

## IV

*(Notices)*

## NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

## OLAF SUPERVISORY COMMITTEE

## ACTIVITY REPORT OF THE OLAF SUPERVISORY COMMITTEE — 2017

(2018/C 389/01)

**Members of the OLAF Supervisory Committee**

Mr Jan MULDER

Chair of the OLAF Supervisory Committee

Committee Member since 23 January 2017, Chair since 1 March 2017

Former Member of the European Parliament, the Netherlands.

Ms Colette DRINAN

Committee Member between 13 July 2016 and 15 November 2017,

Chair from 7 September 2016 to 1 March 2017

Director of Audit, Office of Comptroller &amp; Auditor General, Ireland.

Chartered Accountant.

Ms Maria Helena FAZENDA

Committee Member since 23 January 2017

General Secretary of Internal Security System, Portugal.

Public prosecutor.

Mr Petr KLEMENT

Committee Member since 23 January 2017

Supreme Public Prosecutor's Office, Czech Republic.

Public prosecutor.

Ms Grażyna STRONIKOWSKA

Committee Member since 13 July 2016

Public Prosecutor at the National Prosecutor's Office, Warsaw, Poland.

Public prosecutor.

Mr Rafael MUÑOZ LÓPEZ-CARMONA

Committee Member since 1 December 2017

Chief of the General State Comptroller's Support Unit at the Special Prosecutor's Office Against Corruption and Organised Crime, Spain.

Auditor, lawyer, economist.

**FOREWORD BY THE CHAIRMAN**

I have the pleasure to submit the annual report of the Supervisory Committee of the European Anti-Fraud Office (OLAF) for the year 2017.

The current reporting period kept the members of the Supervisory Committee and its Secretariat fully occupied. The year was characterised by a number of personnel changes in the composition of the Committee. Ms Catherine Pignon, Mr Johan Denolf and Mr Dimitrios Zimianitis came to the end of their statutory appointment and were replaced on 23 January by Ms Helena Fazenda, Mr Petr Klement and myself, Mr Jan Mulder. I take this opportunity to thank them for their services to the European Union in general and to this Committee and OLAF in particular.

Ms Colette Drinan resigned as Chair on 1 March 2017 and was succeeded by myself. Ms Drinan also resigned as a member of the Committee on 16 November of the same year and was replaced by Mr Rafael Muñoz López-Carmona. I convey the gratefulness of the Committee for her contribution to our work.

In October 2017, the former Director-General of OLAF, Mr Giovanni Kessler, decided to accept a post in Italy before his term in Brussels had expired. Soon after the announcement of this decision the recruitment procedure for the new OLAF Director-General started. As Chairman of the Supervisory Committee, I participated as an observer in the recruitment procedure. As a Committee we raised no objection to the procedure followed by the Commission.

In 2017 to ensure the independence of the Committee's Secretariat, it was moved from OLAF to an office of the European Commission, namely the Office for the Payment of Individual entitlements (PMO). This, however, is only an administrative attachment. This administrative transfer was accompanied by a physical move from the premises of OLAF to another part of the building outside of the secure OLAF perimeter. With hindsight, it can be said that the results of this change did not live up to the expectations of the Committee.

A major part of the Committee's work was devoted to evaluating the effectiveness of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council<sup>(1)</sup> (the OLAF Regulation) in accordance with Article 19 of the Regulation. The work had to be completed before 2 October 2017.

The main conclusions of the Committee's Opinion on the evaluation of OLAF Regulation, which was duly delivered, were:

- (i) the necessity to include a requirement in the Regulation itself that the Supervisory Committee has a right to obtain the information it thinks necessary to fulfil its role so as to fully reinforce OLAF's independence;
- (ii) that more clarity is needed on procedural guarantees; and
- (iii) that the Member States' cooperation in OLAF investigations should become more mandatory.

The full report is available on the Supervisory Committee's interinstitutional website under <http://europa.eu/supervisory-committee-olaf/>

The Committee focused on familiarising its new members with the inner workings of OLAF, analysing dismissed cases, checking the duration of investigations, scrutinising sensitive cases and verifying implementation of OLAF's expenditure. The Committee members and myself met several times with investigatory staff and the management of OLAF to cooperate and strengthen the governance of the Office.

The Committee concluded that in the coming year much work has to be done on procedural guarantees, on the length of investigations and on the success rate of cases and recommendations transferred to national judicial authorities and EU institutions.

In previous reports, the lack of information provided to the Committee was highlighted as a major problem. The new Committee made it a priority to fulfil its remit by having adequate access to the necessary information. The former Director-General Mr Kessler made encouraging efforts in this direction, and after Mr Nicholas Ilett became acting Director-General the process was accelerated. He improved the dialogue and smooth cooperation between OLAF and its supervisor and has always been available to provide information and share his views and management options with the Committee. The Committee has particularly appreciated this open dialogue channel.

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<sup>(1)</sup> 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 (OJ L 248, 18.9.2013, p. 1).

The Committee issued a standing invitation to the OLAF Director-General and to senior staff and management members to attend all of its plenary meetings. This initiative certainly improved the flow of information. The Committee members have adopted a constructive and cooperative approach in which OLAF and the Committee can mutually reinforce each other's role as governance bodies of the Office. The situation in the reporting period of 2017 was, however, not yet ideal, as we will highlight in the pages that follow. More time will be needed for this approach to develop its full beneficial potential for the European Union.

A topical issue at every meeting was the developments linked to the creation of the newly established European Public Prosecutor's Office (EPPO). As the EPPO will have an influence on the future of OLAF, the Committee has made sure that it is kept closely informed about the preparations for its legislative birth, its financial implications and its future functioning. There will be a role for both OLAF and the EPPO in the EU and their synergies will improve the protection of taxpayers, Member States and the EU's interests. OLAF has also kept the Committee periodically informed about the steps undertaken by OLAF and the Commission to implement the EPPO Regulation.

As previously said, the year that lies behind us was a year of transition. Changes in the composition of the Committee and the administrative location of the Secretariat created a situation in which it was not always easy adapt to the changes for all involved, not least for the Secretariat. I want to thank all those who made it possible to continue our work in conformity with the OLAF Regulation.

Jan MULDER

*Chairman of the OLAF Supervisory Committee*

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## MISSION STATEMENT

**Article 15(1) of Regulation (EU, Euratom) No 883/2013:**

*'The Supervisory Committee shall regularly monitor the implementation by the Office of its investigative function, in order to reinforce the Office's independence in the proper exercise of the competences conferred upon it by this Regulation.*

*The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General in accordance with Article 7(8).'*

1. The mission of OLAF's Supervisory Committee is to reinforce OLAF's independence in the proper exercise of the competences conferred upon it <sup>(2)</sup>. To accomplish this mission, the EU legislator entrusted the Committee with a threefold role: regular monitoring of the investigatory function of OLAF, assisting the Director-General in discharging his responsibilities and reporting to the EU institutions.
2. The Committee and the OLAF Director-General are both part of the governance established by the legislator in Regulation (EC) No 1073/1999 and confirmed in Regulation (EU, Euratom) No 883/2013. The Committee is the supervisory body of OLAF and guardian of OLAF's independence; it regularly monitors the implementation by OLAF of its investigative function and its administrative performance. In particular, it monitors developments in the application of procedural guarantees and the duration of investigations.

The OLAF Director-General ensures not only the management of the Office but also the review of procedures, the handling of complaints, the discharge of his duties and the direction of investigations. This is a considerable responsibility that no other Director-General in the European Commission has. No other Director-General can investigate staff and members of the European institutions. The Director-General of OLAF is the one who is appointed by the Commission in close consultation with the European Parliament and the Council, and once the Supervisory Committee has issued a favourable opinion on the appointment procedure. As such, the OLAF Director-General is *primus inter pares*, a qualified function ensuring high standards of ethics and integrity in the EU institutions.

