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Regulation 833/2013 Concerning Investigations Conducted by OLAF: A Missed Opportunity for Substantial Reforms?

Abstract

Four years after the first proposal for regulation presented by the European Commission, the establishment of a European Public Prosecutor Office is still subject to an intense debate among the EU institutions and the Member States. While the legal doctrine has extensively debated the question, little attention has been paid to the legislative reform adopted in 2013 that intended to improve investigations conducted by the existing European body having competence to investigate fraud and corruption against the EU financial interests: the European Anti-Fraud Office. Drawing on a comprehensive analysis of the new Regulation 883/2013 concerning investigations conducted by OLAF, the paper comes to the conclusion that the enacted reform fails to address some crucial issues that the European anti-fraud enforcement system is facing and will still face after the eventual creation of an EU prosecutorial authority.

I. Introduction

In July 2013, the Commission's proposal on the establishment of the European Public Prosecutor's Office (EPPO) has rekindled political and academic debates over the fight against EU fraud.[2]The text intended to implement the possibility provided under article 86 TFEU to grant a supranational body the power to investigate and prosecute offences detrimental to the Union's budget.[3] However, little attention has been paid to

1 Post-doctoral researcher, University of Luxembourg. The present contribution summarizes the findings of a PhD thesis under the supervision of Prof. Stefan Braum published under the title "*L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraude*" (Nomos, 2015). The analysis of judicial review mechanisms has been further developed as part of the research project "*Effective defence rights in criminal proceedings: a European and comparative study on judicial remedies*" led by Prof. Silvia Allegrezza at the University of Luxembourg and founded by the European Commission.

2 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

3 Art. 86 TFEU.

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the legislative reform which, a few months later, sought to strengthen EU fraud investigations under the current legal framework. In September 2013, Regulation 883/2013 was adopted with the aim of filling the gaps and enhancing the consistency of procedures governing the European Anti-Fraud Office (OLAF).[4]The latter is an investigative organ established in 1999 within the Commission for the specific purpose of fighting against fraud, corruption and any other illegal activity affecting the financial interests of the European Union.[5] To this end, the Office is primarily empowered to carry out administrative investigations on any illegal activity, including irregularities and criminal offences, detrimental to the EU budget.[6]

Since its creation, OLAF faced criticism that pointed out, on the one hand, the insufficient powers to tackle criminal activities affecting the Union's budget[7] and, on the other, OLAF's lack of accountability, particularly with regard to violations of individual rights.[8]These issues were already addressed in two proposals for regulation presented by the Commission in 2004[9] and 2006.[10]Whilst the EU institutions failed to adopt the proposals, the politicisation of OLAF's investigations and, thereby, interinstitutional tensions increased over the years. Significant examples are two cases involving members of EU institutions. In 2011, a British newspaper revealed that three Members of the European Parliament solicited bribes in return for legislative amend-

4 Regulation (EU, Euratom) 2013/883 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999, OJ 2013, L 248/1 (hereinafter Regulation 2013/883).

5 Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ 1999, L 136/20.

6 Art. 1(1), Regulation 2013/883.

7 Having regard to the administrative character of OLAF, the prime concern of the EU institutions lies in the insufficient follow-up of anti-fraud investigations at the national level. In particular, OLAF cannot compel judicial authorities of the Member States to take specific actions, notably to prosecute offences detrimental to the Union's financial interests. European Parliament, Committee on Budgetary Control, "Working document on legal follow-up to OLAF investigations", 4 February 2009, PE 418.344v 02-00. The resulting lack of coordination and cooperation in investigating and prosecuting EU fraud engenders gaps in the judicial action that the establishment of a EPPO is intended to solve.

8 Besides the need to strengthen the efficiency of OLAF's investigation, the reform of the investigative procedures explicitly intended to establish a balance between "*independence and accountability of the Office*". Amended Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) 1074/1999, COM (2011) 135 final.

9 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), COM (2004) 103 final.

10 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), COM (2006) 244 final.

ments.[11]The President of the institution, however, opposed to inspections of the suspects' professional offices by OLAF, claiming that such intrusive measures would first require the waiver of parliamentary immunities that presupposes a request issued by a judicial authority.[12]Mistrust against OLAF reached its height with the *Dalli* case.[13]The former Maltese Commissioner resigned after the Anti-fraud Office held that he was involved in a bribery case. Following leaks of confidential documents to the media, Members of the European Parliament addressed fierce criticism toward the way OLAF conducted the investigation, with particular emphasis on the impartiality and independence that the Office shall guarantee.[14]In March 2016, the Commission finally decided to lift the immunity of the OLAF Director General, suspected by the Belgian authorities of having listened in on a phone conversation during the course of the investigation, in violation of national criminal law.[15]A few months later, the General Court dismissed the application for the adoption of interim measures suspending the Commission's decision, while arguing that the criminal proceedings undertaken by the Belgian authorities only concern an illegal phone tapping carried out in the course of a closed investigation.[16]Consequently, the lift of immunity is not likely to seriously impair the performance of the Director General's tasks, nor the proper functioning of OLAF.[17]

The adoption of Regulation 883/2013 was debated in this strained political context. While some provisions tried to clarify the reciprocal roles of OLAF and EU institutions,[18] the reform aimed above all to improve the effectiveness of the existing system of fraud investigations before the possible establishment of the EPPO.[19] Does Regulation 883/2013 fulfill its objectives? The following analysis will highlight improvements and persistent gaps with regard to the most debated aspects of OLAF investiga-

11 Pancevski, "Euro MEP faces jail over cash for amendments scandal", The Sunday Times, 12.8.2012.
12 OLAF Press release, "OLAF reaffirms its competence to investigate members of the European Parliament", 25 March 2001, OLAF/11/04.
13 For an historic alanalysis of the political tensions surrounding OLAF, V. Pujas, "Les difficultés pour l'OLAF pour s'imposer en tant qu'acteur légitime de la protection des intérêts économiques et financiers européens", *Cultures & Conflits* (2/2006), 107 – 127.
14 Commission on Budgetary Control, Working document, "Analysis of the failings of the OLAF investigation", 14 May 2013, DT\936170EN.doc.
15 Decision C(2016)1449 final of the European Commission of 2 March 2016 concerning an application for waiver of immunity, not published.
16 Case T-251/16 R, *Director-General of OLAF v Commission*, para 47.
17 *Ibid*, para 48.
18 The most significant example is article 16 of Regulation 883/2013. The provision sets forth a procedure enabling the EU institutions and OLAF to exchange views, particularly on the strategic investigative priorities, as well as the cooperation between the Office and other national and supranational actors involved in the fight against fraud.
19 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust", COM (2013) 532.

tions: efficiency, procedural guarantees, judicial review and future role of the Anti-fraud Office within the European penal area.

II. Quest for efficiency

Since the creation of OLAF, the efficiency of administrative investigations is a "leitmotif" of European anti-fraud strategies.[20] In this regard, the reform of OLAF regulation pursues a double objective. On the one hand, the Commission stressed the need to clarify the role of the Office and to improve the conduct of investigations.[21]However, the definition of administrative investigative powers allocated to OLAF has not been subject to substantial reform. On the other hand, a set of provisions aims to foster the cooperation between OLAF and the national authorities.[22]

A. Improved implementation of investigative tasks

Since 2000 onwards, emphasis was placed on the inefficient use of OLAF's resources.[23]Among the provisions intended to tackle this issue, Regulation 883/2013 introduces a set of criteria for opening an investigation. According to Article 5, the OLAF Director-General may open a case "*when there is sufficient suspicion*" of an illicit activity affecting EU's final interests.[24] The provision thus codifies the ruling of the CJEU in the *Commission v. ECB* case, in which the existence of "*sufficiently serious suspicions*" was interpreted as a guarantee against the disproportionate use of investigative powers.[25] The latter aspect is explicitly included in the additional criterion set forth under the new Regulation, namely the "*proportionality of the means employed*".[26] Lastly, the Director-General shall also take into account the investigation policy priorities of OLAF.[27]In particular, where minor infringements are at stake, he or she should consider whether the disciplinary authorities within the EU institutions are best placed to investigate the case. As regards the national competent authorities, it should be recalled that OLAF may open a "coordination case", meaning that its role is

20 See among all Communication from the Commission, "Protection of the Communities' financial interests – The fight against fraud. For an overall strategic approach", COM (2000) 358 final; Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money, COM (2011) 2936 final.

