

Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations

REGULATION (EU, Euratom) 2020/2223 OF THE
EUROPEAN PARLIAMENT AND OF THE COUNCIL

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amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 325 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the Court of Auditors⁽¹⁾,

Acting in accordance with the ordinary legislative procedure⁽²⁾,

Whereas:

- (1) The adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council⁽³⁾ and Council Regulation (EU) 2017/1939⁽⁴⁾, substantially strengthened the means available to the Union to protect its financial interests by means of criminal law. The establishment of the European Public Prosecutor's Office (EPPO) is a key priority in the Union's criminal justice and anti-fraud policy, having the power to carry out criminal investigations and bring indictments related to criminal offences affecting the financial interests of the Union, within the meaning of Directive (EU) 2017/1371, in the participating Member States.
- (2) To protect the financial interests of the Union, the European Anti-Fraud Office (the 'Office') conducts administrative investigations into administrative irregularities as well as criminal conduct. At the end of its investigations, it may make judicial recommendations to the national prosecution authorities, in order to enable them to pursue indictments and prosecutions in Member States. In the Member States participating in the EPPO, it will report suspected criminal offences to the EPPO and collaborate with the EPPO in the context of the EPPO's investigations.

Changes to legislation: There are currently no known outstanding effects for the Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council. (See end of Document for details)

- (3) Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council⁽⁵⁾ should be amended and adapted in light of the adoption of Regulation (EU) 2017/1939. The provisions of Regulation (EU) 2017/1939 governing the relationship between the Office and the EPPO should be reflected in, and complemented by, provisions in Regulation (EU, Euratom) No 883/2013, in order to ensure the highest level of protection of the financial interests of the Union through synergies between them, while ensuring close cooperation, information exchange, complementarity and the avoidance of duplication.
- (4) In view of their common goal of preserving the integrity of the Union budget, the Office and the EPPO should establish and maintain a close relationship based on the principle of sincere cooperation and aiming to ensure the complementarity of their respective mandates and the coordination of their action, in particular as regards the scope of the enhanced cooperation for the establishment of the EPPO. The relationship between the Office and the EPPO should contribute to ensuring that all means are used to protect the financial interests of the Union.
- (5) Regulation (EU) 2017/1939 requires the Office, as well as the institutions, bodies, offices and agencies of the Union and competent authorities of Member States, to report to the EPPO without undue delay suspected criminal conduct in respect of which the EPPO may exercise its competence. Since the mandate of the Office is to carry out administrative investigations into fraud, corruption and any other illegal activity affecting the financial interests of the Union, it is ideally placed and equipped to act as a partner and privileged source of information for the EPPO.
- (6) Elements pointing to possible criminal conduct falling within the competence of the EPPO may be present in initial allegations received by the Office or emerge only in the course of an administrative investigation opened by the Office on the grounds of a suspicion of administrative irregularity. In order to comply with its duty to report to the EPPO, the Office should therefore report suspected criminal conduct at any stage before or during its investigations.
- (7) Regulation (EU) 2017/1939 specifies the minimum elements that reports are to contain. The Office may need to conduct a preliminary evaluation of allegations to ascertain those elements and collect the necessary information. The Office should conduct such an evaluation expeditiously and by means which do not risk jeopardising a possible future criminal investigation. Upon completion of its evaluation, the Office should report to the EPPO where a suspicion of an offence within its competence is identified.
- (8) In consideration of the Office's expertise, the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties ('institutions, bodies, offices and agencies') should be able to make use of the Office to conduct such a preliminary evaluation of allegations reported to them.
- (9) In accordance with Regulation (EU) 2017/1939, the Office should in principle not open an administrative investigation in parallel with an investigation conducted by the EPPO into the same facts. However, in certain cases, the protection of the financial interests of the Union may require that the Office carry out a complementary administrative

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investigation before the conclusion of criminal proceedings initiated by the EPPO, with the purpose of ascertaining whether precautionary measures are necessary, or whether financial, disciplinary or administrative action should be taken. Such a complementary investigation may be appropriate, inter alia, to recover amounts due to the Union budget that are subject to specific time-barring rules, where the amounts at risk are very high, or where there is the need to avoid further expenditure in risk situations through administrative measures.