3. The Committee plays an advisory role with regard to the OLAF Director-General, whom it assists in the discharge of his responsibilities precisely due to the particular role attributed to the function by the EU legislator. The Committee does so by:
  - **communicating** to the Director-General the results of the Committee's monitoring of:
    - how OLAF is implementing its investigative function;
    - the application of procedural guarantees and the duration of investigations; and
    - where necessary, making appropriate recommendations;
  - **addressing** opinions to the Director-General, including, where appropriate, recommendations on the resources needed to carry out OLAF's investigative function, on the investigative priorities and the duration of investigations;
  - **submitting** its observations (including recommendations where appropriate) on the guidelines for investigation procedures (and any amendments to them) adopted by the Director-General in accordance with Article 17(8) of Regulation (EU, Euratom) No 883/2013;
  - **monitoring** the quality of investigations conducted by OLAF and of the recommendations it issues.
4. The Committee is a dialogue partner of the EU institutions. It reports to the institutions on its activities, may issue opinions at their request, produces reports on investigative matters and exchanges views with them at a political level. As a result, the Committee provides the EU institutions with expertise based on its monitoring experience. It also gives assurance that OLAF is acting within the limits of legality and regularity and that the core values of the EU are respected when conducting investigations.

<sup>(2)</sup> Article 15 of Regulation (EU, Euratom) No 883/2013.

## LEGISLATIVE FRAMEWORK

**Article 19. Evaluation report**

*'By 2 October 2017, the Commission shall submit to the European Parliament and the Council an evaluation report on the application of this Regulation. That report shall be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend this Regulation.'*

5. Throughout this report, reference is made at various points to the conclusions of Opinion No 2/2017 'accompanying the European Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013' <sup>(3)</sup>. This was the most important opinion prepared by the Committee in 2017. In the Opinion, the Supervisory Committee evaluated: (i) OLAF's legal environment; (ii) the life-cycle of OLAF investigations; (iii) respect for fundamental rights and procedural guarantees during investigations led by OLAF; (iv) the role and functioning of the Supervisory Committee; and (v) the legislative proposal on the establishment of the EPPO.
6. In its Opinion, the Supervisory Committee came to the conclusion that an amendment to Regulation (EU, Euratom) No 883/2013 should unify the grounds for all OLAF investigations in order to avoid fragmentation and interpretation difficulties, and to strengthen clarity of law and procedural guarantees. The unified legal framework should also contain an exhaustive code setting out OLAF's powers. The Regulation will need to pay special attention to clarifying OLAF's powers with regard to the EU institutions and the division of competences between OLAF and the future EPPO.

In the Committee's view, the currently applicable internal rules do not provide the conduct of investigations with the transparency intended by the legislator. Furthermore, the number of instructions may mislead OLAF staff, and specifically investigators. This situation could be prevented by having comprehensive investigation procedures laid down in the Regulation. This would include less flexible criteria for opening investigations so as not to put at risk legal certainty and fair treatment of incoming information by OLAF. Having comprehensive investigation procedures would also introduce mechanisms to counterbalance any potential abuse of discretion or undue external pressure on the Director-General of OLAF. This would also counterbalance the wide discretion granted to the Director-General by the current Regulation by bringing in an obligation whereby the Director-General would have to regularly inform the Supervisory Committee of the grounds for any decision not to open an investigation.

7. The Supervisory Committee found that the main areas of OLAF's investigations (which include structural funds, agriculture, own resources, customs, external aid and corruption) should be better indicated in OLAF Regulation in order to clarify OLAF's investigatory rules and powers in those sectors. This would facilitate independence in the proper exercise of the Office's powers and provide a sound foundation for OLAF to work together with the EPPO.
8. On the duration of investigations, the Supervisory Committee considered that the Regulation should be amended to include a requirement for the Director-General of OLAF to take into account statutory limitations in Member States concerned by an investigation. At least 18 months before expiration of the statutory limitation period, OLAF should send an interim report to the authorities of respective Member States. The form and content of the interim report would be equivalent to the final report and would not contain recommendations. The Committee also supported the establishment of follow-up teams who could give recommendations on judicial follow-up and the coordination of the activities of OLAF and all authorities involved in investigations, including the future EPPO.
9. On the closing of investigations, it is the Supervisory Committee's view that the legislator should consider creating explicit rules on the information OLAF has to send to the Committee. In order for the Committee to be in a position to assist the Director-General in discharging his duties in this area, it would need at least to receive from OLAF the investigation report sent to the Member State judicial authority and the reply from that authority to OLAF.

Given its strong mandate from all three institutions, the Supervisory Committee indicated that it would also like to play a significant role in establishing links between OLAF and its partners, in particular the EPPO.

<sup>(3)</sup> See OLAF Supervisory Committee's website: [http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion\\_2\\_2017.pdf](http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2_2017.pdf)

## MONITORING OF OLAF RESOURCES

**Article 6(2) of Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office, as amended by Decision of 27 September 2013 2013/478/EU:**

'2. After consulting the Supervisory Committee, the Director-General shall send the Director-General for budgets a preliminary draft budget to be entered in the annex concerning the Office to the Commission section of the general budget of the European Union.'

**Article 15(1) third paragraph of Regulation (EU, Euratom) No 883/2013:**

'The Supervisory Committee shall address to the Director-General opinions, including where appropriate, recommendations on, inter alia, the resources needed to carry out the investigative function of the Office [...]

10. The Supervisory Committee examined OLAF's 2018 preliminary draft budget, with a particular focus on two items: (i) the OLAF content management system ('OCM'), OLAF's database containing case-related information established to replace CMS, the old case management system; and (ii) OLAF's human resources. The Committee placed high expectations on the 2017-2019 human resources (HR) strategy which OLAF was to adopt in the course of 2018 taking into account the Committee's recommendations made to the Director-General of OLAF in its Opinion No 1/2017 'OLAF Preliminary Draft Budget for 2018'.
11. The Committee supported the OLAF's preliminary draft budget for 2018 in Supervisory Committee's Opinion No 1/2017, in particular OLAF's request for five additional administrator posts to be allocated to OLAF's investigative function in order to strengthen OLAF's core mission.
12. In particular, the Committee considered that the OCM database system was important due to the amount of budget involved in its implementation and due to the impact of the system on OLAF's investigatory function. Therefore the Committee recommended that the OLAF Director-General request the Internal Audit Service (IAS) of the European Commission 'to carry out a post-implementation evaluation of the OCM which should incorporate the experiences of users, in addition to other elements.' OLAF replied on October 2017 that it 'will carefully consider the need for requesting the IAS for such a post-implementation evaluation'. OLAF further indicated in February 2018 that an audit on OLAF IT project management practices (including OCM) will be carried out as soon as possible.
13. As regards OLAF's 2017-2019 human resources strategy, in its Opinion No 1/2017 the Committee issued five recommendations addressed to the OLAF Director-General on improving OLAF human resources management, particularly by diminishing staff turnover, retaining staff, and recruiting and training investigators. OLAF partially replied to some of those recommendations.
14. The Committee recommended that OLAF pay particular attention to 'detailed workforce planning, which assesses the number of staff to be recruited each year over the 2017-2019 human resources strategy period. OLAF replied on 6 October 2017 that when developing its HR strategy for 2017-2019, it will pay special attention to the topics highlighted in the Committee's recommendations. However, to date no human resources strategy for 2017-2019 has been made available to the Committee. OLAF considers this recommendation to be ongoing and further added in February 2018 that the document will be ready in the first half of 2018.
15. In its Opinion 1/2017, the Committee recommended that OLAF give special consideration to the following items: (i) measures that could be taken to reduce the average recruitment period; (ii) identifying possible staff retention measures based on information gathered through the exit interview process; (iii) detailed assessment of training needs; and (iv) measurement and benchmarking of key training statistical data. OLAF replied on 6 October 2017 that it will pay special attention to the topics highlighted in the Committee's recommendations when developing its human resources strategy for 2017-2019, and further reported on February 2018 <sup>(4)</sup> concerning the above-mentioned recommendations.

<sup>(4)</sup> OLAF's note 'OLAF's reporting for 2017 on its implementation of the Supervisory Committee recommendations' — Ares(2018) 781022.

