rapporteur: Markus Pieper); and EP report on the Report on the establishment of the European Public Prosecutor's Office (EPPO) adopted on 12 March 2014.



Ombudsman and the Supervisory Committee would meet certain limits: some are limited in their scope, some intervene ex post only or long after the investigative act has been committed. Fundamental rights could therefore not be ultimately effective without a proper complaint procedure. The Supervisory Committee consequently calls for an internal procedure for dealing with individual complaints whereby a senior independent Controller, attached to the Secretariat of the Supervisory Committee, would be in charge of dealing with individual complaints (see also section 5.1). Recently, OLAF has followed the recommendation of the Supervisory Committee to better formalise its internal complaints procedure by adopting it with a written decision and publishing it on its website.

Box 1 below analyses the actual record of complaints against OLAF in recent years.

|   |  |
|---|--|
| Box 1   | <i>Complaints lodged against OLAF's acts in recent years</i> <sup>14</sup> |
| <p>In addition to the possibility of review by an EU or national court, complaints against OLAF's investigative or administrative acts can be lodged with the Ombudsman, the EDPS or directly with the Director-General. In recent years, less than ten complaints have been lodged each year against OLAF (25 complaints between 2011 and 2013, with the number varying from one year to another and sometimes several complaints relating to the same case), a figure which needs to be put in a perspective with hundreds of investigation measures carried out each year. A number of these complaints concern the <b>issues of access to documents</b>, and relate to the fact that the complainant is not satisfied with the amount of information OLAF has granted to him, and not to the core of the investigative actions.</p> |  |
| <p><b><i>Most of the complaints are lodged with the Ombudsman</i></b> and concern specific procedural issues, including access to documents and to the file<sup>15</sup>. In a number of cases, the Ombudsman decided not to pursue the complaints. Some complaints concerned procedural issues which had not yet been completely clarified at that time in the Regulation. Regulation 883/2013 has now clarified a number of these issues, such as the right to be assisted by a lawyer or the obligation to inform the person concerned of the outcome of the investigation<sup>16</sup>.</p>   |  |
| <p><b><i>Complaints lodged with the EDPS</i></b> form a minor but important share of all complaints against OLAF. As an example, during the period 2009-2012<sup>17</sup>, four groups of interlinked complaints were submitted to the EDPS, half of them concerning requests for further access to personal data. The two other complaints concerned the processing of personal data during the conduct of investigations (digital forensic examinations) on which the EDPS concluded that OLAF had complied with the data protection requirements<sup>18</sup>.</p>   |  |

<sup>14</sup> This analysis is based on statistics provided by OLAF's Legal Advice Unit. Are considered as complaints those requests having as a subject the review of an act unfavourably affecting the complainant. This means that requests to access documents, one's file or personal data are not considered as complaints, while complaints against the reply provided by OLAF on these requests will be considered as complaints.

<sup>15</sup> Thirteen complaints were lodged with the Ombudsman between 2011 and 2013.

<sup>16</sup> In recent years the Ombudsman concluded on maladministration regarding the procedural guarantees and fundamental rights of the persons concerned in four cases (two in 2012 and other two in 2013). In all four cases OLAF timely responded to all critical remarks and provided the Ombudsman with information on measures it had taken or was intending to take. Most of the indicated problems were already systemically resolved in ISIP and recently in GIPs, as well as in the new OLAF Regulation. There is also a case of maladministration concerning on-the-spot checks.

<sup>17</sup> Eight complaints were registered by the EDPS in 2011 and 2012, two in 2009 and one in 2010. No complaint was received in 2013.

<sup>18</sup> Some EU staff Members complained about the fact that OLAF would have gathered an excessive amount of personal data from a computer (private documents) and from the SIM card of a service mobile phone (telephone traffic data).

Four complaints have also been lodged *directly with OLAF's Director-General* between 2011 and 2013 and submitted to OLAF's internal review adviser, responsible for dealing with complaints (see box 2). This type of complaints corresponds to the type of complaints which could, in the future, be dealt with through a new complaints procedure.

Concerning the issue of **access to documents** (public access to documents or access to one's file or to one's personal data by a person concerned) which forms the basis for an important share of the complaints, it is interesting to note that the EUCJ recently developed a case law concerning access to documents related to investigation activities in procedures whose confidentiality is guaranteed by the Union legislation, whereby there is a general presumption of applicability of the protection of the purpose of inspections, investigations and audits with a consequent refusal to disclose them (without it being necessary to conduct a case-by-case based assessment<sup>19</sup>). Applying this principle should help OLAF to reduce the deadlines in answering requests for access to documents.

There have been and continue to be procedures for filing complaints. Even if the case record does not support the assumption of violations of procedural guarantees by OLAF, there remains an interest in reinforcing the protection of the defence rights of persons concerned by investigations to reduce any risk of their violation and increase trust in OLAF's investigations.

The respect of individual guarantees remains an important objective. It appears therefore necessary to have a closer look at how this issue is currently addressed in OLAF (3.2.3.1), and which lessons can be drawn from the procedures in other areas (3.2.3.2).

### 3.2.3. *Experiences in dealing with procedural safeguards*

#### 3.2.3.1. *OLAF's experience: mechanisms of control over procedural guarantees, following in particular implementation of Regulation 883/2013*

Since some stakeholders expressed concerns about a possible lack of control over OLAF which could potentially lead to a violation of procedural safeguards, it appears essential to analyse the current mechanisms of controls which include in particular controls over the respect of procedural safeguards. This follows implementation of the new Regulation 883/2013 which strengthened procedural safeguards and introduced the obligation to conduct a legality review.

As illustrated in the chart below, different types of control over OLAF's investigation measures apply throughout the life cycle of an investigation. Both internal and external control mechanisms are in place and may appear on a systematic or regular basis or be driven by complaints. Tools intended to prevent violation of procedural guarantees by informing OLAF's staff about these rights, procedures and managerial control are also in place (e.g. Internal guidelines to the Staff on investigation procedures (GIP), instructions to staff related to the protection of personal data, staff trainings and special advisors to the investigative directorates).

At each stage of an investigation, at least one control applies (internal, external or both types of controls): during the selection phase (decision to open or not an investigation), the investigation phase (the conduct of the investigation itself) and the review phase (after completion of the investigation). Internal controls are carried out in particular by Unit 0.1 and by the Director-General. OLAF's Legal Advice Unit and the Special Advisors to the investigative Directorates (directorates A and B) further support the quality control of investigations. OLAF has also established a Data Protection Officer in charge of monitoring compliance of OLAF with the EU requirements on Data protection and reporting annually on this issue.

