

12 May 2016

OLAF's comments on the 2015 Activity Report of the OLAF Supervisory Committee

The OLAF Supervisory Committee (SC) formally transmitted its Activity Report for 2015 to the Commission, Council, European Parliament and European Court of Auditors on 19 April 2016. This is the fourth annual report of the current Committee. The report covers notably three Opinions: Opinion No 1/2015 *OLAF's Preliminary draft budget* of 5 May 2015, Opinion No 2/2015 *Legality check and review in OLAF* of 15 December 2015 and Opinion No 3/2015 *Opinion on the OLAF draft Investigation Policy Priorities for the year 2016* of 17 February 2016. OLAF's replies can be found on its website: http://ec.europa.eu/anti-fraud/about-us/supervisory-committee/exchanges-between-olaf-and-its-supervisory-committee_en

This document contains OLAF's main comments on the SC 2015 Activity Report.

General comments on the preparation and presentation of the SC Activity Report (SCAR) 2015

- The report covers observations of the SC related to events in 2015 and findings presented in the three Opinions adopted during the year, but also related to certain matters occurring in 2014 and 2016. The report contains factual errors and misinterpretations, which could have been identified and corrected if the SC had consulted OLAF prior to the publication of the report.
- The report was presented for the first time on 20 April 2016, during an OLAF lunchtime debate. The purpose of OLAF lunchtime debates is to inform OLAF staff and – as the name indicates – to allow for an open debate among OLAF staff. OLAF had not been informed by the Committee that representatives from other Institutions, such as the European Parliament or Council, had been invited by the SC and would participate. OLAF would like to ask the SC to address the Institutions in the appropriate fora.
- The year 2015 has been dedicated to the revision of the Working Arrangements between OLAF and the SC. During the year, several working meetings took place between OLAF's Director-General, the SC Chairman and their respective staff, where all the points of the Working Arrangements were discussed and agreed. The OLAF Director-General discussed the matter with the SC in a number of plenaries. Vice-President Georgieva has also been involved in the discussions and, under her guidance, agreement was reached on a majority of points, while three outstanding issues were jointly identified for consultation with the Legal Services of the three Institutions. Against this background, it is disappointing that the SC does not make more reference to these common efforts, as a sign of joint commitment to achieve progress, but rather chooses to highlight the difficulties and characterises the year as "far from ideal".

Conditions of exercise of the supervisory function

The main concern expressed in the report is the SC's lack of access to information and, in particular, to individual case files. In the foreword of the report, the SC Chairman mentions that *"The most urgent issue remains the Committee's access to information in OLAF which is currently so restricted that efficient supervision is impossible"*.

OLAF's comment:

OLAF has continued to keep the SC regularly informed of the Office's activities, implementation of its investigative function, and action taken by way of follow-up to investigation in line with the Regulation 883/2013 and the agreed Working Arrangements. In 2015, OLAF transmitted to the SC 622 documents with information on cases lasting more than 12 months. OLAF informed the Committee of 370 recommendations issued as a result of OLAF's investigations, and a further 88 instances in which information was transmitted to judicial authorities of the Member States. Other relevant documents were also transmitted to the SC, such as OLAF's mid-term report, guidelines on case selection, procedure on whistleblowing, information on OLAF's preliminary draft budget, information on complaints and OLAF's recommendations not followed.

In addition to the obligation of regular reporting, the SC has also received information upon request, including full access to case files in OLAF's management system. For the SC's work on specific issues, OLAF proposed to give access to random samples of relevant cases. During 2015, the SC had full access to more than 100 cases in OLAF's case management system¹ as a result of such samples. The reason for providing random samples of cases is that the systemic analysis of OLAF's investigative activities requires an analysis of several cases, not only one.

