9. The political and judicial accountability of OLAF

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1. INTRODUCTION – OLAF, THE ADMINISTRATIVE ANTI-FRAUD AUTHORITY

The *Office de Lutte Anti-Fraude* (OLAF) is the Commission service entrusted with the task of carrying out administrative investigations to combat illegal activity adversely affecting the EU's financial interests, as well as investigating serious misconduct by EU officials, other staff and/or members of EU institutions.[2] It does so by carrying out so-called internal and external investigations. Internal investigations focus on misconduct within the EU's institutions, bodies, offices and agencies (IBOAs), and external investigations on the actions of economic operators and citizens. The term 'financial interests of the EU' (hereafter: PIF[3]) covers all expenditure, revenue (e.g. customs duties, agricultural duties) and assets covered by the EU budget or any budget managed by the European Union.[4] VAT is a tricky area. Although a percentage of VAT revenue is part of the EU's budget, OLAF itself has no autonomous investigative powers in this area.[5]

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[1] The views expressed are exclusively those of the author and may not in any circumstance be regarded as expressing an official position of the European Commission. Websites last visited on 28-10-2016.

[2] cf Commission decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) 1999/352/EC [1999] OJ L136/20 (Decision 1999/352/EC), as lastly amended by Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 [2013] OJ L248/1 (Reg 883/2013).

[3] Following the French '*protection des intérêts financiers*'.

[4] See Reg 883/2013, art 2(1) and Council Regulation (EC, Euratom) 2988/95 on the protection of the European Communities financial interests [1995] OJ L 312/1 (Reg 2988/95), art 1.

[5] cf J Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)* (Europa Law Publishers 2011) 77–8.

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In the exercise of its investigative competences, OLAF conducts so-called autonomous investigations, making use of its own powers (Reg 883/2013, arts 3, 4). But it can also participate in investigations opened by national authorities (possibly at its own request), be it by means of technical or administrative assistance or, more proactively,[6] in so-called 'mixed inspections' or in a coordinating role.[7]

Apart from its investigative functions, OLAF has coordinating and advisory functions (including VAT).[8] It supports mutual cooperation and facilitates the gathering and exchange of information and contacts. It also assumes a role in developing anti-fraud policies, 'fraud proofing' of legislation and policies, as well as other tasks attributed to the Commission by secondary legislation.[9] As part of the Commission, it is also involved in the legislative process (e.g. on the EPPO or the PIF Directive[10]), without however assuming a 'regulatory' function.

This combination of tasks is one reason why OLAF has a hybrid institutional structure. On the one hand, its Director-General (hereafter: D-G) and staff are formally part of the Commission and its budget is provided by the Commission. On the other hand, however, OLAF is functionally independent as far as its investigative tasks are concerned. In that capacity, it cannot take or seek instructions from the Commission, any government or any other institution or body.[11]

Although OLAF is an administrative body, the dividing lines between it and the area of criminal law are sometimes rather thin. While it carries out 'administrative investigations',[12] there are numerous references in the legislative instruments that directly refer to concepts like 'fraud' or 'corruption'. Moreover, OLAF is required by law to be in close contact with

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6 cf K Ligeti and M Simonato, 'Multidisciplinary Investigations into Offences Against the Financial Interests of the EU' in F Galli and A Weyembergh (eds), *Do Labels Still Matter?* (Editions de l'Université de Bruxelles 2014) 86ff.

7 cf Commission, 'Guidelines on Investigation Procedures for OLAF Staff' (1 October 2013) (GIP), art 10

8 cf Reg 883/2013, art 1(2).

9 cf Decision 1999/352/EC, art 2.

10 Commission, 'Proposal for a Directive of the European Parliament and the Council on the fight against fraud to the Union's financial interests by means of criminal law' COM (2012) 363 final.

11 See also Inghelram (n 5) 117, 174.

12 See art 1(1) and (4) of Reg 883/2013 on external investigations, this follows from the specific instruments to which this paragraph refers, see for instance Council Regulation (Euratom, EC) 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities [1996] OJ L 292 (Reg 2185/96) and Reg 2988/95).

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police and judicial authorities.[13] Regulation 883/2013 therefore includes a series of safeguards in cases where natural persons are interviewed as 'persons concerned'. These persons are entitled, inter alia, to the right to avoid self-incrimination (art. 9(1)). Article 11(2) of Regulation 883/2013 also stipulates that an OLAF final report constitutes 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. These mechanisms have been designed to bridge the interface between administrative and criminal law in the best possible way, though it seems that in many Member States this provision has little impact on the admissibility of OLAF reports as evidence in judicial proceedings.[14]

However, OLAF is not a prosecution service and has no sanctioning powers. Its conclusions do not directly entail legal consequences, neither in criminal nor in administrative law. It may issue non-binding recommendations to IBOAs and/or national authorities,[15] which often will be of an administrative nature (e.g. recovery of amounts spent). It is up to the national authorities or the IBOAs to decide which steps they take. If an IBOA decides to start disciplinary proceedings, these include several stages, at each of which the person concerned person will be heard. Where a national authority conducts a criminal investigation, it will usually start gathering information and evidence 'from scratch'.

OLAF does not operate on the basis of a uniform code of procedure. On the contrary, it uses a patchwork of horizontal and sectoral EU instruments (including customs, common agricultural policies and structural funds) which often refer to national law.[16] In consequence, OLAF is in the majority of cases dependent on national authorities for the performance of its tasks. This may lead to paradoxical situations where in certain Member States OLAF has wider powers in 'mixed inspections', than in inspections *propriu motu*.[17] For all these reasons, Article 3(4) of Regulation 883/2013 stipulates that Member States are

13 cf Reg 883/2013, art 1(2), 7(3), 11(5).
14 cf Ligeti and Simonato (n 6) 91.
15 Reg 883/2013, art 11(1).
16 See Reg 2185/96, arts 6–7; and sectoral rules such as Council Regulation (EC) 1290/2005 on the financing of the common agricultural policy [2005] OJ L 209/1 (Reg 1290/2005), art 37 or Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 [2006] OJ L 210/25 (Reg 1290/2005), art 72.
17 Ligeti and Simonato (n 6) 88–9.

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to designate a service ('the anti-fraud coordination service'/AFCOS) to facilitate effective cooperation and exchange of information with OLAF.

The many different tasks and powers of OLAF make it a particularly difficult authority to comprehend. The tension between operational independence and accountability is hard to overlook. The combination of operational and other tasks within a single authority, as well as the mixed framework of EU and national law, pose challenging questions in terms of accountability. These factors beg the question of how the many different accountability forums can keep an overall view on OLAF's discharge of its duties. However, it is equally the case that an abundance of accountability forums may hinder OLAF in performing its tasks.