21 Recitals 1 and 2 of the Amended Proposal for a Regulation concerning investigations conducted by OLAF, COM (2011) 135 final.

22 *Ibid*, p. 4.

23 In response to this, OLAF's Supervisory Committed strongly suggested the adoption of investigative priorities and planning. See Supervisory Committee, "Activity report July 2000 – September 2001", JO 2001, C 365/1, point 3.2.

24 Art. 5(1), Reg 883/213.

25 Case C-11/00, *Commission v. ECB,* ECLI:EU:C:2003:395, para 141.

26 Art. 5(1),Reg 883/2013.

27 *Ibid.*

limited to provide expertise and assistance in the coordination of investigations carried out by the national competent authorities.[28]

Likewise, OLAF was frequently criticized for the slowness of investigation that may undermine efficiency.[29] In response, Regulation 883/2013 states that an investigation shall cover a period of time "*which must be proportionate to the circumstances and the complexity of the case*".[30] In addition, a procedure for monitoring the length of an investigation has been introduced. When the case is not closed after 12 months and every 6 months thereafter, OLAF Director-General shall justify the duration of the investigation and report to an internal body in charge of monitoring the implementation of investigative tasks,[31] namely the Supervisory Committee.[32]

B. Piecemeal definition of investigation powers

The new set of procedural rules has, however, a limited impact in enhancing the consistency of the legal framework. Indeed, Regulation 883/2013 does not modify the decentralised structure of EU fraud investigations, nor the heterogeneous definition of powers allocated to OLAF. On the contrary, it still distinguishes two sets of investigative powers.[33] On the one hand, OLAF conducts internal investigations within the institutions, bodies, offices and agencies of the Union, where alleged fraud or corruption involve EU officials and members of the institutions.[34]This implies unannounced access to premises and to any relevant information held by such institutions and bodies, the power to take a copy of any document and, if necessary, to assume custody of such documents, as well as the power to request oral or written information from officials and members of the EU institutions.[35]On the other hand, the OLAF carries out external investigations, particularly where suspicions of fraud concern economic operators.[36] Within this framework, OLAF exercises the powers conferred on the Commission by Regulation 2185/96, consisting in on-the-spot checks and inspections in the Member States.[37]The powers OLAF enjoys to carry out external investigations are de-

28 Art. 8.3 Guidelines on Investigation Procedures for OLAF Staff, 2013, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/gip_18092013_en.pdf> (last visited July 2016.).

29 Supervisory Committee, Opinion n°2/2009, "OLAF's Reports of Investigations that have been in progress for more than nine months", JO 2009, C 314/1; Court of Auditors, "Special Report 1/2005 concerning the management of the European Anti-Fraud Office (OLAF)", OJ 2005, C 202/1.

30 Art. 7(5),Reg 883/2013.

31 Art. 7(8),Reg 883/2013.

32 Art. 15(1),Reg 883/2013.

33 Internal and external investigations were already distinguished under articles 3 and 4 of Regulation (EC) 1073/1999 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999, L 136/1.

34 Art. 4(1),Reg 2013/883.

35 Art. 4(2),Reg 2013/883.

36 Art. 3,Reg 883/2013.

37 Art. 3 (1),Reg 883/2013; Council Regulation (Euratom, EC) 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to

fined by reference to the domestic legislation of the country in which its officers intervene. According to Regulation 2185/1996, OLAF may avail itself of the same powers as national administrative inspectors and under the conditions set out by the relevant domestic law.[38]The assimilation rule also applies to inspection reports[39] and final reports[40] drawing on the findings of investigations conducted by OLAF: they constitute admissible evidence in administrative or judicial proceedings in the Member States in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.[41]

The distinction between internal and external investigations, however, becomes artificial in practice since very often evidence of the alleged fraud is located both within the EU institutions and in the Member States.[42]In this regard, Regulation 883/2013 mitigates the consequences of a sharp distinction. Henceforth, OLAF may have access to relevant information held by EU institutions and bodies during external investigations[43] and, conversely, it may carry out inspections at the premises of economic operators for obtaining information relevant to the matter under internal investigations.[44]

From a strict legal perspective, the differentiation between internal and external investigations still is of fundamental importance. While Regulation 883/2013 provides a uniform definition of powers for internal investigations, the reference to national law in external investigations results in a piecemeal set of prerogatives. Given the assimilation to national administrative inspectors, OLAF powers of external investigation and the value of reports vary according to the relevant Member State and thus increase the difficulties in identifying the scope of investigative powers. Nevertheless, other EU enforcement systems adopt a different solution. For instance, Regulation 1/2003 governing antitrust proceedings sets out unified powers of investigations exercised by the Commission throughout the territory of the EU.[45] The system is based on clear rules for the allocation of a case at the national or supranational level and therefore enhance the foreseeability of the applicable rules of procedure and related guarantees for individuals. By contrast, OLAF competence to open an investigation is assessed case-by-case according to its investigative priorities and the principle of subsidiarity.[46]Similar to antitrust proceedings, a uniform definition of OLAF's investigative powers should be accompanied by rules for allocation of EU fraud cases. Nonetheless, this approach

protect the European Communities' financial interests against fraud and other irregularities, OJ 1996, L 292/2.

38 Art. 3(3,) Reg 2013/883 and art. 7, of Reg 2185/96.

39 Art. 8(3),Reg 2185/1996.

40 Art. 11(1),Reg 883/2013.

41 Art. 11(2),Reg 883/2013.

42 This may be the case, for instance, where the head of an undertaking corrupts an EU official in order to obtain unduly European subsidies.

43 Art. 3(5),Reg 883/2013.

44 Art. 4(3),Reg 883/2013.

45 Council 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, OJ 2003, L 1/1.

46 Art. 5(3) TEU.

would raise difficulties. First, fraud investigations often involve both European and national funds, an element that should be considered when applying subsidiarity. Second, in contrast to breaches of European competition law defined by article 101 and 102 of the TFEU, the lack of harmonised definition of fraud may constitute an obstacle.[47] Indeed, the material scope of OLAF's investigations covers a wide range of irregularities and criminal offences, the definition of which varies considerably from one State to another.

C. Strengthened cooperation with national authorities

A second major difference distinguishes anti-fraud investigations from anti-trust proceedings. Unlike the Commission in competition matters,[48]OLAF is vested with limited enforcement powers. In particular, it cannot compel an economic operator to give European officials access to its premises. In this situation, OLAF may request national police and judicial authorities to take precautionary and coercive acts, such as searches, seizure and sealing.[49]Domestic authorities are under the obligation to provide OLAF with the necessary assistance, within the limits provided under national law.[50] For instance, if the assistance requires a measure that is subject to prior judicial authorisation, the latter shall be applied for.[51]Therefore, the success of OLAF action is dependent upon the effective cooperation with national competent authorities, especially in external investigations.[52]

The experience shows that OLAF encountered difficulties in identifying the competent national authority.[53] One should not forget that the vast range of illicit activities detrimental to the EU budget as well as the numerous policy sectors concerned, tremendously increase the number and type of competent authorities in the Member States. The situation is even more complex given the differences in the scope of competences and powers national legislation grants to the administrative, police and judicial authorities. In order to address this complexity, Regulation 883/2013 requires Member States to designate an Anti-Fraud Coordination Service (AFCOS), which will constitute a central contact point for enhancing cooperation and exchange of information between OLAF and the national competent authorities.[54] It is worth noting, however,

47 Whilst the PIF Convention and Regulation had a very limited harmonising effect of the substantial definition of illicit activities detrimental to the Union's financial interests, the proposal for a directive presented in 2012 was not yet adopted. Proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.
48 Art. 18(3) and 20(4), Reg 1/2003.
49 Art. 3 (3),Reg 2013/883.
50 Art. 3(3) para 2,Reg 883/2013.
51 Art. 3(3) para 2,Reg 883/2013.
52 White, "EU anti-fraud enforcement: overcoming obstacles", (1/2010) *Journal of Financial Crime*, 81 – 99, at 83.
53 European Commission, "Reflection Paper on the Reform of OLAF", SEC (2010) 859, p. 7.
54 Art. 3(4),Reg 883/2013.

