

**COMBATING FRAUD AFFECTING THE EUROPEAN UNION BUDGET
THE ROLE OF THE EUROPEAN ANTI-FRAUD OFFICE
(OLAF)**

Interview with Giovanni Kessler*

edited by

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1. The protection of the EU financial interests and OLAF's powers

OLAF is mandated to investigate fraud and other irregularities affecting EU revenue and expenditure. With respect to the latter, the Office has the power to investigate on EU direct contributions (such as EU funding for research, which are managed centrally by the Commission), funds in shared management between the Commission and the Member States (especially agricultural and structural funds), and aid to non-EU Countries. As to the revenue, OLAF's powers are traditionally more limited, mainly focusing on agricultural taxes and customs duties. In spite of the impact of VAT fraud on EU financial interests (which was lately recognised by the EU Court of Justice in the Taricco judgment), OLAF does not exercise its investigative powers in the area of VAT.

a) In your experience as Director General of OLAF, what is your assessment on the spread of fraud and corruption across Europe? And on OLAF's capability to fight them?

Fraud and corruption certainly exist in Europe, albeit to varying degrees. There are countries where these illegal activities do appear to be more prevalent, although we have seen a significant improvement in the capacity of national authorities to identify and to prosecute fraud with EU funds.

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At OLAF, we are committed to investigating fraud which affects the financial interests of the European Union as well as serious misconduct of EU staff members, and we believe we have been very successful in fulfilling our mandate. For example, just four years after we reorganised the Office to ensure increased efficiency and optimal use of resources, our results are quite impressive - OLAF has concluded 93% more investigations than before its reorganisation, and delivered 83% more recommendations. The more efficient processing of incoming information of potential investigative interest has also led to OLAF opening of 86% more investigations than before 2012. So do we have the capability to fight fraud and corruption? Of course we do! But we could certainly do more.

Allow me to explain. Our investigations uncover fraudulent activities of persons and criminal networks operating in and outside the 28 Member States of the European Union. What we have increasingly been seeing, however, is that our cases have a clear transnational element. Fraud and fraudsters just do not stop at national borders. When it comes to judicial cooperation, Europe is still fragmented along national lines. This poses a significant challenge for our investigators, who have to function within the constraints of antiquated national systems.

This is why I am strongly in favour of setting up a truly European Public Prosecutor's Office. With the help of the EPPO, Member States should work as one to detect and prosecute crimes affecting the EU's budget. A European Public Prosecutor is the only proportionate reaction to transnational crimes.

b) What is, or could be, the impact of the *Taricco* judgment on OLAF's investigative powers in the area of VAT?

The Court of Justice of the European Union clarified that VAT is part of the EU financial interests, which OLAF is mandated to protect. The judgment has not addressed OLAF's investigative powers, these powers apply to VAT fraud to the same extent than to any other fraud affecting the EU financial interest.. The *Taricco* judgment confirms and consolidates the previous case law further clarifying that the PIF Convention, which harmonizes substantial and procedural criminal law, also covers VAT fraud. However, the Convention does not regulate OLAF's work.

c) The very issue of the inclusion of VAT fraud has long been an obstacle in the adoption of the so-called PIF Directive. What consequences could arise for OLAF in case of exclusion of VAT fraud from the scope of the Directive?

In principle, the PIF Directive will have no direct bearing on the tasks and competences of OLAF, as OLAF's competence for the conduct of investigations is derived from Regulation no. 883/2013 and from the Commission Decision establishing OLAF. OLAF is thus mandated to conduct investigations into fraud, corruption and any other illegal activity affecting the financial interests of the Union. As repeatedly stated by the Court of Justice¹, VAT, as an own resource of the European Union, falls within the scope of the financial interests of the European Union and of Art. 325 TFEU. In the *Taricco* judgement, the Court further clarified that VAT falls within the scope of Articles 2 (1) of the PIF Convention. It is therefore part of the interests which OLAF is already mandated to protect under Articles 1, 2 (1) of Regulation no. 883/2013. However, as the European Court of Auditors has noted in its Special Report on Tackling VAT Fraud (no. 24/2015), OLAF lacks a clear secondary leg-

