

Proposal for revisions to address shortcomings of Regulation EU No 883/2013 concerning investigations conducted by OLAF

The European Association of Non-Integrated Metal Importers & Distributors (**EURANIMI**) is a non-profit trade association that represents multiple independent EU based companies who globally source a wide variety of stainless steel and aluminium products, such as sheets, plates, bars, profiles, tubes and fittings, and import and distribute these products in the EU.

We are writing to you in connection with the European Commission's (the **Commission**) 'Call for evidence'¹ concerning the evaluation of 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) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (**Regulation No 883/2013**).²

EURANIMI considers that it is essential to draw the Commission's attention to the shortcomings of Regulation No 883/2013 which have impacted our members. It is our opinion that Regulation No 883/2013 needs to be revised to meet its objectives, protect EU-based importers and to promote compliance with procedural guarantees.

These comments are divided into two sections. **Section 1** provides an overview of the principles of EU law that Regulation No 883/2013 in its current form is infringing by falling short in the protection of procedural rights. In **Section 2**, we set out proposed amendments.

1. SHORTCOMINGS OF REGULATION NO 883/2013: FAILURE TO PROTECT PROCEDURAL RIGHTS

1.1 Overview of the protection of procedural rights under EU law

Article 1 of Regulation No 883/2013 sets out the 'Objectives and Tasks' of the European Anti-Fraud Office (**OLAF**). Article 1(4) states that: "[...] the Office shall conduct administrative investigations for the purpose of fighting fraud corruption and any other illegal activity affecting the financial interests of the Union."³ This important objective of Regulation No 883/2013 and the tasks of OLAF thereunder must however be weighed against the importance of protecting the procedural rights of those implicated by these investigations, particularly in light of the potential criminal implications of the outcome of such investigations. Indeed, OLAF investigations can often lead to criminal proceedings in EU Member States, with the information collected by OLAF used as evidence. As such, comprehensive procedural guarantees and ensuring OLAF's compliance with these guarantees whilst conducting investigations is crucially important.

¹ European Commission, Regulation on the European Anti-Fraud Office (OLAF) – Evaluation <[Regulation on the European Anti-Fraud Office \(OLAF\) - Evaluation \(europa.eu\)](#)>.

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) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (hereinafter, *Regulation No 883/2013*).

³ Regulation No 883/2013, Article 1(4), p.3.

Procedural rights are protected under EU law through the Charter of Fundamental Rights of the European Union⁴ (the **Charter**). In particular, Article 41 of the Charter enshrines the right to good administration, which encompasses the right to be heard before an adverse decision is taken, the right of a person to have access to their file, and the administration's obligation to give reasons for its decisions.⁵ It is well-established in EU case law that "[...] respect for the rights of the defence, enshrined in Article 41(2) of the Charter, constitutes a fundamental right which is an integral part of the EU legal order."⁶ As such, the integral nature of these rights within the EU legal order highlights the sheer significance of ensuring that they are respected by EU institutions, bodies and offices, including OLAF.

Regulation No 883/2013 sets out certain procedural safeguards. Article 3(8) states that "*the economic operator concerned shall have the right not to make self-incriminating statements and to be assisted by a person of the economic operator's choice*".⁷ Furthermore, Article 9 lays out the 'Procedural guarantees' provided for under Regulation No 883/2013. For example, Article 9(1) states that "[...] investigations shall be conducted objectively and impartially and in accordance with the principle of the presumption of innocence [...]"⁸ and Article 9(2) states that "[a]ny person interviewed shall have the right to avoid self-incrimination. [...] The invitation shall include a list of the rights of the person concerned, in particular the right to be assisted by a person of his choice."⁹ In addition, and importantly, Article 9(4) foresees that "[...] once the investigation has been completed and before conclusion referring by name to a person concerned are drawn up, that person shall be given the opportunity to comment on facts concerning him."¹⁰ Finally, Regulation No 883/2013 establishes a "Controller of procedural guarantees" and establishes a complaints mechanism that allows persons concerned by OLAF investigations to lodge complaints regarding OLAF's compliance with the procedural guarantees¹¹ in Article 9a and 9b.

Despite the EU legislator's clear consideration of the need to provide procedural guarantees in light of the far-reaching implications of OLAF investigations, we consider that Regulation 883/2013 does not go far enough to ensure the protection of procedural rights. This is evidenced by the case law reaching the EU's courts which addresses these very concerns, as discussed in **Section 1.2** below.

