OLAF's reply to the Supervisory Committee Opinion No 1/2021 on OLAF's recommendations not followed by the relevant authorities

1. General comments

It is in the interest of OLAF and the EU to improve the follow-up given to OLAF's recommendations, as a means to ensure better protection of the EU budget. OLAF therefore welcomes the Opinion of the Supervisory Committee (SC) on OLAF's recommendations not followed by the relevant authorities as a valuable contribution to that process.

While shedding light on certain weaknesses, the Opinion of the SC also acknowledges a number of good practices and positive developments. As regards the latter, OLAF has recently taken significant steps to improve the follow-up given to its recommendations.

a) Cooperation with the recipients of OLAF's recommendations

Since Director-General Itälä took office in August 2018, OLAF has further intensified cooperation with the recipients of its recommendations. In most cases, OLAF consults the recipients on the recommendations before these are issued. This practice, which could not be reflected in the sample of investigations analysed by the SC, increases acceptance and buy-in on the recipients' part and will contribute to more effective follow-up. Moreover, as far as judicial recommendations are concerned and as acknowledged by the SC, OLAF has put much effort in working closely with the national judicial authorities in a number of Member States. It is a frequent good practice that OLAF and national judicial authorities work in parallel already during an OLAF investigation and coordinate their operational activities. OLAF puts a great emphasis on reinforcing this kind of cooperation, often formalised through Administrative Cooperation Arrangements signed with its national counterparts, and will continue promoting early cooperation with national authorities as much as possible.

b) Creation of the Task Force Monitoring

In 2020, OLAF created a dedicated Task Force Monitoring, combining a broad spectrum of skills and expertise from all directorates and units involved in the different aspects of monitoring. The Task Force is streamlining monitoring methodologies, coordinating data collection and analysing monitoring results, which will eventually help evaluate OLAF's performance. Despite having been in place only for a short time, it has already been producing substantial results. As a priority, the Task Force is currently dealing with the follow-up to OLAF's financial recommendations, in cooperation with DG BUDG, in order to identify any systemic reasons for the non-implementation or partial implementation of recommendations. In the near future, this analysis, conducted in exchange with our stakeholders, will feed into enhanced corporate guidance on recoveries. From here, the focus of the Task Force is already being expanded to include OLAF's administrative recommendations, which aim, inter alia, at helping the EU bodies and Member States to strengthen their internal control systems in the fight against fraud when an OLAF investigation uncovers a potential weakness. Over time, the work of the Task Force will increasingly extend also to OLAF's judicial and disciplinary recommendations.

c) Amended OLAF Regulation

The amended OLAF Regulation[1], which entered into force on 17 January 2021, contains new relevant provisions strengthening the obligations of national authorities to inform and report to OLAF at different stages of its investigative activity, especially at the monitoring stage. Notably, Member

[1] Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations.

States are now required to notify to OLAF relevant national rules on admissibility of evidence in criminal proceedings and to send to OLAF the final decisions taken by national courts. In addition, there is now the possibility for OLAF to set a time limit for national authorities to report on follow-up actions taken further to its recommendations, applicable to both internal and external investigations. OLAF will strive to ensure, through cooperation with the relevant authorities, the proper application of these new provisions.

d) Financial monitoring: reporting on the amounts actually recovered

As regards financial recommendations, OLAF has already broadened its monitoring approach to include the amounts actually recovered based on its recommendations. A stocktaking exercise, collecting data also on these amounts, has been launched and coordinated by the Task Force Monitoring, and results will be made public once confirmed.

Ensuring closer monitoring of the follow-up given to OLAF recommendations and providing assistance to the authorities concerned requires significant efforts and resources. OLAF therefore has some reservations as to the feasibility of certain findings and recommendations of the SC, which, in OLAF's view, may not take sufficient account of OLAF's scarce resources[2]. In addition, certain weaknesses identified by the SC are inherent in OLAF's administrative mandate, which does not provide for the same tools that judicial authorities have at their disposal. Building a strong criminal case therefore cannot be the primary objective of an OLAF investigation – rather, the Office protects the Union's financial interests and informs national authorities about any tangible suspicion of fraud and other criminal offences, which is then for them to follow up at national level. Finally, as also commented by the SC, the situation is about to change when the European Public Prosecutor's Office (EPPO) takes up its operations, as ensuring a more robust fight against fraud by means of criminal law was the purpose of creating the EPPO and of harmonising Member States' legislation through the PIF Directive.

Last but not least, OLAF takes note of the fact that the SC did not question the validity or soundness of the decisions taken by responsible authorities in the context of their follow-up of OLAF's final reports (paragraph 20). In this regard, OLAF welcomes the acknowledgement of the SC of the importance of the actions taken by the recipients of OLAF's recommendations ("*Follow-up steps taken by the recipient of a final case report are as important as OLAF's investigation itself", paragraph 35*). Findings and recommendations need to be seen within the perspective of the scope to which the SC decided to limit its analysis.

2. Specific comments

Recommendation 1:

The Director-General of OLAF should reinforce the existing structure of his Office, including the new Task Force Monitoring, with experts in judicial, financial and disciplinary follow-up.

To encourage competent authorities to cooperate and ensure OLAF's recommendations are followed, the Director General of OLAF should ensure that the above mentioned reinforced structure should be responsible for:
a) providing the necessary legal or investigative assistance to the relevant authorities;
b) maintaining regular contacts with the appropriate EU institutions and national authorities;
c) closely monitoring the overall implementation process for OLAF's recommendation by the competent authorities.

[2] The number of OLAF staff has decreased from 435 in 2013 to 329 in 2021.

