

1. INTRODUCTION

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1. BACKGROUND

The European Anti-Fraud Office (OLAF) is a main actor in the domain of the protection of the Union's financial interests (PIF).¹ Among other tasks, OLAF carries out administrative investigations on matters affecting the Union budget either within EU institutions, bodies, offices and agencies ('internal investigations') or in the Member States and third countries ('external investigations'). At the end of its investigations, OLAF draws up a report in accordance with the rules laid down in Article 11 of Regulation 883/2013.² The admissibility of such reports as evidence in national proceedings, especially criminal ones, is crucial for the effective protection of EU financial interests. According to Article 11(2) of Regulation 883/2013, OLAF final reports shall constitute admissible evidence in national administrative or judicial proceedings 'in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors'.³ OLAF reports shall also be subject to the same evaluation rules as those applicable to national administrative reports and shall have the same evidentiary value as such reports.⁴ Like Article 8(3) of Regulation 2185/96 on reports drafted at the end of OLAF on-the-spot checks and inspections,⁵ Article 11(2) of the OLAF Regulation enshrines therefore an *assimilation* rule: OLAF final reports shall be treated in the same way as national reports by administrative inspectors.

Such an assimilation rule, however, poses problems. First, it can apply only if there is, at the national level, an administrative authority with a mandate and powers that can be considered 'equivalent' to those of OLAF. Finding such an 'equivalent' authority may not always be a straightforward task. Second, national rules and practices on the admissibility of administrative reports in criminal proceedings vary across Member States, in this way hampering a coherent judicial follow-up to OLAF investigations conducted in them. Third, national judicial authorities, once they have received OLAF reports, sometimes end up repeating the investigative activities already performed by the

¹ PIF stands for '*protection des intérêts financiers*'.

² Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L 248/1 (hereinafter also 'OLAF Regulation').

³ Art 11(2) of Regulation 883/2013.

⁴ *ibid.*

⁵ Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 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 292/2.

Office in order to obtain admissible evidence. The duplication of investigative activities is nonetheless contentious from different perspectives. It violates the principle of procedural economy, as human and technical resources are deployed twice to obtain the same result. It prolongs the elapsed time since the commission of the alleged crimes, with the consequence that there are higher risks of their becoming statute-barred before any decision on the merits can be taken. At the same time, persons under OLAF investigation would undergo the ordeal of an investigation for a second time. Finally, the element of surprise that is needed for some investigative activities – eg, inspections and searches – is lost when suspects are already aware of investigations concerning them.⁶

Already in 2011, the Commission noted that the ‘results of EU administrative investigations frequently remain unused by national criminal courts’.⁷ According to an OLAF study of Member States’ follow-up to OLAF’s judicial recommendations issued between 1 January 2008 and 31 December 2015, 169 out of 317 recommendations were dismissed, 94 of them on grounds of ‘insufficient evidence’.⁸ OLAF reported that Member States’ authorities repeatedly take the view that Article 11(2) of Regulation 883/2013 ‘is not always a sufficient legal basis to allow Member States’ judicial authorities to use OLAF reports as evidence in trial’,⁹ so that national authorities often ‘perform investigation activities again in order to acquire admissible evidence’.¹⁰

As the Commission acknowledged in May 2018 when tabling the proposal for an amendment of Regulation 883/2013, the recent OLAF Regulation’s evaluation revealed that the rules on the admissibility of OLAF-collected evidence in national judicial proceedings turned out to be ‘the most important factor affecting the follow-up to OLAF recommendations’.¹¹ The Commission thus suggests abolishing the assimilation clause for national administrative proceedings, as well as ‘judicial proceedings of a non-criminal nature before national courts’.¹² In these cases, the admissibility of OLAF reports would be subject only to the simple verification of their authenticity. Nothing would change, however, for criminal proceedings. In April 2019, the European Parliament instead suggested that the assimilation principle should no longer apply to criminal proceedings either and that OLAF reports should ‘constitute admissible evidence in judicial proceedings’,¹³ including criminal ones, upon simple verification of their authenticity.

⁶ Katalin Ligeti, ‘The Protection of the Procedural Rights of Persons Concerned by OLAF Administrative Investigations and the Admissibility of OLAF Final Reports as Criminal Evidence’ (Study for the European Parliament’s Committee on Budgetary Control 2017) 27–28.

⁷ Commission, ‘On the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers’ money’ COM(2011) 293 final, 26 May 2011, 8.

⁸ OLAF, ‘Analysis on Member States Follow-Up to OLAF’s Judicial Recommendations Issued between 1 January 2008 and 31 December 2015’, Ref Ares(2017)461597 – 27/01/2017 (2017) 1.

⁹ *ibid.* 2.

¹⁰ *ibid.*

¹¹ Commission, ‘Proposal for a regulation 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’ COM(2018) 338 final, 23 May 2018, 5.

¹² *ibid.*, Art 1(10)(b).

