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(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

OLAF SUPERVISORY COMMITTEE

Activity Report of the OLAF Supervisory Committee

February 2013-January 2014

(2014/C 318/01)

Members 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).

The mission of the Supervisory Committee of OLAF, as outlined by Regulation (EU, Euratom) No 883/2013 ([1]), is to reinforce OLAF's independence in the proper exercise of the competences conferred upon it ([2]). To accomplish this mission, the EU legislator entrusted the SC with a threefold role:

— The SC is the **supervisory body** of OLAF and a guardian of OLAF's independence; it regularly monitorsthe implementation by OLAF of its investigative function and, in particular, developments concerning the application of procedural guarantees and the duration of investigations.

— The SC plays an **advisory role** with regard to the Director-General of OLAF, whom it assists in the discharge of his responsibilities:

  — by communicating to him the results of the SC's monitoring of the implementation of the OLAF investigative function, the application of procedural guarantees and the duration of investigations as well as, where necessary, making appropriate recommendations;

  — by addressing opinions to him, including, where appropriate, recommendations on, inter alia, the resources needed to carry out OLAF's investigative function, on the investigative priorities and on the duration of the investigation;

  — by submitting its observations (including, where appropriate, recommendations) on the guidelines on investigation procedures (and any modification thereto) adopted by the Director-General in accordance with Article 17(8) of the Regulation.

— The SC is a **dialogue partner** of the EU institutions, to which it reports on its activities, at whose request it may issue opinions and with whom it exchanges views at a political level, thus providing the EU institutions with unique expertise based on its monitoring experience.

([1]) 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).

([2]) Article 15.

FOREWORD BY THE CHAIRMAN

As Chairman of the Supervisory Committee of the European Anti-fraud Office, I have the pleasure to submit the Annual Activity Report of our Committee, in accordance with Article 15(9) of Regulation (EU, Euratom) No 883/2013.

This is the second Activity Report of the current Supervisory Committee and it provides an overview of the main activities carried out during the reporting period, from 1 February 2013 until 31 January 2014.

Chapters 1 and 2 offer a comprehensive account of the SC's monitoring activities. They focus on the monitoring of the implementation by OLAF of its investigative function and on OLAF's management in relation to its investigative function. Chapters 3 and 4 concern the SC's relations with OLAF, as well as with the EU institutions and other stakeholders. Chapters 5 and 6 give an overview of the Committee's working methods, of the policy papers adopted by the Committee and considerations regarding its Secretariat.

At the end of the reporting period one of the SC Members, Mr Jens Madsen, left the Committee to take over a new and challenging position in his national administration. I would like to take the opportunity of this report to thank him for his valuable contribution to the work of the Committee, and to welcome a new Member, Mr Dimitrios Zimianitis, as of 1 February 2014.

Finally, I would like to express special thanks to the staff of our Secretariat, for their invaluable support and their high quality work, which contributed in a great measure to the effectiveness of our monitoring of OLAF's investigative function.

Brussels, 12 March 2014.

Johan DENOLF

OVERVIEW

Monitoring activities

Analysis and assessment of:

— 56 cases requiring information to be forwarded to national judicial authorities;

— 186 nine-month reports;

— 293 opinions on selection of cases;

— 14 complaints and requests from individuals;

— 1 complaint from an EU institution;

— 2 requests for public access to the SC's documents;

— 1 request for cooperation from a national judicial authority.

Opinions and reports

— 4 opinions in relation to the implementation and management of OLAF's investigative function:

  — Opinion No 1/2013: OLAF's Preliminary draft budget for 2014;

  — Opinion No 2/2013: Establishing an internal OLAF procedure for complaints;

  — Opinion No 1/2014: OLAF Investigation Policy Priorities;

  — Opinion No 2/2014: Case selection in OLAF.

— 2012 Annual Activity Report.

Position and policy papers

— Position paper on 'Reinforcing procedural safeguards in OLAF';

— Observations on investigation procedures in OLAF;

— Paper on the mission and competences of the SC in the light of Regulation (EU, Euratom) No 883/2013 and the mid-term strategy;

— Monitoring guidelines (on-going);

— Amendment of the Rules of procedure (on-going).

Cooperation

— New working arrangements with OLAF.

1. MONITORING OF OLAF INVESTIGATIONS

1. The Supervisory Committee of OLAF (SC) monitors different aspects of OLAF investigative activities on the basis of information which the Director-General of OLAF (OLAF DG) is obliged to provide and of information requested by the SC on its own initiative.

> *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, on the investigative priorities of the Office and on the duration of investigations. Those opinions may be delivered on its own initiative, at the request of the Director-General or at the request of an institution, body, office or agency, without however interfering with the conduct of investigations in progress.*

Instructions to Staff on Investigative Procedures

2. On 7 February 2013, the OLAF DG provided the SC with a copy of an amended version of the Instructions to Staff on Investigative Procedures (ISIP). On 5 July 2013, he provided the SC with a second amended version of the ISIP, intended to align OLAF's investigative procedures with new provisions foreseen by (draft) Regulation (EU, Euratom) No 883/2013. The OLAF DG informed the SC of its intention to adopt the amended ISIP on 31 July 2013.

3. While underlining that it cannot carry out an in-depth analysis of the amended ISIP within such a short timeframe, the SC provided, on 30 July 2013, a number of observations and questions on the amended ISIP ([1]). The SC examined, in particular, the provisions concerning the selection procedure and the conduct of investigation and coordination cases.

4. The SC considered that the amended ISIP should, inter alia:

   — explicitly mention the notion of '*sufficient suspicion*', as provided for in the Regulation, as a precondition for the opening of an investigation;

   — clearly structure the separation of selectors and reviewers in the Investigation Selection and Review Unit;

   — maintain a clear distinction between internal and external investigations, since OLAF's powers of investigations are different;

   — include provisions for organizing a wider internal control of the legality check, not only of the investigative activities mentioned in the ISIP, but also those that are not specifically foreseen in the ISIP but could potentially result in an interference with the rights of the persons concerned.

5. On 5 September 2013, at the SC's request, the OLAF DG provided his comments and additional information on issues raised by the SC. He also informed the SC of the finalisation of the amendments to the ISIP taking into consideration some of the SC's comments and forwarded to the SC the final draft of the new Guidelines on Investigation Procedures for OLAF staff, replacing the ISIP.

Investigation Policy Priorities

6. Opinion No 1/2014 assessed OLAF Investigation Policy Priorities (IPPs) established, on a yearly basis, by the OLAF DG and published in the Annual Management Plan ([2]).

7. The SC compared the IPPs for 2012 and 2013 with the draft IPPs for 2014 and welcomed the improved definition of the latter as a result of SC comments expressed during technical meetings with the OLAF DG, in the sense that the IPPs should not contain general principles (which should always be taken into account when deciding whether or not to open an investigation), but only specific areas or types of fraud which OLAF should deal with as a matter of priority.

8. The SC found that the financial indicators, which in previous years were overstated, were completely excluded from the draft IPPs for 2014. The SC underlined that such indicators should be relevant for the assessment of the seriousness of the risk of fraud involved and could be useful as an element of reference and as internal guidelines on the application of the proportionality principle. The SC also drew attention to the need to reconsider the subsidiarity/added value policy and to apply it with caution, as well as to the need for a regular assessment of the IPPs.

9. The SC pointed out the need to clarify the IPPs and recommended that the OLAF DG issue guidelines on the application of the selection principles established by Regulation (EU, Euratom) No 883/2013 and to enter into a constructive dialogue with the stakeholders on the determination and implementation of the IPPs, in particular with regard to financial indicators and possible follow-up of dismissed cases when their assessment leads to the conclusion that there are sufficient suspicions of fraud. At this stage, it remains difficult for the SC to appreciate OLAF's performance in the areas covered by the IPPs, since OLAF itself has not conducted any impact assessment of the IPPs. The SC therefore requested that the OLAF DG provide an assessment of the results of the implementation of the IPPs for 2012 and 2013 in each of the prioritised areas, together with a summary of the feedback provided by the stakeholders.

([1]) See Annex 5.
([2]) See Annex 3.

Case selection in OLAF

10. Opinion No 2/2014 on Case selection in OLAF ([1]) assessed the efficiency, quality and transparency of the selection process in OLAF. The SC's assessment was carried out on the basis of, inter alia, an analysis of a sample of 293 opinions of the OLAF Investigation Selection and Review Unit (ISRU) recommending either the dismissal of cases or the opening of investigation/coordination cases.

11. The SC firstly assessed the efficiency of the selection function by looking into the resources made available to the ISRU to carry out its tasks and the concrete results achieved in 2012 and 2013. The SC found that the technical, investigative and language expertise was sometimes missing or insufficient; legal analysis was not sufficiently demonstrated; the time allocated for selections (compulsory 2-month period) did not appear adequate in some cases; a clear procedure for dealing with whistle-blowers was also needed.

12. The SC then evaluated the quality of the opinions in the light of their conformity with the selection criteria established by the OLAF DG. The SC found that the instructions on the implementation of the selection criteria were not strictly adhered to: little consideration was given to the relevant legal instruments when assessing OLAF's competence to act; the selectors lacked precise indicators for evaluating the sufficiency of information; where such indicators were present, they were not constantly and consistently used; there was a frequent use of unsubstantiated statements.

13. Finally, the transparency of the selection process was scrutinised by looking into the information flow throughout the selection process, in particular with regard to the cooperation between the ISRU and the investigation units.

14. The SC issued a number of recommendations to the OLAF DG, aimed at improving the selection function of the ISRU. As an overall conclusion to its assessment, the SC issued a final recommendation that OLAF carry out an internal evaluation of the activities of the ISRU aimed at establishing, inter alia, the level of resources needed, the unit's strengths and weaknesses and the 'error rate' for the evaluated cases. The SC also requested that the DG inform it on the follow-up given to the recommendations of this opinion one year after its adoption.

Duration of investigations

Article 11(7) of Regulation (EC) No 1073/1999:

Where an investigation has been in progress for more than nine months, the Director shall inform the Supervisory Committee of the reasons for which it has not yet been possible to wind up the investigation, and of the expected time for completion.

Article 7(8) of Regulation (EU, Euratom) No 883/2013:

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.

15. The SC monitored the duration of OLAF's investigations by using, as a source of information, the 9-month reports ([2]) and reports drawn up in cases transmitted to national judicial authorities forwarded by OLAF under the former Regulation (EC) No 1073/1999, as well as other case related documents when access was granted to the OLAF's Case Management System (CMS).

16. The SC started to analyse the reasons provided by OLAF for explaining the duration of cases lasting more than nine months: complexity of the matter under investigation, lack of resources, low priority of the case, lack of co-operation. The SC has noted a divergence between investigation directorates and their units regarding the accuracy of the explanations provided. The SC's analysis is still on-going.

17. Regulation (EU, Euratom) No 883/2013 introduced two major changes aimed at allowing the SC to better monitor the duration of investigations: the twelve-month reports replacing the nine-month reports (which correspond better to reality, since most of OLAF's investigations last more than 12 months), and the new obligation for OLAF to regularly report every following 6 months, allowing the SC to follow the whole life cycle of an investigation.

([1]) See Annex 4. Although this Opinion was adopted in March 2014, the SC decided to annex it to this Activity Report, since almost all the work on the opinion was carried out during the reporting period.

([2]) In 2013, the SC received 186 nine-month reports.

18. On 31 January 2014, the SC received, for the first time, 83 twelve-month reports out of 243 cases lasting then more than 12 months. The SC noted with concern that, while the workform used for these reports was revised by OLAF according to the requirements of Regulation (EU, Euratom) No 883/2013, the new reports sent to the SC contained insufficient information, in particular concerning elements that would allow the SC to check the potential existence of undue delays in investigations. As an example, 33 out of the 83 reports in cases lasting more than 12 months give the reasons and the remedial measures envisaged in order to speed up the investigation without, however, providing any factual information whatsoever (i.e. a description of facts, the investigative steps taken by OLAF and their chronology, potential periods of inactivity, type of fraud, financial impact, time barring considerations etc.), without which it is impossible for the SC to fully evaluate the duration of an investigation. While Regulation (EU, Euratom) No 883/2013 has reinforced the role of the SC in controlling the duration of investigations, OLAF is not providing, on its own initiative, enough information for the SC to fulfil that mission. The SC raised this issue in a meeting with the OLAF DG and expects that the reports to be provided in future will be more descriptive.

19. The SC was informed by OLAF, during a technical meeting, of the tools used by OLAF to monitor the duration of cases, which consist mainly of a system of flagging in the CMS that dates for twelve- and six-month reports are due. OLAF set up also a new junior management structure within the investigative units, in charge of, inter alia, monitoring the duration of investigations. The SC welcomes OLAF's efforts and its willingness to improve the awareness of time limitations among investigators. At the same time, the SC underlines that the twelve- and six-month reports provided to the SC could be a useful management tool for OLAF itself to monitor the duration of investigation, but it is rendered impossible due to the lack of a substantial content in most of them. This is especially important for the cases which prolonged duration may adversely affect the reputation and professional lives of persons concerned or may result in time-barring of the subsequent national legal procedures.

Cases transmitted to national judicial authorities

Article 11(7) of Regulation (EC) No 1073/1999:

The Director shall inform the committee of cases requiring information to be forwarded to the judicial authorities of a Member State.

Article 17(5) third paragraph of Regulation (EU, Euratom) No 883/2013:

The Director-General shall inform the Supervisory Committee periodically:

(…)

(b) of cases in which information has been transmitted to judicial authorities of the Member States (…).

20. Regulation (EU, Euratom) No 883/2013 introduced a major change with regard to the cases that OLAF intends to forward to national judicial authorities: OLAF does not have to inform the SC of those cases *prior* to the transmission (as under the former Regulation (EC) No 1073/1999), but onlyperiodically, after the transmission.

21. Between 1 February 2013 and 30 September 2013 (until the entry into force of Regulation (EU, Euratom) No 883/2013), the SC received 56 cases [1] *requiring information to be forwarded* to national judicial authorities. Full access to the case-related documents in the CMS was granted, upon SC's request, in 18 cases.

22. The SC was not able, however, to examine thoroughly those cases *prior* to their transmission to national judicial authorities, due to the fact that it would receive access to the CMS case files only after the expiry of the 5-day period foreseen in previous agreements with OLAF. The SC's assessment of the application by OLAF of procedural guarantees is based mainly on the information contained in the Opinions on Final or interim reports and recommendations issued by the ISRU [2] and, when access to cases was granted, on the case related documents registered in the CMS. The SC noted that according to all the ISRU opinions all the investigative activities were carried out in accordance with the applicable legal rules. On the basis of these opinions and other documents examined, the SC

[1] 21 cases requiring information to be transmitted to national judicial authorities forwarded by OLAF to the SC in January 2013 were reported on in the 2012 SC's Annual Activity Report. The total number of cases received in 2013 was 77.

[2] OLAF forwarded to the SC the Opinions on Final/interim report and recommendations in 72 out the 77 cases transmitted to national judicial authorities in 2013.

identified only isolated problems with regard to respect by OLAF of procedural guarantees (e.g. lack of information of the person concerned of the completion of the investigation in one case and lack of written authority to interview the person concerned in another case ([1])).

23. In one case, a person concerned reported to the SC an alleged serious breach by OLAF of the confidentiality requirement. However, the SC, having no adequate inquiry tools (the incident was not mentioned in the OLAF case file), could only refer the complaint to the OLAF DG who denied the existence of such a breach.

24. On 31 January 2014, the SC received information on 17 additional cases in which information *was transmitted* to judicial authorities of the Member States since 1 October 2013 (since the entry into force of Regulation (EU, Euratom) No 883/2013). Given the fact that this information arrived on the last day of the period covered by this activity report, the SC will request additional information and examine these cases later in 2014.

Decisions to defer the information to the institution, body, office or agency

Article 4(6) of Regulation (EU, Euratom) No 883/2013:

Where internal investigations reveal that an official, other servant, member of an institution or body, head of office or agency, or staff member may be a person concerned, the institution, body, office or agency to which that person belongs shall be informed. (…)

In exceptional cases, the provision of such information may be deferred on the basis of a reasoned decision by the Director-General, which shall be transmitted to the Supervisory Committee after the closure of the investigation.

25. Regulation (EU, Euratom) No 883/2013 introduced, for the first time, the obligation for the OLAF DG to transmit to the SC, after the closure of an investigation, his reasoned decision to defer the information to an institution, body, office or agency to which the person concerned by an internal investigation belongs. On 31 January 2014 the SC was informed by OLAF that there had been no such deferrals since the entry into force of the Regulation.

Recommendations made by the OLAF Director-General

Article 11(7) of Regulation (EC) No 1073/1999:

The Director shall inform the committee of cases where the institution, body, agency or office concerned has failed to act on the recommendations made by it.

Article 17(5) third paragraph of Regulation (EU, Euratom) 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 (…).

26. During the reporting period and in fact since the beginning of its mandate, the SC has received very limited information on cases in which the recommendations made by the Director-General have not been followed. The SC's own inquiry leads it to the conclusion that, as in previous years, a significant number of such recommendations have not been followed. The SC highlighted in its previous activity reports that OLAF itself seems not to have had, in the past, appropriate monitoring tools allowing it to properly follow-up the implementation of its recommendations by national and EU authorities.

27. Following OLAF's reorganisation in 2012, the monitoring of the implementation of its recommendations was decentralized to the investigative units. Currently OLAF is working on the development and implementation of new monitoring tools allowing it to better follow-up the results and impact of its recommendations. The SC noted that OLAF did already undertake a significant effort to measure the implementation of its recommendations, in particular the judicial and financial ones. For example, OLAF is reviewing more than 600 cases closed with judicial recommendations. The SC noted with interest the evaluation grid used for this review, according to which the recommendation follow-up by national judicial authorities was checked against key stages of the national judicial proceedings (opening of a criminal investigation, indictment or dismissal decisions, acquittal or conviction decision etc.). As to the financial follow-up, OLAF seeks to improve its procedures to be able to establish the amounts **effectively recovered** for the EU budget.

([1]) In the latter case, the interview of the person concerned was conducted under the rules of the former OLAF Manual.

28. The SC recognizes the complexity of this still on-going exercise and welcomes OLAF's willingness to improve its follow-up tools. At this stage, however, and in the absence of relevant information, it is premature for the SC to appreciate the impact of changes brought about by the reorganisation on the effectiveness and efficiency of OLAF's monitoring work. The SC expects better information from OLAF in the future, once the appropriate monitoring tools are implemented.

OLAF's procedures for dealing with complaints

29. In its Opinion No 2/2013 (Establishing an internal OLAF procedure for complaints) adopted in December 2013 ([1]), the SC examined the options for redress open to persons involved in OLAF's investigations regarding potential violations of their rights and procedural guarantees. The SC found that such persons did not have sufficient and immediate remedies to redress potential violations either through an external (an EU or national court, the European Ombudsman or the European Data Protection Supervisor) or internal mechanism (OLAF itself).

30. The SC underlined that the new Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF does not resolve the problem, since it does not introduce a mechanism for dealing with individual complaints. The SC expressed the opinion that the current legislative gap could be filled by a formalised complaints procedure within OLAF, in particular, concerning alleged breaches of fundamental rights and procedural guarantees in the course of an OLAF investigation.

31. The SC therefore recommended that the OLAF DG establish and publish such an internal procedure after consulting with the SC on the details. The SC expressed its wish that the OLAF DG report regularly to the SC on complaints received by OLAF and the follow-up given to them.

32. In January 2014, OLAF published on its website a description of the steps taken within OLAF when dealing with complaints. Following a request from the SC to see the written decision for establishing a relevant procedure, in his letter of 17 February 2014, the OLAF DG confirmed that he considered this web publication to be the formalisation of existing procedures which did not require a formal written decision on his part.

33. **As a result the SC must conclude that its recommendation has not been implemented. The SC is concerned by the danger of misleading citizens who would like to file a complaint with OLAF. They may think that the text presented on the OLAF website provides them with a legal framework for the complaint while in fact the relevant procedure (for complaints concerning procedural guarantees) does not, formally, exist, there being no legal act constituting the legal basis for such a procedure.**

Complaints and requests addressed to the Supervisory Committee

34. During the reporting period, the SC received **14 complaints and requests** from individuals. This represents an increase of 100 % compared to the previous year. The complaints concern, inter alia, alleged failure to respect fundamental rights and procedural guarantees, breach of confidentiality of investigations, excessive duration of investigations and allegedly wrongful closure of cases without recommendations. The complaints came mainly from persons concerned by OLAF investigations, but also from whistle-blowers unhappy with decisions taken by OLAF following their reporting of alleged fraud.

35. The SC replied to the complainants by underlining that in the framework of the current Regulation, the SC is not designed as a complaint body. However, the SC took these complaints into account in the framework of its systemic monitoring of OLAF's investigative function and requested, where it considered it appropriate, for further information and explanations from OLAF and/or full access to the CMS case files.

36. In January 2014 the SC received a formal notification from an EU Institution, which expressed its concern over an allegedly unjustified interference by OLAF with the right to protection of personal data of the officials of that institution. In its reply, the SC underlined that this allegation concerned an on-going investigation in which the SC is not allowed to intervene. The SC also indicated that the competent authority for dealing with such a complaint is the European Data Protection Supervisor and that the SC would need to await his decision.

([1]) See Annex 2.

37. The SC received 2 requests for access to its Opinion No 2/2012. The SC considered that the requested document was covered by exceptions set forth in Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council ([1]), in particular in the second and third indent of Article 4(2) and in Article 4(1)(b)) and therefore could not be publically disclosed at the time. However, the SC expressed its willingness to provide this document, if so requested, in the framework of on-going court proceedings.

38. Finally, a national judicial authority requested the lifting of the inviolability of the SC's archives with respect to Opinion No 2/2012 and of the reserve duty of its members, for the purpose of a national proceeding. The SC gave a favourable answer to this request.

39. The Staff Regulations of officials of the EU as well as the Conditions of Employment of other servants of the EU provide that any official or other servant who becomes aware of facts which give rise to a presumption of the existence of a possible illegal activity, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General or OLAF ([2]). These rules are equally applicable within OLAF, which means that OLAF staff members are obliged to report to one of their OLAF hierarchical superiors or, if they consider this to be appropriate, directly to the Secretary-General of the Commission any factual information and evidence on possible illegal activities or serious professional misconduct within OLAF of which they become aware. To take account of the particular position of staff in OLAF wishing to report possible wrongdoing within OLAF, it has been agreed ([3]) with the SC that such matters may be reported to its Chairman.

40. The SC has never received any such report. Possibly the procedure has not been adequately communicated to the OLAF staff, but even more importantly, the SC has not been granted any tools to follow-up such possible complaints and to ensure an effective inquiry and remedy.

2. **MONITORING OF THE MANAGEMENT OF THE INVESTIGATIVE FUNCTION OF OLAF**

Article 6(2) of Commission Decision establishing OLAF, as amended by Commission Decision 2013/478/EU ([4]) : 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 (…).

Preliminary draft budget for 2014

41. To give assurance that OLAF's budget duly takes into account the independence of the investigative function of OLAF and that OLAF is resourced to function effectively and efficiently as an inter-institutional service in stepping up the fight against fraud, the SC adopted Opinion No 1/2013 on OLAF's Preliminary Draft Budget for 2014 ([5]).

42. The SC looked into the allocation of resources to priority activities and into the human resources strategy. The SC's recommendations focussed on the follow-up of investigations and on the development of indicators for efficiency and quality of the investigative function following the EU anti-fraud policy and the Commission anti-fraud strategy. It was also recommended that OLAF give focus to training, career development, succession planning as well as an appropriate balance between support services and investigators.

43. The SC underlined the importance of consulting the SC by means of a real and substantive exchange of opinions between the OLAF DG and the SC **prior to** the preliminary draft budget being sent to the Director-General for Budget in any form.

([1]) OJ L 145, 31.5.2001, p. 43.
([2]) Article 22a of the Staff Regulations and Article 11 of the Conditions of Employment of other servants of the EU.
([3]) After consultation of the Commission's Legal Service — see note of the OLAF DG of 10 November 2008 to OLAF staff members.
([4]) OJ L 257, 28.9.2013, p. 19.
([5]) See Annex 1.

44. Finally, the SC recommended the introduction of a separate budget entry, within the OLAF budget, for both the SC and its Secretariat in order to clarify the costs of the SC function and to highlight in a transparent manner the inter-institutional character of the SC and its Secretariat. Furthermore, the SC underlined the importance of the DG allocating sufficient resources to the SC Secretariat and ensuring its independent functioning.

45. The SC supported the Preliminary Draft Budget for 2014 with the provision that the recommendations made in its Opinion are taken into consideration.

OLAF reorganisation and Staff Satisfaction Surveys

46. The survey carried out in 2013 throughout the Commission, followed by an internal survey in OLAF, showed a low level of satisfaction of staff with regard to their professional environment. The SC is particularly concerned by three elements, given their potential impact on the efficiency of OLAF's investigative function:

— according to OLAF staff, the massive reorganisation of the Office did not lessen the administrative burden on investigators or improve the transparency of internal procedures;

— the staff did not consider that OLAF senior management either communicated with them sufficiently or paid the necessary attention to their feedback;

— following the reorganisation of OLAF in 2012, all senior managers and over 75 % of middle managers were newly appointed to their current units/directorates, many members of the staff left and over one quarter of the remaining staff considered leaving, which, taken as a whole raises serious concern regarding the continuity of expertise within the Office.

47. As a consequence, the SC requested that the OLAF DG inform it regularly on measures foreseen or implemented to address these issues.

3. **COOPERATION WITH OLAF**

Follow-up by OLAF to the recommendations made by the Supervisory Committee

48. In 2012, the SC issued a number of recommendations to the OLAF DG, in particular concerning the protection of fundamental rights and procedural guarantees ([1]). The SC's initial analysis indicates that the implementation of most of its recommendations from 2012 has not been satisfactory. In responses from the OLAF DG either there has been no sufficient justification for non-implementation or there has been no substantive information on how the recommendations were supposedly implemented. The SC will therefore analyse that issue in a separate Opinion to be delivered in 2014.

Working arrangements with OLAF

49. During the reporting period, the SC had extensive and lengthy discussions with the OLAF DG on the SC access to case-related information. The outcome of these discussions is reflected in the Working Arrangements ([2]) signed by the OLAF DG and the SC Chairman on 14 January 2014. The arrangements set out (i) the scope of information on OLAF's investigative activities to be provided to the SC, (ii) the methodology for providing information and (iii) the timeframe. They are intended to strike a fair balance between OLAF's duty to protect the confidentiality of information related to its investigations and the monitoring needs of the SC.

