1. Introduction

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1.1 Introduction – Goals and set-up of this project

The *Office de Lutte Anti-Fraude* (OLAF) is a key player in the EU's anti-fraud policy. It is the authority entrusted with the task of carrying out administrative investigations to combat illegal activity which adversely affects the EU's financial interests, as well as investigating serious misconduct by EU officials, other staff and/or members of EU institutions. OLAF has both operational as well as non-operational tasks. This project focuses on OLAF's operational framework with respect to investigative actions. It addresses the question of whether there is a need to recalibrate and improve the OLAF legislative framework for the gathering of information and evidence related to suspicions of irregularities or fraud affecting the EU's financial interests. It does so by comparing the OLAF framework with other bodies of EU law with similar law enforcement tasks. Such a comparison will enable an analysis to be made of the similarities and differences in the respective legislative frameworks of these bodies, also as far as the interaction with their national partners is concerned.[1]

The problematic position of OLAF in the area of the gathering of information is well documented. Shortly after the Commission published a communication thereon,[2] and in parallel to the introduction of the new Regulation 883/2013, Ecorys also published a study on how to strengthen the framework for the protection of the EU's financial interests.[3] Those studies, together with a number of scientific publications,[4] identified a number of problems.

First of all, it appears that there is no coherent framework for cooperation between OLAF and its national partners, also because the exact tasks and competences of the national authorities differ per Member State.[5] OLAF operates on the basis of a patchwork of powers, depending on the various national jurisdictions, but also on the basis of the different PIF policy areas (VAT,

1 See also Kuhl in K. Ligeti & V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (2017), Oxford: Hart.

2 Communication 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) 293.

3 Ecorys, *Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests, JUST/A4/2011/EVAL/01* (2013), Brussels.

4 Cf. J.F.H. Inghelram, *Legal and institutional aspects of the European Anti-Fraud Office (OLAF)* (2011), Groningen: Europa Law Publishers; Katalin Ligeti and Michele Simonato, 'Multidisciplinary Investigations into Offences Against the Financial Interests of the EU,' in F. Galli & A. Weyembergh (eds.), *Editions de l'Université de Bruxelles 2014*; M. Luchtman & M. Wasmeier, in M. Scholten & M. Luchtman, *Law Enforcement by EU Authorities: Political and judicial accountability in shared enforcement* (2017), Cheltenham: Edward Elgar Publishing [forthcoming].

5 Ecorys 2013, p. 19-20; Ligeti & Simonato 2014.

customs duties; agriculture, structural funds, human aid, etc.).[6] This seriously hampers OLAF in the performance of its operational mandate. The scope of its powers are unclear and fragmented across territorial and functional lines; instruments for enforcing cooperation are limited or even absent, particularly in the context of external investigations.

In addition to this, the standards for protecting fundamental rights are different between the administrative and judicial proceedings in which OLAF is often involved. Here, too, we see differentiations per Member State. OLAF's position is particularly complicated, because it operates at the interface of criminal and administrative law.[7] In fact, many provisions in its institutional framework have been designed to facilitate the smooth interaction between these fields of law. The practical results are, however, very different. The Ecorys study notes, for instance, that '[d]efence rights in administrative proceedings are less specified than in criminal proceedings and the competent agencies are given more flexibility to preserve these rights. The small amount of attention paid to procedural guarantees in administrative investigations is characteristic not only for the national, but also for the supranational level. Moreover, these unclear rules on procedural safeguards in administrative investigations may affect the use of information and the admissibility of evidence gathered by the authorities involved in a fraud case.'[8]

Although OLAF is a vital part of the EU's strategy to protect its financial interests, the aforementioned sources reveal that a level playing field for conducting investigations is lacking. This situation pertains to the investigative powers and the way that they can be enforced in cases of non-cooperation, but also to the applicable safeguards and remedies for individuals. OLAF, therefore, while entrusted with the task of conducting administrative investigations at the European level, operates on the basis of a framework that often refers back to national law when it comes to its investigative powers and safeguards. That inherently means that in order to assess the full scope and competences of OLAF's investigatory powers and procedural safeguards, an analysis of the interaction between EU and national law is essential.

1.2 This project's goals and comparative approach

1.2.1 Goals

This project was born out of the idea of comparing OLAF's legal framework with other authorities which also possess such a European mandate and to see if they face similar problems and, if so, how they deal with them. The number of such European actors with enforcement tasks is increasing as we speak.[9] The comparison in this project includes the area of financial services (banking law, and more particularly cooperation within the Single Supervisory Mechanism/SSM: ECB, and the supervision of credit rating agencies/trade repositories: ESMA), as well as EU competition law (European Commission/DG Comp). These authorities are comparable to OLAF for the following reasons:

6 Ecorys 2013.

7 Luchtman & Wasmeier 2017.

8 Ecorys 2013, p. 36; see also O.J.D.M.L. Jansen & P.M. Langbroek (eds.), *Defence rights during administrative investigations. A comparative study into defence rights during administrative investigations against EU fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland* (2007), Antwerp: Intersentia; S. Gleβ and H.E. Zeitler, 'Fair Trial Rights and the European Community's Fight Against Fraud', (2001) *European Law Review,* no. 2, pp. 219-237.

