

# Position of OLAF in a multi-level governance system of the European Union<sup>1</sup>

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## Abstract

The author aims to investigate the position of OLAF in the multi-level governance system (MLG) of the European Union with specific inter-institutional consequences of such location, assuming that OLAF is not a classical supranational institution. In the research subject an important role is played by the European Commission (EC), which established OLAF and gave it specific competences to act. These facts are fundamentally important for further considerations, so they can have a major impact on the precise determination of OLAF's position in the MLG. If OLAF as an agent and supervisor has control powers over supranational institutions, including its principal, a supranational European Commission, it is unlikely that it would also be a supranational institution. This article demonstrates, that OLAF is not a classic supranational institution because it exhibits strong features of a supra-supranational institution operating in a multi-level EU governance system. A helpful theoretical and methodological research tools we consider the Principal/Agent Theory (PAT) and its combination Principal/Supervisor/Agent Theory (PSAT) on the one hand, and the concept of multi-level governance (MLG) on the other hand.

**Keywords:** OLAF, multi-level governance, supra-supranational level, European Union

## Pozycja OLAF w systemie wielopoziomowego sprawowania rządów w Unii Europejskiej

### Streszczenie

Celem artykułu jest zbadanie miejsca jakie zajmuje OLAF w systemie wielopoziomowego zarządzania Unii Europejskiej ze specyficznymi inter-instytucjonalnymi konsekwencjami tego miejsca, przy założeniu, że OLAF nie jest klasyczną instytucją ponadnarodową. Istotną rolę w przedmiocie badań odgrywa Komisja Europejska (KE), która ustanowiła OLAF i nadała jemu kompetencje do działania. Ramy te są ważne i mają wpływ na precyzję usytuowania OLAF w systemie wielopoziomowego zarządzania. Jeżeli OLAF jako agent i nadzorca ma kompetencje kontrolne nad ponadnarodowymi instytucjami, włącznie ze swoim mocodawcą – Komisją Europejską – to nie jest on podobny do innych instytucji ponadnarodowych. Pomocnymi w badaniu narzędziami teoretyczno-metodolo-

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gicznymi są, z jednej strony teoria mocodawca-agent (*Principal/Agent Theory*, PAT) oraz jej mutacja – teoria mocodawca-agent-nadzorca (*Principal/Agent/Supervisor Theory*, PSAT), a z drugiej strony koncepcja wielopoziomowego zarządzania (*Multi-level Governance* – MLG).

**Słowa kluczowe:** OLAF, koncepcja wielopoziomowego zarządzania, supra-supranational poziom, Unia Europejska

## Adopted research perspective

The activity of OLAF (*Office Européen de Lutte Anti-Fraude, European Anti-Fraud Office*) is one of the least researched among the institutions<sup>2</sup> of the European Union (EU). As one of the executive agencies established by the European Commission (EC), it operates in a very specific way, which may inspire not only attempts to explain its action, but also to look for much wider consequences for the current arrangements made in European studies.

Significant elements affecting OLAF's activity appear already at the time of its creation (Xanthaki 2006; Haus 2000; Pujas 2003). Thus, the analysis begins at the moment when the EC creates institutions (primarily executive agencies) to support it in areas with a high degree of specialisation, and at the same time delegates competences through which they can work for the EC to those institutions in a secondary mode<sup>3</sup>. Note that the Commission is the principal here and the executive agencies are its agents. EC is an agent of the Member States that have brought it to life, but at the same time it is the principal for executive agencies that it establishes, and to which it delegates competences in a secondary mode so that they can act. One of such agencies established by the EC is OLAF. The purpose of the research is an attempt to position OLAF in the multi-level governance (MLG) system of the EU with specific inter-institutional dependencies and consequences of such a position.

The research hypothesis assumes that OLAF is not a classical supranational institution because it has control powers over supranational institutions, including its principal, which is the EC. This assumption implies the main research question, which can be formulated as follows: what kind of institution in the MLG is OLAF, since it is not a supranational institution?

A helpful research tool here seems to be the Principal/Agent Theory (PAT), the initial phase of which involves motivations (sociological, psychological) of players in business

<sup>2</sup> The term „institution” in relation to OLAF is used in this article in a general and broader sense than the institution mentioned in art. 13.1 TEU.

<sup>3</sup> Secondary delegation concerns competences already belonging to EU institutions and it actually involves redistribution by a given institution of its own competences or competences acquired towards an agency (agent) appointed or chosen by it. By contrast, primary delegation takes place from the level of the Member States to EU institutions. It is based on foundational treaties and their subsequent revisions. The result of secondary delegation, competences come from the supranational level of managerial institutions to the “supranational level of Community agencies (*EU - level Agencies*)” (Majone 1997: p. 144). Then one can speak of a specific horizontal dispersion of competences between many specialised community agencies at the supranational level. Secondary delegation takes place entirely on the supranational level.

or politics, and then there are strategies involving two types of such players, which is, principals and agents. Strategies are sets of intentional behaviours, actions and interactions aimed at the achievement of the desired effect, and interactions between the principal and the agent constitute the basic analytical unit in this theory. PAT includes a very advanced application of game theory.