External controls are carried out by:

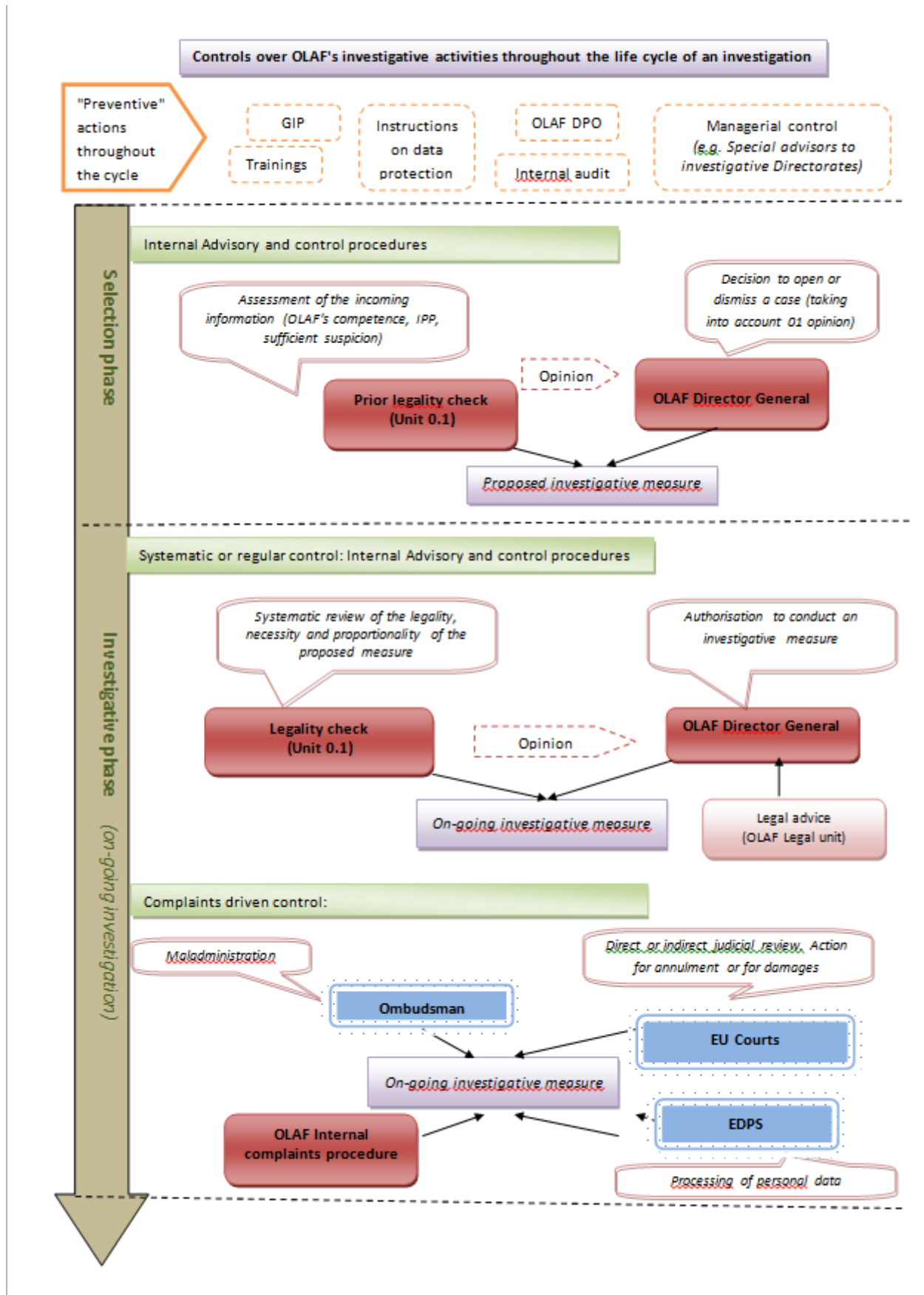
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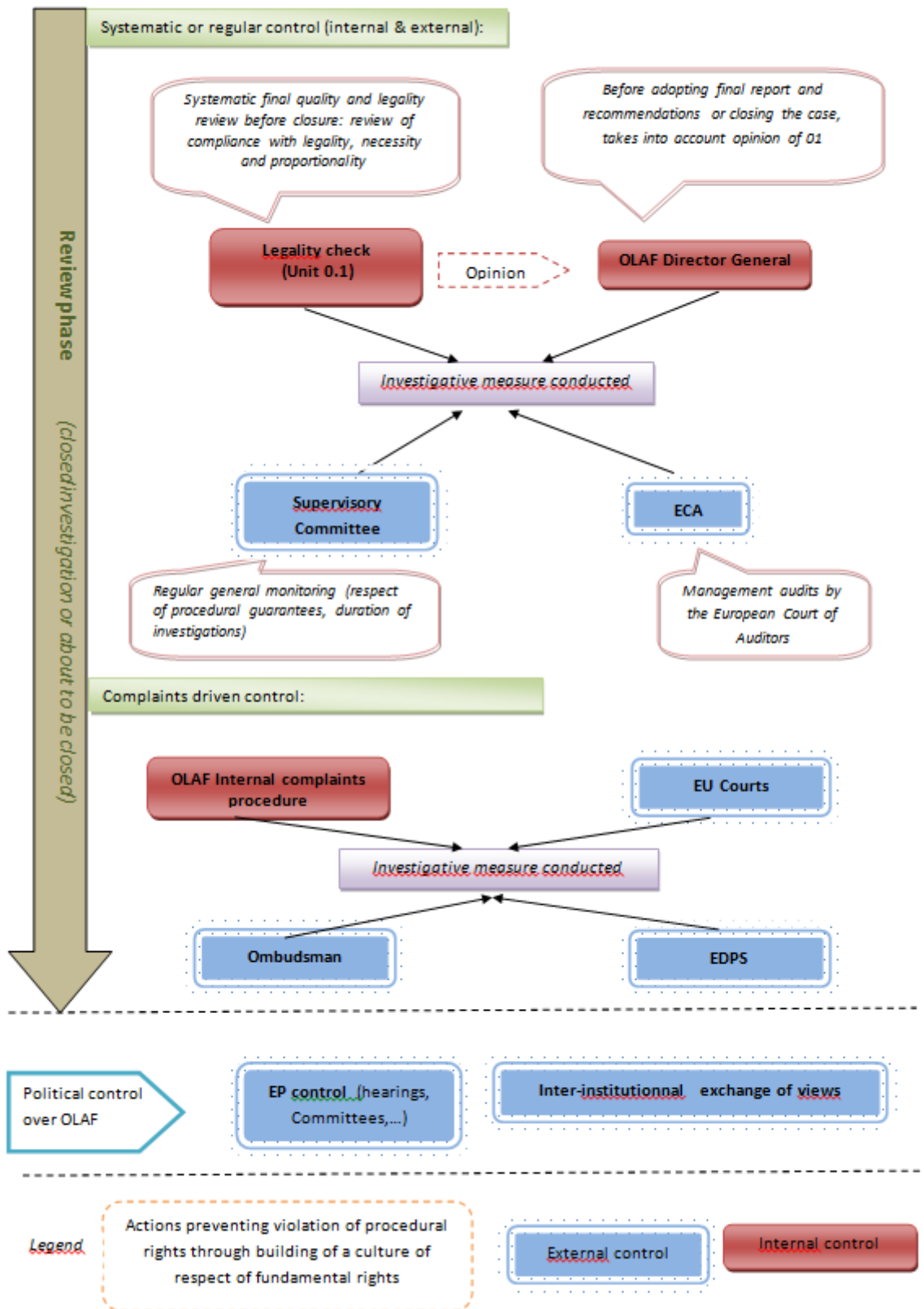
<sup>19</sup> See cases C-477/10P – Commission vs. Agrofert and C/404/10P – Commission vs. Editions Odile Jacob SAS.

- the Ombudsman (who controls the respect of the principle of good administration),
- the European Data Protection Supervisor (who is responsible for monitoring and ensuring the application of the EU data protection requirements),
- the EU Courts (on the basis of action for annulment or action for damages),
- the Supervisory Committee (general monitoring of the investigative function), and
- the European Court of Auditors (which carries out management audits and issues opinions on OLAF).

Finally, OLAF is subject to the overall political control of the European Parliament, which exercises its control notably through hearings of the Commissioner, the annual discharge exercise or questions from the Members of the Parliament.

