



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: SC Opinion No 2/2015 – Legality Check and Review in OLAF**

Dear Mr Pöysti,

Thank you for the Supervisory Committee Opinion on Legality Check and Review in OLAF, adopted on 15 December 2015.

Enclosed to this note you will find OLAF's comments on the Opinion. I appreciate the opportunity to provide our comments on the final version of the Opinion and the assurance that these will be transmitted to the Institutions.

Yours sincerely,

Giovanni Kessler

Encl: OLAF's comments on the SC Opinion 2/2015 – Legality Check and Review in OLAF

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## **OLAF's comments on the Supervisory Committee's Opinion 2/2015 on Legality check and review in OLAF**

The Supervisory Committee (SC) announced its intention to examine the review function of OLAF Unit 01 Investigation Selection and Review (ISRU) on 20 May 2014. The SC sent OLAF its Draft Opinion on *Legality Check and Review in OLAF* on 26 November 2015 to which OLAF provided initial comments on 9 December 2015. The final Opinion was adopted in the SC plenary of 15 December 2015 and transmitted to OLAF by note of 12 January 2016.

OLAF welcomes the SC Opinion and appreciates the cooperation of the SC during its preparation and the opportunity to provide comments to the Final Opinion before its transmission to the Institutions.

During the preparation of the Opinion OLAF has put at the disposal of the SC, as requested, the following:

- information on the review function of ISRU (provided by OLAF on 10 June 2014);
- background documentation and statistical information (provided by OLAF on 1 July 2014);
- copies of 84 ISRU opinions on legality checks and final review - comprising (1) the requests for investigative activities and review, (2) the opinions for those requests as well as final ISRU review opinions, (3) the subsequent decisions (provided by OLAF on 17 July 2014);
- full access to 42 case files in OLAF's case management system (32 cases in July 2014 and 10 cases in March 2015);
- replies to SC questionnaire (provided by OLAF on 14 October 2014);
- interviews granted by the staff of ISRU - six reviewers and the Head of Unit, seven investigators and Heads of Sector, as well as by all Heads of investigative Units (taking place on 29 September 2014, 20 October 2014 and 5 November 2014 respectively);
- human resources information (provided by OLAF on 17 August 2015)
- comments to the Draft Opinion on *Legality Check and Review in OLAF* (provided by OLAF on 9 December 2015).

The Opinion reflects the consultation process. However, it should be noted that over a year has passed since the SC started preparing its Opinion and OLAF began providing the subsequent explanations. The review and legality check in OLAF has further developed since that time. Therefore, the observations of the SC included in the Opinion are partly historical.

The Opinion focuses on examining the functioning of the review function of OLAF ISRU. To give a full and updated picture of this function, included below is a presentation of the legality check and review function which includes OLAF comments related to the SC Opinion.

## **1. Description of the review function**

### **1.1 Legal background**

As the need for a streamlined and efficient review mechanism in OLAF had arisen, in 2012 prior to the entry into force of Regulation 883/2013, the Office re-organised its working procedures and internal structures, putting in place a review function for the first time<sup>1</sup>.

The Instructions to Staff on Investigative Procedures of 1 February 2012 provided for the review of all final case reports, thereby introducing a systematic check of all investigations of OLAF once concluded. This increased quality control and governance over the investigative function exercised in full independence.

At the entry into force of Regulation 883/2013 and in accordance with Articles 17 (7)<sup>2</sup> and 17 (8) (c)<sup>3</sup> the Director-General had thus already put in place an internal advisory and control procedure, entrusted to the ISRU, as specified in the Guidelines on Investigation Procedures for OLAF Staff of 1 October 2013, under Article 12 (legality check during the investigation) and Articles 20 and 21 (final review and case closure).

### **1.2 Scope of the review activities**

As acknowledged by the SC in its Opinion, ISRU is tasked to carry out legality, necessity and proportionality control of the investigative activities in order to ensure the respect of the fundamental rights and procedural guarantees of the persons involved and of the national law of the Members States concerned.