16. OLAF reported to the Committee on a number of HR matters. Firstly, at the end of 2018 OLAF will draft a report to identify areas for improvement to reduce the recruitment period. It considers the implementation of the Committee's recommendation as ongoing. Secondly, OLAF pointed out that it is the Directorate-General for Human Resources and Security (DG HR) that is responsible for managing training courses for the entire Commission. As a result, the cost of training is not available to individual DGs. Thirdly, OLAF further reported on the existence of training paths for newly appointed investigators and for senior investigators, and provided information about the existence of internal training and general training for Commission staff.
17. It is the Committee's view that OLAF's resources should be concentrated on its core business i.e. carrying out investigations into illegal activities, serious irregularities, fraud, breach of professional duties and other matters detrimental to the EU's interests. The Committee considers that support to investigations is part of OLAF's core business and that having in-house human resources and financial capabilities that are independent from the Commission contribute to OLAF's independence. This is of particular importance for recruitment, training and the capacity to react to new and complex fraud patterns.
18. The Committee expressed the view in its Opinion No 1/2017 that the transfer of posts from OLAF to the EPPO should be carefully considered and managed so as to protect OLAF's ability to deliver on its continuing mandate, in particular its investigative capacity. This may require reducing the policy capacities of OLAF if further posts are to be transferred to the EPPO, so as to preserve the investigative directorates' capabilities.
19. The Committee further indicated that once the final proposal on establishing the EPPO has been adopted, it might consider submitting a report, as provided for by Article 15(9) of Regulation (EU, Euratom) No 883/2013, on the impact that establishing the EPPO has on OLAF investigative capabilities.
20. In addition to its Opinion No 1/2017 on *OLAF Preliminary Draft Budget for 2018*, the Committee has analysed information provided by OLAF on the implementation of the 2017 budget. The Committee considers that austerity measures should not negatively affect the capacity of the Office to carry out efficient investigations.
21. The Committee also noted that OLAF had a low level of budget execution and that it continued to experience a high turnover rate, not being able to recruit enough staff to cover all vacancies. The Committee noted that mission budget does not discriminate between expenditure for investigations and expenditure for other purposes. It is the view of the Committee that efficient investigations, involving forensic, legal and logistical support may need increased mission budget. The Committee will analyse this issue in cooperation with OLAF to gather more evidence and to ensure that all the needed resources are made available to investigators.
22. The Committee considers that the OLAF Director-General's discretionary powers to transfer budget from under-used budget lines to budget lines where more funds are needed is an efficient tool. This power should, however, primarily be used to reinforce the core tasks of the Office, particularly those of the investigative directorates.
23. The Committee reiterates its previous recommendation delivered in its Opinion No 1/2017 that the Internal Audit Service (IAS) should carry out an audit of the problems encountered in implementing the OCM database, including the costs. On 24 January 2018 the Committee's rapporteur responsible for monitoring OLAF resources requested a complete report on the OCM project's cost breakdown since its inception. Such information has not been provided by OLAF to the Committee yet.



## ACCESS TO INFORMATION FOR SUPERVISORY FUNCTIONS

**Article 15(1) of Regulation (EU, Euratom) No 883/2013:**

*'The Supervisory Committee shall regularly monitor the implementation by the Office of its investigative function [...]*

**Article 4 of Commission Decision of establishing the European Anti-Fraud Office: 28 April 1999**

*'[...] [The Supervisory] Committee shall be responsible for the regular monitoring of the discharge by the Office of its investigative function.'*

**Joint Opinion of the Legal Services of the European Parliament, Council and Commission of 5 September 2016**

*The Joint Opinion underlines that Regulation (EU, Euratom) No 883/2013 empowers the Supervisory Committee to receive information from the OLAF Director-General:*

- *on cases in which information has been transmitted to national judicial authorities even when no investigation has been carried out by OLAF;*
- *on additional case-related information concerning all cases, including ongoing investigations and not only information on closed cases;*
- *as to the reporting obligations of the OLAF Director-General, Regulation (EU, Euratom) No 883/2013 implies an active duty of information for OLAF. In that regard, the granting of purely passive electronic access to OLAF databases would not be sufficient to fulfil the OLAF Director-General's obligations as laid down in Regulation (EU, Euratom) No 883/2013.*

24. In previous Committee's annual reports, the Committee highlighted as an urgent issue its limited access to OLAF case-related information. The situation started to improve under the previous Director-General and this process accelerated in the second half of 2017 following the appointment of a new acting Director-General.

In this context, the Committee experienced problems over access to investigative information and to OLAF's OCM database of cases during the first 9 months of the reporting period. The situation improved afterwards.

25. Based on its own experience of the OCM database during the analysis of cases with 'observer access' to the system, the Supervisory Committee concluded that in the current state of the OLAF database, the data provided are not adapted to the needs of supervision. Moreover, it seems that the OCM database is not even adapted to OLAF's own investigatory needs.

The Committee was made aware of the discussions taking place in OLAF over how to adjust the OCM system to fit OLAF's needs and is closely following developments. The Committee is seriously concerned about this issue and will closely work with OLAF to find a solution.

26. The Committee finds it surprising that the OCM, the major ICT project for OLAF's investigatory function, was implemented without taking into account the needs of its supervisory body. The features that the Committee had at its disposal in the former database, CMS, have also been discontinued. In the circumstances, the Committee is working on data that OLAF provides or makes available to the Committee via the OCM. The Committee cannot extract statistical or reporting information by itself until an add-on or module or feature is included to enable the Committee to use operational data for monitoring purposes.
27. The OCM database has no feature adapted to the Committee's needs for monitoring cases and systemic patterns in OLAF operational data. The Committee is concerned that the present system does not allow OLAF to migrate case documents from the old database, CMS, to OCM in a satisfactory way. This situation has had a major adverse impact on the Committee's supervision of the implementation of OLAF's investigatory function, including developments in the respect for fundamental rights and procedural guarantees.

28. The Committee was given access to 64 OLAF files, which included: (i) 60 cases in which the Director-General took the decision not to open an investigation and as a consequence to dismiss the case and (ii) four cases in which investigations were conducted and completed through the issuing of a final case report. The Committee analysed the cases and will publish its conclusions in the near future. Some results of the analysis were also used in its Opinion No 2/2017 accompanying the Commission evaluation report of the application of OLAF Regulation (EU, Euratom) No 883/2013 and in other monitoring activities.
29. The Committee noted that the content and quality of reports submitted by OLAF on cases lasting more than 12 months in 2017 did not include any information suitable for effectively monitoring the duration of investigations. In particular, despite the increasing length of investigations (from 12 months to 18, 24, 30 months or more), most of the reports did not contain the substantive information explaining the reasons for the duration of the investigations and the remedial measures to speed up investigations. For the detailed report on this subject, please see the chapter on monitoring the duration of OLAF investigations in this report.

#### REINFORCING OLAF'S INDEPENDENCE

##### **Article 15(1) of Regulation (EU, Euratom) No 883/2013:**

*'The Supervisory Committee shall regularly monitor the implementation by the Office of its investigative function, in order to reinforce the Office's independence in the proper exercise of the competences conferred upon it by this Regulation.'*

##### **Article 15(9) of Regulation (EU, Euratom) No 883/2013:**

*'The Supervisory Committee shall adopt at least one report on its activities per year, covering, in particular the assessment of the Office's independence, the application of procedural guarantees and the duration of investigations. Those reports shall be sent to the European Parliament, the Council, the Commission and the Court of Auditors.'*

##### **Article 17(3) of Regulation (EU, Euratom) No 883/2013:**

*'The Director-General shall neither seek nor take instructions from any government or any institution, body, office or agency in the performance of his duties with regard to the opening and carrying-out of external and internal investigations or to the drafting of reports following such investigations. If the Director-General considers that a measure taken by the Commission calls his independence into question, he shall immediately inform the Supervisory Committee, and shall decide whether to bring an action against the Commission before the Court of Justice.'*

##### **Article 17(9) of Regulation (EU, Euratom) No 883/2013:**

*'Before imposing any disciplinary penalty on the Director-General, the Commission shall consult the Supervisory Committee.'*

30. In the 2016 annual report, the Supervisory Committee established that on 2 March 2016 the European Commission partially waived the OLAF Director-General's immunity from legal proceedings in response to a request from the Belgium judicial authorities. By note dated 14 March 2016, the OLAF Director-General of OLAF informed the Supervisory Committee on the basis of Article 17(3) of Regulation (EU, Euratom) No 883/2013 that he considered the Commission Decision of 2 March to be a measure calling the independence of the Director-General into question.
31. Despite requests to both the Commission and the OLAF Director-General, the Committee was not provided with the substantive information or a copy of the Commission's decision and procedure followed. Moreover, the main action brought by the OLAF Director-General before the General Court seeking the annulment of the Commission Decision is still currently being considered by that court. Therefore the Committee is still not currently in a position to form a conclusive view. A national criminal case is still pending in Belgium and as the Committee did not receive any information on this, no further comments can be made.
32. The OLAF Director-General, Mr Giovanni Kessler, resigned in October 2017 before the end of his seven-year mandate to take up the post of Director-General of the Agency for Customs and Monopolies in Italy, on secondment from the European Commission. As a result, the procedure to appoint a new OLAF Director-General began. The Committee indicated to the Commission that measures should be taken that ensure that no conflict of interest could occur which could be detrimental to OLAF's independence in the conduct of investigations.