Chart 1 Description of the internal and external control mechanisms over OLAF throughout the life cycle of an investigation 1





Box 2

*OLAF's internal practice of dealing with complaints*

Even if no complaints procedure is enshrined in the Regulation, OLAF has the duty to examine complaints lodged directly with it, as part of its duty to comply with the general principles of good administration. Following a recommendation of the Supervisory Committee, OLAF has formalised its internal complaints procedure which is now published on its website<sup>20</sup>. The Legal Advice Unit is tasked with the review of the complaints, including complaints concerning procedural guarantees in the context of investigations. The Legal Advice Unit has full access to all relevant information and is provided with any necessary assistance by the responsible investigative Directorate. After consulting the Advisor to the responsible investigative Directorate, it reports its findings to the Director-General.

In the past, a complaints procedure had already been mentioned in OLAF's manual and in the Internal Instructions to staff on investigations (ISIP). The Director-General appointed, on an ad hoc basis, an EU senior official, working in OLAF but not connected to the investigation, to conduct the review of the complaints.<sup>21</sup> Between February 2012 and September 2013, six complaints have been received in the context of this procedure.

*The Contribution of OLAF Regulation 883/2013  
to reinforced control mechanisms over OLAF and to strengthened procedural safeguards*

Control mechanisms over OLAF's investigations are also the result of the implementation of the new OLAF Regulation, which represents a major step forward in the strengthening of procedural safeguards for the persons concerned by OLAF investigations and of OLAF's governance.

- In particular, the **internal legality review foreseen by Article 17(7) of Regulation 883/2013** ("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") has been implemented. OLAF carried out an **internal reorganisation** which led to the creation of a new Selection and Review Unit (Unit 0.1), an independent unit directly under the supervision of the Director-General (Box 3).

Box 3

*OLAF's internal legality review mechanism (Unit 0.1)*

Unit 0.1 carries out an independent ex-ante legality review at each step of the investigation:

- during the selection phase;
- during the investigative phase (on the purpose of the case and on the scope of the investigation as well as prior to certain activities, Unit 0.1 verifies the legality, the necessity and the proportionality of the planned investigative measure, such as inspections of premises and interviews of persons concerned);
- after completion of the investigation (following the completion of the investigation before adopting the final report and the recommendations on its drafting and in respect of the comprehensiveness of the communications and notifications following the closure decision), Unit 0.1 checks that all actions were conducted in accordance with applicable rules and specifically that the rights of persons concerned have been respected.

<sup>20</sup> The procedure is presented in detail on OLAF's website: [http://ec.europa.eu/anti\\_fraud/investigations/complaints-on-olaf-investigations/complaints\\_on\\_olaf\\_investigations\\_en.htm](http://ec.europa.eu/anti_fraud/investigations/complaints-on-olaf-investigations/complaints_on_olaf_investigations_en.htm).

<sup>21</sup> In practice, legal experts or experienced senior officials supported by legal experts have been appointed.

Unit 0.1 issues opinions on each investigative measure carried out by OLAF's investigators (opinion on planned investigative measures) as well as on final reports, of which a small percentage have so far been negative. This review also allows identifying fields for possible improvement of practice of OLAF.

- *New Internal guidelines on investigative procedures* (GIP)<sup>22</sup> were adopted on 1 October 2013 and have implemented or confirmed the procedural guarantees laid down in Regulation 883/2013 as well as the internal control procedure, including the legality check, described above. Several trainings have been organised on these new guidelines for all the staff and also some specific training for the management in particular.
- Implementation of a *clarified and improved framework of relations with the Supervisory Committee*: if the relations between OLAF and its Supervisory Committee have been characterised in a recent past by some degree of tension, which has raised some concerns among certain stakeholders, these relations have recently improved and should be further improved following the adoption, on 14 January 2014, of new working arrangements pursuant to Regulation 883/2013. The working arrangements deal mainly with the practical modalities of the obligations for OLAF to provide the Supervisory Committee with regular and reliable information on the investigative function of the Office to enable the Supervisory Committee to perform its systemic monitoring responsibilities. They also provide a framework for OLAF to transmit certain case related information, fully respecting the relevant legal provisions on data protection.
- Another new element of OLAF governance introduced by Regulation 883/2013 is the setting up of an *annual inter-institutional exchange of views*.<sup>23</sup> While individual cases cannot be discussed during this exchange, it gives EU institutions the opportunity to debate on the procedural safeguards applied in OLAF. The first political exchange of views, which took place on 8 April 2014, covered procedural safeguards and the complaints procedure as well as the working arrangements with the Supervisory Committee.

### 3.2.3.2. *Perspective of the EPPO and lessons from the areas of competition and financial markets supervision*

The Commission has committed itself in its Communication of 17 July 2013 to consider ways to improve OLAF's governance and reinforce procedural safeguards in investigations, as a step-by-step approach to accompany the establishment of the European Public Prosecutor's Office, even before the EPPO is established. This assessment should be inspired by the procedural safeguards in the Commission's proposal on the establishment of a European Public Prosecutor's Office in as much as they can be transposed to OLAF's administrative investigations and enacted even before the EPPO is established. In addition, stakeholders who think that OLAF's procedural safeguards should be strengthened often refer to the legal framework of DG Competition, another EU administrative investigative service, and to the role of the Hearing Officer in competition matters.

It appears therefore advisable to analyse and take stock of the mechanisms of procedural safeguards under the EPPO proposal and for DG Competition, related to their respective investigative powers. Experience of the European Securities and Markets Authority (ESMA), which, in 2009, has been granted investigative powers towards the credit rating agencies, may also provide some input to the analysis. A comparison with the situation in Member States also shows that defence rights applied by national administrative investigation authorities are in

<sup>22</sup> GIP have replaced the ISIP (Internal Instructions to Staff on investigative procedures) from 1 October 2013

<sup>23</sup> Article 16 of Regulation 883/2013 foresees that the three EU institutions (Council, Parliament and Commission) meet, once a year, the Director-General of OLAF for an exchange of views at political level to discuss OLAF's policy relating to methods of preventing and combating fraud, corruption and any other illegal activity affecting the financial interests of the EU.

general not as developed and explicit as in OLAF. Safeguarding evidence seems to be given high priority when considering defence rights, even in policy areas where investigative powers are higher than those of OLAF and are accompanied by sanctioning powers, such as in the areas of taxation and competition<sup>24</sup>.

*Box 4*

*The EPPO proposal: investigative powers and procedural safeguards*

Investigative powers of the EPPO are defined in Article 26 of the proposed Regulation (see annex II). Article 26 distinguishes two types of investigative measures and requires a judicial authorisation only for the first type of measures, defined in points (a) to (j) of the proposed Article 26(1): these measures are the most intrusive ones and include searches of private premises and personal property or computer system (Article 26(1)(a)), production order of any relevant document or of stored computer data including traffic data and banking account data (Article 26(1)(b)), sealing of premises, interception of telecommunications including e-mails (Article 26(1)(e))<sup>25</sup>.

The second type of investigative measures foreseen for the EPPO are considered less intrusive and therefore do not require, at EU level, judicial authorisation<sup>26</sup>. They are defined in points (k) to (t) of the proposed Article 26(1) and include access to premises (Article 26(1)(n))<sup>27</sup>, summoning of witnesses (Article 26(1)(k)), seizure of objects needed as evidence or surveillance in public places (Article 26(1)(r))<sup>28</sup>.

OLAF's investigative powers can at the most be compared with the second type of EPPO's investigative powers (e.g. access to premises and seizure of objects needed as evidence), which do not require, at EU level, any judicial authorisation. OLAF's investigative measures are administrative by nature, are not enforceable as such and therefore cannot be compared to "searches" which is a wording characteristic of judicial bodies having the power to enforce their decisions. OLAF relies on the willingness of the institution to allow access to their premises. Besides, Inspections of professional premises of EU staff or taking of copies of their professional working tools - such as computer or other data medium- can be considered only to a limited extent to be an intrusion into their privacy since these professional tools are not their personal property but the property of the institution; as owner of these professional tools and employer of the member of the staff concerned by an investigation, the institution is entitled to access these tools and OLAF, as an internal inter-institutional administrative body responsible for investigating possible breaches of their obligations by EU staff, derives its power to access these

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<sup>24</sup> See "Defence rights during administrative investigations: a comparative study into defence rights during administrative investigations against EU fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland." Oswald Jansen and Philipp M. Langbroek, 2007, Intersentia. This study was funded by the European Commission.

