

OLAF's reply to the Supervisory Committee Opinion No 1/2020 on OLAF's dismissed cases concerning Members of the EU Institutions

1. Background

On 26 January 2017, the Supervisory Committee (SC) informed OLAF that it wished "to carry out a broader study with a view to assessing how sensitive cases are handled" and requested access to OLAF cases concerning Members of the EU institutions registered in the 2014-2016 period, in order to select a sample from that list to review in detail the procedures applied¹.

On 20 March 2017, OLAF provided the SC with the list of OLAF cases involving Members of the EU institutions opened between 1 January 2014 and 31 December 2016².

In May and June 2017, several SC members and staff of the SC Secretariat were granted access to a random sample of 30 dismissed cases and three closed investigations.

In October 2017, the SC informed OLAF that the sample of cases had proved insufficient for the purpose of its analysis³ since it did not include any cases concerning Members of the European Commission. Therefore, the SC requested copies of the files of the remaining 30 dismissed cases not included in the sample and of investigations closed in 2015 and 2016 concerning Members of the European Commission. OLAF immediately granted the SC access to the remaining 30 dismissed cases and to the closed investigations concerning Members of the European Commission.

In March 2019 the SC rapporteurs met with OLAF staff to discuss OLAF's rules and procedures on assessing and dismissing a case.

By note of 14 January 2020⁴ the Secretariat of the SC transmitted to OLAF the draft Opinion on OLAF's dismissed cases concerning Members of the EU institutions.

In February 2020, OLAF provided its comments on the draft Opinion, including case-by-case explanations and additional information concerning measures implemented by the Office since the period covered by the SC analysis, which, in OLAF's opinion, addressed most of the SC recommendations⁵. Also in February 2020, the SC Secretariat met with OLAF staff to discuss OLAF's comments. In early April OLAF transmitted to the SC its calculations concerning the duration of cases.

The final Opinion was transmitted to OLAF on 23 April 2020⁶.

2. General comments

OLAF welcomes the Supervisory Committee's Opinion on OLAF's dismissed cases concerning Members of the EU Institutions. OLAF notes that the Opinion refers to the 2014-2016 timeframe and that the Committee's findings and observations are valid for the mentioned period.

However, OLAF would like to emphasize that considerable changes have been made in the selection process of cases since the period under consideration.

¹ Ref. Ares(2017)424572 – 26/01/2017

² Ref. Ares(2017)1498616 – 20/03/2017

³ Ref. Ares(2017)5090123 – 18/10/2017

⁴ Ref. Ares(2020)218134 – 14/01/2020

⁵ Ref. Ares(2020)799469 – 7/02/2020

⁶ Ref. Ares(2020)2182284 – 23/04/2020

Notably, a "Selections Handbook", adopted in June 2018 as an internal working document for the purposes of OLAF Unit 0.1 Selection & Review, has contributed to the consistency of the practices among the selectors by setting forth the procedures and best practices applied in this field, and putting, at the same time, a particular emphasis on the reduction of the duration of the whole process. The Selection Handbook is the main toolkit providing guidance to the selectors on how to verify and process information for delivering the opinion to the Director-General. It brings together, in a single document, all relevant legislative provisions, instructions and best practices for each element of the selection⁷.

In addition, in March 2019 the OLAF Director-General approved a new structure of the Unit 0.1 with the aim of improving the Unit's performance by ensuring a more balanced workload distribution among its staff members and thus increasing the efficiency in the use of the resources. For this purpose, a new set of key performance indicators was created allowing for better measuring, distributing and balancing the workload. The new Unit structure resulted also in reinforced supervision and management by the Heads of Sector and the Head of Unit of the different tasks carried out by the selectors.

As a result, OLAF considers most of the Supervisory Committee's well-founded recommendations as **already implemented**. OLAF welcomes the fact that the Supervisory Committee has acknowledged some of those improvements despite it becoming aware of the new measures only in February 2020.

OLAF's more specific comments outlined in this document follow the structure of the SC Opinion.

3. Specific comments

1) INTRODUCTION

OLAF notes that the finding highlighted in point 12 ("*lack of a systematic and consistent approach in several areas of the life cycle of a case*") does not refer to the current state of affairs but to the period under consideration (2014-2016).

2) OLAF'S LEGAL AND ORGANISATIONAL FRAMEWORK

OLAF welcomes the acknowledgement by the SC of the measures introduced by OLAF in 2018 and 2019 to improve the selection process (points 23, 24 and 25).