In this chapter, we will delve into this debate by focusing on the different instruments to secure accountability in relation to OLAF. As far as the national law dimension is concerned, our focus will be on the Netherlands, as one of the very few states which has passed legislation on the cooperation between OLAF and the Dutch authorities. We will identify if and how different forms of political and judicial accountability relate to each other, and how these tasks have been distributed over the national and EU levels. Before we do so, we start with an overview of OLAF's tasks and its institutional setting, including OLAF's Supervisory Committee (section 2). We then move on to the political and judicial accountability forums (section 3). In this section, we also discuss how these accountability forums relate to the institutions focusing on financial accountability (the Court of Auditors) and the Ombudsman.

2. SHARED ENFORCEMENT AND THE PROTECTION OF THE EU'S FINANCIAL INTERESTS[18]

2.1 Investigative Tasks and Powers – Cooperation with the Dutch *Douane Informatie Centrum*

There can be no misunderstanding about the importance of national law and national authorities for OLAF's investigative powers. First of all, OLAF is to a very large extent dependent on the Member States regarding its case flow: it needs to be fed with information on (alleged)

[18] On the notion of enforcement, cf the Foreword to this book.

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irregularities.[19] Second, though OLAF's powers seem well developed on paper (including digital forensic operations), most of its powers with respect to individuals or operators in the Member States are connected to the context of so-called on-the-spot checks[20] and, in principle, they can only be enforced with the help of national authorities. Finally, where follow-up by the national authorities is needed, the OLAF files and final report are transferred to the national authorities with a view to further action. Although national authorities should report on the follow-up (Reg 883/2013, art 11(6)) on request, OLAF has no powers to force national authorities to start, for instance, criminal proceedings. The fact that an administrative EU service produces potential evidence for criminal proceedings is precisely why a fair amount of attention has been given to procedural safeguards in OLAF regulations. These safeguards are incorporated in the OLAF Guidelines on investigation procedures (hereafter: GIP).[21]

Autonomous inspections, which can be used for internal and external investigations, give OLAF the lead role in the investigation, though it is highly dependent on its national partners in practice. Regulation 2185/96 provides the legal framework for on-the-spot checks in the Member States. OLAF officials must then be granted access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned needed for the proper conduct of the on-the-spot checks and inspections.[22] This includes access to professional books, documents and computer data, as well as physical checks on the nature and quantity of goods or completed operations.[23] Important limitations to these powers are found in Article 5, stipulating that checks and inspections are to be carried out on economic operators to which EU administrative measures and penalties may be applied[24] and only where there are reasons to think that irregularities have been committed.

'Mixed inspections' with national authorities do not impose such thresholds. But then, national authorities have the lead role, while OLAF

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[19] cf C Stefanou, S White and H Xanthaki, *OLAF at the Crossroads: Action against EU Fraud* (1st edn, Bloomsbury Publishing 2011) 39, 42.

[20] See Reg 2185/96.

[21] Reg 883/2013, art 17(8).

[22] Reg 2185/96, art 7 and sectoral rules such as Reg 1290/2005, art 37 on agriculture, cf arts 11, 14 and 15 GIP.

[23] Reg 2185/96, art 7 and relevant sectoral rules.

[24] Exceptionally, inspections can also concern economic operators holding pertinent information, art 5(3).

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officials are only allowed to join the inspections but do not have – unless national law provides otherwise – powers of investigations themselves. This is provided in sectoral rules like Article 47 of Regulation 1306/2013[25] in the agricultural sector, or Article 75 of Regulation 1303/2013[26] on structural funds.

Apart from on-the-spot checks in the Member States, OLAF can perform inspections within the premises of the EU (internal investigations), as well as have access to data held by IBOAs (internal and external investigations). OLAF can also interview so-called persons concerned or witnesses at any time during an investigation. Persons concerned are defined as any person or economic operator suspected of having committed any illegal activity affecting the EU's financial interests (Reg 883/2013, art 2(5)). Persons concerned are entitled to certain procedural guarantees, including the right to avoid self-incrimination, even though they are not, at that moment, formally charged with an offence (see Reg 883/2013, art 9 and art 16 of GIP). This provision, of course, facilitates the later use of the interviews as evidence in criminal proceedings.

Regulation 2185/96 was only implemented in the Netherlands in 2012, at the specific request of the Commission. This happened after a long period of cumbersome cooperation between OLAF and Dutch authorities. The main problem was the great number of Dutch authorities involved in cooperation with OLAF and the lack of coordination between these authorities. Nowadays, the 2012 Act on administrative assistance to the European Commission during inspections and on-the-spot checks[27] determines the competent authorities, provides rules in cases of conflict of competences, and attributes the necessary investigative powers to the Dutch authorities. The last-mentioned is done through a referral to the Dutch General Act on Administrative Law (GALA), which defines the power to enter premises (except for homes without permission), demand information, order the production of professional (as opposed to personal) documents, and take samples and inspections of vehicles (GALA, arts 5:15–5:19). The individuals concerned are required to cooperate. In cases of non-cooperation police assistance may be invoked, and the individual will be liable to criminal prosecution.

In practice, the responsibility for smooth cooperation rests, per 1 April

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[25] OJ [2013] L 347/549.
[26] OJ [2013] L 347/320.
[27] *Wet op de verlening van bijstand aan de Europese Commissie bij controles en verificaties ter plaatse*, Official Gazette 2012, 467.

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2016, with the Dutch AFCOS, a part of Customs, which falls under the Dutch Ministry of Finance. It receives most, if not all, of the requests by OLAF. In the majority of cases, it will also perform the actual assistance during the on-the-spot checks. Further rules and procedures are found in the Handbook *Douane* (customs), which contains a special section on cooperation with OLAF.

The foregoing picture raises interesting questions in terms of political and judicial accountability. Unlike in mixed inspections, in autonomous inspections, for instance on-the-spot-checks, the responsibility lies with OLAF. But how does this work in practice? Does this mean that Dutch courts have no role to play in the course of OLAF investigations? To what extent do Dutch courts take account of OLAF materials? Before we deal with these questions, let us first pay more attention to OLAF's institutional position.

2.2 Investigative Independence

Section 2.1 made it clear that, although OLAF has no prosecuting or sanctioning powers of its own, it does have powers that interfere with fundamental rights of citizens and companies. This setting – a body of the executive with investigative powers and a large amount of discretion concerning when and how to use those powers – makes OLAF's operational independence vis-à-vis the EU's political institutions a remarkable legal construct. OLAF does not take instructions from anyone on the performance of its investigative tasks. It decides autonomously – of its own motion or upon request – on whether it will open investigations (Reg 883/2013, art 5(2)), while other EU authorities are not allowed to commence their own internal investigations when OLAF has done so or is considering doing so (Reg 883/2013, art 5(3)). OLAF's D-G, to whom many important tasks (including the opening of investigations) have been entrusted, holds office for a non-renewable period of seven years. Although he reports to the Parliament, Council, Commission and the Court of Auditors (see section 3.2 below), the final say on OLAF's investigative policies and budget is in his hands (Reg 883/2013, art 17(5)). The D-G cannot be relieved of his duties, except for very serious circumstances and after a special procedure.[28] In turn, he assumes the role of appointing

[28] See Decision 1999/352/EC, art 5, as amended by Decision 2013/478/EU amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office [2013] OJ L 257/19, art 1. The question whether a criminal investigation concerning the D-G is such a circumstance may arise in the aftermath of 'Dalligate', see text to note 36 infra.