that the legal status and powers granted to the AFCOS significantly vary from one Member State to another.[55]

Moreover, OLAF does not have sanctioning powers. The final report of internal investigations is transmitted to the institution concerned, either in the view of taking disciplinary measures against the suspected person or to anticipate request for the waiver of immunity in case of criminal offences.[56] Likewise, where the findings of an investigation indicate the commission of a criminal offence, OLAF communicates to the national prosecuting authorities a final report, which indicates the facts established, precise allegations as well as recommendations about the appropriate follow-up to be undertaken at the national level.[57] Therefore, OLAF's final report must be understood as a case file that constitutes admissible evidence in front of national courts and therefore must carefully fulfil the legal requirements established by the law of the competent Member State.[58] However, neither the request for assistance nor the final report transmitted by OLAF to national judicial authorities, are legally binding.[59] The competent prosecuting authority has the duty to examine the information forwarded by OLAF carefully and thereby take the appropriate action within the limits and under the conditions set out by the domestic law.[60]

The abovementioned limitation inevitably results from the Member States' exclusive competences for criminal enforcement and prosecution. In particular, Regulation 883/2013 reiterates that administrative investigations shall not affect the powers of national authorities to initiate criminal proceedings.[61]While the sharing of competences between the Member States and the EU can only be reversed with the establishment of an EPPO, Regulation 883/2013 introduces the duty for the Member States to inform OLAF on the actions taken following the transmissions of the reports.[62] This new requirement would presumably incentivise national authorities to undertake the necessary actions. It further provides more reliable data concerning the follow-up of the investigation and enables the Office to monitor effectively the implementation of its recommendations.[63] This may include a financial follow-up deemed to ascertain that the funds were recovered, as well as a disciplinary and judicial follow-up. In this respect, it

55 Commission Staff Working Document, Follow-up of recommendations to the Commission report on the protection of the EU's financial interests – fight against fraud, 2013, SWD(2015) 152 final.
56 Art. 11(4), and (5) Reg 2013/883.
57 Art. 11(3),Reg 2013/883.
58 Art. 11(2),Reg 2013/883.
59 Art. 2(2),Reg 2013/883.
60 Case T- 193/04, *Tillack v. Commission*, ECLI:EU:T:2006:292, para 72.
61 Art. 2(4),Reg 883/2013.
62 Art. 11(6),Reg 883/2013. The same rules applies in respect of requests for assistance addressed by OLAF to the national competent authorities. Art. 3(6) para 2 Regulation 883/2013.
63 See for instance, OLAF Report 2014, p. 24, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_report_2014_en.pdf>.

should be stressed that OLAF officials may actively take part in the subsequent judicial proceedings as experts or witnesses.[64]

III. Effective protection of procedural safeguards

The criminal-law implications of OLAF's operational activities make the protection of individual rights a crucial issue. Despite the administrative classification provided under Regulation 883/2013,[65] the investigations conducted by OLAF have an undisputable punitive aim: establish facts and collect evidence that may lead to criminal prosecution and the imposition of penalties within the meaning of article 6 ECHR.[66] According to the consistent case law, interferences with procedural guarantees and particularly defence rights are not confined to the adversarial stage of proceedings. They further apply, even though with less stringency, in the preliminary stage of administrative proceedings in order to prevent those rights from being irremediably compromised.[67]Likewise, Regulation 883/2013 sets out for the first time a catalogue of procedural guarantees that anti-fraud investigations must comply with.[68]In doing so, the European legislator addressed part of the question, leaving aside the adoption of an internal review mechanism that has however been extensively debated.

A. A consolidated set of procedural guarantees

Among the strides forward made by the new Regulation, the introduction of a set of procedural guarantees for witnesses and suspected persons should be welcomed.[69]In particular, Article 9 of Regulation 2013/883 acknowledges the applicability of the following rights for the suspect, who is identified as the "person concerned": the right to information, the privilege against self-incrimination, the right to be heard before conclusions referring by name to the person concerned are drawn, the right to legal assistance, the presumption of innocence and the right for the person concerned to express

64 Art. 26 and 27 Guidelines on Investigation Procedures for OLAF Staff.
65 Art. 2,Reg 883/2013.
66 Gleβ, Zeitler, "Fair Trial Rights and the European Community's Fight Against Fraud", 7 ELJ (2001), 219 – 237.
67 Case C-105/04 P, *NederlandseFederatieveVerenigingvoor de Groothandel op ElektrotechnischGebied c. Commission*, ECLI:EU:C:2006:592, para 50.
68 Art. 9,Reg 883/2013.
69 Indeed, the lack of provisions defining procedural guarantees, especially the rights of defence, during OLAF investigations was subject to criticism by the institutional actors and scholars. See OLAF Supervisory Committee, Opinion n°2/03 accompanying the Commission's report evaluating the activities of the European Anti-fraud Office, COM (2003)154 final; Inghelram, "Fundamental Rights, the European Anti-Fraud Office (OLAF) and a European Public Prosecutor's Office (EPPO)", (1/2012) KritV 67 – 81; Braum, "Justizförmigkeit und EuropäischeBetrugsermittlung, Bemerkungenzum Fall Eurostat (EuGT-48/05, Urteil vom 8. July 2008)", JZ (6/2009), 298 – 304.

himself in the language of his choice.[70] It is worth noting that the provision does not refer to the right of access the case file. OLAF has the sole obligation to provide the person concerned with a summary of the facts in order to enable him to submit comments.[71]

The improvement is twofold. First, the individual guarantees set out under Article 9 of the Regulation apply indistinctly to internal and external investigations. Hence, the provision overcomes the discrepant standards of protection under the previous legal framework. Indeed, only the persons concerned by an internal investigation (*i.e.* members, officials and agents of the EU institutions, bodies and agencies) benefited from the right to information and the right to be heard.[72] Second, Article 9 of Regulation 883/2013 provides for a detailed list of defense rights. Before the entry into force of the new Regulation, legal uncertainty was underpinned by a single recital in the explanatory statements of Regulation 1073/1999 that referred vaguely to "*full respect for human rights and fundamental freedoms*".[73] The absence of specific provisions was all the more crucial having regard to the quasi-criminal character of OLAF investigations.[74]Not only scholars advocated for the application of procedural guarantees drawn from the right to fair trial.[75]Even before the adoption of Regulation 883/2013, the CJEU indicated that the Anti-Fraud Office shall respect the right to information and to be heard, the presumption of innocence, the reasonable length[76] and impartiality[77] in the conduct of investigation.

B. Internal monitoring mechanisms, a question still open

Control mechanisms for the implementation of procedural guarantees remain however an unsolved issue. Indeed, Regulation 883/2013 simply codifies a long-standing practice: OLAF Supervisory Committee, composed of five independent members, shall monitor the developments concerning the application of procedural guarantees.[78] Since 2000, persons who considered their rights infringed during the investigation addressed

70 Art. 9, Reulation 2013/883.
71 Art. 9(4), para 2Reg 883/2013. On the right of access to the case file, White, "Rights of the Defence in Administrative Investigations: Access to the File in EC Investigations", Review of European Administrative Law, (2009), 59 – 69.
72 Art. 4 Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF), JO 1999, L 136/15.
73 Recital 10,Reg 1073/1999.
74 Wade, "OLAF and the Push and Pull factors of a EU criminal Justice System", Eucrim (3 – 4/2008), 128 – 132.
75 Gleβ, Zeitler, "Fair Trial Rights and the European Community's Fight Against Fraud", *op cit.*
76 Case T-48/05, *Franchet et Byk v. Commission*, ECLI:EU:T:2008:257.
77 Case T-309/03, *Camós Grau v.Commission*, ECLI:EU:T:2006:110.
78 Art. 15(1) para 2,Reg 883/2013.

complaints to the monitoring body.[79] This led the Supervisory Committee to exercise control over the observance by OLAF of individual rights.[80] The situation caused hostility between the Committee and the OLAF Director-General. The former repeatedly reproached the latter for not providing the information necessary to fulfill its tasks.[81] The Director-General reiterated that the assignment of the Supervisory Committee consisted in overseeing the independence of the Anti-fraud Office in the conduct of investigations, which are carried out under the sole responsibility of the OLAF Director.[82]This last argument explains the limits of the monitoring powers allocated to the Supervisory Committee that persist under Regulation 883/2013. Indeed, the Committee addresses to the Director-General opinions, which are not legally binding so as to not interfere with the conduct of investigations in progress.[83]