3) METHODOLOGY

In point 26 the SC states that 30 cases were chosen by the OLAF Director-General, however, the sample was randomly selected⁸.

4) DURATION OF THE CASE SELECTION PROCEDURE

Recommendation 1

"As a matter of good administration, for cases where the information is provided by MS/IBOAs without an explicit request to open an investigation, OLAF should take appropriate procedural steps to handle those cases with priority.

In particular, the Director-General of OLAF should:

a) adopt internal checks to identify those cases where information is provided by MS/IBOAs;"

⁷ Being an internal working document, the Selection Handbook is not publicly available.

⁸ OLAF also notes that the draft Opinion was transmitted to OLAF on 14 January 2020, and not in December 2019 as stated in point 29.

OLAF considers the recommendation **as already implemented**. Since 2016, OLAF has introduced the necessary tools and procedures which allow for proper processing of the source of information and automatic identification of those cases where information is provided by Member States (MS) and Institutions, Bodies, Offices and Agencies of the EU (IBOA). Due registration of the source of information is ensured in the OLAF Case Management system (OCM). The statistical tools managed by the Single Point of Entry allow automatically identifying all selection cases where information is provided by MS or IBOA.

"b) ensure that, at least, a holding reply is provided within 2 months to the MSs/IBOAs concerned;"

OLAF considers the recommendation **as already implemented**. At the very beginning of the selection, the MS/IBOA (similarly to all other identifiable initial sources) are provided with acknowledgement of receipt, which indicates that the information forwarded to OLAF is under scrutiny with the aim of establishing whether an investigation should be opened. This holding reply is automatically generated by the OCM within the first 10 days after the opening of the selection case. Where appropriate, that notification also contains a request for additional details on the relevant matter. That request can be put forward also at a later stage, depending on the specificities of the case and further developments. In other words, IBOA/MS authorities are aware that the selection process is ongoing.

"c) ensure that any extension beyond this two-month period is duly justified and proportionate to the circumstances and activities carried out."

OLAF considers the recommendation **as already implemented**. OLAF consistently pursues a swift selection of cases within the two-month deadline while ensuring appropriate analysis, shaped on the cases characteristics. In addition, cases requiring so, are prioritised to further speed up the selection process.

The monitoring of the duration, consistency and quality of the selections is ensured by the Heads of Sectors, under the general supervision of the Head of Unit 0.1.

In particular, the permanent contact between the selectors and their respective Head of Sector and a systematic analysis of cases in each selector's portfolios are meant to ensure that any extension beyond the two-month period is duly justified and proportionate to the activities carried out and to the specificities of each particular case.

Recommendation 2

"For internal cases, and to maintain administrative consistency, when the information does not come MS or IBOAs, OLAF should take appropriate procedural steps to ensure that the selection process is carried out in a timely manner.

In particular, the Director-General of OLAF should:

a) adopt internal checks to identify those cases (in the OCM) where the selection process has exceeded the two-month period;"

OLAF considers the recommendation **as already implemented**. Since the beginning of 2018, the permanent supervision of the Head of Unit and the Heads of Sector has been ensured, notably with managerial statistical tools based on the Single Point of Entry table. Furthermore, in mid-2019 a management monitoring module was implemented in the OCM (the "monitoring dashboard"), which allows the Heads of Sector and the Head of Unit to identify ongoing selection cases exceeding the two-month period. The module offers the managers also a possibility to have an automatic preview of all cases under their supervision approaching the two-month period (less than 5 days).

"b) ensure that any extension beyond this two-month period is duly justified and proportionate to the circumstances and activities carried out."

OLAF considers the recommendation **as already implemented**. See the reply to recommendation 1c above.

Other remarks:

OLAF welcomes the assessment of the SC as regards the necessary flexibility of the deadline for completing the selection of cases, as indicated in points 34 and 44 of the Opinion.

OLAF recalls that it strives to respect the two-month target for all cases, even though it is only legally obliged to do so for cases in which there is a clear request from an IBOA or a Member State to open an investigation. OLAF underlines that the duration of the selection procedure is proportional to the activities carried out. The average duration of the selection during 2019 was 2.2 months. The average duration during the first four months of 2020 is 1.7 months.

In this regard, OLAF also finds that the statement concerning the extension of the two-month deadline in point 34 (*"This approach should also be duly justified and approved at the level of Unit 0.1, a procedure that is not implemented at present"*) does not reflect the current state of affairs (see replies to recommendations 1 and 2 above).