<sup>25</sup> The remaining EPPO's investigative powers which require a prior judicial authorisation according to Article 26(1) of the EPPO proposal are the freezing of the proceeds of crime, real-time surveillance of telecommunications traffic data, monitoring of financial transactions, freezing of future financial transactions, surveillance in non-public places including covert video and audio surveillance and covert investigations. Other investigative measures do not require any judicial authorisation, except if such requirement is foreseen by national legislation. However, stakeholder consultations on the EPPO proposal show that a number of them are concerned by a possible new requirement since their Member State does not currently require judicial authorisation for all the investigative powers foreseen in article 26(1).

<sup>26</sup> National legislation may require such judicial authorisation.

<sup>27</sup> This must be understood as access to public premises since access to private premises requires judicial authorisation under Article 26(1)(a).

<sup>28</sup> Include identification measures (taking of photos, visual recording and recording of a person's biometric features), seizure of objects needed as evidence, tracking and control of persons, tracking and tracing of objects, targeted surveillance in public places of the suspected and of third persons, access to national and EU public registers as well as registers kept by private entities in a public interest.



tools from the institution itself (*see section 3.2.2*). The Commission's right of access, even in the absence of the person concerned, to an EU official's computer held in his office and used for the professional purposes, has been confirmed by the Court of Justice.<sup>29</sup>

*Box 5 DG Competition: investigative powers and the Hearing Officers*

At EU level, a function currently concerned with safeguarding the procedural guarantees during investigations is that of the Hearing Officer for competition proceedings<sup>30</sup>. The Hearing Officer is attached, for administrative purposes, to the cabinet of the Commissioner with special responsibility for competition, but acts independently. Responsible for safeguarding the procedural rights throughout competition proceedings, in particular the right to be heard, his main tasks are (1) to organise and conduct the oral hearing and (2) to act as an independent arbiter where a dispute arises on the effective exercise of procedural rights between parties and DG Competition (only if this dispute cannot be resolved by them).

He acts mostly on request by a complainant and after the request has first been lodged with DG Competition. The scope of his mandate is clearly defined in Decision 2011/695/EU<sup>31</sup> and covers some specific procedural issues raised during the investigative phase, on which he has decisional or recommendation powers: legal professional privilege, the right to be informed of one's procedural status, the privilege against self-incrimination, and request for extension of deadlines to reply to a request for information. He can also report on other procedural issues. After the investigation phase, he also decides on disputes related to access to the file and disclosure of business secrets and other confidential information.<sup>32</sup>

It is important to note that the Hearing Officer has no power to intervene before the conduct of an investigation measure (ex-ante control). Besides, his control exclusively concerns the effective exercise of the right to be heard and the respect of the legality, it does not extend to control on the proportionality of the investigative measure.

There are currently two Hearing Officers, assisted by 8 full time staff provided by DG Competition.

It should also be noted that specific guarantees and control mechanisms in the field of competition appear justified by the scope of DG Competition's investigative and sanctioning powers and achieve the necessary balance between the objectives of efficiency of the investigation and protection of citizen's fundamental rights. DG Competition's investigative

<sup>29</sup> See case C-191/98 P Tzoanos vs. Commission. The Court has also ruled that such access does not violate the right of defence.

<sup>30</sup> See [http://ec.europa.eu/competition/hearing\\_officers/index\\_en.html](http://ec.europa.eu/competition/hearing_officers/index_en.html)

<sup>31</sup> Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29

<sup>32</sup> Regarding the hearings and the effective exercise of procedural rights, the Hearing Officer provides advice to the Commission, through interim reports (which are inaccessible internal documents) whereby he draws conclusions on the respect of procedural rights during the proceedings as a whole. He is required to attest whether the rights have been respected in his final reports which are published in the Official Journal. Apart from the matter in which the Hearing Officer takes binding decisions (extension of time limit for replying to a decision requesting information in antitrust proceedings; right to be informed of one's procedural status in antitrust investigations; extension of the time limit for replying to a statement of objections or making known one's views; access to the file; disclosure of business secrets and other confidential information), his conclusions are not strictly binding, similarly to the Controller of procedural safeguards described in the Communication of 17 July 2013, whose conclusions would nevertheless be communicated to the Director-General of OLAF and attached to the report sent to the competent national judicial authorities.

powers<sup>33</sup> go further than OLAF's powers and include the possibility to seal business premises and to inspect other premises including private homes of directors and staff of an economic operator (the latter measure requires national judicial authorisation). Besides, the Commission enjoys important sanctioning powers in the field of competition comprising the power to issue injunctions and to impose fines (of up to 10% or periodic payments of up to 5% of the average daily turnover<sup>34</sup>). OLAF does not have any sanctioning power.

*Box 6*

*The European Securities and Markets Authority (ESMA):  
Investigative powers and controls*

The investigative powers that the European Securities and Markets Authority (ESMA) enjoys towards credit rating agencies deserve a closer look, as they may provide us with further insight on the balance between investigative powers and control mechanisms over the exercise of these powers at EU level.

In order to fulfil its mandate, ESMA has been granted more developed powers than OLAF, both regarding investigative and sanctioning powers. Regarding its investigative powers<sup>35</sup>, ESMA can perform on-site inspections, access any business premises, seal business premises and books and records relevant to the investigation. It can also request records of telephones and data traffic<sup>36</sup>. Contrary to OLAF, ESMA can summon persons concerned to provide information and apply fines (of up to 3% of the average daily turnover<sup>37</sup>) in case it is provided with incorrect or misleading answers. It has the same powers regarding "related third parties" (persons who are not directly concerned by an investigation but have a close link with the person concerned).

To offer a complete picture of ESMA's powers, it is necessary to mention the important sanctioning powers at its disposal: withdrawal of registration, temporary prohibition to issue credit ratings, fines and others. OLAF does not have any sanctioning power. It can only make recommendations to the EU institutions and bodies or to national judicial authorities.

As far as controls over ESMA are concerned, a hearing procedure aimed at ensuring the respect of the right to be heard of the persons subject to the proceeding is formalised in the relevant Regulation. ESMA's Board of Supervisors gives the opportunity to be heard on ESMA's findings before ESMA takes any sanctioning decision. In addition, ESMA's decisions may be appealed through the Board of Appeal, which is a joint body of the European Supervisory Authorities (EBA, EIOPA and ESMA).

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<sup>33</sup> See Articles 17 to 22 of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>34</sup> See Article 23 and 24 of Regulation 1/2003 of 16 December 2002.

<sup>35</sup> See Articles 23b to 23d of Regulation 1060/2009 of 16 September 2009 on credit rating agencies.

<sup>36</sup> Judicial authorisation is necessary to access records of telephones and data traffic if provided so by national legislation.

<sup>37</sup> See Article 36b of Regulation 1060/2009. The amount of a fine shall be of up to 3% of the average daily turnover of the company or of up to 2% in the case of a natural person. Fines are imposed on a daily basis and cannot be imposed for more than 6 months.