¹³ European Parliament, ‘Legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning

The fate of this proposed amendment is uncertain at the time of writing. In addition, it is not even clear whether a rule such as that envisaged by the Parliament would truly change the status quo, as it would apply in a context where there is no harmonisation of national rules on national criminal proceedings.

The admissibility of OLAF final reports in criminal proceedings, therefore, will arguably remain problematic in the future, and not even the establishment of the European Public Prosecutor's Office (EPPO)¹⁴ will alleviate all concerns about the coherence and effectiveness of PIF enforcement. OLAF will still be able to conduct investigations entailing a potential criminal law follow-up vis-à-vis PIF cases beyond the EPPO's competence, including those concerning Member States that do not participate in the EPPO enhanced cooperation.¹⁵

The issues connected with the admissibility of OLAF-collected evidence should also be assessed within the broader landscape of EU law enforcement. OLAF is not the only EU administrative authority that may forward reports and evidence to national authorities with a view to a punitive follow-up. Transmission of evidence with an 'EU origin' can also occur in European Central Bank (ECB) frameworks regarding the Single Supervisory Mechanism (SSM),¹⁶ the European Securities and Markets Authority (ESMA) regarding the supervision of trade repositories,¹⁷ and the European Commission's Directorate General for Competition (DG COMP).¹⁸

In 2016 and 2017, Utrecht University led two EU co-funded research projects that proved the relevance of comparing OLAF's legal framework with the ECB, ESMA and DG COMP with respect to investigatory powers and exchange of information between these entities and national enforcement authorities.¹⁹ The present project ADCRIM

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 (COM(2018)0338 – C8-0214/2018 – 2018/0170(COD))', amendment 85.

¹⁴ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] OJ L 28/1.

¹⁵ Namely, Denmark, Ireland, the United Kingdom, Hungary, Poland, and Sweden. It seems however that Sweden will soon join the other 22 Member States that already participate in the EPPO enhanced cooperation (<https://ec.europa.eu/commission/commissioners/2014-2019/oettinger/blog/sweden-join-european-public-prosecutors-office_en> accessed 4 June 2019).

¹⁶ According to Art 136 ('Evidence of facts potentially giving rise to a criminal offence') of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L 141/1, 'Where, in carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA [national competent authorities] to refer the matter to the appropriate authorities for investigation and possible criminal prosecution...'.
¹⁷ 'ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties ... it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences ...' (Art 64(8) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1).

¹⁸ Art 12 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 concerns the exchange of information between DG COMP and national competition authorities, and the use of such information.

¹⁹ Michiel Luchtman and John Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University 2017); Michele Simonato, Michiel Luchtman and John

(‘Admissibility of OLAF final reports as evidence in criminal proceedings’) aims to complement these two studies by delving further into issues raised by the admissibility of evidence collected by EU law enforcement authorities, and especially OLAF, in national criminal proceedings.

2. AIM AND SCOPE OF THE RESEARCH

ADCRIM is a comparative study involving seven EU Member States: France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom.²⁰ It aims to analyse national provisions and case law on the admissibility of evidence and reports drawn up by administrative authorities in punitive administrative and criminal proceedings, with a focus on the latter. This review of national legislation, case law, and practices led to identifying some obstacles and limits to the admissibility of OLAF-collected evidence in national proceedings. Along the lines of the previous two Hercule III studies,²¹ the seven countries have been chosen because of their ideal geographical distribution and their different approaches to the interplay between criminal and administrative law.²² Among these seven Member States, there are common law and civil law systems, as well as adversarial and inquisitorial criminal justice systems.

The analysis of national administrative and criminal justice systems also assessed whether and to what extent OLAF can learn lessons from the other three above-mentioned EU law enforcement authorities. Following up on the findings of the two previous Hercule III studies led by Utrecht University, ADCRIM inquired whether the issue of the admissibility of evidence would also benefit from a comparison between OLAF, the ECB, ESMA, and DG COMP.

Finally, drawing on the seven national reports, as well as two ‘transversal’ reports that deal with the relationship between admissibility of evidence and fundamental rights and the transmission of evidence from the EU to the national level, recommendations to strengthen the admissibility of OLAF reports in national criminal proceedings have been put forward. This has been done taking into account the competing interests in the field, namely the need to ensure adequate and effective protection both of the EU budget and, at the same time, procedural safeguards and fundamental rights under the EU Charter of Fundamental Rights.

A few clarifications on the scope of the research are appropriate. First, for the purpose of this study, ‘punitive administrative proceedings’ refers to national proceedings for applying administrative sanctions, and more precisely fines,²³ that would qualify as having a criminal nature according to the so-called *Engel* criteria established by the

Vervaele (eds), *Exchange of Information with EU and National Enforcement Authorities: Improving OLAF Legislative Framework through a Comparison with Other EU Authorities (ECN/ESMA/ECB)* (Utrecht University 2018).

²⁰ The United Kingdom is still part of the EU at the time of writing. Any reference to the UK should be understood as referring to the English and Welsh legal system.

²¹ See n 19 above.

²² See Michiel Luchtman, ‘Introduction’ in Luchtman and Vervaele (eds) (n 19) 4.