9 For a comprehensive analysis, see M. Scholten and M. Luchtman, *Law Enforcement by EU Authorities: Political and Judicial Accountability in Shared Enforcement* (2017), Cheltenham: EE [forthcoming].

1) they are administrative authorities that are attributed tasks in relation to the identification and investigation of infringements of EU law and, therefore, have clear ties to punitive law enforcement (administrative and/or criminal law);
2) these authorities are capable of operating all over the European Union, yet
3) they operate on the basis of a framework that comprises both the EU and the national legal orders, both with respect to the investigative powers and the procedural safeguards.

Of course, there are also differences between these authorities and OLAF. Two differences must be mentioned right from the beginning. First of all, ECB and ESMA have quite a different relationship with the actors under their investigation than DG Comp and certainly OLAF. As financial supervisory authorities, their core task is the supervision of branches of the financial markets. The monitoring of the operations of the supervised entities is a day-to-day task. As a consequence, the entities they supervise are well known to them (because they need ECB or ESMA authorizations to become active) and constantly provide information to these authorities' 'going concern'. This has two implications: that the information flows freely from the supervised entity to the EU regulator, and that the entities have a direct interest in cooperation (because if they do not, they will face serious consequences). The situation is different for DG Comp and certainly OLAF. The latter has no tasks in the area of market supervision.[10] The (legal) persons under investigation are not necessarily known. Moreover, there is generally no incentive to cooperate. Rather, the contrary appears to be true.

A second difference could be that OLAF operates in a field that is, by definition, closely related to criminal justice in a strict sense (fraud and corruption by both legal and natural persons). That implies that the office – though operating under an administrative law signature – constantly needs to keep an eye on the interaction with the criminal justice systems of the Member States. That, too, may be a reason to cast doubt on the 'comparability' of the authorities in this project.

Although these factors certainly need to be taken into account, they do not make a comparison less suitable or valuable. The fact remains, after all, that ECB, ESMA and DG Comp are also entrusted with tasks in the sphere of law enforcement, a concept which is defined for the purposes of this report as the investigating and sanctioning of (alleged) violations of substantive norms of EU law.[11] The sanctioning stage includes the punitive sanctioning of an administrative and criminal law nature. As is apparent from the case law of the Court of Justice and the European Court of Human Rights, the right to a fair trial (the criminal law limb of that right) applies to both types of proceedings. This means that also ECB, ESMA and certainly DG Comp have to deal with the interaction between administrative and criminal law means of enforcement. Moreover, although particularly ECB and ESMA have been attributed exclusive supervisory and enforcement tasks, the national dimension of their legal framework cannot be easily overlooked. These authorities, like DG Comp and OLAF, need their national partners for a variety of reasons, including knowledge of local habits and customs, practical support and, last but not least, the availability of coercive powers – i.e. the power to open doors, if necessary – in cases of non-cooperation. Moreover, there is the possibility of EU investigations running parallel to or before

10 This also applies to DG Comp; see, however, Art. 17 Reg. 1/2003.

11 J. Vervaele, 'Shared Governance and Enforcement of European Law: From Comitology to a Multi-level Agency Structure?' in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (1999), Oxford: Hart Publishing, p. 131.

national criminal proceedings *sensu stricto*. Also to that extent, they may face problems that are similar to those of OLAF.

The analysis of the identified EU enforcement authorities will therefore offer explanations for the following sub-research questions that are so relevant to OLAF:

I. What powers do these authorities have at their disposal (and, possibly, explain why some authorities have less or more powers than the others), and at which level (EU or national);
II. How are fundamental rights and procedural safeguards integrated into these systems and, if so, at which level (EU or national);
III. How has judicial control been organized;
IV. Whether and how the design of these powers anticipates a possible subsequent use in criminal proceedings, and
V. Whether and how pending criminal investigations hamper the functioning of the investigations by the EU authorities.

Because the interaction with the legal orders of the Member States is tremendously important, this project also analyses how the EU legal framework of the respective EU authorities interacts with the national laws of six national jurisdictions in light of the research questions. The analyses offered by the six national reports will reveal potential differences in how the EU rules have been implemented at the national level, even though the gathered information may subsequently be used in another Member State (for instance as evidence). On the basis of an optimal geographical spread and diverging national approaches to the interaction between criminal and administrative law, the following Member States have been selected: the Netherlands, the United Kingdom, Germany, France, Italy, and Poland.

