



The Director-General

Brussels

**NOTE FOR THE ATTENTION OF MR TUOMAS PÖYSTI,
CHAIRMAN OF THE OLAF SUPERVISORY COMMITTEE**

(Via the Secretariat of the Supervisory Committee)

**Subject: OLAF comments on the Supervisory Committee's Report 3/2014 on the
Opening of cases in OLAF in 2012**

Dear Mr Pöysti,

In a note from the Secretary of the OLAF Supervisory Committee (SC) of 22 January 2015, OLAF was requested to provide comments on the already adopted SC Report 3/2014, to be attached to the SC Report and transmitted together to the Institutions. You will find these OLAF comments enclosed.

Yours sincerely,

09 FEB. 2015

Giovanni KESSLER

Encl.: OLAF comments on the Supervisory Committee's Report 3/2014 on the opening of cases in OLAF in 2012



OLAF COMMENTS ON THE SC REPORT 3/2014 ON OPENING OF CASES IN OLAF IN 2012

In a note from the Secretary of the OLAF Supervisory Committee (SC) of 22 January 2015, OLAF was requested to provide comments to the already adopted SC Report 3/2014 on *Opening of cases in OLAF in 2012*. As mentioned in the same note, OLAF's comments were to be "attached to the Report and transmitted together to the Institutions".

Summary

1. Background

The opening of 423 cases was a one-off event necessary to allow for a smooth implementation of the new organisational structure of the Office and new investigative procedures which came into effect on 1 February 2012. The Decision to open those cases deserving to be investigated solved the issue of the significant backlog, allowed for an efficient start of the reorganised OLAF and enhanced the protection of the rights of the persons concerned.

2. The SC Report 3/2014

The SC Report contains an incomplete and misleading reconstruction of the facts, and fails to mention relevant documents showing OLAF's efforts to provide the SC with the requested information and access to cases. Moreover, the Report does not give a full account of the reasons why OLAF was not able to grant full access to a sample of cases until November 2014.

A number of OLAF quotes and even a reference to the Regulation are inaccurate. These misquotations and incorrect references of the SC Report have led to unfounded assumptions and a tainted analysis.

OLAF's cooperation was made difficult by the fact that the purpose and expected outcome of the SC's monitoring on this matter were unclear. The SC's use of the format of a Report, instead of an Opinion, has deprived OLAF of the possibility of having an appropriate dialogue on the issue. If given the opportunity, OLAF could have explained its reasons and prevented possible errors and misinterpretations by the SC.

3. Legal analysis

The Decision was in line with the legal provisions applicable at the time of adoption and did not fall short of relevant case law. The opening of the 423 cases was not an isolated act but a result of a comprehensive process conducted in accordance with a specific managerial decision of the Director-General. Consequently, the cases were opened following a procedure which guaranteed an individual assessment in each case.

If the SC Report had taken into account all the available information, it could not have failed to conclude that the opening Decision was adopted in compliance with the legislation in force at the time of adoption and that it respected the applicable requirements flowing from case law and general principles of law as recognised by the Court of Justice of the European Union.

4. OLAF Statistics

OLAF accurately recorded its statistics and transparently reported on the opening of the 423 cases in its Annual Reports 2012 and 2013.

Any suspicion that OLAF would have opened the 423 cases to improve its reported performance is without factual basis. As for the duration of investigations, the improvement in the performance indicator in 2012 has been largely offset by a deterioration of this performance indicator in the following two years. As for the ratio of investigations closed with recommendations, the Decision to open the cases has had a negative impact on this performance indicator in 2012 and the following years.

1. Background

Prior to the reorganisation of 2012, incoming information of possible investigative interest was analysed by the investigators in OLAF. Based on their assessment, the Decision of the Director-General to open or not an investigation was, in most cases, preceded by a position of the then existing OLAF Executive Board.

A new system was introduced on 1 February 2012 with the reorganisation of the Office and with the entry into force of the new Instructions to Staff on Investigative Procedures, issued by the Director-General. It thoroughly changed the selection of cases, entrusting dedicated staff within the newly established Investigation Selection and Review Unit with the assessment and selection of cases and the preparation of an opinion. Consequently, the Executive Board was abolished and, under the new internal organisation, the investigators were no longer in charge of carrying out the initial assessment of whether an investigation or coordination case should be opened.

Therefore, prior to the entry into force of the new investigative procedures on 1 February 2012, OLAF put in place a set of measures to ensure transition for those cases that were still in the assessment phase at that point in time. The investigative units were instructed¹ to review all on-going assessments before 1 February and to close those in which there was not sufficient information to justify the opening of an investigation or coordination case. Additional meetings of the Executive Board of both Directorate A and B took place in January 2012 to facilitate the closure of on-going assessment cases, which could not lead to the opening of an investigation.