In order to cope with the controversy, in 2006 the Commission envisaged the creation within OLAF of a Review Advisor, who would have specific competence for monitoring the respect of procedural guarantees during investigations.[84] A similar initiative was presented for the second time by the 2014 proposal amending Regulation 883/2013 as regards the establishment of a Controller of Procedural guarantees.[85]Attached to the Commission from an institutional point of view, the latter would be appointed by common accord of the EU institutions.[86] This would enable the Controller of Procedural Guarantees to independently undertake a twofold task.[87]On the one hand, the Director-General would be required to obtain the prior authorization of the Controller when OLAF intends to exercise its power to inspect the professional office of the Member of an EU institution.[88] Inspired by the *ex-ante* judicial review of cer-

79 Supervisory Committee, "Activity report. July 2000 – September 2001", JO 2001, C 365/1, at 15.

80 See for instance Supervisory Committee, Opinion No 5/2010, "Respect for fundamental rights and procedural guarantees in investigations by OLAF", JO 2011, C 188/37.

81 For instance, Supervisory Committee, "Activity Report. January 2012 – January 2013", JO 2013, C 374/4.

82 House of Lords, European Union Committee, "The Fight Against Fraud on the EU's Finances", 12th Report of Session 2012 – 2013, 17 April 2013, at 28.

83 Art. 15(1) para 3 Regulation 883/2013.

84 Art. 14 Proposal for a Regulation concerning investigations conducted by OLAF, COM (2006) 244 final.

85 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) n° 883/2013 as regards the establishment of a Controller of procedural guarantees, COM(2014) 340 final.

86 Art. 9 c Proposal for a Regulation as regards the establishment of a Controller of procedural guarantees, COM(2014) 340 final.

87 The independence of the reviewing body and thereby its institutional position was the main source of debate between the European institutions. For an overall analysis of the different solutions proposed, 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", SWD(2014) 183 final.

88 Art. 9b Proposal for a Regulation as regards the establishment of a Controller of procedural guarantees, COM(2014) 340 final.

tain measures ordered by the EPPO,[89] the mechanism aims above all to ensure the free exercise of political mandates held by the members of the Union's institutions.[90] On the other hand, any person concerned by OLAF investigations would be entitled to lodge individual complaints with the Controller regarding the observance of procedural guarantees set forth in Regulation 883/2013.[91]Admittedly, the 2014 proposal would provide individuals with an internal administrative remedy in front of an independent body. Nonetheless, the effectiveness of such remedy is limited. Following an adversarial procedure, the Controller would address to the Director-General a recommendation on the complaint with no legally binding value.

Instead, Regulation 883/2013 simply requires the Director-General to put in place "*an internal advisory and control procedure, including a legality check*".[92]Thus, a second organ within OLAF – the Investigation Selection and Review Unit – verifies respect of procedural guarantees in the course of investigations.[93] It should further be noted that any person concerned may address a complaint related to rights enshrined in Article 9 of Regulation 883/2013 to the OLAF Director-General.[94] Although legal provisions provide only EU officials with such remedy,[95]practice has extended the complaint procedure to external investigations. Nonetheless, the multiplication of internal supervision procedure cannot replace nor diminish the importance of the judicial review undertaken by an independent and impartial court.

IV. Lack of effective judicial protection

In the last years, the supervision of OLAF investigations has raised widespread criticisms from European institutions[96] and legal doctrine.[97] In particular, scholars put into question the effective judicial protection of individual rights against investigative mea-

89 Commission Staff Working Document, SWD(2014) 183 final, p. 7.
90 Emphasis on this aspect is also illustrated by the first Commission Statement to Regulation 883/2013.
91 Art. 9a Proposal for a Regulation as regards the establishment of a Controller of procedural guarantees, COM(2014) 340 final.
92 Art. 17(7),Reg 883/2013.
93 OLAF Supervisory Committee, Opinion No 2/2015, "Legality check and review in OLAF", <http://europa.eu/supervisory-committee-olaf/sites/default/files/legality_check_opinion_2_2015-final.pdf>.
94 See Information concerning complaints on OLAF investigations, <http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-on-olaf-investigations_en>.
95 Article 90a, Staff Regulations of Officials of the European Union.
96 See in particular COCOBU, "Document de travail sur l'analyse des manquements dans l'enquête de l'OLAF", 14 May 2013, PE 510.771v 01-00.
97 Groussot, Popov, "What's wrong with OLAF? Accountability, due process and criminal justice in European Anti-fraud policy", 47 CML Rev (2010), 605-643; Inghelram, "Judicial review of investigative acts of the European Anti-fraud Office (OLAF) : a search for a balance", 49 CML Rev (2012), 601 – 628.

sures taken by OLAF,[98] which must be assessed in the light of judicial subsidiarity. Indeed, the judicial scrutiny in issue encompasses the primary role of the CJEU as well as that of national judges where OLAF cooperates with the police and judicial authorities of the Member States. As Regulation 883/2013 does not modify in substance the definition of OLAF's investigative powers nor the rules governing the cooperation with the national competent authorities, the question remains unanswered. Does the combined scrutiny undertaken by national and European judicature ensure the effective judicial protection of persons concerned by OLAF investigations?

A. Judicial review by the CJEU

The CJEU has exclusive competence to establish the unlawfulness of acts taken by EU institutions, bodies and agencies[99] as well as to compensate individuals for the prejudice caused by EU institutions or by its servants in the performance of their duties.[100] As OLAF has no distinct legal personality, any judicial action challenging the validity of its investigative measures is directed against the Commission.[101] From this perspective, the person concerned has access to the EU courts by means of the various remedies available under the treaties. On the one hand, the applicant may challenge the legality of OLAF's investigations directly by means of actions for annulment.[102] In addition, individuals who have suffered damages caused by OLAF may bring an action for non-contractual liability of the EU before the Court of Justice[103]. On the other hand, the review of legality of acts adopted by OLAF may intervene incidentally *via* preliminary rulings.[104]

1. Contentious inadmissibility of actions for annulment

Under Article 263 § 4 TFEU, the CJEU has jurisdiction to review the legality of acts taken by European institutions that are addressed to the applicant or which are of direct and individual concern to him. Such judicial remedy offers the possibility to challenge directly before the General Court the compliance by OLAF with investigative procedures, including the rights of defendants.[105] However, the CJEU has systemati-

98 Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office. An analysis with a Look forward to a European Public Prosecutor's Office*, (Europa Law Publishing, 2011), 203 *et seq*.;Covolo, *L'émergence d'un droit penal en réseau. Analyse critique du système européen de lutte antifraude*, (Nomos, 2015), 555 – 621.

99 Fenger, Broberg, *Le renvoi préjudiciel à la Cour de justice de l'Union européenne* (Larcier, 2013), at 49.

100 Art. 268 and 340 TFEU.

101 Inghelram, "Judicial review of investigative acts of the European Anti-fraud Office (OLAF): a search for a balance", *op cit*, 603 – 605.

102 Art. 263 § 4 TFEU.

103 Art. 268 and 340 TFEU.

104 Art. 267 TFEU.

105 See in particular art. 9,Reg 883/2013.

cally declared actions for annulment against OLAF's acts inadmissible.[106]The reason primarily lies in the restrictive requirements set forth in Article 263 § 4TFEU. Under the provision, acts amenable to judicial review are measures the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position.[107] In the case *IBM v. Commission*, the Court held that, in the case of acts or decisions adopted by a procedure involving several stages, only the measure which definitively lays down the position of the institution on the conclusion of that procedure can in principle be subject to actions for annulment.[108] By contrast, merely provisional measures intended to pave the way for the final decision are not considered acts amenable to judicial review under article 263 TFEU.[109] Similarly, investigations conducted by OLAF constitute the preliminary stage of proceedings that may lead to a decision by disciplinary or judicial authorities establishing the liability of the person concerned.[110] Consequently, the case law consistently considered that acts adopted by the Anti-Fraud Office are preparatory measures that cannot be subject to actions for annulment. The underlying reasoning has been outlined in the *Tillack* case.[111] The Court emphasized that the findings of OLAF set out in the final report do not compel national judicial authorities to take a specific action.[112] On the contrary, the competent authorities have to examine the information forwarded by OLAF carefully and remain free to draw the appropriate consequences from it, if necessary by initiating legal proceedings. A different interpretation "*would alter the division of tasks and responsibilities*" since it would put into question the exclusive competence of domestic judicial authorities to start prosecution.[113] Consequently, the duty of careful examination reflects the non-mandatory character of reports and requests for assistance addressed by OLAF to the national competent authorities.