In European studies, the PAT theory has already been applied to the study of the EU political system, including the analysis of delegating functions<sup>4</sup> and used, among others, to explain why sovereign states form international organisations (institutions) (Ruszkowski 2008, 2010; Pollack 1997, 2003, 2005). However, the PAT's exploratory potential is much larger, also with regard to institutional introspection, and perhaps primarily inter-institutional.

The essence of this theory is the reflection on the relationship between the principal (principal, employer, boss, etc.) and the agent (representative, contractor), which is bound by a specific contract (hierarchical dependence). It means that the principal and the agent are not partners and are not equal. We are dealing here with a bipolar strategy (the previously mentioned *game theory of principal-agent*), in which each party of the system works in its own interest, but this situation can also lead to conflicts.

In addition to the PAT theory, the mutation theory – the PSAT (Principal-Supervisor-Agent Theory) theory – will be used in the analysis. The PSAT involves the introduction of control functions, which may be assigned to the agent or a third party, i.e. the supervisor, into the classic principal-agent system.<sup>5</sup> The supervisor category is extremely important for the research subject, i.e. the analysis of OLAF and its interinstitutional position in the EU's MLG system. OLAF is an executive agency of the EC having control competences, which belong to its immanent resource and actually define its purpose (Weyembergh, Briere 2017; Simonato et al. 2018).

Supranational institutions in the EU can be both an agent and a supervisor over principals. Thanks to the supervisory functions (monitoring, control), the supranational nature of such a central institution is emphasised and more clearly exposed. In addition, supervision strengthens the "readability" of power-based relations within a given organisation (system). It is a response to imbalance, but it can cause tensions between each levels in the system authority hierarchy. Thus, supervision causes an imbalance which is based on the rules and principles of a given organisation at its source (March, Simon 1987: p.152–153).

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<sup>4</sup> The PAT can be a useful tool to analyse the process of delegating (or entrusting) functions of states to the supranational level, or to examine decision-making mechanisms in a given political system. The PAT is used to examine dependencies, including difficulties that arise after establishing contractual relations between the principal and their agent and within their duration. Agency interactions begin when one party (principal) enters into a hierarchical relationship based on a contract with the other party (agent) and delegates responsibility to it, performing functions or tasks upon request. The purpose of constructing contractual relations in the principal-agent system is to analyse the difficulties that arise during the asymmetric distribution of information clearly favouring the agent (Kassim, Menon 2002: p. 3).

<sup>5</sup> J. Tallberg proposes to extend the PAT theory in two directions: vertically by adding supervisors to it, and horizontally by introducing a collective principal or a collective agent (Tallberg 2003: p. 24).

In the research subject and searching for answers to the question posed, an important role is played by the EU, which established OLAF and gave it specific competences to act. These facts are fundamentally important for further considerations, so they can have a major impact on the precise determination of OLAF's position in the MLG.

In the PAT, the EC is an agent of the Member States, which in turn as a collective principal, established it and delegated its competence and powers to act. The delegation of competences (functions, tasks) by the Member States of the EU to its institutions takes place through treaties and is of a primary nature. As a result of the delegation of competences, the EC also received prerogatives for state control (e.g. it is a guardian of treaties), thus it is not only an agent, but also a supervisor. The role of the EC as an agent and a supervisor for the Member States as well as the nature of its competences and the original mode of their delegation make the EC have characteristics of a strictly supranational institution.

We will transfer the same relationship between the principal and the agent to the relations between the EC and OLAF and we will additionally use it to investigate the position of OLAF in the EU's MLG system. The EC is not only an agent of the Member States, but also a principal for OLAF, for example. It is important for the analysis, that OLAF, on the other hand, is an agent of the EC, but it is not an agent of the Member States, because they have not created it and have not delegated powers to it and thus have no control over it.<sup>6</sup>

Based on the findings of the PAT/PSAT theory, relations between the EC and OLAF can be divided into several phases: (1) creating an agent and/or a supervisor by the principal, (2) delegating tasks and competences to the agent, (3) emerging of information asymmetry between the agent and the principal, (4) controlling the agent by the principal and the agent escaping from this control, (5) controlling the principal by the agent. The aforementioned phases determine further research procedures in the undertaken analysis.

### **Creation of OLAF as an agent and a supervisor**

OLAF was established by Decision No. 1999/352 of the European Commission (EC) of 28 April 1999, which entered into force on 1 June 1999 (Commission Decision 1999/352). The predecessor of OLAF was formed in 1988 at the request of European Commission (and within its General Secretariat) and it was the Unit for the Coordination of the Fight against Corruption (*Unité de Coordination de la Lutte Anti-Fraude* – UCLAF). The Commission assigned competences in the field of administrative control, fraud control, anti-corruption and embezzlement control, including irregularities related to the implementation of the Community budget (also within the EC) to UCLAF (Vervaele 1999). As an agent of the Commission, UCLAF did not enjoy much liberty and independence (although independence should be a fundamental feature of the agent), because it was positioned in the structures of the Commission (its principal). The search for a more autonomous and independent agent was therefore only a matter of time.