1.2.2 What this project will do

The methods employed in this project are of a legal comparative nature in a double sense. They include the interactions between the EU legal order and six national legal orders in four different EU policy areas. The four policy areas are consequently compared. The focus is on the gathering of information during the investigative stage and, more in particular, on the following four types of investigative measures:

1. The interviewing of persons (which includes oral/written questioning) and production orders;
2. The monitoring of banking accounts (live/real time);
3. The right to enter premises (‘droit de visite’), including searches, seizure, sealing, taking samples and forensic images;
4. Access to traffic data and recordings of telecommunications.

Any analysis of the investigatory powers also needs to take into account the relevant rule of law standards, including fundamental rights standards, such as the right to privacy, to an effective remedy and to a fair trial. This is why the following safeguards – which are of particular importance during the initial stages of proceedings – have been included in the overall design, but only to the extent that they determine the normative framework for the aforementioned investigative acts**:**

a) The privilege against self-incrimination, as far as is relevant for the interviewing of persons and the production orders. The aim is to identify if and how the privilege has been incorporated into the normative framework for interviews and production orders in the setting of (national assistance to) EU authorities' investigations (possible 'Miranda warnings', the right to remain silent, the right to refuse the production of documents).[12] In addition, the goal is to identify to what extent (the possibility of) criminal proceedings at the national level in parallel with the investigations by the four EU authorities affect the duty to cooperate in the investigations by the EU authorities. This project does not deal with the scope of the privilege as such, nor with how and when it is breached. Neither does this project deal with, for instance, the later drawing of inferences from the defendant remaining silent during investigations.
b) The right to have access to a lawyer, but only in relation to the questioning of persons and the 'droit de visite'. This project is interested in how this safeguard has been incorporated in the design of investigative measures, particularly questioning and entering premises. The focus is not on what happens when this framework is disregarded, which may for instance lead to the exclusion of evidence, etc.
c) In addition to the foregoing two safeguards, it was discussed during the first meeting in Utrecht in April 2016 whether or not it would be possible to exclude legal professional privilege/ LPP (lawyers) and professional secrecy (journalists, banks, accountants, tax advisers) from the scope of this project. This project also pays attention to these safeguards where they are relevant to the administrative law investigations of the EU authorities.

1.2.3 What this project will not do

It is important to stress what this project will not do. Its focus is on the gathering of information by EU authorities and on the cooperation between the EU and national authorities in doing so. That means that this project does not deal with the sharing of information that is already available to the national partners with the EU authorities,[13] or the follow-up by national authorities, including – particularly – the use as evidence in criminal proceedings.

The four authorities have in common that they all operate under an administrative law framework and, in principle, have the power to perform investigations on the joint territories of the participating Member States. Their national counterparts will normally also operate under an administrative law framework (banking authorities, competition authorities, members of the AFCOS network). Yet, as said, these tasks can also have effects on criminal justice (in a wide sense), because 1) the EU authorities have the power to impose punitive sanctions, or 2) because their investigations are relevant to punitive law enforcement (criminal or administrative) at the national level.

In light of this, it is necessary to point out that this project does not deal with the relationship between OLAF and the future European Public Prosecutor's Office, nor with the national criminal law dimension *sensu stricto* of the four policy areas of this study (PIF, banking regulations, credit rating agencies and TRs, and competition law). Rather, the project team has analysed how the national partners of the EU authorities assist the latter in their tasks (in terms of powers,

12 Some of the four authorities have the power to impose punitive sanctions. Others, for instance OLAF, have included these safeguards in their framework (cf. Art. 9 Reg. 883/2013).

13 This topic is the subject of another project, funded under Hercule III, by Utrecht University, and is currently up and running in 2017-2018 (led by Dr. M. Simonato, Prof. Dr. M. Luchtman and Prof. Dr. J. Vervaele).

safeguards, judicial protection). But only where administrative investigations interfere with criminal proceedings, or *vice versa*, that is of concern to this project.

Finally, it is worth mentioning that, as Regulation 883/2013 is currently being revised, there was no need to make specific recommendations for the existing OLAF framework. Some general strategies have nonetheless been indicated at the end of this report.

1.3 This project's design and work packages

It is apparent from the above that, in order to realize the core ambition of improving OLAF's investigatory framework, input is needed on the following issues:

- An analysis of the legislative framework of the EU bodies at the EU level, in terms of the investigatory powers, safeguards and remedies (chapter 2);
- An analysis of how the EU legal frameworks are integrated into and interact with the six national legal orders (investigatory powers, safeguards and remedies; chapters 3-8);
- A transversal report on judicial protection (chapter 9);
- A comparison of the four different types of EU frameworks, and their interaction with the national legal orders (investigatory powers, safeguards and remedies; chapter 10);
- The formulation of the overall findings and possible strategies for improving OLAF's framework, both in terms of effective law enforcement and legal protection (chapter 11).