Following the review of the on-going assessment cases, the responsible investigation units concluded that 225 investigations and 198 coordination cases deserved to be opened. The review and selection process of these 423 cases² lasted on average eight months, which indicates that the cases were duly considered and the matters under assessment were of a substantial nature, requiring further action by the Office. On the basis of the selection carried out by the investigative units, the Director-General decided to open these cases³, without going through the Board procedure.

The one-off opening of the 423 investigation and coordination cases was the result of a managerial decision, which provided a solution for the significant backlog of assessment cases. By opening the cases, OLAF avoided that investigative activities would be carried out during the longstanding case assessments, a past practice which had been criticised notably by the Court of Auditors. Transforming an assessment case into an investigation case provides safeguards that each OLAF activity would be carried out in accordance with the OLAF Regulation and Instruction to Staff on Investigative Procedures, ensuring legality controls and rights of the persons concerned which did not apply to the assessment cases.

The assessment cases involving Members and staff of the EU institutions and bodies (so-called internal cases) were excluded from this procedure and continued to be carried out by the responsible investigative unit. Decisions to open or dismiss these staff cases were made following the opinion of the Investigation Selection and Review Unit in accordance with the new procedures.

Therefore, the Decision to open those cases that deserved to be investigated and the dismissal of the assessment cases with no sufficient reasons for an investigation, solved

¹ Note of OLAF Director-General of 19 December 2011, Ares(2011)1374364.

² From the 423 cases opened on 1 February 2012, 5 cases proved to be duplicate cases. Therefore, the actual number of cases opened was 418, however for the sake of simplicity and since the cases are generally referred to as "the 423 cases", we will do so also in this note.

³ The cases were opened on 2 February 2012, based on a Decision of the Director-General to enter into force on 1 February 2012. However, for the sake of simplicity, since the opening date is generally referred to as "1 February", we will do so also in this note.

the issue of the significant backlog, allowed for an efficient start of the reorganised OLAF and enhanced the protection of the rights of the persons concerned.

2. The SC Report 3/2014

The SC Report is divided into two parts: Part One adopted in November 2014, before the SC had full access to a sample of cases, and Part Two adopted in January 2015, after the SC had full access to a sample of cases. The Report does not clearly explain why it is structured in this way and the two parts contain incoherent statements⁴ and distinct conclusions.

2.1. SC's access to information, statistics and cases, and correspondence OLAF-SC on the matter

The section *Supervisory Committee's requests for information and OLAF's replies*, included in Part One of the SC Report, does not reflect the totality of the notes exchanged on the matter. It also does not mention SC's inability to provide OLAF, until 5 November 2014, with clarifications on the scope of the sample and a valid justification for its access request, in line with the "3 steps approach" suggested by the European Data Protection Supervisor (EDPS)⁵ and with Article 12 of the Working Arrangements between OLAF and the SC.

On 23 September 2013, the SC asked OLAF for general information on the opening of the 423 cases, to which OLAF gave a detailed reply on 14 October 2013. As requested by the SC on 18 December 2013, OLAF also provided, on 10 January 2014, statistical information⁶ on the opening of the 423 cases.

On 15 April 2014, the SC informed OLAF that it had "*decided to examine some of the cases opened in OLAF in February 2012*" and requested full access to a sample of cases in OLAF's Case Management System, without however providing any justification. During the bilateral meeting of 12 May 2014 with the SC Chairman at that time, OLAF Director-General clarified that, in line with Article 12.2 of the Working Arrangements, the SC must always justify their requests for full access to cases.

In its reply of 26 May 2014, the SC requested access to a sample of cases "*to review the legality of opening decisions within the context of each individual investigation*", making reference to its assessment of "*OLAF's independence in the opening of the investigations*".

The SC's justification and the details of the requested sample, provided in its reply of 26 May 2014, were not sufficient for OLAF to be able to provide the access requested. OLAF explained the need for clarifications in a note of 12 June 2014 and during a meeting on 16 July 2014 between the SC Chairman and OLAF Director-General. This meeting is not mentioned in the SC Report.

Furthermore, OLAF sent the SC two reminders, on 17 September 2014 and 30 October 2014, asking the SC to clarify its request, to enable OLAF to provide the accesses requested. These notes are not mentioned in the SC Report.

⁴ E.g.: Part one incorrectly quotes OLAF saying that "*the average duration of these 423 cases was 8 months [...]* However, the SC notes that it is three times less than the average duration of other cases". Part two states that "*Out of 367 cases closed at the time of the statistical review by the SC, 253 cases closed as the first ones had the average duration of less than 12 months*".

