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#### 'I' ITEM NOTE

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	9313/18 + ADD 1 - COM(2018) 338 final + SWD(2018) 251 final
No. prev. doc.:	10095/19 + ADD 1
Subject:	Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations <b>(1st reading)</b> – <i>Confirmation of the final compromise text with a view to agreement</i>

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1. On 23 May 2018, the Commission submitted to the European Parliament and the Council a proposal to amend Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations (the OLAF Regulation).
2. This proposal aims, primarily, at ensuring smooth cooperation between OLAF and the European Public Prosecutor's Office (the EPPO), which is foreseen to become operational at the end of 2020 or the beginning of 2021. Moreover, the proposal aims at addressing the main shortcomings in the effectiveness of OLAF investigations, such as lack of access to bank account transactions, admissibility of reports and recommendations of OLAF in national proceedings, and to clarify certain procedural provisions. A more far reaching revision of the OLAF Regulation may be proposed in the medium term.

3. The proposal is based on Article 325 TFEU (ordinary legislative procedure).
4. The Court of Auditors delivered its opinion No 8/2018 on 15 November 2018.<sup>1</sup>
5. On 16 April 2019, the Plenary of the European Parliament adopted a legislative resolution for a position at first reading.<sup>2</sup> That resolution is based on the report of the Committee on Budgetary Control and on the opinions of the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs.
6. The Working Party on Combating Fraud has discussed the file at numerous meetings between June 2018 and May 2019. On 12 June 2019, the Permanent Representatives' Committee adopted a mandate to begin negotiations with the European Parliament.<sup>3</sup> The most important amendments made by the Permanent Representatives' Committee's mandate to the Commission's initial proposal concerned:
  - a limitation of OLAF's mandate in relation to VAT fraud, aligned to Directive (EU) 2017/1371<sup>4</sup> on the fight against fraud (PIF Directive);
  - a limitation of OLAF's right to access to bank account transactions due to the sensitivities for such access in some Member States;
  - maintaining the status quo foreseen in the OLAF Regulation as regards the admissibility of evidence gathered by OLAF in national judicial proceedings;

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<sup>1</sup> OJ C 42, 1.2.2019, p. 1.

<sup>2</sup> Doc. 8570/19.

<sup>3</sup> Doc. 10095/19.

<sup>4</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28.7.2017, p. 29).

- clarifications regarding the cooperation between OLAF and the EPPO without imposing direct obligations on the EPPO in the OLAF Regulation, which has a different legal basis than Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the "EPPO")<sup>1</sup>;
- clarifications of the mutual obligations of the national anti-fraud coordination services (AFCOS) and OLAF.

7. The European Parliament made more numerous amendments, which can be summarised as follows:

- clarification that "irregularities" are also covered in the Regulation (not only fraud);
- abolishment of the distinction between "internal" and "external" investigations - which would possibly have limited OLAF's powers for internal investigations;
- abolishment of Investigative Policy Priorities (IPPs) for opening investigations;
- introduction of stricter procedural rules, such as: (i) deadlines for OLAF's evaluation of a case, (ii) obligations on Member States to report back to OLAF on the follow-up of OLAF recommendations and information submitted to AFCOS, (iii) more transparency obligations on OLAF and rules on access to file for the person concerned, (iv) obligation on national courts to notify OLAF and justify where they reject the OLAF report as evidence, (v) establishment of a "controller of procedural guarantees" to verify OLAF's compliance with procedural rights, (vi) inclusion of a new right of appeal by concerned persons to annul investigation reports;

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<sup>1</sup> OJ L 283, 31.10.2017, p. 1.