ISRU carries out two different types of control depending on at which stage it intervenes:

- during the course of an investigation, an *ex ante* control of the legality, necessity and proportionality of the proposed investigative activities, before they are carried out;
- upon closure of an investigation, a final review of all the investigative activities conducted, in the form of an *ex post* control of the legality, necessity and proportionality of the investigative activities, together with the overall review of the Final Report (including the respect of the national law of the Members States concerned), the proposed closure decision, the proposed recommendations, as well as of all necessary documentation.

In both instances, ISRU subsequently formulates an advisory paper in the form of an Opinion for consideration by the Director-General. In practice, prior consultation with the investigation units takes place every time there are issues raising concerns, while a formal consultation procedure with the investigation directorate is foreseen before issuing a negative opinion<sup>4</sup>. As pointed out by the SC, the close cooperation between reviewers and the investigative units in such cases allow for an improvement in the investigative practice, ensuring compliance with the legal requirements and procedural guarantees.

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<sup>1</sup> To be noted that although the former "*magistrates*" unit had a certain role in a liaison with the judicial authorities on possible matters of implementation of judicial recommendations, it did not have a systematic responsibility to check the compliance of all case reports with requirements of procedural guarantees to improve compliance with all requirements under European Union and national law.

<sup>2</sup> Article 17(7) of Regulation (EU, EURATOM) No 883/2013 stipulates that the Director General shall put in place an internal advisory and control procedure, including a legality check, relating, inter alia to the respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Members States concerned, with particular reference to Article 11(2).

<sup>3</sup> Following Article 17(8) (c) of Regulation (EU, EURATOM) No 883/2013, the Director General shall adopt guidelines on investigation proceedings for the staff of the Office. Those guidelines shall be in accordance with this Regulation and shall cover, inter alia...(c) details on the internal advisory and control procedures, including the legality check.

<sup>4</sup>As foreseen under Article 21.4 of the Guidelines on Investigation Procedures for OLAF Staff.

In this context, with the aim of ensuring transparency, legal certainty and consistency, the Office has adopted a systematic and standardised approach to the review function in all its aspects. Emphasis has been placed on the adequate composition of the reviewers within ISRU as well as on the development of necessary working methods and tools.

### **1.3 Staff number and workload**

Knowledge covering different legal systems, as well as a multitude of languages, is deemed of primary importance for the effective composition of the reviewers' team within ISRU. OLAF welcomes the SC recognition that "*all the reviewers have relevant educational and professional backgrounds as well as a high level of expertise*". The Office takes the view that consistency and uniformity of practices throughout OLAF is vital and may be achieved only by a limited number of persons working closely together as a team.

OLAF would however point out that the reviewers' team is not conceived as a forum of prosecutors from the 28 Member States, but rather as a flexible and operational pool of legal experts who work in complementarity and ensure coherence and consistency of their practices. This model guarantees an optimal use of their experience, appropriate to the specific challenges, while drawing from available resources in OLAF. Increasing its size to include members from all Member States would not be an efficient use of resources.

As observed by the SC, the number of reviewers has varied from 2012 to date. Similarly over time reviewers have sometimes been tasked with selection cases depending on their availability and the needs of the Office. The involvement of the experienced reviewers in the selection process, in particular when serious selection cases are concerned, and/or the association with selectors in an advisory capacity, is a strength of the ISRU ensuring consistency, quality and efficient use of human resources at the very important opening stage of OLAF's investigations.

The skills, knowledge and versatility of the existing staff of the ISRU, combined with the possibility of consulting the OLAF Legal Advice Unit if needed, is sufficient for the proper functioning of OLAF's review function.

### **1.4 Procedures and work forms**

OLAF provided the SC with the "*starter kit*"<sup>5</sup> and work forms which the reviewers use and welcomes the recognition by the SC of the significant improvement in the work forms. The SC also had access to a significant sample of ISRU opinions on legality checks and final reviews.