⁵ EDPS Opinion of 19 July 2007 (Case 2007-73).

⁶ The data provided to the SC included: OF number, sector, type of recommendation, recipient, recommended amount for the 423 cases.

From 26 May until 5 November 2014, OLAF received no reply nor any reaction from the SC on the matter, despite OLAF's note of 12 June, the discussion of 16 July and the two written reminders, and hence, was unable to give the access to the cases.

In the SC plenary meeting of 4 November 2014, OLAF Director-General once again expressed OLAF's readiness to give access to the cases as soon as a clarification would have been received. Finally, in a note dated 5 November⁷, the new SC Chairman clarified and gave proper justification for the request. Consequently, OLAF was able to provide the requested statistical data⁸ on 7 November 2014 and granted full access to a sample of 40 cases on 14 November 2014⁹. In the reconstruction of the events contained in the SC Report, no mention is made of the SC Chairman note of 5 November.

As regards the statistical information on the 423 cases, it is unfairly described in the SC Report as "*limited*", although it contains all the statistical information requested by the SC.

In short, the SC Report contains an incomplete and misleading reconstruction of the facts, failing to mention relevant documents showing OLAF's efforts to provide the SC with the requested information and access to cases. Moreover, the SC Report does not give a full account of the reasons why OLAF was not able to grant full access to a sample of cases until November 2014.

2.2. Misquotations and incorrect references in the SC Report

The SC Report contains several misquotations and incorrect references to documents, including to the Regulation 883/2013.

Paragraph 1 of the SC Report states that SC's monitors "*the implementation of the Office's investigative function, in order to reinforce its independence **and** the proper exercise of the competences [of the Office]*" (emphasis added) and "*to ensure that investigations are carried out to the highest standards*". However, Article 15 of Regulation 883/2013 specifies that the "*SC 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*" (emphasis added). There is a difference in whether the SC reinforces the "*independence and the proper exercise*" or the "*independence in the proper exercise*" of OLAF's competences, since the interpretation of the SC implies that it has a role in monitoring the quality of OLAF's investigative activities. The Regulation 883/2013 also does not specify any role of the SC in ensuring that the OLAF investigations are "*carried out to the highest standards*".

Under paragraph 11 of the SC Report, it is mentioned that "*the OLAF DG challenged the SC's competence to examine the fulfilment of this requirement*", i.e. the requirement of establishing "*sufficiently serious suspicion*" for the opening of the cases in question. In its note of 12 June 2014, OLAF did not challenge SC's right to assess whether OLAF has addressed the "*sufficiently serious suspicion*" for the opening of cases, but rather whether the SC's intention to "*review the legality*" of single acts within "*each individual investigation*" was falling within the competences of the SC, as laid down in Regulation 883/2013.

Under paragraph 15 of the SC Report, OLAF's note of 18 October 2013 is misquoted. In the note, it is explained that "*the **average duration of the assessment phase** of these*

⁷ SC note of 5 November 2014, Ares(2014)3674650.

⁸ The data was extracted on 7 November 2014 in the presence of a SC Secretariat member and contained: the duration of investigations, duration of the assessment, the opening decision (date, legal basis and Unit allocated the case), the classification of the investigation as an investigation case or a coordination case, the outcome of the investigation (whether or not recommendations were issued) and the estimated financial impact in all cases opened where available for 423 cases.

⁹ Access to an additional case was provided upon SC request a few days later, in total 41 cases.

423 cases was 8 months" (*emphasis added*), while in the SC Report it is quoted that "*the average duration of these 423 cases was 8 months*"(*emphasis added*)¹⁰. Whether the period of 8 months represents the average duration of the assessment phase or to the average duration of the entire cases makes a great difference and has a crucial impact on the conclusions drawn.

The misquotations and incorrect references included in the SC Report have led to incorrect assumptions, which do not support the conclusions of the Report.

2.3. Inconsistency in the process leading to the adoption of the SC Report

Since September 2013, when the SC initially expressed its intention to examine the opening of the 423 cases, there was no clarity as regards the purpose and the expected outcome of the monitoring activity of the SC on the matter.

First, during the exchange of correspondence between OLAF and SC, the latter provided **different justifications** for its requests for information:

On 23 September 2013, the SC requested information on "*whether any evaluation or assessment as to the existence of «sufficiently serious suspicion» was carried out*" for the 423 cases.