As for the absence of a time-limit for certain steps (points 32 and 36), while noting that there is no rule requiring OLAF to allocate a case number within five days from the reception of the information, OLAF agrees with the Supervisory Committee that, save in duly justified cases, it would constitute good administrative practice that 5 working days include also the allocation of a case number..

Having said this, OLAF reiterates that in general pre-selection activities, i.e. registration and allocation of cases, at present indeed do take place within 5 working days, as also acknowledged by the SC in point 43. In light of this, OLAF notes that the finding in point 32 (*"a number of weaknesses on the issue of duration can be identified"*) refers strictly to the period under consideration (2014-2016).

Concerning the cases in which it took OLAF exceptionally long to allocate a case number and dismiss a case, it should be noted that those were exceptions and that remedial measures have been put in place to avoid that this happens again.

5) SOURCE OF INFORMATION AND INSTITUTIONS CONCERNED

Recommendation 3

"As a general rule, OLAF should contact the source of information. This is to check whether the information comes from a reliable source, and to request any clarification or verification deemed necessary. The only reason OLAF should not contact the source is if doing so could undermine other future OLAF activities or is clearly unnecessary."

In particular, the Director-General of OLAF should:

a) mention in the case file (OCM) whether the source of information was contacted;"

OLAF considers the recommendation **as already implemented**. In their opinions, selectors always mention activities carried out, including the contacts with the source. This takes place in the form of the acknowledgment of receipt of the source's information and, subsequently, when deemed necessary, in the form of a request for additional information from the source.

"b) contact the source when it is a public authority or a whistleblower;"

OLAF considers the recommendation **as already implemented**. Selectors are trained to have a proactive approach and to systematically request clarifications from the source, when deemed necessary for the purpose of the selection. This activity is duly reflected in their opinions. In particular, IBOAs and national public authorities are contacted to verify the allegations or to request information in practically all cases, with very few exceptions.

With regard to whistleblowers among EU staff, OLAF adopted specific internal instructions, which refer to the Staff Regulations (SR) and provide that *"OLAF replies by a first communication acknowledging receipt and giving the EU staff member information about OLAF's procedure in the context of an Article 22a of the SR disclosure and also informs the EU staff member of the time needed to take appropriate action, as foreseen in Article 22b(1)(b) of the SR. This first reply should be sent within 15 working days after receipt in accordance with the Code of Good Administrative Behaviour. Where this does not allow OLAF sufficient time to inform the EU staff member of the estimated time needed to take appropriate action, this should be done within the 60 days deadline foreseen by Article 22b(1)(b) of the SR."*

Unit 0.1 uses a specific form to implement the above-mentioned instructions. Consistency across the Unit is ensured through close supervision of cases during the selection by the Heads of Sector and by internal trainings.

"c) keep records of all communications (date, content, means of communication) and of the number of attempts to communicate with the source (twice, as a minimum)."

OLAF considers the recommendation (to keep records of all communications) **as already implemented**. The correspondence with the source through various communication channels is duly registered in the OCM. The outcome of the exchange of information is also reflected in the selection opinion, as part of the activities carried out.

As for the recommendation **to establish a minimum number of attempts to communicate with the source**, OLAF agrees that when it decides on its own motion to contact a source and does not succeed on its first attempt, it should try contacting the source at least once again.

Other remarks:

As a general rule, OLAF contacts the source of information to request clarifications and verifications whenever necessary. However, a rigid rule in this respect, i.e. an obligation for the selector to communicate with the source, would not always be practicable, or even logical (e.g. when the source expresses wish to not be contacted, does not provide any contact reference etc.). Besides that, it also happens that OLAF is contacted by sources who, for their own purposes, wish to gather information on the activity OLAF might have carried out in a certain case. In such instances, any contact with them would be inopportune.

OLAF considers that a certain flexibility remains necessary as to whether and how many times a source should be contacted. A source does not necessarily need to be contacted to assess his/her reliability as in some cases this can be inferred, for example from the nature, quality and drafting of the incoming information. There are, however, exceptions. For example, many IBOA report or transmit raw information provided by external sources without carrying out any quality control or internal cross check.

It is also worth recalling that OLAF has in recent years put in place additional internal measures ensuring consistency among selectors, systematic contact with reliable sources and a close supervision by the Heads of Sector and the Head of Unit.