When reflecting upon the practicalities of the formulation of the reviewers' opinions, in form and substance, the Office decided to promote the use of standard work forms.

Initially reviewers were instructed, on the grounds that the review and legality check process needed to be very swift, to fill in the work forms succinctly and elaborate in depth only in the event of a negative opinion.

However, this practice has changed over time. As experience grew within the Office, both the work forms and their content evolved accordingly. The drafting of comprehensive text on each and every point under scrutiny does not serve the requisite purpose of a swift review and legality check process. Nonetheless, the work form templates have been adjusted in such a way as to permit the insertion of reasoned comments on every aspect covered by the review where necessary. The reviewers thus provide more comprehensive explanations and argumentation on specific legal and procedural questions.

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<sup>5</sup> It should be noted that this has since been replaced with a completely updated "*Unit 0.1 Set of Working Tools*", comprising a collection of legal texts, all internal guidelines and relevant administrative cooperation agreements.

OLAF is of the opinion that in their current form the opinions contain concrete information and assessment of all fields covered by the control, in particular in relation to the respect of the procedural guarantees of the persons involved and the national law of the Member State concerned.

OLAF would like to note that striking the correct balance between the necessary swiftness of a response and having a quality output is a challenging process, but the benefits of the review mechanism as it has evolved over time are significant and its added value may even to some extent be measurable.

## **2. Added value of the review function**

### **2.1 General**

The Office has dedicated time and resources to optimising the design and practical functioning of the review function so that it may develop its full added value.

Overall the review function as described above constitutes an element of checks and balances for the Director-General and the Office as a whole. It allows the Director-General to make reasoned decisions taking into account the independent, unbiased opinions of legal experts who are not involved in the actual investigations.

The significant benefits of this internal advisory and control procedure are multiple and range from the improved overall quality and credibility of the outcome of OLAF investigations to the more efficient internal governance of the Office.

As opposed to an external legal review by a Court, the review mechanism

- allows the Office to benefit of an ex ante control in real time as regards the legality check of the investigative activities requiring the authorisation of the Director-General in the course of the investigation,
- ensures the overall quality and conformity of the investigative activities with applicable rules and improves the outcome of the investigations including the final case reports, decisions on closure and OLAF recommendations.

The reviewers also brings added value to the investigative function. ISRU exercises its responsibilities in an open dialogue with the investigative units, contributing thus to the development of coherent procedures, a consistent approach to recurrent issues, homogeneous interpretation of the legal framework and a culture of good practices within the Office.

### **2.2 Effectiveness of the legality check and review activities**

The control of the respect of national provisions concerning administrative and judicial proceedings is a primary task for the reviewers with a view to ensuring that the final case reports may constitute admissible, credible and valuable evidence in the course of administrative and criminal proceedings in the Member States concerned.

Reviewers check the respect of relevant provisions and principles under national law in as much as they may have an impact on the use of the OLAF investigative results in national proceedings and on the soundness of recommendations proposed for adoption to the Director-General.

As elaborated under point 1, the reviewers' knowledge of national legal systems covers the most relevant legal orders in the Member States. Specific country profiles prepared in the Office, together with the possibility of consulting the OLAF Legal Advice Unit if needed and the use of information made available by the European Judicial Network, can be utilised to assess a certain national legislation.

Finally, the transparency and systematic nature of the standards used in the exercise of the review function contribute to the aim of a full respect of the fundamental rights and

procedural guarantees of the persons involved in the interests of legal certainty and consistency of practices.

The review covers the check of the legality of the investigative activities carried out, relevant notification and information requirements, as well as the granting of the opportunity to comment on the facts concerning the person concerned.

The review function also serves to check compliance with data protection requirements, scrutinises the consistency of the conclusions in final reports with findings presented in accordance with investigative activities carried out and verifies whether the investigation has been conducted continuously, whether it has been carried out in compliance with relevant confidentiality requirements and whether a possible conflict of interest has been properly identified and addressed.