Likewise, the investigative measures adopted by OLAF cannot be regarded as intermediary acts reviewable under Article 263 TFEU. The latter concerns acts that constitute a definitive measure taken independently of any decision on whether infringements to the relevant rules have been committed.[114] Where such contested acts have binding legal effects and affect the interests of the applicant by bringing about a distinct change in his legal position, actions for annulment against those measures are ad-

106 Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office. An analysis with a Look forward to a European Public Prosecutor's Office*, *op cit*, at 203 *et seq.*
107 Fenger, Broberg, *op cit.*
108 Case 60/81, *IBM v. Commission*, ECLI:EU:C:1981:264, para 10.
109 *Ibid*, para 12.
110 Art. 11,Reg 883/2013.
111 Case T- 193/04, *Tillack v. Commission*,ECLI:EU:T:2006:292; Case T-193/04 R, *Tillack v. Commission*, ECLI:EU:T:2004:311; Case C-521/04 P(R), *Tillack v. Commission*, ECLI:EU:C:2005:240.
112 Case T- 193/04, *Tillack v. Commission*, para 72.
113 *Ibid*, para 72 – 73.
114 Case 60/81, *IBM v. Commission*, para 11.

missible.[115] Examples are requests for information[116] and inspection measures[117] adopted by the Commission on the basis of legally-binding decisions in anti-trust proceedings. When adopting such a decision, the Commission may compel undertakings to provide information and give access to premises and documents by the imposition of fines and periodic penalty payments. By contrast, OLAF is not granted with similar sanctioning powers.[118] For instance, the Anti-Fraud Office requests the assistance of police and judicial authorities where an undertaking refuses to give access to its premises and therefore opposes to on-the-spot checks and inspections. Although bound by the duty of loyal cooperation,[119] the requested domestic authorities are free to adopt the appropriate action in accordance with national laws.

In sum, the CJEU declared inadmissible actions for annulment directed to the decision to open an investigation,[120] acts performed in the course of an investigation,[121] the final report,[122] the decision to close an investigation[123] as well as the decision to forward to an EU institution[124] or to the national prosecuting authorities the findings of the investigation.[125]It is not disputed that investigative measures undertaken by the Anti-Fraud Office may affect the interests of the suspected person, particularly by infringing his fundamental rights and procedural guarantees set forth under Regulation 883/2013[126]. Since the CJEU cannot directly review the legality of investigative measures adopted by the Anti-Fraud Office, does the suspect have other effective remedies? Two judgements of the European Courts illustrate the problematic alternatives. The first judgment precisely ended the "*Tillack* saga".[127] The applicant was a journalist suspected by OLAF of bribery. He contested before the ECtHR the conformity of house searches conducted by Belgian judicial authorities upon request of the Anti-Fraud Office, invoking the confidentiality of journalists' sources protected under Article 10 of the Convention. The Court explicitly emphasized that the contested measure was aimed to collect information "*for the benefit of OLAF*".[128] In addition, the suspi-

115 *Ibid.*
116 Art. 18(3),Reg 1/2003.
117 Art. 20(4), Reg 1/2003.
118 Covolo, *L'émergence d'un droit penal en réseau. Analyse critique du système européen de lutte antifraude*, *op cit*, 567 *et seq.*
119 Art. 4(3) TEU.
120 Case T-215/02 R, *Gómez-Reino v. Commission*, ECLI:EU:T:2002:251; Case C-471/02 P (R), *Gómez-Reino c. Commission*, ECLI:EU:C:2003:210.
121 Case T-215/02, *Gómez-Reino v. Commission*, ECLI:EU:T:2003:352.
122 Case T-29/03, *ComunidadAutónoma de Andalucía v. Commission*, ECLI:EU:T:2004:235; Case T-309/03, *Camós Grau v. Commission*, ECLI:EU:T:2006:110; Case T-4/05, *Strack v. Commission*, ECLI:EU:T:2006:93; Case C-237/06 P, *Strack v. Commission*, ECLI:EU:C:2007:156.
123 Case T-4/05, *Strack v. Commission*; Case C-237/06 P, *Strack v. Commission*.
124 Case T-215/02, *Gómez-Reino v. Commission*.
125 Case T-193/04, *Tillack v. Commission*; Case T-261/09 P, *Commission v. Violetti and others*, ECLI:EU:T:2010:215.
126 Art. 9, Reg 883/2013.
127 ECtHR, *Tillack v. Belgique*, Appl. No. 20477/05, judgement of 27 February 2008.
128 *Ibid*, para 64.

cions of bribery communicated by the Office "*were based on mere rumors, as revealed by the European Ombudsman's inquiries on two occasions in 2003 and 2005*".[129] Although it is clear from the judgement that OLAF was responsible, at least partially, for the violation of fundamental rights in issue, the ECtHR could only condemn Belgium as far as the EU is not part to the Convention.

Further concerns regarding the lack of judicial review were raised by the Civil Service Tribunal in *Violetti.*[130] The applicant introduced an action for annulment against an OLAF final report, which was transmitted to the Italian judicial authorities without giving him the opportunity to be heard. The Tribunal considered that if the EU judicature were not to carry out the review of legality, the defense rights granted to the persons concerned by OLAF investigation could not be protected effectively and "*in sufficient time*" in the case where conclusions referring to him are communicated to the competent national authorities.[131] Indeed, "*the national court would retain before it the information forwarded to it by OLAF, even though the implication of any finding by the Community judicature of such illegality on account of failure to observe the rights of the defence is that the national court should be barred from acting on the basis of such information*".[132] Accordingly, the right to an effective judicial protection of defence rights would justify the admissibility of action for annulment against OLAF's final report.[133] The attempt to overturn the *Tillack* ruling was reversed by the General Court. In the line of a well-established case law, the latter recalled that the principle of effective judicial protection does not allow the EU judicature to set aside the requirements for the admissibility of actions for annulments laid down in the treaties.[134] Consequently, the acts taken by OLAF cannot be subject to judicial review under article 263 § 4 TFEU. Nonetheless, the Court stressed that the effective judicial protection of individual rights is ensured by other remedies available to the person concerned, more specifically actions for damages and preliminary reference procedures.[135]

2. Action for damages: an effective remedy?

The inadmissibility of actions for annulment does not prevent individuals from claiming compensation for damages resulting from a measure or from unlawful conduct attributable to OLAF in the conduct of the investigations. Indeed, actions for damages under Articles 268 and 340 TFEU constitute an autonomous judicial remedy,[136] the ad-

129 *Ibid*, para 63.
130 Case F-5/05 and F-7/05, *Violetti and others v. Commission*, ECLI:EU:F:2009:39.
131 *Ibid*, para 78.
132 *Ibid*, para 78.
133 *Ibid*, para 79 – 81.
134 Case T-261/09 P, *Commission v. Violetti and others*, para 56 – 58.
135 *Ibid*, para 65 *et seq.* The same argument was advanced by the General Court in its judgment of 4 October 2006, Case T- 193/04, *Tillack v. Commission*, para 80.
136 Jaeger, "Les voies de recours sont-elles des vases communicants?", in RodrigezIglesias (ed.), *Mélanges en hommage à Fernand Schockweiler* (Nomos, 1999), 233 -25.

missibility of which is not dependent upon an act adversely affecting the applicant. According to consistent case law, the right to compensation arises where the following conditions are met.[137] First, the rule of law infringed must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. Such scope of judicial review led the CJEU to ascertain the legality of investigations carried out by OLAF and more specifically the respect of individual rights. Whilst examining an action for compensation, the General Court held for the first time OLAF liable for having violated the rights of defence.[138]