¹ Cf. Judgments in Case C-539/09 *Commission v Germany*, paragraph 72; Case C-617/10 *Akerberg Fransson*, paragraphs 25, 26; Case C-105/14 *Taricco*, paragraph 39.

al base and investigative tools to effectively investigate VAT fraud. In particular, OLAF has no access to Eurofisc or VIES data and no access to bank account information, data which would be vital for OLAF to be able to investigate VAT fraud effectively and efficiently. Therefore, in order for OLAF to be capable to tackle VAT fraud as mandated by Art. 325 TFEU, its powers should be strengthened.

A provisional agreement was reached between the co-legislators on the PIF directive at the Justice and Home Affairs Council, whereby VAT fraud cases are included in the scope of the directive when they cause a damage of at least EUR 10 Million. Formal adoption of the directive is expected to take place in the course of 2017. An important consequence of VAT inclusion in the scope of the PIF directive is that the EPPO will have the competence and the tools to carry out criminal investigations into VAT fraud.

2. Structure, organisation, and independence of the Office

OLAF is headed by a Director General, appointed by the European Commission for a non renewable period of seven years. Furthermore, whilst being within the administrative structure of the Commission, OLAF is conceived as a fully independent body. In fact, it exercises its powers of investigation in complete independence from institutions, bodies, offices and agencies of the Union, as well as with respect to the Member States. To this end, the Office's activity is only subject to the monitoring of a Supervisory Committee. However, the latter may not interfere with the conduct of the investigations.

- a) How is the Office structured and how are the competences allocated among the staff members? What are the powers and responsibilities of the Director General? What is the professional background of OLAF investigators?**

OLAF, which has around 420 staff members, is split into four Directorates - two of these Directorates deal exclusively with investigations. Each Investigation Directorate is divided into specialised units, dealing with specific areas, such as structural or agricultural funds or customs and trade fraud, or with misconduct of EU staff members. In total, OLAF has nine investigative units. The third Directorate manages Investigation Support, such a digital forensics or legal advice, while the last fourth Directorate is responsible for Anti-Fraud Policy.

- b) What are the tools that best enable the Office to work in full independence?**

The independence of the Office's investigative function is supported by a clear and unambiguous legal framework, and a commitment of its staff to upholding highest ethical standards. The OLAF Director-General can bring action against the Commission before the Court of Justice if he believes a measure taken by the Commission calls his independence into question. By contrast, OLAF'S Policy work, which is concentrated in the Policy Directorate, is working like other European Commission Services under the guidance of the Commissioner in charge (currently Günter Oettinger).

3. The investigations conducted by OLAF

According to Regulation no. 883/2013, OLAF only may open an investigation in the presence of a "sufficient suspicion" that there has been fraud, corruption or other illegal activity affecting the financial interests of the Union. In particular, the Office has the power to investigate both on EU officials and agents (internal investigations), and on the territory of the Member States (external investigations). In

external investigations, OLAF may undertake inspections and controls of premises (on-the-spot checks) and examinations of witnesses and persons under investigation (interviews). However, such investigative activity is of a merely administrative nature, thus being limited by the lack of coercive powers. The assistance and cooperation of national authorities are therefore critical for the conduction of effective investigations and the adoption of disciplinary, administrative, financial, or judicial measures in case irregularities are detected.

a) What are the criteria used by the Office to open an investigation? How is the "sufficient suspicion" assessed?

The criteria used by the office to open an investigation are specified in Art. 5 of Regulation no. 883/2013. The opening of an investigation requires that there is sufficient suspicion of fraud, corruption or any other illegal activity affecting the financial interests of the EU.