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<sup>6</sup> This is a rule that coincides with a certain medieval vassal system, and which can be summed up by the statement that "my agent's agent is not my agent."

After the liquidation of UCLAF, by the decision of the European Commission of 1 May 1998 (COM 98/276, COM 98/278), the Task Force for Coordination of Fraud Prevention (TFCFP) was established for a short period, which was only a transitional body preparing a comprehensive institutional solution. This solution was OLAF, which took over the tasks, internal structure and personnel of UCLAF and TFCFP.

Among the reasons (motivations) for which the EC, as the principal, decided to set up its executive agent<sup>7</sup>, in the form of OLAF the following must be listed: willingness to achieve the desired result in a specific area, which is combating corruption and embezzlement, reducing operating costs and making decisions, relieving and reducing their own responsibilities in these areas, willingness to receive specialist and expert knowledge, settling disputes and solving specific problems by operational methods. In the case of establishing OLAF, a broader perspective to explain the causes of the creation of an agent that focuses on the issue of having information and assumes that agents are created to provide specialised, unbiased knowledge, arguing that delegating competences is the main mechanism generating distribution benefits should be much more adequate. Creating an institution (agent) is inherently distributive and the choice of institution is motivated by the desire to institutionalise the desired set of preferences (Kassim, Menon 2002: p. 5).

In addition, the PSAT theory explains that the principal or principals may appoint not only an agent, but also a supervisor, i.e. an entity that will have control and supervisory tasks. In practice, a supervisor is a variant of an agent established to control other agents, or supervise credible obligations of principals.<sup>8</sup> It does not change the fact that the principal remains the sole and residual disposer and the owner of the result developed by the agent.

Establishing OLAF, the EC gained a specialised instrument to fight corruption, fraud and actions against the EU's financial interests. OLAF, being the executive agent of the EC, received from them, as its principal, first of all institutional independence (in terms of the operational mandate including investigations) and administrative and financial autonomy, and – what is very important – competence to act, including the right to carry out internal controls in all Community institutions (e.g. EC, European Parliament, Court of Justice of the EU), while maintaining external control mechanisms in the form of investigations in the Member States (art. 3 and 9 of the EC's decision of 28 April 1999).<sup>9</sup> Thus, the EC may also be a controlled entity and subject to OLAF's operations. This means that

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<sup>7</sup> Executive and regulatory agencies operate in the EU institutional system alongside the executive and ancillary institutions and are "used" in particular by the European Commission in the course of its work. The European Commission eagerly delegates money and powers in particular to executive agencies. In turn, the delegation of competencies to regulatory agencies is more likely if the transaction costs leading to direct regulation by the legislator are high. There is even an argument about better control of expenditures in these decentralised bodies than in the common budget.

<sup>8</sup> Jonas Tallberg proves that in a situation where states submit to decisions taken at the supranational level, they behave as agents, which may additionally confirm the behaviour of the European Commission, which in turn supervises the level of implementation of Community legislation in the Member States, and this task is closer to the tasks of the principal or supervisor (Tallberg 2003).

<sup>9</sup> In conjunction with Council Regulation (Euratom, EC) No. 2185/96 of 11 November 1996.

OLAF is not only an agent of the European Commission, but also a supervisor over its supranational principal and other actors at all levels of EU governance.

### **Delegating tasks and competences to the agent**

Delegating competences by the principal to the agent is supposed to be an antidote to problems resulting from collective actions (egoisms, particularisms, difference of preferences, etc.), where both actors expect the benefits of long-term cooperation. However, it should be emphasized that firstly of all they also need security that transaction costs involved in monitoring and control of the agent will not outweigh the benefits of the contract, and, secondly of all, that the agent will respect the provisions contained in the contract and will not behave autonomously (Kassim, Menon 2002: p. 4–5).

The main motive for delegating control powers to OLAF by the EC was the willingness to reduce transaction costs, the need to increase democratic legitimacy and acceptance of OLAF's activities (through its independence and the mission assigned to it). In addition, the delegation of certain tasks to OLAF has allowed the Commission to overcome the difficulties that may arise from their implementation. Because it is easier to overcome these problems by specialists, experts (technocrats) from OLAF than by not always adequately prepared officials of the EC. Therefore, OLAF exercises investigative powers conferred on the Commission by relevant EU acts, doing so as its agent.

In the case of delegation of competences by the EC to OLAF, we are dealing with a secondary delegation from the level of EU institutions to other EU institutions with the omission of Member States (state bypassing). Such delegation is based on EU secondary legislation. Thus, the EC transferred competences to OLAF not only pursuant to the decision of 1999 establishing OLAF, but also on the basis of several other acts of secondary legislation, including *ex ante* under EC Regulation No. 2185/96 to carry out control and supervision in the Member States in accordance with existing cooperation agreements in third countries (art. 3 and 9 of the Decision of the EC of 28.04.1999). In Regulation No. 1073/1999 of the European Parliament and the Council of 25 May 1999 concerning OLAF's investigations, its operational (investigative) competences towards Community bodies were additionally specified (in line with the EC decision). Based on art. 4 item 2 of this Regulation, OLAF has received full access (without prior notice) to all information and premises of EU bodies, institutions and offices and agencies (Regulation No. 1073/1999).<sup>10</sup> The Office may copy all documents and contents of all data carriers there. OLAF may be entrusted investigations in other areas (OLAF Manual 2009) by the EC or by other institutions. The specification of OLAF's control competences was affected