50. With regard to cases transmitted to national judicial authorities, the SC expressed its wish to be provided with a copy of the opinions issued by the ISRU to the OLAF DG on the Final Report and Recommendations, in order to enable the SC to monitor developments concerning the application of procedural guarantees. Given that this document may contain personal data, the SC agreed with OLAF to request first the European Data Protection Supervisor's opinion on the matter. This opinion is currently pending.

([1]) See a summary in Annex 7.
([2]) See Annex 10.

51. The first transmission under the Working Arrangements of the information which the OLAF DG is obliged to send to the SC on a regular basis took place on 31 January 2014, the last day of the reporting period for this report. As a consequence, a more detailed assessment of the implementation of the arrangements will be presented in the following report.

52. While considering that the Working arrangements represent an important achievement, the SC insists now that their implementation must be improved, in particular with regard to the content of information provided to the SC by OLAF. Otherwise, the SC will not be able to conduct its monitoring functions effectively.

4. COOPERATION WITH STAKEHOLDERS

Meetings with EU Institutions

53. Between May and July 2013 the SC was invited to present the conclusions from its 2012 Activity Report to the Parliament (the Committee on Budgetary Control), to the Council (the Working Group for the Fight against Fraud) and to the European Court of Auditors.

54. In several other meetings with the Committee on Budgetary Control and with Commissioner Šemeta, the SC reported on the results of OLAF investigations and the respect of fundamental rights. It also presented its conclusions on effectiveness of the supervision of OLAF, the reform of the OLAF Regulation and a new supervision structure for OLAF as proposed in the Commission's Communication on *Improving OLAF's governance and reinforcing procedural safeguards in investigations* ([1]).

55. In November 2013 the SC organised an informal exchange of opinions on the challenges facing OLAF and its SC after the entry into force of Regulation (EU, Euratom) No 883/2013.

Exchange of views with EU Institutions

56. In August 2013 the SC initiated preparations to a formalised exchange views on policy related to OLAF's activities with the Commission, Parliament, Council and the Court of Auditors, as foreseen by Article 16 of Regulation (EU, Euratom) No 883/2013. The SC proposed to focus firstly on the supervision framework for the reformed OLAF. Regrettably, the Commission's administration organised the preparatory meetings including all other participants but excluding the SC. It remains therefore to be seen whether the first exchange of views will satisfy the objectives set forth by the Regulation.

European Parliament's public hearing on procedural guarantees

57. In October 2013, the SC adopted, on the basis of its monitoring experience, a position paper on Reinforcing procedural safeguards in OLAF ([2]). The SC's position on possible new legislative amendments to Regulation (EU, Euratom) No 883/2013, as proposed by the Commission in its Communication, was presented during a public hearing organised by the Parliament ([3]).

58. The SC welcomed the Commission's proposal, but pointed out that some structural solutions should be reconsidered with specific regards to the independence of OLAF and of the SC. In particular, any potential conflicts of competences and duplication of work between the present and the foreseen supervision structures should be avoided. The SC proposed alternative solutions which would retain the useful instruments proposed by the Commission, but which would, at the same time, incorporate them into a comprehensive supervision mechanism.

Civil society

59. The Transparency International EU Office (TI-EU) decided to perform an assessment of the EU's integrity system ([4]). In January 2014, the SC Chairman and members of the SC Secretariat met TI-EU's representatives and discussed issues such as the relationship between OLAF and the SC, OLAF's accountability and independence and the integrity rules governing the SC itself.

([1]) COM(2013) 533 final, 17.7.2013.
([2]) See Annex 6.
([3]) Public hearing of 3 October 2013 'OLAF and the rights of the persons concerned'.
([4]) See http://www.transparencyinternational.eu/european-union-integrity-system-study/.

5. **SUPERVISORY COMMITTEE'S GOVERNANCE**

Supervisory Committee's role under Regulation (EU, Euratom) No 883/2013

60. Regulation (EU, Euratom) No 883/2013 has introduced a number of changes to the role of the SC and to its monitoring tools. A significant part of the SC meetings was thus dedicated to discussions on their impact on the SC's activities.

61. The SC conducted a thorough analysis of the changes concerning its mission and role, its core tasks, its monitoring and reporting tools. The SC's **paper** on the **Mission, competences and objectives of the SC** ([1]) in the light of the new OLAF Regulation explains these changes, the SC's monitoring formula and the role of its Secretariat, its independent functioning being a guarantee of the independence of the SC itself.

Priorities and objectives

62. The SC defined its strategic objectives and priorities for the forthcoming period of its mandate, aimed at increasing the effectiveness and impact of its core activities and thus the support of OLAF's investigative function and reinforcement of OLAF's independence. The SC defined the following strategic objectives: (i) developing effective and pragmatic monitoring tools; (ii) improving the cooperation with OLAF and its Director-General; (iii) acting as a stakeholder in implementing the fight against fraud policy; (iv) increasing the SC's visibility among the EU institutions and Member States; (v) developing the SC's working methods; (vi) safeguarding the independent functioning of the SC and of its Secretariat; (vii) contributing to the legislative proposal of reinforcing OLAF's supervision. To meet these objectives, the SC identified a number of priorities, which are also presented in the paper on the **Mission, competences and objectives of the SC**, which represents at the same time the SC's **mid-term strategy**.

Code of conduct

63. On 9 October 2013, the SC adopted a Code of conduct together with an Explanatory memorandum on Safeguards of impartiality and risks of conflict of interest in the exercise of the monitoring functions ([2]). The SC highlighted that its Members generally hold key functions in their national judicial system or administration, allowing them to act as a counterpart/partner of OLAF at a national level at any stage of an OLAF case. At the same time, they regularly monitor OLAF's cases, in particular, those requiring transmission of information to the national judicial authorities. Situations may thus occur when they may be faced with the same OLAF case both in the framework of their national duties and as Members of the SC. It is thus essential to make sure that dealing with a case in this dual capacity does not give rise to any actual or potential conflicts of interest endangering the public trust in the impartiality and objectivity of their work. The SC carried out an overview of those specific tasks of the Members of the SC which could possibly lead to conflict of interest situations, followed by an inventory of concrete situations when conflicts of interest may occur. The code of conduct foresees a clear procedure on how to manage conflict of interest situations.

64. In order to establish this policy and code of conduct in clear legal terms, the SC considered it appropriate to amend its Rules of Procedure. This work is currently on-going.

Working methods

65. In March 2013, the SC welcomed a new Member, Mr Tuomas PÖYSTI. During its October 2013 meeting, the SC elected Mr Johan DENOLF to serve as Chairman for a further year.

66. From February 2013 to January 2014 included, the SC held 11 plenary meetings in Brussels and Luxembourg. The Chairman, the *rapporteurs* and the members of the Secretariat met also regularly to work on particular issues as well as on the preparation of and follow-up to the plenary meetings.

67. For every major issue examined, the SC appointed a *rapporteur*. Such was the case in particular for the OLAF budget, the analysis of the OLAF's procedures for dealing with complaints, the DG's Instructions to Staff on Investigative Procedures, OLAF Investigation Policy Priorities and the analysis of the selection process in OLAF. The *rapporteurs* worked with the SC Secretariat to prepare draft opinions or papers to be discussed in the plenary meetings.

([1]) See Annex 8.
([2]) See Annex 9.

68. During the February 2013 plenary meeting, the SC Secretariat presented to the senior management of OLAF the working methods of the SC in particular with regard to cases to be transmitted by OLAF to national judicial authorities. It was also explained what information was needed by the SC in order to carry out its tasks properly. This presentation served as the basis for the SC to develop a set of **monitoring guidelines**. Following the entry into force of Regulation (EU, Euratom) No 883/2013, the SC is in the process of establishing new monitoring guidelines.

6. SUPERVISORY COMMITTEE'S SECRETARIAT

69. The Secretariat of the SC consists of lawyers, investigators and assistants who ensure the daily monitoring of OLAF investigative activities and assist the SC Members in the execution of their tasks. The Secretariat receives all the information provided to the SC and carries out its initial examination. The Secretariat is also responsible for preparing legal advice for the SC Members.

70. The SC would like to highlight that its Secretariat must be able to assist the SC in implementing its monitoring functions in a loyal and efficient manner without being exposed to the risk of potential conflicts of interest as OLAF staff subordinate to the OLAF DG. During the past few years, the SC has consistently underlined the importance of its independent and effective functioning which requires an independent and adequately staffed Secretariat that, whilst situated within the structure of OLAF, functions independently and under the exclusive instructions of the SC. The SC is satisfied that the independent functioning of its Secretariat is now guaranteed by Regulation (EU, Euratom) No 883/2013 [1].

71. The SC has identified four basic conditions ensuring the independent functioning of the Secretariat: (i) recruitment, appraisal and promotion of the Head of the Secretariat on the basis of the SC's decisions; (ii) reclassification of the Head of the Secretariat as a senior manager; (iii) recruitment, appraisal and promotion of the staff of the Secretariat by its Head; (iv) sub-delegation of the Secretariat's budget implementation to its Head. The SC has started discussions with the OLAF DG on the implementation of this new regulatory requirement, which are currently on-going.

72. The SC is also satisfied that the OLAF DG has re-established the number of posts allocated to the Secretariat to eight, as was the case before the reorganisation of OLAF in 2012.

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[1] Recital 40.

ANNEXES

1. Opinion No 1/2013: OLAF's Preliminary draft budget for 2014
2. Opinion No 2/2013: Establishing an internal OLAF procedure for complaints
3. Opinion No 1/2014: OLAF Investigation Policy Priorities
4. Opinion No 2/2014: Case selection in OLAF
5. SC's observations on investigation procedures in OLAF
6. Paper on Reinforcing procedural safeguards in OLAF
7. SC's 2012 Recommendations
8. Mission, competences and objectives of the SC: Mid-term strategy
9. Code of Conduct of the Members of the SC and Explanatory memorandum on safeguards of impartiality and risks of conflict of interest in the exercise of the monitoring functions
10. Working arrangements with OLAF

ANNEX 1

OPINION No 1/2013

OLAF's preliminary draft budget for 2014

Brussels, 16 July 2013

INTRODUCTION

At the meetings of 27 February and 16 July, 2013, OLAF's Supervisory Committee examined OLAF's preliminary budget for 2014 and adopted the following opinion.

In accordance with the 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) ([1]) and Article 3 of the Commission Decision 1999/352/EC, ECSC, Euratom ([2]), the European Anti-Fraud Office (hereinafter OLAF) shall have full independence to exercise its investigative function in all institutions, bodies, offices and agencies established by or on the basis of the Treaty on the European Union, Treaty on the Functioning of the European Union and the Euratom Treaty. To do this and to ensure that OLAF is able to function in an efficient and effective manner and contribute in the best possible way to the Union's objectives of the fight against fraud defined in Article 325 of the Treaty on the Functioning of the European Union, a specific budget line within the Commission budget (European Commission section of the general budget of the European Union) is created for OLAF. ([3])

In accordance with Article 11 of the Regulation (EC) No 1073/1999 the mission of the OLAF Supervisory Committee (SC) is to reinforce the independence of OLAF in the exercise of OLAF's investigative function. In the reform of Regulation (EC) No 1073/1999 adopted by the European Parliament and the Council in 2013, the role of the SC has been strengthened as guardian of the independence of OLAF in its investigative function and in the supervision of the respect of fundamental rights and freedoms. In this context, and with a view to the powers conferred by the Commission on the SC ([4]), the SC has considered OLAF's preliminary draft budget (PDB) and the Commission draft budget for 2014 concerning OLAF and delivers the following Opinion.

The objective of the procedure in which the SC adopts an Opinion on OLAF's preliminary draft budget and draft budget is to give assurance that the draft budget duly takes into account the independence of the investigative function of OLAF and that OLAF is resourced to function effectively and efficiently as an inter-institutional service in stepping up the fight against fraud as foreseen by the Union legislator in Regulation (EC) No 1073/1999. The SC Opinion on the preliminary draft budget also creates a documented forum of the SC advice to the Director-General of OLAF and to the Budgetary Authority of the Union and other Institutions of the Union on the prerequisites for efficient allocation and use of resources to and within OLAF. In this way the SC Opinion contributes to the attainment of value for money, legal certainty and efficient anti-fraud policy in the European Union. The Opinion of the SC is not therefore limited only to commenting on the budget line on the SC of the OLAF.

I. **RESOURCES**

In the draft budget presented by the Commission on 26 June 2013, the OLAF budget will be increased by approximately 1,5 % with a total expenditure of EUR 58 523 000. The increase comes principally from the transfer of an additional 6 posts from headquarters budget line 'Expenditure related to officials and temporary staff working with the institution to OLAF'. If the impact of the EU enlargement to include Croatia is taken into account, the increase in the OLAF expenditure is 0,7 %. In the draft budget presented by the Commission the general increase in the Commission's administrative expenditure is 0,1 % and 0,8 % when taking into account the expenditure resulting from the enlargement to Croatia. The OLAF Budget has not been subject to the same strict savings measures as those within the Commission services in general. The SC notes this with satisfaction and considers that this line on resources provides the conditions necessary to continue the fight against fraud as one of the important priorities of the European Union.

The budget line concerning buildings and IT has been kept on zero growth in accordance with the general orientation of the Commission. The SC observes that a well-organised and up-to-date ICT support and infrastructure are necessary

([1]) 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) (OJ L 136, 31.5.1999, p. 1).
([2]) Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 20).
([3]) See Art. 13 of Regulation (EC) No 1073/1999 (Art. 18 of the Regulation amended as of 1 October 2013).
([4]) Article 6 of the Commission Decision 1999/352/EC, ECSC, Euratom.

conditions for a cost-effective fraud investigation function. The SC has no objection to the general orientation in the Commission draft budget but SC would stress the need to keep both OLAF's Case Management, ICT analytics and other information systems up to date in order to enable OLAF to function efficiently.

Allocation of resources to priority activities

The SC has regularly recommended to OLAF in its previous opinions on the budget to allocate more staff to OLAF's core business — investigations — by shifting them from the support units. In addition, the SC has proposed clarification of the distinction between investigative and operational activities of OLAF. The SC notes the reorganisation of OLAF put in place on 1 February 2012 in which resources at the organisational level were increasingly concentrated on investigations. As a result of this, in the OLAF Report of 2012, the distribution of staff in the units dealing with the fight against fraud, OLAF policy strategy and coordination and administrative support is reported separately. This goes in the direction of clarification of the distinction between investigative and other operational activities of OLAF in line with the SC's earlier recommendations. However, the SC considers that clarification between investigation and investigation support functions, anti-fraud policy functions and other operational activities of OLAF should go still further.

Opening and follow up of the investigations

The SC would mention that consistent application over the years of the investigative policy priorities in line with Union's anti-fraud policy and the Commission's anti-fraud strategy is a core issue in the resources management of OLAF and in the performance of its investigative function. The SC notes that in the OLAF Management Plan the alignment with the investigative policy priorities is defined as one of the performance indicators for OLAF. ([1]) The SC underlines the importance of transparent and reliable follow-up of the investigative policy priorities.

The SC would refer to its earlier observations and statistics as presented by the European Court of Auditors in the Special Report No 2/2011 ([2]) on the low number of OLAF investigations leading to convictions by Member States judicial authorities. ([3]) The SC considers that the rate of OLAF reports leading to convictions is one of the key indicators of the effectiveness of OLAF's investigative function requiring close and open attention. The SC recognises that the reasons why OLAF reports do not lead to conviction may, in some instances lie outside OLAF's control, however, the impact of such external factors should be carefully analysed and transparently reported. The SC therefore encourages OLAF to continue to develop indicators and report on them in a transparent and reliable manner in order to show an example of value for money and to demonstrate the positive impact that contribution of additional resources to OLAF has in the fight against fraud in the European Union, appropriate follow-up thus ensuring that the ultimate results of investigations are achieved. Without this OLAF risks carrying out good, hard work which may ultimately not produce the required results.

HR strategy

The reorganisation of the Office resulted in significant shifts of staff and modifications in their job description or even a completely new allocation of tasks. In such circumstances the SC reiterates its earlier position that it is essential to have an appropriate human resources strategy built on the identified and real needs of the organisation and its priorities, with the aim of giving direction and maximising the use of existing resources. The SC draws particular attention to OLAF's ability to recruit and maintain high quality professionals in its investigative functions as a focal point of cost-effective anti-fraud service at the Union level.

A crucial element of the human resources strategy should continue to be the continuous training related to internal mobility and overall restructuring. It should address the optimum balance between administrators and staff members with administrative professional background performing core investigative tasks and assistants providing support services.

Recommendations:

- **Effective follow-up of investigations must be ensured and results of the investigations reported with timely and reliable indicators**
- **OLAF shall continue to develop indicators describing the efficiency and quality of its investigative function and on the alignment with the anti-fraud policy of the European Union and anti-fraud strategy of the European Commission**
- **A human resources strategy based on a needs assessment of OLAF's current activities should be developed and focus given to training, career development, succession planning and appropriate balance between assistants providing support services and administrators performing core investigative tasks.**

([1]) See OLAF Annual Activity Report 2012 final, Ares (2013) 509786 — 26.3.2013: chapter 1.3, Specific objectives for 'fight against fraud': investigative and coordination activities, p. 5.
([2]) Special Report No 2/2011, 'Follow-up of Special Report No 1/2005 concerning the management of the European Anti-Fraud Office'.
([3]) See the SC Opinion 1/2012 of the 2013 OLAF draft budget, reproduced as Annex 2 of the SC Annual Report of 2012.

II. **BUDGETARY PROCEDURE**

The Commission Decision establishing OLAF is clear that the SC must be consulted on the PDB of OLAF *before* it is sent to the Director-General for Budgets ([1]). Up to now the Director-General of OLAF has transmitted the PDB to the Committee after 'technical' meetings/arrangements with DG Budget. In 2013 the SC was presented with the preliminary draft budget in February and informed in June with regard to the Commission Decision on the draft budget for 2014. The SC believes that to provide an effective opinion on the PDB is one of its core tasks and would remind the Director-General of OLAF to undertake a substantive consultation with the SC prior to budget negotiations with DG Budget. Furthermore, the SC would encourage the Director-General to consult the SC on the OLAF Annual Management plan in order to have independent support and feed-back based on the follow-up of the investigative function by the SC.

Conclusion:

— **The Director-General of OLAF shall ensure that the SC be effectively consulted regarding the next PDB by means of a real and substantive exchange of opinions between the Director-General and the Committee *before* the PDB is sent to the Director-General for Budget in any form.**

III. **THE SC AND THE SECRETARIAT OF THE SC**

The SC expenditure

The SC notes that the budget line of the expenditure related to the SC is not changed in 2014 draft budget.

The SC draws attention to the fact that with the extended responsibilities attributed to the SC by the Union legislator, the performance of the duties of the SC requires the devotion of a considerable amount of time by its Members who, by definition, do so on a part time bases.

The Resources of the Secretariat of the SC

In accordance with Regulation (EC) No 1073/1999 the SC has a crucial role to play in the monitoring of OLAF's investigative function. Moreover, the SC has a specific inter-institutional character.

In the discharge of its duties assigned by the legislator, the SC is dependent on its Secretariat. The SC would like to point out that the role of the Secretariat is primarily not to assist in the organisation and documentation of the meeting of the SC. In practice, the SC Secretariat performs an overall, regular monitoring of the investigative function of OLAF. This results from the fact that it is the SC Secretariat which has access, in accordance with the established access arrangements, to the OLAF Case Management System. The data protection rules *de facto* require that access to case information by the SC is implemented via the SC secretariat. An adequately staffed Secretariat with high quality personnel is thus a vital condition for the SC in the discharge of its duties as stipulated by the legislator.

The SC considers that the 2014 draft budget creates conditions for appropriate resourcing of the SC Secretariat.

The SC would point out the general principle of sincere cooperation between Institutions and bodies of the European Union, which is a general principle of the Union law, specifically that Regulation (EC) No 1073/1999 sets out further requirements on the sincere cooperation between the Director-General of OLAF and the SC. The Director-General of OLAF shall, in the spirit of sincere cooperation, consult the SC on all issues which relate to the staffing, promotion of personnel and resources of the SC Secretariat.

To be fully informative and representative of the total cost of supervision, the budget entry for the SC should incorporate the total cost of operations stemming from the duties stipulated in Regulation (EC) No 1073/1999, that is, all the SC Members' expenditure as well as that of its Secretariat which includes their salaries, training, travel etc.

OLAF has the privilege of transferring its funds freely from one line item to another. By joining up the total cost of the SC's function in a separate budget entry it is ensured that funds targeted for use by the SC are actually used for the supervisory function. However, funds remaining unused could be redeployed to other headings within the OLAF budget. Such redeployment should only be possible with prior notification to the SC and its approval.

([1]) Article 6(2) of the Commission Decision 1999/352/EC, ECSC, Euratom cited above provides: 'After consulting the Surveillance Committee, the Director shall send the Director-General for Budgets a preliminary draft budget to be entered in the special heading for the Office in the annual general budget'.

The Head of the SC Secretariat should be sub-delegated as the authorising officer to manage the total fund allocation for the SC's operations under the control of the Committee. Having one budget line which incorporates all expenditure will facilitate the management and efficiencies of the supervisory framework whilst, at the same time, any unused funds are passed on to other OLAF budget lines by the Director-General upon the approval of the SC.

A separate budget line has the benefit of transparency and reflects also the independence of the SC in line with the Regulation. At the same time, this separate budget line will inform the three institutions appointing the SC regarding the resources specifically allocated to the supervisory function.

Secretariat Staff

The SC maintains its position, as expressed in its previous opinions on the OLAF budget, on the minimum requirement of eight Secretariat staff, which is equivalent to the current needs of the SC. This represents about 2 % of OLAF staff ([1]) which the SC deems the minimum number required for it to carry out its monitoring function efficiently. ([2]) The SC would point out that the legal duties of the SC require a small, but high quality staff in Secretariat. The SC has noted with satisfaction the intention of the OLAF Director-General to allocate additional posts to the Secretariat. The SC expects a fluid and rapid implementation of the announced intention.

Furthermore, the SC is of the opinion that, with regard to the appointment of the Head of the Secretariat and other staff for its Secretariat, including internal transfers, there should be close consultation with the Committee, as indicated in its Rules of Procedure ([3]) reflecting the principle of cooperation stipulated in the Regulation.

The SC acknowledges that the Commission staff rules and the appraisal and promotion system do not currently permit the SC Members to evaluate the performance of the staff of the Secretariat directly. The SC also notes that nothing in the Commission staff rules and appraisal and promotion system excludes the consultation of the SC and that some Institutions have developed consultation systems for situations in which a member of staff is effectively working for another directorate or body than the one which is legally responsible for the appraisal and promotion. Therefore the SC considers that even though the appraisal of the Head of Secretariat and his promotion are ultimately decided by the Director-General of OLAF, he should make these decisions on the basis of the opinions of the Committee under whose direct authority the Secretariat works, as it is foreseen in the SC's Rules of Procedure ([4]). This will ensure the continuous independence of the Secretariat in their day to day functions.

Recommendations:

- **Separate budget line for both the SC and Secretariat should be considered to clearly indicate the costs of the SC function and to highlight in a transparent manner the inter-institutional character of the SC and its Secretariat.**
- **The Director-General of OLAF shall, in sincere and close cooperation with the SC, ensure that appropriate resources and staff members are allocated to the SC Secretariat in line with the intention expressed by the Director-General.**
- **Regular monitoring of the investigative function of OLAF and SC access to information depend on a small but high quality Secretariat. The Secretariat should have eight members of staff.**
- **Appointments, appraisal and promotion of the SC Secretariat staff should only be made following the approval of the SC, thus ensuring full independence of the SC Secretariat in the performance of its duties.**
- **Appraisal of the Head of Secretariat and his promotion should be decided by the Director-General on the basis of the SC's opinion.**

IV. **CONCLUSION**

The SC supports OLAF's draft budget for 2014 with the provision that the above recommendations be taken into consideration.

([1]) According to the OLAF report for 2011, there are 437 staff in the Office.

([2]) For the detailed analysis of the SC workload and consequently of the necessary SC Secretariat resources, see the note of the Head of the SC Secretariat of 21 March 2013. In view of the incoming amendments to Regulation (EC) No 1073/1999 entrusting additional tasks to the SC, the resources of the SC Secretariat may require reinforcement in the year 2014.

([3]) Article 11(3) of the SC's Rules of Procedure provides as follows: 'In any case, the Head of the Secretariat shall inform the SC about the candidates for membership of the Secretariat. Once the applications are known, the Committee shall discuss in the plenary session whether they meet the Committee's working needs with a view to submitting a proposal for their appointment to OLAF's Director-General' (OJ L 308, 24.11.2011, p. 114).

([4]) Article 11(5) of the SC's Rules of Procedure provides as follows: 'The Supervisory Committee shall periodically evaluate the work of the Head of the Secretariat and of the Secretariat members'.

In accordance with Article 6(2) of the Commission Decision of 28 April 1999, the Opinion should be transmitted to the Budgetary Authority by OLAF. Furthermore, the SC invites the Director-General of OLAF to update the SC regularly on measures taken by OLAF towards implementation of the recommendations in this Opinion.

Adopted in Brussels, on 16 July 2013

For the Supervisory Committee,

Johan DENOLF

Chairman

ANNEX 2

OPINION No 2/2013

on establishing an internal OLAF procedure for complaints

The Supervisory Committee of the European Anti-Fraud Office (OLAF) examined the options for redress open to persons involved in OLAF's investigations regarding potential violations of their rights and procedural guarantees. The Committee found that such persons do not have sufficient and immediate remedies to redress potential violations either through an external (an EU or national court, the European Ombudsman or the European Data Protection Supervisor) or internal mechanism (OLAF itself). The Committee believes that the new Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF has not resolved the problem, since it does not introduce a mechanism for dealing with individual complaints. The Committee expressed the opinion that the current legislative gap could be closed by putting in place a transparent and efficient complaints procedure within OLAF, to deal with complaints alleging potential breaches of fundamental rights and procedural guarantees in the course of an OLAF investigation. The Committee therefore recommended that the Director-General of OLAF institute such an internal procedure and put forward concrete suggestions with regard to its implementation.

INTRODUCTION

1. OLAF has been given far-reaching powers of investigation in order to efficiently carry out its mission to protect the financial interests of the EU. The exercise of these powers is very likely to touch upon the fundamental rights of persons concerned by investigations ([1]), and therefore their respect by OLAF is essential. It contributes — as the SC has already emphasised ([2]) — not only to ensuring the effectiveness and efficiency of OLAF's investigative activities, but also to consolidating its reputation, credibility and ultimately its independence.

2. OLAF is obliged to ensure the protection of fundamental rights by safeguarding the procedural guarantees as listed by the EU Charter of Fundamental Rights ([3]). In addition, the EU legislator decided to enhance OLAF's accountability for its investigative activities by reforming its legal framework ([4]) which resulted in the adoption of Regulation (EU, Euratom) No 883/2013 ([5]) (hereinafter, the Regulation).