The decision whether to open an investigation must also take the following principles into account:

- Proportionality. The administrative or budgetary burden of conducting an investigation should not be out of proportion to the benefit expected from the results of the investigation;
- Efficient use of the Office's resources. Account must be taken of the workload of the investigative unit that would be responsible to conduct the investigation, whether OLAF staff possesses the required expertise, whether relevant information has already been identified/gathered, and the time elapsed between the wrongdoing and the arrival of the information at OLAF;
- Subsidiarity. The criteria to be considered include whether OLAF has sole competence to investigate the matter, or whether OLAF is best placed to investigate when it does not have such sole competence; whether use of the full range of OLAF's investigative powers is needed; independence (or lack thereof) of the other entity that has power to investigate the matter; whether an IBOA or MS authority has requested OLAF to investigate the matter; the added value that an OLAF investigation would provide; and
- The investigation policy priorities of the Office. These are adopted by the Director General each year, within the context of the annual management plan. They set out the policy criteria for the opening of investigations and coordination cases.

In order to assess "sufficient suspicion", an analysis is made of the information received from the source and any further information gathered by means of the selection activities carried out. The analysis focuses on the following criteria:

- Reliability of the source. This assessment must be made based on specific and objective reasoning. Criteria to be considered include whether the source is anonymous, confirmation of the identity of the source, cooperativeness of the source, whether the source has direct knowledge of the information, accuracy of the facts provided, motivation, and prior history with OLAF;
- Credibility of the allegations. Allegations are deemed credible if they refer to real and specific instances of fraud, and if corroborated by elements established during the course of the selection activities carried out (precision and timeliness of the information, corroborating

documentation, whether the allegations are under investigation by other financing organizations, whether the irregularities were discovered during an audit, etc.);

- Sufficiency of the information. The following elements are considered: likelihood of gathering probative information during the investigation, substantiality of the information gathered during the selection, gravity of the alleged infringement, corroboration by multiple sources, and by investigation of a co-financing entity.

b) What are the limitations entailed by the administrative nature of OLAF investigations?

I do not think that there are limitations, which are necessarily due to the administrative nature of OLAF's investigations. Rather, OLAF is lacking some important tools that would help it better deal with the fraud patterns it is facing, particularly when it comes to transnational cases. For example, OLAF investigators have no access to financial flows and bank accounts, they cannot compel persons to testify and sometimes cannot enter premises without prior authorization.

The current OLAF Regulation also does not foresee the obligation of European Union institutions or services to report on the actions taken following OLAF recommendations addressed as a result of external investigations, nor does it impose any specific obligation for EU staff to cooperate with the Office in external investigations.

A particularly important issue relates to the evidentiary value of our final case reports, which is not uniform across Member States. By law, our reports have the same evidentiary value of reports of national administrative authorities (Article 11(2) of Regulation no. 883/2013). This has two consequences. Firstly, OLAF reports can only be used in those Member States where such national administrative reports are admissible in criminal proceedings. Secondly, some Member States, interpret Article 11(2) of Regulation no. 883/2013 in a narrow way, not considering OLAF reports as equivalent evidence to some national administrative reports in trial. Therefore, after receiving the OLAF final report, some Member State prosecutors carry out all investigative activities again in order to acquire admissible evidence.

c) How close and effective is the cooperation between the Office and the national authorities in the context of on-the-spot checks and interviews?

The operational efficiency in particular in the area of the external investigations of the Office depends greatly on cooperation with the competent authorities of the Member States. In this framework OLAF is working together with them in a constructive and positive way. Of course, OLAF staff acts in compliance with the rules and practices of the Member States and with the procedural guaranties provided for in the EU legislation.

National authorities are responsible for providing the assistance required for an effective on-the-spot check, in particular when the application of national enforcement powers is necessary. The effectiveness of the cooperation has further been improved with the designation of the anti-fraud coordination services (AFCOS), as provided by Article 3&4 of Regulation no. 883/2013.

d) To what extent are the evidence gathered during the investigations and OLAF's final reports enclosed in the criminal proceedings?