#### *3.2.4. What should further be improved?*

The EU relies on a democratic political system governed by the rule of law. OLAF should offer the best protection of the procedural rights of the persons concerned by an investigation together with the effective protection of the EU financial interests and citizens' interest as EU taxpayers. Even though there is no indication that procedural rights of persons concerned would not be adequately respected in OLAF's investigations, a fully independent control would strengthen public confidence in OLAF and consequently in the EU itself. Strengthening public confidence appears appropriate as Regulation 883/2013 has clarified that OLAF's Supervisory Committee is not in charge of carrying out any a priori control over OLAF's investigations. Therefore, there is a need to assess how reinforced control could be set up without interfering with the efficiency of OLAF's investigations.

### **3.3. Subsidiarity and proportionality**

According to the subsidiarity principle, the EU should act only where it can provide better results than intervention at Member State level. The protection of the EU's financial interests is a shared responsibility between the Commission and Member States, according to Article 325 of the TFEU. However, the initiative assessed in the framework of this Analysis of Impacts would in no way affect the powers and responsibilities of the Member States for taking measures to combat fraud affecting the EU financial interests concern and would concern exclusively the control over OLAF' activities which are provided for in an EU Regulation. Any modification to this legal framework can therefore only be regulated by EU legislation. In addition, the preferred option identified in this document should be limited to what is necessary in order to attain the objectives laid down in section 4 of this Analysis of Impacts and comply with the principle of proportionality.

#### 4. OBJECTIVES

The general policy objective is, in accordance with Article 6 TEU, Article 16(1) TFEU and Articles 7, 8, 41, 47 and 48 of the Charter of Fundamental Rights to ensure protection of fundamental rights, while at the same time achieving protection of the EU financial interests, in accordance with Article 325 TFEU (protection of EU citizens as taxpayers).

The specific objectives are to further reinforce procedural safeguards of the persons concerned by OLAF's investigations by strengthening control over OLAF while maintaining OLAF's independence and efficiency; in particular as regards the duration of the investigations and the institutional framework of controls; reinforced controls over OLAF may to some extent also strengthen the quality of OLAF's investigations.

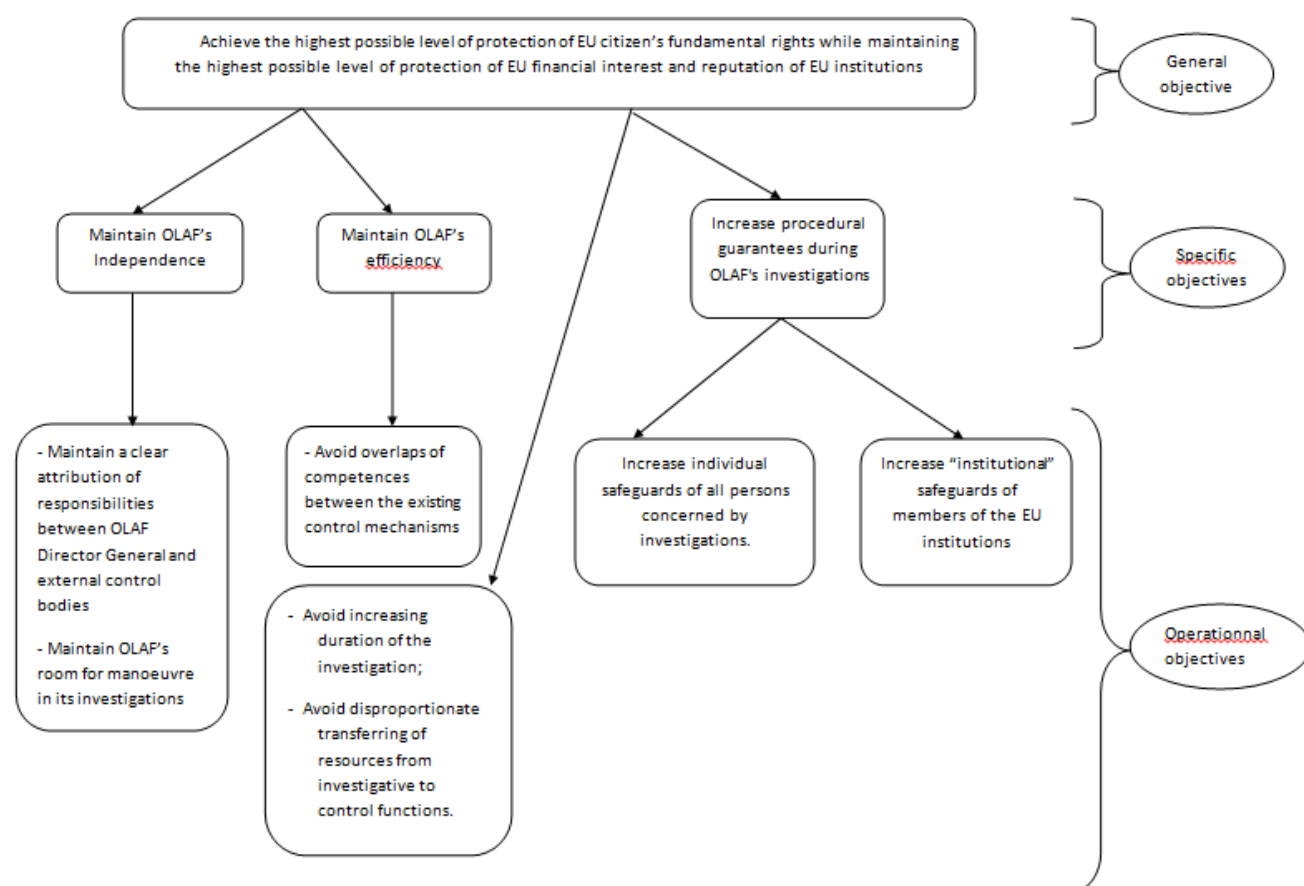
The operational objectives regarding procedural safeguards are of two kinds:

- reinforcing procedural safeguards of **all individuals** concerned by OLAF's investigations (in external or internal investigations);
- reinforcing "institutional" procedural safeguards of the **Members of the EU institutions**.

The operational objectives regarding the efficiency of OLAF are twofold: to avoid overlaps of competences between the control mechanism which would be created and the existing mechanism, as described in section 3 of this Analysis of Impacts (see Chart 1), and to avoid increasing the overall duration of the investigations in order not to violate EU fundamental rights (Article 47 of the EU Charter of Fundamental Rights).

The operational objectives regarding OLAF's independence are to maintain clear attribution of responsibilities between the Director-General and the new control bodies. Balance also needs to be maintained between enhancing external control and maintaining OLAF's independence in its investigative function.

## Objectives tree



## 5. POLICY OPTIONS: DESCRIPTION AND ANALYSIS OF IMPACTS

### 5.1. Description of the options

Two elements are considered under these options:

(i) the need for OLAF's Director-General to first obtain a prior authorisation when OLAF intends to conduct inspections of premises and take copies of documents and of data media of Members of the EU institutions. OLAF's legal framework of investigations would thus be adapted to take into account the specificities, special responsibilities, independent status and special mode of election or appointment under the Treaties of the Members of the EU institutions, which distinguish them from the other persons concerned by OLAF's investigations. Under option 4, the same investigative measures would also, when concerning EU staff, be subject to prior review (prior opinion) by an independent expert. The legality and the proportionality of OLAF's intended investigative measure would be examined.

(ii) the creation of a new independent complaints mechanism in order to offer reinforced protection of fundamental rights and procedural guarantees for all persons concerned by OLAF investigations. This complaints function would be carried out using OLAF's internal resources and the infrastructure of the Supervisory Committee under option 2, whereas under option 3 and 4, this function would be entrusted to an external and independent high ranking expert.