3. The SC welcomes the changes brought by the Regulation but would like, nevertheless, to point out that the mechanisms put in place to enforce the procedural guarantees need further improvement. The Regulation provides for a legality check ([6]) and a monitoring mechanism ([7]), but does not establish a mechanism for dealing with individual complaints which would be, in the SC's view, indispensable for ensuring effective protection of fundamental rights.

4. In the SC's opinion, persons involved in OLAF investigations **do not have sufficient and immediate remedies** to redress potential violations of their rights and the recent reform of the legal framework has not solved that problem. Therefore, the SC takes the view that **the Director-General of OLAF ((hereinafter, the DG) should swiftly establish a transparent and stable internal procedure for dealing with individual complaints**.

I. **INSUFFICIENCY OF THE EXISTING REDRESS MECHANISMS**

5. Persons considering that, in the course of an investigation, OLAF breached their fundamental rights and wishing to complain, have at their disposal various means of judicial and non-judicial review which, however, may be insufficient, for the reasons stated below.

([1]) Although little consideration was given to this aspect when OLAF was created, the few procedural guarantees defined in the former Regulation (EC) No 1073/1999 were developed by the case-law of the EU General Court.
([2]) See the SC's Opinion No 5/2010 on *Respect for fundamental rights and procedural guarantees in investigations by the European Anti-Fraud Office*, point 3.
([3]) See in particular Article 41 of the Charter.
([4]) One of the objectives of the reform was to reinforce the protection of fundamental rights and procedural guarantees within OLAF's investigations.
([5]) 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).
([6]) The legality check relates, inter alia, to the respect of procedural guarantees and fundamental rights of persons concerned (Article 17(7)).
([7]) Article 15(1).

6. Firstly, they may seek the direct judicial review by an **EU Court** (action for annulment, action for damages and request for interim relief) or indirectjudicial review by **EU and national courts** (preliminary ruling procedure). ([1]) However, it should be noted that these actions are governed by rather strict rules on admissibility ([2]) and must fulfil a number of conditions to trigger a right to reparation ([3]). Even when an action is successful, *'Judicial protection is obtained long after the contested investigative act and the act as such is not affected by the EU court's ruling; only compensation for the prejudice created by that act is obtained'* ([4]).

7. Secondly, persons wishing to complain may address themselves to the **European Data Protection Supervisor** (EDPS), who is specifically entrusted ([5]) with the competence of hearing and investigating complaints lodged by persons whose personal data are processed by OLAF. However, the material scope of his review is limited to the protection of personal data and privacy.

8. Thirdly, the **European Ombudsman** (EO) is competent to investigate complaints regarding maladministration ([6]) against OLAF, namely failure to act in accordance with the law, to respect the principles of good administration, or breaches of fundamental rights. Nevertheless, it is the EO's view — which the SC fully shares — that an institution *'in frequent contact with people who may have reason to complain should provide for a first line complaints mechanism allowing for their problems to be addressed and solved rapidly, before, in the event that resolution is not successful, having to turn to other redress mechanisms, such as Ombudsmen and courts'* ([7]). The SC considers that this statement also applies to OLAF.

9. Fourthly, **the SC** itself — as the OLAF's supervisory body — is quite often the addressee of individual complaints which it takes into consideration as a valuable source of information concerning OLAF's investigations and thus triggering the SC's monitoring activity. The SC's role, as emphasised by a ruling of the EU General Court ([8]) and confirmed by Regulation (EU, Euratom) No 883/2013, is to monitor developments concerning the application of procedural guarantees and the duration of investigations ([9]) which cannot be carried out without examination of individual cases. However, the SC was not established as a complaints body and its supervision takes place only *ex post*, since the SC cannot intervene in ongoing investigations. Furthermore, the SC regrets the lack of appropriate monitoring tools at its disposal and the absence of a specific reporting obligation for the DG to inform the SC of complaints addressed to him and, in particular, on the way they were dealt with.

10. In addition to the external mechanisms, the SC notes that an internal mechanism for dealing with individual complaints is not completely absent from the legal framework governing OLAF's investigations. Any official or other servant of the EU who is the subject of an internal investigation has the right to submit to **the DG** a complaint against an act adversely affecting him in connection with investigations by OLAF ([10]). However, according to the existing EU case-law, OLAF's investigative acts do not constitute acts adversely affecting the persons concerned within the meaning of Article 90a of the Staff Regulations and therefore are not challengeable acts ([11]).

11. Moreover, the SC would point out that OLAF staff who are aware of possible illegal activities or serious violations of professional duties that might trigger potential breaches of fundamental rights and procedural guarantees within an investigation have the additional possibility to report wrongdoing within OLAF to **the President of the SC**, on the basis of Article 22a of the Staff Regulations and of the agreement between the DG and the SC ([12]).

([1]) For a thorough overview of the different kinds of judicial review of OLAF's investigative acts, see J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-fraud Office (OLAF) — An Analysis with a Look Forward to a European Public Prosecutor's Office*, Europa Law Publishing, 2011, p. 203. See also X. Groussot, Z. Popov, *What's wrong with OLAF? Accountability, due process and criminal justice in European anti-fraud policy*, Common Market Law Review 47, 2010, p. 605-643.

([2]) For example, the actions for annulment introduced against OLAF investigative acts have constantly been declared inadmissible on the grounds that none of such acts has to date been deemed to bring about a distinct change in the applicant's legal position.

([3]) In actions for damages, there are three conditions to be met in order to trigger a right to reparation: the infringement of a rule of law intended to confer rights on persons; a sufficiently serious breach of this rule; the existence of a direct causal link between the breach of the rule of law and the damage allegedly suffered by the complainant.

([4]) J.F.H. Inghelram, *Judicial review of investigative acts of the European Anti-Fraud Office (OLAF): a search for balance*, Common Market Law Review 49, 2012, p. 601-628.

([5]) Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

([6]) According to the definition given by the EO, *'Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'* (see the EO's Annual Report 1997, p. 23).

([7]) See the Special Report of the EO in own-initiative inquiry OI/5/2012/BEH-MHZ concerning FRONTEX, 12 November 2013, point 43.

([8]) *Franchet and Byk* v *Commission* (No 2),8 July 2008, Case T-48/05.

([9]) Article 15(1) of Regulation (EU, Euratom) No 883/2013.

([10]) See Article 14 of the former Regulation (EC) No 1073/1999. Its content has been included in Article 90a of the Staff Regulations and as a consequence has been deleted from Regulation (EU, Euratom) No 883/2013.

([11]) See *Commission* v *Antonello Violetti and Others and Nadine Schmit*, 20 May 2010, Case T-261/09.

([12]) See the note of the Director-General to OLAF staff (I/011472 of 10 November 2008) and the note JUR(2008)45321 of 1 April 2008 of the Commission's Legal Service.

II. LACK OF A COMPLAINT PROCEDURE IN REGULATION (EU, Euratom) No 883/2013

12. The SC notes that the intention of the EU legislator was to strengthen the protection of procedural guarantees applicable in OLAF's investigations (a) by inserting in the Regulation detailed provisions concerning the procedural guarantees and (b) by enforcing them by means of an enhanced review. As a result, Article 9 of the Regulation contains now explicit procedural guarantees and thus defines and clarifies the contents of those foreseen in the Charter. On the other hand, although the EU institutions involved in the legislative process all agreed on the need for a review of potential violation of fundamental rights and put forward various proposals aimed at establishing both an *ex ante* legality check (relating, inter alia, to the respect of procedural guarantees of persons under investigation, during all stages of the investigation) and an *ex post* review procedure for handling individual complaints ([1]), it seems that no consensus was finally reached, since the Regulation does not explicitly put in place any such procedure.

13. The SC would point out that in the past, *via* its internal rules, OLAF put in place a review procedure open to all persons concerned in internal and external investigations in which procedural guarantees were allegedly not respected in a manner possibly having an impact on the conclusions of the investigation ([2]). This procedure evolved under the influence of interinstitutional discussions on reforming the OLAF legal framework. Since the Commission's proposal of 17 March 2011 contained provisions on a review procedure ([3]), the Instructions to Staff on Investigation Procedures (ISIP) ([4]) adopted by the OLAF DG as of 1 February 2012 anticipated the forthcoming legislative changes with the setting up of a procedure for dealing with complaints concerning an alleged failure to respect procedural guarantees ([5]). However, that Commission's proposal, which was subject to negotiations during the legislative process, was ultimately not maintained. Therefore, when the ISIP were replaced by the new Guidelines on Investigation Procedures (GIP), which entered into force on the same day as the new OLAF Regulation (1 October 2013), this internal procedure disappeared.

14. As a result, neither the Regulation nor OLAF's internal rules foresee any formal procedure for dealing with individual complaints. Therefore, the objective of improving the mechanisms for redressing potential breaches by OLAF of procedural guarantees of persons under investigation has not been achieved. The SC would point out that the recent Communication from the Commission on *Improving OLAF's governance and reinforcing procedural safeguards in investigations* ([6]) supports the SC's view and its repeated recommendations ([7]) concerning the introduction of transparent and stable procedures for an internal legality check and for an independent review of complaints. This Communication also confirms the need for further improvements to the Regulation, by establishing of the office of a '*Controller of procedural safeguards*'.

15. With its longstanding experience in monitoring OLAF's investigative function and thereby compliance by OLAF with fundamental rights and procedural guarantees, the SC is therefore concerned by the lack of a transparent procedure for dealing with individual complaints and takes the view that, at least during the transitional period, until further amendments to the Regulation are adopted, the current gap should be closed by the DG re-establishing an internal procedure for complaint in OLAF.

III. THE WAY FORWARD: AN INTERNAL PROCEDURE FOR COMPLAINTS

16. In OLAF's view, the notion of 'complaints' covers (i) complaints concerning procedural guarantees in the context of investigative actions, (ii) complaints against a reply by OLAF to a request for access to personal data and (iii) complaints from whistle-blowers (concerning either OLAF's obligation to inform them on the action taken following their fraud reporting or the protection of their identity) ([8]). According to information provided by OLAF, in the last three years there were 25 complaints concerning OLAF's investigation activity, of which 13 were

([1]) During the legislative process, the EU institutions put forward various proposals: an independent Review Adviser with the participation of the SC, a Review Panel consisting of senior officials of OLAF and of the Commission's Legal Service, two separate procedures (legality check by legal experts of OLAF and complaints to the Review Adviser *via* the SC), a review procedure to be set up by the DG within the Office.

([2]) See the former OLAF Manual — Operational Procedures, version July 2011, point 5.1.6.

([3]) Article 7b: this procedure aimed at dealing with requests from persons concerned by an investigation, to have an independent opinion regarding the respect of the procedural guarantees provided for in the Regulation.

([4]) Replacing the former OLAF Manual — Operational Procedures.

([5]) Article 23 of the ISIP — '*23.1 Where a natural person concerned by an investigation has requested a review of the handling of his procedural guarantees, the Director-General appoints a member of OLAF staff not connected with the investigation, to conduct such a review. 23.2 The person entrusted with the review must act independently in his review of the complaint and report his findings to the Director-General. 23.3 The Director-General may take appropriate action in respect of any failure to respect procedural guarantees and will inform the complainant*'.

([6]) COM(2013) 533 final, 17.7.2013.

([7]) See the SC's Annual Activity Report 2012, specifically Section 2 of Annex III.

([8]) OLAF does not count as 'complaint' the applications for access to documents (including 'confirmatory applications'), the requests for access to personal data, staff complaints (Art. 90 of Staff Regulations), motions to courts, complaints addressed to the Commission which do not concern directly OLAF, letters from informants/whistle-blowers unhappy with OLAF's decision to dismiss a case.

addressed to the EO ([1]), 8 were addressed to the EDPS ([2]) and 4 were requests for review addressed to OLAF ([3]). OLAF is also aware of other complaints, addressed to other bodies (e.g. to the SC), but it does not have any systemic overview, register or statistics related to them.

17. Taking into account the number of cases opened by OLAF (718 in 2012 ([4])) and the fact that complaints against OLAF are addressed, in particular, to the EDPS, the EO and the SC ([5]), the small number of complaints addressed to OLAF itself may lead to the conclusion that the absence of a transparent and independent procedure for handling complaints in OLAF effectively deters potential complainants from exercising their rights.

18. The SC notes, from its monitoring experience, that in the previous years the handling of complaints appeared to be carried out on a case-by-case basis rather than through a stable and consistent procedure. The SC shares the EO's view that a case-by-case approach is not '*the best way to ensure the efficient and transparent handling of complaints*' ([6]) and that without a proper complaint procedure '*compliance* [with fundamental rights] *cannot ultimately be effective*' ([7]). Such a procedure is a key element of OLAF's accountability and legitimacy, because protecting fundamental rights *'is not only to the benefit of persons under investigation but also of OLAF, whose legitimacy can only increase when fundamental rights are (seen to be) effectively protected*' ([8]).

19. The SC considers that, from the OLAF perspective, a complaint procedure would help (i) the detection by OLAF of any breach of its own legal obligations, thus allowing for a prompt reaction, (ii) monitoring by OLAF of compliance with fundamental rights and procedural guarantees by its own staff, (iii) avoiding the risk of discriminatory treatment of persons concerned, (iv) settling possible disputes before they aggravate ([9]).

20. In the SC's opinion, Article 41 of the Charter of Fundamental Rights ([10]) (right to good administration) would offer a sufficient legal basis for establishing an internal procedure for dealing with individual complaints. Complainants are entitled to expect from OLAF that their 'affairs' are 'handled' — according to the principles defined by the Charter.

21. The SC therefore believes that the DG should put in place a transparent and efficient internal procedure for dealing with all the types of complaints related to OLAF investigative activities, including not only complaints alleging potential breaches of fundamental rights in the course of an OLAF investigation, but also those concerning duration of investigations, legality of OLAF's acts, breaches of confidentiality, refusals to provide information. The following practical recommendations are without prejudice to the forthcoming legislative proposals ([11]) or to the SC's position as expressed in its paper on *Reinforcing procedural safeguards in OLAF — in view of the monitoring experience of the Supervisory Committee* ([12]) — they should be regarded as transitional measures until the current legal framework is improved.

22. The SC would firstly point out that it is for the DG to establish and define the exact scope and content of rules on handling of complaints in OLAF. In so doing, the DG should take into consideration a number of requirements triggered by the right to good administration. Recommendations by the EO and the Code of Good Administrative

([1]) 7 complaints in 2013, 3 complaints in 2012 and 3 complaints in 2011.
([2]) 5 complaints in 2012 and 3 complaints in 2011.
([3]) 1 request in 2013, 2 requests in 2012 and 1 request in 2011.
([4]) See the OLAF 2012 Activity Report.
([5]) See the Annual Activity Reports of the EDPS and the EO. The SC itself received 7 complaints in 2012 and 14 complaints in 2013, concerning, inter alia, alleged failure to respect fundamental rights and procedural guarantees, breach of confidentiality of investigations, duration of investigations.
([6]) See the EO's Decision closing his inquiry into complaint 3072/2009/MHZ against the Commission, 5 April 2011, point 27.
([7]) See the Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), 9 April 2013, point 79.
([8]) J.F.H. Inghelram, *Judicial review of investigative acts of the European Anti-Fraud Office (OLAF): a search for balance*, quoted above, p. 627.
([9]) See the Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ quoted above, point 47.
([10]) Article 41(1) of the Charter: '*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*'.
([11]) See the Commission's proposal quoted above.
([12]) This paper was adopted at the SC's plenary meeting on 8 October 2013 and transmitted to the three appointing Institutions on 24 October 2013.

Behaviour should be also taken into account. Without establishing an exhaustive list, the SC would point to the following requirements:

— fairness and impartiality, including, inter alia, the requirement that a complaint should be treated by a person not related to the investigation or not in the direct line of hierarchy of the person(s) related to the investigation ([1]) and the necessity to set out a minimum level of guarantees ensuring the functional independence of the person handling a given complaint,

— the requirement to state reasons for the decisions taken following a complaint ([2]);

— a reasonable time-limit for handling a complaint ([3]),

— the right of access to one's file (subject to limitations explicitly foreseen in the Charter ([4]),

— the right to address OLAF in one of the EU official languages and to have an answer in the same language ([5]),

— the requirement to inform the complainant of any possible alternative forms of redress ([6]).

23. Secondly, with regard to the person entrusted with the handling of complaints, he should have the appropriate competencies, qualifications and experience. Such person should have well defined tasks and benefit from access to appropriate resources. He should have access to all relevant case-related information and OLAF staff should fully cooperate with him.

24. Regarding particularly the requirement of independence, the SC would stress that any effective *internal* complaint procedure, which would necessarily imply the handling of a complaint by an OLAF (senior) official, requires that this person act, when carrying out his review duties, in full independence of the DG. This is a key element in ensuring external credibility and public trust. The SC acknowledges the difficulty of implementing such a requirement, since this person should report to the DG on his findings while the latter remains the appointing authority deciding on the career progress of all OLAF officials ([7]).

25. The SC would indicate three possible solutions to that problem.

(i) Firstly, the SC Secretariat being the only part of OLAF with regulatory guarantees of independent functioning with regard to the DG ([8]), the most logical solution would be to place the (senior) official entrusted with handling complaints under the Head of the SC Secretariat, but without involving him in any regular work of the SC.

(ii) Secondly, the official could be nominated as a 'complaint' advisor to the DG, but his functional independence should be safeguarded by the **right** to inform the SC whenever he considers that a measure taken by the Director-General puts his independence into question ([9]) and by the **obligation** to report on all his findings related to the complaints not only to the Director-General, but also to the SC ([10]).

(iii) Thirdly, the task could be entrusted to the OLAF Legal Advice Unit, but then its Head should have equal safeguards as a 'complaint advisor' — in his capacity of the handler of complaints.

([1]) See the Decision of 26 June 2008 of the EO on complaint 1354/2007/VIK against the European Economic and Social Committee, point 2.3: '*it is good administrative practice that complaints against a Community official should normally not be answered by this very same official, but by the superior of this official or by another appropriate official/body*'.

([2]) See Article 18 of the European Code of Good Administrative Behaviour. See also the Draft recommendation of the EO in the inquiry into complaint 1183/2012/MMN against OLAF, 15 November 2013.

([3]) See Article 17(1) of the European Code of Good Administrative Behaviour, which elucidates the '*reasonable time*' requirement of the Charter by establishing a two months period from the date of receipt of a request or complaint. Article 17(2) allows for an extension of this period if it is justified by the '*complexity of the matters which it raises*'. The SC notes with interest the EO's statement that extension of the time limit within which an EU institution may deal with a complaint can be justified by the complexity of the issues raised, but not by an alleged lack of sufficient human resources or internal obstacles within its own services, since '*in accordance with the principles of good administration, the EU institutions have the duty to ensure that they provide their various services with sufficient resources to fulfil the tasks which have been entrusted to them*' and to '*structure their various services in a such a way as not to hinder the performance of the institution's duties, including in particular, the need to treat complaints by citizens within a reasonable time*' (see EO's Decision closing his inquiry into complaint 2288/2011/MMN against the European Investment Bank, 25 September 2013, pt. 28, 30).

([4]) This right may be limited by the need to respect the legitimate interests of confidentiality and of professional and business secrecy.

([5]) See also Article 13 of the European Code of Good Administrative Behaviour.

([6]) See, in this respect, the Decision of the EO on complaint 1512/2007/JMA against the European Commission, 5 June 2008. Article 19 of the European Code of Good Administrative Behaviour may also be relevant in this respect.

([7]) See the concerns expressed by civil society representatives with regard to the compatibility of the principle of independence with the fact that a person works in the interest of a specific entity (see the Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ quoted above, point 78).

([8]) Recital 40 of Regulation (EU, Euratom) No 883/2013.

([9]) As it was suggested by the Commission in its proposal of 17 March 2011, Article 7b.2.

([10]) Idem. See also Article 14 a) of the European Parliament legislative resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (COM(2006) 244 — C6-0228/2006 — 2006/0084(COD)) (OJ C 16E, 22.1.2010, p. 201).

26. Finally, the SC considers that information on how to address complaints to OLAF, together with a description of the procedure for handling them, should be published on OLAF's website, for the sake of transparency and legal certainty. Moreover, the SC should be regularly informed of the complaints received by OLAF and the way they have been handled, this allowing it to properly perform its role of monitoring developments concerning the application of procedural guarantees and the duration of investigations.

SUPERVISORY COMMITTEE'S RECOMMENDATIONS

In the light of the above considerations, the Supervisory Committee:

(1) **Recommends** that the Director-General set up an internal procedure for dealing with individual complaints concerning OLAF investigations;

(2) **Invites** the Director-General to consult the details of the procedure with the SC, before its adoption;

(3) **Recommends** that the Director-General publish the procedure on OLAF's website after its adoption;

(4) **Expects** the Director-General to report regularly to the SC on complaints received by OLAF and the way they have been handled.

Adopted in Brussels, December 2013

For the Supervisory Committee

Johan DENOLF

Chairman

ANNEX 3

OPINION No 1/2014

OLAF Investigation Policy Priorities

The Supervisory Committee of the European Anti-Fraud Office (OLAF) examined the Investigation Policy Priorities (IPPs) established, on a yearly basis, by the Director-General of OLAF. The Committee compared the IPPs for 2012 and 2013 with the draft IPPs for 2014. The Committee welcomed the improved definition of the IPPs for 2014. The Committee considered however that the policy on financial indicators and the implementation of the proportionality principle needs further clarification. The Committee also drew attention to the need to reconsider the subsidiarity/added value policy and to apply it with caution, as well as to the need of a regular assessment of the IPPs.

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INTRODUCTION

1. The Investigation Policy Priorities (IPPs) were established by the European AntiFraud Office (OLAF) for the first time within the framework of the Management Plan 2012 as an element of the reorganisation of the Office, aiming at improving the selection procedure. *'The IPPs [were] used by OLAF to decide on the opening of investigations. These priorities [came] into play after the competence of OLAF and the necessary level of suspicions [had] been established'* ([1]).

2. On 1 October 2013, Regulation (EU, Euratom) No 883/2013 ([2]) entered into force. It obliges the Director-General of OLAF (OLAF DG) to determine the IPPs each year and also to forward them, prior to their publication, to the Supervisory Committee (SC) of OLAF ([3]). In the light of its role of reinforcing OLAF's independence and of its duties to assist the OLAF DG in discharging his responsibilities ([4]), the SC decided to thoroughly examine the IPPs for 2012, 2013 and 2014.

I. THE IPPS ESTABLISHED BY THE DIRECTOR-GENERAL

I.1. *IPPs for 2012*

3. There were five IPPs established in 2012:

   (i) *proportionality,*

   (ii) *efficient use of investigative resources,*

   (iii) *subsidiarity/added value,*

   (iv) *special policy objectives,*

   (v) *financial impact*.

4. The special policy objectives were related to sectors and geographical areas decided by the OLAF DG on the basis of concerns and priorities expressed by the European Institutions and of OLAF's own risk analyses. For 2012 the special policy objectives included:

   a) *double funding in external aid,*

   b) *smuggling of cigarettes and alcohol along the EU eastern border,*

   c) *cohesion funds,*

   d) *pre-accession funds in current accession and candidate countries,*

   e) *suspected corruption or links to organised crime* ([5]).

5. The priority related to the financial impact included financial indicators, e.g. EUR 500 000 in the European Social Fund and Cohesion Fund and € 1 million in the European Regional Development Fund (estimated misappropriation or wrongful retention of funds), over € 1 million (estimated illegal diminution of resources) in the customs sector ([6]).

I.2. *IPPs for 2013*

6. The IPPs have been updated for 2013 and they include four criteria:

   (i) *proportionality,*

   (ii) *efficient use of investigative resources,*

   (iii) *subsidiarity/added value,*

   (iv) *special criteria for 2013*.

([1]) OLAF Management Plan 2012, p. 20.
([2]) Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).
([3]) Article 17(5) of Regulation (EU, Euratom) No 883/2013.
([4]) Article 15 and recital 37 of Regulation (EU, Euratom) No 883/2013.
([5]) OLAF Management Plan 2012, p. 21.
([6]) Ib., p. 22.

7. The special criteria for 2013 are related to sectors only and no longer to geographical areas. The adoption of those criteria is linked to documents issued by stakeholders ([1]). There are three prioritised sectors:

a) *smuggling of cigarettes and alcohol into the EU,*

b) *the EU and national public procurement in the field of regional policies,*

c) *rural development* ([2]).

Finally, the special criteria include also financial indicators which are equivalent, in content, to the *financial impact* priority of 2012 ([3]).

I.3 ***Regulation (EU, Euratom) No 883/2013***

8. Regulation (EU, Euratom) No 883/2013 establishes certain principles to be taken into account by the OLAF DG, alongside the IPPs, when deciding whether or not to open an investigation ([4]).

9. Those general principles include:

(i) *proportionality of the means employed,*

(ii) *efficient use of resources,*

(iii) *added value of an OLAF internal investigation,* taking into account the nature of an illegal activity and its financial impact.

I.4 ***Draft IPPs for 2014***

10. On 4 December 2013 the OLAF DG transmitted to the SC the draft IPPs for 2014 which are to be adopted by the end of January 2014. The draft priorities for investigation in 2014 include:

(i) *smuggling of cigarettes and tobacco into the EU, in particular via maritime transport and along the EU Eastern border;*

(ii) *abuse of origin rules and tariff classification in both preferential and non-preferential trade regimes in order to evade payment of conventional customs duty and anti-dumping duties;*

(iii) *cases with indications of fraud and/or corruption in relation to public procurement for infrastructure networks;*

(iv) *cases of fraud concerning specific projects (co)financed by the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and Pre-accession Funds and in which action by the Member States or Candidate Countries is deemed to be insufficient.*

11. The draft priorities are related to the areas of activities of OLAF Directorate B only (not Directorate A). They are based on 9 key documents issued by stakeholders and they do not contain any reference to financial indicators.

I.5 ***Feedback from other Directorates-General of the European Commission***

12. On 11 February 2013 the responsible unit in the Directorate-General for Agriculture and Rural Development (DG AGRI) formally alerted OLAF via a registered note ([5]) that the financial indicator for one of the priorities — rural development — adopted by the OLAF DG, apparently without having consulted DG AGRI and defined as over EUR 250 000, would exclude 99,83 % of cases, since only 1 036 beneficiaries, out of 563 196, received subsidies above that threshold. DG AGRI expressed the view that it might be worthwhile considering a revision of the threshold of EUR 250 000, in order to increase the impact of OLAF's activities in the rural development sector. In May 2013 the Director-General of DG AGRI complained ([6]) to the OLAF DG that the above mentioned note of 11 February 2013 had never been answered. OLAF DG replied in July 2013, 'taking note' of the proposed 'adaptation of the financial thresholds', stressing that they are just one of the indicators and that when cases are dismissed on the basis of the IPPs, the relevant information is 'systematically' transferred to the competent authorities ([7]).