On 26 May 2014, the SC justified its request for full access to a sample of cases by referring to the assessment of "*OLAF's independence in the opening of investigations*", the SC's intention to examine "*the existence of «sufficiently serious suspicion»*" and to review "*the legality of opening decisions within the context of each individual investigation*".

On 5 November 2014, the SC provided a new justification, namely "*to review the systemic capacity of OLAF to handle a flux of cases in its processes*". The purpose was not, according to the same note, "*to review the legality of individual acts*".

OLAF is surprised to note that the SC Report does not include any reference to OLAF's independence in the opening of investigations nor any assessment of the capacity of the Office to handle a "*flux of cases*". It only concludes on the legality of the opening Decision, in contradiction with what was stated in the note of 5 November.

Second, during the exchange of correspondence, it was unclear which would have been the **format** of the SC analysis on the opening of the 423 cases:

On 18 December 2013, the SC mentioned an Opinion.

On 26 May 2014, the SC had not decided whether "*this issue requires its opinion or Report*".

On 5 November 2014, the SC announced that it was working "*on a conclusion regarding the handling by OLAF of 423 cases*".

Regulation 883/2013 suggests that the appropriate format of the outcome of a SC analysis should be an Opinion¹¹. The issuing of a Report by SC is reserved by the Regulation 883/2013 to the periodical "*report on its activities covering in particular the assessment of the Office independence, the application of procedural guarantees and the duration of investigation*", and to reports on the follow-up given by authorities to OLAF's investigations¹². None of these aspects are mentioned in the SC Report.

¹⁰ Footnote 13 in the SC Report attributes the misquotation to an OLAF note of 18 **December** 2013, while in fact it belongs to OLAF's note of 18 **October** 2013. The same incorrect reference is made in footnote 6 of the SC Report.

¹¹ Article 15 (1) Regulation 883/2013.

¹² Article 15 (9) Regulation 883/2013.

OLAF has underlined the importance of being consulted on SC Opinions before their adoption. Such a consultation was also agreed in the past between the SC and OLAF, and put in practice with Opinion 3/2014 of 15 May 2014. However, since then the SC has not issued any Opinions, and seems to concentrate on producing Reports. None of these Reports were consulted with OLAF, which would have been the usual procedure according to e.g. audit standards. Indeed, it is an established practice of bodies such as the European Court of Auditors and the European Ombudsman to allow the party audited or otherwise concerned to provide its comments before the adoption of any related conclusion, independently of whether it is an Opinion, Report or Recommendation¹³. Such a dialogue allows for clarifications or corrections, in order to avoid any factual mistakes.

OLAF's cooperation was made difficult by the fact that the purpose and outcome of SC's activity on this matter were unclear. The SC's use of the format of a Report, instead of an Opinion, has deprived OLAF of the possibility of having an appropriate dialogue on the issue. If given the opportunity, OLAF could have explained its reasons and prevented possible errors and misinterpretations by the SC.

3. Legal analysis

3.1. Legal requirements applicable to the opening of investigations

The SC Report and its conclusions are based on the assumption that the OLAF Director-General was bound by a legal requirement of establishing a *"sufficiently serious suspicion"* for the opening of the 423 cases (see, in particular, paragraphs 3, 11 and 25 of the SC Report). The SC acknowledges in paragraph 12 that the said requirement of *"sufficiently serious suspicion"* *"applied formally only to investigations and not to coordination cases"*, hence limiting its argumentation to the 225 investigations among the 423 cases.

In that context, however, the SC introduced in paragraph 13 of the SC Report a reference to yet another legal requirement of *"a measured and individual assessment of the necessity to open cases"* (see also paragraph 23), not even indicated in the general scope of the Report announced in paragraph 3.

According to paragraph 20 of the SC Report, both requirements are *"set forth in the applicable legislation, case law and internal OLAF rules"*. As detailed below, those requirements as formulated by the Report were laid down neither in the legislative provisions in force at that time, nor in the case law of the Court of Justice of the European Union or in the OLAF internal rules. OLAF fulfilled all legal requirements applicable at the time of the Decision.

3.1.1. Applicable legislation

In paragraph 20 and related footnote 15, the SC Report claims that Article 5 of Regulation 1073/1999, applicable on 1 February 2012, sets out the legal requirements for the opening of investigations. However, as the SC Report itself admits in paragraph 13 (and implicitly also in paragraph 27), Article 5 of Regulation 1073/1999 did not provide for any explicit requirements for opening of investigations, unlike the corresponding Article 5 of Regulation 883/2013. Regulation 883/2013 also does not confirm any intention of the legislator to *"effectively"* overrule a former concept of *"sufficiently serious suspicion"*, as the SC Report suggests in footnote 16 to paragraph 20.