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<sup>10</sup> For example, MEPs are obliged despite their immunity to full cooperation with OLAF, including making all necessary documents available to them. OLAF has investigative powers towards individual deputies of the EP. They, in turn, should cooperate with OLAF. OLAF has access to all information and all rooms in the EP' (Berner 2004: p. 87-88). OLAF's internal investigations do not violate parliamentary immunity and the right to refuse to testify under Protocol No. 7 on the privileges and immunities of the European Union annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

by virtue of Regulation No. 1073/99 of the European Parliament and of the European Council of 31 May 1999 and Regulation of the European Parliament and of the Council (Euratom) No. 1074/1999 of 25 May 1999, but above all, pursuant to the Regulation of the European Parliament and the Council of the European Union No. 883/2013 of 11 September 2013 (the so-called OLAF Regulation), which repealed the two previous regulations and strengthened OLAF's investigative mandate and the scope of assistance of this Office to EU Member States and their services in the fight against corruption, embezzlement and other illegal activities damaging the EU's financial interests (Schaerlaekens 2004; Brammer 2009).

Secondary delegation can be of a horizontal nature when competences are ceded by supranational institutions to agencies without supervisory powers (which results in the fragmentation of competences)<sup>11</sup>, and of a vertical nature, when competences are transferred to Community agencies with control and supervisory powers (which results in the centralisation of competences, but at a level higher than the conventional supranational level). The hierarchical structure of control, power and communication, which is additionally strengthened by delegating competences to higher instances and also positioning knowledge, information, etc., is becoming clear here in the EU political system. The delegation of competences by the EC to OLAF is, therefore, a secondary vertical delegation.

OLAF, as an agent, can try to expand its competences at the expense of its principal, i.e. at the expense of the EC, or independently of its principal (without diminishing its competence resources) (Braun 2004: p. 9). Maximising competences is a natural tendency diagnosed in supranational agents. OLAF primarily wants to strengthen its capabilities in control activities and, above all, in operational activities, thus wanting to have a greater impact on the political results of the ongoing investigation process. The already mentioned decision of the EC establishing this Office includes information about the possibility to extend competences by OLAF. In fact OLAF is responsible for the preparation of legislative and regulatory initiatives of the EC in order to prevent fraud and is responsible for other operational activities of the EC in the fight against fraud (...), in particular: a. development of necessary infrastructure, b. ensuring the collection and analysis of information, c. showing technical support to other EU institutions and relevant national bodies (art. 2 sec. 4 and 5 of Commission decision 1999/352). For example, OLAF has increased the scope of its powers for tasks that bring them closer to the offices dealing with tax supervision. Like any maximisation of the agent's competences, also the above-mentioned tax powers have strengthened OLAF, even though they did not generate a total hollow-up effect of the Member States or the EC from this area of competences, however OLAF certainly took over some prerogatives that were previously managed by the Member States and the EC.<sup>12</sup>

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<sup>11</sup> As part of horizontal secondary delegation, internal delegation may occur in a given EU institution. For example, the Director-General of OLAF may delegate the written execution of some of his/her tasks to one or more employees of the Office, specifying the terms and scope of that delegation (art. 17 sec.6 of Regulation No. 883/2013).

<sup>12</sup> In the case of OLAF, several methods can be recalled from the catalogue of methods for maximising competences by a supranational institution. The method of delegation of competences by the principal,

In addition, it should be remembered that in general OLAF cares for the Community and civil interest, not for national or institutional interest (e.g. it can accept or reject the entire Community budget, and does so without the participation of the Member States, which is another evident example of bypassing the Member States).

### Information asymmetry between the agent and the principal

OLAF as an executive agency is a highly specialised institution. Its competences and information resources are of a special nature, often also strongly limited in terms of access to it by other EU's institutions, including the OLAF principal, which is the European Commission.

OLAF has expert knowledge, available only to them, which may lead the EC to delegate to them further tasks and responsibilities in the hope of effective service of a given competence area and of right decisions in technical areas, including easier problem-solving. The agent has more knowledge than the principal, which from the very beginning causes information asymmetry<sup>13</sup> in the relations between them, which as a result of appropriate actions can be used by the agent for its own purposes and interests and to the disadvantage of the principal (see below OLAF's control over the Commission).