## SELECTION PROCEDURE OF THE NEW DIRECTOR-GENERAL OF OLAF

**Article 17(2) of the OLAF Regulation,**

*'The Commission shall draw up a list of suitably qualified candidates for the position of Director-General of OLAF after a favourable opinion has been given by the Supervisory Committee on the selection procedure applied by the Commission.'*

33. On 25 April 2017, the European Commission sent to the Council, the European Parliament and the Supervisory Committee for consultation the draft vacancy notice of the procedure to select a new OLAF Director-General. The European Commission also invited the Supervisory Committee to designate a representative to participate as an observer during the interviews at the different levels of the selection process.
34. By letter of 12 May 2017, the Supervisory Committee welcomed the commitment of the Commission to recruiting the OLAF Director-General as a Temporary Agent for the duration of the seven-year term of office and not as a permanent Commission official. The Committee stressed that the political neutrality of the OLAF Director-General should be underlined by indicating that the post was incompatible with any affiliation to any political activities whatsoever during the term of the mandate. With regard to the conditions of employment, the Committee considered that the assessment of the 'nine months probationary period' of the OLAF Director-General touched directly on the issue of his independence, making a contribution from the Committee on the OLAF Director-General's performance in the implementing the investigatory function indispensable.
35. On 28 June 2017 the post of Director-General of OLAF was advertised under vacancy notice COM/2017/10373. The notice was published in the *Official Journal of the European Union* (OJ C 204) with a deadline for submitting applications of 27 July 2017, subsequently extended to 15 September 2017. The post was advertised as a position for Director-General, Temporary Agent.
36. The Supervisory Committee appointed Mr Mulder as its representative in the selection procedure organised by the Commission. He closely followed developments in the procedure and attended the pre-selection panel and the Consultative Committee on Appointments as an observer. He periodically discussed the progress made within the Supervisory Committee and shared all elements of evidence acquired so that the Committee members could gradually form an opinion on the legality and regularity of the procedure applied.
37. Following several exchanges of letters with the Secretary-General of the Commission and Commissioner Mr Günter Oettinger, on 5 March 2018 the Committee communicated to Commissioner Mr Günter Oettinger that it had no objection to the procedure followed by the Commission. The Supervisory Committee may consider issuing a report on how to improve future procedures at a later stage.

**MONITORING DEVELOPMENTS CONCERNING THE APPLICATION OF PROCEDURAL GUARANTEES IN OLAF INVESTIGATIONS**

**The second paragraph of Article 15(1) of Regulation (EU, Euratom) No 883/2013:**

*'The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees (...).'*

**Article 17(7) of Regulation (EU, Euratom) No 883/2013:**

*'The Director-General shall put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to the respect of procedural guarantees and fundamental rights of the persons concerned (...).'*

**Legality check and review**

38. In its Opinion No 2/2017, the Supervisory Committee analysed the legality check and review conducted in the course of OLAF's investigative activities, focusing on the respect of procedural guarantees and fundamental rights. In previous opinions<sup>(5)</sup> the Committee recommended that OLAF improve reviewers' best practices when checking compliance with procedural guarantees and the proportionate duration of investigations. The Committee also recommended that the OLAF Director-General adopt a plan containing specific action to effectively reinforce the internal control and advisory mechanism, as laid down by the Regulation. The Committee intends to enter into a dialogue to create a permanent structure in OLAF to this end.

<sup>(5)</sup> Supervisory Committee's Opinion No 2/2015 'Legality check and review in OLAF'.

### **Complaints procedure on OLAF's investigations**

39. Previous compositions of the Committee already commented at length on this issue in earlier opinions. The Committee recommended that the Director-General of OLAF establish an efficient internal procedure to deal with individual complaints. The Committee also requested that the Director-General regularly report to it on individual complaints received by OLAF and on the follow-up given to them <sup>(6)</sup>. It is essential that investigations are conducted in a proper way. A complaints procedure has been published on OLAF's website but to date no formal decision of the OLAF Director-General adopting the procedure has been shared with the Committee.
40. The OLAF Director-General has taken action to ensure that individual complaint reports are sent to the Committee. However, not all complaints registered by OLAF or complaints lodged before other bodies against OLAF are shared automatically with the Committee. Cases triggering those complaints are not made available and the explanations included in the report are of a general nature. OLAF does not make the original complaints and its replies to complainants available to the Committee. The Committee is therefore unable to ensure that the fundamental rights of persons affected by investigations are protected and that the procedural guarantees are applied.

The Committee intends, via permanent dialogue with OLAF, to develop a system that makes more efficient monitoring the norm.

### **Fundamental rights and procedural guarantees**

#### **OLAF Regulation**

##### **Article 15(1), second paragraph**

*'[...] The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General in accordance with Article 7(8).'*

##### **Article 7(8)**

*'8. If an investigation cannot be closed within 12 months after it has been opened, the Director-General shall, at the expiry of that 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and the remedial measures envisaged with a view to speeding up the investigation.'*

##### **Article 9 Procedural guarantees (not reproduced here due to its length)**

41. The Committee paid particular attention to this area, given its monitoring role under Articles 15(1) and 7(8) and 9 of the OLAF Regulation. The rules governing the rights and obligations of persons under investigation by OLAF were improved and clarified in the new OLAF Regulation. However, OLAF did not put in place efficient controls and monitoring mechanisms, as referred to in Supervisory Committee Opinion No 2/2017 <sup>(7)</sup>. The Committee considers that control and monitoring mechanisms are extremely important and will pay close attention to this.
42. The Committee focused on: (i) the fundamental rights and principles which might affect the independent and impartial conduct of investigations; and (ii) fundamental rights and principles for which settled case-law concerning OLAF and decisions of the Ombudsman exist. These rights include the right of defence, the right of access to documents, the confidentiality of investigations, the right of the person concerned to be informed of the investigation, the right of the interested party to express their views on all facts concerning them, the right of access to investigation files and/or final report and the right to the protection of personal data.
43. The Committee examined this matter by using several sources of information: (i) the individual complaints received by OLAF on potential breaches of fundamental rights; (ii) the information sent from OLAF to the Committee through the final case reports of OLAF's closed investigations; (iii) the information sent by OLAF on the basis of Article 7(8) of the OLAF Regulation; and (iv) information from the analysis of dismissed cases.

<sup>(6)</sup> Supervisory Committee's Opinion No 2/2013 'Establishing an internal OLAF procedure for complaints' and Supervisory Committee Activity Reports from 2014 to 2016.

<sup>(7)</sup> See Supervisory Committee's Opinion No 2/2017 Chapter II in particular points 11 and 24.

(i) *Individual complaints received by OLAF on potential breaches of fundamental rights*

44. OLAF made available to the Committee short notes where alleged breaches of rights in the course of OLAF's investigations were listed, together with a brief response from OLAF indicating that the complaint was unfounded<sup>(8)</sup>. In some cases, OLAF also indicated that proceedings before the European Court of Justice were pending on some of those alleged breaches of fundamental rights. The complaints and the replies from OLAF to the complainants were not available to the Committee. Moreover, the documents supporting the complaints procedure to establish OLAF's position were not made available to the Committee, even though this would have been essential for the Committee to be able to perform its remit.
45. The fundamental rights and procedural guarantees allegedly breached by OLAF in the complaints related to a variety of different rights; the Committee was also familiar with the publicly available Ombudsman decisions on this matter, which provided more detailed information on the alleged breaches of fundamental rights and procedural guarantees than the material contained in the above-referred OLAF notes.
46. The information provided by OLAF to the Committee was insufficient to analyse how the Office implements its investigative function and to carry out a rigorous study into developments on fundamental rights. To do this, the Committee would need to receive, at least, the full text of the complaint and the full response from OLAF. The Committee's intention is to recommend that OLAF develop a structure by which the regular reporting on all existing complaints known to OLAF would be made available to the Committee, enabling it to get better insight into the situation.