In addition, the opening of coordination cases was an internal organisational measure to provide assistance to the national competent authorities in accordance with Article 1(2) of

¹³ OLAF applies the same principle, by giving the opportunity to the person concerned in an investigation to provide comments before drafting the Final Report.

Regulation 1073/1999. By its nature, it does not involve any OLAF investigative activities and as such did not fall within the scope of Article 5(1) of that Regulation at all.

In short, the legislation in force at the time of the adoption of the Decision did not lay down any requirements for the opening of an OLAF investigation or coordination case. It did neither provide for any specific level of suspicion to be established, nor for procedure or formalities to be followed prior to opening of an OLAF investigation or coordination case.

3.1.2. Case law

Paragraph 27 of the SC Report further argues that *"the requirements [...] have been introduced [...] by the European Court of Justice (ECJ) to provide a legal framework for the discretionary powers of the OLAF DG"*.

a) sufficiently serious suspicion

The SC Report refers to Cases C-11/00 and C-15/00 (paragraph 3 – footnote 4, paragraph 20 – footnote 16) where the ECJ indeed used the expression *"sufficiently serious suspicion"*. However, these judgments did not concern individual OLAF investigation, nor did they aim at establishing criteria for individual decisions of the Director-General or, even less so, criteria for opening external investigations or coordination cases. Hence, the notion of *"sufficiently serious suspicion"* used by the ECJ has to be read in the very specific context of the inter-institutional competence dispute between OLAF represented by the Commission on one hand, and the ECB and EIB on the other.

The judgments examined the legality of decisions of the ECB and EIB establishing a system of independent investigations concurring with the powers of OLAF under Regulation 1073/1999. The Court principally used the reference to an initial suspicion as an argument to demonstrate that OLAF (and the Commission) will not arbitrarily intervene into the independence of those bodies when carrying out internal investigations on EU staff under Article 4 of Regulation 1073/1999 (Cases C-11/00 *Commission v ECB*, p. 141, and C-15/00 *Commission v EIB*, p. 164).

Moreover, the SC Report fails to recognise, more relevant case law of the Court. Notably, the ECJ stated that that *"the legality of a measure adopted [under a discretionary power] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue"* (265/87 *Schröder*, p. 22). The Civil Service Tribunal confirmed that OLAF enjoys *"a wide margin of discretion with regard to the opening and conduct of administrative investigations"* in relation to the EU staff, i.e. in internal investigations. As to the limitation of that discretion, the Tribunal clarified that opening of an internal investigation on EU staff is subject to a *"reasonable suspicion"* of a disciplinary offence (Joined Cases F-124/05 and F-96/06 *A and G v Commission*, p. 173). Moreover, such a decision may not be affected by a manifest error in the assessment of the facts or by misuse of powers (*A and G v Commission*, p. 367 in conjunction with p. 172).

In any case, the quoted case law concerns the opening of OLAF internal investigations on EU staff, which were subject to different procedural rules than external investigations, as also recognised by the General Court (see T-48/05 *Franchet and Byk v Commission*, p. 116), and where a reputational risk for the person concerned was much higher than in external investigations (see F-23/05 *Giraudy v Commission*, p. 165 – 167).

Consequently, the Court of Justice of the European Union did not introduce any legal requirement which would subject the opening of an external investigation or coordination case to the establishment of a *"sufficiently serious suspicion"* and on which the SC could plausibly rely in its analysis.

b) *a measured and individual assessment of the necessity to open cases*

Paragraph 13 of the SC Report also refers to the principle of proportionality, enshrined in Article 5 TEU. It indeed applies, as a general principle, to both legislative and administrative measures which may interfere with the legitimate interests of individuals or economic operators (C-331/88 *Fedesa*, p. 13). However, the SC Report does not explain how that principle translates into the requirement of *"a measured and individual assessment of the necessity to open cases"* or, even less so, how that principle supports SC's conclusion on applicability of the *"sufficiently serious suspicion"* to all 423 cases, including coordination cases. The case law of the Court is also silent on that matter.

3.1.3. Internal OLAF rules

Under paragraph 16, the SC Report suggests that the initial assessment was to be *"duly motivated and registered in each case file"* and based its scrutiny of 41 sample case files exclusively on that assumption, as documented in paragraphs 21, 23, 24 and 25 of the SC Report. However, no basis is cited for this assumption.