²³ The scope of the administrative facet of this study will therefore be limited to proceedings leading to the imposition of administrative fines and not include other possible sanctions, unless otherwise specified.

European Court of Human Rights (ECtHR),²⁴ which the Court of Justice of the European Union (CJEU) has recently endorsed.²⁵ Throughout this study, the reference to ‘punitive administrative proceedings’ thus encompasses proceedings before administrative authorities but not before administrative courts, unless otherwise specified. References to ‘punitive proceedings’ shall instead be understood as referring to both punitive administrative and criminal proceedings.

Second, the scope of the comparison between OLAF, ESMA, the ECB, and DG COMP is limited to the ‘vertical’ dimension of admissibility, ie admissibility of evidence collected by these EU bodies and forwarded to national authorities for punitive administrative or criminal follow-up. ADCRIM does not address the horizontal transfer of evidence under the frameworks for mutual legal assistance and mutual administrative assistance.

Third, the working definition of ‘admissible evidence’ is relevant evidence that may be shared with administrative sanctioning authorities or criminal courts and that may contribute to findings of fact in criminal or punitive administrative proceedings. The study group acknowledged that this project focuses on ‘evidence’ rather than on ‘intelligence’ or ‘information’, which instead refer to pieces of information that, as such, could not contribute to findings of fact in domestic punitive proceedings. As the dividing line between the two notions is blurred, some contributions within ADCRIM refer, when needed, to the exchange of information between EU law enforcement entities and national authorities. The second Hercule III project focused much more intensely on such exchanges of information.²⁶

Finally, the study refers to ‘OLAF-collected evidence’ and ‘OLAF reports’ mostly interchangeably, unless otherwise specified. The former concept seems however broader than the latter. In laying down the above-mentioned assimilation rule, Article 11(2) of Regulation 883/2013 refers to OLAF ‘reports’. These reports are complex legal products that can be accompanied by other relevant documents (such as records of the interviews performed according to Article 9 of the OLAF Regulation, reports of the on-the-spot checks or of digital forensics operations, etc). The term ‘OLAF-collected evidence’, which the Commission also uses in its recent Proposal for the reform of Regulation 883/2013,²⁷ includes therefore both OLAF final reports and these items of evidence.

3. METHODOLOGY AND PLAN OF THE STUDY

Coordinated by the University of Luxembourg and carried out by an international team of experts from seven European universities,²⁸ the ADCRIM project lasted between 1 April 2018 and 31 March 2019. Building on background research carried out by the University of Luxembourg staff, a questionnaire was prepared to guide national

²⁴ See *Engel and Others v The Netherlands* Apps nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976).

²⁵ See, for instance, Case C-489/10 *Bonda*, EU:C:2012:319.

²⁶ Simonato, Luchtman and Vervaele (eds) (n 19).

²⁷ COM(2018) 338 final, 5 and 11.

²⁸ See Annex II for further details.

rapporteurs in the analysis of the relevant national rules and procedures. Included in Annex I to this study, the questionnaire was discussed and amended during the project's first meeting, which took place in Luxembourg on 5 and 6 June 2018 and was attended by one OLAF representative.

The questionnaire was divided into five parts: i) general framework on the collection and admissibility of evidence in national proceedings; ii) admissibility of OLAF-collected evidence in national punitive administrative proceedings; iii) admissibility of evidence collected by the ECB, ESMA, and DG COMP in national punitive administrative proceedings; iv) admissibility of evidence collected by national and EU law enforcement authorities in national criminal proceedings; and v) focus on the admissibility of OLAF-collected evidence in national criminal proceedings. In addition to desk research, national rapporteurs interviewed, when needed, national experts and practitioners to gain a better understanding of problems and practices connected with the admissibility of OLAF reports in domestic procedures.

A draft version of the national reports was discussed during the project's second meeting, which the University of Luxembourg hosted on 28 February and 1 March 2019. Two representatives from OLAF were present at this meeting, during which the study group's members also discussed the preliminary findings of the comparative report as well as of the two 'transversal' reports on 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' and 'Lawful and Fair Use of Evidence from a European Human Rights Perspective'.

The final text of the two transversal reports is to be found, respectively, in chapters 2 and 3 of this study, while chapters 4–10 include the seven national reports (France, Germany, Hungary, Italy, Luxembourg, the Netherlands, and the United Kingdom). Chapter 11 offers a comparative analysis that draws upon the national and transversal reports. On the basis of such reports, and the comparative one as well, policy recommendations to strengthen the admissibility of OLAF-collected evidence in national criminal proceedings have been formulated in chapter 12.

All reports use the OSCOLA referencing system.²⁹ The members of the study group, as well as OLAF staff who were involved in ADCRIM either by attending one of the meetings or accepting to be interviewed in the framework of the project, are listed in Annex II. The study was finalised in June 2019.

²⁹ The current edition of the OSCOLA guidelines (2012), which the authors have followed with a few deviations, can be found at <www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf> accessed 4 June 2019.