Working proactively with OLAF's stakeholders on the implementation of OLAF recommendations is indeed an important pathway to a better follow-up of the results of OLAF's investigations. This is why, for all recommendations that require a definition of the scope, OLAF has made it its practice to consult the recipient's services before a recommendation is issued (not applicable for disciplinary recommendations that simply suggest the opening of a disciplinary procedure by the recipient). Such contacts provide an opportunity to anticipate potential difficulties in the implementation phase, to discuss possible solutions and to adapt the wording of the recommendation where appropriate. As for judicial recommendations, OLAF has in recent years enhanced its cooperation with the judicial authorities on the follow-up to its recommendations. Judicial recommendations distinguish between the suggestion to open a judicial procedure or to add OLAF's Final Report to an already on-going procedure at national level. OLAF's practice to work in parallel or in close contact with national judicial authorities already during an OLAF investigation, and to coordinate operational activities, facilitates the follow-up of OLAF's judicial recommendations.

As a further step in that direction, in June 2020 the Director-General of OLAF established the Task Force Monitoring as a temporary structure of OLAF's organisation. The Task Force Monitoring currently works in a partially decentralised form, allowing for a combination of a broad spectrum of skills and experience from all directorates, investigative and investigation support units (including the legal advice unit) experienced in the different aspects of monitoring. OLAF therefore considers that the Task Force Monitoring already includes the appropriate expertise. In this context, OLAF cannot agree with the SC's reference to investigators' lack of monitoring knowledge (paragraph 37). OLAF's investigators are carefully selected; they have extensive legal and financial knowledge and many other pertinent skills, and a thorough knowledge of the case in question. Therefore, when it comes to monitoring, knowing the reasons behind the content of a specific recommendation is essential knowledge for the appropriate follow-up of any recommendations.

That said, OLAF welcomes the SC's support for additional resources to be deployed in the Task Force Monitoring (paragraph 16). If additional resources were made available to OLAF, reinforcing the Task Force's core team and partially relieving the investigators from monitoring tasks other than providing the background knowledge of the recommendation(s) concerned, so that they could return to devote the freed proportion of their working time to investigations, would indeed be a desirable course of action.

Already with the Task Force in its current, temporary, form, OLAF has visibly intensified its contacts with stakeholders further, as suggested as a course of action in sub-point b) of the SC's recommendation above. Closely monitoring the process of implementing each of OLAF's recommendations or assisting the recipients in this process as a generalised practice, as suggested in sub-points c) and a) of the SC's recommendation, is done as extensively as possible. It would, however, require a significant amount of additional resources for OLAF and/or – for financial and administrative recommendations – to enable what would further enhance the effectiveness of OLAF's monitoring: a much stronger involvement of other central services of the Commission, other IBOAs and national authorities. Especially with regard to judicial recommendations, one should also not take for granted the openness of independent national authorities to such assistance. In addition, ensuring that OLAF's assistance is welcome in all Member States requires considerable resources and efforts that are currently made by investigators instead of investing them into advancing ongoing investigations.

Recommendation 2:

The Director-General of OLAF should try to strengthen further the obligations on competent authorities to report to OLAF on their actions – especially to inform OLAF of the reasoning behind

their decision and forward a copy of the decision itself. Through cooperation with these authorities, the Director-General should ensure that Article 11 of the OLAF Regulation becomes an effective tool for following-up OLAF's recommendations.

As mentioned by the SC (paragraph 41), the amended Regulation 883/2013 contains new relevant provisions strengthening the obligation of national authorities to inform and report to OLAF at different stages of its investigative activity, especially in the monitoring phase.

It should be noted that it is not in the remit of the OLAF Director-General to strengthen further the reporting obligations of the relevant authorities beyond what is stated in the Regulation. That task is the exclusive prerogative of the co-legislators. However, OLAF is indeed striving to ensure, through cooperation with the competent authorities, the proper application of the new provisions introduced by the amended Regulation 883/2013.

Recommendation 3:

The Director-General of OLAF should improve the current system for reporting to the Committee, informing it of any decision not followed as soon as OLAF becomes aware of it. This should be made possible thanks to the new automatic reporting possibilities to be built into the OCM.

The legal basis for OLAF's reporting obligation to the SC is Article 17(5) of Regulation 883/2013. This requires "*periodic*" reporting "*of cases in which the recommendations made by the Director General have not been followed*". The current approach of reporting, once a year, about the cases in question meets the requirements of Article 17(5). As such, there is no obligation for OLAF to go further in its reporting, and to report to the SC "as soon as it becomes aware" that recommendations have not been followed.

Nevertheless, in the interest of providing the SC with the maximum information to conduct its tasks, in the context of the draft Working Arrangements, OLAF and the SC agreed that the SC will have direct access to all closed investigations (whether in monitoring or not), and thus receive direct access to key data on judicial and financial monitoring. In addition, "*pursuant to Chapter II, OLAF will share with the SC any tool that gives targeted access to data on the follow-up of OLAF's recommendations as soon as such tool becomes operational*" (draft Working Arrangements, Article 7(2)).

OLAF considers that this agreement addresses the SC recommendation. In practical terms, access by the SC to the reporting module of OLAF's Content Management System (OCM) is part of the 2021 project roadmap. The exact time will depend on project priorities, i.e. system changes due to the revised Regulation 883.

Recommendation 4:

When the investigation identifies a potential criminal offence, the Director-General of OLAF should ensure that the investigators and OLAF's review unit conduct a thorough analysis of the national procedural requirements for criminal proceedings. This analysis should, as a minimum, include consideration of (i) jurisdiction and territorial competence; (ii) the objective element of a crime committed (actus reus); (iii) the intention to commit a crime (means rea); and (iv) the statute of limitation. In particular, the Committee recommends that the Director-General:

A - ensures this analysis is part of the workforms used by investigators when preparing the final case reports;

B - promotes early cooperation with the judicial authorities in the Member States concerned and avoids the duplication of investigative activities; and
C - sends, where feasible, an interim report to the authorities in the Member State concerned 18 months before the statutory limitation period expires. This interim report would be equivalent to the final report and it would not contain any recommendations; if OLAF believes that such a report cannot be sent before the statutory limitation expires, this should be justified in the case file
D - ensures that the case file contains an analysis of any potential statute of limitation carried out as early as possible once the relevant facts have been ascertained (ideally at the moment a likely criminal offence is identified);
E - intensifies cooperation and communication with those national authorities where OLAF's final case reports are systematically dismissed on procedural grounds or because the evidence gathered is considered insufficient. Where necessary, OLAF should make proposals for legislative changes to address these issues.