There is no doubt that OLAF has an *ex post*<sup>14</sup> information advantage over the Commission, because only they know best what methods and actions they use or what intentions they have during the implementation of tasks. Some of OLAF's methods of operation are known only to them and remain within the sphere of their internal tools. Hence, information asymmetry may help OLAF get engaged in opportunistic behaviours – concealment or hiding certain actions, applied methods and manners leading to the achievement of goals and concealment or hiding of information (Kassim, Menon 2002: p.3)<sup>15</sup>. It is obvious that in the case of OLAF's control powers over the Commis-

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independent maximisation of competences by the agent, extending the EU's activity to the areas that contribute to OLAF, the CJEU jurisprudence, international agreements to which the EU is a party. On 24 June 2016, when the EU joined the Protocol on Combating Illegal Trade in Tobacco Products of 2012 (the Protocol is an integral part of the WHO Framework Convention on Tobacco Control), OLAF was the largest beneficiary of this accession, which received further operational competences in the fight against illicit trade in cigarettes and tobacco. At the same time, OLAF investigators gained access to a new electronic tool for combating customs fraud. OLAF has been authorised to build a new IT system that allows the EU and its Member States to improve the tracking of suspect cargo on board ships. OLAF has been granted access to the Container Status Message system (CSM), which collects information on the movements of containers carried on sea-going vessels (*The OLAF Report 2016*, 2017: p. 25).

<sup>13</sup> Information asymmetry *de facto* consists in shifting the possession of information in favour of the agent. The principal experiences a deficit of information and the agent has an informational advantage and independence, which may help them escape from the supervision of the principal. In the principal-agent system, information asymmetry is distributed in the agent's favour.

<sup>14</sup> I.e. after establishing the agent and relations between them and the principal, in contrast to *ex ante* information asymmetry, which occurs before establishing the relationship between the principal and the agent.

<sup>15</sup> It is worth noticing that asymmetric information distribution, in which OLAF has the leading role and advantage, between OLAF and the EC also results from concealment and hiding of certain actions and information by OLAF.

sion, the likelihood of concealment increases due to the divergence of preferences and interests (Pollack 1997: p. 108).

OLAF's information advantage over the Commission raises its independence from its principal. The EC cannot always follow OLAF's work on an ongoing basis, they only get to know its effects more often, believing that OLAF has the right knowledge and skills, and at the same time is capable of taking risks (moral hazard).

## **Control of the European Commission over OLAF**

The control of the principal over the agent is an important element in the PAT theory. In the case of the EC as OLAF's founder, such control would be a form of supervision at the supranational level, because the EC is a supranational structure.

OLAF is not just an agent of the EC, but it is also a supervisor. Therefore, even the supranational institution that established it, namely the EC, has difficulties controlling it. Above all, OLAF is independent of the EC as its principal and other EU institutions. OLAF's operational independence and administrative and financial autonomy in the exercise of their mandate constitute characteristics of the agent.

The Director-General of OLAF, who is responsible for investigations carried out by the Office and has the opportunity to initiate an investigation (art. 5 sec. 1-3 of Regulation No. 883/2013) cannot accept any instructions from outside. This means that when carrying out investigative tasks, the director of this Office cannot ask the Commission or another EU institution or body or any government of an EU Member State for suggestions, nor accept any instructions from them. However, the EC may impose disciplinary sanctions on the Director-General of OLAF after consultation with the Council and the EP and the Surveillance Committee, which must be substantiated (art. 17 sec. 9, 10 of Regulation No. 883/2013)<sup>16</sup>.

In the EU institutional practice, the special Surveillance Committee, which consists of five independent experts appointed for five years (without the possibility of renewal) by the European Parliament, the EC and the Council of the EU (art. 4 of Decision of the Commission No. 1999/352) has control over OLAF<sup>17</sup>. This means that the EC as the principal of OLAF has no direct control over it. At this point the influence of supranational principals (EC, EP and Council) on OLAF, by appointing an expert to the above-mentioned Surveillance Committee is presumed. It would be something of a very limited personal pressure, but only of an indirect nature. This state of affairs testifies to OLAF's unique position in the EU political system.

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<sup>16</sup> If the Director-General considers that the measure taken by the Commission undermines his/her independence, he/she shall immediately inform the Surveillance Committee and decide whether to lodge a complaint against the Commission before the Court of Justice (art. 17 sec. 3 of Regulation No. 883/2013).

<sup>17</sup> The Surveillance Committee should not interfere in the conduct of on-going investigations and assist the Director-General of OLAF in carrying out his/her duties. His/her tasks are to assess the Office's independence, apply procedural guarantees and the duration of investigations (art. 15 of Regulation No. 883/2013).

However, *ex ante* control of the Commission over OLAF covers only the scope of procedures and administrative activities of OLAF, including legal instruments available to the agent and procedures the agent must abide by (Pollack 1997: p. 108). OLAF must follow decisions and regulations under which it was established and equipped with competence.

The above mentioned considerations make it clear that the EC has some influence on the election of the Director-General of OLAF and the selection of experts for the Surveillance Committee, which makes the EC, as the principal, have some indirect influence on OLAF. In this situation, every agent, including OLAF, tries to avoid such an influence. The main tool for OLAF to escape from the EC's control is its control competences over the Commission. They make the roles of the two institutions in control clearly reversed in favour of OLAF. Information asymmetry in favour of OLAF also helps them to resist the Commission's control.