It is worth noting that the judgements referred to only concern internal investigations. Where an alleged violation of individual rights results from the cooperation between OLAF and the national competent authorities during external investigations, the Court never admitted the existence of a causal link between the breach in issue and the damage suffered. The argument put forward is identical to the one justifying the inadmissibility of actions for annulment: "*it was the task of the judicial authorities to decide what action should be taken in respect of the information forwarded by OLAF (…) Consequently, the conduct of the national judicial authorities, which decided, in the context of their own prerogatives, to initiate legal proceedings and then to carry out investigations, caused the harm allegedly suffered by the applicant*".[139]

Although the above-referred case law has indisputably contributed to strengthen the protection of defence rights in OLAF investigations, the question arises whether actions for damages provide the suspect with an effective remedy against the violation of those rights. The answer faces two critical considerations. First, where the Court finds a breach of defence rights attributable to OLAF within judicial proceedings instituted under Articles 268 and 340 TFEU, the applicant can only obtain a monetary compensation for the prejudice suffered. In other words, actions for damages do not have any legal consequences on the investigative act itself, such as for instance nullities that prevent the use of evidence collected by OLAF. This may lead to paradoxical situations. In the case *Camós Grau*, the General Court held that the final report presented a "*one-sided and biased examination*" of the facts resulting from the lack of impartiality in conducting the investigation.[140] Nonetheless, the report remained from a legal point of view a valid act, which was forwarded to the national prosecuting authorities. Second, given the length of the procedure before the CJEU, it is unlikely that the judgement establishing the violation by OLAF of defence rights is rendered before the national competent authorities start legal actions against the suspect.[141]

137 Case C-352/98 P, *Bergaderm and Goupil v. Commission*, ECLI:EU:C:2000:361, para 42.
138 Case T-309/03, *Camós Grau v.Commission*, ECLI:EU:T:2006:110; Case T-48/05, *Franchet et Byk v. Commission*, ECLI:EU:T:2008:257.
139 Case T- 193/04, *Tillack v. Commission*, ECLI:EU:T:2006:292, para 122.
140 Case T-309/03, *Camós Grau v.Commission*, para 129.
141 Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office*, *op cit*, p 220.

3. Rare examples of references for preliminary ruling

Besides actions for damages, the CJEU repeatedly emphasized that effective judicial protection is further guaranteed through questions for preliminary ruling.[142] Under Article 267 TFEU, individuals have the possibility to request national courts, which have no jurisdiction themselves to declare the act by which OLAF forwarded information to the national authorities invalid, to make a preliminary reference to the EU judge on validity.[143] This implies the existence of a national measure amenable to judicial review that has been taken on the basis of requests for assistance addressed or findings communicated by OLAF. Where the latter have influenced in a decisive manner the content of a subsequent challengeable act, a request for preliminary ruling would enable the CJEU to review the legality of the impugned act addressed by OLAF to the national judicial authorities and, where appropriate, to invalidate such an act.[144] According to the case law, national judges play a key role in the system of judicial protection given the non-mandatory character of OLAF legal acts vis-à-vis the competent national authorities. Because the action taken by the latter "*in response to the information forwarded to them by OLAF is within their sole and entire responsibility*", judicial protection against criminal proceedings initiated in the Member States "*must be ensured at national level with all the guarantees provided by national law, including those which follow from the fundamental rights*".[145]

The argument of judicial subsidiarity should however be weighed against the legal practice. To date, only two questions for preliminary ruling challenging the validity of OLAF acts have been referred to the CJEU. In the case *Thomson Sales Europe,*[146]the Court held that the preliminary reference was not necessary for the resolution of the dispute and, accordingly, dismissed the action on grounds of manifest inadmissibility. Only in the case *Afasia Knits Deutschland,*[147] the judges answered questions for preliminary ruling addressed by a national court. The applicant contested the validity of an OLAF report relating to the findings of an on-the-spot check conducted in Jamaica and providing the national authorities with evidence against him. The Court found that the OLAF acts were consistent with the international agreement allowing the Office to conduct investigations in third countries, whilst pointing out that the Jamaican competent authorities took part in the inspections and endorsed the results of the investigation carried out by OLAF.[148]

142 Art. 267 TFEU.
143 Case T- 193/04, *Tillack v. Commission*, para 80.
144 See by analogy the judicial review on the validity of acts adopted by the EU institutions on the basis of information forwarded by OLAF. Case T-309/03, *CamósGrau v. Commission*, § 55.
145 Case C-521/04 P(R), *Tillack v. Commission*, para 38.
146 Case C-348/11, *Thomson Sales Europe*, ECLI:EU:C:2012:169.
147 Case C-409/10, *Afasia Knits Deutschland*, ECLI:EU:C:2011:843.
148 *Ibid*, para 34.

These examples raise two sets of questions. On the one hand, the request for preliminary ruling must be necessary to enable the national court to give judgment.[149] However, in the vast majority of the cases, national law enforcement authorities are required to assist OLAF in conducting investigations[150] and take measures[151] that are not necessary and exclusively based on the information provided by the European body. For instance, judicial authorities may order further investigation before initiating criminal proceedings. Consequently, the applicant may encounter difficulties in demonstrating that the validity of a national measure subject to judicial review or the culpability of the accused is primarily dependent on the legality of an act taken by OLAF. On the other hand, the conditions governing the referral for a preliminary ruling may question the effectiveness of the remedy provided under Article 267 TFEU. Indeed, the framing of the question as well as the decision to refer a preliminary ruling to the CJEU rely exclusively on the national judge.[152] The experience shows that the proneness of domestic courts to introduce such an action varies considerably from one Member State to another.[153] In addition, Article 267 TFEU imposes only on the national courts against whose decisions there is no judicial remedy under national law to bring the matter before the CJEU.[154] In practice, the applicant might have the possibility to challenge the legality of OLAF acts many years after the initiation of criminal proceedings, provided that national authorities have taken actions on the basis of information forwarded by the Office. Admittedly, the interlocutory procedure between national and European judges may intervene during the preliminary stage of criminal proceedings. For instance, an investigating judge may refer a preliminary ruling to the CJEU where an individual contests the lawfulness of a national measure, which is justified by the findings of OLAF investigations.[155] Nonetheless, such a possibility will depend on the conditions and structure of judicial remedies available under domestic law.

B. The role of national courts

It follows from the above that the national judge is deemed to contribute significantly to the effective judicial protection of individual rights affected by OLAF investigations.[156] The scope of judicial review in issue concerns primarily two situations. The first scenario implies an investigative measures executed by the law enforcement au-

149 Art. 267(3) TFEU.
150 Art. 3(3),Reg 883/2013.
151 Art. 11(6),Reg 883/2013.
152 Case 44/65, *Singer*, ECLI:EU:C:1965:122; Case C-196/89, *Criminal Proceedings v. Nespoli and Crippa*, ECLI:EU:C:1990:355, para 23; Joint Cases C-376/05 and C-377/05, *Brünsteiner*, ECLI:EU:C:2006:753, para 28.
153 Fenger, Broberg, *op cit*, at 53 *et seq.*
154 Art. 267(4) TFEU.
155 Case 65/79, *Procureur de la République v. Chatain*, ECLI:EU:C:1980:108; Case 54/80, *Procureur de la République v Wilner*, ECLI:EU:C:1980:282.
156 Case T- 193/04, *Tillack v. Commission*, para 80.

thorities in order to assist the Anti-Fraud Office. In particular, where an undertaking opposes to give OLAF access to the premises or when there is a need to ensure the effectiveness of an on-the-spot check, the duty to assist the European investigators[157] may imply for the national authorities to take searches, seizures and sealing orders. Such measures shall be subject to prior judicial authorization, where provided for by national law.[158] The case law of the CJEU in competition matters gives guidance on the scope of judicial scrutiny carried out by national courts. The latter shall protect individual rights against arbitrary and disproportionate intervention of the enforcement authorities of the Member States.[159] Therefore, national judges have competence to review the proportionality between the impugned measure adopted by domestic authorities and the subject-matter of the investigation ordered by the Commission.[160] In addition, national courts shall ascertain the existence of reasonable grounds for suspecting an illicit activity and, therefore, justify the action undertaken at the national level. However, the judicial authority in charge of reviewing such acts cannot substitute its own assessment of the need for the investigations conducted by OLAF.[161] In other words, the national court is required to satisfy itself of the suspicions communicated by the Office and, where necessary, to ask the latter for additional information which is necessary to carry out judicial scrutiny.[162]

The second situation encompasses judicial supervision of acts adopted by OLAF, which are placed in the national case file. In this regard, it should be recalled that the reports forwarded by the Anti-fraud Office to the national judicial authority constitute evidence before domestic courts. Similarly, OLAF's agents have the possibility to appear at the hearing as a witnesses or experts. In those circumstances, what is the scope of judicial review undertaken by national courts where the defendant challenge the legality of the act taken by OLAF? Two judgement of the French *Cour de cassation* clearly illustrate the complexity of the issue.