In OLAF's view, the recommendation describes good practices, which, however, do not appear proportionate in view of OLAF's scarce resources and administrative mandate. In addition, one should bear in mind that once the European Public Prosecutor's Office (EPPO) becomes operational, OLAF's judicial recommendations will in principle concern only the Member States not participating in the EPPO.

As regards **sub-recommendation A**, it should be noted that the OLAF final report always covers the question of jurisdiction, the objective elements of the possible offences involved and the statute of limitations, where relevant. However, as also acknowledged by the SC, OLAF is an administrative body and cannot apply the same investigative powers as a prosecutor or the law enforcement services. Thus, it is unrealistic to expect that OLAF produces final reports that include all elements and aspects of a criminal offence, elements that would need to be present in an indictment. An administrative investigative body cannot be expected to provide criminal law conclusions as it does not have the powers and competence to carry out criminal law investigations. In this regard, especially in connection to a higher standard of proof, see also OLAF's reply to point 50.

Also, OLAF does not have sufficient resources that could be deployed to build expertise in every Member State's criminal and procedural laws. However, what might be possible is for OLAF to accumulate over time such expertise strictly focussed on non-EPPO countries.

Another important argument to consider is whether, in practice, the lack of follow-up to OLAF recommendations is attributable, in whole or part, to an insufficient standard of proof at all. In this regard, we refer also the European Court of Auditors' Special Report 1/2019, paragraph 101[3]. As a result, OLAF is pro-actively working with its sources to discover potential allegations as early as possible.

[3] "*Our interviews with representatives from national authorities, independent academics and EU institutions (including OLAF) indicate that the main reason for dismissal is not lack of evidence, but rather that cases are too old. It is not necessarily that the time limit for a given case has already expired or is about to expire, but rather that it is already years since the alleged offence was committed.*

This is not to say that OLAF's investigations take too long. In most cases, OLAF conducts administrative investigations after the act in question has been detected and reported. It is therefore dependent on the timeliness of the information it receives in particular from IBOAs and Member States. Furthermore, OLAF's administrative investigation then needs to be followed by a further criminal investigation in the Member State concerned."

As to early cooperation with national authorities (**sub-recommendation B**), OLAF fully agrees with the SC recommendation. OLAF is already working closely with national judicial authorities in a number of Member States (as also acknowledged by the SC under paragraph 61) and will continue to do so whenever possible. In addition, equally important is the reinforced cooperation with EUROJUST, the upcoming intense cooperation with the EPPO, and actively extended cooperation with Europol.

As regards **sub-recommendation C** (and paragraph 55), Article 12(1) and (2) of Regulation 883/2013 appears to permit the type of communication envisaged here, subject to the application of Articles 10 and 11. However, as regards the requirement that "*this interim report would be equivalent to the final report*", it should be noted that such equivalence is not possible for legal reasons. From a legal point of view, Regulation 883/2013 treats final reports and their annexes differently from other information transmitted to the competent authorities in the course of OLAF's investigative activity. Indeed, final reports fall within Article 11(3) and (4) of the Regulation, whereas other case-related information transmitted whilst the investigation is still open falls within Article 12(1) and (2). In the framework of its cooperation with national authorities, OLAF considers the appropriate way to transmit information to them in the course of its investigations on a case-by-case basis.

As regards **sub-recommendation D**, OLAF confirms that the statute of limitations is analysed whenever this is relevant for the case, i.e. when the facts date back in time a certain number of years, and thus it is appropriate to check whether prescription could have intervened or is likely to intervene during the investigation. The analysis takes place once all factual information and evidence is obtained. The OLAF investigation units are familiar with the pertinent national laws, they have access to different data banks, including the mini-country profiles updated in-house, and they can request the support of the legal unit wherever necessary.

The final reports refer to the provisions on the statute of limitations only when the suspected offences are in whole or part time-barred. When this is not the case, the final reports do not mention the prescription (even when the check of statute of limitations has been done) as it does not appear relevant.

As regards **sub-recommendation E**, OLAF has not identified any Member States where its judicial recommendations are systematically dismissed and would point out the limited statistical records in this respect. However, OLAF's Director-General has set up the dedicated Task Force Monitoring, to monitor and analyse the follow-up of its investigations. This is crucial not only to measure OLAF's impact, but also to help evaluate and, where possible, improve the way the Office works with the Member States to ensure an effective response to fraud. Moreover, the amended OLAF Regulation provides that the Inter-institutional Exchanges of Views with OLAF may specifically address any horizontal and systemic issues encountered in the follow-up to the Office's final investigation reports. Thematic trainings and exchange of best practices could also be organised. An example was OLAF's Protection of the EU Financial Interests Conference (known as "Law Enforcement Conference") organised in 2019.

Recommendation 5:

The Director-General of OLAF should also provide information in OLAF's annual report about the real outcome of the financial recommendations and of the amounts of money actually recovered by the competent authority.

The Director-General of OLAF should also ensure, through timely cooperation with the IBOAs, that the financial recommendations issued are in line with the applicable legal and contractual framework and comply with the principle of proportionality.