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authority in relation to other OLAF staff. OLAF therefore has strong budgetary and administrative autonomy.[29]

OLAF's investigative independence is warranted for two main reasons. First of all, it is recognized that its mandate also covers abuses within the Commission itself.[30] Second, and even when the Commission is not implicated, it was thought wise to keep OLAF investigations at a distance from political day-to-day life, and to prevent OLAF from eventually being (ab) used for political motives. The same reasoning applies in relation to the Member States (external investigations) where independence was also seen as a mechanism to boost the reliability and effectiveness of EC intervention in the Member States.[31]

The resulting hybrid structure – a Commission service with advisory and coordinating tasks, but independent for its investigative tasks – was combined with a series of measures to tackle the possible adverse consequences of 'too much' independence. These measures include, first, legislative guidance on how OLAF should perform its tasks. Article 5 of Regulation 883/2013, for instance, stipulates that investigations are only to be opened after a *sufficient suspicion* of fraud, corruption or other activities affecting the EU's financial interests.[32] Article 9 of Regulation 883/2013, moreover, stipulates that investigations must be performed objectively and impartially. And upon completion of the investigation, persons concerned must be given the opportunity to comment on the facts (art 4), which, incidentally, does not mean that full access to the files must be given.

Obviously, such legislative measures only set out a broadly defined framework for the guidance of executive discretion. It is therefore relevant that Article 17 of Regulation 883/2013 requires OLAF's D-G to issue investigation policy priorities[33] and guidelines on investigation procedures (the previously mentioned GIP), including procedural guarantees. Moreover,

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[29] See Decision 1999/352/EC, art 6 as amended.

[30] As stressed for instance by V Mitsilegas, *EU Criminal Law* (Hart 2009) 13; Stefanou, White and Xanthaki (n 19) 151. While all EU institutions are to cooperate with the office, this has not always gone smoothly; cf Case F-139/11 *BJ v Commission* ECLI:EU:F:2012:94.

[31] Commission, 'Commission Report – Evaluation of the activities of the European Anti-fraud Office (OLAF) – Parliament and Council Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 (Article 15)' COM (2003) 154, s 1.1.2.

[32] See for an example OLAF Supervisory Committee, 'Opinion No 2/2012. Analysis of the case OF/2012/0617' (2012) 8.

[33] cf Commission, 'Management Plan 2016, European Anti-Fraud Office (OLAF) (2016) <http://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_mp_2016_en.pdf>.

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the D-G must put in place an internal advisory and control procedure, including a legality check. This task has been assigned to OLAF's 'investigation selection and review unit'. In addition, there is now an internal complaints procedure, managed by the office's legal advice unit.[34] As the guidelines (GIP) must be published on OLAF's website (Reg 883/2013, art 17(8)), it makes sense to assume that they have binding effects in relation to third parties (for instance, persons concerned) as well.[35]

At the time of writing this chapter, the pertinence of OLAF's operational independence could not be better illustrated than by the fact that, on 2 March 2016, the European Commission lifted, at the request of the Belgian authorities, the immunity of OLAF's D-G in the aftermath of 'Dalligate'.[36] The Belgian authorities want to question OLAF's D-G over the allegations that, during the investigation of former Commissioner Dalli, he listened in to a telephone conversation between a witness and an implicated person without informing the latter, which could constitute a criminal offence under Belgian law. This decision is now before the General Court. Article 17 (3) of Regulation 883/2013 stipulates that if the D-G considers that a measure taken by the Commission calls his independence into question, he must immediately inform the Supervisory Committee, and must decide whether to bring an action against the Commission before the Court of Justice of the EU (CJEU).[37]

Despite a whole series of measures to reinforce OLAF's independence, criticism of its structure and institutional position has not stopped. Regarding internal investigations, there are concerns that OLAF's mission is still not fully supported by other EU institutions. In external investigations, operational independence is hampered by a fragmented and decentralized framework. A lack of procedural safeguards and fear of political interference with OLAF's investigative tasks at EU and national

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[34] cf Commission, 'Complaints on OLAF investigations' (last updated 9 November 2016) <http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en>.

[35] cf on the former 'OLAF Manual' under Regulation (EC) 1073/99 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (Reg 1073/99) Inghelram (n 5) 58.

[36] Protocol No 7 on the privileges and immunities of the European Union [2012] OJ C 326/1, arts 11 and 17.

[37] Case T-251/16 *D-G OLAF v Commission* [2016] OJ-C 260. On 20 July 2016, the Court rejected the D-G's request to suspend the Commission's decision, see T-251/16R *D-G OLAF v Commission* [2016] OJ C 326/28.

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level are other concerns that are heard. It is high time, therefore, that we delve into the various mechanisms accountability mechanisms.

2.3 The Supervisory Committee

The most important institution to guard OLAF's independence is its Supervisory Committee (hereafter SC) (Reg 883/2013, art 15). The SC consists of five independent members with expertise in judicial, investigative or comparable functions. They hold their positions for a non-renewable term of five years and must not seek instructions from anyone. The Committee's focus is to monitor OLAF in the performance of its investigative competences (particularly on procedural guarantees and the duration of investigations) and thus to reinforce its independence. It must be periodically informed on OLAF investigations in general, and can access information on specific cases in particular situations. It also receives the D-G's annual investigation policy priorities as well as the GIP prior to their publication (Reg 883/2013, art 17(5), (8)). The SC has issued opinions and recommendations on OLAF's investigative policies, on its internal procedures for dealing with complaints and on the implementation of its own recommendations to OLAF.[38] However, the SC does not interfere with investigations in progress (Reg 883/2013, art 15 (1)).[39]

In practice it is revealed that the dividing line between systemic supervision and review of individual cases is not always very clear. In duly justified situations, the SC can ask for information on investigations, including reports and recommendations on closed investigations. Moreover, based on Article 11(7) of Regulation 1073/99, the General Court held that 'the Committee's task is to protect the rights of persons who are the subject of OLAF investigations. Therefore, it cannot be disputed that the requirement to consult that committee before forwarding information to the national judicial authorities is intended to confer rights on the persons concerned'.[40] While the wording of the relevant provision (Reg 883/2013, art 15(5)) has since been changed, the Court's reasoning seems to be transferable. This reveals that the SC's task is not limited to a general evalua-

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38 See Commission, 'Supervisory Committee of OLAF' (last updated 7 March 2017) <http://europa.eu/supervisory-committee-olaf>.

39 Inghelram (n 5) 192.

40 Case T-48/05 *Franchet and Byk v Commission* [2008] ECR II-01585, para 168; discussed by Ingelhram (n 5) 192–3; X Groussot and Z Popov, 'What's Wrong with OLAF? Accountability, Due Process and Criminal Justice in European Anti-fraud Policy' (2010) CMLRev 605, 631–2.