- Option 1 (status quo): no modification is brought to Regulation 883/2013 at this stage but a report evaluating its implementation could be drawn up in advance of the date foreseen in Article 19 of Regulation No 883/2013 (2 October 2017), for example in 2015. This report submitted to the European Parliament and the Council “shall be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend the Regulation”<sup>38</sup>. This report could also take into account progress achieved in the negotiations on setting up the EPPO, which would be responsible for criminal investigations and prosecutions of offences against EU financial interests.
- Option 2<sup>39</sup>: Regulation 883/2013 is revised to introduce:
  - (i) an internal “quasi-judicial” prior authorisation for the most intrusive investigative measures towards Members of the EU institutions, delivered by a dedicated judicial unit within OLAF. These judicial recommendations would be monitored ex-post by OLAF’s Supervisory Committee.
  - (ii) a Controller of procedural guarantees, part of a wider Supervisory Committee and sharing its Secretariat, tasked with reviewing complaints by all persons concerned by OLAF’s investigations, concerning the respect by OLAF of the procedural guarantees laid down in Regulation 883/2013. The Controller would be attached to the Secretariat of the Supervisory Committee without being involved in the regular work of the Supervisory Committee.
- Option 3: Regulation 883/2013 is revised to introduce:
  - (i) an external “quasi-judicial” prior authorisation for the most intrusive investigative measures towards Members of the EU institutions (inspections of premises and taking of copies of documents and data media), of an independent and external expert qualified to hold judicial office. This expert, administratively attached to the European Commission, would be created as a body independent from OLAF or its Supervisory Committee.
  - (ii) a new office of a Controller of procedural guarantees, acting on complaints, concerning the respect by OLAF of the procedural guarantees laid down in Regulation 883/2013 and external from OLAF or its Supervisory Committee (he would however be administratively attached to the European Commission). He could be the same person as the expert in charge of granting the “quasi-judicial” authorisation.
- Option 4: Regulation 883/2013 is revised to introduce:
  - (i) an external “quasi-judicial” prior authorisation for the most intrusive investigative measures towards the Members of the EU institutions by an independent and external expert qualified to hold judicial office (under the same conditions as in option 3);
  - (ii) a new office of an external Controller of procedural guarantees, acting on complaints or on his own motion, concerning the respect by OLAF of the procedural guarantees laid down in Regulation 883/2013;
  - (iii) a prior opinion of the Controller of procedural guarantees when OLAF would intend to conduct certain investigative measures towards EU staff (inspections of premises and taking of copies of documents and data media);

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<sup>38</sup> Article 19 of Regulation No 883/2013.

<sup>39</sup> This option is based on the opinion of the Supervisory Committee (see opinion 2/2013).

## 5.2. Analysis of impacts

The policy options are assessed from the perspective of their effectiveness in meeting the key objectives defined in section 4: reinforcing procedural safeguards without weakening the protection of EU financial interests, in particular by maintaining OLAF's independence and efficiency. Whilst enhancing procedural safeguards is seen as desirable, it should be acknowledged that this may have an impact on the independence of OLAF and on the efficiency of OLAF's investigations and will also involve certain costs. These potential impacts are discussed in this section under each relevant policy options. Three main criteria are used to analyse these impacts: effectiveness in meeting the policy objectives (Strengthening procedural safeguards while protecting EU financial interests), financial burden and acceptability to stakeholders.

### **Option 1: status quo (no modification to Regulation 883/2013 but an anticipated evaluation report on the implementation of Regulation 883)**

| Effectiveness in meeting the policy objectives |  |
|--|--|
| <i>Strengthening procedural guarantees</i>     | This option would not allow for immediate benefits in terms of enhancement of procedural guarantees of the persons concerned by the investigations since no modification would be brought to Regulation 883/2013. However, before embarking on a new reform, it would have the benefit of consolidating OLAF's framework and practices following the implementation of the new Regulation, which has already strengthened procedural guarantees. Procedural guarantees could benefit from this consolidation since proper implementation of a right is as essential as its recognition in a legal text (changing practices needs time and training and cannot be the sole result of a new legal provision). In addition, in the medium term, an evaluation report of OLAF's reform after an initial period of implementation would enable a thorough analysis of the results of the reform and would serve as a basis for further adjustments of the legal provisions. It would also allow for taking into account the progress made on setting up the EPPO. |
| <i>Protecting EU financial interests</i>       | This option would have no impact on the protection of the EU financial interests, in particular regarding efficiency of OLAF's investigations and independence of OLAF, since OLAF's legal framework would not be modified in the short term.  |
| Other impacts                                  |  |
| <i>Financial burden</i>                        | This option would have no financial impact since OLAF's legal framework would not be modified in the short term.   |
| Acceptability to stakeholders                  |  |
| <i>Acceptability to stakeholders</i>           | This option could be unlikely to be acceptable for the European Parliament which favours an immediate revision of Regulation 883/2013 in order to achieve what could not be achieved during the latest reform and further strengthen procedural safeguards. Discussions in the Council so far tend to suggest that they could favour this option since they have expressed serious doubts about a new reform, seeing it as premature, and expressed their wish to wait for additional progress in the negotiations on the EPPO.  |

**Option 2: Revision of Regulation 883/2013 to introduce a “quasi-judicial” prior authorisation of a dedicated judicial unit within OLAF concerning the Members of the EU institutions and a Controller of procedural guarantees as part of a wider Supervisory Committee**

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|--|---|
| Effectiveness in meeting the policy objectives:        |   |
| <i>Strengthening procedural guarantees</i>             | <p>If this option were to have some <i>positive impacts</i> on procedural guarantees, it would not offer the same level of protection as options 3 and 4 since these controls would not be entrusted to an independent expert. The overall objective would therefore not be reached.</p> <p>Regarding the <i>Controller of procedural guarantees</i>, if procedural rights of all persons concerned by OLAF's investigations were to be enhanced by an additional possibility to have their complaints reviewed, the protection offered would be lower than with a fully external Controller. Indeed, as the Controller would be attached to the Supervisory Committee, even if the Supervisory Committee offers regulatory guarantees of independent functioning vis-à-vis the Director-General, his independence would not be as strong as if he was recruited outside OLAF.</p> <p>No impacts are foreseen on the <i>protection of personal data</i> since the EU requirements on data protection will continue to apply without any change, in particular the possibility to complain to the European Data Protection Supervisor.</p> |
| <i>Strengthening institutional safeguards</i>          | Regarding the <i>quasi-judicial authorisation</i> , if this option were to reinforce the protection of institutional safeguards thanks to an ex-ante control on the legality and the proportionality of the intended investigative measure, it would not offer the same level of protection as options 3 and 4 since controls would not be entrusted to an independent expert appointed in an inter institutional procedure, but to an internal unit of OLAF.   |
| <i>Protecting EU financial interests</i>               | Negative impacts of this option on the duration of OLAF's investigations (channels of communication between the Controller and the Supervisory Committee would be facilitated by sharing the infrastructure) and on its independence would be lower than under options 3 and 4 since no external independent body would be involved.  |
| <i>(impacts on OLAF's efficiency and independence)</i> | This option would however run the risk that the Supervisory Committee becomes involved in on-going investigations. Clear separation of the roles of the Committee and the Controller (general monitoring role and review of individual cases) within the same body or within bodies sharing the same secretariat could in addition appear strange to the outside observer.  |
| Other impacts  |   |
| <i>Financial burden</i>                                | This option would trigger limited costs, since existing resources within OLAF and the Supervisory Committee would be used. Costs would be limited to the remuneration of the Controller.  |
| Acceptability to stakeholders                          |   |
| <i>Acceptability to stakeholders</i>                   | Taking into consideration the opinions expressed during the negotiations on the past OLAF reform and those about a possible new reform, a Controller attached to the Supervisory Committee would have little chance of acceptance by the Council which consistently expressed the opinion that the Committee  |



|  |   |
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|  | should not interfere with individual cases and limit its task to monitoring OLAF's activity in order to identify general, systemic problems in its functioning. The European Parliament could probably support an internal Controller attached to the Supervisory Committee but might prefer a more independent procedure for the authorisation of certain investigative measures directed against Members of the institutions. |
|--|---|