Following the Commission's commitment, inter alia in its 2019 Anti-Fraud Strategy[4], to enhance the monitoring of the follow-up given to OLAF recommendations by the Commission and its executive agencies in order to obtain a comprehensive picture of the situation and to identify the systemic reasons for under-implementation of recommendations, OLAF, in cooperation with DG BUDG, has undertaken in 2020 and 2021 a comprehensive analysis of the follow-up given to OLAF's financial recommendations. The analysis also covers the amounts of funds actually recovered by the competent authorities. The results of that analysis are currently subject to further Commission-internal consultation processes involving the Commission's Corporate Management Board (CMB), which coordinates corporate aspects of the fight against fraud in the Commission[5].

For the time being, OLAF is therefore not in a position to provide this information in its annual report. Nevertheless, it should be noted that the SC has been informed of the results of the analysis for the CMB and will be timely informed of any further developments.

As regards the second part of the SC recommendation (compliance of financial recommendations with the legal framework, including the principle of proportionality), OLAF is fully committed to the relevant standards when formulating financial recommendations. OLAF's Director-General has intensified cooperation with IBOAs at multiple levels. Both OLAF's policy of pre-consulting spending services before issuing financial recommendations to them and a thorough analysis of the follow-up to recommendations by the Task Force Monitoring contribute to optimising OLAF's recommendation practice.

At the same time, it should be noted that a margin of interpretation is inherent to the concept of proportionality. In addition, the IBOAs remain independent in relation to the follow-up action to take following the transmission of OLAF's financial recommendations and may therefore come to different conclusions as to the compliance with the principle of proportionality in specific cases. For these reasons, compliance with the principle of proportionality can sometimes be a moving target and will be difficult to "ensure" in all circumstances.

Recommendation 6:

The Director-General of OLAF should inform the Committee of all the administrative recommendations which have not been followed by the authority concerned. The Director-General of OLAF should ensure that the new case management system will enable compliance with these recommendations to be monitored.

While administrative monitoring has not been prioritised in the past, OLAF is now endeavouring to maximise the effectiveness and transparency of its work also in this area. In particular, the Task Force Monitoring is preparing to take stock of administrative recommendations issued in the past and their follow-up. The scope of this exercise is determined in accordance with the principles of effectiveness and efficiency. Reporting on the implementation of administrative recommendations, including to the SC, could realistically start at some point in 2022, i.e. following this stocktaking

[4] Commission Anti-Fraud Strategy COM(2019)196 and Action plan SWD(2019)170, see in particular actions number 9 and 60.

[5] See Article 2(1), first sub-paragraph, last bullet point, of Commission Decision C (2018) 7706 final on the Corporate Management Board of 21 November 2018.

exercise. Administrative recommendations will be monitored on a regular basis in the future. A dedicated module in OLAF's Content Management System is in the planning and scheduled for 2022.

Moreover, to strengthen the effectiveness of OLAF's administrative recommendations and their follow-up, OLAF is close to completing new rules on how to draft and how to monitor such recommendations. The Drafting Instructions clarify the potential scope and typology of administrative recommendations; they are complemented by work forms to be used by the investigative units, which will help maximise the clarity and pertinence of recommendations. The Monitoring Guidelines define a short reporting period of six months for feedback from the recipients of administrative recommendations, which can be shortened even further, and provide a structured framework for OLAF's interaction with those stakeholders.

(Executive summary)

- **Point 1 under "three main weaknesses"** on working proactively with OLAF's stakeholders on the implementation of OLAF recommendations - please see the reply to Recommendation 1.
- **Point 2 under "three main weaknesses"** – The SC on several occasions implies that the quality of OLAF's reports is the reason why the authorities concerned rarely conduct further activities unless they already have a parallel investigation on the same case. While the quality of OLAF's final reports is undoubtedly important for the subsequent follow-up, one should not exclude other reasons that go beyond OLAF's control.
- **Point 3 under "three main weaknesses"** – When the SC refers to a gap in the standards of proof between OLAF final reports and the expectations of Member States' judicial authorities, it should be borne in mind that OLAF's investigative mandate is an administrative one. OLAF's primary mission is to protect the Union's financial interests, not to conduct criminal prosecution. However, where an OLAF investigation finds sufficient grounds for suspecting a criminal offence, national authorities may investigate further, which can then lead to an indictment or to dismissal of the case. Please also see the comment on paragraph 50.
- **Proposal to review the current system of monitoring procedures** – please see the reply to Recommendation 1.
- **Proposal to improve the current reporting –** please see the reply to Recommendation 3.
- **Proposal to establish timely cooperation with judicial authorities** – please see the reply to Recommendation 4, sub-recommendation B.
- **Proposal to report annually the amounts recovered following OLAF's financial recommendations** – please see the reply to Recommendation 5.
- **Proposal to guarantee the financial recommendations are in line with the principle of proportionality** – please see the reply to Recommendation 5.
- **Proposal to establish uniform and homogenous administrative and penal standards to protect the fundamental rights and procedural guarantees of persons concerned, and to strengthen the admissibility of evidence** – please see the comments under paragraphs 48-50.

(Introduction)

- **Paragraph 3:** The percentage referred to by the SC (36%) does not come from the **last** OLAF report (which is the 2019 OLAF Report, available at https://ec.europa.eu/anti-fraud/about-us/reports/olaf-report_en), but from the 2018 OLAF Report. Since OLAF's last report (2019)

mentions a slight improvement for the period 2015 - 2019 (39%), it is not fully correct to state that "*the indictment rate is continually declining each year*".

- **Paragraph 4:** As regards establishing a timely cooperation with the relevant authorities, please see the reply to Recommendation 4, sub-recommendation B. When it comes to taking all necessary investigative steps during an investigation and anticipating and addressing any future adverse issues arising from the criminal procedure at national level, as further recommended by the SC, it should be noted that the judicial/criminal relevance of a case is not always evident from the beginning of the investigation. Introducing such a condition/rule for every case would further complicate the investigative process.
- **Paragraph 5** – please see the comment to paragraph 50.
- **Paragraph 7** – OLAF does not initiate criminal investigations, only the competent judicial authorities can do so. Therefore, it is not fully correct to say that "*criminal investigations will be initiated directly by European Prosecutors instead of OLAF*".