([1]) OLAF Management Plan 2013, footnotes 32, 33 and 34 on p. 44.
([2]) Ib., p. 44.
([3]) Ib., p. 45.
([4]) Article 5(1).
([5]) Note Ares(2013)175305 addressed to the Head of Unit 0.1.
([6]) Note Ares(2013)1118690.
([7]) Note Ares(2013)2587818.

13. With regard to a number of cases dismissed by OLAF and transferred to DG AGRI for appropriate action, DG AGRI continued to express its disagreement. In particular, DG AGRI pointed out that its competence lies in carrying out system audits; it therefore cannot undertake verifications regarding individual cases (e.g. possibly irregular payments to individual beneficiaries) that would amount to investigative activities for which it is not competent. As a consequence, DG AGRI decided not to follow-up such cases forwarded by OLAF. ([1]) In reply, DG AGRI was referred to OLAF's 'Guidance note for treatment of dismissed cases' ([2]) listing actions that can be taken in such circumstances.

14. The SC's inquiries have shown that the problem of insufficient consultation with the stakeholders concerns also other 'spending' DGs. In particular the issue of criteria for establishing financial indicators and the issue of the follow-up of cases of fraud or irregularity which are dismissed by OLAF seem to be addressed unilaterally by OLAF, without taking effectively into account opinions of the stakeholders.

II. SUPERVISORY COMMITTEE'S ASSESSMENT OF THE IPPS

II.1 *Improved definition of the IPPs*

15. The **IPPs for 2012 and 2013** contained, as priority criteria to be taken into consideration by OLAF to decide on the opening of investigations, three general principles, namely proportionality, need for efficient use of investigative resources and subsidiarity. The SC has pointed out in technical meetings with OLAF that *proportionality* and *subsidiarity* belong to the general principles of the EU law and as such must be always applied by all the EU bodies in accordance with the established EU case-law. As a result, those principles cannot constitute discretionary priorities of the Director-General of OLAF.

16. The SC notes that Regulation (EU, Euratom) No 883/2013 has established a clear distinction between the three general *principles* which always need to be taken into account by the Director-General and the *priorities* which he himself is to determine each year within the context of the annual management plan ([3]). The principles established in the Regulation correspond largely to the first three IPPs for 2012 and 2013. Therefore, since 1 October 2013, only the special annual criteria and the financial indicators determined by the Director-General can be considered as the IPPs for OLAF in the sense of the Regulation.

17. **The SC welcomes the fact that, following its comments expressed during technical meetings, the Director-General included in the draft IPPs for 2014 only those elements which can be clearly considered under the Regulation as *priorities* (and not *principles*).**

18. Moreover, the SC would draw attention to the fact that the general *principles* established in the Regulation are binding on the Director-General for all his decisions on opening or not an investigation. Since these decisions are based on the opinions of the Investigation Selection and Review Unit, the SC believes that it is important to provide the responsible staff in that unit with guidelines on the application of those principles.

II.2. *Need to clarify the policy on financial indicators*

19. The **IPPs for 2012 and 2013** listed a certain number of financial indicators to be taken into account in the selection process, together with other priority criteria. Already in its 2012 Annual Activity Report, the SC indicated that some of the thresholds were excessively high. At that time, the SC expressed its concern that potential fraud or irregularities likely to have a lower, but still significant financial impact, may not be taken into consideration, despite clear evidence ([4]). In particular, the SC highlighted that *'The setting by the Director-General of high financial thresholds, to be taken into consideration by OLAF prior to open an investigation in various sectors and the possibility for the Director-General not to open an investigation even if there is 'sufficient suspicion', without a parallel duty for the Director-General to inform the competent authorities of institutions when he decides not to open an investigation, risks resulting in areas of impunity'* ([5]).

20. Another concern that the SC wishes to express relates to the fact that those financial indicators were established apparently without any consultation with the stakeholders. It would not be consistent with the European Commission's anti-fraud strategy, which promotes OLAF's proactive and reinforced role in assisting the Commission Services, by providing, inter alia, a methodology and guidance on the development and implementation of the

([1]) E.g. note Ares(2013)3660752 of December 2013.
([2]) Ares(2013)622043 of April 2013.
([3]) See Article 5.
([4]) See the SC's 2012 Annual Activity Report, p. 23.
([5]) Ib., p. 42.

sectoral anti-fraud strategies ([1]). The SC would point out that the departments responsible for managing and/or supervising EU funds should receive proper information concerning suspicions of fraud or irregularities detrimental to the EU financial interests. In the absence of such information, they cannot ensure adequate protection of the EU's financial interests. In addition, the SC considers that OLAF would benefit from a constructive dialogue with its stakeholders with regard to financial indicators, since they are primarily responsible for managing EU funds and, as such, hold the most reliable information on elements of expenditure potentially affected by fraud, irregularities or other illegal activities detrimental to the EU financial interests.

21. **The SC welcomes the fact that, following its comments expressed in its Activity Report for 2012, the Director-General decided to review the policy on financial indicators. The SC is, however, concerned that, as the result, the DG has completely excluded any financial indicators from the draft IPPs for 2014, leaving the unit responsible for case selection without any concrete guidance in this respect.**

22. The SC would point out that, despite the financial indicators for 2012 and 2013 being arbitrary and dangerously overstated, it considers that some financial impact criteria — discussed with the stakeholders — are, however, relevant for the assessment of the seriousness of the risk involved and could be useful as an element of reference and as internal guidelines on the application of the proportionality principle. The financial criteria should take into account the input from the European Commission's Directorates-General and from the EU institutions or bodies involved in the financial lifecycle and which are the best placed for holding timely information on the management of EU funds and on potential risks of fraud or irregularities detrimental to the EU financial interests.

II.3. ***Need to reconsider the subsidiarity/added value policy***

23. The SC notes that the subsidiarity principle, combined with the assessment of the added value of OLAF's action, was one of the IPPs for 2012 and 2013. In Regulation (EU, Euratom) No 883/2013 the *added value* appears as a stand-alone principle concerning internal investigations ([2]), while the principle of *subsidiarity* is referred to (in the meaning of Article 5 of the Treaty on European Union) in the context of external investigations ([3]). However, they continue to be applied by the Investigation Selection and Review Unit as one selection criterion, regardless of the type of case ([4]). Since the two principles have been reinforced by the Regulation and defined in two different contexts, the SC considers that OLAF should clarify their application in the selection process.

24. The SC also notes, from the feedback received from other Directorates-General of the Commission, as well as from its own analysis of opinions of the Investigation Selection and Review Unit, that the application of this principle by OLAF is a matter of concern and that the likelihood of a follow-up by another authority seems to be insufficiently taken into consideration. While reiterating its views with regard to OLAF's 'de minimis' policy, in particular the opinion that, in cases where minor wrongdoings/low impact cases can be dealt with satisfactorily by other services, OLAF may forward incoming information to other Commission services, rather than decide to open an OLAF investigation ([5]), the SC would point out that OLAF should be careful to verify whether or not the recipient authority has the necessary competence and powers to deal with the case, in order to be sure that appropriate follow-up is given to cases dismissed by another authority.

II.4 ***Need to regularly assess the IPPs***

25. The SC notes that the IPPs, which are determined within the context of OLAF's Annual Management Plan, change every year and there are significant differences between the IPPs for 2012, 2013 and 2014. In the SC's opinion, such changes should be justified by concrete needs and measurable indicators. However, the SC is not aware of any internal or external evaluation, feedback or follow-up of the IPPs for 2012 and 2013, and equally notes the absence of any action aimed at assessing the impact of the priorities prior to their adoption.

26. The SC believes that the IPPs should have as a purpose accomplishing certain objectives and therefore their implementation should be regularly assessed by OLAF, in order to establish whether or to what extent those objectives have been achieved. Moreover, the adoption of any new IPPs should be based on an impact assessment, which should include concrete and measurable indicators, lessons learnt from the implementation of previous IPPs and results of internal audits. The draft IPPs which shall be forwarded to the SC every year should be accompanied by the assessment of the implementation of former IPPs and the impact assessment of new IPPs, together with background documents.

([1]) See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions and the Court of Auditors, on the Commission antifraud strategy, 24.6.2011, COM(2011) 376 final.
([2]) Article 5(1).
([3]) Recital (49).
([4]) The work-form 'Opinion on opening decision' (version amended and adopted as of 1 October 2013) lists the subsidiarity/added value amongst the IPPs to be evaluated, without any distinction between internal and external cases.
([5]) See the SC's Annual Activity Report, June 2008-May 2009, point II — 1.2.

III. **SUPERVISORY COMMITTEE'S RECOMMENDATIONS**

27. In light of the above considerations, the Supervisory Committee:

(1) recommends that the Director General issue guidelines on application of the three selection principles established by the Regulation, including on the application of financial indicators as a proportionality criterion;

(2) recommends that the Director General enter into a constructive dialogue with the stakeholders on the determination and implementation of IPPs, in particular with regard to financial indicators and possible follow-up of dismissed cases;

(3) requests the Director General to provide the SC, by 6 March 2014, with an assessment of the results of the implementation of the IPPs for 2012 and 2013 together with a summary of the feedback provided by the stakeholders; in the following years those documents should be attached to the new draft IPPs transmitted annually to the SC.

Adopted in Brussels, on 6 February 2014

For the Supervisory Committee

Johan DENOLF

Chairman

ANNEX 4

OPINION No 2/2014

Case selection in OLAF

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INTRODUCTION

1. On 1 February 2012, OLAF's investigative procedures and internal organisation were significantly changed. New Instructions to Staff on Investigative Procedures (ISIP) were issued and a new Investigation Selection and Review Unit (ISRU) was created. This unit deals with both the selection and review of cases ([1]) and provides opinions on the basis of which the Director-General (DG) of OLAF takes decisions on opening or dismissing cases, on the main investigative activities, on the final report and on the recommendations. The ISRU is thus involved in the whole lifecycle of an investigation or coordination case and most of the decisions taken by the DG in the investigation area are based on its opinions. Therefore, the internal rules, the organisation, the competences, the efficiency and the quality of the work of the ISRU have a major and direct influence on the performance of the whole OLAF investigative function. The Supervisory Committee (SC) has therefore decided to pay particular attention to the execution by this unit of its role.

Scope and purpose of the SC's review

2. The SC's review has focused on the selection function of the ISRU — and, in particular, on the selection process ([2]). The SC's analysis takes into account the legal provisions and instructions to staff in force at the time when the analysed opinions were delivered, namely Regulation (EC) No 1073/1999 ([3]) and the ISIP. However, the SC's recommendations are made in the light of the current Regulation (EU, Euratom) No 883/2013 ([4]) and the new Guidelines on Investigative Procedures (GIP), both of which entered into force on 1 October 2013.

3. On 1 February 2012, the assessment of the incoming information of possible investigative interest to OLAF was transferred from the investigation units to the ISRU. A centralised decision-making system was created, consisting of two levels: the decisional level, represented by the DG, and the advisory level, represented by the ISRU. Such centralisation may help to improve the efficiency and consistency of the selection of cases, provided that the ISRU carries out its function in an effective, competent and transparent manner, according to clear principles and drawing on the expertise of investigative, analytical and legal units. The SC's review has as its objective to verify whether those requirements have been satisfied.

Methodology

4. The SC selected a sample of opinions on the opening or dismissal of cases: it consisted of a statistical sample of opinions from all the cases created between 1 September 2012 and 31 March 2013 plus all opinions of May 2013 and plus further 20 opinions selected by the DG. According to the criteria submitted by the SC, OLAF identified 314 opinions ([5]) of which 1 contained erroneous numbering and 20 were submitted in duplicate (appearing twice on OLAF's lists). Therefore the total number of opinions eligible to be examined by the SC came to 293, of which 218 opinions (74,4 %) recommended the dismissal of cases and the remaining 75 opinions (25,6 %) recommended the opening of investigation or coordination cases (*figure 1*). All the recommendations have been followed by the DG.

([1]) During the selection stage, the ISRU is in charge of processing the incoming information and provides the DG with opinions on the opening or dismissal of cases; during the investigation stage, it provides opinions on the necessity and legality of the main investigative activities requiring prior authorisation by the DG; before the closure of an investigation or coordination case, the ISRU reviews the final report and recommendations.

([2]) Article 5 of the ISIP.

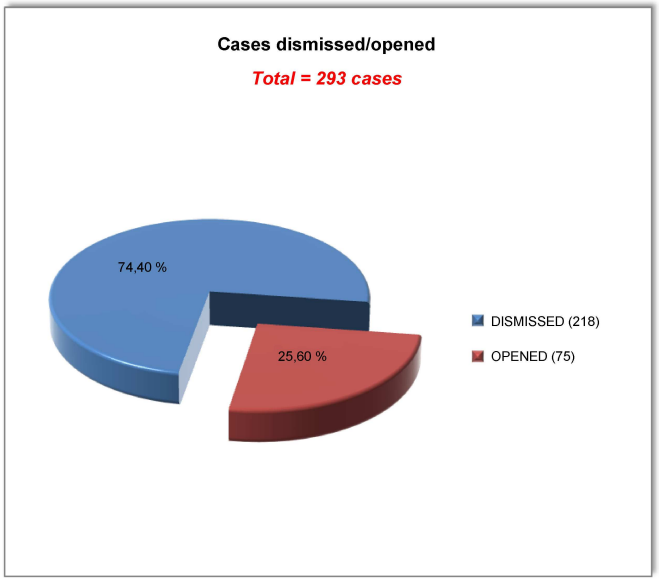
([3]) Valid until 30 September 2013.

([4]) 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).

([5]) Selecting one in three cases created between 1.9.2012 and 31.3.2013 came to a total of 237 cases of which 11 were found by OLAF to be duplicates of pre-existing cases = 226 opinions; all opinions delivered for the month of May 2013 = 68 opinions.

Figure 1

Cases dismissed/opened



5. The SC's review is based on:

(a) an analysis of the selection of the ISRU's opinions;

(b) an analysis of the relevant background documentation made available by OLAF — including the ISIP, the GIP, the related work forms, a 'Starter Kit' provided to the selectors ([1]), as well as statistical information provided by OLAF ([2]) or extracted from the OLAF Case Management System (CMS);

(c) interviews — according to a semi-structured model — with individual staff members of the ISRU, as well as with staff of investigation units, as immediate recipients of the work of the ISRU (where cases are not dismissed).

6. The details of the analysis and of the findings are presented in Part II of this opinion. In Part I the SC presents its conclusions and recommendations made to the DG.

PART I RESULTS AND RECOMMENDATIONS

Need to improve the resources allocated to the ISRU

7. The SC's examination of allocation of resources to and within the ISRU revealed that, generally, there are experienced selectors in the unit, covering a wide range of specialisations. However, each selector deals with different sectors, including those where they have less expertise, which, in particular with regard to selectors who have no investigative experience, may have affected the quality of the assessment carried out. The limited number of the training courses completed by the selectors does not appear to compensate for the lack of previous experience. The SC found also that legal knowledge was not sufficiently demonstrated in many opinions and that language expertise was sometimes missing (see paragraphs 31-35 and 38).

8. The SC is of the opinion that the fact that selectors are required to assess information in domains with which they are not always familiar may increase the risk of losing time when having to switch between different sectors and of performing incomplete assessments of incoming information. Selectors need to be experienced and properly trained to perform selection tasks. Selectors should also concentrate their efforts on tasks and sectors in which they are most qualified.

([1]) It contains, inter alia, general guidelines for selection and review.
([2]) Covering two periods of reference: February 2012 to December 2012 and January 2013 to November 2013.

9. The SC equally noted that it was neither possible nor productive to strictly adhere to the mandatory 2-month period foreseen in the ISIP for completing the selection of cases. Therefore, the SC welcomes the fact that the new Guidelines on Investigation Procedures eliminated this overly rigid time limit, which allows for a better balance to be struck between OLAF's objective to improve the efficiency and effectiveness of its investigation and coordination cases (by speeding up the period dedicated to the assessment of incoming information) and the need to avoid excessive time pressure (which might be damaging to the quality of the assessment) (see paragraphs 39-40).

10. Lastly, the SC noted that the adoption of clear instructions for dealing with whistle-blowers, as well as technical improvement of the Fraud Notification System (FNS) would also be desirable (see paragraphs 41-44).

Recommendation 1:

Improve the resources allocated to the ISRU

OLAF should take appropriate measures to ensure that ISRU has at its disposal sufficient and adequate resources to carry out its selection tasks.

In particular, OLAF should:

(a) Increase the number of selectors with investigative experience;

(b) Apply the principle of specialisation of selectors more rigorously;

(c) Ensure that the selectors have the appropriate (legal, linguistic and sectorial) expertise and provide them with sufficient training;

(d) Improve the functioning of the FNS, in order to allow it to cope with the upload of documents of greater size;

(e) Adopt proper procedures for dealing with whistle-blowers.

11. The SC also noted that the reviewers have been entrusted not only with review tasks, but also with the selection of cases. The SC would point out that, the tasks of the selectors being fundamentally different from those of the reviewers, combining their responsibilities is questionable. The SC is therefore of the opinion that the attribution of cases for selection to the reviewers, in order to compensate for the insufficiency of the language expertise within the unit and resulting in an increase of the reviewers' workload, should remain a temporary and exceptional solution (see paragraphs 36-37).

Recommendation 2:

Separate structurally the selectors from the reviewers

OLAF should place the selectors in an organisational structure separate from the reviewers. OLAF should also reduce, as much as possible, the number of cases for selection allocated to the reviewers.

Furthermore, OLAF could consider either decentralising the selection function to the investigative Directorates, or introducing a rotation system whereby investigators from each investigation unit are allocated, for a period of time, to the ISRU.

Need to improve the application of the selection criteria

12. The SC found that the assessment of OLAF's competence to act was insufficiently substantiated and in general little consideration was given to the relevant legal instruments (see paragraphs 47-49).

Recommendation 3:

Improve the assessment of the criterion 'OLAF's competence to act'

OLAF should require the selectors:

(a) to better explain the concrete illegal or irregular activities to which the allegations refer and the way in which they affect the financial interests of the EU;

(b) to make systematically reference to the relevant legal instruments.

In addition, OLAF could also consider compensating for the lack of sufficient legal expertise by the introduction of appropriate training courses and procedures for consultations with OLAF's Legal Advice Unit.

13. The SC notes that there are no clear instructions with regard to the indicators to be used by the selectors to evaluate whether or not the information is sufficient to justify the opening of an investigation or coordination case. As a result, evaluation of this selection criterion was not always properly carried out, while at the same time a variety of practices and a certain degree of inconsistency was noted in the ISRU's opinions. The SC concludes that OLAF's approach to assessing this selection criterion needs to be further developed and clarified. To that nd, OLAF could take note of concrete indicators used by selectors in some of the opinions (see paragraphs 50-54).

Recommendation 4:

Further develop and clarify parameters for evaluating the 'sufficiency of information'

OLAF should establish a list of concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions.

14. The SC notes that the Investigation Policy Priorities (IPPs) established by the DG indicate very clearly a number of concrete and measurable indicators that shall be used in the selection process. However, the SC's review of opinions revealed that these indicators are not systematically and rigorously applied, in particular with regard to 'proportionality', 'efficient use of resources' and 'special policy objectives/criteria'.

15. With regard to assessment of proportionality of OLAF's action, the SC found that, despite instructions in the IPPs, the opinions frequently contain unsubstantiated statements and, in many of them, the proportionality test is either absent or incomplete. Moreover, the special policy objectives/criteria are not systematically used (see paragraphs 56-57 and 64-65).

Recommendation 5:

Clarify the application of the proportionality principle

OLAF should clarify the application of the proportionality principle and provide the selectors with clearer guidelines.

In particular, OLAF should better assess the forecast of the manpower required and other foreseeable costs, weighted against the likelihood of financial recovery and/or of prosecution, and deterrent value. Financial indicators, which are relevant for the assessment of the seriousness of the risk involved, should be used as an element of reference and as internal guidelines on the application of the proportionality principle.

16. The SC also found that the evaluation of the criterion 'efficient use of resources' was not properly carried out. The SC believes that several factors may explain that. On the one hand, the evaluation of the four indicators mentioned in the IPPs is hardly achievable without close contact with the investigation units. While the selectors may indeed check in the CMS on the workload of the investigation units (in terms of number of investigators and investigations per unit), the management of these units is better placed to appreciate whether this workload permits swift and continuous investigative activities or could slow down priority investigations. On the other hand, neither the IPPs nor other guidelines on selection ([1]) establish a threshold above which the *ratio* of cases per investigator would be considered to be excessive workload. As a consequence, in the absence of clear instructions as to the way in which the size of the workload should be evaluated and of a systemic dialogue between the ISRU and the investigation units, the evaluation of the efficient use of investigative resources would appear to depend to a great extent on a personal approach of each selector. The variety of approaches and sometimes inconsistencies noted by the SC in the opinions confirm this conclusion (see paragraphs 58-60).

17. The SC's review of opinions revealed that, in the few cases where an estimate of the size of the workload of investigators was made, it was not a determining factor for the dismissal of cases. The SC would support the

([1]) The 'Starter Kit'.

approach that the workload of investigation units should not in itself be sufficient justification for the dismissal of a case. The lack of sufficient resources in investigation units should be tackled by other means, especially via management tools (e.g. temporary reallocation of staff).

Recommendation 6:

Clarify the parameters for the evaluation of the criterion 'efficient use of resources'

OLAF should apply more rigorously and, where necessary, clarify the application of some of the indicators established in the IPPs for evaluating the 'efficient use of resources'.

In particular, OLAF should better assess the following indicators: size of workload of investigation units and its impact on the on-going investigations, as well as the availability of expertise. To that end, OLAF could improve the co-operation between the ISRU and the investigation units.

18. The SC found that the reasons outlined as to why an OLAF action would not bring any added value to the control activities carried out by other EU or national bodies, which are better placed to act, are generally well explained. Some reasons are recurring, so it would be more efficient for OLAF to identify the main reasons and establish for the selectors a pre-determined list of possible situations where another authority is considered better placed to act (see paragraph 61).

19. The SC noted with concern that the likelihood of a follow-up by another EU or national authority seems to be insufficiently taken into consideration by OLAF. When information on dismissed cases is forwarded to national or EU authorities, it is of the utmost importance that OLAF follows up the action taken by them, in order to be able to react in an appropriate manner when a case is not effectively dealt with by these authorities (see paragraphs 62-63).

20. The SC would point out that, while the national authorities may indeed often be better placed to act, the situation is, however, different with regard to the EU institutions. When OLAF forwards information on serious suspicions of fraud to various DirectoratesGeneral of the Commission or to other EU institutions, bodies, offices or agencies for further action, OLAF must check whether they have, apart from a general competence to carry out system audits, the appropriate powers to undertake (possibly investigative) actions in individual cases. These checks are necessary especially in the EU staff sector, where OLAF has, in certain matters, sole competence, while in others it has shared competence with the EU institutions, bodies, offices and agencies, with some of which it has concluded agreements on the *de minimis* policy.

Recommendation 7:

Apply with caution the subsidiarity principle

OLAF should pay special attention to cases it decides to dismiss on grounds of subsidiarity/added value reasons.

In particular, OLAF should:

(a) Verify that the recipient authority does have the necessary powers to take forward cases dismissed by OLAF on grounds of subsidiarity/added value;

(b) Establish an appropriate system of monitoring (prompt, systematic and clearly evidenced) of cases dismissed on grounds of subsidiarity/added value and report in a transparent manner on the results of this monitoring exercise.

21. The SC's overall assessment of the way in which selectors evaluated and applied the selection criteria revealed that the quality (in terms of completeness, clarity, consistency) of the motivation of opinions depends to a great extent on the individual approach and experience of selectors. To enhance the quality, OLAF should apply more rigorously the indicators it established for the assessment of these criteria and further develop and clarify some of them.

Recommendation 8:

Improve the quality of the motivation of opinions

OLAF should improve the quality, clarity and consistency of the motivation of the opinions on opening decision.

In particular, OLAF should consider amending the work-form 'Opinion on opening decision', in order to include specific reference to a number of items, to be chosen by the selectors from pre-determined lists.

These pre-determined lists could include references to:

(a) relevant legal instruments (to be used when assessing OLAF's competence to act);

(b) concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions (to be used when evaluating the sufficiency of information);

(c) concrete and measurable indicators for assessing the IPPs.

Need to increase transparency of the selection process

22. The examination of the information flow during the selection process showed that in general OLAF is ready to provide information on dismissed cases to other EU or national authorities, while at the same time it would appear that sources of information are not systematically informed of OLAF's decisions upon completion of the selection process (see paragraphs 67-69 and 72).

23. The SC finds it important for the persons or entities providing OLAF with initial information to be informed of the relevant action (not) taken by OLAF. Appropriate feedback encourages fraud reporting, and it is, at the same time, a strong transparency indicator. The SC shares the view of the European Ombudsman that providing the sources of information with reasons for decisions taken by OLAF as a follow-up to that information increases transparency and strengthens trust in OLAF's functioning ([1]).

24. The SC also noticed an apparently low level of cooperation between the ISRU and the investigation units (or investigation support units) which receive very little information on dismissed cases. The SC would point out that, when a case is dismissed, the information held (sometimes exclusively) by the ISRU may still be of interest for the investigation units (e.g. to detect new fraud mechanisms), and they could also sometimes provide, thanks to their expertise, useful feedback for the selection unit and thus increase the efficiency of the selection process (see paragraphs 70-71).

Recommendation 9:

Increase transparency of the selection process

OLAF should improve the transparency of the selection process.

In particular, OLAF should:

(a) Give better feedback to the source of information on the action (not) taken by OLAF following the information provided by the source;

(b) Reinforce internal consultation and the exchange of information between the ISRU, and the investigation (and investigation support) units.

25. The SC noted that the conclusions of the opinions do not always clearly mention the actions that OLAF should take at the end of the selection process. When they are not completely omitted, some of these actions can only be deduced from other sections of the opinion (see paragraphs 67-69 and 72).

([1]) See the Draft recommendation of the European Ombudsman in her inquiry into complaint 1183/2012/MMN against OLAF, 15 November 2013, paragraph 28.

Recommendation 10:

Improve the clarity of conclusions of opinions

Further improvements are needed with regard to the conclusions drawn up at the completion of the selection process, which should clearly specify the actions that OLAF should take following a decision to dismiss or open an investigation or coordination case.

In particular, conclusions of opinions should clearly mention the actions that OLAF intends to take upon completion of the selection process, such as:

(a) to inform the national or EU authorities better placed to act;

(b) to protect (or not) the identity of the source;

(c) to inform (or not) the source of information of OLAF's decisions.