OLAF also emphasises that it is fully complying with its obligations towards whistleblowers, as foreseen by Article 22 a of the Staff Regulations and Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. As regards EU staff wishing to report potential illegal activities, OLAF applies a specific procedure protecting the identity of the whistleblower. Moreover, as provided

for by Article 5 (4), second paragraph of Regulation 883/2013, OLAF informs the whistleblower of the decision whether or not it opened an investigation. Protection against retaliation is ensured by the relevant IBOA.

As for the particular case referred to by the SC under point 66, it should be noted that the source was initially unknown and could therefore not initially be treated as a whistleblower. When the source later decided to reveal his identity, the selector had already established strong arguments suggesting that the allegations were not grounded and was ready to propose to dismiss the case. There was therefore no need to apply the whistleblower procedure.

6) EVALUATION OF THE ACTIVITIES CARRIED OUT

Recommendation 4

"OLAF should improve the effectiveness of the planned activities that aim to verify the validity of the allegations raised.

In particular, the Director-General of OLAF should carry out all necessary activities provided for by the OLAF Regulation and OLAF's internal rules in a systematic and consistent way."

OLAF considers the recommendation **as already implemented**. Several managerial measures have been put in place in recent years to ensure consistency of practices within the selection unit and among selectors. The monitoring of the duration, consistency and quality of the selections is ensured by the Heads of Sectors, under the general supervision of the Head of Unit. All the selectors are trained to have a proactive approach and to perform all necessary activities for supporting sound and well-documented opinions.

Recommendation 5

"In order to strengthen internal consultation and the exchange of information between Unit 0.1 and the relevant investigation and support units, the OLAF Director-General should ensure that the case file (OCM) contains records of whether such consultations and exchanges have taken place or not."

OLAF considers the recommendation **as already implemented**. Since 2018, during the selection phase, a systematic consultation and exchange of information with the investigative units has been in place. Since the end of 2018, that activity is also systematically documented in the selection opinion. In particular, the consultation is compulsory in cases where the unit intends to propose the opening of an investigation or when the case is proposed for dismissal on the grounds of "other principles and criteria". Depending on the case, the consultation might also occur under other circumstances, if deemed necessary by the selector.

Other remarks:

OLAF underlines that selection activities are systematically carried out in all cases and are adapted to the needs and specificities of each case. Having said this, some cases require more or different selection activities than other, depending on their complexity, topic, field, etc. It should also be noted that, unlike investigators, selectors can only carry out verifications but no investigative activities such as interviews with persons concerned or inspections.

In particular, IBOAs, national authorities and other stakeholders are contacted to verify the allegations or to request information in practically all cases, with only very few exceptions where this is not required due to a specific reason.

As regards the use of OLAF's Operational Analysis and Digital Forensic Unit, it should be noted that due to very objective reasons – such as the limited analytical capacity and the limited

duration of the selection process – it is not possible to rely on the Digital Forensic Unit expertise in every selection.

As for **case No 8**, it should be noted that it was opened on OLAF's own initiative based on press articles, and subsequently dismissed based on insufficient suspicion. Those referred to as "the source" in the Opinion are a journalist who published the press article and NGOs who drew up an investigative report which inspired the press article.

The institution concerned was requested to provide information on the possible follow-up it might have given to the above mentioned report from NGOs. No reply was obtained, but given the nature of the allegations, OLAF was able to dismiss the case even in the absence of the reply. OLAF did not consider it appropriate to contact or notify the journalist or the NGOs. Alerting the Member State of information that was publicly available would also not have been neither appropriate nor proportionate.

Case No 28 was dismissed based on the fact that an external auditor found that the accounts of the political party concerned were in line with the rules and that there were no other indications supporting the allegation. The journalist who had provided the initial information was contacted and requested to provide further details corroborating his allegations, but he never replied to OLAF. The request to the IBOA was aimed at possibly triggering an internal audit which, if undertaken, would have taken time and would have gone beyond the scope of the selection.

In a similar case which resulted in the opening of an investigation, the initial information was corroborated with abundant supporting elements, unlike in this case.

7) RELIABILITY, CREDIBILITY AND OLAF COMPETENCE

As for the SC recommendation to draw up concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions, OLAF considers that such indicators cannot be included in a pre-determined list. However, OLAF internal documents, the Selection Handbook and the Vademecum on case selections, contain detailed instructions on the matter.

OLAF notes the acknowledgement by the SC of the improvements made by OLAF in assessing the reliability of the source and the credibility of the allegation raised in all cases where OLAF was competent to act.