(Methodology)

- **Paragraph 13** – OLAF notes that OLAF's previous practice of not collecting information regarding the actual amounts recovered was in line with OLAF's financial monitoring guidelines (currently under revision)[6]. Therefore, as regards financial monitoring, it is not correct to say that OLAF is not consistent with its own internal rules. As regards judicial follow-up, OLAF's practice in the past years has been to monitor judicial recommendations until the stage of the indictment/dismissal. In this respect, OLAF is in the process of reviewing its Guidelines on judicial monitoring, adapting them to the new applicable legal framework, notably Article 11(2), fourth subparagraph, imposing on Member States an obligation to send to OLAF, upon request, the final national court decisions. In this context, subject to the circumstances of the cases concerned, available resources and the future cooperation of the EPPO, OLAF will consider whether to re-instate the monitoring of post-indictment decisions for analysis purposes. Please see also the comment on Footnote 39.
- **Paragraph 16** – OLAF welcomes the SC support and the acknowledgement of the need to obtain additional resources for the Task Force Monitoring to be able to effectively carry out its tasks.
- **Paragraph 19** – Please see the replies to Recommendations 1 and 4. See also comment under paragraph 13. The Task Force Monitoring is currently reviewing OLAF's Guidelines on judicial monitoring.

(OLAF's recommendations not followed - in figures)

- **Paragraphs 25 and 26** – OLAF notes that under the hypothesis of a continuously declining indictment rate, that decline should have been even more pronounced in statistics for the last five instead of the last seven years. The fact that this was not the case, but that instead the indictment rate for the last five years actually increased, casts doubts on this hypothesis.
- **Footnote 20** – OLAF assumes that reference was meant to be made to table 7 and not Figure 7.

[6] Extending OLAF's monitoring beyond the establishment of amounts to be recovered to the final outcome in terms of actual recovery by the recipients of financial recommendations is the cornerstone of that revision. Furthermore, OLAF's revised Monitoring Guidelines should take full account of the results of the stocktaking of financial recommendations issued since 2012, conducted in 2020, and the ensuing exchange of views among DG BUDG, the spending services and OLAF, which is ongoing. The revision is expected to be completed latest at the beginning of 2022.

- **Paragraph 27** – OLAF notes that figures based on the replies received in just one calendar year are naturally subject to statistical fluctuation, depending on the cohort of cases finalised in previous years.
- **Paragraph 30** – OLAF cannot fully agree with the statement that "*the conclusions in that study regretfully appear not to have led to any further follow-up or had an impact in the way OLAF conducts its investigations"*. As pointed out in the study's conclusion, it provided further support to the EPPO project and fed into the evaluation of Regulation 883/2013; the revised Regulation provides for a number of improvements. Furthermore, the study underlined the need for more dialogue with the Member States, already frequently sought by OLAF. The work of OLAF's new Task Force Monitoring will further broaden the analytical base for such dialogue and for a continuous evaluation of OLAF's investigative activities.

(OLAF monitoring procedure)

- **Paragraph 35** – On OLAF's part, judicial monitoring certainly is highly important for improving the follow-up given to its recommendations and the effectiveness of its investigative function. However, the successful implementation of its recommendations depends on a number of heterogeneous factors. In particular, according to the existing legal framework, it is the sole competence of Member States' authorities to decide, independently and in line with the different margins of discretion granted by national law and internal prosecution policies, what action (if any) to take following the receipt of OLAF's judicial recommendations.
- **Paragraph 36** - All the steps referred to under paragraph 36 are already covered by OLAF's monitoring process and will be further developed by the Task Force Monitoring, within the limits of available resources (please see the reply to Recommendation 1).
- **Paragraph 37** – In the context of the 2012 reorganisation, maintaining dedicated follow-up teams was deemed incompatible with a constantly decreasing number of staff and OLAF's reinforced focus on investigative activities, also in line with what was requested by the SC at the time. While assigning monitoring tasks to the investigators added to their workload, disbanding the follow-up teams freed up posts for the investigative units. The statement made in that context in the SC's 2012 Annual Activity Report and referred to by the SC's Opinion, according to which investigators "*generally will not have the specific knowledge (legal, linguistic) and status to provide assistance to national authorities in the judicial follow-up or even to monitor it effectively*.", was not supported by concrete evidence at the time.
- **Paragraph 38** – The implied causal link between partially unsatisfactory monitoring results and the design of OLAF's monitoring procedures is not fully substantiated. It should be noted that the Task Force Monitoring is based on a concept of distributing work in the most efficient way, leaving case-related monitoring tasks with investigators but supporting them through specialised advice in the domains of IT and legal affairs and ensuring general coordination and streamlining of the whole monitoring process by the Task Force Monitoring core team. This concept cannot be invoked as an argument against a strong involvement of investigators in monitoring. OLAF's pool of investigators offers a broad spectrum of skills and knowledge as requested by the SC. Please also see the reply to Recommendation 1.
- **Footnote 30** – In addition to the staff cuts mentioned by the SC (from 435 to 389 between 2013 and 2018), the number of OLAF staff has further decreased since 2018, to 329 in 2021. In 2022, should there be no reinforcements, that number is expected to go further down to 322. In addition, OLAF has lost administrative credits for external staff (*interimaires*, Seconded National Experts and Contract Agents) in a dramatic way over the last years. The total budget for external staff went down from 2,592,000 EUR in 2016 to 2,349,000 EUR in 2022. OLAF's loss of

administrative credits corresponds to 14 external staff members. Further additional cuts were proposed for OLAF by the Commission in 2021.