The first case calls into question the role OLAF plays in national criminal proceedings.[163] After having been heard as a witness by the Court of Appeal, an OLAF official requested and obtained copy of the record of the hearing. Such documents were not communicated to the defendant. According to the Cassation Court, the situation amounted to a violation of the right to a fair trial guaranteed by article 6 ECHR. The judgement stressed that the disclosure of the record of the hearing to OLAF suggested that the European Officials, who recommended the case for criminal prosecution, had close ties with the national court, which sentenced the accused. Thus, the judicial scrutiny carried out by domestic courts may encompass the observance by OLAF of fundamental rights applicable to national criminal proceedings.

157 Art. 3(3) para 2,Reg 883/2013.
158 Art. 3(3) para 3,Reg 883/2013.
159 Case 46/87, *Hoechst v. Commission*, ECLI:EU:C:1989:337, para 19.
160 Case C-94/00, *Roquette Frère SA v. Commission*, ECLI:EU:C:2002:603, para 76.
161 Case 46/87, *Hoechst v. Commission*, para 35.
162 Case C-94/00, *Roquette Frère SA v. Commission*, para 54.
163 Cass. crim. (France), 27 January 2010, Appl. No 09-81693.

The second judgment takes a step further. The *Cour de cassation* held that national criminal tribunals have jurisdiction to review acts adopted by an independent body vested with powers of administrative investigation, such as OLAF, where it is established that such an act has been adopted in violation of fundamental rights.[164] The judgement stressed that the impugned act of the European body was part of the criminal case file the content of which is subject to review by national judiciary. Consequently, by denying its competence, the lower court did not guarantee the right to an effective judicial review for the accused. Whilst the decision of the French Court should be welcomed in the light of defence rights, the judgement raises questions as regards the sharing of competences between national and EU courts. According to the European case law, the CJEU has exclusive competence to declare invalid an act taken by an EU institution. Admittedly, a judicial action brought in front of a national court would systematically imply the referral of a preliminary ruling as to the validity of the impugned OLAF's act. National courts would simply draw the legal consequences that the illegality found by the EU judge has for the national criminal proceedings according to their domestic law (*e.g.* exclusionary rules). However, in conducting inspections in the territory of the Member States, OLAF shall act in compliance with the national rules and practices, as well as with the procedural guarantees provided for in Regulation 883/2013.[165] If the alleged violation constitutes a breach of domestic provisions, can OLAF's act be assimilated to an act taken by national administrative inspectors? Does this imply the competence of the national courts to review directly the legality of OLAF acts? When addressing this thorny issue, one can at least make a general observation: European enforcement systems in which supranational bodies apply or act in compliance with domestic law need to clarify the complementarity between national and European judicial remedies, so as to ensure that their articulation ultimately guarantees an effective protection of individual rights.

V. OLAF, forgotten actor of the European penal area

The effective protection of the Union's financial interests does not solely rely on the vertical cooperation between national and supranational authorities. It further encompasses the consistent coordination between the European actors involved in the fights against fraud.[166] In this respect, Regulation 883/2013 barely clarifies the role of OLAF. Besides the conduct of administrative investigations, the Office contributes to the design and the preparation of legislative instruments for fighting EU fraud.[167]In addition, it is in direct contact with the police and judicial authorities of the Member States to provide expertise and assistance.[168]The latter aspect displays similarities and overlap-

164 Cass. crim. (France), 9 December 2015, Appl. No 15-82300.
165 Art. 3(3) para 1,Reg 883/2013.
166 White, "EU anti-fraud enforcement : overcoming obstacles", *op cit*, at 83.
167 Art. 2(4), Commission Decision 1999/352.
168 Art. 2(6), Commission Decision 1999/352.

ping tasks assigned to the supranational actors involved in the fight against fraud.[169]In particular, the material scope of competence held by Europol and Eurojust covers swindling and fraud, corruption and counterfeiting, forgery of administrative documents and trafficking therein, as well as related offences such as money laundering.[170] Since May 2016, crime against the financial interests of the Union is explicitly included in the list of offences.[171]Consequently, OLAF, Eurojust and Europol are likely to support national authorities in investigating and prosecuting a same case.

As regards their respective tasks, OLAF is responsible for ensuring the collection and analysis of information related to illicit activities affecting the Union's budget.[172] In a similar way, Europol's activity mainly consists of collecting, storing, and processing intelligence Europe-wide in order to facilitate the exchange of information between the competent authorities of the Member States.[173] While the overlapping tasks may lead to duplication of efforts, the possibility for OLAF of sharing intelligence with Europol would be invaluable for the conduct of investigations.[174] As regards judicial cooperation, OLAF does not just provide the national prosecuting authorities with input necessary to initiate criminal proceedings.[175] When investigations are carried out at the national level, it may also ensure the coordination among the judicial authorities in cross-border cases by facilitating information exchange and mutual legal assistance.[176] Similar tasks are allocated to Eurojust.[177]Again, the overlapping competences of EU actors entail risks of confusion of tasks and duplication of efforts.

Surprisingly, the cooperation between OLAF, Eurojust and Europol has proved insufficient in practice.[178] The primary explanation lies in the fact that the three supranational bodies were created in a piecemeal fashion, while the first concern of policy

169 Covolo, "From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?",Eucrim (2/2012), 83 – 88.

170 Annex I of Regulation 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), JO 2016, L135/53; Art. 4 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime as modified by the Council Decision 2003/659/JHA and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, OJ 2002, L 063/1.

171 *Ibid.*

172 Art. 2(5) b,Commission Decision 1999/352.

173 Art. 4,Reg 2016/794 on Europol.

174 Stefanou, White, Xanthaki, *OLAF at the Crossroads Action against EU Fraud*, (Hart Publishing, 2011), at 166.

175 Indeed, OLAF communicates the findings of investigations and evidence collected to the national judicial authorities, particularly through the final case report. Art. 11 Regulation 883/2013.

176 Art. 8.3 Guidelines on Investigation Procedures for OLAF Staff.

177 Art. 3, Council Decision 2002/187/JHA setting up Eurojust.

178 C. Stefanou, S. White, H. Xanthaki, *OLAF at the Crossroads Action against EU Fraud*, *op cit*, 162 – 166.

makers was to improve cooperation among national authorities.[179]Moreover, it should be recalled the overlapping tasks allocated to Eurojust and OLAF led first to antagonism. No sooner was the former created as a provisional unit in 2001,[180]than the latter appointed a magistrate's unit with the purpose of liaising directly with national judicial authorities.[181]The competition between the two bodies may also be due to the fact that they embodied different models of European integration in the field of criminal law: OLAF as a communitarian and Eurojust as an intergovernmental response for coordinating prosecution Europe-wide.[182] We should not forget that the EPPO was first conceived on the basis of Article 280 TEC -the same legal basis used later for the establishment of OLAF – whilst Eurojust was originally perceived as rival to the EPPO.[183]