The admissibility of the evidence gathered by the Office, which is normally attached to the investigation reports, is enshrined in Article 11 (2) of Regulation no. 883/2013. According to this legal provision, reports drawn up by the Office on completion of an investigation "*...shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors*". It should be noted that such reports have to take into account the national law of the Member State concerned.

4. Coordinating Member States' investigations. The coordination cases

Besides carrying out its own investigations, OLAF also provides assistance to the Member States in organising close and regular cooperation between national authorities, and coordinating their action with a view to protecting the financial interests of the Union against fraud. More specifically, in case of cross-border crimes involving several Member States (so-called coordination cases), OLAF does not directly carry out investigative activity, but facilitates the exchange of information and evidence between the national authorities, by so overcoming the traditional system of mutual legal assistance based on letters rogatory. Also, in order to facilitate the exchange of information, OLAF may sign Administrative Cooperation Agreements (so called ACA) with local authorities.

a) What are the conditions to open a coordination case?

OLAF generally opens coordination cases when national authorities are either considered to be better placed to handle the particular matter or when investigations are already ongoing at national level.

b) How often does OLAF enter into ACAs? How effective are such agreements?

Administrative cooperation arrangements (ACAs) are not binding agreements, but administrative instruments of a technical and operational nature which establish the practical modalities for investigative cooperation with other authorities. OLAF enters into ACAs whenever there is a need identified in the context of investigative cooperation, be it before cooperation starts (for instance to clarify the practicalities of the future cooperation), during an investigation (for instance when it appears that an ACA would facilitate cooperation) or even after an investigation (for instance to strengthen and cement the relationship established on the occasion of the investigation). Occasionally, ACAs are concluded in the absence of actual or planned investigative cooperation, with a view to strengthening the ties with an authority.

The effectiveness of ACAs is therefore a factor of the quality of the cooperation with the partner authority. Overall, they have proved a useful tool to support OLAF's investigations. This is particularly true in case of investigations in third countries or with international organisations. This is because OLAF's powers as laid down in EU law (e.g., the on-the-spot check Regulation no. 2185/96) do not apply outside of the EU territory and therefore OLAF relies more heavily on the cooperation of local authorities or international organisations.

c) Does OLAF information exchange system actually result in the overcome of the system of letters rogatory? In what respect is it more efficient from the procedural perspective?

OLAF can definitely facilitate information exchange between its operational partners in the context of its coordination activities. However, the system of letters rogatory among national authorities remains in place.

d) According to your experience, are there issues of admissibility in the national criminal proceedings as to evidence gathered by OLAF in the context of coordination cases? If any, how are they addressed?

In coordination cases, OLAF does not carry out investigative activities. OLAF's role is to contribute to investigations being carried out by other national authorities by facilitating the collection and exchange of information and contacts, whilst the main investigative input is provided by other authorities. Strictly speaking, the evidence is not, therefore, gathered by OLAF investigators, but by the competent national authorities in accordance with national procedural rules. In case issues of admissibility of the evidence gathered are raised before the national judicial authorities, who are subsequently called to review the different investigative steps undertaken, they concern compliance with domestic law. OLAF is not, in principle, involved in such matters.

5. Procedural guarantees pending investigations

In spite of its administrative nature, OLAF investigative activity shows some typical characteristics of criminal investigations. As explained above, OLAF investigations often lead to criminal proceedings initiated by national authorities, where information collected by the Office may be used as evidence. For this very reason, Regulation no. 883/2013 provides the application of a number procedural safeguards in favour of the person concerned by the investigations, such as the presumption of innocence and the right against self-incrimination.

a) After the 2013 reform, and in view of a potential amendment of Regulation no. 883/2013, what may be further improved in terms of procedural guarantees?