During 2015, the SC has been very active and, notably, produced three Opinions; it also finished work on other Opinions which have been included in its Activity Report 2014. As it is evident from these Opinions, and from OLAF's replies, the Office has provided the Committee with substantial information, allowing the SC to draw its conclusions. OLAF also asked the SC² in February 2015 to draft an Opinion on the collection of statistics on investigative performance in OLAF. The SC engaged in the analysis, several meetings between OLAF and the SC took place and extensive information was provided by OLAF for this purpose, most recently in July 2015. The SCAR 2015 does not contain any reference to this matter.

In **paragraph 1**, the SC mentions that the SC did not receive access to individual case files but only to a number of random samples of cases.

OLAF's comment:

During 2015, there were only two instances where the SC requested access to individual case files. In both instances, OLAF provided information addressing the concerns of the SC, and offered additional information on request, in line with the 3-step approach set out by the European Data Protection Officer (EDPS)³ and in line with the joint Working Arrangements. OLAF also specifically offered to grant access to the two requested case files, should the information provided not be sufficient. The

¹ 42 cases for which access was granted in 2015 and 86 cases for which access was granted in 2014 but lasted until 2015.

² On the basis of Article 15(1) subparagraph 3 of Regulation 883/2013

³ EDPS 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 (case 2007-0073)

https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Supervision/Priorchecks/Opinions/2007/07-10-04_OLAF_external_investigations_EN.pdf

SC did not follow-up on these offers.

The random samples of cases to which OLAF has given the SC access are comprised of individual OLAF cases. The cases are not hand-picked by the SC or OLAF, but randomly selected from a representative population in line with Article 15 of the Working Arrangements. The random samples have been drawn using IT tools and in the presence of the SC Secretariat staff.

In **paragraph 2**, the SC states that the OLAF Director-General chooses what information to be provided to the SC, while the SC considers that it should have "*independent access to information in order to ensure objective monitoring.*"

OLAF's comment:

The information sent to the SC is not at the discretion of the OLAF Director-General, but is provided in accordance with the provisions of the Regulation 883/2013 and the current Working Arrangements.

The Regulation makes a clear distinction between information sent in accordance with OLAF's duty of regular, automatic reporting on one side, and the access to further information upon request of the SC on the other side. OLAF has always complied with the Regulation and the agreed Working Arrangements and has regularly transmitted to the SC the information to which it is entitled to on an automatic basis. OLAF has also provided the SC with a substantial amount of additional information upon request. In line with Regulation 883/2013 and in compliance with data protection requirements, the SC's requests for further information must be duly justified.

Investigative independence

In **paragraphs 5 and 6**, the SC argues that it should have "*unrestricted access to all case files and case-related information which it considers necessary to perform its duties*" and since none of its requests for access to individual cases has been granted, it was not able to fulfil its duties, "*as regards the protection of OLAF's independence*". In **paragraph 9**, the SC concludes that it has not received from OLAF the information necessary to assess whether its investigative function has been conducted in full independence as required by the Regulation.

OLAF's comment:

The SC has in 2015 requested access only to two individual case files. As mentioned above, OLAF provided additional information in both instances and offered access to the case files, should the SC consider the information provided insufficient.

OLAF considers that the supervisory function of the SC entails an analysis of several cases rather than of one or two specific cases. This was also confirmed by the SC Chairman in its statement on the main points of the SCAR 2014: "*The role of the Supervisory Committee is not to judge the legality of individual acts in investigations but to monitor developments in the application of procedural guarantees.*"⁴ To enable the monitoring of such developments, OLAF has proposed to the SC random samples of individual cases. SC Opinions, such as *Legality check and review in OLAF*, are based on such samples as well as other information provided by OLAF. This demonstrates that the SC has had the information necessary to perform its duties at its disposal.

⁴ [Statement by the Chairman of the OLAF Supervisory Committee on the main points of the Supervisory Committee 2014 Annual Report: http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/scar_2014_chairman_statement.pdf](http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/scar_2014_chairman_statement.pdf)

As regards the investigative function of OLAF, this has always been executed in full independence as required by the Regulation. OLAF has informed the SC of any instances where the investigative independence has been threatened and will continue to do so.