In paragraph 20 of its SC Report, the SC states that the Director-General had to respect, among others, the requirements set forth in *"internal OLAF rules"*, identified in footnote 17 as *"OLAF Manual – Operational Procedures, point 3.2.2"*¹⁴. The OLAF Manual, no longer applicable at the time of the Decision, was a general instruction to staff issued by the Director-General. Point 3.2.2 of the Manual provided organisational guidance to OLAF staff and did not constitute any legal requirement binding on the Director-General.

The SC acknowledges, in paragraph 12 of its SC Report, that *"a special procedure could have been useful for organisational reasons"*. Precisely that situation occurred in relation to the 423 cases opened. As already explained in OLAF's note of 12 June 2014, *"the opening of a large number of investigation and coordination cases on 1 February 2012 was a one-off event necessary to allow a smooth implementation of the new organisational structure of the Office which had to come into effect"* and to deal with a significant backlog of assessment cases.

It is a prerogative of the Director-General to direct the conduct of investigations, as stipulated in Article 6(1) of Regulation 1073/1999. This also includes the direction of the assessment process. Within that legal framework, the general organisational guidance applicable to the assessment process (as set out in the OLAF Manual) was effectively overruled by the specific instructions of the Director-General on the organisation of case assessment in the transition to the new system introduced by Instructions to Staff on Investigative Procedures on 1 February 2012, as clearly documented in the Director-General's note of 19 December 2011.¹⁵

Consequently, there was no OLAF internal rule which would require the initial assessment to be *"duly motivated and registered in each case file"* or which would otherwise prevent the Director-General from opening external investigations or coordination cases.

¹⁴ OLAF Manual, no longer applicable at that time, referred to *"seriously serious suspicion"* as one of the purposes of the assessment in the third paragraph of Section 3.2.2(1). The evaluators were supposed, in accordance with Section 3.2.2(3)(a), to ascertain, amongst other, *"whether the grounds for suspicion are sufficiently serious"*. To that effect, every *"assessment of initial information"* to be presented to the Executive Board contained part called *"sufficiently serious suspicion"* where evaluators had to fill in information on the allegation made, on the reliability of the source and *"probability of information to be accurate"*. However, it has also to be noted that not all initial information was subject to the standard assessment procedure. OLAF Manual expressly laid down two special parallel procedures – *prima facie* non-case procedure and urgent assessment procedure. In both cases, the evaluation of initial information was not subject to decision of the Executive Board and to the requirements of formal assessment, including that of *"sufficiently serious suspicion"*.

¹⁵ Note of OLAF Director-General of 19 December 2011, Ares(2011)1374364.

3.1.4. Legality of the OLAF Decision

As follows from the foregoing, the Decision was in line with the legal provisions applicable at the time of adoption and did not fall short of relevant case law. Moreover, the OLAF Director-General had not issued any self-binding guidance that would have prevented him from adopting the course of action leading to and encompassing the Decision to open the 423 cases.

Nevertheless, OLAF is of the view that general principles of law enjoin it to open investigations solely where a minimum of *indicia* are present. As any public body, it is bound to act in an objective and non-arbitrary manner.¹⁶ However, in the absence of any guidance in legal provisions or case law, the standard applicable has to be determined with the help of general principles of legal interpretation.

In this context, systematic and functional arguments plead that the level of suspicion as a requirement for the opening of an external investigation must necessarily be modest. As in any investigatory context, the Office cannot, at the stage of opening of an investigation be required to already be in the possession of evidentiary material which the investigation is intended to reveal subsequently. In view of the *effet utile* of OLAF's powers, exaggerating the level of suspicion required at the stage of opening could unduly limit the ability of the Office to carry out the duties imparted to it by the institutions and by the legislator.

The structure of OLAF investigations further supports this argument. Indeed, in the OLAF legal framework, the opening of an investigation does not as such represent or go together with formal investigative measures; any such measures require a separate authority based on a thorough legality, necessity and proportionality check. Moreover, unlike in the case of an internal investigation, the opening of an external investigation has no immediate impact on the person concerned, if any, in particular, it is not automatically notified to any authorities or bodies. In addition, it is important to retain that the opening of an investigation in no way prejudices its outcome. In its investigations, OLAF is obliged to seek evidence for and against the person concerned which benefits from the full range of procedural guarantees applicable.

Finally, the procedure for the identification of cases to be opened was not defined by Regulation 1073/1999 or in any other way. It could be adapted by internal organisational measures of the Director-General in accordance with managerial considerations. In particular, there is no requirement to elaborate an extensive reasoning for the opening Decision (see further below on this point).

In relation to the cases at hand, OLAF ensured that only meritorious investigations were pursued by a series of filters that were put in place in the run-up to the entry into force of the OLAF reform on 1 February 2012 and which helped ensure that the new organisation could start working efficiently and effectively.