(ii) *Information sent from OLAF to the Committee on the basis of Article 7(8) of Regulation (EU, Euratom) No 883/2013*

47. The Committee analysed OLAF's respect for the fundamental right to good administration in the context of investigations that could not be closed within 12 months after their opening. The right of persons to good administration (i.e. a reasonable time for investigations), which could also prevent time-barring issues, is guaranteed by Article 41 of the Charter of Fundamental Rights of the EU. The Committee is aware that a lengthy investigation out of proportion to the circumstances and complexity of the case may have serious negative consequences on both the rights of the defence of the persons concerned and the follow-up to the investigation.
48. The Committee examined 417 reports on investigations lasting more than 12, 18, 24 and 30 and up to 66 months. The reports were sent by the Director-General by December 2017. However, they did not contain the relevant information that would enable the Committee to fulfil its remit. The content of OLAF's reporting to the Committee requires radical changes which will again be the subject of dialogue between the Committee and OLAF in the light of the Committee's findings in Opinion No 2/2014. Further analysis on this topic will be presented later in this report, in the chapter on the monitoring of the duration of investigations.

(iii) *Information made available by OLAF to the Supervisory Committee through the final case reports of OLAF's closed investigations*

49. The OLAF final case reports contained relevant information on the respect of fundamental rights and procedural guarantees, taking into consideration that in the reports OLAF provides a summary of its investigation activities and of the main documents from the preliminary investigation on which financial, administrative, disciplinary or judicial action will stand.

During the reporting period, the Committee received limited information<sup>(9)</sup> through this source of information. This was because it could only examine the final case reports corresponding to four closed investigations conducted by OLAF that were forwarded to the national judicial authorities.

(iv) *Information from the analysis of dismissed cases*

50. This concerns cases when OLAF decided not to conduct an investigation after having assessed the incoming information. These are not investigations but instances of dismissed information where an assessment or a *prima facie* assessment was carried out by non- investigatory staff.

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<sup>(8)</sup> Notes sent from the Director-General of OLAF to the Supervisory Committee on Complaints to OLAF regarding procedural guarantees under OLAF's complaint procedure from 2014 to 2017.

<sup>(9)</sup> Four OLAF Final case reports overall.

51. During the reporting period, the Committee examined 60 ‘opinions on opening decision’ prepared by investigation selection and review Unit (ISRU) and in which the Director-General of OLAF took the decision not to open an investigation. The monitoring of this information is of fundamental importance for the reinforcement of OLAF’s independence at the key moment when investigations are opened. An opinion on this matter will be delivered in the near future <sup>(10)</sup>.

#### MONITORING THE DURATION OF OLAF INVESTIGATIONS

##### **Article 15(1) OLAF Regulation second paragraph**

*‘[...] The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General in accordance with Article 7(8).’*

##### **Article 7(5)**

*‘Investigations shall be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case.’*

##### **Article 7(8)**

*‘If an investigation cannot be closed within 12 months after it has been opened, the Director-General shall, at the expiry of that 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and the remedial measures envisaged with a view to speeding up the investigation.’*

#### **General remarks**

52. The duration of OLAF investigations is an important indicator in assessing the effectiveness of investigations and monitoring the respect of procedural guarantees. The duration of OLAF investigations is equally used to assess: (i) issues of time barring; (ii) the follow-up of OLAF’s investigations; and (iii) the Office’s actual independence in carrying out its investigations, including efficient use of OLAF’s human and financial resources <sup>(11)</sup>. The objective reasons for the duration of investigations may also impact the OLAF investigation policy priorities.
53. Although the OLAF annual management plan sets only a general goal for the average duration of investigations (e.g. in 2017 this was not to exceed 20 months <sup>(12)</sup>), it plays a role as a statistical tool. The Committee notes that no system requiring formal prolongation of an investigation after its opening exists in OLAF investigative procedure. As a consequence, each investigation is open for an indefinite period of time. The sole mechanism similar to a control system is the OLAF Director-General’s obligation to report to the Supervisory Committee at the end of a 12 months period and every 6 months thereafter <sup>(13)</sup>.
54. In the Committee’s view, the concept of ‘duration of an investigation’ cannot only refer to the statistical length of investigations, i.e. just the number of months that it lasts. Nevertheless, this statistical approach prevails in OLAF’s current reporting system to the Committee. The OLAF Regulation demands that investigations be conducted ‘continuously over a period which must be proportionate to the circumstances and the complexity of the case’. To ensure that duration is proportionate to the complexity of the case and that it is conducted continuously, investigators and their management should maintain firm control of the investigation life-cycle from its opening. The quality of OLAF’s reports at the various stages of the investigation (including the ‘12 months reports’, ‘18 months reports’, ‘24 months reports’ and subsequent reporting information) is crucial so as to enable the Committee to regularly monitor the progress of investigations.

<sup>(10)</sup> See ‘Guidelines on Investigation Procedures for OLAF Staff’ (Chapter I Articles 1 to 7) adopted by the Director-General of OLAF on the basis of Article 17(8) of OLAF Regulation (EU, Euratom) No 883/2013.

<sup>(11)</sup> See Supervisory Committee’s Opinions No 4/2014 ‘Control of the duration of investigations conducted by the European Anti-Fraud Office’ p. 3. and No 2/2009 ‘OLAF’s Reports of Investigations that have been in progress for more than nine months’.

<sup>(12)</sup> A target for the percentage of ongoing investigations lasting more than 20 months for 2017 was indicated as less as 30 % in the Management Plan 2017 of European Anti-Fraud Office (OLAF), p. 5.

<sup>(13)</sup> This monitoring mechanism reinforces OLAF’s independence in the proper exercise of its competences and is of a different nature than the internal control procedures foreseen in article 17.8 of OLAF Regulation and integrated in the guidelines on investigation procedures for OLAF staff adopted by the Director-General (including the final review by the Investigation Selection and Review unit — Article 21).

55. In the Committee's view, it would very much facilitate OLAF case management if the 'Guidelines on Investigation Procedures for OLAF Staff' made it compulsory to establish and regularly update an investigation plan for each opened investigation. OLAF case management could not only better control the length of investigations but also improve the efficiency of the human and financial resources allocated to the investigations. In this way, compulsory investigation plans would be a powerful tool for managing and controlling investigations in progress.

#### ***The Committee's analysis of 417 reports for investigations lasting more than 12 months***

56. The Committee carried out an analysis of 417 reports<sup>(14)</sup> on OLAF investigations lasting more than 12 months (hereafter, '12 months reports') including: '12 months reports', '18 months reports', '24 months reports' and reports covering investigations that are ongoing for longer time periods. The Committee's aim was to examine the reports' content according to the legal requirements in Article 7(8) of the OLAF Regulation<sup>(15)</sup> and based on the Committee's observations made in the past, specifically in Committee's Opinion No 4/2014 '*Control of the duration of investigations conducted by the European Anti-Fraud Office*'.

57. The Committee focused its analysis on assessing:

- a. the number of cases in which OLAF's '12 months reports' included reasons why the investigations had not been completed;
- b. the number of cases in which the '12 months reports' included remedial measures to speed up the investigations;
- c. the number of cases in which there was progress in conformity with the Committee's recommendations in Committee Opinion No 4/2014;
- d. the number of cases in which the remedial measure indicated by OLAF was not consistent with the reasons put forward for not having completed the investigation.

58. In almost 25 % of the reports received, the Committee found that OLAF did not provide substantive reasons why the investigations had not been completed within 12 months. In about 75 % reports the remedial measures were not indicated. In 75 % of the reports, the Committee found that the remedial measures to speed up the investigations did not correspond to the reasons indicated by OLAF for not having completed the investigations<sup>(16)</sup>. In 70 % of the reports analysed, there had been no progress or very limited improvement since Committee Opinion No 4/2014 was issued, with OLAF continuing to provide poor information to the Committee on investigations lasting more than 12 months.

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<sup>(14)</sup> Sent from OLAF to Supervisory Committee in 2017.

<sup>(15)</sup> Article 7(8) of the OLAF Regulation reads 'If an investigation cannot be closed within 12 months after it has been opened, the Director-General shall, at the expiry of that 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and the remedial measures envisaged with a view to speeding up the investigation'.