In **paragraph 7**, the SC mentions that *"The OLAF DG did not inform the SC of any acts or omissions of any national authorities which might constitute a threat to OLAF's independence"*, although OLAF has signalled in information transmitted to the SC *"lack of cooperation on the part of some national authorities"*.

OLAF's comment:

It is not immediately clear to OLAF how the lack of cooperation of some national authorities can constitute a threat to OLAF's independence. OLAF's investigators may be confronted with lack of cooperation during the investigations and have sometimes signalled this to the SC as a reason for delays in an investigation (rather than as a threat to independence) but, as recognised by the SC in its Opinion 4/2014, *"OLAF was proactive in taking remedial measures to enhance cooperation with stakeholders during investigations in cases where slow/lack of cooperation was indicated"*.⁵

In **paragraph 8**, the SC mentions that *"the DG declared himself not to be in a position to provide information on the exact nature of the so-called «Clearing House» meetings between OLAF and the Commission"*.

OLAF's comment:

In June 2014 OLAF gave the SC information on the nature of the Clearing House meetings. However, as regards the organisational aspects, OLAF has referred the SC to the organiser of the meetings, *i.e.* the Commission. The Vice-President Georgieva has replied to the SC concerns. OLAF regularly meets with other institutions, not just the Commission, under similar arrangements.

In **paragraph 10**, the SC mentions that the OLAF Director-General *"alerted the SC to a possible threat to OLAF's independence due to statements of a Member of an EU Institution (the European Parliament)"*, but did not provide evidence in this regard.

OLAF's comment:

OLAF is not aware of such instances during the reporting year 2015. In 2014, OLAF informed the SC of statements by a Member of an Institution considered as threats to members of OLAF staff. The SC did not ask OLAF for further evidence and no follow up was given by the SC in this matter, as far as OLAF is aware.

Procedural guarantees and legality check

In **paragraph 16**, the SC makes reference to a specific complaint received by the SC *"that an OLAF investigation has been «invalidated» in its entirety by a national court for violating the procedural guarantees of the persons concerned."*

⁵SC Opinion No 4/2014 Control of the duration of investigations conducted by OLAF:
http://ec.europa.eu/anti-fraud/sites/antifraud/files/20150327_sc_opinion4_2014_duration_investigations_en.pdf

OLAF's comment:

Concerning this case, OLAF has already provided information to the SC and explained that the procedural guarantees applicable to OLAF investigations have been respected. OLAF has also suggested to the SC a meeting with the investigators in charge, an offer to which the SC has not yet replied.

An application related to measures taken by the Commission further to OLAF's recommendations is pending before the General Court of the EU. In these circumstances, OLAF notes that the statement of the SC tends to present the matter from the perspective of the complainant while the case is before the EU Courts. OLAF would question the timing of such a statement in light of the fact that the case is currently *sub judice* and that the French judgement referred to by the SC is not public. It is regrettable that the reference was included by the SC in its report without having made use of OLAF's offer to provide more information.

In general, national courts may have to rule on the admissibility of material provided by OLAF as evidence in the national procedure at hand. Conversely, it is a long established principle of EU law that the EU Courts have exclusive jurisdiction to rule on the validity of the acts of EU institutions. Being such an act, the OLAF final report was not – and could not be – declared invalid as such by the national court.

Legality check and review – SC Opinion No 2/2015 Legality check and review in OLAF

In **paragraphs 18** the SC summarises the information provided by OLAF for the SC Opinion ("*the SC requested and received access to a sample of 42 case files as well as 244 case-related documents from a sample of 60 other cases. The SC also conducted interviews with OLAF staff and received significant background documentation*"), while in **paragraph 19** the findings of the Opinion are highlighted.

OLAF's comment:

OLAF appreciates the positive approach of the SC during the preparation of this Opinion and the cooperation with OLAF. In relation to the recommendations issued by the SC, OLAF has already started taking measures to implement some of these. For example, OLAF has, in line with recommendation 5, developed an internal review digest to compile best practices for the benefit of reviewers and investigators.