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tion of OLAF's policies. Indeed, the SC has repeatedly been very critical of OLAF's performance, particularly in individual cases. An example is the opinion on the Dalli case, where OLAF and its D-G were severely criticized for, inter alia, the alleged recording of a telephone conversation.[41]

The SC's opinions and recommendations are not legally binding on OLAF. However, they are provided to the IBOAs. The SC also sends the annual report of its activities to the Parliament, Council, Commission and the Court of Auditors and it may submit its reports to those institutions on other occasions (Reg 883/2013, art 15). It is not unusual for the Parliament to discuss or refer to SC reports.

Although it can express opinions on individual cases, the SC was not designed as a complaints body. In view of the strict limits for judicial control on the legality of OLAF's actions (section 3.3) and of the limitations of the SC's mandate, the Commission proposed a so-called controller of procedural guarantees that will be given the role of monitoring that procedural guarantees are respected in ongoing cases. The proposal has a long history and was originally – and in various forms – included in the proposal that led to the current Regulation 883/2013, but eventually removed.[42] The 2014 proposal for a regulation on the establishment of a controller of procedural guarantees would task it with reviewing complaints lodged by persons concerned in OLAF investigations about the potential non-respect of their procedural guarantees and with authorizing certain investigative measures related to members of EU institutions.[43] The status of this proposal is far from clear. Since its introduction there has been no follow-up in the Council, as it was considered premature, particularly in light of the negotiations on the European Public Prosecutor.[44]

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[41] Opinion 02/2012, Analysis of Case OF/2012/0617.

[42] See also OLAF Supervisory Committee, 'Activity Report of the OLAF Supervisory Committee February 2013-January2014' [2014] OJ C318/1.

[43] European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Launching the public consultation process on a new energy market design" (COM (2015) 340 final)' [2016] C82/13, 3 (cf Commission, 'Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step appoach to accompany the establishment of the European Public Prosecutor's Office' COM (2013) 533 final).

[44] cf Council, 'General Secretariat of the Council to the Permanent Representatives Committee on a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of procedural guarantees' (14075/14, 27 October 2014) OJ/CRP2 37.

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The SC is supported by a secretariat, which so far has been provided by OLAF. This means, however, that the administrative and financial responsibility is with the OLAF D-G (Reg 883/2013, arts 15(8), 18). Recently, this has become a contentious issue. Supported by the EP, the SC asked to strengthen its legal and operational independence.[45] The Commission reacted by proposing that the secretariat should be provided by the Commission 'independently from the Office', with financial resources from a specific budget line within the general EU budget.[46] The corresponding amendment of the OLAF Regulation was adopted on 26 October 2016.[47]

3. ACCOUNTABILITY

3.1 Political Accountability

Ex post accountability helps to promote transparency and to avoid arbitrariness in the exercise of OLAF's functions. It provides for a forum to identify and discuss possible loopholes in the framework for inves-

[45] See European Parliament Decision of 29 April 2015 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2013 [2015] 2014/2075; European Parliament resolution of 10 June 2015 on the OLAF Supervisory Committee annual report 2014 [2015] 2015/2699; OLAF Supervisory Committee, 'Activity Report of the OLAF Supervisory Committee February 2013-January 2014' [2014] OJ C318/1 and OLAF Supervisory Committee, '2014 Activity Report of the OLAF Supervisory Committee'.

[46] Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF)' COM (2016) 113 final. Before that, the Commission amended its Decision 1999/352 (see Commission decision (EU) 2015/2418 of 18 December 2015 amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office (OLAF) OJ L333/148) regarding budget appropriations relating to the members of the SC. Welcoming this proposal, the Court of Auditors moreover suggested in addition that the SC should be heard when it comes to lifting immunity of the OLAF D-G: European Court of Auditors, 'Opinion No 1/2016 concerning a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF)' (ECA 2016).

[47] Regulation (EU, Euratom) 2016/2030 of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU, Euratom) 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF) [2016] OJ L317/1.

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tigations. Through its policy guidelines, OLAF is forced to explain its arguments and, on occasion, to justify deviations from those guidelines, especially in light of the Commission's general policies in the fight against fraud. Moreover, judicial review in specific cases may not always reveal inconsistencies in OLAF's general handling of cases.

Being a Commission service, OLAF answers, in particular, to the EP, especially for its non-investigative tasks. Article 325 (5) TFEU specifies that the Commission, in cooperation with Member States, submits to the EP and to the Council a yearly report on PIF measures. OLAF has an important role to play in this.

The bulk of this work is done by the Parliamentary Committee on Budgetary Control (CONT). To facilitate the process, Regulation 883/2013 provides for mechanisms that provide the Parliament, the Council, the Commission and the Court of Auditors with information. According to Article 17(4), the D-G must report regularly to them on the findings of OLAF investigations, the action taken and the problems encountered. However, in so doing, the confidentiality of investigations and the legitimate rights of individuals must be respected. The same holds, where appropriate, for the national law applicable to the judicial proceedings. Article 17(8) states that the adopted guidelines on the conduct of investigations, the procedural guarantees, data protection and details on internal advisory and control procedures are also to be sent to these institutions.

This duty of information obviously facilitates the debate between OLAF and its accountability forums. According to Article 16 of Regulation 883/2013, the Parliament, the Council and the Commission must meet the D-G once a year for an exchange of views at political level to discuss OLAF's policy. The SC participates in the exchange of views. Others may be invited to attend at the request of the EP, the Council, the Commission, the D-G or the SC. The exchange of views may relate to such topics as the strategic priorities of OLAF's investigation policies or the reports provided by the D-G. Here too, the participating institutions cannot interfere with the conduct of investigations in progress. Nonetheless, the D-G also provides oral reports, in closed session, on the progress of specific cases.[48]

There are no 'sanctions' available to the accountability forums in cases where they express disagreement with OLAF's performance of tasks. Nonetheless, the influence of these forums is substantial in practice, first, because the EP and Council participate in selecting OLAF's D-G, who is

[48] cf House of Lords, *Strengthening OLAF, the European Anti-Fraud Office – Report with Evidence* (24th Report of Session 2003-04, HL Paper 139, 2004) 19.

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appointed by the Commission for a seven-year term of office. Secondly, OLAF's performance can play a role in the discharge of the Commission's annual budget. Thirdly, Article 19 of Regulation 883/2013 provides for an evaluation of that Regulation. On the basis of that, OLAF's legal framework may be amended, which is a strong impetus for OLAF to take into account the outcome of the deliberations with the EP and the other institutions.