<sup>(16)</sup> Instead of specifying the remedial measures taken to speed up the investigation throughout its lifecycle, some of the '12 months reports' only indicated what the current state of the case was, i.e. that the final report had been submitted to the management for approval, that the final report was being drafted or that the investigation was continuing its implementation as usual. The Committee also identified a number of cases in which OLAF stated that there is no need to adopt any remedial measures or that the final case report will be adopted, or where the report provided only an indication of what work should be done in the case file (including translation, filing, recruiting an investigator, contacting sources of information).

59. As a consequence of the situation presented in the previous paragraph, the content of these reports did not, in the Committee's view, make it possible to check and examine the reasons for non-completion of investigations and the remedial measures envisaged to speed them up <sup>(17)</sup>.
60. The Supervisory Committee analysed 417 reports of investigations lasting more than 12 months. Additionally, the Committee examined subsequent OLAF reports on several investigations which had been running for substantially more than one year. The Committee compared the initial '12 months reports' with subsequent reports on these individual cases reported to the Committee by Director-General of OLAF every 6 months thereafter (cases lasting more than 12, 18, 24, 30, 36 or 42 months and cases up to 66 months). The Committee concluded that the quality of information provided by OLAF on the basis of Article 7(8) of Regulation (EU, Euratom) No 883/2013 did not improve for the same case over time and that sometimes it did not change despite the increasing length of the OLAF investigations. Excessive duration of investigations is a cause for concern as it puts at stake the fundamental rights of the persons affected by investigations, while statutory limitations (i.e. the risk of time barring) jeopardise the judicial, administrative, disciplinary and/or financial authorities' opportunity to take further action.
61. As a conclusion, the Committee confirms its previous observation stated in its activity report for 2016, namely that there has been no progress in OLAF's practices to implement the OLAF Director-General's legal obligations deriving from Article 7(8) of Regulation (EU, Euratom) No 883/2013. As a result, the Committee cannot provide assurance that investigations are conducted continuously and without undue delay, having regard to the circumstances and complexity of the cases.
62. The Committee was not made aware of the existence of any internal written reporting system in which the investigator presents the development of the case, its directions and activities conducted and planned to be conducted i.e. concerning the substance of the investigations, including a consistent approach and methodology resulting in an obligation to prepare and further update an initial investigation plan <sup>(18)</sup>. However, OLAF claims that it systematically checks the duration of investigations using a system of statistical reports produced by OLAF internal electronic databases (the former CMS case management system and the current OLAF content management (OCM)), showing the duration of investigations and the distribution of workload.
63. The OLAF Directors A and B signing the reports on investigations lasting more than 12 months informed the Supervisory Committee's rapporteur that they regularly carry out a detailed review, together with OLAF investigators, of progress in the case in question and the reasons why it has not been completed. The Committee underlines that the reports on investigations lasting more than 12 months should be based on OLAF's own management measures, to the extent possible, and be a part of a comprehensive internal monitoring procedure. Currently, however, such reports are produced exclusively for the Committee <sup>(19)</sup> and their content is extremely limited, meaning that they are neither sufficient for the Committee's monitoring purposes nor useful for OLAF's management of the duration of investigations.

## Conclusions

64. In the Committee's opinion, adequate reports on investigations lasting more than 12 months are useful and efficient tools for monitoring the duration of investigations by both the Committee and by OLAF management. Compulsory preparation of an investigation plan and its subsequent update can also improve the quality of OLAF investigations. In the Committee's view, the proposed solutions could also lead to shortening the duration of investigations.

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<sup>(17)</sup> Among the 417 '12 months reports' sent from OLAF to the Supervisory Committee, the Committee can indicate seven examples of 12 months reports (for cases lasting more than 24 months) it considers particularly bad practice and five examples that can be considered in this context as better practice, despite their being insufficient for the Committee to assess whether case duration was proportionate to the circumstances and complexity of the case.

<sup>(18)</sup> In four closed cases to which the Committee was granted access in 2017, only two had an initial planning document among the documents of the case file which could be considered an 'investigation plan' within the meaning of Article 9(1) of the 'Guidelines on Investigation Procedures for OLAF Staff' (i.e. preliminary examination of the information gathered in the selection process). In the third case, a state of play note for information purposes or for the handover of the case was presented. The fourth case did not include any such document.

<sup>(19)</sup> Explanations given to the Committee member by the directors of OLAF Directorates A and B during a working meeting on 14 December 2017 and by the acting OLAF Director-General to the Committee during a meeting on 23 January 2018.



65. The Committee calls on OLAF to increase the effectiveness and the quality of reports on investigations lasting more than 12 months. Already in Committee's Opinion No 4/2014, the Committee proposed a template serving this purpose and based on the OLAF legal framework<sup>(20)</sup>. This form was further developed in collaboration with OLAF but its implementation by OLAF was discontinued; the information in the form covered the following items, which are of particular relevance: (i) detailed case identification, including the estimated economic impact; (ii) a detailed description of the case, including the date of the initial information; (iii) the legislation allegedly breached; (iv) potential sanctions and time-barring considerations; (v) operational action undertaken to date and its results; (vi) operational action still to be carried out; and (vii) reasons for the case not being complete, including resource allocation, the amount of operational work, cooperation issues and other matters. The Committee expresses its willingness to work together with the OLAF Director-General and the responsible senior management to develop a reporting system that satisfies both parties concerned.

#### ASSESSMENT OF OLAF'S INVESTIGATION POLICY PRIORITIES AND OF INVESTIGATION GUIDELINES

**The first paragraph of Article 17(5) of Regulation (EU, Euratom) No 883/2013 states that:**

*'The Director-General shall each year determine, within the context of the annual management plan, the investigation policy priorities of the Office and shall, prior to their publication, forward them to the Supervisory Committee.'*

Article 5(1):

*'the Decision by the OLAF DG whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of the Office.'*

#### **Article 16 (2) Exchange of views with the institutions**

'2. The exchange of views may relate to:

(a) the strategic priorities for the Office's investigation policies'

66. Over the past few years, the Supervisory Committee has on a number of occasions highlighted serious reservations, in particular in its Opinions No 1/2014 and No 3/2015, on how the OLAF's investigation policy priorities (IPPs) were established and applied. Most of the Committee's conclusions and recommendations remain valid and their implementation by OLAF is still pending.

67. The Committee also expressed its views on OLAF's IPPs and their implementation in the exchange of views with the institutions on 23 November 2017. The Committee underlined that OLAF's IPPs were mainly focused on sectors under the responsibility of OLAF Directorate B (Investigations II), including customs duties, expenditure concerning EU structural funds, agricultural policy and rural development funds, to the detriment of other expenditure and revenue sectors.

68. OLAF's draft IPPs for 2018 keep to an approach that is very similar to that taken in previous years. The draft IPPs focus on the following areas:

1. cases relating to transport and infrastructure network projects, in particular public procurement procedures;
2. cases concerning: (i) projects (co)financed by the European Social Fund, the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the pre-accession funds, in which action by Member States or candidate countries may be insufficient; or (ii) projects which have cross-border elements;
3. cases indicating possible abuses of origin rules or tariff classification in both preferential and non-preferential trade regimes and valuation-related fraud in order to evade payment of conventional customs duties, including tariff measures that are part of the EU trade defence policy;
4. cases of smuggling of tobacco, alcohol and counterfeit medicines into the EU, and of illegal manufacturing of tobacco;
5. cases relating to humanitarian and development aid and other support provided to migrants and refugees.

<sup>(20)</sup> See Annex 2 attached to Committee Opinion No 4/2014 'Control of the duration of investigations conducted by the European Anti-Fraud Office'. The model form can be easily adapted to the content of Article 7(8) of OLAF Regulation (EU, Euratom) No 883/2013.