In 2013, after many years of intense negotiations, Regulation no. 883/2013 on OLAF investigations entered into force. It brought important changes to OLAF's investigative procedures, in particular by strengthening the procedural guarantees of persons involved in OLAF investigations. In particular, Art. 9 of the Regulation provides a set of rights and guarantees for all persons concerned by OLAF investigations. These include the respect for the presumption of innocence, the right to avoid self-incrimination, the right to be assisted by a person of his/her choice, to obtain a copy of his/her interview records, and to be given an opportunity to comment on facts concerning him/her before the conclusions of the investigation are drawn up.

As matters stand, I believe that the protection offered is sufficient. In fact, persons concerned enjoy full procedural rights in the stages that may follow an OLAF investigation, either before EU or national authorities.

In addition, OLAF has put in place two measures that further ensure that the rights of the persons concerned are duly taken into consideration and respected in full. The first one stems directly from Art. 17 paragraph 7 of the Regulation and concerns the establishment of a control procedure that would perform a legality check in respect of fundamental rights and procedural guarantees. This extremely important task is performed by OLAF's Investigation Selection and Review Unit. The second one concerns the establishment of a formal procedure, which allows any person affected by an OLAF investigation to address a complaint to the Director-General of OLAF about the violation

of their procedural guarantees.

I consider therefore that the present framework is satisfactory. This is corroborated by the low number of complaints, both internal and external, we receive regarding procedural guarantees.

In a broader context, OLAF conducts its investigative activity in the respect of the general EU legislation, such as the Regulation for protection of personal data no. 45/2001. As you know the European Commission has just adopted on 10 January 2017 a proposal for a new regulation for the protection of personal data by the EU institutions and bodies. The new text will further enhance our commitment to respect the right of the persons in the digital era.

b) What are the complaints instruments provided in favour of the person affected by OLAF investigations?

Any person affected by an OLAF investigation may address a complaint either directly to OLAF or to a number of external bodies.

Complaints addressed to OLAF are handled by its Legal Advice Unit. The Legal Advice Unit has full access to all relevant information, conducts a review of the complaint and reports on its findings. In case the review has identified a failure by OLAF to respect procedural guarantees in the course of an investigation, I take appropriate action. The complainant will in principle receive a reply within two months of the registration date of the complaint.

In addition, persons affected by OLAF investigations may submit a complaint to external bodies, such as the European Ombudsman and to the European Data Protection Supervisor (EDPS)

The European Ombudsman investigates complaints about maladministration in EU institutions, bodies, offices, and agencies. The Ombudsman may find maladministration if OLAF fails to respect fundamental rights, legal rules or principles, or the principles of good administration. Complaints lodged with the EDPS, the EU authority responsible for the protection of personal data and privacy, mainly concern alleged infringements of rights relating to data protection, as provided by Regulation no. 45/2001.

In recent years, both the total number of inquiries conducted by the Ombudsman in relation to OLAF investigative activities and the complaint submitted to the EDPS remained low, in particular given the hundreds of investigation measures carried out each year by the Office.

Finally, persons affected by an OLAF investigation can also raise issues related to the legality of the different investigative measure before the European Courts either in the context of litigation against measures taken by the Commission or other institutions, based on OLAF recommendations, such as financial recovery or disciplinary procedures, or in the context of an action for damages caused by OLAF. In this respect, it is important to highlight that an individual cannot bring an action directly against an investigative measure or a decision taken by OLAF, since, according to established case-law, such measure/decision does not produce binding legal effects of such a kind as to affect the applicant's interests by bringing about a distinct change in his position.

Detailed information about the different complaint-mechanisms is published on OLAF's website. In addition, information about the handling of complaints in a given year is also included in OLAF annual reports.

Without prejudice to any judicial remedy, every person affected by an OLAF investigation may lodge a complaint with the European Data Protection Supervisor if he or she considers that his or her rights to protection of personal data have been infringed by OLAF.

c) What role should the defence counsel play in this context?

Save for the proceedings before the Courts, persons affected by an OLAF investigation are not required, at any stage of the investigation, or before the different complaint-mechanisms, to be represented by a lawyer. It is nevertheless a right of the persons concerned to be assisted by a person of their choice. A lawyer's role is to ensure that the rights of his client are duly observed. However, as I have already stressed, all persons concerned enjoy the same rights, may have recourse to the same complaint-mechanisms and will enjoy the same treatment regardless of their being represented by a lawyer.