OLAF's mechanisms for political accountability have received criticism. This has to do, first, with the limited possibilities for interventions by the accountability forums.[49] It has been said by some that operational secrecy hampers political accountability.[50] The decision on disclosure is taken by OLAF itself. And where information is provided and interventions can be made, the previously mentioned instruments for interventions are perceived as rather blunt instruments and not tailor-made for the purpose of holding OLAF to account for its investigative policies. Secondly, the relationships with and between the different accountability forums are complicated and the interests involved are very diverse. This also hampers political accountability for OLAF's performance of its investigative tasks. As already said, parliamentary review of OLAF is carried out in the same way as its review of the Commission, to which OLAF is attached.[51] OLAF, therefore, must both help the Commission to 'fulfil its obligations and satisfy Parliament's wish for facts allowing it to exert its financial management audit task, while complying with the legal framework for its investigations that places restrictions on its communication activities'.[52] In turn, the Commission itself accounts to the Parliament and Council on the basis of Article 325(5) TFEU and for the discharge of its entire budget. The great number of different interests in this relationship may not necessarily be related to the topics mentioned in Article 17(4) of Regulation 883/2013. Also, where inconsistencies are found in OLAF's activities, they might be balanced against other interests in the relationship between Commission and Parliament. OLAF could thus become a bargaining chip

[49] cf Inghelram (n 5) 196.

[50] Stefanou, White and Xanthaki (n 19) 65–70, 154–8 are very critical on these exceptions to the duty of disclosure, because CONT itself has strict procedures to protect confidentiality.

[51] cf ibid., 58ff.

[52] Commission, 'Commission Report – Evaluation of the activities of the European Anti-fraud Office (OLAF) – Parliament and Council Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 (Article 15)' COM (2003) 154, par 41; see also Mitsilegas (n 30) 213–14; Stefanou, White and Xanthake (n 19) 49.

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in the complex interplay between Commission and Parliament. In terms of its independence, we perceive this to be a risk for OLAF.

3.2 The Court of Auditors

As the Union's 'financial watchdog',[53] i.e. the independent guardian for its financial interests, the Court of Auditors (hereafter: the ECA) examines the accounts of all the EU's revenue and expenditure, as well as the legality and regularity of any financial transaction, and it provides a related statement of assurance (TFEU, art 287). The institutional relationship between the ECA and OLAF is complex and sometimes sensitive:[54] on the one hand, they are partners in the detection and investigation of financial irregularities; on the other hand, OLAF is competent to investigate potential wrongdoings inside the ECA, whereas the latter audits OLAF not only with regard to the use of its resources and financial management, but also, to a certain extent, concerning its investigative function.

Since the establishment of OLAF, the ECA has taken a deep interest in OLAF's work and its performance and efficiency, along with the protection of rights of individuals. Apart from opinions on related legislative initiatives and references in its annual reports, it has issued two detailed special reports. In its special report and 'performance audit' no. 1/2005,[55] the ECA presented a rather critical stocktaking not only of OLAF's financial management,[56] but also of its investigation management (regarding administrative issues such as filing, documentation and supervision, as well as the respect of fundamental rights and even the quality of OLAF investigation reports). As to the legal framework, the ECA criticized the absence of an 'independent control of the legality of investigative actions'.[57] In its

[53] cf European Court of Auditors, 'About us. Mission and Role' <http://www.eca.europa.eu/en/Pages/MissionAndRole.aspx>.

[54] cf Case T-259/03 *Nikolau v Commission* [2007] ECR II-00099, or Case F-129/11 *BH v Commission* ECLI:EU:F:2012:93, paras 21–23, Case F-139/11 *BJ v Commission* ECLI:EU:F:2012:94, paras 21–23 and Case F-140/11 *BK v Commission* EU:F:2012:95, paras 21–23; regarding the latter Valentina Pop, 'EU auditor used public funds to hamper anti-fraud inquiry' *Euobserver* (27 April 2012) <https://euobserver.com/justice/116058>.

[55] Court of Auditors, 'Special Report No 1/2005 concerning the management of the European Anti-Fraud Office (OLAF), together with the Commission's replies OJ C202/1.

[56] It questioned the management of funding programmes by OLAF (see ibid. recommendation 13).

[57] See ibid., para 83.

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second report on OLAF (no. 2/2011), the ECA extended and updated this analysis.

While the ECA can only issue non-binding recommendations, its influence on the management of OLAF investigations should not be underestimated, as it is frequently referred to by other institutions, particularly the EP. The ECA has been an important catalyst for political/public discourse. OLAF has repeatedly reshaped its internal guidelines and instructions, procedures and administrative structure, referring to ECA recommendations (see also Chapter 12).

3.3 Judicial Accountability

3.3.1 The EU level[58]

A dividing line between the different accountability forums is the intervention in ongoing cases. Political accountability forums are expected not to interfere with this aspect of the law in action, for good reasons. The question then arises whether courts offer forums for accountability, either at the EU or national level. Most of the relevant cases deal with procedural safeguards, such as the right to be heard before completion of the case file, the right of access to the file, and more generally, the rights of the defence. These rights must not only be observed in administrative procedures which may lead to the imposition of penalties, it is also necessary to prevent the rights of the defence from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of the conduct.[59]

Practice has shown that there are two routes for judicial control of investigative actions by OLAF. The first route is through an action for annulment. Article 263 TFEU provides that the CJEU can review the legality of acts of the Commission that are intended to produce legal effects vis-à-vis third parties.[60] For that purpose, it can hear cases brought by any natural or legal person against an act addressed to that person or which is of direct and individual concern to them. Ever since *IBM v Commission*, this has been taken to mean that these legal effects have to be

[58] We did not include the supervision by the European Data Protection Supervisor in our analysis.

[59] cf Case 347/87 *Orkem v Commission* [1989] ECR-3283, paras 32–33.

[60] For EU staff, the same approach applies on the basis of TFEU, art 270 and Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community OJ [1962] P045/1385 (last amended by Regulation (EU) 423/2014, OJ L 129/12), art 91.

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binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his or her legal position.[61] The existing case law seems to suggest that these requirements may be an unsurmountable hurdle in most, if not all, OLAF cases.

The case law of the CJEU reveals, regarding internal investigations, that OLAF investigations constitute preparatory acts and that the relevant findings can later be subjected to review against the final decision, for instance in disciplinary proceedings.[62] Likewise, a decision by OLAF to forward the file against a Union official (internal investigation) to national authorities does not bring about a distinct change in that official's legal position. Whilst the Civil Service Tribunal ruled differently in *Violetti et al.*,[63] this decision was quashed by the General Court.[64] In external investigations, too, a decision to forward a final report to national authorities does not produce binding effects, as national authorities are by no means obliged to institute proceedings.[65] The same goes for a decision to pass on information on alleged criminal offences.[66] Where such information is subsequently used in legal proceedings, remedies are available against the final decision (or in certain circumstances, against specific acts) either by national courts, or, ultimately, the European Court of Human Rights. Here too, one could say that the decision to forward the information is considered to be a preparatory act.[67]

This case law has drawn criticism.[68] Its main point is that, in the present system, legal protection may contain a significant loophole, since actions of OLAF are usually not – save for actions for damages – reviewed by the EU judiciary, whereas national courts may not always be seized or may not refer a case to the EU Courts for a preliminary ruling. The question is, however, whether this means that there is automatically a gap in judicial protection. Where evidence collected by OLAF is used with regard to a sanction (be it administrative, disciplinary or criminal in nature) and/or a financial correction or recovery, there will usually be a possibility to challenge the relevant investigative act in the relevant (subsequent) legal proceedings. Moreover, although national courts are indeed not allowed

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[61] Case 60/81 *IBM v Commission* [1981] ECR-2639, para 9; Case T-309/03 *Camós Grau v Commission* [2006] ECR II-1173, para 47.