69. The Committee already expressed its concern that only 30 % of the cases conducted by OLAF were in line with the IPPs set out above, despite Directorate B having both the largest number of investigators and the largest number of open cases.
70. The Committee was informed that the low percentage of open cases falling within the IPPs (30 %) was due to the quality of information received by OLAF, which limited the extent to which sufficient suspicion could be established. In the Committee's plenary meeting of 14 February 2018, OLAF confirmed the figures and pointed out that the IPPs were only taken into consideration for the opening of cases when other requirements of Article 5 of the OLAF Regulation were met.
71. In addition, it seems that OLAF's IPPs were set using input provided by stakeholders, including contributions from the Commission Fraud Prevention and Detection Network, the European Court of Auditors reports, European Parliament resolutions and Commission reports on the protection of financial interests.
72. However, the Committee would highlight the remarks made by representatives of the Commission Fraud Prevention and Detection Network, who question OLAF's approach. It seems that OLAF's decisions to open investigations were mainly 'demand-driven', on a case-by-case basis.
73. As a result, about 70 % of OLAF investigations do not fall under its IPPs. The Committee has asked OLAF to provide more information on the investigations that made up the other 70 % and on the reasons for taking those decisions.
74. The Committee has come to the conclusion that more radical changes in OLAF's approach to IPPs are necessary to ensure that they are set and applied properly. The key issue is to use criteria for setting IPPs that have a realistic picture of OLAF's powers and resources.
75. In addition, OLAF has privileged conditions and capabilities to be proactive in this area, resulting mainly from two aspects:
- (i) the fact that the Director-General has the power to open investigations on his or her own initiative (Article 5(1) and (2) of Regulation (EU, Euratom) No 883/2013); and
  - (ii) the readily available support of the EU institutions and the Commission departments, in particular the directorates-general, in identifying the main risk areas and spending priorities, including the multiannual financial framework.
76. For OLAF to act in an effectively proactive manner it needs more than just a wide overview of the origins of fraud, corruption and irregularities that affect the EU's financial interests; it would particularly benefit from having an internal body specialised in identifying and analysing the areas of greatest risk and with serious impact on EU funds.
77. OLAF's budget and staff resources are key factors for the correct implementation of the IPPs; therefore input from both investigative directorates (Directorates A and B) in this area would also be useful.
78. The Committee would like to enhance dialogue with OLAF on these strategic and practical issues. To that end, the Committee and OLAF have agreed that the directors responsible for investigations (i.e. the directors in charge of Directorates A and B) will take part in the Committee's plenary meetings and present their analysis on these matters. The number of investigations carried out, as mentioned in the 2015, 2016 and 2017 OLAF annual activity reports, may be used as a reference point.

#### **MONITORING CASES IN WHICH OLAF'S RECOMMENDATIONS HAVE NOT BEEN FOLLOWED**

***The third paragraph of Article 17(5) of Regulation (EU) No 883/2013:***

*'The Director-General shall inform the Supervisory Committee periodically:*

- (a) of cases in which the recommendations made by the Director-General have not been followed;*
- (b) of cases in which information has been transmitted to judicial authorities of the Member States;'*

79. Once an OLAF investigation has been closed, the final report establishing the facts (with supporting evidence and a full list of the registered elements of the case file) and any recommendation issued by the OLAF Director-General should be sent to Member State competent authorities or the EU institutions and bodies responsible for subsequent action.
80. There are four types of recommendations issued by the OLAF Director-General once an investigation is closed: (i) **administrative** (fraud-proofing of contracts, grant agreements, legislation and administrative praxis); (ii) **financial** (recovery of amounts unduly spent); (iii) **judicial** (criminal proceedings by national authorities); and (iv) **disciplinary** (disciplinary procedures by EU institutions, agencies and bodies).
81. Under Article 17(5) of Regulation (EU, Euratom) No 883/2013, the OLAF Director-General is required to inform the Committee periodically of cases in which his recommendations have not been followed. The Director-General met the obligation to inform the Committee about cases in which his recommendations have not been followed. This was done by sending a note for the attention of the Chairman of the Committee on 4 September 2017. An attachment to the note covered replies that OLAF received from the authorities concerned between 1 March 2016 and 28 February 2017 to recommendations issued since 1 October 2013. This period followed the previous reporting period (1 March 2015 to 29 February 2016) without gaps.
82. The information on the follow-up to OLAF's recommendations was given in the form of an overview chart which covered: (i) the OLAF case number; (ii) the date the recommendation was issued; (iii) identification of the recipient; (iv) a short summary of the recommendation; (v) the date of the reply concerning non-implementation; (vi) reasons given by the authority concerned; and (vii) in some cases, OLAF comments giving further clarifications.
83. Given the scope of information the Committee has received, it was not possible for it to make an in-depth study of the reasons given by the national authorities for why OLAF's recommendations had not been followed. However, the above-mentioned documents showed there were 22 OLAF recommendations which were not followed by the authorities concerned in the relevant period.

On the basis of the information on the 22 cases, the Committee reached the findings and conclusions as listed in the following paragraphs:

84. The main reason for not following the OLAF recommendations was the existence of different findings in the subsequent proceedings led by national authorities. That said, there were also cases in which the authorities concerned were EU bodies.
85. In some cases, the reasons were explicitly given as 'lack of evidence' or 'non-sufficient evidence' (most recipients of OLAF recommendations were national prosecution services, and in one case an EU authority).

In several cases, the national authority concerned repeatedly concluded that the 'case did not show direct "culpability" on the part of the beneficiary'; in at least two other cases, the national authorities (of the same Member State) could not identify any individual personally responsible for the offences. Some of these reasons give rise to further questions about the quality of national implementation of EU law provisions on the protection of the EU's financial interests<sup>(21)</sup>. These findings will need further analysis by both OLAF and the Committee.

86. OLAF reported to the Committee's rapporteur that there have been situations where authorities in a Member State dismissed cases owing to lack of evidence caused by loss or destruction of documents initially identified by OLAF but not secured and subsequently not found e.g. during a house search made by national authorities. This also highlights gaps in the application of national procedural rules in conjunction with Regulation (EU, Euratom) No 883/2013, which requires that evidence be secured at the earliest stages of proceedings and that its admissibility be ensured in further stages or subsequent proceedings, including in a criminal trial. The Committee concludes that only early and close cooperation with the national authorities can prevent the loss of evidence due to its actual destruction or to its inadmissibility on formal procedural grounds.

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<sup>(21)</sup> Mainly the Convention on the protection of the European Communities' financial interests and its additional protocols.

87. Other reasons given by the authorities concerned included 'lack of territorial jurisdiction' or 'damage below the threshold of a criminal offence'. There was just one case in which the reasons for not following OLAF's recommendations were not provided at all.
88. The Committee requested additional information on cases concerning projects implemented outside of the EU in which OLAF gave recommendations to an EU authority to recover EU funds and/or to impose a financial penalty. In some cases, the EU authority concerned justified its non-compliance with OLAF's recommendations by stating that it had no legal basis to impose administrative sanctions. This raised questions about the extent to which OLAF had been adequately informed of the relevant EU and international legislation. After analysing documents relating to all cases concerned, the Committee finds that given (i) the complexity of relationships with other international partners and (ii) the specific environment of areas with a high risk of misappropriation of funds, it is important that OLAF carries out legal analysis and checks whether there is a legal possibility to impose sanctions and recover funds before it issues recommendations, especially in cases concerning external action financing instruments.
89. Having examined all the reasons given by the authorities concerned, the Committee concludes that cooperation both with the national authorities and with the EU authorities concerned is crucial and needs to take place from the outset of OLAF investigations. Cooperation and coordination between OLAF and the authorities concerned are the best way to secure evidence, ensure the admissibility of evidence and avoid differing interpretations of national and EU law. The Committee therefore supports all legislative changes to both national and the EU law (mainly to Regulation (EU, Euratom) No 883/2013) which would lay down a duty of cooperation and coordination between national authorities, OLAF and possibly other EU authorities involved in investigating fraud and irregularities.
90. The Committee finds that evaluating the impact of OLAF investigations by analysing the recommendations the Office issues to authorities concerned and the authorities' response is particularly important when it comes to setting effective procedures both within and outside the Office. The Committee repeatedly expressed dissatisfaction with the removal of the *ex ante* control mechanism from Regulation (EU, Euratom) No 883/2013 and maintains its opinion that for the Committee to be able to fulfil its remit it needs more information to be placed at its disposal. At the very least, the investigation reports sent to the authorities concerned and the authorities' responses should be automatically sent to the Committee so that it can carry out continuous analysis and seek explanations both from the authorities concerned and from OLAF. In this way it will be able to help improve OLAF's investigatory impact and help secure the admissibility of evidence.