- (10) For the purpose of the application of the requirement of non-duplication of investigations, the notion of ‘same facts’ should be considered, in light of the case-law of the Court of Justice of the European Union (CJEU) on the *ne bis in idem* principle, to mean that the material facts under investigation are identical or substantially the same and understood in the sense of the existence of a set of concrete circumstances which are inextricably linked in time and space.
- (11) Regulation (EU) 2017/1939 provides that the EPPO may request the Office to carry out complementary administrative investigations. In the absence of such a request, such complementary investigations should be possible on the initiative of the Office under specific conditions after consulting the EPPO. In particular, the EPPO should be able to object to the opening or continuation of an investigation by the Office, or to the performance of certain acts pertaining to one of its investigations, in particular with a view to preserving the effectiveness of its investigation and powers. The Office should refrain from performing an action to which the EPPO has raised an objection. Where the Office opens an investigation in the absence of such an objection, it should conduct that investigation, consulting the EPPO on an ongoing basis.
- (12) The Office should actively support the EPPO’s investigations. In this regard, the EPPO should be able to request the Office to support or complement its criminal investigations through the exercise of powers under Regulation (EU, Euratom) No 883/2013. The Office should provide such support within the limits of its powers and within the framework provided for in that Regulation.
- (13) To ensure effective coordination, cooperation and transparency, the Office and the EPPO should exchange information on an ongoing basis. The exchange of information prior to the opening of investigations by the Office or the EPPO is particularly relevant to ensure proper coordination between their respective actions, to guarantee complementarity and to avoid duplication. To that end, the Office and the EPPO should make use of the hit/no-hit functions in their respective case management systems. The Office and the EPPO should specify the procedure and conditions for that exchange of information in their working arrangements. In order to ensure the proper application of the rules that seek to avoid duplication and ensure complementarity, the Office and the EPPO should agree on certain time limits for their information exchanges.
- (14) The Commission Report on Evaluation of the application of Regulation (EU, Euratom) No 883/2013 of 2 October 2017 (the ‘Commission evaluation report’) concluded that the 2013 changes to the legal framework brought clear improvements as regards the conduct of investigations, cooperation with partners and the rights of the persons concerned. At the same time, the Commission evaluation report highlighted

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some shortcomings which have an impact on the effectiveness and efficiency of investigations.