Need to improve the reporting to the SC

26. The SC found instances where it had not been informed of obstructions that OLAF had encountered during the selection process. Moreover, OLAF did not inform the SC of cases dismissed where the opinions recommended that information should be transmitted to national judicial authorities. OLAF's obligation to inform the SC of 'cases' requiring information to be forwarded to the judicial authorities of a Member State ([1]) covers both cases opened as investigations and cases dismissed. Although such examples may be quite rare, the SC would highlight that such situations fall within its mandate and OLAF should thus provide the SC with appropriate information (see paragraphs 54 and 71).

Recommendation 11:

Improve reporting to the SC on risks to OLAF's independence and on dismissed cases transmitted to national judicial authorities

OLAF should improve its reporting to the SC on issues falling within the mandate of the SC.

In particular, OLAF should:

(a) Inform the SC whenever actions or omissions of EU or national authorities are likely to jeopardise OLAF's investigative independence and of the measures it intends to put in place in order to improve cooperation with these authorities;

(b) Inform the SC of all dismissed cases in which information has been transmitted to judicial authorities of Member States, in accordance with Article 17(5) of Regulation (EU, Euratom) No 883/2013.

Final remarks and recommendation

27. During technical meetings with OLAF in 2013, the SC presented some concerns arising from its examination of the ISRU's opinions and from the interviews conducted with OLAF staff, with regard to, inter alia, the time-frame for completing selections, the decreasing number of analysts within the ISRU and the division of tasks between selectors and reviewers. The SC notes that OLAF introduced some significant improvements during the period when this opinion was being drafted. The 2month time limit for selection was removed from the GIP. The internal structure of the ISRU was modified on 1 January 2014: the unit is now divided into 3 sectors (two sectors dedicated to the selection and one dedicated to the review), run by heads of sectors assisting the head of unit. The SC welcomes these improvements.

28. Moreover, the SC wishes to underline that it is not its intention to substitute its own judgment on cases examined for that of OLAF, i.e. the SC is not judging whether individual cases should or should not have been opened. However, taking into consideration all of the above conclusions and recommendations and, in particular, the concerns with regard to the sufficiency of human and time resources allocated to the ISRU as well as with regard to compliance with the selection criteria, the SC believes that it would be of benefit for OLAF to carry out an internal evaluation of the activities of the ISRU, aimed at establishing, inter alia, the level of resources needed (number of staff and expertise), the strengths and weaknesses, the 'error rate' in evaluated cases (in particular those dismissed) and the relation between selectors and reviewers.

([1]) See Article 11(7) of the former Regulation (EC) No 1073/1999 and Article 17(5) of Regulation (EU, Euratom) No 883/2013.

Recommendation 12:

Carry out an internal evaluation of the activities of the ISRU

OLAF should carry out an internal evaluation of the activities of the ISRU.

Such evaluation could be done either by OLAF's internal auditor and/or by a special team designated by the Director-General, in close consultation with Directors A and B.

The SC invites OLAF to consider the recommendations of this opinion and to report to the SC on the follow-up given to them. The SC expects to receive OLAF's report by 15 June 2014.

PART II ANALYSIS AND FINDINGS

29. The SC defined a number of indicators for the evaluation it carried out. To assess the efficiency of the selection function, the SC looked into the resources made available to the ISRU to carry out its tasks and the concrete results achieved in 2012 and 2013. The quality of the opinions was evaluated in the light of their conformity with the selection criteria established by the DG ([1]), while the transparency of the selection process was scrutinised by looking into the information flow throughout the selection process.

(1) *The resources allocated to the selection function*

30. Appropriate staff (number and expertise), sufficient time and clear instructions, appropriate technical and IT tools — those elements are critical for a successful selection process. Therefore, the SC has assessed the allocation of these resources to and within the ISRU.

(1.1) Human resources

31. **Number of staff** — The ISRU had 16 selectors in 2012 and 2013 ([2]), who dealt with an ever increasing amount of incoming information ([3]). The average number of selections per selector was 74, meaning that an average of 3 working days was spent on one selection ([4]). An opinion was expressed in the interviews conducted by the SC that the staffing of the ISRU may be insufficient and that the heavy workload may affect the quality of the opinions. The SC does not have the necessary means and information to compare whether the performance of the ISRU is equivalent to that of the investigators who formerly carried out the assessment of the initial information prior to the OLAF reform. The SC believes that OLAF itself could and should perform such an analysis. ([5])

32. **Technical and investigative expertise** — In order to accomplish its mission, the ISRU needs to work within all the areas of OLAF's investigative competence. A wide range of expertise is covered by the staff within the unit, both through their education (economy, law, accounting/finances, biology, political sciences) and their professional experience (public finances inspectors, repression of corruption/fraud specialists, lawyers and magistrates, lecturers, auditors, customs officers, national police force, administrative assistants and secretaries). However, it appears from information provided by OLAF that some of the selectors do not have any investigative experience.

33. The SC noted, from the examination of the opinions of the ISRU, that cases appear to be attributed to the selectors on the basis of their personal skills (competencies, language etc.). However, the distribution of cases per

([1]) The three selection criteria are: OLAF's competency to act, the sufficiency of information to open an investigation or coordination case and the Investigative Policy Priorities.

([2]) Ares(2013)3357296.

([3]) The information of possible investigative interest received by OLAF was defined by the ISIP as '*all information received by OLAF or information gathered on OLAF's own initiative, that could be considered for the opening of an investigation or coordination case and which must be submitted to the selection procedure for analysis*'. In 2012, OLAF received 1,264 incoming information items which represented an increase of 21 % compared to 2011 (Source: OLAF 2012 Activity Report, page 13). The number of incoming information items also slightly increased in 2013 compared to 2012: OLAF received 1 156 incoming information items from February 2012 to December 2012, and 1 222 items from January 2013 to December 2013. Source: Ares(2013)3357296.

([4]) According to statistics provided by OLAF, a selector dealt with, on average, 72 cases from February 2012 to December 2012 (221 working days) and 76 from January 2013 to December 2013. Source: Ares(2013)3357296.

([5]) Prior to the reform of OLAF, incoming information was assessed by the investigators allocated to the 8 investigation units. In 2010, the investigation units counted 152 staff members (including Heads of Unit and secretaries). Source: Special Report No 2/2011 of the European Court of Auditors, Annex II.

sector and per selector indicates that each selector provides opinions not only within their sectors of expertise. Statistical information extracted from the CMS showed that selectors without investigative experience dealt with a high number of cases — mostly dismissed — in very different sectors. Some of the opinions examined clearly reflected the lack of specific or investigative expertise of the selectors, who themselves sometimes acknowledged that they 'are not specialist [in the matter analysed]' ([1]).

34. **Legal expertise** — In the opinions analysed, the SC notes the limited use of references to the relevant legal instruments ([2]). This is a clear indicator that the appropriate legal knowledge is either missing or not being sufficiently applied within the unit.

35. **Language expertise** — The ISRU must be able to handle incoming information potentially drafted in all the 24 EU official languages, which is clearly impossible given the current number of selectors ([3]). As a result, the lack of language expertise has sometimes prevented the selectors from properly assessing the incoming information ([4]).

36. The lack of appropriate language expertise has been supplanted by the attribution of cases for selection to the reviewers ([5]), based mainly on their language skills ([6]), leading to an increase in their workload, while they were already in charge of providing opinions to the DG on the legality of OLAF's key investigative activities ([7]), on the requests to extend the scope of cases ([8]) and on case closures ([9]).

37. The SC believes that this may represent only a temporary solution of an exceptional nature, more especially considering that the workload of reviewers will likely continue to increase in the future given that the new GIP foresee that, in addition to the opinions provided under the ISIP, they will also need to advise the DG on interviews with witnesses ([10]) as well as to provide opinions on the requests to split and merge cases ([11]).

38. **Trainings** — The SC would like to stress that the lack of previous experience or knowledge need not be an impediment to performing a good selection process, at least for 'simple' cases (e.g. cases clearly outside OLAF's competence, the so-called 'prima facie' non-cases or where allegations are not substantiated), as long as appropriate training has been provided. The SC was surprised to note that, on the one hand, the training courses followed by the selectors did not cover all the different sectors of OLAF's field of work while, on the other hand, the specialised courses were followed by only a very limited number of selectors ([12]).

(1.2) Time resources

39. The percentage of selections which the selectors completed within the 2-month period foreseen in the ISIP ([13]) was 76 % ([14]). Some cases were dismissed (mainly on the grounds of the insufficiency of information), because it was not possible to acquire the necessary information within the fixed time limit imposed ([15]). At the same time, it appears that some cases which were previously dismissed have been opened later, on the basis of the information provided by the source after the fixed period ([16]). Moreover, it was ascertained during the interviews conducted by the SC that the assessment of the incoming information was affected by time pressure. These examples show that it was not only impossible, but sometimes also counterproductive to adhere strictly to the

([1]) 1 opinion.
([2]) See Part II.2 of this opinion.
([3]) According to the 2012 Activity Report of the ISRU, this unit was comprised of 11 different nationalities and was able to deal with information in 16 languages.
([4]) At least in 2 opinions.
([5]) The unit had 7 reviewers. A statistical search in the CMS showed an average of 60 cases dismissed per reviewer (2012 and 2013 cases).
([6]) 71 out of 293 opinions analysed were drafted by the reviewers.
([7]) Article 12.2 of the ISIP. In 2012 OLAF performed 97 on-the-spot checks and inspections, 66 interviews with persons concerned, 38 investigative missions to third countries, 11 inspections of EU premises, 10 digital forensic examinations (Source: OLAF 2012 Activity Report, page 21). These activities were authorised by the DG, on the basis of opinions provided by the reviewers of the ISRU.
([8]) Article 12.3 of the ISIP. The SC has no statistical information as to the number of opinions provided by the ISRU in this respect.
([9]) 465 investigation and coordination cases were closed by OLAF in 2012 (Source: OLAF 2012 Activity Report, page 18).
([10]) Article 11.2, a) combined with Article 12.2 of the GIP. In 2012, OLAF carried out 108 interviews with witnesses (Source: OLAF 2012 Activity Report, page 21).
([11]) Article 12.4 of the GIP.
([12]) In January 2012, training for selectors was provided comprising several modules. Module 1 was followed by three participants; module 2 was followed by twelve participants; modules 3 and 5 were followed by seven participants; module 4 was also followed by seven participants. Specialised training courses were also provided later, e.g. in the area of Agricultural funds — Investigations by OLAF (one participant); New financial Regulation (three participants); EIB training on internal procedures (three participants); DEVCO — Budget support (one participant); SPS/SPAS training (four participants); Computer forensics in support of OLAF's investigations (one participant); Operational analysis in support of OLAF's investigations (one participant). Source: OLAF.
([13]) Article 5.5 of the ISIP.
([14]) Ares (2013) 3357296.
([15]) The source of information did not reply to OLAF's requests in 24 out of 125 cases dismissed on the grounds of insufficiency of information (19 %).
([16]) 1 case dismissed on the grounds that the information fell outside the IPPs was reopened later on as an investigation.

2-month time limit, in the absence of a procedure, in the ISIP, allowing extending this period, in duly justified situations. The SC believes that a flexible approach is recommendable taking into account that sometimes the necessary supplementary information may emerge after the 2-month period or the source of information may take some time to reply to supplementary questions.

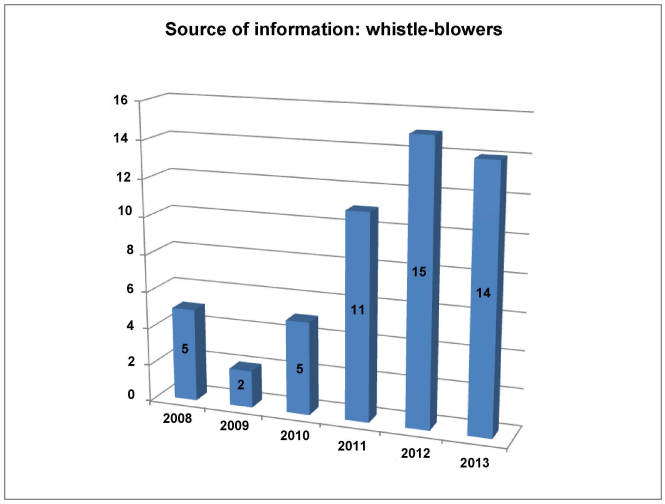
40. The SC notes that Regulation (EU, Euratom) No 883/2013 does not impose a mandatory selection period, except for cases where a Member State concerned or an EU institution, body, office or agency requests that OLAF open an investigation and where a decision whether or not to open an investigation shall be taken within two months of receipt by OLAF of the request, otherwise OLAF shall be deemed to have decided not to open an investigation ([1]). The new GIP eliminated the overly rigid 2-month time limit, while at the same time maintaining strict deadlines for the Registry to register the incoming information and transmit it to the ISRU ([2]).

(1.3) **Instructions**

41. Selectors carry out their tasks on the basis of instructions given by the DG, namely the ISIP (and, since 1 October 2013, the GIP) and of standardised work-forms ([3]). The SC has analysed these instructions and already provided the DG with a number of comments ([4]). The SC also makes some recommendations with regard to the work-form 'Opinion on opening decision' used by the selectors in Part I of this opinion.

42. During the interviews carried out with OLAF staff it was stated, inter alia, that in all probability many cases are not reported to OLAF due to the lack of a clear procedure for dealing with whistle-blowers. The SC notes that the selectors are instructed to comply with general rules ([5]), but do not have specific instructions or any formal procedure for dealing with whistle-blowers (e.g. formal contact points, work forms, process for the selectors to contact the OLAF's Legal Advice Unit). As a result, different approaches have sometimes been noted amongst the selectors ([6]). While taking note of the increase over the past few years, of the number of cases where the source of information was a whistle-blower (*figure 2*), the SC believes that the adoption of clear and detailed guidelines on how to deal with them would be helpful for the selectors.

Figure 2



Source: CMS

([1]) Article 5(2) and 5(4) of Regulation (EU, Euratom) No 883/2013.
([2]) Selection period of no longer than 2 months nevertheless remained a target in OLAF 2013 Management Plan.
([3]) General guidelines on the selection appear also in the 'Starter Kit'.
([4]) On 5 July 2013 the DG provided the SC with a copy of an amended version of the ISIP, which the DG envisaged adopting at the date of the entry into force of the new OLAF Regulation. The SC provided its first comments by letter of 30 July 2013.
([5]) Articles 22a and 22b of Staff Regulations and Commission Guidelines on Whistleblowing (SEC(2012)679 final).
([6]) In one opinion the identity of the whistle-blower is clearly mentioned, while in another opinion it is anonymised. Both opinions recommended the opening of an investigation.

(1.4) IT/technical resources

43. Successful assessment of incoming information depends to a great extent on IT/technical tools available to the ISRU which is able to access various internal and external databases. The SC noted that, for the most part, the opinions make clear mention of the consultation of databases and of the results of the research carried out by the selectors.

44. The IT tools made available to the public to report fraud are also important. One of them is the OLAF Fraud Notification System (FNS), a web-based information system that may be used to submit information to OLAF, and through which the selectors may communicate with the source of information ([1]). On several occasions, the opinions of the ISRU mention that the informants have tried to send documents through the FNS, but these documents have not been received because of the restrictions imposed by the FNS, which blocks the upload of overly large files or limits the number of characters that can be used, without, however, informing the sender.

(2) *The selection process: compliance with the selection criteria*

45. The selection process consists of a step-by-step application of three selection criteria: OLAF's competency to act, the sufficiency of information to open an investigation or coordination case and the Investigative Policy Priorities (IPPs) established by the DG ([2]). If the first selection criterion (or the first and second selection criteria) is not fulfilled, the case is dismissed and the information assessed no further ([3]). *Figures 3 and 4* show the distribution of cases dismissed and opened by sector.

Figure 3

Distribution of cases dismissed by sector

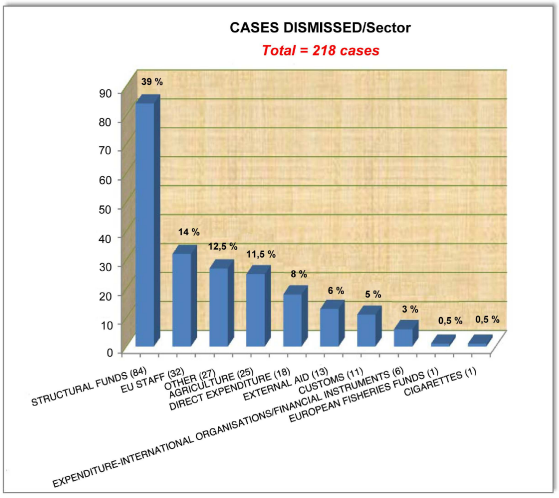
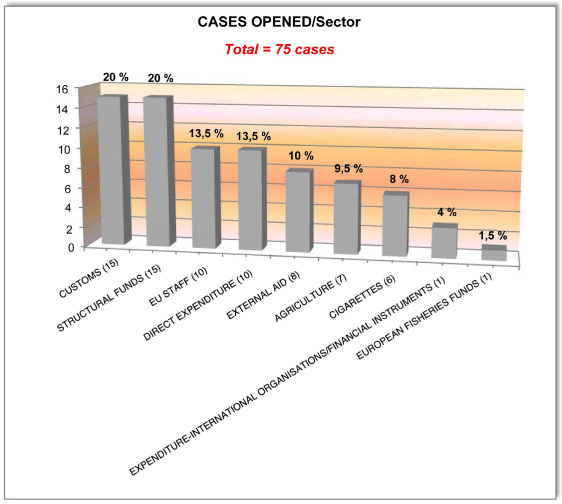


Figure 4

Distribution of cases opened by sector



46. The ISIP and the IPPs contain instructions on how to apply each of the selection criteria. The SC's review of the opinions was thus aimed at assessing their conformity with these instructions.

(2.1) OLAF's competency to act

ISIP, Art. 5.4: In assessing whether OLAF is competent to act, consideration must be given to relevant EU Regulations, Decisions, Interinstitutional Agreements and other legal instruments relating to the protection of the financial and other interests of the EU ([4]).

([1]) Through the FNS, OLAF collects information supplied by users of the system in a questionnaire, including a free text field. Messages are recorded and analyzed by OLAF staff. If the user chooses to register for ongoing communications, OLAF collects the information subsequently transmitted in all following communications between OLAF and the user. This information is recorded on a dedicated server, and used as a source of intelligence/evidence.

([2]) Article 5.3 of the ISIP, which corresponds to Article 5.3 of the GIP. The latter was not significantly changed.

([3]) See the Annex which illustrates this approach.

([4]) This provision was slightly changed in the GIP: 'In assessing whether OLAF is competent to act, consideration shall be given to relevant EU Regulations, Decisions, Interinstitutional Agreements and other legal instruments relating to the protection of the financial interests of the EU, and any other interest of the EU the protection of which falls under OLAF's mandate.'

47. The SC notes that the lack of OLAF's competence to act, being the reason given for the dismissal of 15 % of the cases (*figure 5*), was in general well explained ([1]). On the other hand, little consideration was given to the relevant legal instruments in those cases where OLAF was considered to be competent to act ([2]). Moreover, the assessment of OLAF's competency to act is not sufficiently substantiated: in many opinions there is a general and unsubstantiated reference to a potential impact on the EU financial interests or to the fact that EU funds were involved ([3]); in some opinions it is just stated 'yes' in the parts referring to the potential impact on the EU financial interests/potentially serious matter relating to the discharge of professional duties ([4]); other, very few, opinions only mention that 'OLAF is competent' without giving any further explanation ([5]).

48. In general, the SC notes that the quality of the assessments varies according to selectors and their experience in specific sectors: opinions concerning customs, cigarettes and EU staff are comprehensive and generally contain a clear explanation as to the irregularity arising from the allegations, the way it impacts the EU budget and the amount at stake (when determined).

49. The SC also notes that the work-form 'Opinion on opening decision' used by the selectors includes two different options for referring to the potential impact on the EU financial interests and to possibly serious matters relating to the discharge of professional duties: one in the 'summary' part of the work-form, where the selectors need to tick the relevant boxes, and one in the body of the opinion (part 3 of the work-form), where the selectors need to assess *in concreto* OLAF's competency to act. This double option might have created some confusion amongst the selectors, since some of them seem to assume that ticking the boxes in the 'summary' part exempts them from carrying out a concrete analysis of OLAF's competency to act in Part 3 of the opinion, which should not be the case.

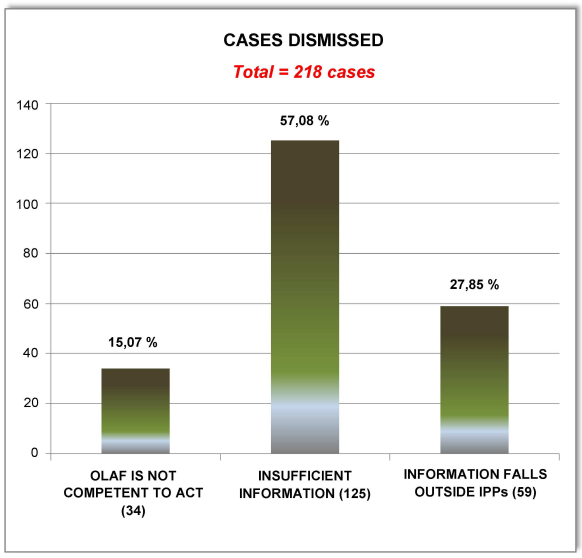
(2.2) **Sufficiency of information**

ISIP, Art. 5.4: In evaluating whether the information is sufficient to open an investigation or coordination case, consideration must be given to the reliability of the source and the credibility of the allegations. In addition, all information collected during the selection process must be taken into account when justifying the opening of an investigation or coordination case ([6]).

50. The insufficiency of information was the main reason for dismissing cases (*figure 5*). The SC therefore paid particular attention to the grounds on which the selectors based their conclusions.

Figure 5

Reasons for dismissing cases



([1]) 34 cases, concerning mainly civil/private disputes between individuals/companies where EU funds were not concerned, questions of interpretation of the EU legislation, matters falling within the exclusive competence of the Member States such as criminal offences (e.g. kidnapping).
([2]) Reference to legal instruments was made in 25 out of 259 opinions where OLAF was considered to be competent to act (9,6 %).
([3]) 55 out of 259 opinions where OLAF was considered to be competent to act (21 %).
([4]) 6 out of 259 opinions where OLAF was considered to be competent to act (2,31 %).
([5]) 3 out of 259 opinions where OLAF was considered to be competent to act (1,15 %).
([6]) This provision was not significantly changed in the GIP.

51. The SC identified opinions where the assessment of the sufficiency of the information (reliability of the source and credibility of the allegations) is unsubstantiated ([1]), incomplete ([2]) or inconsistent ([3]). Equally, little consideration was given to a third parameter emerging from the EU case-law (sufficiency of suspicions), which was rather rarely used, mainly because it was not mentioned in the ISIP or in the workform used by the selectors ([4]). Moreover, it seems to have various meanings for the selectors: most of the time it was considered that the information was insufficient due to lack of 'clear indications of fraud' or 'absence of fraud elements' or because there was 'no concrete information as regards possible irregularities or fraud' ([5]); in other cases the (in)sufficiency of suspicions was determined by the quality of the information at OLAF's disposal ([6]), sometimes the 'seriousness of the allegations' was also an element taken into consideration ([7]). Bearing in mind the existing difference between the 'seriousness of the allegations' and the 'seriousness of suspicions', the SC would point out that this latter parameter should not have been considered as optional, since the EU case-law has established the 'sufficiently serious suspicion' as a precondition for the opening of an investigation ([8]). The new Regulation (EU, Euratom) No 883/2013 has now explicitly incorporated this requirement ([9]) and this change is reflected in an amended work-form accompanying the new GIP. The SC welcomes this improvement.

52. The SC believes that the deficiencies noted above could be explained, at least partially, by the fact that neither the ISIP nor any other internal document ([10]) provides the selectors with precise indicators for implementing this criterion, namely concrete situations when a source of information can be considered reliable (or not), when the allegations put forward are credible (or not) or when there are sufficient suspicions of fraud or irregularities (or not). Appreciation of these elements depends, therefore, very much on the personal approach of each selector, based on their investigative experience and specialised knowledge.

53. The SC was, however, able to identify a number of concrete indicators used in some of the opinions. The reliability of the source was evaluated by using indicators such as (i) the verifiability of the source (anonymous or not), (ii) the type of the source (natural person; EU institution, body, office, agency or a Member State or third country authority; OLAF itself), (iii) the (in)direct knowledge of or connection with the matter reported to OLAF, (iv) the possibility for OLAF to contact the source to request further information (v) the degree of cooperation between the source and OLAF, (vi) the trustworthiness of the source, (vii) the motivation of the source and potential degree of subjectivism. As to the assessment of the credibility of the allegations, their appreciation was based on indicators such as (i) the quality of the initial information provided to OLAF ([11]), (ii) its verifiability ([12]), (iii) the context.

54. On the other hand, the SC identified a number of objective reasons explaining the insufficiency of information gathered during the selection process, such as (i) the imprecision of the initial information, which did not allow further research; (ii) technical problems with the FNS preventing the reception of documents; (iii) time pressure of the 2-month period for selection, which did not allow in-depth searches for additional information; (iv) lack of response from stakeholders (EU, national or third countries authorities, sources of information) or even obstruction on their part ([13]). The SC regrets that, in the latter case, such obstruction was not reported to it.

(2.3) **Investigation Policy Priorities**

ISIP, Art. 5.4: The IPP set out the criteria to be applied in determining whether information falls within an established investigative priority ([14]).

([1]) In 64 out of 259 opinions (24,71 %) where OLAF was considered to be competent to act and the (in)sufficiency of information was evaluated, the SC noted the use of unsubstantiated statements — usually one sentence such as 'the information is/would/should (not) be sufficient/enough to open an investigation' (58 opinions), 'all the elements needed to further investigate have clearly been identified' (1 opinion), 'the information is sufficient and the sources are reliable' (3 opinions), or even a simple 'yes' (2 opinions).

([2]) No consideration was given either to the reliability of the source or to the credibility of the allegations in 22 out of 259 opinions (8,5 %) where OLAF was considered to be competent to act and the (in)sufficiency of information was evaluated.

([3]) In some cases where the source was anonymous, the selectors considered either that its reliability cannot be proved or assessed (5 opinions) or considered it to be unreliable (2 opinions).

([4]) The sufficiency of suspicions was clearly assessed in 69 out of 259 opinions (26,64 %) where OLAF was considered to be competent to act and the (in)sufficiency of information was evaluated.

([5]) 58 opinions.

([6]) 8 opinions.

([7]) 3 opinions.