**Option 3: Revision of Regulation 883/2013 to introduce a quasi-judicial prior authorisation concerning the Members of the EU institutions and a Controller of procedural guarantees, acting on complaints**

|  |  |
|--|--|
| Effectiveness in meeting the policy objectives:  |  |
| <i>Strengthening procedural guarantees</i>   | The Controller of procedural guarantees under this option would offer higher protection of procedural safeguards than under option 2 since he would be independent. Under this option, the negative impact on the right to prompt handling of the investigations would however be higher than under option 2: communication with fully external and independent bodies would involve more delays (require specific deadlines for information, transmission and scrutiny) and would not be facilitated by sharing of the infrastructures.<br><br>As under option 2, no impacts are foreseen on the <i>protection of personal data</i> .   |
| <i>Strengthening institutional safeguards</i>  | This option would offer higher protection of the safeguards attached to the function of the Members of the EU institutions than under option 2 since the control function would be entrusted to an independent expert.   |
| <i>Protecting EU financial interests</i><br><br><i>(impacts on OLAF's efficiency and independence)</i> | This option would have <i>more negative impacts</i> than option 2 on the duration of the investigations, on the OLAF's overall efficiency (due to increased complexity of the legal framework) and on potential overlaps of competences with the Supervisory Committee. However, this option could also simultaneously reinforce OLAF thanks to a higher level of trust in its investigations, allowing for a smooth follow up by judicial or disciplinary authorities.  |
| Other impacts  |  |
| <i>Financial burden</i>  | The costs implied by this option would be higher than those under option 2, but lower than those under option 4.<br><br><u><i>1) Costs of a quasi-judicial authorisation</i></u><br><br>The prior quasi-judicial authorisation would require providing a salary or indemnities to one part-time high ranking expert (a person with a highly qualified judicial background, ideally a former judge of an EU Court) and a substitute, as well as remunerating the staff to assist them.<br><br>Indemnities provided to the members of the Supervisory Committee provide some guidance in this respect: members are entitled to an allowance of 525 euro for each meeting day. In addition, they are reimbursed travel and subsistence costs according to Commission rules, and can also request the payment of a flat rate of 525 euro, for preparation of meetings.<br><br>In case the expert would be called upon to act 10 times a year, the cost would be between 5,250 euro and 10,500 euro per year. |

|                                      |   |
|--------------------------------------|---|
|                                      | <p style="text-align: center;"><u>2) Cost of a Controller of procedural guarantees</u></p> <p>Costs would include setting up a body of an external Controller (composed of the Controller himself, his substitute and his staff). One part-time Controller should be recruited, assisted by a staff of four. The costs involved by this option would remain more limited than those of option 4, since the Controller would only act on complaints. To keep the additional control framework as simple as possible and to make the best use of the limited resources, the same person could be tasked with delivering the “quasi-judicial” authorisation and with reviewing complaints.</p> <p>Although their characteristics do not allow for a full comparison with OLAF, DG Competition has two Hearing Officers who are assisted by eight persons (three advisors, three assistants and two secretaries) remunerated from DG Competition’s budget<sup>40</sup>.</p> |
| Acceptability to stakeholders        |   |
| <i>Acceptability to stakeholders</i> | Taking into consideration the opinions expressed during the negotiations on the last OLAF reform and those expressed ultimately on a possible new reform, option 3 seems to have more chance of acceptance by the Council than options 2 and 4. This option could also be acceptable to the European Parliament.  |

**Option 4: Revision of Regulation 883/2013 to introduce a quasi-judicial prior authorisation concerning the Members of the EU institutions (and a prior opinion concerning EU staff) and a Controller of procedural guarantees, acting on complaints or on his own motion**

|   |   |
|---|---|
| Effectiveness in meeting the policy objectives: |   |
| <i>Strengthening procedural guarantees</i>      | <p>Regarding the <i>Controller of procedural guarantees</i>, his positive impacts on procedural safeguards would be higher than under option 3 since the Controller would be able to act also on his own motion. Procedural safeguards for EU staff would also be further strengthened since the Controller would also be in charge of delivering a prior opinion on specific investigative measures.</p> <p>Duration of the investigations would however be increased to a greater extent than under option 3 since the Controller would act on his own motion and would exercise, for EU staff, an ex-ante control before the conduct of some investigative measures.</p> |
| <i>Strengthening institutional safeguards</i>   | This option would offer the same benefits as option 3.  |

<sup>40</sup> Between 1 April 2012 and 31 March 2014, the Hearing Officers have been substantially involved in 16 antitrust cases, while in other 17 antitrust cases they had only limited involvement. In the same period, the Hearing Officers have also been substantially involved in 11 merger cases. In the case of OLAF, less than ten complaints are lodged with different bodies each year (the European Ombudsman, the EDPS, or with OLAF’s Director-General).

|   |  |
|---|--|
| <p><i>Protecting EU financial interests</i></p> <p><i>(impacts on OLAF's efficiency and independence)</i></p> | <p><i>1) Impacts on OLAF's efficiency:</i></p> <p><i>Positive impacts</i> on the quality of OLAF's investigations could be higher than under option 3 since the greater scrutiny exercised on OLAF by a Controller possibly acting on his own motion could lead to a higher level of trust in OLAF. However, this option would have <i>more negative impacts</i> as it would slow down OLAF's work, increase the complexity of the legal framework and the potential overlaps of competences with the Supervisory Committee.</p> <p><i>2) Impacts on OLAF's Independence:</i></p> <p>This option would trigger concerns regarding OLAF's independence since an ex-ante control covering both legality and proportionality of the intended measure would limit OLAF's discretion in the use of its investigative powers</p> |
| <p>Other impacts</p>  |  |
| <p><i>Financial burden</i></p>  | <p>Option 4 would trigger far greater costs than the other options, since the Controller of procedural guarantees could act on his own motion and therefore would potentially be tasked with controlling all investigative measures in all kinds of investigations. The Controller could need a staff of about ten persons, in order to deliver prior opinions for EU staff in a swift manner<sup>41</sup>.</p>  |
| <p><i>Other impacts:</i></p>  | <p>Option 4 may negatively impact the reputation of EU bodies by providing EU staff with additional procedural safeguards as compared with the other type of persons concerned by OLAF's investigations.</p>   |
| <p>Acceptability to stakeholders</p>  |  |
| <p><i>Acceptability to stakeholders</i></p>   | <p>Taking into consideration the opinions expressed during the negotiations on the past OLAF reform and those expressed ultimately on a possible new reform, this option may have little chance of acceptance by the Council, regarding its financial impacts and the risk of delaying excessively OLAF's investigations.</p>  |

<sup>41</sup> Some assumption may be drawn from similar situations, even though not fully comparable: OLAF Unit 0.1, currently tasked with an ex-ante and ex-post legality review of all OLAF's investigative measures, has a team of around 10 dedicated staff. OLAF's Supervisory Committee has 5 members assisted by 5 EU staff. DG Competition has two full time Hearing Officers assisted by 8 EU staff. Some internal statistics show that between 2010 and 2012, an average of 15 cases per year involved the inspection of premises of EU staff.