[62] Case C-471/02 *Gómez-Reino v Commission* [2003] ECR I-3207, paras 61–65.

[63] Joined Cases F-5/05 and F-7/05 *Violetti and others v Commission* ECLI:EU:F:2009:39, discussed by Groussot and Popov (n 40).

[64] Case T-261/09 P *Commission v Violetti and others* ECLI:EU:T:2010:215.

[65] Case T-29/03 *Comuniad Autónoma de Andalucia v Commission* [2004] ECR II-2923.

[66] Case T-193/04 *Tillack v Commission* [2006] ECR II-3995.

[67] cf ibid., paras 69–70.

[68] cf Inghelram (n 5) 189.

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to annul acts of OLAF themselves, they could ask the CJEU for a preliminary ruling if they consider that an act is illegal. It seems, however, that so far there has been no such reference on the respect of procedural rights by OLAF.[69]

Nonetheless, in light of the criticism outlined above, there have been attempts to mitigate the effects of this case law. The Commission, for instance, suggested deviating from it in cases where there are interests involved of civil servants who were not the subject of the investigation. Those individuals are, after all, unlikely to have another remedy before either EU or national courts. It may be possible to develop similar arguments on third-party rights in external investigations. Alternatively, the Civil Service Tribunal saw room for deviations (in cases affecting civil servants) from *IBM*, by stressing the (possible) adverse career consequences stemming from an OLAF decision to refer the case to national authorities and the fact that national courts would not be competent to address those consequences.[70] However, as already said, that decision was quashed. Nonetheless, the General Court itself did not exclude the possibility of a judicial review in particular cases either. It indicated that: '*la conclusion selon laquelle une décision de transmission d'informations ne constitue pas un acte faisant grief ne préjuge pas de la position du juge à l'égard de la qualification d'autres actes de l'OLAF*'.[71] But there have been very few, if any, cases on this since this case.

Inghelram has suggested, building upon the CJEU's judgement in *Rendo and others* (competition law),[72] that in cases where an OLAF act hinders the effective exercise of fundamental rights, an action for annulment should be a possibility.[73] In effect, this suggestion boils down to widening the notion of a 'distinct change in legal position', so that it then becomes possible to include, for instance, interferences with the right to privacy (telecom surveillance, searches) or property (seizures). It remains open whether the EU courts would indeed be willing to do that. There have already been cases where alleged violations of fundamental rights were not taken up under an annulment action, but as an action for damages.

This brings us to the second remedy, i.e. the action for damages (TFEU,

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[69] The same picture emerges from other cases in this project, including Directorate-F and EFCA; see the relevant chapters.

[70] cf Joined Cases F-5/05 and F-7/05 *Violetti and others v Commission* ECLI:EU:F:2009:39, paras 75–83, 94.

[71] Case T-261/09 P *Commission v Violetti and others* ECLI:EU:T:2010:215, para 71.

[72] Case T-16/91 *Rendo and others v Commission* [1992] ECR II-2417, para 54.

[73] Inghelram (n 5) 206–14.

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arts 268 and 340). For that, a set of conditions has to be fulfilled, namely the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage complained of. As regards the first of those conditions, the case law requires a sufficiently serious breach of a rule of law intended to confer rights on individuals. The decisive test for that is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. There have indeed been various cases where OLAF actions were examined in light of such principles as the principle of sound administration, or the rights of the defence,[74] the latter including the presumption of innocence,[75] the right to be heard,[76] or the right to have access to files or the final report.[77] In a fair number of cases, these complaints have been successful, forcing OLAF to be more careful with the provision of information on individuals and strengthening the rights of the defence.[78]

All in all, we see that the protection offered at EU level against investigative acts by OLAF currently focuses on damages. Where follow-up on OLAF actions takes place within the EU institutions, remedies should be available at a later instance. So far as cooperation with national authorities is concerned, a similar argument applies. Indeed, looking at the Strasbourg case law on how violations of privacy may or may not affect the fairness of a later trial,[79] there is no need to *a priori* exclude the transfer of data from OLAF to national authorities, even when irregularities are found. However, two concerns remain. First of all, it must be noted that regarding, for example, violations of rights like the right to be heard, those rights also guarantee informed decision-making. One may wonder to what extent actions for damage really offer a solution where persons concerned were not able to have any light shed on their case.[80] Second, and more importantly, national authorities that are in charge of assessing the fairness of the proceedings as a whole must indeed be willing to seek the cooperation of the EU courts (and recognize the problems for individuals), in cases where the legality of OLAF actions – as in the *Dalli* case – are put to the test. The question is whether this always happens, as we will see below.

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[74] Case T-48/05 *Franchet & Byk* [2008] ECR II-01585, paras 151, 15.
[75] Ibid., paras 209–219.
[76] Case T-259/03 *Nikolaou* [2007] ECR II-00099, paras 227–234.
[77] Case T-215/02 *Gómez-Reino v Commission* [2003] ECR II-01685, para 65; Case T-48/05 *Franchet & Byk* [2008] ECR II-01585, paras 255–262.
[78] See, *in extenso*, Groussot and Popov (n 40).
[79] *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000).
[80] cf Groussot and Popov (n 40) 613.

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3.3.2 The national level

The question is to what extent the rather restrictive approach to judicial supervision at EU level is 'compensated' for at the national level. This can be done through *ex ante* judicial authorizations for investigative measures, through review of decisions to deploy certain investigative measures, or by challenging the final decision which has led to the imposition of a measure. By way of a preliminary issue, we first need to explore whether there is a difference between OLAF's autonomous inspection powers and its powers in 'mixed inspections'. Regarding the latter, there can be no doubt that – as Dutch authorities are responsible – investigative acts will be attributed to the Dutch authorities, and judicial protection for investigative acts will be offered by the Dutch courts. Things are less clear with regard to cases where OLAF exercises its autonomous powers, but needs the help of DIC or other authorities in the enforcement of them. Arguably, there is a parallel with the situation in competition law, where the CJEU has developed a delicate balance between the powers of the national courts and the EU courts in this respect. In competition law, national courts are only allowed to check for non-arbitrariness and proportionality.[81] A similar division of tasks between the EU and national level can be envisaged here.[82] It would prohibit Dutch authorities – executive and judicial – from going beyond a test of proportionality and non-arbitrariness in the case of assistance in OLAF measures.[83]

In practice, however, such a system of division of labour between the EU and Dutch levels does not seem to exist. This is because EU courts – as was shown above – do not test the legality of OLAF actions as such. OLAF itself cannot take decisions on the follow-up of its investigations. Secondly, on the side of the Dutch authorities, there is no system of prior judicial authorization for OLAF investigative measures, not even where premises are entered. Under the system of administrative law, Dutch administrative authorities are not allowed to enter a home, at least not without the permission of the inhabitant. There was some controversy on whether a judicial authorization would nonetheless be necessary, after it became clear that 'home' as referred to in Article 8 ECHR also includes the registered office of a company run by a private individual and a legal entity's registered office, branches or other business premises.[84] Because

[81] Case C-94/00 *Roquette Frères* [2002] ECR I-09011.