1.2 Regulation No 883/2013 challenged before the EU courts: shortcomings in protecting procedural rights

Since Regulation 883/2013's entry into force, both the General Court (the **GC**) and the Court of Justice of the European Union (the **ECJ**) have heard cases concerning the shortcomings of OLAF in ensuring the protection of procedural rights in its investigations. Issues that have been raised include the clarity of procedural safeguards, the right to be heard, and the transparency of the investigation process.

For example, the appeal judgment in C-787/22 P *Sistem ecologica*¹² considered OLAF's refusal to grant the appellant's request to access certain documents contained in its file, whereby OLAF had alleged that

⁴ 'Charter of Fundamental Rights of the European Union', Official Journal of the European Communities, C 364/1, 18.12.2000.

⁵ *Ibid*, Article 41.

⁶ Judgment of 30 November 2023, '*Sistem ecologica*' production, trade and services d.o.o. *Srbac*, v *European Commission*, C-787/22 P, EU:C:2023:940, para. 150.

⁷ Regulation 883/2013, Article 3(8), p.6.

⁸ Regulation 883/2013, Article 9(1), p.12.

⁹ Regulation 883/2013, Article 9(2), p.13.

¹⁰ Regulation 883/2013, Article 9(4), p.13.

¹¹ Regulation 883/2013, Articles 9a, 9b, pp. 14-17.

¹² *Sistem ecologica*.

Formatted: English (United States)

Formatted: English (United States)

Regulation No 883/2013 did not afford the person concerned a right to access the file¹³. However, the ECJ held, contrary to the GC, that “persons concerned” by the investigation should have the opportunity to access documents in relation to an OLAF investigation.¹⁴ Here, the ECJ needed to step in to fill a lacuna in the procedural guarantees offered by Regulation 883/2013. This finding clearly demonstrates that the Regulation is not fit for purpose in its current form and should be revised accordingly.

The ECJ in C-787/22 P *Sistem ecologica* also considered the limitations of the procedural guarantee provided for by Article 9(4), which only gives the person concerned the opportunity to provide comments before the conclusions are drawn up in OLAF’s final investigation report, and not afterwards. Indeed, the ECJ held that “[i]t is, however, clear that Regulation No 883/2013 makes no provision for the right, for a ‘person concerned’ such as the appellant, to present, continuously and as it sees fit, arguments and ‘supplementary’ evidence in the context of an investigation conducted by OLAF. Article 9(4) of that regulation provides solely for the right, for such a person, to be given the opportunity to comment on the facts concerning him or her before the conclusions referring by name to that person are drawn up, and consequently, before the adoption, by OLAF, of its final investigation report.”¹⁵ We consider the inability of persons concerned by the investigation to present arguments and additional evidence throughout the investigation process to be a serious limitation on key procedural rights, which does not allow them to effectively exercise their right to be heard.

Finally, aside from C-787/22 P *Sistem ecologica*, there have been a number of other instances where the ECJ has overturned a GC judgment on appeal in light of a finding that OLAF failed to ensure sufficient protection of procedural rights. For example, in C-497/22 P OC¹⁶, the ECJ, contrary to the GC, found OLAF to have infringed its obligation to comply with the principle of the presumption of innocence and the right to good administration. Finally, in C 650/19 P *Vialto Consulting Kft.*¹⁷, the ECJ set aside the GC’s judgment in so far as it dismissed as unfounded the complaint raised by Vialto relating to the Commission’s infringement of its right to be heard.

We consider that the case law outlined above provides ample evidence that Regulation 833/2013 does not sufficiently protect procedural rights and as such substantiates the need for our proposed amendments to this Regulation.

2. PROPOSED AMENDMENTS

EURANIMI proposes the following amendments to revise Regulation 833/2013 in a way that will reinforce the protection of EU-based importers and procedural rights, including the right to good administration, during OLAF investigations.

2.1 Ensure the right to appeal OLAF’s final investigation report in the EU courts

It is of fundamental importance that a revised version of Regulation 833/2012 foresees adequate access to the EU courts and in particular the possibility of introducing an action of annulment directly against an OLAF

¹³ *Sistem ecologica*, para. 32.

¹⁴ *Sistem ecologica*, para. 83.

¹⁵ *Sistem ecologica*, para. 69.

¹⁶ Judgment of 7 March 2024, *OC v European Commission*, C-497/22 P, EU:C:2024:215, para. 88.