- **Paragraph 39** – While OLAF agrees that the high number of recommendations not being followed most likely represents a loss for the EU budget, the claim that re-establishing dedicated follow-up teams would be cost-effective cannot be substantiated by OLAF's experience. OLAF would be grateful to receive and discuss a detailed evaluation of the respective costs and benefits of OLAF's current approach and that recommended by the SC.
- **Paragraphs 40 –** The Task Force Monitoring is already extending its analytical work as recommended by the SC. Please see also the reply to Recommendation 1.

(Competent authority reporting to OLAF)

- **Paragraphs 43-44** – Please see the reply to recommendation 2.

(OLAF reporting to the SC)

- **Paragraph 46 –** see the reply to Recommendation 3.

(Judicial recommendation)

- **Paragraph 47 –** please see the comment on paragraph 25. The conclusion that lower indictment rates point to lower conviction rates appears not to be supported by the reasoning as it stands.
- **Footnote 39 –** OLAF notes that capping the monitoring of judicial recommendations at the indictment stage was part of OLAF's measures to adapt to shrinking resources. It is questionable whether the additional workload of following all cases until the final outcome of the criminal procedure (which takes several years, especially in case of appeals) would be justified. Arguably, the judicial authority's decision whether to indict or dismiss a case is an even better (as more direct) indicator on the value of the OLAF investigation.
- **Paragraph 48 –** The conclusion that the lack of a strong monitoring procedure affects the rate of implementation seems not to be sufficiently substantiated.

(Administrative versus criminal investigations: standards on procedural guarantees and admissibility of evidence)

- **Paragraph 50 –** As mentioned by the SC (paragraph 49), OLAF emphasises that "the OLAF Regulation clearly confers on OLAF the power to conduct administrative investigations", where the "beyond reasonable doubt" standard does not apply. It should be noted that there is no requirement for OLAF to draft its final reports to meet a higher standard of proof but solely an obligation resulting from the CJEU case-law for OLAF to respect the duty of diligence (T-399/17, Dalli v Commission, para. 200), which OLAF highly respects. This duty, which is part of the right to a good administration, requires OLAF to examine carefully and impartially all the relevant facts of the case. It must conduct investigations with the greatest possible diligence in order to dispel the doubts which may exist and to clarify the situation (C-337/15 P, Staelen v Ombudsman, para. 114); this latter case concerns the Ombudsman but the principle applies as well to OLAF. As a result, regardless of whether the national follow-up may be administrative or criminal in nature, OLAF is required, by virtue of the duty of diligence, to properly describe the factual circumstances concerning sufficiently founded suspicions of fraud, corruption or illegal activity. In addition, the reference to a 'higher standard of proof' is vague; in the absence of a definition by the legislator or even a commonly agreed set of principles applicable to criminal

proceedings, it remains uncertain what higher standards is OLAF to apply precisely. The admissibility of the final report will depend on national laws, which differ quite widely from one another.

- **Paragraph 51** – As mentioned by the SC, the amended Regulation 883/2013 addresses in several ways the issue of procedural guarantees, and brings novelties both in terms of an increased level of guarantees and of available controls. In particular, the new Regulation provides for additional guarantees in the context of on-the-spot checks, and information on applicable guarantees at the start of the check (Article 3); introduces a right to access to the final report by the person concerned under the conditions of Article 10(3); sets up a Controller of procedural guarantees (Articles 9a and 9b); and extends the right of access to information by the SC (Article 15(1)). The new provisions complement the current safeguards in Regulation 883/2013 and bring the level of guarantees to high standards in the area of administrative investigations. In addition, Article 12e(3) requires OLAF and the EPPO to ensure the application of the procedural safeguards laid down by the EPPO Regulation when performing supporting measures requested by the EPPO.

  Nonetheless, the SC stresses the need for OLAF to "apply high standards of procedural guarantees". In this respect, it should be noted that the legislation does not – and should not – make OLAF as a body conducting purely administrative investigations generally subject to the procedural guarantees of criminal law. OLAF conducts its investigations based on powers of administrative law (which do not include the coercive powers typical of law enforcement). Moreover, the revised Regulation 883/2013 maintains the rule that OLAF reports shall constitute admissible evidence in criminal proceedings in Member States in the same way and under the same conditions as administrative reports of national administrative inspectors. This rule makes OLAF evidence subject to any restrictions of national law that apply to administrative authorities, regardless of the standards applied by OLAF. This will be the case even in the one instance where the revised OLAF Regulation makes criminal law standards relevant to an OLAF investigation: the new rule in Article 12f that – when OLAF performs support measures at the request of the EPPO – the EPPO and OLAF shall cooperate to ensure that the procedural guarantees of the EPPO Regulation are observed. OLAF is already in discussions with the EPPO on how to implement this rule.

  In any event, as indicated in paragraph 52, in the cases where recommendations were not followed, the issue was not the procedural standards applied by OLAF.

- **Paragraph 52** – Moreover, the fact that "*in none of these cases did a national authority signal a breach of the fundamental rights or procedural guarantees as a reason to dismiss the case*" does not necessarily lead to the conclusion that the standards of proof constitute the main obstacle to better follow-up, which OLAF has to overcome if it wants to increase the rate of compliance with its judicial recommendations. See also the reply to Recommendation 4.