([8]) Cases C-15/00 *Commission* v *EIB* and C-11/00 *Commission* v *ECB*.

([9]) Article 5(1).

([10]) In particular the 'Starter kit'.

([11]) Clarity, preciseness, completeness: information has been considered to be detailed and substantiated/documented when it provided the names of persons/entities involved, dates, location, and fraud mechanism.

([12]) Information has been considered to be verifiable and accurate when confirmed after being cross checked with information otherwise provided to or gathered by OLAF.

([13]) Lack of cooperation from a Member State was reported in one opinion. Obstructions from an EU Delegation were also reported in one opinion (disclosure of the existence of OLAF's case to the person concerned and lack of cooperation with OLAF, mainly by not providing the information requested by the latter).

([14]) This provision was removed from the GIP. However, the reference to the IPPs as a selection criterion was kept in Article 5.3 of the GIP.

55. Each of the investigation policy priorities established by the DG — proportionality, efficient use of investigative resources, subsidiarity/added value and special policy objectives/criteria for 2012/2013 — can be assessed on the basis of the concrete and measurable indicators which are clearly indicated in the IPPs. The SC's review is aimed at assessing the way in which the selectors applied those indicators. ([1])

(2.3.1) *Proportionality*

IPPs: OLAF should focus on cases where it can expect a fair return for its efforts. The expected results need to be balanced against the human and material resources that will be needed to bring a case to a successful conclusion.

This entails formulating a reasonable forecast of the manpower required and other foreseeable costs (e.g. due to missions) in connection with the investigation while also taking into account:

— *Likelihood of financial recovery*

— *Likelihood of prosecution — for example, whether there is sufficient time to investigate before time-barring and whether there are reasons prima facie to suspect a criminal intent*

— *Possible high deterrent value: for example action is taken in a high value area where little action has been taken before*

56. In general terms, the proportionality principle requires that there be a reasonable relationship between an objective to be achieved and the means used to achieve it. Applied to OLAF's decisions, these require an appropriate *equilibrium* between, on the one hand, the investigative **means** to be deployed by OLAF if a decision to open an investigation or coordination case is taken and, on the other, the **results** that are expected. This approach is well reflected in the IPPs, which provide the selectors with clear indications as to the elements that need to be weighed against each other, resulting in a '*fair return for* [OLAF's] *efforts*'.

57. The SC notes however that there are a limited number of cases where the indicators for proportionality, as mentioned in the IPPs (likelihood of recovery and of prosecution, possible deterrent value) are clearly indicated and where a balance is struck between the number and type/complexity of the investigative activities needed to be carried out and the expected amount to be recovered/the likelihood of action to be taken by a competent authority, or between the relatively low financial impact of the alleged irregularities and the workload of the investigative unit ([2]). However, the indicators contained in the IPPs were not rigorously applied in some cases: investigations were opened on the basis of only the two first selection criteria ([3]); the proportionality test consisted of unsubstantiated statements ([4]) or in remarks with regard to a different policy criteria ([5]); reference to a financial cost/benefit *ratio* of an investigation to be carried out was incomplete ([6]).

(2.3.2) *Efficient use of investigative resources*

IPPs: An efficient use of resources means inter alia that once opened, investigations should be dealt expeditiously.

This will entail checking whether:

— *The workload of the relevant Unit will permit to begin investigative activities soon after the case has been opened*

— *The workload of the relevant unit will permit to carry out work continuously as required by Regulation (EC) No 1073/99*

— *Investigations underway and whose priority is higher are not slowed down*

— *Expertise required in order to carry out the investigation is available (language/sectoral/technical/legal knowledge)*

([1]) The SC's comments on the IPPs themselves can be found in the SC's Opinion No 1/2014.

([2]) 37 out of 134 opinions (27,61 %) where the IPPs were assessed (59 opinions recommending dismissing a case on the grounds outlined in the IPPs and 75 opinions recommending the opening of investigation/coordination cases).

([3]) 2 cases.

([4]) In 24 out of 134 opinions (18 %) where the IPPs were assessed it was only stated that 'it is/it would be proportionate/disproportionate' or 'it would be/not be proportional' to open an investigation or coordination case or OLAF 'can/cannot expect a fair return from its investigative efforts'.

([5]) E.g. when carrying out the proportionality test, reference was made to the subsidiarity/added value of OLAF's action (the assumption that an OLAF action would not be proportionate because action was already taken at national level and OLAF cannot bring any added value was found in 15 out of 59 opinions (25,42 %) recommending dismissing a case on the grounds outlined in the IPPs).

([6]) Where the potential financial impact of the irregular activity affecting the EU budget was estimated or the likelihood of prosecution in the Member State or of disciplinary action by the EU institution concerned was anticipated, there is no reference to the forecast of the human and material resources needed to investigate: 8 out of 59 opinions (13,55 %) recommending dismissing a case on the grounds outlined in the IPPs.

58. The SC notes that the evaluation of the workload of the investigation units is often missing ([1]), unsubstantiated ([2]), inconsistent ([3]), or makes reference to indicators such as proportionality or the added value of OLAF's action ([4]). When verification *in concreto* of the workload of the investigation unit is carried out, the selectors mention the number of cases per unit and the number of investigators per unit, without making any estimate as to the size of the workload of the investigation unit ([5]). In the few cases where such an estimate was made, the heavy workload of the investigators was a reason for dismissing them, but always used in conjunction with subsidiarity reasons ([6]).

59. The number of opinions making reference to the possibility to carry out activities continuously and without slowing-down on-going or priority investigations is also very limited ([7]), while the availability of expertise within a specific unit seems to be better evaluated ([8]).

60. Few opinions make explicit reference to an internal consultation as to the availability of the human resources and/or expertise within the investigation units ([9]). From the interviews conducted by the SC it is also clear that the investigation units are only rarely consulted regarding the resources situation.

(2.3.3) *Subsidiarity/added value*

IPPs: OLAF will prioritise cases where it is the only authority with competence in a specific situation or when it can clearly add value to the actions of others.

This will entail checking whether:

— *OLAF has sole competence (in certain matters in relation to EU staff) or whether there is an identifiable authority that can act*

— *One or several authorities have requested the assistance of OLAF in a complex case and OLAF is therefore in a position to add value*

— *An OLAF investigation could add value in terms of recovery, prosecution or deterrence to the control activities already carried out by other EU or national bodies*

61. The SC notes that the criterion of subsidiarity/added value represents the main reason used for advising the dismissal of a case on the grounds outlined in the IPPs, taken alone or combined with other reasons ([10]). Apart from a small number of opinions giving it no consideration ([11]) or unsubstantiated ([12]), the reasons outlined as to why an OLAF action would not bring any added value in terms of recovery, prosecution or deterrence to the control activities carried out by other EU or national bodies, which are better placed to act, are generally well explained ([13]).

62. The SC received information, from other Directorates-General of the Commission, pointing out that OLAF is dismissing cases, while at the same time forwarding them for action to those Directorates without, however,

([1]) The evaluation of the workload is missing in 50 out of 134 opinions (37,31 %) where the IPPs were assessed: some opinions mention that no investigative resources should be used (22 opinions), while others make no reference to the investigative resources (28 opinions).

([2]) In the sense that it is stated that OLAF would be able to carry out an investigation or that a specific unit would be competent to investigate or would have the necessary resources available, but without any further explanation (30 out of 134 opinions (22,38 %) where the IPPs were assessed).

([3]) One opinion mentions that the workload of a specific investigation unit would not allow investigative activities to begin soon after the case has been opened and consequently recommended the dismissal of the case, while another opinion issued in the same period by a different selector indicates the contrary with regard to the same investigation unit, and as a consequence recommends the opening of an investigation case.

([4]) 7 out of 134 opinions (5,22 %) where the IPPs were assessed.

([5]) 40 out of 134 opinions (29,85 %) where the IPPs were assessed.

([6]) In 5 out of 59 opinions (8,47 %) recommending dismissing a case on the grounds outlined in the IPPs.

([7]) Such reference was made in 5 out of 134 opinions (1,49 %) where the IPPs were assessed.

([8]) 42 out of 134 opinions (31,34 %) where the IPPs were assessed.

([9]) 3 out of 59 opinions (5 %) recommending dismissing a case on the grounds outlined in the IPPs.

([10]) It was found that OLAF's action could have an added value only in 1 out of 59 cases dismissed on the grounds outlined in the IPPs. The case was however dismissed because it was considered that an OLAF action would not have been proportionate (financial *ratio* cost/benefit too high).

([11]) 1 opinion, advising dismissal of a case exclusively on the grounds that the financial impact was too low.

([12]) 2 opinions out of 59 opinions (3,38 %) recommending dismissing a case on the grounds outlined in the IPPs.

([13]) E.g. the EU/national authorities were aware or already dealing with the matters submitted to OLAF or with similar matters; due to the nature of the denounced acts they were better placed to conduct a national enquiry or they had more powerful means to investigate than OLAF; there would be duplication of work if OLAF was involved and consequent risk of jeopardising a national investigation; it was considered that, in accordance with principles of subsidiarity and proportionality, the Member State had the primary responsibility for the management and control of the EU funded projects). Those explanations were found in 56 out of 59 opinions (95 %) recommending dismissal of a case on the grounds outlined in the IPPs.

checking whether they had the necessary competence and powers to act. The SC notes with concern that the Directorates-General of the Commission, which have been considered by OLAF to be better placed to act and thus receive from OLAF information on dismissed cases, are not required to report back to OLAF on actions taken ([1]).

63. Moreover, the SC notes that cases concerning Members of the European Parliament (EP), where OLAF has clearly competence to act ([2]) were dismissed on the grounds of subsidiarity, although it was stated that in similar cases the EP did not report back to OLAF, despite an explicit request, on the action taken with regard to the information sent by OLAF ([3]). The SC would draw attention to the *Practical Arrangements* recently agreed between the EP and OLAF ([4]) which do not include such situations on the list of activities which usually/probably do not lead to serious situations requiring OLAF investigations and where OLAF is presumed not to intend to open an investigation or where there is a high probability that OLAF will not open an investigation ([5]).

(2.3.4) *Special policy objectives/criteria*

64. According to the IPPs, OLAF will focus its investigative activity on sectors considered to be a priority and also on those cases where financial indicators determine the seriousness of fraud ([6]). When it comes to the prioritised sectors, the SC noted that the reference to them was quite rare ([7]). Similarly, the financial indicators were not always used: in some cases there is no reference at all, even when the financial impact is known ([8]). When they are referred to, mainly in sectors such as EU staff or structural funds, they are used either to dismiss cases on the grounds that the financial impact was non-existent or too low, taken alone or in conjunction with other IPPs, or to recommend the opening of an investigation or coordination case. The SC noted that the financial indicators were not always a determining factor when proposing to dismiss or open a case: when the financial indicators correspond to the IPPs, the case may, however, be dismissed on subsidiarity/added value grounds ([9]) or, conversely, when a case does not fall within the special policy objectives it may however be opened as an investigation if the other selection criteria are fulfilled ([10]).

65. As a general remark, the SC would point out that the financial indicators should not be used as thresholds for justifying the dismissal or opening of cases, but rather as an indicator for estimating or measuring the seriousness of the fraud risk involved (proportionality test) ([11]).

(3) ***The information flow during the selection process***

66. A centralised system where the number of OLAF staff aware of specific incoming information is very limited ([12]) may lead, in the SC's opinion, to a lack of transparency and of accountability in the decision-making process, especially with regard to the cases dismissed. It should be balanced by a procedure for providing the appropriate information to the relevant EU or national authorities with which OLAF shares competence in the antifraud fight, to the investigation directorates and also to the sources providing OLAF with the initial information. The SC therefore examined the transparency of the selection process in the light of these three information-sharing requirements.

([1]) According to the replies by the EC to the EP's written questions to Commissioner Šemeta, in the framework of the 2012 discharge to the Commission (questions 6d and 6e).

([2]) 2 cases regarding allegations of possible irregular cost declarations or possible irregular defrayal of parliamentary assistance expenses, with direct impact on the EU financial interests and representing a potentially serious matter relating to the discharge of professional duties of Members of the European Parliament.

([3]) The 2 cases referred to in the previous footnote were dismissed on subsidiarity grounds five and, respectively, seven months after another similar case was dismissed and referred to the EP. It was proposed to refer the two cases to the EP, despite the fact that, at the time of the drafting of the opinions, OLAF had not received any feedback from the EP.

([4]) 19 July 2013. The cases referred to above were however dismissed several months before the signature of the Practical arrangements.

([5]) See Annex II to the Practical arrangements with the EP.

([6]) See the IPPs for 2012 and 2013 and the SC's Opinion No 1/2014 on the IPPs.

([7]) 17 out of 134 opinions (12,68 %) where the IPPs were assessed.

([8]) The financial impact was known in 80 (out of 134) cases where the IPPs were assessed. In 13 of them (16,25 %) the opinions did not make explicit reference to the financial indicators.

([9]) The financial impact was known in 34 (out of 59) cases dismissed on the grounds outlined in the IPPs. In 7 of them the financial impact corresponded to the IPPs, but they were dismissed on subsidiarity/added value grounds.

([10]) The financial impact was known in 46 (out of 75) cases opened (investigation or coordination cases). In 6 of them the financial impact was below the financial indicators as mentioned in the IPPs.

([11]) See the SC's Opinion No 1/2014 on the IPPs.

([12]) With regard to dismissed cases, the information flow includes staff of the Registry (the person registering the incoming information), of the ISRU (the selector in charge and/or the Head of Unit) and the DG, who takes the ultimate decision to dismiss the case. The circulation chain may thus include from two persons (the Director-General and the Head of the ISRU, when the latter is acting as selector — this was the case in two of the opinions analysed) — when the incoming information is transmitted exclusively and directly to one of them) up to a maximum of four persons (the Director-General, the Head of the ISRU, the selector and the Registry staff).

(3.1) Information provided to the competent EU or Member States' authorities

67. Whenever an EU or national authority is better placed to deal with a case, OLAF should transfer it there. Such follow-up is necessary for every case where a sufficient suspicion of fraud has been established, but where OLAF decides not to open an investigation. Otherwise, not only would areas of impunity be created, but the transparency and coherence of the selection process would also be compromised.

68. Opinions advising dismissal of a case on the grounds of subsidiarity/added value usually indicate that information should be forwarded to the authority considered better placed to act ([1]). However, it is not always clearly stated in the 'conclusions' part of the opinion, but can sometimes only be deduced from other sections.

69. Another important aspect that OLAF needs to take into account when transferring information to a competent authority is the necessity to protect the identity of the source, in particular of whistle-blowers. The SC notes the very limited number of opinions recommending non-disclosure of the identity of the source to those authorities, sometimes upon request by the source itself ([2]).

(3.2) Information provided to the investigation directorates

70. During the interviews with OLAF staff, the lack of transfer of information on dismissed cases to the investigation units was described as inhibiting the exchange of knowledge and experience. On the other hand, the SC was informed by OLAF notes ([3]) that there was a regular contact between the ISRU and the investigation units during the selection phase, principally in order to check the availability of investigative resources in a specific unit, or connections between new incoming information and already existing cases.

71. However, the opinions reviewed by the SC do not reflect regular contacts. Few opinions make explicit reference to an internal consultation ([4]) or to the forwarding of information on a dismissed case of possible interest for an on-going investigation to the investigator in charge ([5]). This lack of consultation is even more evident in a few other cases where the selectors faced difficulties in carrying out searches or assessing information drafted in a language with which they were not familiar and where the investigation units (possessing the relevant language expertise) were never consulted ([6]), as well as in instances where investigation/coordination cases similar to or connected with the information being assessed were identified ([7]). That situation could raise problems in cases where it is recommended to send the information under assessment to a competent national judicial authority but not to the investigation unit dealing with the connected case, or to the SC ([8]).

(3.3) Information provided to the source of information

72. The SC notes that the opinions of the ISRU do not systematically propose informing the source of information of OLAF's decisions ([9]). While this is understandable with regard to decisions to open investigation/coordination cases (for confidentiality reasons) ([10]), it may be questionable with regard to dismissed cases.

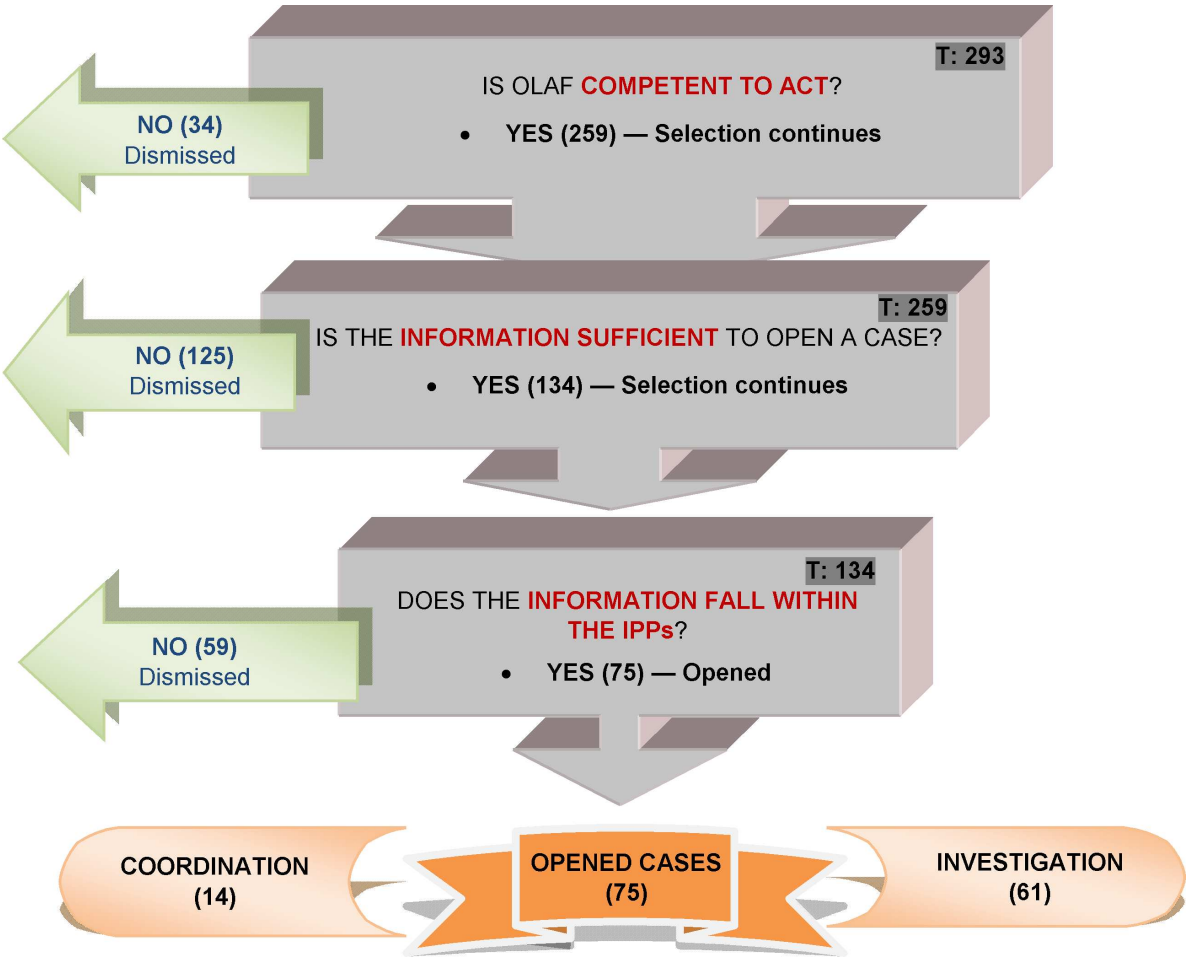
Adopted in Brussels, on 12 March 2014

For the Supervisory Committee
Johan DENOLF
Chairman

([1]) 47 out of 59 opinions (79,66 %) recommending dismissing a case on the grounds outlined in the IPPs.
([2]) In cases dismissed where it was proposed to forward relevant information to the competent authority, recommendations of non-disclosure of the identity of the source was found in 7 opinions (out of 42 cases where the identity of the source is known by OLAF).
([3]) Ares (2013)1903286 and (2013)3417726.
([4]) 29 out of 134 opinions (21,64 %) where the IPPs were assessed make reference to an internal consultation, with regard to the availability of the human resources and/or expertise (3 opinions), verification of connection of the information being assessed to existing investigations (3 opinions), or discussions on the proposal to dismiss a case or to open an investigation/coordination case (23 opinions — mainly in those cases where the initial information was forwarded for assessment to the ISRU by the investigation units themselves).
([5]) 1 out of 59 opinions (1,69 %) recommending dismissing a case on the grounds outlined in the IPPs.
([6]) 2 out of 59 opinions recommending dismissing a case on the grounds outlined in the IPPs.
([7]) 3 out of 59 opinions recommending dismissing a case on the grounds outlined in the IPPs.
([8]) 1 out of the 3 cases mentioned in the previous footnote.
([9]) The identity of the source was known by OLAF and/or OLAF can communicate with the source in 132 out of 218 cases dismissed. It was proposed to inform the source of information of OLAF's decisions to dismiss cases in 22 out of these 132 opinions (16,66 %).
([10]) 1 out of 75 opinions recommending the opening of investigation/coordination cases proposed that the source of information be informed of OLAF's decision.

ANNEX

The selection process — a step-by-step approach



ANNEX 5

SUPERVISORY COMMITTEE'S OBSERVATIONS ON THE AMENDED ISIP

GENERAL CONSIDERATIONS

In general, the Committee considers that by their content, the Instructions to Staff on Investigation Procedures (ISIP), which as of February 2012 replaced the OLAF Manual, constitute the governing principles of OLAF investigative procedures. They merit completion by the institution of operational guidelines (practical guidance according to Recital 18 of the amended Regulation) aimed at a concrete definition of the implementation of these guidelines in order to ensure a transparent, coherent implementation, to ensure respect for the equal treatment of all persons. Such guidelines would be useful when confronting those obstacles or difficulties faced by investigators, which are not mentioned in the ISIP.

SPECIFIC COMMENTS

1. **The selection procedure (chapter 1)**

Decision on the opening of a case

Regarding the conditions governing the opening of cases, the ISIP refer, in Article 5.3, to the existence of *information sufficient* to *open an investigation or coordination case*. However, they do not refer to the *sufficient suspicion*, as provided in the amended Regulation. The existing European jurisprudence has established 'sufficiently serious suspicion' as a precondition for the opening of the investigation. Given the importance of that condition for the sake of the guarantee of fundamental rights, the SC considers this notion should be explicitly mentioned.

The measures the ISRU is entitled to take prior to the decision whether to open a case

The ISIP provide the possibility, inter alia, to *take a statement from any person able to provide relevant information*. The glossary defines a statement as a written record of evidence relevant to an investigation provided by a person within the framework of an OLAF case, which could be applied to a witness. The SC questions to what extent and what type of measures the ISRU is entitled to take prior to the opening of a case taking into consideration the procedural guarantees as outlined in the ISIP following the opening of the case. Clarification on this point would appear useful.

The internal competencies within the ISRU

Whilst enjoying the power of assessment and proposal to open an investigation, the ISRU has, in addition, the responsibility for reviewing the legality of a certain number of investigative measures as foreseen by the investigation units. In order to clearly set out the principle of an independent legality control within OLAF, it would be appropriate to clearly define in the ISIP the separation of selectors and reviewers in this unit.

Dismissed cases where there are grounds for sufficient suspicion

As pointed out by the SC in its annual report, the text of the Reform strengthens the primacy of the principal of opportunity in the opening or investigations without establishing a subsequent duty for the Director-General to inform the competent authorities of the Member State or the institution concerned when he decides not to open an investigation.

As further mentioned by the SC in its annual report, the ISIP does not make any provision for those cases where there may be sufficient grounds for suspicion but which may not necessarily lead to a decision to open an investigation.

2. **The provisions regarding the investigations and coordination cases (chapter II)**

The nature of the investigations

The SC notes that any reference to the administrative nature of the investigative measures OLAF is entitled to conduct has been deleted. There could therefore be a risk of confusion for persons and the public at large as to the extent of its powers.

The SC notes that the distinction between internal and external investigations has also been removed also and endeavours to understand the reasons supporting this change given that this categorisation is provided for in the text of the amended Reform, as well as in the previous ISIP. The SC would suggest it to be of a particular importance to maintain this distinction, since the powers and the investigative measures OLAF is entitled to carry out do not appear to be similar, according the scope of the investigation.

The scope of the legality check during an investigation

The ISIP establishes a prior legality check of specific and limited investigative measures.

As the SC has pointed out in its annual activity report, some others investigative measures may have a significant impact on procedural guarantees and fundamental rights, for example measures that could be seen as 'interference by a public authority' with the exercise of the right to respect for private life could result in an interference with fundamental rights.

The text of the Reform has specifically foreseen that the Director-General shall put in place an internal advisory and control procedure including a legality check relating, inter alia, to respect (…) of the national law of the Member States concerned.

It appears therefore that the ISIP should include provisions for organising a wider internal control covering, in particular, verification of the consistency of the gathering of elements for investigations when requested from Member States.

3. **Cooperation with others agencies (Europol, Eurojust)**

The ISIP do not contain provisions relating to the rules applicable for the implementation of cooperation, in particular the content and procedures for the exchange of information with other agencies liable to carry out investigations or to coordinate action by Member States in the areas of competence shared with OLAF.

In this regard the SC shares the Recommendations 3 and 4 as issued by the European Court of Auditors in its follow-up report 2011 to its Special Report No 1/2005 on the management of OLAF.

4. **Decisions of the Director-General**

In order to ensure transparency and impartiality where the Director-General decides not to follow the opinion of the ISRU at important stages (*inter alia*, the opening or dismissal of cases, closure decisions, extension of the scope of an investigation), the ISIP should provide a reasoned decision from the Director-General.

In several sections of the ISIP (Articles 5.4, 8.1), reference is made to '*the financial and* **other interests of the EU**'. This wording should be clarified, in light of recital 6 of the amended Regulation.

Article 13.4 — In the view of the Supervisory Committee, the ISIP should specify the principle according to which inspections of EU premises are conducted in the presence of the Member or official concerned, prior to providing provisions for inspection in the case of absence of the person concerned from the office.

5. **Specific changes**

The SC would like, in particular, to know the reasons for the modifications to the following Articles:

14.6: on-the spot checks,

15.2: digital forensic operations within inspections or on-the-spot checks,

16.2 and 16.5: interviews,

18.1 and 18.2: the opportunity to provide comments,

19.10: the final report and proposed recommendations.