- (15) It is necessary to address the clearest findings of the Commission evaluation report by means of amendments to Regulation (EU, Euratom) No 883/2013. Those amendments are necessary in the short term to strengthen the framework for the Office's investigations in order that the Office remains strong and fully functioning and that it complements the EPPO's criminal law approach with administrative investigations, without changing the Office's mandate or powers. The amendments primarily concern areas where the lack of clarity of Regulation (EU, Euratom) No 883/2013 could hinder the effective conduct of investigations by the Office, such as the conduct of on-the-spot checks and inspections, the possibility of access to bank account information, or the admissibility of the case reports drawn up by the Office as evidence in administrative or judicial proceedings.
- (16) The amendments to Regulation (EU, Euratom) No 883/2013 do not affect the procedural guarantees applicable to the framework of investigations. The Office is bound by the procedural guarantees of Regulation (EU, Euratom) No 883/2013 and Council Regulation (Euratom, EC) No 2185/96⁽⁶⁾ and those contained in the Charter of Fundamental Rights of the European Union. That framework requires that the Office conduct its investigations objectively, impartially and confidentially, seeking evidence for and against the persons concerned, and carry out investigative acts on the basis of written authorisation and following a legality check. The Office is required to ensure respect for the rights of the persons concerned by its investigations, including the presumption of innocence and the right to avoid self-incrimination. When interviewed, the persons concerned have, inter alia, the right to be assisted by a person of their choice, to approve the record of the interview, and to use any of the official languages of the institutions of the Union. The persons concerned also have the right to comment on the facts of the case before conclusions are drawn.
- (17) Persons reporting fraud, corruption and any other illegal activity affecting the financial interests of the Union should be afforded the protection of Directive (EU) 2019/1937 of the European Parliament and of the Council⁽⁷⁾.
- (18) Where the Office performs, within its mandate, supporting measures at the request of the EPPO, in order to protect the admissibility of evidence, as well as fundamental rights and procedural guarantees, while at the same time avoiding duplication of investigations and providing for an efficient and complementary cooperation, the Office and the EPPO, acting in close cooperation, should ensure that the applicable procedural safeguards of Chapter VI of Regulation (EU) 2017/1939 are observed.
- (19) The Office has power to conduct on-the-spot checks and inspections, which allow it to access the premises and documentation of economic operators in the framework of its investigations into suspected fraud, corruption or other illegal conduct affecting the financial interests of the Union. Such on-the-spot checks and inspections are carried out in accordance with Regulation (EU, Euratom) No 883/2013 and with Regulation (Euratom, EC) No 2185/96, which in some instances make the application of those powers subject to conditions of national law. The Commission evaluation report found

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that the extent to which national law applies is not completely clear, and as a result hinders the effectiveness of the Office's investigative activities.

- (20) It is therefore appropriate to clarify the instances in which national law is to apply in the course of investigations by the Office, without changing the powers of the Office or the way in which Regulation (EU, Euratom) No 883/2013 operates in relation to the Member States, reflecting the judgment of the General Court of 3 May 2018 in Case T-48/16, *Sigma Orionis SA v European Commission*⁽⁸⁾.
- (21) The conduct by the Office of on-the-spot checks and inspections in situations where the economic operator concerned submits to the on-the-spot check and inspection should be subject to Union law alone. This would allow the Office to exercise its investigative powers in an effective and coherent manner in all Member States with a view to contributing to a high level of protection of the financial interests of the Union throughout the Union in accordance with Article 325 of the Treaty on the Functioning of the European Union.
- (22) In situations where the Office needs to rely on the assistance of the competent authorities of Member States, particularly where an economic operator resists an on-the-spot check and inspection, Member States should ensure that the Office's action is effective, and should provide the necessary assistance in accordance with the relevant rules of national procedural law. In order to safeguard the financial interests of the Union, the Commission should take any Member State's failure to comply with its duty to cooperate with the Office into account in considering whether to recover the amounts concerned through the application of financial corrections on Member States, in accordance with the applicable Union law.
- (23) The Office is able, under Regulation (EU, Euratom) No 883/2013, to enter into administrative arrangements with competent authorities of Member States, such as anti-fraud coordination services, and institutions, bodies, offices and agencies, in order to specify the arrangements for their cooperation under that Regulation, in particular concerning the transmission of information, the conduct of investigations and any follow-up action.
- (24) Regulation (EU, Euratom) No 883/2013 should be amended to introduce a duty on the part of economic operators to cooperate with the Office, in accordance with their obligation under Regulation (Euratom, EC) No 2185/96 to grant access for the carrying out of on-the-spot checks and inspections of premises, land, means of transport or other areas, used for business purposes, and with the obligation set out in Article 129 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council⁽⁹⁾ that any person or entity receiving Union funds is to fully cooperate in the protection of the financial interests of the Union, including in the context of investigations by the Office.
- (25) As part of that duty of cooperation, the Office should be able to require economic operators to supply relevant information where they may have been involved in the matter under investigation or may hold such information. When complying with such requests, economic operators should not be obliged to make self-incriminating statements, but they should be obliged to answer factual questions and provide