- **Paragraph 54 -** OLAF emphasises that Unit 01, through its the Review function, is responsible for the legality checks and the final review of the closing package in line with OLAF's mandate and resources. In addition, OLAF's legal advice unit provides legal support to the investigators during the whole cycle of investigations, including in the monitoring phase. While compliance with the national legislation of the Member States concerned is ensured by the investigation unit and falls under the control of unit 01, one has to bear in mind that ultimately this is the responsibility of the national prosecutor who will receive the recommendation. Needless to say that in the event that an OLAF recommendation is not followed by the prosecutor, this does not mean that the recommendation should not have been issued or that the analysis was not appropriate. It is

well known that at the national level not all pleas and recommendations are followed either. For example, a prosecutor can prosecute or even plead for the guilt of a person and the court can acquit, or a prosecutor can recommend/support that a certain legal provision is applicable while the Court can decide otherwise and vice-versa. In these instances, the conclusion that the prosecutor did not carry out a proper legal analysis is not warranted. Rather, this should be regarded as a normal and regular occurrence in the great variety of criminal cases, which may be assessed in different ways by different actors.

(Early, timely cooperation with national authorities)

- **Paragraph 55 -** Early and timely cooperation with national authorities is indeed beneficial for both sides. Close coordination between national authorities and OLAF is therefore considered as good practice in OLAF and, as also stated in the 2019 OLAF Report, in a bid to improve cooperation and increase the indictment rate, OLAF has been working even more closely with national judicial authorities in a number of Member States. It is OLAF's current practice that national judiciary is contacted:
  - when a parallel judicial procedure exists or might exist
  - if there are indications for a criminal offence or substantiated findings that a criminal offence might have happened and whenever urgent measures in this regard are needed (i.e. due to the period of limitations or the need for safeguarding of evidence, etc.).
- **Paragraph 58** – as also indicated in OLAF's reply to the ECA's Special Report No 01/2019, the period that has elapsed since the alleged offence was committed is not only linked to the duration of OLAF's investigations, which has decreased continuously over the past years, but also to the detection of the fraud, the timing when it was communicated to OLAF and the time when the national prosecutor finally acted on OLAF's recommendation.

(Lacking/insufficient evidence)

- **Paragraph 62 -** Member States' judicial authorities are independent. Nonetheless, OLAF continues to work at better understanding the reasons why national judiciaries sometimes dismiss a number of the cases submitted by the Office. Each judiciary has the possibility to do initial verifications after receiving the OLAF report. Reasons why it might consider an administrative case not worthy of a criminal procedure may not necessarily be linked to the quality of OLAF's investigation and findings.

  Also, as mentioned in OLAF's analysis of Member States follow up to OLAF's judicial recommendations from 2015, it could be that some cases for which the official reason for dismissal was "lack of or insufficient evidence" were actually dismissed for reasons of low priority. In practice, dismissals due to "low priority" appear to be more frequent than the statistics suggest, as in a number of cases low priority is not provided as the explicit reason, but could only be indirectly inferred from the motivation by the national authorities to OLAF: For example, if OLAF provides evidence for a crime, which the prosecutor does not consider admissible in trial, while the prosecutor at the same time does not carry out the necessary investigative activities to collect admissible evidence, the case may be dismissed for reasons of insufficient evidence, even though dismissal may be effectively due to a low priority treatment of the case. It is not possible for OLAF to collect information providing a realistic picture in this respect as the decisions depend on national criminal authorities.
- **Paragraph 63** - Due to OLAF's administrative mandate, OLAF's Final Report cannot necessarily be expected to constitute a sufficient basis for an indictment, as the SC is implying throughout this section. Instead, OLAF's investigations should aim to demonstrate a tangible suspicion of

criminal wrongdoing, which then leads national authorities "to conduct complementary activities", i.e. to investigate further and potentially eventually indict.

- **Paragraphs 64 and 65** – As mentioned above, despite OLAF's considerable investigative efforts, its limited investigation powers and practical possibilities mean that conclusive evidence of a criminal offence cannot always be collected. Therefore, important elements of evidence of fraud, such as proof of the payment of bribes, the individual responsibilities of the persons concerned, or the *mens rea*, may not be obtained. In addition, OLAF's final reports are not expected to constitute a sufficient basis for an indictment. As regards the sentence "if *OLAF had had in place proper follow-up teams, it could have known in advance that its reports, in some cases, fell short of the minimum burden of proof*", it should be noted that even when OLAF is aware that the outcome of its investigation may not meet the minimum burden of proof in national law, OLAF still finds it imperative to send the report and recommendations to the national prosecutor allowing him/her to take the investigation further and uncover the elements that the OLAF administrative investigation may not have uncovered. Instead, OLAF could also choose to transmit judicial recommendations in fewer cases, for example only in cases in which there is a certainty of prosecution. If this were the case, OLAF's judicial recommendations would have 100 per cent success rate. However, OLAF is not driven by statistics but rather an approach which serves justice.
- **Paragraph 66 –** OLAF does not share the SC's conclusions concerning Case 41. In OLAF's view, all possible efforts were made to identify the individuals responsible for the actions mentioned, and the detailed final report shows it. In the final report, it was explained that documents relating to the implementation of the project presented different signatures. The report also referred to the checks done at the Municipality and contacts made with the mayor, who provided further documentation and explanations. Ultimately, it appears that the forgery of signature and further fraud were well substantiated by evidence collected by OLAF. The final report results were very detailed, making reference also to various activities that should have been implemented in the framework of the project (with the related documentation attached).
- **Paragraph 67 -** As regards **sub-point 1**, OLAF notes that this is already the practice. All relevant documents, such as reports from on the spot checks (OTSC)/interviews, documentation collected (e.g. invoices, project documentation, replies to the opportunities to comment) are duly attached to the final reports and provided to the judicial authorities (copies). As to the "original", OLAF usually does not provide the original, either because, when collecting documents from the economic operators, OLAF mainly does not acquire originals, but rather copies; or because, when it comes to the OTSC or other reports, OLAF has to keep the original in the OLAF archives. Having said this, it should be noted that sometimes certain documents (mentioned and referred to in a footnote of the final report) are not provided immediately with the final report, but will then be provided at the judicial authority's request. An example would be when such documents originate from a criminal investigation under another judicial authority. In such cases, OLAF asks this other judicial authority for the permission to provide the requested documentation to the judicial authority to which the recommendation is addressed.