#### THE EUROPEAN ANTI-FRAUD OFFICE AND THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

91. The current composition of the Supervisory Committee of OLAF took office in January 2017. From its appointment it paid particular attention to the process of establishing the European Public Prosecutor's Office (EPPO), as provided for by Regulation (EU) 2017/1939 of the Council, adopted on 12 October 2017 following the consent of the European Parliament.
92. In its Opinion No 2/2017 of 28 September 2017 accompanying the Commission's Evaluation Report on the application of Regulation (EU, Euratom) No 883/2013, the Committee devoted a chapter (Chapter VI) to the impact that establishing the EPPO would have on OLAF's mandate, including budgetary consequences. Later, on 23 November 2017 the Committee participated in the annual exchange of views with the institutions<sup>(22)</sup> and considered two of the main topics of the future relationship between OLAF and the EPPO: (i) the transmission of information from OLAF to the EPPO; and (ii) the support and complementarity that OLAF would need to provide to the EPPO if requested (Articles 24 and 101 of the EPPO Regulation).
93. The Committee is ready to provide the Commission and other institutions with its views, given the impact that applying the EPPO Regulation may have not only on OLAF's governance but also on the implementation of its investigatory function and on the Supervisory Committee's monitoring role.

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<sup>(22)</sup> Article 16 'Exchange of views with the institutions' of the OLAF Regulation.

94. In its Opinion No 2/2017 accompanying the Commission evaluation report of the application of OLAF Regulation (EU, Euratom) No 883/2013, the Committee identified some of the main challenges that OLAF will face as an administrative body complementing and supporting the work of the EPPO, in particular in the following areas:

***'The reporting of information without undue delay to the EPPO of any criminal conduct in respect of which it could exercise its competence in accordance with Articles 22 and 25(2) and (3) of the EPPO Regulation <sup>(23)</sup>.'***

95. Since OLAF is not permitted to open any parallel administrative investigation into the same facts on which the EPPO is conducting a criminal investigation, it will be of fundamental importance for OLAF to make the content of this obligation consistent with OLAF's rules and policy on opening/dismissing and transferring cases.

In this context, there will be a need for provisions on the exchange of information between OLAF and the EPPO prior to the opening and during the conduct of an investigation that could potentially fall within each other's scope at a later date. This would also require specific rules for an efficient system of communication between OLAF and the EPPO to guarantee that there is no duplication of their work and that the mandate provided for in Article 101(2) of the EPPO Regulation is fulfilled. Where necessary, the provisions setting out the kind of information OLAF is required to send to the Supervisory Committee would need to be adapted.

96. Rules about the initiation, suspension and discontinuation of administrative investigations require clarification in the future reform of the OLAF Regulation. These rules would need to take into consideration the transmission of information by OLAF to the Supervisory Committee given the latter's specific role in reinforcing OLAF's independence in the proper exercise of its competences.

The Supervisory Committee considers that its contribution may help navigate difficulties that may arise between OLAF and the newly established EPPO as they build their relationship.

#### ***Conducting administrative investigations at the EPPO's request***

97. The Committee noted that final reports and recommendations sent by OLAF to Member State judicial authorities were not followed up in around 50 % of cases. From the Committee's monitoring experience, the reasons for this were of a diverse nature, and included: (i) facts allegedly committed but not considered to be a criminal offence; (ii) facts not supported by evidence or supported by insufficient evidence; and (iii) facts that were time-barred.

98. This makes it all the more necessary to include in the reform of the OLAF Regulation provisions for setting up teams with experts in national checks of evidence gathering and judicial follow-up. OLAF will need to provide high-quality assistance to the EPPO in compliance with the national rules on admissibility of evidence, including the respect of fundamental rights and procedural guaranties.

99. The Committee has expressed to Commissioner Mr Günther Oettinger its willingness to participate in preparatory meetings developing the future relationship between OLAF and the establishment of the EPPO if so required.

#### ***Providing the EPPO with information, forensic analysis, expertise and operational support***

100. The Committee indicated that the amendment of the OLAF Regulation will be an opportunity to modernise the OLAF's investigative powers to make it fully operational in the light of the EPPO's needs. This would be particularly relevant for the investigative measures that OLAF would be entitled to undertake, while at the same time complying with the same procedural safeguards valid for the EPPO in order to avoid failures in future criminal trials before national courts. Further issues that require consideration as part of the reform of the OLAF Regulation include access to information on money transfers in accordance with national law and the promotion of close cooperation with financial intelligence units.

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<sup>(23)</sup> Article 24(1) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO) (OJ L 283, 31.10.2017, p. 1).

**SUPERVISORY COMMITTEE GOVERNANCE*****Meetings with EU institutions, bodies and other agencies***

101. The Committee actively contributed to the exchange of views with the institutions, as laid down in Article 16 of Regulation (EU, Euratom) No 883/2013. The Committee also held regular meetings with, and provided expert assistance to: (i) the Commissioner responsible for OLAF; (ii) the Budgetary Control Committee of the European Parliament; (iii) the Anti-Fraud Group in the Council; and (iv) the European Court of Auditors.

***Working methods and transparency***

102. In 2017, the Committee held 10 plenary meetings. The Chair, the rapporteurs and the members of the Supervisory Committee Secretariat also met regularly to work on particular issues. For every major issue examined, the Committee appointed a rapporteur. The rapporteurs worked with their Secretariat to prepare draft reports, opinions or papers to be discussed in the plenary meetings. They also met with OLAF management and staff as part of the preparation of the Committee's opinions and reports. The Committee's opinions were always discussed extensively with OLAF prior to finalisation.
103. To ensure maximum transparency of its work, the Committee publishes non-confidential documents of public interest on its interinstitutional website: <http://europa.eu/supervisory-committee-olaf/>.

***Secretariat of the OLAF Supervisory Committee***

104. The Secretariat of the Supervisory Committee consists of lawyers and assistants who ensure the daily monitoring of OLAF investigative activities and assist the Committee members in the execution of their tasks.
105. The Secretariat's role is to contribute to the efficient performance of the tasks assigned to the Supervisory Committee with a view to reinforcing OLAF's independence, in particular with regard to the Committee's monitoring function. The Secretariat is also responsible for giving legal advice to the Committee members. In 2017, the Secretariat had a total of eight posts, allocated to five administrators (lawyers), two assistants and one contract agent. However, three posts were not filled (two assistants and one lawyer), undermining the support capacity of the Secretariat.
106. Following an amendment to Regulation (EU, Euratom) No 883/2013<sup>(24)</sup>, the Committee's Secretariat is now provided directly by the European Commission in close cooperation with the Supervisory Committee. The Secretariat is working independently from OLAF under the instructions of the Committee. To that end, the Secretariat is administratively attached to the Office for the Payment of Individual Entitlements of the European Commission (PMO). Now, one year after the move to the PMO, it can be said that the results of this change did not live up to the expectations of the Committee. The Committee has indicated to the European Commission that a more suitable place for the Committee's Secretariat must be found. This change will enable the European Commission and the Committee to consider all possible options for the best place to locate the Secretariat, including revisiting the original option to make the Secretariat once again part of OLAF, albeit under different conditions.

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<sup>(24)</sup> Regulation (EU, Euratom) 2016/2030 of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU, Euratom) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF) (OJ L 317, 23.11.2016, p. 1). The Regulation entered into force on 1 January 2017.

107. Under the Rules of Procedure of the Supervisory Committee<sup>(25)</sup> and the OLAF Regulation (EU, Euratom) No 883/2013, Secretariat staff may receive instructions only from the Committee<sup>(26)</sup>. The Commission is the responsible EU institution providing the budget and other resources needed for the Committee and the Secretariat to fulfil their mandate.

**Budgetary matters**

108. The Committee's budget for the year covered by this report was EUR 200 000, and the level of execution of the budget was 99,63 %. The Authorising Officer by Sub-delegation responsible for the expenditure is the PMO.

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<sup>(25)</sup> See Article 11 of the Rules of Procedure of the Supervisory Committee which are published in OJ L 308, 24.11.2011, p. 114.

<sup>(26)</sup> Article 15(8) of OLAF Regulation reads: 'Its [the Supervisory Committee's] secretariat shall be provided by the Commission, independently from the Office, and in close cooperation with the Supervisory Committee. Before the appointment of any staff to the secretariat, the Supervisory Committee shall be consulted and its views shall be taken into account. The secretariat shall act on the instructions of the Supervisory Committee and independently from the Commission. Without prejudice to its control over the budget of the Supervisory Committee and its secretariat, the Commission shall not interfere with the monitoring functions of the Supervisory Committee'.