## 2.3 Performance

### (1) Presentation of statistical data<sup>6</sup>

Statistics allow the monitoring of the performance of the review function, as expressed in up to date facts and figures. During the preparation of the SC Opinion in 2014, OLAF did not have at its disposal performance figures for ISRU. However in 2015, OLAF has started to compile such data and the table below presents 2015 statistics on the review caseload: number of files processed, average duration and percentage of cases in which specific comments were made which have led to a need for further discussion with the investigative unit.

<b>JANUARY-DECEMBER 2015</b>	REVIEWS	AVERAGE DURATION (working days)	PERCENTAGE OF CASES LEADING TO DISCUSSIONS AND MODIFICATION OF DOCUMENTS
Legality checks	<b>424</b>	<b>3.8</b>	<b>5%</b>
Final Reports	<b>345</b>	<b>10.0</b>	<b>25%</b>

### (2) Analysis

The above data show a considerable workload. However, specific planning has meanwhile been put in place to cope with this. This is reflected in the figures on duration of review and legality check. The speed of processing of requests largely depends on the level of difficulties of each file.

## 2.4 Impact on the work of the Office

The review function has contributed to an improved level of internal governance and the application of high quality standards.

OLAF received only a limited number of complaints regarding an alleged violation of procedural guarantees (five in 2014 and four in 2015). While this cannot be regarded as a direct consequence of the efficient review procedure, the Office considers that the transparent, consistent and reasoned review check has contributed to it.

Similarly, it is expected that the number of Court actions against OLAF will diminish over time also on the account of the contribution of the reviewers to the overall quality of the investigations.

<sup>6</sup> Figures are based on internal ISRU records and have an indicative value. Cases where discussions with investigative units resulted only in minor delays were not taken into account.

The review function contributes significantly to the overall performance of the Office, promoting consistency of practices and quality. Ultimately this is expected to further enhance the credibility of OLAF in the Member States.

### **3. Conclusions**

#### **3.1 Progress achieved**

The Office welcomes the positive feedback of the SC, in particular to the extent it acknowledges the independence and swiftness of the review function, the quality and expertise of reviewers, the motivation of the opinions and also the evolution of the review function over time.

While the SC acknowledges that ISRU took into account the use of the experience accumulated in the past few years and the lessons learned, it has to be noted that the fact finding exercise of the SC took place in the late 2014 early 2015; therefore the SC has not been able to take into account the latest developments and the current situation.

The Office considers that the opening of a dialogue with the SC about the review function as well as the taking into account of the comments provided by the investigative units in the context of the fact finding exercise of the SC has certainly encouraged ISRU to further improve its practices:

- As a result of the dialogue with the SC, in the past year statistical data has been collected and analysed for the first time in order to capture the measurable aspects of the review function;
- The reviewers, taking into consideration and reflecting upon the remarks of the investigation units in the same context, make a sincere effort on one hand to respond to the investigative needs more swiftly, on the other hand to better explain the working method, the added value and the impact of the review function on the overall quality of their work and the work of the whole Office.

On this note, the exchange of opinions and the taking into consideration of the essence of the recommendations of the SC will enable OLAF to further improve its internal procedures and take the next steps into the future.

#### **3.2 Future steps**

ISRU intends to consolidate the positive results and the high quality standards already achieved and further improve and streamline the practices within the Office. The experience gained will enable OLAF to further strengthen the review procedures.

In accordance with suggestions made by the SC, OLAF intends to collect best practices as identified in the review process and provide for appropriate internal communication. This will consolidate the investigative doctrine implementing Regulation 883/2013 on any questions which require further interpretation and clarification of procedures.

The review function being independent and covering all legal and procedural aspects of the investigations has already achieved high quality standards and can become a pillar of legal certainty and a point of reference for the whole Office in the foreseeable future.