6. OLAF and the European Public Prosecutor's Office (EPPO)

In 2013 the European Commission submitted a proposal for a Regulation on the establishment of a European Public Prosecutor (so-called EPPO) based on Art. 86 TFEU. Under this proposal, the EPPO would be competent to investigate, prosecute and bring to justice the perpetrators of crimes against the Union's financial interests. However, in the course of the negotiations within the EU Council the text of the proposal has largely moved away from the initial project, and the Member States have not been able to achieve unanimity on the establishment of the EPPO. The Justice and Home Affairs Council of 8-9 December 2016 has thus taken note of Members States different positions and concluded that these give "a clear indication on the likely procedural way forward to ensure a positive conclusion". In other words, it appears that the establishment of the European Prosecutor will be carried out under the procedure of enhanced cooperation, pursuant to art. 86 TFEU.

a) Why is it necessary to establish the European Public Prosecutor? What would be the practical difficulties in its functioning?

Europe judicial system is still very much fragmented along national borders. This is a problem we are trying to address at European level. The proposal for setting up a European Public Prosecutor's Office aims to create a true European space of justice, where the Member States are working as one to detect and prosecute crimes affecting the EU's budget. The concept of a European Public Prosecutor, operating as a single office across the Union, is intended to address shortcomings in the current enforcement system as regards cooperation of prosecution services and other authorities and the ability to investigate across borders. A European Public Prosecutor is therefore, in our view, the necessary and proportionate reaction to transnational crimes.

b) What would be the future of OLAF in this perspective?

OLAF will maintain its current mandate, and the exercise of this mandate will need to be adapted to the existence of the EPPO and the relationship of cooperation and complementarity between the two bodies.

Certain areas of OLAF's current activity will not be affected by the EPPO. These include non-fraudulent irregularities affecting the EU's financial interests, and serious misconduct or crimes committed by EU staff without a financial impact, as well as our work coordinating investigations carried out by national authorities.

OLAF and the EPPO will both be able to investigate EU fraud or other crimes affecting the financial interests of the EU. To avoid duplication, if OLAF would have suspicion of such criminal offences, it will be obliged to report this to the European Public Prosecutor's Office at the earliest possible stage. OLAF will not start investigations in cases where there is an EPPO investigation. OLAF will be able to provide assistance to the European Public Prosecutor's Office on request, as it already

does today to national prosecutors. This change will facilitate a speedier investigation process and will help to avoid duplications of administrative and criminal investigations into the same facts. In this way, the chances of a successful prosecution will be increased.

In cases where the EPPO does not act on a given case under its competence, because of restrictions to the exercise of its competence or as a result of its shared competence with Member States, OLAF will continue conducting its investigations as today. Equally, OLAF will retain its full mandate in the Member States not participating in the EPPO.

c) What issues would the Union face should the enhanced cooperation be activated?

Once an EPPO is established, the Union needs mechanisms to protect its financial interests in the non-participating Member States, and to deal with cross-border cases involving participating and non-participating Member States in the EPPO. We must avoid at all costs that the EPPO leads to decreased protection in such situations.

In such circumstances, OLAF can play a prominent role to ensure an equivalent level of protection in EPPO participating and non-participating Member State. It will continue to conduct its investigations in non-participating Member States, and sending judicial recommendations to the Member States where PIF offences are detected, as well as in the participating Member States in situations where the EPPO does not act. We should not forget in this regard that the Council has foreseen a shared competence between the EPPO and the Member States, and that as a result many PIF cases will remain with the national prosecution services. The EPPO, for instance, may decide not to open an investigation in cases involving both participating and non-participating Member States, leaving this to the Member States themselves. In such situations, OLAF would be the only body capable of conducting an investigation involving all Member States concerned.