Detailed comments on SC Opinion 2/2015 *Legality Check and Review in OLAF* are available on OLAF's website⁶.

Complaint procedure

In **paragraph 24** the SC mentions that it is not in a position to have an overview of the individual complaints concerning OLAF investigations since it only receives complaints lodged by third parties on the basis of the procedure on *complaints addressed to OLAF* published on the website⁷, and not other complaints, such as the ones addressed to the European Ombudsman or the EDPS.

⁶OLAF's response to the SC's Opinion 2/2015 *Legality Check and Review in OLAF*:

http://ec.europa.eu/anti-fraud/sites/antifraud/files/20160201_olaf_comments_sc_opinion2_2015_en.pdf

⁷http://ec.europa.eu/anti-fraud/olaf-and-you/complaints-on-olaf-investigations_en

OLAF's comment:

OLAF has, in 2014 and 2015, provided the SC with information on the complaints received by the Director-General, and thus addressed to OLAF, on the respect of procedural guarantees. These complaints would be relevant for the mandate of the SC as provided by Article 15(1) second subparagraph of Regulation 883/2013 which refers to "monitoring developments concerning the application of procedural guarantees". Complaints not addressed to OLAF, but to other specific competent bodies, are of a different nature. Not being the owner of such data and depending on the circumstances of the case, OLAF may not be in a position to provide the information to the SC or may not even have it at hand. It is not apparent that the SC has parallel competence to deal with matters investigated by - for instance - the European Ombudsman, nor that there is a need for such action. There could rather be a risk of duplication of efforts⁸.

Investigation Policy Priorities for the year 2016 - SC Opinion No 3/2015 on the OLAF draft Investigation Policy Priorities for the year 2016

In relation to the Investigation Policy Priorities (IPPs) for 2016, the SC mentions that the internal guidelines on case selection, which were not communicated to the SC prior to their adoption, do *"not reflect the importance of the IPPs in the selection process"*. Furthermore, *"the consultation of stakeholders (limited to 3 Commission spending Directorates-General and 1 agency) appears very limited and has not been subject to a formal Commission inter-service consultation"*. The SC concludes that it cannot consider that the IPPs for the year have been properly substantiated.

OLAF's comment:

OLAF's selection principles are established by Regulation 883/2013 and further described in the Guidelines for Investigation Procedures for OLAF staff on which the SC has been consulted in line with Article 17 (8) of the Regulation. The internal guidelines on case selection aim to provide more detailed and technical guidance to selectors on how to apply those selection principles.

The first step in the selection phase is to establish whether OLAF is competent to investigate. Once this is confirmed, the available information is examined in order to determine, in accordance with Article 5 of Regulation 883/2013, whether there is sufficient suspicion that there has been fraud, corruption, any other illegal activity affecting the financial interests of the Union, or serious wrongdoing by EU staff or a member of an institution. After establishing the existence of sufficient suspicion the OLAF selectors proceed to the analysis of the following criteria: proportionality, efficient use of investigative resources, subsidiarity and whether the information falls under the IPPs set by OLAF for the year. The final decision takes all the above criteria into account.

As regards the consultation of the stakeholders in the FPDNet of the Commission⁹, OLAF would like to point that, contrary to what the SC reports, all Commission services were involved and consulted. The three Directorates-General and one agency mentioned by the SC were not the only services consulted, but the only services who chose to reply in writing. In line with Article 17 (5) of Regulation 883/2013, the IPPs are determined by the OLAF Director-General under his statutory competence, and therefore, a fully-fledged inter-service consultation, which is a Commission tool to prepare its policies, would appear to be an inappropriate procedure. The Commission, as well as the other EU Institutions, are also consulted on the IPPs during the annual inter-institutional Exchange of Views

⁸ The European Ombudsman and the EDPS have even agreed on arrangements to avoid duplication if seized with the same matter: https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/PressNews/News/06-11-30_EO_EDPS_MoU_EN.pdf

⁹ The Fraud Prevention Network (FPDNet) is an inter-service working group comprised of anti-fraud contact points in all Commission services and established through the Commission Anti-Fraud Strategy in 2011.

and have given their opinions in this context. This is not mentioned in the Opinion of the SC, although representatives of the Committee participated in the Exchange of Views.