Summarising and extending the above-mentioned findings, a more consolidated catalogue of OLAF's methods of escaping the EC's controls can be built. Among them, the following should be mentioned:

- 1) activities that can control or oversee the EC. Supervisory (monitoring and control) powers of OLAF as the supervisor of the Commission allow them to conduct investigations and other operational activities against the EC (see more in detail below – in the chapter "Control competencies of OLAF"),
- 2) activities that may bypass the EC. To work more broadly and more effectively in the EU's interinstitutional system, OLAF has established cooperation with Euro-pol and Eurojust (pursuant to art. 2 sec. 6. of the decision of the EC), in addition, it remains in direct contact with the police and judicial authorities of member states and third countries<sup>18</sup>, as well as with international institutions (e.g. with Interpol), which makes it take actions that bypass its principal,
- 3) OLAF's ability to extend its competences (maximisation of competences, acquisition of new powers),
- 4) information asymmetry, which allows OLAF to hide some of its activities (*hidden actions*), especially investigative, and for the same reasons, not disclosing information at its disposal (*hidden information*),
- 5) operational independence as well as administrative and financial autonomy,
- 6) OLAF as an agent-supervisor much more effectively escapes the control of the principal than other community agencies, but it only demonstrates its extremely specific role in the EU's political system. As a result, at this stage, we can say that the EC, as the principal of OLAF, has no direct control over it, but OLAF has full and direct control and supervisory powers over the EC.

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<sup>18</sup> In 2017 OLAF had an infrastructure of over 70 international contracts with third countries that dealt with information exchange and mutual assistance in combating corruption, fraud and embezzlement. These contracts are concluded on the basis of art. 19 of Regulation No. 515/97 (Compare: *The OLAF Report 2016, 2017*: p. 26).

## Control competences of OLAF

Thanks to the PSAT (Principal–Supervisor–Agent Theory) analysis, studies of the relationship between the supranational principal, which is the EC, and agents located in the EU, show an interesting phenomenon. It turns out that in addition to agents such as executive or regulatory agencies, or supervisory and advisory committees, operating in the EU political system like their principal, i.e. the European Commission, at the same supranational level, because they do not have direct supervisory powers over their principal, there is also OLAF, that is, an executive agent established directly by the European Commission, which – it seems surprising – has, in the face of its supranational principal, superior competences<sup>19</sup>. Therefore, OLAF is a supervisor of the Commission and other supranational institutions as well as the Member States.

OLAF is authorised to conduct external and internal administrative investigations in order to combat fraud and corruption and other unlawful activities detrimental to the Community's financial interests.<sup>20</sup>

As part of internal investigations, OLAF may conduct administrative investigations against the EC, the Council of the European Union, the European Parliament and the European Central Bank<sup>21</sup> in matters covering the competence scope of these institutions and in all other EU institutions, bodies, offices and agencies (art. 4 of Regulation No. 1073/99). This is clearly a new competence scope for OLAF as an agent-supervisor compared to its predecessors (UCLAF and TFCFP). In addition, OLAF has been granted the right to conduct disciplinary and criminal investigations and has been completely excluded from the supervision of the EC, which ensures its independence from its principal (Berner 2004: p. 87). OLAF's administrative investigations aim to combat fraud, including embezzlement and corruption, as well as other illegal activities detrimental to the EU's financial interests. Therefore, OLAF can control each EU institution, including its principal, the European Com-

<sup>19</sup> OLAF is not the only case of an agent-supervisor. According to K. McNamara, the European Central Bank is also a regulatory agency and has power over certain supranational institutions and countries (McNamara 2002: p. 4). Similarly, some jurisdictions of the Court of Justice of the EU should be examined in this respect, which may repeal, reduce or increase fines or periodic penalty payments imposed by the European Commission, and according to art. 260 and 261 of the Treaty on the Functioning of the European Union have an unlimited jurisdiction with regard to the control of the Commission's decisions regarding its monetary sanctions, for example in the supervision of business mergers (compare also art.16 of Council Regulation 4064/89). However, the cases of the ECB and the ECJ should be investigated further.

<sup>20</sup> If it is necessary, OLAF may combine as part of a single investigation the aspects of external and internal investigations without having to open two separate investigations (item 21 of motives of Regulation No. 883/2013: p. 3).

<sup>21</sup> The ECB may be controlled by OLAF in accordance with Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (Official Journal of the EC L 136 of 31 May 1999, p. 1. Initially, the ECB did not want to recognise OLAF's right, which led to the accusation of the bank by the European Commission (guardian of Community law) at the beginning of 2000 and bringing it to justice before the Court of Justice of the EU. The main complaint of the Commission against the ECB was the refusal of the bank to cooperate with OLAF in the fight against fraud and corruption. Similar accusation and for similar reasons, the Commission submitted to the European Court of Auditors concerning the European Investment Bank (see the ECJ judgment in the case C-11/00, ECR I-7147).

mission. It can even bring a complaint against the Commission to the Court of Justice of the EU, when it considers that its independence is threatened or limited by actions and measures taken by the EC (art. 17 sec. 3 of the Regulation No. 883/2013).