- strengthening of the rules on cooperation between OLAF and the EPPO, such as: (i) the possibility for the EPPO to instruct OLAF to use a higher standard of proof so that OLAF's results are surely admissible as evidence in ensuing criminal proceedings, (ii) an obligation on OLAF to stop acting once the EPPO opens an investigation into the same facts, (iii) the requirement that the EPPO has consented in writing to OLAF opening a complementary investigation;
  - strengthening of the Supervisory Committee's right to access OLAF's case files;
  - additional subjects to be discussed at the annual interinstitutional exchange of views, including the follow-up actions from Member States to OLAF reports and recommendations;
  - requirement that OLAF's annual report contains an assessment on the degree of cooperation from competent authorities of Member States and Union institutions;
  - additional requirements on the Commission to adopt delegated acts to lay down investigation procedures and acts permitted.
8. On the other hand, the European Parliament has made no amendments on the provisions amended by the Council (i.e. the VAT mandate of OLAF, access to bank accounts and the admissibility of evidence in national proceedings).
9. Several technical meetings, physical and virtual, took place since November 2019. A large number of issues were resolved with compromises from both sides during those meetings. The most contentious points were, in principle, resolved in a political trilogue, on 26 June. On a few of those, the "in principle" agreement was spelled out in technical meetings in July. The main elements of the agreement are the following:
- VAT: it was agreed to return to the status quo as laid down in the current version of the OLAF Regulation as requested by the Council;

- access to bank account transactions: a compromise wording was found, which limits OLAF's rights of access to those of national investigators that have access to bank accounts;
- higher procedural standards for OLAF investigations conducted in support of the EPPO: upon an opinion from the OLAF Supervisory Committee, the European Parliament requested the application by OLAF of procedural standards that would be equivalent to those in criminal investigations in order to protect the admissibility of evidence gathered in ensuing criminal proceedings; the compromise found obliges the EPPO to cooperate closely with OLAF to ensure that the EPPO (not OLAF) maintains the procedural standards without OLAF's mandate being enlarged, which is an important element for the Council;
- privately owned devices: under the appropriate legal safeguards, OLAF will be allowed access to privately owned devices to the extent those are used for work purposes and to the same extent as the national investigation authorities, insofar as external investigations are concerned; with regards to internal investigations reference is made to the decisions adopted by the respective institution, body, office or agency;
- admissibility of evidence: the status quo on the rules on the admissibility of OLAF reports as evidence in national proceedings has been maintained as regards criminal proceedings, as it was a strong demand from the Council's side not to impinge in any way on the independence of national courts; the admissibility of OLAF reports as evidence in administrative proceedings and the communication with OLAF on issues encountered with the admissibility have been strengthened;
- access to OLAF reports: the person concerned is allowed to request access to OLAF's final report under the condition that explicit consent is given within a period of 12 months by the relevant national authorities who conduct the ensuing national proceedings;

- controller of procedural guarantees: an independent function that is attached in organisational terms to the Supervisory Committee has been agreed; the scope of the controller's function covers also the rules applicable to OLAF investigations, in particular procedural requirements and fundamental rights; the controller can issue recommendations to the Director-General of OLAF;
- cooperation between OLAF and the EPPO: a compromise has been found whereby the EPPO's consent will be required for OLAF to conduct complementary investigations; the EPPO may not remain silent, but it is under no obligation to justify its objections to OLAF;
- Supervisory Committee: the access of the Supervisory Committee to OLAF's case files has been regulated, thus resolving a long dispute between the two bodies;
- the European Parliament agreed to abandon its request to abolish the distinction between external and internal investigations, which would have affected the clarity of the applicable rules in the Council's view;
- an improvement of the follow-up reporting from Member State authorities to OLAF has been foreseen in order to allow OLAF to better monitor its cases and identify shortcomings while overall the reporting obligations on national authorities were kept at bay as requested by the Council.

10. The members of the Working Party on Combating Fraud analysed the compromise in two informal videoconferences on 13 and 23 July 2020. The majority of delegations supported the political agreement. Nevertheless, a number of delegations maintained a request to clarify the interpretation of the rules giving OLAF access to bank account information by redrafting the respective recital. Several exchanges between the Council and the European Parliament took place in July and September, but no agreement was possible. After a written consultation, the members of the Working Party on Combating Fraud, during an informal videoconference held on 22 September, showed broad support for the compromise proposal as contained in the Addendum to this note.
11. In view of the above, the Permanent Representatives Committee is invited to
- endorse the final compromise text of the Regulation as set out in the Addendum;
  - approve in principle the submission, at a later date, of this finalised compromise text, firstly for political agreement and subsequently, following legal-linguistic revision, for adoption as the Council's first-reading position. This approval would be conditional upon the receipt of an offer letter from the Chair of the European Parliament's Committee on Budgetary Control confirming that the European Parliament can accept the text as set out in the Addendum and that, should the Council adopt this text as its first-reading position, the European Parliament would not adopt any amendments to it in its second reading.
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