As the powers of OLAF, DG Comp, ECB and ESMA (interviews & production orders, on-site inspections, traffic data) often refer back to national law and therefore urge the need for swift cooperation with national authorities, the purpose of the national reports is to identify the partners of the EU authorities at the national level and their tasks and, consequently, to analyze, in light of the research questions above, the investigative powers that they have and the ways in which the defence rights can be implemented (if at all). The national reports should thus be able to offer a comparison at the national level of how the national authorities are able to cooperate with their EU counterparts in the exercise of their investigative tasks. The sub-questions to be answered by the national reports are:

1. What powers do the national partners of the four EU authorities have at their disposal (and, possibly, why they were denied others);
2. How are fundamental rights and procedural safeguards integrated into these systems and, if so, at which level (national or European?);
3. How has judicial control been effectuated;
4. To which extent do parallel punitive proceedings have an influence on cooperation duties?

The issue of judicial protection is key to all areas. This is why a separate report is dedicated to this topic. The purpose of the transversal report on judicial protection is to make a comparison of how judicial protection is organized in cases of the aforementioned investigative acts at the EU level. It deals with the procedural issues, but also with the applicable fundamental rights framework.

The overall comparative report, based on the national and transversal reports, provides a comparison of how the interaction between national and EU law works, by comparing this

interaction in six legal orders in light of the available powers, the applicable safeguards and the available remedies. It will identify the (gaps in the) level playing field in the four different areas of EU law.

A final analysis and summary of our main findings is included at the end of this report. This part of the report also includes an analysis of the possible strategies to overcome deficiencies in OLAF's legal framework.

Regarding the collection of the relevant data, all chapters of this report contain a legal analysis of the relevant sources (EU/national legislation, case law, doctrine) in light of the central research questions and based on the format that was developed and refined during the two expert meetings in Utrecht in April and November 2016. As the focus of the project is also on the law in action, all rapporteurs have interviewed representatives of the relevant actors, at the EU and national level (the four EU authorities and their national partners). A list of the persons interviewed has been included in Annex II to this report. Some of the respondents only wanted to cooperate on the basis of anonymity.

This project started on 8 March 2016. It has been carried out by an international team of experts. The reports on the EU framework, the legal order of the Netherlands, as well as the comparative analysis and overall conclusions have been prepared by the staff of Utrecht University.[14] The national reports on Germany, Italy, France and Poland have been prepared by experts from those legal orders.[15] The transversal report was written by experts from the University of Luxembourg.[16] The overall composition of the project team is included in Annex III.

In order to enhance the internal consistency of the project, the project team convened in Utrecht on two occasions. The first meeting, on 14-15 April 2016, was dedicated to the design of the templates for the EU, national and transversal reports.[17] On the basis of the discussions during those two days, a final template (Annex I) was designed which was consequently used by all rapporteurs for the preparation of a first draft of their reports.

On 10-11 November 2016, a second meeting of the entire project team was organized. That meeting was used to discuss the provisional results of the national reports, the EU report and the report on judicial protection. Representatives of ECB,[18] ESMA[19] and DG Comp[20] were present during the meeting and provided input on the law in action from the perspective of their organizations. On the basis of this meeting, the reports were finalized. The final versions of the reports were consequently used by the authors of the comparative analysis to write the comparative report and overall conclusions.[21] The work of the project team was concluded on 17-04-2017.

14 Chapter 2 (Dr. M. Scholten & Dr. M. Simonato); chapter 4 (Ms. J. Graat, LLM); chapters 10 and 11 (Prof. Dr. M. Luchtman & Prof. Dr. J. Vervaele).
15 Respectively by Prof. Dr. M. Böse and Dr. A. Schneider (German report – chapter 3), Prof. S. Allegrezza (Italian report – chapter 5), Prof. Dr. P. Alldridge (UK report – chapter 6), Dr. C. Nowak and Dr. M. Błachucki (Polish report – chapter 7), and Prof. Dr. J. Tricot (French report – chapter 8).
16 Prof. Dr. K. Ligeti and Dr. G. Robinson (chapter 9).
17 Representatives of OLAF during the meeting were Ms. C. Ullrich and Ms. M. Janda.
18 Mr. J. Viguer Pont.
19 Mr. C. Mayock.
20 Mr. J. Klein.
21 Prof. Dr. M. Luchtman and Prof. Dr. J. Vervaele (chapters 10 and 11).