In addition, the office may take all actions in connection with the performance of official duties by officials, including heads of offices and agencies, staff members of the institutions in the EU (art. 1 sec. 4 of the Regulation No. 883/2013). In addition, OLAF may ask members of the Community institutions to prepare oral information.<sup>22</sup> Internal investigations are carried out in all EU institutions, bodies, offices and agencies (art. 4 of the Regulation No. 883/2013). OLAF's unique control mandate is to conduct internal investigations of officials of varying degrees in the EU institutions. In connection with these investigations, OLAF may issue disciplinary recommendations (DR) towards the staff of EU institutions in which symptoms of corruption or other abuses have occurred. Such recommendations may result in taking investigative measures when the suspicion is confirmed, DR are ineffective and the institution concerned will not act alone. No action is undertaken by OLAF if the suspicion is not confirmed or when the DR has brought effect, or the institution concerned has explained the situation on their own (compare with Table No. 1). We should remember that OLAF has the possibility of conducting administrative investigations against the EU's managing institutions in cases involving the scope of competences of these institutions<sup>23</sup> and in all other EU bodies, offices, agencies and institutions (art. 4 of the Regulation No. 1073/99). In addition, OLAF having powers to conduct disciplinary and criminal investigations and excluding them from the direct EC's surveillance constitute a new solution (Berner 2004: p. 87-89). OLAF received (pursuant to art. 4 item 2 of the Resolution No. 2185/96 of 11 November 1996) full access to all information, institutions and agencies. The Office may copy all documents and contents of all data carriers.

**Table 1: Actions taken by the institutions following disciplinary recommendations of OLAF in 2014-2016.**

EU institution	Total number of cases	No decision	Decision made, no actions	Actions undertaken
EU agencies	9	4	3	2
Court of Justice of the EU	2	1	1	0
European Commission	20	4	5	11
Economic and Social Committee	2	1	1	0

<sup>22</sup> To work more broadly and more effectively in the EU's interinstitutional system, OLAF has partnered with Europol and Eurojust (in accordance with art. 2 sec. 6 of the Decision 1999/352). OLAF remains in direct contact with the police and judicial authorities of the Member States. Therefore, also at EU level, such contact is needed.

<sup>23</sup> OLAF's internal investigations do not violate parliamentary immunity and the right to refuse to testify.

European External Action Service	4	1	0	3
European Investment Bank	2	1	0	1
European parliament	9	3	1	5
<b>TOTAL</b>	<b>48</b>	<b>15</b>	<b>11</b>	<b>22</b>

Source: *The OLAF Report 2016*, European Union, Luxembourg 2017: p. 34.

In the three analysed years (2014-2016), 48 disciplinary recommendations of OLAF forced the EU institutions to undertake 22 curative actions. Most of these actions were taken by the European Commission (11), and no action was taken by the EU agencies and the Economic and Social Committee.

In addition to internal investigations, OLAF performs competences entrusted to it by the EC under the so-called external investigations, which are used to carry out on-the-spot controls, inspections and supervision in the Member States, in economic entities and - in accordance with existing cooperation agreements or administrative arrangements - also in third countries (based on art. 3 and art. 9 of the Decision of the EC of 28 April 1999 and art. 3 and 14 of the Regulation of the European Parliament and the Council of the European Union No. 883/2013 of 11 September 2013) to protect the financial interests of the European Communities against fraud and other irregularities.

Based on the above findings, it can be concluded that OLAF is currently one of the most specific community agencies in terms of theoretical reflection. Relations between OLAF as an agent and the Commission as its supranational principal are based on secondary delegation starting at the supranational level, on which the principal acts<sup>24</sup>. Secondary delegation by a supranational institution as the principal to the agent created by them, who has supervisory powers over their supranational principal and enjoys all the other features of the agent, is a vertical delegation, i.e. "upward" to the higher level in the MLG, which in the initial theoretical reflection phase related to this issue, can be defined as the "supra-supranational" level.

OLAF is an agent of the EC that created it, but is not an agent of other EU institutions (including supranational institutions). In turn, OLAF's competences as a supervisor refer not only to the EC, but also to actors operating on other levels of multilevel governance (towards the Member States at the national level, towards regions at the regional level, etc.). Thus, OLAF as an agent has a narrower impact than OLAF as a supervisor. However, focusing on OLAF's control and supervisory competences only over supranational institutions (European Commission, European Parliament, European Central Bank, etc.), it should be confirmed that in this respect it operates above supranational institutions. Such an agent-supervisor is a special institution with features situating it above its supranational principal (EC), because:

<sup>24</sup> And not at the national level, as is the case with primary delegation.

- 1) it was established by a supranational principal,
- 2) from the supranational level, it was given the competence to act in the post-secondary mode (role of the agent),
- 3) it has supervisory powers over a supranational principal and has sanctions against this principal (role of supervisor),
- 4) it has the ability to independently expand its own competences (maximising competences),
- 5) it has preferences other than its supranational principal (conflict of interest),
- 6) it enjoys independence from the supranational principal and internal autonomy,
- 7) it has an information advantage over the supranational principal (information asymmetry),
- 8) it escapes control of the supranational principal.

Of these eight elements forming a catalogue showing the specificity of OLAF, the three condensed features seem particularly important, also for its inter-institutional positioning in a MLG system in the EU. They are: (1) no direct control by the EC as its supranational principal, (2) supervising the supranational EC that established it (and also other supranational institutions), and (3) escaping the control of the EC (thanks to information asymmetry, independence or the ability to bypass the EC). Owing to these superior and independent attributes, OLAF acquires the characteristics of a supra-supranational institution<sup>25</sup>. This is an extremely interesting observation that has consequences also for the entire multi-level system, which should take into account the new, supra-supranational level of governance.