[82] GIP, art 12 provides for a necessity, legality and proportionality assessment, before OLAF's D-G authorizes inspections of premises or on-the-spot checks.

[83] cf Inghelram (n 5) 83–8, 189, 266–7.

[84] *Société Colas Est and others v France* App no 37971/97 (ECtHR, 16 April 2002), para 41.

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of this, discussion arose as to whether entering premises that did not formally qualify as home ('*woning*') under Dutch law, but did come under the scope of Article 8 ECHR, required *ex ante* judicial authorization.[85] Until now, Dutch case law has not followed this reasoning.[86] This appears to be in line both with 'Strasbourg' and 'Luxembourg', as both now hold that the presence of a post-inspection judicial review is capable of offsetting the lack of prior judicial authorization.[87]

In the third place, we must note on *ex post* protection that (assistance to) OLAF investigative acts do not constitute decisions ('*besluiten*'), which open up remedies under administrative law. The fact that those measures are nonetheless enforceable – for instance through police assistance – does not make any difference. It is possible, however, that civil courts exercise jurisdiction and afford legal protection as a preventive measure.[88]

The foregoing means that, in principle, legal protection against investigative acts is essentially concentrated against the decision in which sanctions were imposed or other measures (e.g. financial recovery) were taken. In this context, one should distinguish between the collection of evidence subject to national law (e.g. witness or expert statements, including statements by OLAF staff) and evidence collected by OLAF and used in national proceedings, which is subject to Union law. The first category is more common than is often assumed, since police and prosecutors tend to conduct their own investigations 'from scratch', rather than relying on OLAF's findings, although in some Member States (like the Netherlands) judgments can be found which refer to OLAF reports.

In the second category (e.g. documents or e-mails 'seized' by OLAF in an autonomous investigation), courts are confronted with a complex EU legal framework. Where proceedings are initiated in the Netherlands, Dutch courts may face questions on the legality of OLAF investigations and reports. Because the courts are not allowed to question the legality of OLAF acts themselves, the help of the CJEU is needed, via the procedure

[85] On this, see also B van Bockel, 'Gone fishing? Grenzen aan de toelaatbaarheid van 'toevallig' tijdens een inspectie verkregen bewijs in Deutsche Bahn' (2016) 3 NtER 69; Y de Vries, 'De onderzoeksbevoegdheden van de Commissie scherp gesteld' (2015) 3 NtER 63.

[86] cf Rb Den Haag 9 April 2004 ECLI:NL:RBSGR:2003:AF7087; CBb 8 July 2015 ECLI:NL:CBB:2015:191.

[87] *Delta Pekárny v Czech Republic* App no 97/11 (ECtHR, 2 October 2014), paras 83, 87, 92; Case C-583/13 P *Deutsche Bahn v Commission* ECLI:EU:C:2015:404, paras 32–34.

[88] For an example, see Rb Den Haag 9 April 2004 ECLI:NL:RBSGR:2003:AF7087.

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for preliminary references.[89] In fact, that system is a vital instrument to close the possible loopholes that would otherwise arise, due to the EU Court's interpretation of Article 263 TFEU.

It therefore comes as quite a surprise to learn that the legality of OLAF investigations, to our knowledge, has never been brought before a Dutch court, let alone that a Dutch court has decided to seize the CJEU on this. An assessment of the online database of Dutch court decisions reveals that OLAF pops up in 126 cases (tax/customs cases and criminal cases).[90] OLAF reports are only discussed in terms of their reliability and the rights of the defence, more particularly the right to be heard and the right of access to the reports and underlying files. Many courts take as a starting point that OLAF materials may *only* be put aside in cases where the complaints raised (and substantiated) by defendants are so serious that OLAF conclusions can no longer be considered reliable.[91]

This approach could be warranted for two reasons. First, it may be based on a system of evidentiary law in which – after the government has presented its case – it is up to the individual to demonstrate an alternative version of the facts with sufficiently convincing evidence.[92] But then, that reasoning would also have applied in purely national (administrative/criminal) cases. That is not the case in the Netherlands. We believe, therefore, that another reason is more likely. It is similar to those cases of interstate cooperation, where mutual trust usually prevents state actors from testing the actions of authorities from other states; remedies are then available in the latter (cf. ECHR, art 13; CFR, art 47).[93] In those cases, however, the reasoning would also exclude a review of the legality of OLAF actions and, in consequence, it is inappropriate. In the EU system of judicial control, national courts after all have a very important role to play, if needs be with the assistance of the EU courts in a preliminary reference procedure. It now turns out that Dutch courts may not – as a rule – consider themselves well placed to perform this task. Their standard appears to be limited to a rather strict test of the reliability of evidence of OLAF reports.

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[89] cf Cases C-314/85 *Foto-Frost* [1987] ECR I-4199; Case T-193/04 *Tillack v Commission* [2006] ECR II-03995, para 80.

[90] See <www.rechtspraak.nl>.

[91] cf Rb Noord-Holland 23 July 2013 ECLI:NL:RBNHO:2013:9668; Hof Amsterdam 4 October 2012 ECLI:NL:GHAMS:2012:BX9643; Rb Haarlem 4 November 2008 ECLI:NL:RBHAA:2008:BG7841.

[92] cf Case T-54/14 *Goldfish & Heiploeg* [2016] OJ C 392/24, paras 90ff.

[93] See for instance HR 5 October 2010 ECLI:NL:HR:2010:BL5629 (criminal chamber).

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We cannot escape the impression, therefore, that the judicial accountability forums are not always aware of their tasks and role in the overall EU system. This can be harmful to the interests of the defendant, who will usually not be offered remedies at EU level either (except for damages). There is also a contrary risk if national courts are not aware of the EU dimension of their tasks and that is that they set aside OLAF acts or evidence without a preliminary reference.[94]

3.4 The Ombudsman

As part of the Commission, OLAF is subject to examination by the Ombudsman, who conducts inquiries on 'instances of maladministration', either on the basis of individual complaints or on his/her own initiative (TFEU, art 228). Unlike the EP and the ECA, the Ombudsman focuses on individual cases. The Ombudsman's findings (usually presented in the form of recommendations and 'decisions') are not legally binding, although their political and institutional weight should not be underestimated. Together with the political, financial and administrative accountability mechanisms, reports by the Ombudsman have an important impact on OLAF's practice and procedure.

In the Ombudsman's own understanding, maladministration is defined extensively, i.e. as failure of a public body 'to act in accordance with a rule or principle to which it is bound'.[95] This definition embraces any 'illegality', but it certainly goes far beyond that.[96] Thus, Ombudsman inquiries are not restricted to purely administrative aspects, but can and do deal with possible infringements of procedural and/or fundamental rights.