  As regards **sub-point 3 (also in relation to paragraph 69)**, please see the reply to Recommendation 4. Nevertheless, OLAF wishes to emphasise that currently, and without prejudice to comments on specific cases, whenever possible within its administrative mandate and powers, OLAF makes efforts to substantiate the potential criminal liability aspect. In general, to this purpose OLAF works in close cooperation with the law enforcement and judicial authorities, in order to acquire good quality information, and is assisted by the police and AFCOS authorities during the OTSC.

(No criminal offence)

- **Paragraph 69** – OLAF believes that following the adoption of the PIF Directive[7] and its transposition in the national legislations there might be less of such issues. In this regard, the definitions in Articles 3 and 4 of the PIF Directive could potentially help. Particularly with regard to the definitions of 'active' and 'passive' corruption, the Directive represents an important step forward in comparison with the previous legal framework under the 1995 PIF Convention which, although it contained similar wording, did not entail the requirement of transposition in national law as the PIF Directive now does.

(Statute of limitations)

- **Paragraphs 70/74** – OLAF is of the view that Article 12 of the PIF Directive could improve the current situation by requiring Member States to provide for 'sufficient' limitation periods for PIF offences. Although the Directive does not set a fixed limitation period, it has the advantage that Member States must make the applicable limitation period clear in their transposing legislation. In this regard, even if the periods differ across Member States, it should in theory be easier for investigators to be aware of them and of the circumstances that could give rise to the interruption or suspension of the period.
- **Footnote 81 -** In case No 36, there were no alleged irregularities related to the implementation and the utilisation of projects after March 2017. Therefore, without a suspicion, no investigation could be conducted. Nevertheless, OLAF stated it was ready to re-open the case should potential allegations emerge.

(Procedural grounds)

- **Paragraphs 77/78 -** The point is based on the notion that OLAF, when it conducts its investigation, has to proceed on the basis of national law. This is not necessarily the case as already demonstrated by the case T-48/16, Sigma Orionis v Commission. This case law has now been codified in the amended OLAF Regulation: the revised Article 3 makes it clear that OLAF will conduct checks in accordance with Union law (Regulation 883/2013 and, to the extent not covered by the latter, Regulation 2185/1996), and will not itself apply national law requirements. National law will only intervene when the economic operator resists, and the assistance of the national competent authorities is necessary; in that case, the national authorities will follow their national procedural law when providing the assistance.

  There may be an argument to be made that OLAF should, to the extent possible and within the resources available, seek to facilitate the admissibility of the final report in cases where a criminal follow-up is envisaged and also to make clear, in the final report, the factual elements which could support a prosecution in national law. As explained in OLAF's reply to paragraph 67 above, such an approach already exists in the investigation units. Strictly speaking, an examination of the procedural steps under national law is not one of the requirements for a final report under Article 11. If investigators have doubts about the application of a procedural step under national law by OLAF, they may enter into contact with the AFCOS pursuant to Article 3(4) of Regulation 883/2013. The new Article 12a of the amended Regulation 883/2013 strengthens the role of the AFCOS in this respect. The may also discuss with national judicial authorities to see which support can be given. Given the detailed and fast-changing nature of national

[7] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law

procedural law, the AFCOS contacts will be in a better position to advise on procedure, both substantively and from a practical point of view, than OLAF staff members.

(Financial recommendations)

- ***Paragraph 80*** – See OLAF's comment under paragraph 13. In addition, OLAF's Task Force Monitoring recently carried out a stocktaking exercise, with the aim to retrospectively monitor implementation and collect information on the amounts actually recovered for financial recommendations issued since 2012.
- ***Paragraph 81*** - OLAF strongly disagrees with this statement. In OLAF's view, the extent to which actual recovery will be successful depends on multiple factors outside OLAF's control (e.g. recipient's legal assessment, recovery practice and speed of action, debtor's solvency and willingness to cooperate) and is therefore not a suitable indicator of OLAF's performance. That said, OLAF acknowledges a public interest in information on the amounts actually recovered, which is why OLAF has extended the scope of its monitoring activities to actual recovery.
- **Paragraph 85/Footnote 89-** For Case No 18 at least, OLAF cannot agree with this assessment. It should be noted that (1) the investigation was opened upon an allegation received from DG DEVCO, (2) OLAF's final report explicitly refers to the principle of proportionality and (3) there was at least a possibility for the recommendation to be implemented by DG DEVCO liaising with the concerned Contracting Authority.

(Administrative recommendations)

- **Paragraph 94 –** Please see OLAF's reply to Recommendation 6.

(Impact of creating the EPPO)

- **Paragraph 96 –** The revision of the OLAF Regulation has been completed and the amended Regulation entered into force on 17 January 2021.
- **Paragraphs 99 and 100** - The suggestion of possible misuse by the EPPO of the applicable legal framework seems inappropriate as it is based on the assumption that the guarantees of criminal proceedings shall not apply when OLAF supports the EPPO. As explained in OLAF's reply to paragraph 51, a new rule in Article 12f will require that – when OLAF performs support measures at the request of the EPPO – the EPPO and OLAF shall cooperate to ensure that the procedural guarantees of the EPPO Regulation are observed. Moreover, the rule on admissibility mentioned above (admissibility as evidence of OLAF reports shall follow the same rules applicable to administrative reports of national administrative inspectors) will apply to any evidence collected by OLAF in the context of an EPPO request for support. This will limit the EPPO's reliance on OLAF for any activity entailing collection of evidence in those Member States where the evidence collected by administrative bodies cannot be used in subsequent criminal proceedings.
- **Paragraph 101** – see the reply to paragraph 51.