## Findings and conclusions

In the research undertaken, the relations between the EC and OLAF were adopted as the basic analysis axis. The applied PAT theory, in combination with the PSAT, allows OLAF to be determined as an agent and supervisor of the EC. OLAF as an agent supervisor is independent and autonomous not only from its supranational principal, but also from other EU institutions and Member States, and also has an information advantage over them and escapes their control.

If OLAF was appointed by the supranational EC and manages competences entrusted to them in the vertical secondary delegation from a supranational level, and it has control powers over its principal and over other supranational institutions, it means that it operates at the "supra-supranational" level. OLAF as an agent and supervisor in the political system of the EU is, therefore, a vertical structure with a "supra-supranational" impact and influence.

In the theory of European studies, there are three fundamental conditions for the emergence of a supra-supranational institution:

- 1) establishment of an institution-agent by a supranational principal,

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<sup>25</sup> With regard to the escape of the "supra-supranational" Community agent, i.e. OLAF, it should be emphasised that it is by nature much stronger than that of supranational agents.

- 2) granting an institution-agent by a supranational principal with competences in the mode of secondary delegation (from the level of a supranational institution to an institution-agent established by it), bypassing the Member States,
- 3) an institution-agent having control (supervisory) competences over a supranational principal.

As a result, such an institution-agent is also a supervisor and operates at a level above the supranational level. OLAF meets all of these conditions, so it has a supra-supranational nature. Thus, the theoretical approaches based on the PAT and the PSAT applied in European studies allow for the determination of the position of OLAF in the MLG and in inter-institutional relations. When attempting to determine this position, we can conclude that OLAF is:

- 1) 1) a supra-supranational executive agent with strong independence and autonomy,
- 2) 2) a supervisor over all EU institutions and EU Member States and sub-national actors,
- 3) 3) an agent capable of establishing international cooperation (international organisations, third countries, etc.).

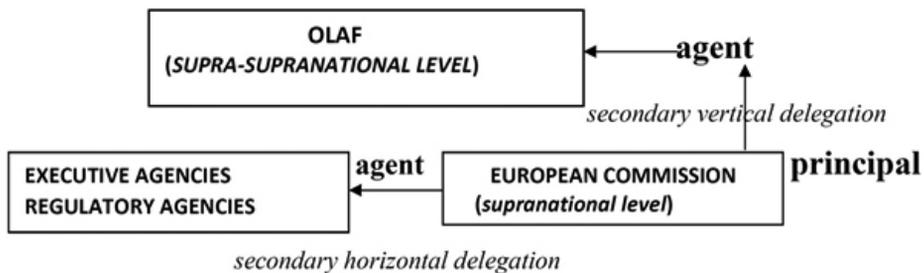
The conducted research allowed us to verify the accepted research hypothesis, which assumed that OLAF is not a classical supranational institution, because it has control powers over supranational institutions, including its principal, which created it and granted it with such powers in the course of secondary delegation. In fact, OLAF is not a classic supranational institution because it exhibits strong features of a supra-supranational institution operating in a EU's MLG system.

In addition, the analysis made has led to several other findings that may have a contextual and postulative meaning here. It found out that:

- 1) secondary delegation can be divided into its horizontal variant, i.e. when the transfer of competences takes place on one level in the MLG (e.g. supranational) and the vertical variant when delegation takes place between levels in the MLG (e.g. between the supranational level and the supra-supranational level, Figure No. 1);
- 2) secondary delegation of the "supranational institution-community agency" type (with both horizontal and, above all, vertical traits) turns out to be a powerful source of intra-EU integration drive;
- 3) while horizontal delegation, and within it, internal delegation of competences by supranational institutions to agencies without supervisory powers, resulted in the fragmentation of competences, vertical delegation of competences to community agencies with supervisory powers results in further centralisation of competences, only at a higher level than the supranational level known so far. The hierarchical structure of control, power and communication known in the EU political system, which is additionally strengthened by the delegation of competences to higher instances and positioning of specific intellectual and technocratic resources there, becomes clear;

- 4) supra-supranational supervising covering virtually all levels in the MLG actually has parameters indicating the existence of meta-governance;
- 5) it seems that the Court of Justice of the EU and the European Central Bank have certain supra-supranational features, but at the supra-supranational level the European Ombudsman can also operate, who is elected by the supranational European Parliament and examines the so-called bad administrative practices in European institutions, i.e. has certain supervisory attributes;
- 6) the supra-supranational level alongside the conventional levels in the MLG (supranational, national and regional) allows for a new look at the multi-level political system of the EU.

**Figure 1: Secondary horizontal and vertical delegation on the example of the European Commission - OLAF relationship**



Source: the author's elaboration.

Attempts to search for and identify supra-supranational traits in OLAF and other EU institutions may open a new area of exploration in European studies, but also introduce a new focus on the research of MLG in the EU, which should take into account the new supra-supranational level of governance.

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