ANNEX 6

Reinforcing procedural safeguards in OLAF in view of the monitoring experience of the OLAF Supervisory Committee

Present supervision structure

1. The European Antifraud Office (OLAF) and its Supervisory Committee (SC) have been established by Commission Decision of 28 April 1999 ([1]). The scope of supervision has been reinforced and specified by Regulation No 883/2013 ([2]) of 11 September 2013. The SC is the guarantor of OLAF's independence and it supervises the investigatory function of OLAF through regular monitoring aimed at ensuring the proper conduct of investigations. The SC focuses in particular on examining whether fundamental rights and procedural guarantees are respected in OLAF's investigations and whether the cases are dealt with efficiently, effectively, in due time and according to the relevant rules and legal provisions.

SC recommendations and Commission proposals

2. In its Annual Activity Report 2012 (in particular in Section 2 of Annex III), the SC recommended, on the basis of its monitoring experience and in view of the identified shortcomings, a number of actions aiming at reinforcing procedural safeguards in OLAF's investigations. The SC recommended in particular introduction of transparent and stable procedures for the internal legality check and for independent review of complaints. The SC recommended also clarification of OLAF's powers in different types of administrative investigations and insisted on providing the SC with effective tools for monitoring the respect of procedural guarantees and fundamental rights by OLAF.

3. That need to strengthen the procedural safeguards and legality checks seems to be a common conclusion of the European Parliament, the Council, the Commission, the Court of Auditors and the SC as expressed in their exchanges of opinions on OLAF investigative activities.

4. Such strengthening should be considered in view of the Commission's proposal for the establishment of the European Public Prosecutor's Office (EPPO). Creation of the EPPO would be a change of paradigm by transferring cases of possible criminal fraud from administrative investigations in OLAF to criminal investigations conducted by European prosecutors. Such change is to result in a substantial reinforcement of the procedural guarantees for persons concerned by investigations.

5. Even with the establishment of the EPPO, OLAF would still have a significant role to play in the protection of the EU against offences and irregularities affecting its financial interests. There is a high degree of uncertainty when it comes to the geographical coverage of the EPPO which most probably will be established by enhanced cooperation of some Member States — their number remains unknown, but almost surely not all of them are going to participate. Therefore investigations of similar nature might be in future conducted in parallel by the EPPO and OLAF, depending on a Member State, which would require strengthening the procedural safeguards in OLAF's investigations, so that they could match the foreseen EPPO standards.

6. Therefore, the SC welcomes with satisfaction the Commission's Communication on *Improving OLAF's governance and reinforcing procedural safeguards in investigations* ([3]). The SC is currently analysing possible consequences of particular solutions proposed there and is looking forward to discussing them with the Institutions and with OLAF. As the first reflection, the SC considers the substance of the proposals as positive, providing for instruments potentially enabling to improve the current level of safeguards. At the same time, some structural solutions, as proposed in the Communication, should be reconsidered with particular regard to the independence of OLAF and of the SC, to ensure avoiding conflicts of competences with respect to the supervision of OLAF as well as duplication of work and inefficient allocation of resources.

New bodies and their competences

7. At this stage, the SC is considering specifically the issues of the institutional framework for two new offices proposed by the Commission and the scope of their competences.

([1]) Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF), (OJ L 136, 31.5.1999, p. 20) as recently amended by Commission Decision 2013/478/EU of 27 September 2013 (OJ L 257, 28.9.2013, p. 19).

([2]) Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

([3]) COM(2013)533 final, 17.7.2013.

8. The Communication advocates establishment of a new office of a 'Controller of procedural safeguard' who would 'monitor compliance with the procedural guarantees applicable to OLAF investigations and of prompt handling of investigations to avoid undue delay'. It is very hard to see how the Controller could avoid having his work overlapping with the work of the SC which would 'monitor systemic developments regarding respect of procedural rights and reasonable deadlines for handling cases'.

9. Even if the differentiation between the tasks of the Controller and of the SC could be possible argued on a theoretical level, the practical experience of the SC shows that review of individual cases is an indispensable element of systemic monitoring of OLAF. Therefore, the daily work — in the separate secretariats of both bodies — would be very similar and consist in examination of individual case files in view of respect of procedural rights and duration of investigation.

10. In its systemic analyses based on samples of individual cases, the SC could be examining, coincidently and even unknowingly, the same case as would be examined by the Controller in the framework of his individual review. It could lead not only to redundant duplication of work, but also to issuing diverging or even conflicting recommendations to the Director-General of OLAF.

11. Furthermore, the Commission proposes to establish an office of a judicial reviewer who would authorise OLAF's intrusive investigative measures concerning Members of EU Institutions. As a result, also his work (as the SC's and Controller's work) would concern examination of the respect of procedural/fundamental rights (although *ex ante* and not *ex post*).

12. The reviewer's competences, his punctual interventions and his placement within or next to the Commission could raise serious concerns as regards OLAF's independence. In view of his placement, his competence to advise on investigative measures against Members of the Commission but also of other Institutions could affect the interinstitutional balance.

13. Also as regards the Controller, who would be similarly placed and separated from the SC, there could be concerns with regard to his independence and to the cost effectiveness of him having a separate secretariat doing the job currently done by the SC's Secretariat.

14. Creation of two additional offices controlling OLAF but separate from the Supervisory Committee of OLAF would lead to multiplication of independent supervising structures, probably resulting in confusion or conflict of competences and duplication of work. That could ultimately decrease the efficiency of the supervision of OLAF.

Alternative solutions

15. The SC is considering other options which would retain the useful instruments proposed by the Commission, but which would at the same time incorporate them into a comprehensive and effective supervision structure.

16. To achieve the important aim of reinforcing the procedural safeguards in OLAF set forth by the Communication, the Controller should form a part of a wider supervisory committee. His independence would be strengthened and he could benefit from the expertise of the SC and its Secretariat having a long experience in examining the respect of procedural guarantees in OLAF. The whole joint structure would be stronger, more efficient and would produce an effect of synergy. A common secretariat would ensure consistency, economy of scale and allow avoiding duplication of work.

17. As regards the judicial reviewer, he could be, theoretically, also attached to a wider supervisory committee to benefit from the knowledge and independent resources of the already established structure. On the other hand, the judicial reviewer being attached to the SC (or to the Commission) would implicate the SC (or the Commission, respectively) in the decision-making process in OLAF which could jeopardise OLAF's independence.

18. Therefore, it seems more logical to place the judicial review back in a dedicated judicial unit within OLAF which would consist, as it used to be the case, of national magistrates. They could, without putting OLAF's independence in danger (as it could be the case with an external body), provide the Director-General, rather expeditiously thanks to their presence within OLAF, with independent and formal legal advice, *ex ante*, on all intrusive investigative measures and other actions requiring compliance with specific national provisions. The SC would continue to monitor, *ex post*, the judicial recommendations to the Director-General and his ensuing decisions, with a view of ensuring OLAF's independence, on the one hand, and the procedural rights of persons concerned, on the other.

19. In the light of its monitoring experience, the SC supports the Commission's proposal to reinforce the procedural safeguards in OLAF investigations. It is particularly recommendable having regard to the abolition in the reformed OLAF of the SC's prior examination of the respect of fundamental right and procedural guarantees before an OLAF case is sent to national judicial authorities — which was considered by the Court of Justice as a crucial safeguard for persons concerned. The improved supervisory structure must be functional and efficient. The SC is looking forward to the forthcoming exchange of opinions between the Institutions under the new OLAF Regulation which could focus on working out optimal and broadly supported legislative solutions.

ANNEX 7

SC Recommendations to OLAF DG (2012)

Subject	Document Reference	SC Recommendations to OLAF DG (2012)
Right to private life	Opinion 2/2012 (p. 17)	1) OLAF to indicate the legal basis prior to applying any measure potentially interfering in the fundamental rights to «private life» and «communications» of persons involved in an investigation.
	Opinion 2/2012 (p. 17)	2) OLAF did not analyse its competence to gather evidence by way of recording private telephone conversations which seems contrary to Article 7 of the EU Charter of Fundamental Rights. OLAF to make necessarily such a legal analysis.
Data protection	Opinion 2/2012 (p. 18)	3) OLAF did not inform persons unrelated to the investigation that their personal data and telephone listings appear in the case file which seems contrary to requirements of Regulation (EC) No 45/2001. OLAF to fulfil this legal obligation without delay.
Right to express views on all facts	Opinion 2/2012 (p. 23)	4) OLAF to ensure that persons concerned are informed of each fact concerning them in a clear and accurate manner, with an expressly separate question asked for each particular allegation, so that they can express views on all the facts concerning them.
Complaints	Activity Report 2012 [1] (p. 26) Opinion 3/2010	5) OLAF to inform the SC of all complaints related to fundamental rights and procedural guarantees to allow the SC to fulfil properly its monitoring remit.
Whistle-blowers	Activity Report 2012 (p. 11) Opinion 5/2011	6) OLAF to ensure protection of whistle-blowers and informants as recommended in the SC Opinion No 5/2011 which seems not to have been fully implemented yet.
Checks of economic operators	Opinion 2/2012 (p. 13)	7) OLAF to ensure a scrupulous legality check before applying Council Regulation (Euratom, EC) No 2185/96 [2] (*on-the-spot checks of economic operators*) requiring justification in terms of the scale of fraud or of the seriousness of the damage done to the EU financial interests (*«very limited evidence»* is **not** a valid justification).
Extension of the scope of investigation	Opinion 2/2012 (p. 13)	8) OLAF to ensure a legality check of extension of the scope of an investigation, to respect in particular the requirement of «sufficiently serious suspicion» with regard to the new aspects.
External vs. internal investigations	Opinion 2/2012 (p. 13)	9) OLAF to differentiate clearly, where it is relevant, between its powers and legal basis applicable to external vs. internal investigations.
Legality check incl. national provisions	Activity Report 2012 (p. 24)	10) OLAF to ensure compliance with national rules for collection of evidence (within the framework of the EU Charter of Fundamental Rights) by establishing a procedure for legality check including the relevant national legal provisions.

[1] OJ C 374, 20.12.2013, p. 1.
[2] OJ L 292, 15.11.1996, p. 2.

Subject	Document Reference	SC Recommendations to OLAF DG (2012)
Sufficient suspicion	Opinion 2/2012 (p. 7, 15) Activity Report 2012 (p. 25)	11) Selectors of cases must have enough time, information and competence to assess the seriousness of suspicions (not only the «*seriousness of allegations*») and to ensure that the decision to open or to dismiss a case is taken with respect for OLAF independence.
IPPs		12) OLAF to reconsider high financial thresholds for opening investigations and to introduce a follow-up procedure for cases dismissed on that basis, to avoid the risk of creating areas of impunity.
DG's direct participation	Opinion 2/2012 (p. 11)	13) DG not to participate personally in investigative activities (interviews, on-the-spot checks, etc.) to avoid situations of a potential conflict of interest, especially in review of OLAF actions.
Notification to institutions	Opinion 2/2012 (p. 8-9)	14) OLAF to follow rigorous the legal requirements on notifications to the institutions concerned by the opening of an investigation. OLAF, in particular, to notify the President when a Member of an institution or body (incl. the SC) is involved in an investigation.
Follow-up of investigations	Opinion 1/2012 (p. 4)	15) An effective follow-up of investigations must be ensured (incl. feedback on OLAF recommendations).
Budget	Opinion 1/2012 (p. 4)	16) OLAF to consult its draft budget **effectively** with the SC before it is communicated outside.
HR strategy		17) OLAF to develop a human resources strategy based on a needs assessment, with focus on training, career development (also for temporary agents), succession planning and justified division of tasks among administrators and assistants.
SC's access to data	Activity Report 2012 (p. 9-10)	18) OLAF to provide the SC with all the necessary information, in particular: (i) sufficient information to assess the respect of fundamental rights and procedural guarantees in cases forwarded to national judicial authorities; (ii) information on duration of cases, sufficient to assess it in the context of legal requirements, including national time-barring provisions; (iii) if necessary, full access to individual case files.
		19) OLAF must ensure that information provided to the SC is reliable, accurate and reflects exactly the content of the case file.
SC Secretariat	Opinion 1/2012 (p. 6)	20) OLAF to ensure adequate staffing of the SC Secretariat (8 posts).
		21) OLAF to indicate global SC Secretariat's expenses separately from other positions.
		22) OLAF to ensure independent functioning of the SC Secretariat as a precondition of the independence and effective functioning of the SC itself, in particular: staff to be appointed, evaluated and promoted on the basis of SC opinions.

ANNEX 8

MISSION, COMPETENCES AND OBJECTIVES OF THE SUPERVISORY COMMITTEE OF THE EUROPEAN ANTI-FRAUD OFFICE

Mid-term strategy (2012–2015)

(Updated in February 2014)

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INTRODUCTION

1. In the light of the mission and tasks entrusted to it by Regulation (EU, Euratom) No 883/2013 ([1]), the Supervisory Committee (SC) of the European Anti-fraud Office (OLAF) hereby defines its strategic objectives and priorities for the first half of its five years mandate (as of 23 January 2012).

1. **LEGAL FRAMEWORK**

1.1. ***Mission and role of the Supervisory Committee***

2. The mission of the SC, as outlined by Regulation (EU, Euratom) No 883/2013, is to reinforce OLAF's independence in the proper exercise of the competences conferred upon it ([2]). To accomplish this mission, the SC was entrusted with a threefold role:

   — The SC is the **supervisory body** of OLAF and a guardian of OLAF's independence.

   — The SC plays an **advisory role** towards the Director-General of OLAF (DG).

   — The SC is a **dialogue partner** of the EU institutions.

1.2. ***Core tasks of the Supervisory Committee***

3. The core tasks of the SC are also defined by the Regulation from this triple perspective.

   — As a **supervisory body**, the SC shall regularly monitor the implementation by OLAF of its investigative function and, in particular, developments concerning the application of procedural guarantees and the duration of investigations ([3]).

   — In the framework of its **advisory role**, the SC provides consultation to the DG:

      — by communicating to him the results of the SC's monitoring of the implementation of the OLAF investigative function, the application of procedural guarantees and the duration of investigations and making, where necessary, appropriate recommendations;

      — by addressing to him opinions including, where appropriate, recommendations on, inter alia, the resources needed to carry out OLAF's investigative function, on the investigative priorities and on the duration of the investigation ([4]);

      — by submitting its observations (including, where appropriate, recommendations) on the guidelines on investigation procedures (and any modification thereto) adopted by the DG in accordance with Article 17(8) of the Regulation.

   — As a **dialogue partner** of the EU institutions, the SC reports to them on its activities ([5]) and exchanges views at a political level ([6]), thus providing the EU institutions with expertise based on its monitoring experience.

1.3. ***Reporting***

4. The SC reports to the European Parliament, the Commission, the Council and the European Court of Auditors on its findings and activities *via*:

   — *activity reports*, which remain the primary medium to report to the EU institutions on the SC's findings and assessment of OLAF's independence, the application of procedural guarantees and the duration of investigation ([7]);

   — *reports* on the results of OLAF's investigations and the action taken on the basis of those results ([8]);

   — *opinions*, including, where appropriate, recommendations adopted on the SC's own initiative or at the request of the DG or of an institution, body, office or agency ([9]).

5. The SC underlines that opinions issued at the request of the DG or by an institution, body, office or agency should relate to the core activities of the SC and should not interfere with the conduct of investigations in progress, or put the independence and the objectivity of the SC at risk.

([1]) 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).
([2]) Article 15(1) first paragraph.
([3]) Article 15(1) first and second paragraphs.
([4]) Article 15(1) third paragraph.
([5]) Article 15(9).
([6]) Article 16.
([7]) Article 15(9) first paragraph.
([8]) Article 15(9) second paragraph.
([9]) Article 15(1) third paragraph.

1.4. *Access to information*

6. The SC's monitoring is based on information that the DG is obliged to provide:

   — The investigation policy priorities determined in the context of the annual management plan ([1]);

   — Periodic information on OLAF's activities, on the implementation of its investigative function and the action taken by way of follow-up to investigations ([2]);

   — Periodic information on cases in which the recommendations made by the DG have not been followed, on cases in which information has been transmitted to judicial authorities of the Member States and on the duration of investigations ([3]);

   — Decisions to defer informing an institution, body, office or agency that its member, official or other servant may be a person concerned in an internal investigation ([4]);

   — The OLAF preliminary draft budget ([5]).

7. In addition, the SC may ask the Office for additional information on investigations, including reports and recommendations on closed investigations, without however interfering with the conduct of investigations in progress ([6]).

2. **MONITORING FORMULA**

8. The SC provides OLAF and the EU institutions with a first-hand practitioners' view based on their expertise as high-level external professionals and on the regular monitoring of OLAF's investigative function.

9. The SC's monitoring is carried out both on a systemic level and on a case-by-case basis, using a matrix review of OLAF investigative activities: the SC collects and examines information concerning OLAF's cases horizontally and on sampling bases for the purpose of systemic and structural analyses; in addition it examines individual files or their components in order to obtain a more profound and concrete understanding of sensitive areas.

10. The SC's monitoring experience, based on examination of individual case files (or their representative samples), on information regularly forwarded by the DG as well as on the SC Members' specific knowledge (*savoir-faire*) of investigations, allows the SC to provide particular added value to the implementation by OLAF of its investigative function. The SC thus effectively contributes to ensuring, within OLAF, good administration, good governance and respect for fundamental rights and procedural guarantees as set out in EU law.

3. **SECRETARIAT OF THE SUPERVISORY COMMITTEE**

3.1. *Role of the Secretariat*

11. The role of the Secretariat of the SC (SCS) is to assist the SC Members in the discharge of their functions. The SCS staff members, legal and operational experts, prepare and carry out the initial examination of those matters subject to the SC monitoring and present the results for the SC Members' consideration.

12. The Regulation obliges OLAF to allocate staff to the SCS *'in close consultation with the SC'* ([7]) and to *guarantee the independent functioning of the SCS in order to ensure that the SC can carry out its mission efficiently* ([8]) — as already recommended by the European Court of Auditors ([9]) and by the SC ([10]) in 2011.

([1]) Article 17(5) first paragraph.
([2]) Article 17(5) second paragraph.
([3]) Article 17(5) third paragraph.
([4]) Article 4(6).
([5]) Article 6(2) of the Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing OLAF (OJ L 136, 31.5.1999, p. 20) as amended by Commission Decision 2013/478/EU of 27 September 2013 (OJ L 257, 28.9.2013, p. 19).
([6]) Article 15(1) fifth paragraph.
([7]) Article 15(8) sixth sentence.
([8]) Recital (40).
([9]) Point 44 of the European Court of Auditor's Opinion No 6/2011: *In order to reinforce the independent role of the Supervisory Committee, the Court recommends that the proposed Article 11(6) should provide that the Committee's secretariat must act solely in accordance with the Committee's instructions and independently of OLAF, and may not be appointed by or subject to the authority of the Director-General.*
([10]) Point 41 of the SC's Opinion no 4/2011: *Although provided by OLAF, the secretariat shall work in complete independence under the chair of the SC and its members. (…) members of the secretariat shall be appointed by an Appointing Authority different from OLAF DG, at the suggestion of the SC; they shall be periodically evaluated solely by the SC; they shall act with loyalty and in full respect of the instructions received exclusively from the SC. (…) the independence of its secretariat — and consequently of the SC — is illusory if the staff of the secretariat is appointed, administered and promoted by the service which it is in charge of monitoring.*

3.2. ***Independent functioning of the Secretariat***

13. It is crucial that the SCS be able to assist the SC in the implementation of its monitoring functions in a loyal and efficient manner without being exposed to the risks of potential conflicts of interest as OLAF staff subordinate to the DG.

14. Therefore, the SC has recommended to the DG four conditions to ensure the independent functioning of the SCS ([1]):

— **Reclassification of the Head of the SCS as a senior manager**

15. The Head of the SCS, also having the function of the SC Secretary, represents the SC in the daily monitoring of OLAF's investigative activities. Since, as an OLAF official, he is hierarchically subordinate directly to the DG, it is essential for the integrity of the SC's monitoring to put in place safeguards of independence for the Head of the SCS. Therefore, when the SCS was originally established, its Head was nominated at Director level ([2]) (in OLAF only the senior management enjoys certain, although very limited, independence with regard to the DG, who is not alone to decide on their appointments, internal transfers or leave) ([3]).

— **Recruitment, appraisal and promotion of the Head of the SCS on the basis of SC decisions**

16. The recruitment of the Head of the SCS should be done through an open competition to reinforce the independent nature of the SC. His appraisal and promotion should be decided on the basis of input from the SC Chairman.

— **Recruitment, appraisal and promotion of the SCS's staff by its Head**

17. The recruitment, appraisal and promotion of the SCS's staff should be delegated, as far as possible, to the Head of the SCS ([4]).

— **Sub-delegation of the SCS's budget implementation to its Head**

18. Powers of the authorising officer with regard to the SCS's budget should be delegated to the Head of the SCS as is already the case for the SC's budget. This would mean, for example, that authorisation of missions for the SCS staff and their participation at public events on behalf of the SC be sub-delegated to the Head of the SCS and thus reinforce the ability of the SC Members to carry out their duties efficiently and to work with their Secretariat in a flexible manner.

19. Such sub-delegation would also be in line with the new wording of the provisions on the financing of OLAF (which introduce independently fixed resources for the SCS ([5])) as well as with the European Parliament's position ([6]).

4. **STRATEGIC OBJECTIVES AND PRIORITIES**

20. In the light of the mission and tasks entrusted to it by the Regulation, the SC hereby defines its strategic objectives for the forthcoming period of its mandate, aiming at increasing the effectiveness and impact of its core activities and thus at supporting OLAF's investigative function and reinforcing OLAF's investigative independence. To meet these objectives, the SC has identified the following priorities.

([1]) Cf. SC's Opinion No 1/2013 on OLAF's Preliminary Draft Budget for 2014 and the previous SC's opinions on OLAF's Preliminary Draft Budget.

([2]) His successor was a senior Head of Unit, but the then DG ensured the then SC Chairman on 13.2.2007 that: 'The status of your Secretariat is indicated by the fact that your present Secretary is one of only three OLAF Heads of Unit to hold the rank of AD14'.

([3]) If, under the general rules of the Commission, it were undesirable to classify a Head of a relatively small team as a director, then the model of the Legal Service could be followed with the Head of the SCS classified as a principal (legal) advisor with management functions over a team of legal officers and secretarial staff (e.g. the M team in the Legal Service consists of a principal legal advisor, 7 lawyers and 5 assistants). The tasks of the SCS Head consist mainly in providing legal advice to the SC Members. Alternatively, the arrangements concerning principal advisors in the European Commission's Bureau of European Policy Advisers could be applied.

([4]) In accordance with Article 6(1) of Commission Decision 1999/352/EC, ECSC, Euratom establishing OLAF (as amended by Commission Decision 2013/478/EU: *The DirectorGeneral of the Office shall exercise, with regard to the staff of the Office, the powers of the appointing authority and of the authority empowered to conclude contracts of employment delegated to him. He shall be permitted to sub-delegate those powers (…).*

([5]) Article 18 of Regulation (EU, Euratom) No 883/2013:
The total appropriations for the Office, including for the Supervisory Committee and its secretariat, shall be entered under a specific budget line within the section of the general budget of the European Union relating to the Commission and shall be set out in detail in an Annex to that section.
The establishment plan of the Office, including the secretariat of the Supervisory Committee, shall be annexed to the establishment plan of the Commission.

([6]) On 23 October 2013 the Parliament recommended to *'split the line for OLAF expenditure related to officials and temporary staff, to reflect the widened mandate and strengthened independence of the Secretariat of the OLAF Supervisory Committee provided for in the new OLAF Regulation'*.

Objective 1: Develop effective (and pragmatic) monitoring tools

1. *Adopt evaluation grids*

— Propose new (and/or update the existing) evaluation grids concerning the application of procedural guarantees and the duration of investigations, to be filled in and regularly provided by OLAF.

2. *Define and use criteria for the sampling of OLAF cases*

— Define and use random, statistical and risk-based criteria for the selection of representative samples of OLAF cases.

3. *Rely on the experience of experts from Member States*

— Rely on the experience of experts from judicial and administrative authorities of Member States, working with OLAF and/or on the follow-up to OLAF cases.

— Return to the practice of hearing these experts for the purpose of the preparation of the SC activity reports and opinions.

— Organise such hearings by an SC rapporteur together with a member of the SCS working on a specific topic, and/or, exceptionally, in the context of the SC plenary meetings.

— Consider the possibility to occasionally organise the SC's plenary meetings in (some of) the Member States, in order to gather — from national experts — information and evidence on subjects precisely defined in advance.

Objective 2: Improve cooperation with OLAF and its Director-General

1. *Agree on new working arrangements with OLAF*

— Propose to OLAF and agree on new working arrangements.

2. *Organise regular exchanges of views with the Director-General*

— Establish a direct reporting and consultation line with the DG and regularly invite him to the SC's plenary meetings.

— Exchange views and information with the DG on specific topics relating to OLAF's investigative activity.

3. *Raise awareness of the SC's role and work within OLAF*

— Organise/participate in workshops/meetings/lunch debates with OLAF staff.

Objective 3: Act as an important player in the fight against fraud

1. *Participate in the exchange of views with the institutions*

— Actively participate in the exchange of views with the EU institutions and the DG.

— Use this new inter-institutional forum as a platform for discussing the results of its monitoring as presented in the SC's opinions, reports and activity reports.

— Ensure that the exchange of views represents a positive arena for discussion and for assessment of the effectiveness of OLAF's work and thus becomes an asset in the fight against fraud.

— Ensure that the exchange of views does not entail the politicising of OLAF.

2. *Hold bilateral meetings*

— Hold regular (yearly) meetings with the three appointing EU institutions and with the European Court of Auditors (at least every two years).

— Hold bilateral meetings with the Commissioner responsible for the fight against fraud (at least once a year).

3. *Take a proactive role in the legislative process concerning the revision of the EU antifraud legislation*

— Take a proactive role in the on-going/forthcoming revision of the EU antifraud legislation, without however interfering in the EU legislative process.

— Assess the application of Regulation (EU, Euratom) No 883/2013.

— Make appropriate recommendations on the instructions/guidelines to staff on investigative procedures as a way to address some of the remaining weaknesses of the OLAF Regulation, in particular, regarding fundamental rights and procedural guarantees.

— Contribute to the development of the Commission's legislative proposal on *Improving OLAF's governance and reinforcing procedural safeguards in investigations* ([1]), in order to:

— reinforce procedural guarantees applicable in OLAF's investigations;

— reinforce OLAF's supervision while at the same time safeguarding its investigative independence.

Objective 4: Increase the SC's visibility among EU institutions and Member States

1. *Develop an effective communication strategy*

2. *Improve reporting tools*

— Inform the appointing institutions of the decisions/action points decided on by the SC during its plenary meetings, in full respect of the principle of confidentiality of investigations.

— Change the format of the activity report, in order to better reflect the reinforced role and the core activities of the SC.