¹⁷ Judgment of 28 October 2021, *Vialto Consulting Kft., v European Commission*, C-650/19 P, EU:C:2021:879, para. 149.

Formatted: English (United States)

Formatted: English (United States)

final investigation report. Currently, OLAF's unlawful investigative acts cannot be the subject of any review before EU Courts in the form of an action of annulment but only an action for damages and interest. We consider that this cannot be regarded as an effective remedy and, as such, must be revised.

2.2 Protection of EU-based importers: publication of a notice initiating a customs fraud investigation in the Official Journal of the European Union

OLAF conducts investigations relating to customs fraud. In EURANIMI's experience, these fraud mechanisms are largely set up by third-country producers without any knowledge by importers even after careful due diligence is carried out pre-emptively. These importers become automatically liable towards the EU national customs authorities and will face the consequences of any such customs fraud, including customs duties and fines and sanctions.

A mechanism should be put in place to protect *bona fide* EU based importers that are not aware of such customs fraud and – at the very least - give them the opportunity to limit financial liabilities on future imports. To this extent, EURANIMI considers that, in line with any other trade defence investigation¹⁸, OLAF should publish a notice in the Official Journal of the European Union announcing the initiation of a customs fraud investigation (especially when the duties allegedly evaded consist in anti-dumping and countervailing duties). This notice will give notice to EU importers of the fraud mechanisms under investigation, allowing them to take proactive measures (e.g. ceasing to import the product under investigation).

2.3 Ensure the right to access information during the investigation

In accordance with Article 41(2) of the Charter and the precedent set in *C-787/22 P Sistem Ecologica*, parties affected by an OLAF investigation as 'persons concerned' have the right to access their file during the investigation. Under Regulation 883/2013, this right is limited to only allow persons concerned to access a copy of the record of an interview conducted by OLAF or a record of past statements made by them. The right of a party concerned to access its file should be enshrined in the revised Regulation 883/2013 by explicitly stating that such concerned persons can request access to the entirety of their file. Any requests to exercise this right should not be frustrated by burdensome and time-consuming administrative procedures and should be processed by OLAF within a reasonable time.

2.4 Ensure the right to be heard before completing the investigation and issuing OLAF's final investigative report

Article 9(4) of Regulation 883/2013 only allows the person concerned an opportunity to comment on facts concerning them once the investigation has been completed and before the conclusions of the investigation that refer to them are drawn up. The ECJ recognised the limited scope of this Article in *C-787/22 P Sistem ecologica*, which does not allow a person concerned to continuously - and as such person sees fit - present arguments and supplementary evidence to OLAF during an investigation.

The procedural guarantee in Article 9(4) does not allow a person concerned to effectively exercise its right to be heard. The fact that the investigation has been completed undermines the ability of OLAF to take into consideration the comments and any evidence provided by a person concerned. This guarantee should be

¹⁸ Article 5 (9) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union.

extended by requiring OLAF to publish a preliminary investigation report before the investigation is completed and allowing persons concerned to comment on this report in a reasonable amount of time.

2.5 Ensure the right for affected parties to comment on OLAF's final investigative report

Under Regulation 883/2013, a person concerned, or an affected party cannot submit comments once the OLAF investigation has been closed and the final investigative report is issued. Persons concerned and affected parties should be given an opportunity to comment on the final investigative report to guarantee the right of good administration. This right to comment should be explicitly provided for in the revised Regulation 883/2013.

2.6 Strengthen the powers of the Controller of procedural guarantees and improve the complaints mechanism

Under Article 9b of Regulation 883/2013, a person concerned can lodge a complaint with the Controller of procedural guarantees (the **Controller**) regarding OLAF's compliance with the procedural guarantees set out in the Regulation. The lodging of a complaint will not have a suspensive effect on the investigation itself. In the interest of administrative efficiency and to further protect the procedural rights of persons concerned by avoiding further infringements on these rights, the lodging of a complaint that is accepted by the Controller as fulfilling the requirements in Article 9b(1) and (2) should have a suspensive effect on the pursuit of the investigation with respect to the person concerned.

3. CONCLUSION

In these comments, we are showing that Regulation No 883/2013 in its current form is not fit for purpose and is not working as it was intended regarding the protection of procedural rights and rights of EU-based importers. EURANIMI strongly encourages the Commission to consider the above-mentioned proposed amendments that are needed to improve the functioning of Regulation No 883/2013, and importantly, to ensure a reinforced protection of procedural rights in the EU.