At the time of writing, the final adopted SC Opinion 3/2015 *on the OLAF draft Investigation Policy Priorities for the year 2016* has not been formally addressed to the OLAF Director-General as required by Article 15 (1) paragraph 3 Regulation 883/2013 and as is usual practice. OLAF has nevertheless provided its comments on the Opinion to the SC on 12 May 2016.

Duration of OLAF investigations

In **paragraph 32**, the SC considers that it has not received sufficient information to substantiate the improvement of internal monitoring tools for the duration of OLAF's investigations or the use of the statutory reports sent to the SC in this regard.

OLAF's comment:

As mentioned in reply to the SC Opinion 4/2014¹⁰, OLAF has developed tools to monitor and control the duration of its investigations and to manage the workload. OLAF senior and middle management receive every month statistical reports with extensive information drawn from OLAF's case management system, notably on the duration of investigations and on the workload. Other tools used for this purpose include regular meetings between investigators and managers and work plans. The use of the information provided to the SC as a tool for monitoring and controlling the duration of its investigations has been considered within OLAF. However, the current practices are proving to be efficient. OLAF has reduced the duration of its investigations in recent years despite an increased investigative activity.

In **paragraph 33**, the SC expresses concerns about the lack of sufficient factual information *"relating to elements that would normally allow the SC to check the potential existence of unjustified delays in the investigations."*

OLAF's comment:

OLAF informs the SC of the reasons and remedial measures envisaged to speed up investigations lasting more than 12 months as stipulated by Article 7(8) Regulation 883/2013. The Regulation is clear and does not leave room for interpretation on what additional case related information OLAF should provide the SC with. OLAF cannot systematically provide the SC with information on ongoing investigations beyond what is specifically outlined in the Regulation, unless requested by the SC to do so for specific cases. In accordance with Article 15(1) second paragraph of Regulation 883/2013, the mandate of the SC is to "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)" and not to check unjustified delays in individual investigations.

Control and management of the duration of OLAF's investigations by the DG

In **paragraphs 34 and 35**, the SC mentions a total of 476 reports received concerning investigations lasting more than 12 months and states that among these reports not all include information on the reasons and remedial measures envisaged to speed up investigations lasting more than 12 months.

¹⁰ OLAF's response to the SC's Opinion No 4/2014 [Control of the duration of investigations conducted by OLAF: http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_reply_sc_opinion_4_2014_en.pdf](http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_reply_sc_opinion_4_2014_en.pdf)

OLAF's comment:

From OLAF's calculations, in 2015 the Office has transmitted to the SC 622 documents with information on cases lasting more than 12 months.

The information transmitted to the SC is completed by around 130 investigators, handling investigations of differing natures, and covers hundreds of cases. It therefore cannot be tailor-made. OLAF is, however, committed to improving the information provided, also in terms of coherence.

In **paragraph 36**, the SC mentions that *"The OLAF DG informed the SC that he considers 24 months a «normal duration» for OLAF investigations"*.

OLAF's comment:

OLAF is not aware of the origin of this statement. OLAF has recognised that "over the years, more than half of OLAF investigations have lasted more than 12 months, this being the norm rather than the exception."¹¹ In fact, OLAF strives to keep the duration of its investigations reasonable and is systematically monitoring the percentage of ongoing investigations lasting more than 20 months¹².

In **paragraph 40**, the SC mentions its request for additional statistical information on the duration of investigations and OLAF's current lack of reply.

OLAF's comment:

It should be noted that OLAF has already suggested on 29 March 2016 to have a meeting to better understand the SC request, and subsequently the OLAF Director-General has asked for clarifications in writing on 7 April 2016. The SC has not yet replied to OLAF's proposals.