In the course of inspections, the Ombudsman can access relevant case files and personal data, as OLAF has a duty to cooperate.[97] This enables individuals, who may not be able to access the file and/or investigation report, to get a procedural review via the Ombudsman. This possibility

[94] This appears to be the case in France; cf Cour de Cassation 9 December 2015 ECLI:FR:CCASS:2015:CR05876; Cour d'Appel d'Aix-en-Provence 17 December 2015 arrêt n° 609/15; Cour de Cassation 9 November 2016 ECLI:FR:CCASS:2016:CR05486.

[95] See European Ombudsman, 'Annual Report 2012' (European Union 2013), 13: 'The Ombudsman has defined "maladministration" in a way that requires respect for the rule of law, for principles of good administration, and for fundamental rights.'

[96] cf M Navarro, 'Le Mèdiateur européen et le juge de l'UE' (2014) 50 CDE 389, 398.

[97] cf European Parliament, Decision of 9 March 1994 (OJ L 113/15), amended by decisions of 14 March 2002 (OJ L 92/13) and 18 June 2008 (OJ L 189/25), art 3.

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seems to be increasingly used,[98] even if many complaints focus on public access to documents.[99] Thus, there is considerable scrutiny of the respect of procedural rights, possibly even of ongoing investigations. Interventions by the Ombudsman have led to settlements, acknowledgements of mistakes, financial compensation and/or a change in the Office's practice. Examples can be found in the Ombudsman's case database[100] and his/her annual reports.

It can be concluded that Ombudsman enquiries form an important element in the accountability setting (adding to judicial and political accountability), especially where judicial review of acts by OLAF is limited. While such inquiries cannot concern facts that are or have been the subject of legal proceedings (TFEU, art 228(2)), the Ombudsman is not excluded from examining issues which cannot be brought to the courts as they would be inadmissible.[101] The Ombudsman's practice of 'draft recommendations' and of highlighting constructive responses in his/her reports, respectively 'naming and shaming' in the absence of such constructivism, has proven to be rather effective. In this regard, the role of the Ombudsman can be considered 'complementary' to that of the courts.[102] Nonetheless, since not even the final recommendations are legally binding, this cannot be a substitute for judicial remedies.

4. CONCLUSIONS – FUTURE PERSPECTIVES: THE EUROPEAN PUBLIC PROSECUTOR

OLAF is a vital player in the approach to fighting fraud directed against the EU's financial interests. Its institutional structure is a hybrid one, which is due to the desire to embed the office in the EU's general PIF policy, but also to guarantee operational independence. OLAF performs many different tasks, which call upon many actors to keep an eye on the performance of its functions. By way of a dividing line, political actors

[98] The European Ombudsman, 'Annual Report 2014' (European Union 2015) mentions 11 cases regarding OLAF.

[99] TFEU, art 15(3); Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43. This should be distinguished from individuals' access to their files (cf art. 41(2) lit. b and 47 CFR).

[100] By inserting 'European Anti-fraud Office' at <http://www.ombudsman.europa.eu/en/cases/home.faces>.

[101] cf Navarro (n 96), 400ff (fn 37).

[102] See ibid., 423, 411ff.

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hold OLAF to account for its general investigative policies and the ways in which these policies are applied in practice, whereas courts should offer redress in individual cases. On the one hand, political oversight of individual cases is thought to be dangerous, because law enforcement can never be made instrumental to the interests of the political rulers. On the other hand, fundamental rights standards dictate that redress in individual cases must be afforded by courts or institutions with an equivalent structure. A clear division of labour between the types of accountability is not only warranted because of concerns for fundamental rights and checks and balances, it also avoids an unnecessary duplication of work.

OLAF's structure poses problems from both of these perspectives. In this chapter we have touched upon the following issues:

- *Political accountability*: it turns out that there is no lack of authorities that are, in one way or another, involved with exercising political scrutiny over OLAF's performance of tasks. We wonder, however, to what extent these authorities truly share a common (or coordinated) vision on what tasks OLAF should perform and what the criteria are for assessing that. Rather, the picture that emerges is that OLAF at times has become a bargaining chip in the complex relations between the different institutions involved. In terms of OLAF's operational independence vis-à-vis the other EU institutions and Member States, that is a very unwelcome development. Nonetheless, both the EP and the ECA (whose responsibility may be regarded as administrative/financial) have given an important impetus for improved accountability.
- *Judicial accountability*: the system of court supervision over OLAF's activities gives cause for concern, too. In particular, the interaction between the courts at national and EU level leaves much to be desired. Whereas the CJEU will not usually hear cases for annulment, Dutch courts, for instance, seem to be of the opinion that testing OLAF's investigations is something to be done only in exceptional cases. Although actions for damages can indeed offer a form of relief for the private parties concerned at EU level, a more fundamental discussion is needed on whether interferences with fundamental rights should influence the (fairness of the) proceedings at national level. As we have seen, the SC and also the Ombudsman try to fill this gap at the moment, but neither institution can make binding decisions. The fact that OLAF operates in a complex patchwork of legal provisions, and sometimes in a grey zone between criminal and administrative law, does not make that discussion easier.

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- *Overall*: on the basis of our analysis, the dividing line between political and legal or judicial accountability and their exact scope is not always clear. The role and tasks of OLAF's SC, which in everyday practice is also involved with oversight of OLAF's operational tasks, are particularly complicated. The General Court explicitly put forward the SC's existence as a control mechanism in specific cases, where information is forwarded to other authorities. That way, the SC assumes quasi-legal control functions. However, its embedment within OLAF's structures hardly qualifies it as a body capable of offering redress in individual cases. To achieve its goals, it is dependent on the powers exercised by other (mostly political) accountability forums. This is clearly illustrated by the *Dalli* case, where its report led to mass media coverage and attention in political accountability forums.

The oversight as described above presents a complicated picture. We cannot discern a general vision on how all the many actors involved keep a comprehensive view of the performance of OLAF's tasks. This may lead to duplications, but also to gaps in accountability. These gaps can manifest themselves in the dividing lines between the EU and national levels, as well as in the division of labour between political and judicial accountability.

We believe that, first, a framework must be provided under which EU and national courts can exercise control over OLAF's investigations. It is helpful to have clearer rules for the cooperation with national authorities, on the admissibility of OLAF evidence in national proceedings and on a body which can address complaints in a truly independent manner. In addition there is much to be said for disentangling the complicated relationship between OLAF, its principal, the Commission, and the EP. Many have indicated that the establishment of a European Public Prosecutor's Office (EPPO) could help solve many of the issues touched upon here. By placing OLAF under the supervision of the EPPO, a balance could be found – so it is said – between operational independence and the accountability for investigative policies at large. Yet in the latest proposal on the EPPO, proposed Article 57a 'only' reads that the EPPO is to establish and maintain a close relationship with OLAF. It does not establish a hierarchical relationship. As things look now, our concerns will therefore remain, even under the proposed EPPO regulation.

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