As set out above (see also *Background*), the Decision to open the 423 cases was not an isolated act but the result of a structured process. The investigative units were instructed¹⁷ to review all on-going assessments before 1 February and to close those in which there was not sufficient information to justify the opening of an investigation or coordination case. Additional meetings of the Executive Board of both Directorate A and B took place in January 2012 to facilitate the closure of on-going assessment cases, which could not lead to the opening of an investigation.

¹⁶ See e.g. Joined Cases 46/87 and 227/88 Hoechst v Commission, paragraph 19; Joined Cases F-124/05 and F-96/06 A and G v Commission, p. 172/173.

¹⁷ Note of OLAF Director-General of 19 December 2011, Ares(2011)1374364.

As the result of this filtering, OLAF lawfully opened investigations on matters that had been thoroughly considered in a legitimate process under the authority of the Director-General. The SC Report does not offer any concrete indications that even one of the investigations had been opened arbitrarily or for undue reasons.

3.1.5. Link of opening Decision and Early Warning System

The above conclusion is not put into question by the connection between OLAF investigations and the functioning of the Early Warning System (EWS). Contrary to what is suggested in paragraph 27 of the SC Report the mere opening of an investigation was not, in the context of the EWS as it stood at the time (and even less so now), *"a circumstance leading to the Commission's decision not to enter into a contract with [the] operator"*.

Indeed, before or around the opening of an OLAF investigation, OLAF might have initiated a *"W1a warning"* in accordance with Article 10(1) of Commission Decision 2008/969/EC, Euratom. This was however a separate measure not automatically flowing from the opening of an investigation and also not dependent on such opening. Importantly, pursuant to Article 16 of Commission Decision 2008/969/EC, Euratom, the activation of an EWS warning initiated in relation to a selection or opening of an OLAF case had no legal consequence for that operator, especially as concerns the operator's capacity to enter into a contract with the Commission.

3.2. The incongruence between arguments and conclusions of the SC Report

The SC Report does not present any criteria under which, according to the SC, the threshold of a *"sufficiently serious suspicion"* could be established or how otherwise a sufficient level of initial indicia for the opening of an investigation should be determined. It also does not mention any *"individual and measured assessment"* on a sample case. Instead, it merely concentrates on a formalistic assessment of case files in the sample, and raises doubts about the possible statistical impact of the Decision on the overall performance of the Office.

The SC Report bases its conclusion on the circumstance that *"the SC did not find any documents identified as «assessment» or «evaluation» in the whole sample of case files"* (paragraph 23) and that *"[in] none of the cases in the sample did the SC find any document confirming that the «sufficiently serious suspicion» had been established before opening the case"* (paragraph 25). The SC's principal argument thus consists in stating in paragraph 18 of its SC Report that *"OLAF failed to provide any satisfactory evidence that the opening of the cases in question had been carried out in accordance with the obligatory legal requirements"*. The SC however does not explain under which legal rule the claimed failure of OLAF to provide evidence to the SC on the reasons leading the Director-General to opening an investigation would trigger the illegality of such an opening.

In addition, in paragraph 24 of its SC Report, the SC refers to the low number of case files containing *"a clear estimation of the possible financial impact as conducted by OLAF"* in the framework of the assessment. The SC fails to explain how this argument supports its conclusion that the alleged requirement of *"sufficiently serious suspicion"* was not met.

These formalistic arguments raised in the SC Report do not support the SC's conclusion that the opening of *"all cases in question [...] is in contradiction with the applicable legal requirements"*. They seem to be based on the erroneous assumption that a requirement for elaborate reasoning was applicable; however no authority is cited that would support such requirement. As set out above the process of initial assessment (today: selection of cases) could be determined by the Director-General. Prior to the 2012 reorganisation, it was in part based on oral deliberation which is not a priori unsuitable for the situation (e.g. discussion on the credibility of informants).

The conclusions of the SC Report are thus without foundation in the applicable legal framework.

3.3. Conclusion on the legal analysis

In short, the considerations of the SC Report do not support its legal conclusions. The SC Report treats the Decision as an isolated act and fails to take into account the process that led to its adoption. In particular, the entire assessment process leading to the opening Decision was conducted in line with a specific managerial decision of the Director-General. Consequently, the 423 cases were opened following a different procedure which however guaranteed an individual assessment of each case.

If the SC Report had taken into account all the available information, it could not have failed to conclude that the opening Decision was adopted in compliance with the legislation in force at the time of adoption and that it respected the applicable requirements flowing from case law and general principles of law as recognised by the Court of Justice of the European Union.