Follow-up to OLAF's recommendations

In **paragraph 42**, the SC mentions that it has not received *"information regarding cases for which recommendations made by the OLAF DG have not been followed."*

OLAF's comment:

This statement is factually incorrect. OLAF has reported to the SC on 5 June 2015¹³ on OLAF's recommendations not followed issued since October 2013. OLAF is currently preparing the reporting for 2015.

In **paragraph 44**, the SC mentions its engagement in a systemic analysis on the *"monitoring process and the follow-up given by national judicial authorities to these [OLAF's judicial] recommendations"* and that to date the relevant information received from OLAF is rather insufficient.

¹¹ See page 2 [OLAF's response to the SC's Opinion No 4/2014 Control of the duration of investigations conducted by OLAF: http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_reply_sc_opinion_4_2014_en.pdf](http://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_reply_sc_opinion_4_2014_en.pdf)

¹² http://ec.europa.eu/atwork/synthesis/amp/doc/olaf_mp_2016_en.pdf

¹³ Ares(2015)2362498 - 05/06/2015.

OLAF's comment:

OLAF is fully engaged in providing the SC with the information required for its analysis on the follow-up of judicial recommendations. In fact, several meetings have already taken place in Autumn 2015 and early 2016 between OLAF and the rapporteur and staff of the SC Secretariat. OLAF has also set up a working group on 18 February 2016 to be able to reply to the substantial requests of the SC and proposed on 25 February to agree on a sample of individual cases for full access, a proposal to which the SC has not yet replied.

Follow-up to SC's recommendations by OLAF

In **paragraphs 45 and 46**, the SC mentions that from the recommendations issued between 2012 and 2014 "*only nine recommendations out of fifty were fully implemented*" and expresses concerns about OLAF's feedback in this regard.

OLAF's comment:

OLAF has assessed and implemented as far as possible the SC recommendations and has reported to the SC extensively on several occasions. In its most recent report on the SC recommendations issued between 2012 and 2014 of 4 September 2015¹⁴, OLAF reported that 45 recommendations out of 50 have been implemented. When providing its assessment to the SC, relevant documentation has also been added. OLAF does not agree with the SC assessment.

Working methods and transparency

In **paragraphs 51 and 52**, the SC mentions that the SC Opinions are always discussed extensively with OLAF prior to their finalisation and that the SC has adopted a "*procedure on the adoption of opinions and reports.*"

OLAF's comment:

OLAF welcomes the announcement that the SC has developed procedures for the preparation and adoption of Opinions and Special Reports, which include consulting OLAF on the draft text. OLAF has provided comments (available on OLAF's website¹⁵) to the SC on their procedure.

Notably, OLAF would welcome a procedure similar to that used by other bodies such as the European Court of Auditors. This would include, in addition to the consultation on the draft text, an initial meeting to discuss the scope, purpose and the envisaged methodology of the Opinion or Special Report, the opportunity to discuss and confirm the preliminary findings at a technical level, an adversarial process and the opportunity to provide comments on the final text, as well as to have these final comments published together with the adopted SC Opinion or Special Report. These steps would facilitate the communication between OLAF and the SC, and make the process more efficient, effective and transparent. Similar steps would also be relevant for annual reports, if these reports, similar to the 2015 report, include information which has not been previously discussed with OLAF.

¹⁴ [OLAF report on the follow-up to the SC recommendations 2012-2015, sent to SC on 4 September 2015:](http://ec.europa.eu/anti-fraud/sites/antifraud/files/20150904_olaf_report_all_sc_recommendations_2012_2014_en.pdf)

http://ec.europa.eu/anti-fraud/sites/antifraud/files/20150904_olaf_report_all_sc_recommendations_2012_2014_en.pdf

¹⁵ http://ec.europa.eu/anti-fraud/about-us/supervisory-committee/exchanges-between-olaf-and-its-supervisory-committee_en#sc%20other