3. *Increase interaction with stakeholders on a broader range of issues*

— Organise and/or participate in events promoting the SC's work (workshops, presentations, conferences, cocktails etc.).

Objective 5: Develop the SC's working methods

1. *Ensure a consistent approach in monitoring OLAF cases*

— Adopt monitoring guidelines.

— Adopt a workflow system to monitor the follow-up by OLAF of the SC's recommendations.

2. *Update the SC's Rules of procedure*

— Update the SC's Rules of procedure, in order to reflect the changes brought about by the new Regulation.

3. *Develop an ethical code of conduct*

— Develop an ethical code of conduct for the use of the SC Members.

([1]) COM(2013)533 final, 17.7.2013.

Objective 6: Safeguard the independent functioning of the SC and its Secretariat

— Advocate the modernisation of the remuneration and financial arrangements for the SC's Members.

— Advocate a separate budget line for the SC and its Secretariat.

— Recommend to the DG appropriate measures for ensuring the independent functioning of the SCS: (1) reclassification of the Head of the SCS as a senior manager; (2) recruitment, appraisal and promotion of the Head of the SCS on the basis of SC's decisions; (3) recruitment, appraisal and promotion of the SCS's staff by its Head; (4) sub-delegation of the SCS's budget implementation to its Head.

ANNEX 9

Code of Conduct of the Members of the OLAF Supervisory Committee

1. Members of the Supervisory Committee of OLAF (SC) shall act in a manner respecting the dignity and public trust of their office. They shall refrain from any activities which may jeopardise or may appear to jeopardise the independence and impartiality of the SC.

2. Members of the SC shall not deal with a matter in which, directly or indirectly, they have any personal interest, in particular, any family or financial interests such as to impair their independence.

3. Members of the SC shall avoid participation in the examination of individual cases concurrently as the responsible officials of a competent national authority and as SC Members.

4. An SC Member shall withdraw from participation in the SC proceedings on an individual OLAF case if he or the services which he directs or over which he exercises effective control or influence are conducting or assist OLAF in conducting an investigation related to that case.

5. An SC Member shall withdraw from participation in the SC proceedings on an individual OLAF case if he directs or exercises effective control or influence over national judicial or administrative proceedings related to that case.

6. An SC Member in a judicial or administrative position may withdraw, in accordance with national provisions on impartiality, from national proceedings related to an individual case if he participated as SC Member in the SC proceedings related to that case.

7. SC Members shall inform the Chairman and the Secretary without delay of the situations referred to in paragraphs 2-6.

8. Documents drawn up following SC proceedings on an individual case shall clearly indicate if any SC Member withdrew from the proceedings or if any of them participated in his capacity as a national judicial or administrative official.

9. Prior to sending to an SC Member any information related to a case (to be) transmitted to his national authorities, the Secretariat of the SC shall provide such Member with an opportunity to withdraw from the SC proceedings on that case.

Brussels, 9 October 2013

For the Supervisory Committee,
Chairman

Explanatory memorandum on the Code of Conduct of the Members of the Supervisory Committee: safeguards of impartiality and risks of conflict of interest in the exercise of the monitoring functions

INTRODUCTION

1. The Supervisory Committee (SC) of OLAF, whose mission is to reinforce OLAF's independence by the regular monitoring of its investigative function, is composed of five independent members having experience in senior judicial, investigative or comparable functions relating to the areas of OLAF's activities ([1]). The membership of the SC is a parttime function.

2. As such, the Members of the SC generally hold key functions in their national judicial system or administration, allowing them to act as a counterpart/partner of OLAF at a national level at any stage of an OLAF case. At the same time, they regularly monitor OLAF's cases, in particular those where information has been transmitted to national judicial authorities. Situations may thus occur when they are to deal with the same OLAF case both in the framework of their national duties and as the SC Members.

3. It is essential to make sure that dealing with a case in this dual capacity does not give rise to actual or potential conflicts of interest and then endanger impartiality and objectivity as well as the public trust in the impartiality and objectivity in the exercise of the national functions of the SC Members or in the discharge of their duties in the SC. Actual or potential conflicts of interests could have a negative impact on the impartiality of the decisions taken and on the quality of their work, could damage their reputation and undermine both the EU institutions' and the public's trust in the SC. Given the potential risks involved, it is important therefore to identify the risk areas for conflict of interest situations in order to prevent them.

4. To do so, after defining the conflict of interest (*part 1*), it is necessary to make an overview of the specific tasks of the SC Members which may possibly lead to conflict of interest situations (*part 2*), followed by an inventory of concrete situations when conflicts of interest may occur (*part 3*). Finally, a clear procedure on how to manage conflict of interest situations is also necessary (*part 4*).

1. DEFINITION OF THE CONFLICT OF INTEREST

5. Apart from their obligation to act independently, without seeking nor taking instructions from any government or any institution, body, office or agency ([2]), the Members of the SC are required to act in full objectivity and impartiality.

6. In general terms, the requirement of impartiality is enshrined in the European Union Charter of Fundamental Rights, which foresees that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union' ([3]).

7. According to the case law of the European Court of Human Rights (standing as a source of general principles of the Union law in accordance with the Article 6(3) of the Treaty on the European Union), *'as a rule, impartiality denotes the absence of prejudice or bias' and 'even appearances may be of a certain importance' or, in other words, 'justice must not only be done, it must also be seen to be done'* ([4]).

8. The requirement of impartiality and objectivity and the obligation to avoid situations in which appearance may give rise to doubts with regard to objectivity and impartiality is also reflected in Article 298 of the Treaty on the Functioning of the European Union which stipulates that, in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. Independence here refers generally to objectivity and impartiality. Even though this provision concerns directly only the SC Secretariat (composed of EU officials), it expresses a general principle of Union law guiding also the activities of the SC itself.

([1]) Article 18(2) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013).

([2]) Article 15(7) of Regulation (EU, Euratom) No 883/2013.

([3]) Article 41 of the Charter — right to good administration.

([4]) ECtHR, judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine*, application no 21722/11, §§ 104-106.

9. The requirement of impartiality, applied to the execution by the SC Members of their tasks, includes an obligation to avoid conflicts of interest, as established in the Decision on their appointment and their Rules of Procedurewhich stipulate that the SC Members *'shall not deal with a matter in which, directly or indirectly, they have any personal interest, in particular, any family or financial interests such as to impair their independence'* ([1]).

10. The above mentioned acts do not define the concept of conflict of interest. A comprehensive definition can be found in the Guidelines of the Organisation for Economic Cooperation and Development (OECD) ([2]), which indicates also three types of conflict of interest:

— **Conflict of interest (actual)**: *'a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities'*.

— **Conflict of interest (apparent)**: 'an apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties *but this is not in fact the case*'.

— **Conflict of interest (potential)**: 'a *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future'.

11. It is also worth noting the Article 13 of Council of Europe's Committee of Ministers Recommendation No. 2000 (10):

'1. Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.

2. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto'.

12. This definition of conflict of interest has three dimensions: (i) the existence of a private or personal interest of a public official, which (ii) comes into conflict with his official duty, and thus (iii) leads to a conflict of interest interfering with professional principles. Essentially, in a conflict of interest situation, the private interest of the public official can or could influence the objective and impartial performance of his official duties ([3]).

13. Conflict of interest was also defined in the EU case-law. The EU judiciary assessed the scope of the conflict of interest under the Staff Regulations, and gave it a broad definition ([4]). Although the Members of the SC are not bound by the Staff Regulations, the interpretation of the Court is relevant on the matter since the wording of the legal provisions concerning conflict of interest — in the Staff Regulations and in the Decision on their appointment — is quite similar. They are an expression of the same underlying general principles of EU law enshrined in the Charter of Fundamental Rights.

14. The term *conflict of interest* as defined above does not, however, take into account expressly all the situations in which the impartiality and independence (as well as the appearance of impartiality and independence) of the SC Members may actually or potentially be endangered. Classic conflict of interest concerns situations in which a public official may have a private interest in conflict with his or her public duties. In the case of the SC Members, the independence and impartiality could be jeopardised also due to their dual roles as high national judicial or administrative officials and SC Members at the same time.

([1]) Article 2 of Decision 2012/45/EU, Euratom of the European Parliament, the Council and the Commission of 23 January 2012 appointing the members of the Supervisory Committee (OJ L 26, 28.1.2012, p. 30); Article 4 of the Rules of Procedure of the Supervisory Committee (OJ L 308, 24.11.2011, p. 114).

([2]) *Managing Conflict of Interest in the Public Service: OECD Guidelines and country experiences*, OECD, Paris, 2003, p. 28. Source of information: the European Court of Auditors' Special Report No 15/2012 'Management of conflict of interest in selected EU Agencies', http://eca.europa.eu/portal/pls/portal/docs/1/18686746.PDF.

([3]) See the Academic research report — Conflict of interest, drafted by Prof. Dr. Ömer Faruk GENÇKAYA, page 5 (this report can be found at http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/tyec/1062-TYEC%20Research%20-%20Conflict%20of%20Interest.pdf).

([4]) Case T-89/01 *Willeme v Commission*, where theCourt of First Instance analysed the scope of the concept of conflict of interest under former Article 14 of the Staff Regulations (currently, Article 11a).

15. Generally, the national in-depth expertise is of great benefit for the discharge of the duties of the SC. Yet, in some situations, an SC Member might have a dual role related to a particular OLAF investigation. This may raise the issue as to whether the judgment of the SC is, or appears to be independent of the judgment and proceedings of national authorities, or whether the data protection and confidentiality requirements either by national law or by Union law are fully observed. In addition, it is important for the independence and impartiality of the SC Members that the third parties understand in all communications in which capacity the SC Members are acting. The analyses of and the measures related to the conflict of interest situations shall cover, in particular, the situation of concurrent duties as national officials and SC Members.

2. SC MEMBERS' TASKS WHICH MAY LEAD TO CONFLICT OF INTEREST SITUATIONS

16. The particular situation of the SC Members arises from the principle that they have their national duties as their primary public obligations. Article 15(2) of Regulation (EU, Euratom) No 883/2013 requires the SC Members to have experience in the senior judicial or investigative functions in the Member States and the appointing Decision specifies that the membership of the SC is a part-time function. As a result the SC Members usually exercise simultaneously their dual roles: national officials and SC Members.

17. When exercising their national duties, the SC Members (or a national office or service which is directed by an SC Member or over which an SC Member exercises effective control or influence) ([1]) may be involved in an OLAF case at different stages:

— they may provide information or assist OLAF in an investigation (e.g. during an onthe-spot check) ([2]);

— they may conduct a national investigation which may be coordinated by OLAF (coordination case) or requiring assistance from OLAF;

— they may be the addressees of OLAF's reports drawn up following an investigation and of subsequent recommendations (of judicial/financial nature) based on the findings of the OLAF investigation ([3]).

18. In their capacity as SC Members, they carry out the tasks laid down in Regulation (EU, Euratom) No 883/2013 and in Commission Decision 1999/352/EC, ECSC, Euratom establishing OLAF ([4]). The duties of the SC include, inter alia, the regular monitoring of the implementation by OLAF of its investigative function, in order to reinforce the Office's independence in the proper exercise of its competences and, in particular, the monitoring of developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General of OLAF. In duly justified situations, the SC may ask OLAF for additional information on investigations, including reports and recommendations on closed investigations, without however interfering with the conduct of investigations in progress.

3. POSSIBLE CONFLICT OF INTEREST SITUATIONS

19. Taken separately, both capacities in which the SC Members may act are official/public qualities. They are generally national officials, and as SC Members they are appointed by three EU institutions and exercise a mission of public interest. However, from the perspective of the definition of the conflict of interest, each of these two capacities could be regarded as a private interest when set against the other: when they act as national officials, their membership of the SC may be seen as a 'private interest'; conversely, when they act as SC Members, their national duty could also be regarded as being a 'private interest' in the widest sense of the term (personal interest).

20. The conflict of interest would then occur when the activity as SC Members would improperly influence the performance of their official national responsibilities and *vice versa*, when their activity as national officials would improperly influence the performance of their responsibilities as SC Members.

([1]) Judicial and administrative structures of the Member States differ substantially, which must be taken into account when establishing rules on potential conflict of interest. The expression 'directs or exercises effective control over' comes from Article 25 of the Rome Statute of International Criminal Court which stands as a generally accepted legal definition of *de jure* or *de facto* direction or command. The expression 'exercises effective influence' is an extension to cover situations in which an SC Member is not formally in the chain of command and thereby not necessarily exercises effective control over a case, but in which he can substantively influence the handling of a case by being, for example, an authority to be heard, actually or potentially, or by being in a position to comment or influence the handling of a case (for example, if an SC Member were a Deputy Prosecutor General and the officer working on an OLAF case reports to the Prosecutor General).

([2]) For example, in accordance with Article 3(3) of Regulation (EU, Euratom) No 883/2013, especially as the anti-fraud coordination service (AFCOS) of the Member State concerned pursuant to Article 3(4).

([3]) Article 11(3) of Regulation (EU, Euratom) No 883/2013.

([4]) As amended by Commission Decision 2013/478/EU of 27 September 2013 (OJ L 257, 28.9.2013, p. 19).

(a) ***Situations when the national duties (as 'private interest') could affect the performance of the SC duties (as 'official duties')***

21. *Example 1:*

— *Assumption*: after being involved in an OLAF investigation in his national capacity, an SC Member becomes an addressee of an OLAF report to the SC on that investigation.

— *Possible conflict of interest*: participation in a dual role in the same process (as an SC Member evaluating the proper conduct of an investigation in which he was involved at the national level as a national official).

22. *Example 2:*

— *Assumption*: after having received as a national judicial official an OLAF report on an investigation, possibly with recommendations to initiate judicial proceedings, an SC Member would have to evaluate compliance by OLAF in that investigation with fundamental rights and with procedural requirements as laid down by the national law.

— *Possible conflict of interest*: a dual role in the same process; use of inside (confidential) information ([1]); lack of impartiality or lack of independence when acting under the authority of the national office.

23. *Example 3:*

— *Assumption*: after having received as a national judicial official an OLAF report on an investigation, with recommendations to initiate judicial proceedings, an SC Member would have to monitor the follow-up by his national judicial authorities of the recommendations made by OLAF.

— *Possible conflict of interest*: a dual role in the same process; use of inside information; lack of impartiality or lack of independence when acting under the authority of the national office.

(b) ***Situations when the SC duties (as 'private interest') could affect the performance of the national duties (as 'official duties')***

24. *Example 4:*

— *Assumption*: after having evaluated an OLAF investigation as an SC Member (in particular with regard to the respect of the fundamental rights and of procedural requirements laid down in the national law), he could receive the case in his national capacity (as a judicial official to whom OLAF report and recommendations or a complaint related to them are addressed).

— *Possible conflict of interest*: a dual role in the same process; use of inside information; lack of impartiality (when acting in his national capacity, he would already have issued/expressed an opinion on the case in his capacity as an SC Member).

25. There may be potentially other situations where the risk of a conflict of interest is not that obvious. They should be assessed on a case by case basis in order to establish *in concreto* whether there are real risks of lack of independence or impartiality, liable to affect the capability to evaluate cases in an impartial and independent manner. The case-law suggests here a pragmatic approach based on the assumption that a purely abstract risk of a conflict of interest (between the dual national and EU role) is not sufficient to establish an infringement of the obligations of impartiality and integrity — it is necessary to identify a concrete factual element supporting the conclusion that there exists a conflict of interest ([2]).

([1]) 'Using confidential information means that a public official disclose to others, or use to further their personal interest, confidential information acquired by them in the course of their official duties. A specific example of this is 'insider information' which means the use of information that is gained in the execution of a public official's office and is not available to the general public to further or seek to further the member's private interest' (see page 7 of the Academic Report quoted in footnote 7).

([2]) This pragmatic approach is taken, for example, by the EU judiciary in cases concerning the statutory obligations of the EU officials: see case T-157/04 *De Bry* v *Commission*, paragraphs 36 to 38. See also the Opinion of the Advocate General Mazak delivered on 27 March 2012 in joined cases *European Commission (C-553/10 P) and Lagardère SCA (C-554/10 P) v Éditions Odile Jacob SAS*, paragraphs 35-36.

4. **PROCEDURE FOR DEALING WITH CONFLICT OF INTEREST SITUATIONS**

26. The procedural steps for dealing with conflict of interest situations are currently set out in Article 4(3) of the SC Rules of Procedure: 'The members of the Supervisory Committee shall inform it of any situation liable to compromise any of the principles governing its activity as referred to in paragraphs 1 and 2 so that the Committee may take appropriate measures'.

27. The SC considers that in order to maintain the high integrity of the SC and to ensure a high level of public trust in the proper supervision of the investigative activities of OLAF and in the independence and impartiality of the SC, it will benefit from the establishment of more comprehensive guidance on the matter and more detailed procedures to be followed.

28. Therefore, the SC adopts hereby its Code of Conduct supplemented by this explanatory memorandum.

29. This Code of Conduct will be incorporated in the SC Rules of Procedure which require further amendment following the entry into force of Regulation (EU, Euratom) No 883/2013.

ANNEX 10

WORKING ARRANGEMENTS

between OLAF and the Supervisory Committee

In order to properly carry out its monitoring tasks with regard to the implementation by OLAF of its investigative function, the Supervisory Committee (SC) needs comprehensive, adequate and timely information with regard to OLAF's investigative activity and the necessary general information, while, at the same time, it fully respects OLAF's independence and the confidentiality of its investigations.

Therefore, the SC and the Director-General of OLAF (DG) hereby agree to the following practical working arrangements in order to implement the provisions of Regulation (EU, Euratom) No 883/2013 [1] *and Commission Decision 1999/352/EC, ECSC, Euratom* [2].

CHAPTER I

INFORMATION TO BE PROVIDED BY OLAF ON ITS OWN INITIATIVE

SECTION 1

General information on OLAF's activity

Article 1

Investigative policy priorities

(Art. 17(5), first sentence, Regulation (EU, Euratom) No 883/2013)

1. The DG will forward to the SC the draft investigative policy priorities, prior to their publication and within a period of time sufficient for the SC to provide its comments.

2. The draft will be accompanied by documents and background information on the basis of which the investigative policy priorities have been formulated.

3. This information will be provided annually.

Article 2

Implementation of investigative function and follow-up

(Art. 17(5), second sentence, Regulation (EU, Euratom) No 883/2013)

1. The DG will forward to the SC:

(a) the Annual Management Plan,

(b) the Annual Activity Report,

(c) a mid-term report and an end-of-year report on the implementation of the investigative function, reflecting the objectives set out in the annual management plan.

2. The DG will also provide continuous access for the SC Secretariat to general and specific case-related data held in OLAF's case management database, as set out in Chapter II.

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[1] 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).

[2] Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), 1999/352/EC, ECSC, Euratom (OJ L 136, 31.5.1999, p. 20) as amended by Commission Decision of 27 September 2013, 2013/478/EU (OJ L 257, 28.9.2013, p. 19).

Article 3

Budget

(Art. 6(2), Decision 1999/352/EC, ECSC, Euratom)

1. The DG will forward to the SC the preliminary draft budget, prior to its sending to the Director-General for Budgets and within a period of time sufficient for the SC to provide its comments.

2. The draft will be accompanied by explanations of changes introduced to the draft as compared to the previous budget.

3. This information will be provided annually.

Article 4

Independence

(Art. 15(1), first paragraph, and Art. 17(3), Regulation (EU, Euratom) No 883/2013)

The DG will provide the SC, with timely information on any situation where the investigative independence of OLAF or its DG is or may be jeopardised.

Article 5

Guidelines on investigation procedures

(Art. 17(8), Regulation (EU, Euratom) No 883/2013)

1. The DG will forward to the SC the draft guidelines on investigation procedures or any modifications thereto, prior to their adoption and within a period of time sufficient for the SC to provide its comments.

2. The draft modifications will be accompanied by explanation of reasons for their introduction.

SECTION 2

Specific information on OLAF's cases

Article 6

Recommendations

(Art. 17(5)(a), Regulation (EU, Euratom) No 883/2013)

1. The DG will provide the SC with a list of cases in which he has issued recommendations, specifying the recipient and the type of recommendation.

2. The DG will report annually to the SC on cases in which recommendations have not been followed.

3. In addition, the DG will send to the SC an annual summary report on the implementation of his recommendations.

4. The SC Secretariat will have continuous access to information referred to in this Article, as set out in Chapter II.

Article 7

Cases transmitted to national judicial authorities

(Art. 17(5)(b), recital 45 and Article 15(1), second paragraph, Regulation (EU, Euratom) No 883/2013)

The DG will forward to the SC a list of cases in which information has been transmitted to national judicial authorities, together with a copy of the transmission letter.

Article 8

Cases lasting more than 12 months

(Art. 7(8) and 17(5)(c), Regulation (EU, Euratom) No 883/2013)

1. The DG will report to the SC on investigations which have not been closed within 12 months, indicating the reasons for which it was not possible to complete the investigation and the remedial measures, envisaged with a view to speeding up the investigation.

2. The reports will be drawn at the expiry of the 12-month period and every six months thereafter.

Article 9

Deferrals

(Art. 4(6), Regulation (EU, Euratom) No 883/2013)

1. The DG will forward to the SC, after the closure of the investigation, the reasoned decision to defer the information to the institution, body, office or agency to which a person concerned by an internal investigation belongs.

2. The DG will also inform the SC of the date when the institution, body, office or agency was provided with the deferred information.

CHAPTER II

INFORMATION MADE CONTINUOUSLY AVAILABLE BY OLAF [1]

Article 10

Access to general case-related data

The staff members of the SC Secretariat shall have access to metadata of cases by means of automated searches in OLAF's case management database, including:

(a) list of cases in selection or dismissed,

(b) list of investigation and coordination cases by Unit and Directorate, as well as by sector of activity,

(c) list of all cases in the monitoring stage by Unit and Directorate,

(d) list of cases lasting more than 12 months.

Article 11

Access to specific case-related data

1. The Head of the SC Secretariat and the staff members authorised by him will have special access to limited data in the OLAF case management database on the basis of self-validation which confirms that this level of access is justified.

2. These data will include the following:

(a) general information (the case number, a general description, the category of source, the relevant EU Institution, office, body or agency in staff cases);

(b) sector (responsible Unit and sector of activity);

[1] The SC may access case-related information following the 'three-step approach' as outlined in the European Data Protection Supervisor's Opinion on a notification for prior checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on Regular monitoring of the implementation of the investigative function, 19 July 2007 (Case 2007-73). Step 1 is covered by Article 10, step 2 – by Article 11 and step 3 – by Articles 12-15. Whenever personal data are transferred to SC, the SC takes adequate measures to ensure confidentiality and proper handling of such data according to the EU law on personal data protection.

(c) stage (selection, investigation/coordination case, monitoring);

(d) case type (investigation or coordination case, legal basis for the opening decision, date of the opening decision, offence category, type of fraud, whether there is an impact on EU financial interests and if so, the estimated amount);

(e) recommendations (recipient of recommendations, type of recommended action, status of recommended action (pending, implemented or not implemented)).

3. Insofar as the special access for the SC Secretariat to the OLAF case management database is technically not available, the DG will, whenever requested, provide the information described above to the staff members of the SC Secretariat indicated by the Head of SC Secretariat.

CHAPTER III

INFORMATION TO BE PROVIDED BY OLAF AT THE SC'S REQUEST

Article 12

Due justification and procedure for requests of additional information

(Article 15(1) paragraph five,Regulation (EU, Euratom) No 883/2013)

1. Requests for additional information on investigations, pursuant to Article 15 (1) fifth paragraph of the Regulation, including access to a case file, also by sampling, shall be made by the SC to the DG in writing, with due justification. The request shall be signed by the SC Chairman or the SC Member appointed by the SC to act as a *rapporteur* responsible for a given monitoring activity.

2. When the request concerns also access to personal data, the SC shall justify why it is necessary.

3. The SC determines the purpose and scope of its monitoring activities, within the framework set by the relevant legislation. On that basis the SC provides the due justification for individual requests.

4. The DG shall reply to SC requests for additional information within 15 working days.

5. When the reply is negative, it shall be justified.

6. When the DG considers it impossible to provide the requested additional information within the 15 working days, it shall, within this time limit, explain the reasons and propose a new date for transmission of the requested information.

Article 13

Additional case-related information

(Article 15(1) paragraph five,Regulation (EU, Euratom) No 883/2013)

When the SC considers it necessary for monitoring of the implementation of OLAF's investigative function, it may request additional information, including, *inter alia*:

(a) reports and recommendations in the cases where OLAF recommendations were not followed;

(b) reports, recommendation and opinions of the review unit, including the prior legality check and the final quality and legal review assessing, among others, compliance with the rights and procedural guarantees of persons concerned;

(c) reports and recommendation in the cases of deferral of the information to the institution, body, office or agency to which a person concerned by an internal investigation belongs;

(d) other reports, recommendations, work forms, notes and information on countries concerned.

Article 14

Access to an OLAF case file

(Article 15(1) paragraph five,Regulation (EU, Euratom) No 883/2013)

1. When the SC considers that it is necessary for monitoring of the implementation of OLAF's investigative function and that the otherwise accessible information is not sufficient in a given case, the SC may request partial or full access to an OLAF case file.

2. Access to the case file will be granted to specified staff members of the SC Secretariat for a specified duration which may be extended upon written request.

Article 15

Sampling

(Article 15(1) paragraph five,Regulation (EU, Euratom) No 883/2013)

1. Where the SC decides to monitor a systemic issue on the basis of sampling of cases which requires additional information or access to OLAF case files, the SC will inform the DG of the criteria for the selection and will request the necessary information or access

2. The SC, in close consultation with the DG, will select a representative sample of cases, following statistical or risk-based sampling.

Article 16

Additional non case-related information

The SC can also ask the DG for additional information relating to OLAF's investigation activity which does not constitute a part of a case file. Such a request shall be signed by the Head of the SC Secretariat, the SC Chairman or the relevant SC Member — *rapporteur*.

CHAPTER IV

FINAL PROVISIONS

Article 17

Timetable for providing information

Unless otherwise indicated in these Working Arrangements, the information to be provided by the DG on its own initiative will be transmitted to the SC four times a year, by the following dates: (i) 31 January, (ii) 30 April, (iii) 31 July, (iv) 31 October.

Article 18

Delegation

The DG may delegate in writing the exercise of his functions under these Working Arrangements to one or more members of the staff of the Office.

Article 19

Entry into force

These Working Arrangements will take effect from the date of their signature.

Article 20

Review

After one year from the date of the signature of these arrangements, the SC and the DG will evaluate their implementation and may propose, if appropriate, any necessary amendments.

Done in Brussels, on 14 January 2014

Giovanni KESSLER	Johan DENOLF
Director-General of OLAF	*Chairman of the Supervisory Committee of OLAF*

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