4. OLAF statistics

In paragraphs 17 and 26 of the SC Report, the SC raised the question of the potential impact of the opening of the 423 cases on OLAF statistics in 2012 and the following years. OLAF accurately recorded in its statistics and transparently reported on the opening of these cases in its Annual Reports 2012 and 2013.¹⁸

As already explained in the section *Background* of this note, out of the 423 cases opened on 1 February 2012, 225 were opened as investigations and 198 were opened as coordination cases. It is important to make the distinction between the two types of cases, since they do not share the same legal basis, nor the same features. The legal basis to carry out the activities within the framework of a coordination case is Article 325(3) of the Treaty on the Functioning of the EU and Article 1(2) of Regulation 883/2013, whereas investigations are carried out under Article 5 of Regulation 883/2013. Before the entry into force of Regulation 883/2013, OLAF's competence for coordination case was defined in Article 1(2) of Regulation 1073/1999. Consequently, OLAF carries out investigative activities only in investigations, not in coordination cases, which are focused on OLAF's role to assist the national authorities of the Member States. Therefore, OLAF generally does not issue recommendations in coordination cases and has limited influence on the duration of such cases.

To clarify the impact of the opening of the 423 cases, more precisely the impact of the 225 investigations on OLAF's statistics, and to provide the SC with data to compare, OLAF has done an analysis based on two scenarios:

Scenario 1, real, in which the 423 cases were opened on 1 February 2012, therefore the 225 investigations are **included** in the statistics as reported in the OLAF Report 2012.

Scenario 2, hypothetical, in which none of the 423 cases has been opened. In this scenario, the 225 investigations are therefore **excluded** from the investigations opened. This scenario is based on the (extreme) assumption that none of the 225 investigations should have been opened.

¹⁸ See for example pages 18 and 22 of OLAF Report 2012 and page 17 of OLAF Report 2013.

The average duration presented below is calculated on the basis of the investigations closed and still open at the end of the reporting period¹⁹ in line with OLAF reporting since 2012.

Figure 1: **Impact of the 225 investigations out of the 423 cases on OLAF investigative statistics**

	2012		2013		2014	
	Included *	Excluded **	Included *	Excluded **	Included *	Excluded **
Average duration of investigations (in months)***	17.3	20.3	17.5	17.1	18.1	16.7
Number of investigations closed with recommendations	84	79	148	129	147	136
Number of investigations closed without recommendations	182	88	145	101	103	86
% of investigations closed with recommendations	32%	47%	51%	56%	59%	61%

* Included: the 225 investigations out of the 423 cases are included

** Excluded: the 225 investigations out of the 423 cases are excluded

*** Average duration of investigations closed during the period and on-going investigations at the end of the period

As presented in the above table, the opening of the 423 cases had an impact on two main OLAF performance indicators: (a) average duration of investigations and (b) percentage of investigations closed with recommendations.

a) Average duration of investigations

In 2012, by including the 225 investigations opened in February 2012, the average duration of investigations was reduced by three months, from 20.3 to 17.3 months. In 2013, by including the 225 investigations opened in February 2012, the average duration increased from 17.1 months to 17.5 months. The same tendency can be noted in 2014, when the average duration of OLAF investigations including the 225 investigations was 18.1 months, compared to 16.7 months if OLAF had not opened any of the 225 investigations. Therefore, the opening of the 225 investigations led to a decrease of the average duration of investigations in 2012, while in 2013 and 2014 it resulted in an increase.

b) Investigations closed with recommendations

The opening of the 225 investigations decreased the rate of investigations closed with recommendations in 2012, 2013 and 2014. Indeed, the percentage of investigations closed with recommendations in 2012 was 32% and would have been 47% if the 225 investigations would not have been opened. The percentage of investigations closed with recommendations would have been higher also for 2013 (56% vs. 51%) and for 2014 (61% vs. 59%) in the hypothetical case that the 225 investigations would not have been opened.

In short, as for the duration of investigations, the improvement in the performance indicator in 2012 has been largely offset by a deterioration of this performance indicator in the following two years. As for the ratio of investigations closed with recommendations, the Decision to open the cases has had a negative impact on this performance indicator in 2012 and the following years. Therefore, any suspicion that OLAF would have opened the 423 cases to improve its reported performance is without factual basis.

¹⁹ Until 2011, OLAF has calculated the average duration of its investigations on the basis of closed investigations only. In order to present a more authentic picture of its investigative performance, since 2012 the statistics on the average duration of investigation/coordination cases take into consideration all cases in OLAF, both closed and still open at the end of the reporting period. This was a managerial decision, to discourage investigators from keeping very old cases open so as not to worsen statistics.