In the view of encouraging synergies among the EU actors, the need for cooperation between OLAF, Eurojust and Europol is now enshrined in Article 13 of Regulation 883/2013. The provision formally acknowledges the possibility for the three bodies to sign administrative agreements and working arrangements and thereby endorses a past practice.[184] In 2004, Europol and OLAF signed an administrative agreement with the primary objective of organizing the exchange of strategic information, intelligence, and technical information in areas of common interest.[185]Although not included in the 2004 agreement, the possibility for OLAF and Europol to exchange personal data is authorized by the current legal framework. Indeed, Article 13 of Regulation 883/2013 allows OLAF to enter working arrangements with Europol and Eurojust concerning *inter alia* exchange of personal data.[186]More recently, Regulation 2016/794 has laid down a set of rules enabling Eurojust and OLAF to have indirect access on the basis of a hit/no hit system to information, including personal data, processed and stored by Europol. [187]As for the cooperation between Eurojust and OLAF, the 2003 Memorandum of Understanding was replaced in 2008 by a Practical Agreement.[188] The two bodies shall inform each other on any case of common interest, coordinate the assistance activities they offer to national judicial authorities and exchange all necessary in-

179 House of Lords, European Union Committee, *Strengthening OLAF, the European Anti-Fraud Office*, 24th Report of Session 2003-04, Report with Evidence, 21 July 2004, at 33.
180 Council Decision of 14 December 2000 setting up a Provisional Judicial Cooperation Unit, OJ 2000, L 324/2.
181 OLAF Activity Report. 1rst June 2000 – 31 March 2001, at 37, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/rep_olaf_2001_en.pdf>(last visited July 2016).
182 C. Stefanou, S. White, H. Xanthaki, *OLAF at the Crossroads Action against EU Fraud*, *op cit*, 163.
183 Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001) 715 final, at 20.
184 Art. 13(1),Reg 883/2013.
185 Administrative agreement on cooperation between Europol and OLAF, 8 April 2004, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/administrative_arrangement_olaf_europol_en.pdf>.
186 Art. 13(1) para 1,Reg 883/2013.
187 Art. 21,Reg 2016/794.
188 Practical agreement on agreements of cooperation between Eurojust and OLAF, 24 September 2008, OJ 2008, C314/3.

formation, including case summaries. As regards the latter aspect, the agreement allows OLAF and Eurojust to exchange personal data within the limits of confidentiality and data protection rules.[189]

Admittedly, Regulation 883/2013 demonstrates awareness of the need for a coordinated action against EU fraud at the supranational level. Nonetheless, this objective could also be reached, as suggested in the past, through institutional reforms.[190] The latter might not simply consist in conferring prosecuting powers to a supranational actor. Institutional reforms would also offer the possibility to clarify the role of and the interplay between OLAF, Eurojust and Europol. Therefore, the more consistent the European criminal law area would be in conferring to each body powers and tasks, the more successful their cooperation would be. The assumption may seem obvious. However, the proposal for a Regulation establishing the EPPO presented by the Commission[191]paid very little attention to interagency cooperation. The Commission essentially foresaw that the competence of the European Prosecutor for investigating and prosecuting offences against the EU financial interests would considerably reduce the activity of OLAF.[192]Likewise, the subsequent proposal presented under the Greek Presidency confined itself to general rules that aim to ensure the coordination between OLAF and the European Prosecutor's Office. "*Close relationship*" would entail better use of the means available, exclusion of parallel investigations and exchange of information.[193]In particular, OLAF would refrain to investigate a case where the alleged fraud constitutes a criminal offence and transfer the case to the EPPO.[194] Conversely, the European Prosecutor would have the possibility to request the assistance or refer the case to OLAF where administrative investigations are most appropriate in a specific case.[195]

189 On the exchange of personal data between OLAF, Europol and Eurojust, White, "EU anti-fraud enforcement: overcoming obstacles", *op cit*, 82 – 83.

190 Rapport d'information No. 1533 déposépar la délégation de l'AssembléeNationale pour l'Unioneuropéenne sur l'OLAF, 8 April 2004, COM(2004) 103 final/E 2517, COM (2004) 104 final/E 2518, 42 – 43; House of Lords, European Union Committee, "Strengthening OLAF, the European Anti-fraud Office", 24th Report of Session 2003-04, Report with Evidence, 21 July 2004.

191 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final.

192 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust", COM(2013)532 final, p. 9.

193 Art. 57a Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, Draft Regulation, Presidency of the Council, 31 January 2017, Doc No 5766/17. Hereinafter Draft Proposal for a Regulation on the establishment of the European Public Prosecutor's Office.

194 Art. 57 a, para 2 Draft Proposal for a Regulation on the establishment of the European Public Prosecutor's Office.

195 Art. 57 a, para 3 and 4 Draft Proposal for a Regulation on the establishment of the European Public Prosecutor's Office.

Is it however sufficient to plainly affirm a principle of close cooperation between EU actors? Would the establishment of a EPPO rather require a careful clarification of the role and legal interactions with the existing supranational bodies of the European penal area? As regards OLAF, the question is not solely limited to the risk of parallel investigations. Admittedly, the political debate seems to exclude a merger between the Anti-Fraud Office and Europol,[196] as well as the possibility for OLAF to become an investigative unit with criminal enforcement powers under the lead of the EPPO.[197] Nonetheless, it should be recalled that according to Article 86 TFEU, the EPPO shall be established by enhance cooperation in case of lack of unanimity within the Council.[198]Therefore, OLAF will continue to exert its full competences vis-à-vis the non-participating Member States. Such a situation prompts two observations. First, a transnational case of fraud might involve the EPPO, judicial authorities Member States that do not participate in the establishment of a European Prosecutor, as well as OLAF. This calls for a legal clarification of the cooperation within the triangle of national and European actors. Second, depending on the Member States involved in a given case, administrative inspectors would still play an important role in investigating fraud detrimental to the EU budget. Thus, the conferral of prosecuting powers to the EU does not only face divergences among the national justice systems. It indirectly touches upon the interaction between administrative and criminal law enforcement, especially as regards admissibility of evidence.[199]The lack of a common definition of administrative investigations, the plethora of national and European sectorial regulations, the different national models opting either for a strict separation or admitting joint participation of administrative and criminal law enforcement authorities,[200]the development of European punitive administrative systems… all these factors bring the interplay between administrative and criminal law among the ongoing challenges of European integration.

196 Rapport d'information No. 1533 déposépar la délégation de l'Assembléenationale pour l'Unioneuropéenne sur l'OLAF, 8 April 2004, COM(2004) 103 final/E 2517, COM (2004) 104 final/E 2518, 42 – 43; House of Lords, European Union Committee, "Strengthening OLAF, the European Anti-fraud Office", 24th Report of Session 2003-04, Report with Evidence, 21 July 2004.

197 Kuhl, "The future of the European Union's Financial Interests, Financial Criminal Law Investigations under the Lead of a European Public Prosecutor's Office", Eucrim (3-4/2008), 186 – 192; Vervaele, "The shaping and reshaping of Eurojust and OLAF. Investigative judicial powers in the European Judicial Area", Eucrim (3-4/2008), 180 – 186.

198 Art. 86(1) TFEU.

199 J. Vervaele, "Compétences communautaires normatives et opérationnelles en matière d'enquête administrative et judiciaire, recueil des preuves et utilisation des preuves dans le domaine des intérêts financiers de l'Union européenne", 3 *Revue de science criminelle et de droit pénal comparé* (1999), 473 – 496.

200 Jansen, Langbroek (eds), *Defense rights during administrative investigations*, (Intersentia, 2007), at 55 *et seq.*

VI. Conclusions

Regulation 883/2013 undoubtedly improves the legal framework of OLAF investigations by enhancing the consistency of procedures and introducing a set of procedural guarantees. However, the new instrument leaves room for improvement, in particular as regards the definition and extent of investigative powers assigned to OLAF. Surprisingly, little attention has been paid to alternatives that other EU enforcement models offer. In particular, European anti-trust proceedings illustrate the possibility for strengthening administrative powers of investigation. For instance, granting OLAF uniform investigative prerogatives, which might include legally binding decisions against persons, may increase efficiency and besides push for a clarified cooperation with the national competent authorities. Admittedly, such an initiative is a matter of political choices. Nonetheless, the example of OLAF reflects the challenges that not only the fight against EU fraud but also the whole European penal area face. The success of OLAF investigations depends on a highly complex cooperation and coordination of national, European and international actors. Successful strategies should therefore pay increasing attention to the interplay within the network of competent authorities as well as the interaction between national and European legal systems. This concerns both the coherent construction of the European penal area and the effective protection of individual rights. Time will tell whether the EU will respond to those challenges.