8) JUSTIFICATION FOR DISMISSING CASES: LACK OF A CONSISTENT APPROACH

Recommendation 6

"OLAF should apply a consistent approach when sending information to Member States and IBOAs concerning dismissed cases involving members of the EU institutions.

In particular, if OLAF is not in a position to conduct a proper investigation, the information collected and the opinion to dismiss the case should always be sent to the EU institution and MS concerned."

OLAF considers the recommendation **as already implemented** in terms of applying a consistent approach on the transmission of information to Member States following the dismissal of a case. However, OLAF **does not agree with the recommendation** to share the opinion of the Selection Unit, 0.1, with Member States or IBOA.

For the treatment of dismissed cases, Unit 0.1 follows the relevant instructions. Since the different nature of cases requires different follow-up, these instructions provide for a certain degree of flexibility. While similar cases should indeed be treated in a consistent way, different circumstances may require a specific assessment, based on the case characteristics. At the end

of the selection process, the analysis carried out might suggest different actions for follow-up, one of which could be to transmit to Member States or IBOA the information received.

The opinion of Unit 0.1 is an internal and sometimes sensitive document, aimed at supporting the OLAF Director-General in taking decisions in full independence. The transmission of collected information (including personal data) to Member States and IBOA concerning dismissed cases involving Members of the EU institutions has to be assessed on a case-by-case basis and be compliant with the need-to-know principle and the relevant data protection rules on legitimate processing by the recipient.

Other remarks:

OLAF would like to emphasise that what may seem to be a lack of a systematic and consistent approach in dealing with cases is an adaptation to the fact that, although apparently similar, cases are never completely the same. Therefore, a certain degree of flexibility is necessary.

The opening or dismissal of a case may for example depend on the supporting elements provided by the source or on whether there is an ongoing judicial investigation at national level. As regards the "similar" opened and dismissed cases compared by the SC under point 83 and 84, the source of the dismissed case was unable to further substantiate his allegations. The allegations were also not corroborated by an external auditor who looked into the matter, and were the subject of an enquiry by the competent national authorities.

9) NOTIFICATION AND TRANSMISSION OF THE DECISION TO DISMISS A CASE

Recommendation 7

"To increase transparency and promote good administration, OLAF should clearly explain in its decision to dismiss a case whether it intends to inform – or send the dismissed case to – the relevant source.

In particular, the Director-General of OLAF should:

a) make the required amendments in its vademecum about the opinion on opening decision to ensure that justification is provided for: (i) why the source may or may not be notified; and (ii) why information should or should not be sent to EU institutions and national authorities."

OLAF considers the recommendation **as already implemented**. When deciding whether the source should be notified on the dismissal decision, the selectors follow the instructions on the provision of case-related information to informants at different stages of investigation procedures.

"b) avoid situations where, at the end of the decision-making process, no one is informed about a dismissed case."

OLAF considers the recommendation **as already implemented**. The opinion template includes a section dedicated to the actions to be performed following the decision to dismiss the case (notification to the source, transfer of information to Member States/IBOA).

Recent instructions require compulsory submission of such notifications, when applicable, together with the dismissal package (opinion and draft decision).

Other remarks:

Figure 7 indicates that a notification to the source of the dismissed case was not sent in 30 cases (50% of the total). However, it should be noted that out of the 60 cases analysed by the SC, **the source was "unknown" in 30 cases** (as also noted by the SC in **point 89**).

OLAF reiterates that notifications and forwarding of information are at present handled in a consistent and systematic way, as explained in the reply to recommendations 7 a) and b) above, and as acknowledged by the SC in point 91.

Recommendation 8

"Regulation No 883/2013 should be amended to make it clear that the Director-General of OLAF should regularly inform the SC of his reasoned decision not to open an investigation.

In the meantime, the Director-General of OLAF should regularly inform the SC of the Director-General's decision not to open an investigation, and of those cases where neither the source nor the IBOA nor the Member State concerned has been forwarded the dismissal decision."

OLAF is currently reflecting on how to inform the SC of dismissal decisions within the current legal framework.

10) EPPO AND DISMISSED CASES

As regards point 92, OLAF observes that the obligation for the EPPO to inform some persons of its decisions to dismiss a case is complemented by a judicial review of such decisions whereas this is not the case for OLAF's decisions to dismiss a case.

For reasons already exposed above, the conclusion that OLAF should also make it a general rule to inform Member States, IBOA and other complainants of its decision to dismiss a case for the sake of consistency (point 93) appears not to take sufficiently into account the different nature of cases and the need to assess each case individually.