## 6. COMPARING THE OPTIONS

*Table 1: Comparison of the options*

|  | Option 1 | Option 2 | Option 3 | Option 4 |
|--|----------|----------|----------|----------|
| Protection of procedural safeguards    | 0        | +        | ++       | ++       |
| Protection of EU financial interests:  |          |          |          |          |
| - OLAF's efficiency                    | 0        | -        | -        | --       |
| - OLAF's independence                  | 0        | -        | -        | --       |
| Financial burden:                      |          |          |          |          |
| - Quasi-judicial authorisation         | 0        | -        | -        | -        |
| - Controller                           | 0        | 0        | -        | --       |
| Impacts on the institutional framework | 0        | --       | -        | --       |
| Acceptability to stakeholders          | -/+      | -/+      | -/+      | -/+      |

“+”: favourable; “++”: highly favourable; “-”: unfavourable; “--”: highly unfavourable; “0”: neutral

*Source: Commission Services' analysis*

The above table summarizes the impacts of each option described in section 5 and helps to compare quickly the different options. It shows that option 3 offers the best balance between the expected benefits (enhanced procedural safeguards), the expected negative impacts on the protection of EU financial interests (impacts on OLAF's efficiency and independence, financial burden, overlaps of competences) and acceptability to stakeholders.

If Option 2 (Controller as part of the Supervisory Committee) would have less negative impacts in terms of increased duration of investigations, increased complexity of the legal framework and costs, it would have negative impacts on the definition of the role of the Committee and would not allow the achievement of the same level of protection of procedural safeguards as under option 3 (since the level of independence of the Controller would be lower).

Option 4 appears to have disproportionate negative impacts on OLAF's efficiency and independence, as well as on costs, as compared to the objectives to be achieved.

## 7. EVALUATION

Article 19 of Regulation 883/2013 foresees that "by 2 October 2017, the Commission shall submit to the European Parliament and the Council an evaluation report on the application of this Regulation. That report shall be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend this Regulation". The same report should also include an evaluation of the new revision assessed in this document.

## 8. ANNEXES

- Annex I: The legality review conducted by OLAF's Selection and Review Unit (Unit 0.1).
- Annex II: Article 26 of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)

## ANNEX I

### OLAF's Selection and Review Unit

- Unit 0.1 has been created following an internal reorganisation. The activity of Unit 0.1 aims at (i) reinforcing effectiveness, efficiency and transparency in the treatment of the incoming information and consistency in the selection of cases and (ii) strengthening the quality and legal review at the closure of investigations, as well as at important milestones during the investigation;
- Unit 0.1 mandate and objectives are related to the advisory function to the Director-General of OLAF by (i) providing independent opinions on the possible opening of investigation or coordination cases, (ii) performing a legality check of the important investigative activities of the Office and (iii) following completion of the investigation/coordination case, reviewing the final report and the recommendations, guaranteeing the comprehensiveness of the communications and notifications following closure and, in doing so, ensuring that all actions were conducted in accordance with applicable rules and specifically that rights of persons concerned have been respected;
- The new unit is composed of 30 members, covering a wide range of disciplinary and professional backgrounds, mainly oriented towards investigative and judicial-related matters (magistrates, lawyers, law enforcement officers, auditors, customs officers, statisticians). Amongst them, ten are qualified to carry out legality checks and reviews;
- Legality check during investigations: The check carried out by Unit 0.1 during the investigation stage covers both (i) the overall *purpose* of the case and *scope* of the investigation (i.e.: conversion of coordination into investigation, splitting and merging of cases) and (ii) the execution of *specific investigative activities*, against the criteria of *legality, necessity* and *proportionality*;
- Review phase: following the completion of the investigation/coordination and the drafting of the final report and of the recommendations, the legality check is focused on the legality of the investigative activities undertaken, the compliance with the rights and procedural guarantees of the persons concerned, the compliance with data protection requirements (DPSR), the consistency of conclusions, the continuity of the investigation, the compliance with confidentiality requirements, declarations of/information on potential conflict of interests, the consideration given to the national law of the Member State concerned, the review of the proposed recommendation(s) in terms of consistency and legality, information and transmission requirements on case closure;
- Unit 0.1 issues a positive or negative opinion. In 2012, more than 200 opinions were issued on investigative activities (a few were negative; sometimes, preliminary comments led to a modification or to the withdrawal of the intended investigative measure). In addition, more than 400 opinions were issued on final reports in 2012 (a few were negative). This review of each and every OLAF case allows fields for possible improvement of OLAF's practice to be identified.

## ANNEX II

### **Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office (COM(2013)534 final)**

#### Article 26

##### Investigation measures

1. The European Public Prosecutor's Office shall have the power to request or to order the following investigative measures when exercising its competence:
  - a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system;
  - b) obtain the production of any relevant object or document, or of stored computer data, including traffic data and banking account data, encrypted or decrypted, either in original or in some other specified form;
  - c) seal premises and means of transport and freezing of data, in order to preserve their integrity, to avoid the loss or contamination of evidence or to secure the possibility of confiscation;
  - d) freeze instrumentalities or proceeds of crime, including freezing of assets, if they are expected to be subject to confiscation by the trial court and there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation;
  - e) intercept telecommunications, including e-mails, to and from the suspected person, on any telecommunication connection that the suspected person is using;
  - f) undertake real-time surveillance of telecommunications by ordering instant transmission of telecommunications traffic data to locate the suspected person and to identify the persons who have been in contact with him at a specific moment in time;
  - g) monitor financial transactions, by ordering any financial or credit institution to inform the European Public Prosecutor's Office in real time of any financial transaction carried out through any specific account held or controlled by the suspected person or any other accounts which are reasonably believed to be used in connection with the offence;
  - h) freeze future financial transactions, by ordering any financial or credit institution to refrain from carrying out any financial transaction involving any specified account or accounts held or controlled by the suspected person;
  - i) undertake surveillance measures in non-public places, by ordering the covert video and audio surveillance of non-public places, excluded video surveillance of private homes, and the recording of its results;
  - j) undertake covert investigations, by ordering an officer to act covertly or under a false identity;
  - k) summon suspected persons and witnesses, where there are reasonable grounds to believe that they might provide information useful to the investigation;
  - l) undertake identification measures, by ordering the taking of photos, visual recording of persons and the recording of a person's biometric features;
  - m) seize objects which are needed as evidence;

- n) access premises and take samples of goods;
- o) inspect means of transport, where reasonable grounds exist to believe that goods related to the investigation are being transported;
- p) undertake measures to track and control persons, in order to establish the whereabouts of a person;
- q) track and trace any object by technical means, including controlled deliveries of goods and controlled financial transactions;
- r) undertake targeted surveillance in public places of the suspected and third persons;
- s) obtain access to national or European public registers and registers kept by private entities in a public interest;
- t) question the suspected person and witnesses;
- u) appoint experts, ex officio or at the request of the suspected person, where specialised knowledge is required.

2. Member States shall ensure that the measures referred to in paragraph 1 may be used in the investigations and prosecutions conducted by the European Public Prosecutor's Office. Such measures shall be subject to the conditions provided for in this Article and those set out in national law. Investigation measures other than those referred to in paragraph 1 may only be ordered or requested by the European Public Prosecutor's Office if available under the law of the Member State where the measure is to be carried out.

3. The individual investigative measures referred to in paragraph 1 shall not be ordered without reasonable grounds and if less intrusive means can achieve the same objective.

4. Member States shall ensure that the investigative measures referred to in points (a) - (j) of paragraph 1 are subject to authorisation by the competent judicial authority of the Member State where they are to be carried out.

5. The investigative measures referred to in points (k) – (u) of paragraph 1 shall be subject to judicial authorisation if required by the national law of the Member State where the investigation measure is to be carried out.

[...]