



The Director-General

Brussels

**Note for the attention of Mr Johan DENOLF,
Chairman of the OLAF Supervisory Committee**

Via the Secretariat of the Supervisory Committee

**Subject: Reply to the Supervisory Committee's Opinion No 2/2014 on
"Case Selection in OLAF"**

Thank you for transmitting the Supervisory Committee's Opinion No 2/2014 on "Case selection in OLAF".

Given the importance of the Investigation Selection and Review Unit, as well as of the selection procedure, and also considering the time and the effort that the Supervisory Committee has invested in this Opinion, I would have appreciated having more than eight working days to analyse the recommendations made and to provide our response. I regret that this was not the case.

As you are certainly aware, as a matter of transparency and completeness, it is of paramount importance that the Institutions receive the reply of OLAF together with the Supervisory Committee's Opinion.

I take this opportunity to underline once again that OLAF would prefer to be shown Opinions in their draft stage so to be able to provide comments before their adoption and publication. I strongly believe that such approach would improve the quality of Opinions as it would allow for the correction of possible factual errors and the clarification of any misunderstanding that the draft Opinions might contain.

You will find attached OLAF's reply to the present Opinion. However, given the very limited time granted to OLAF to comment, I reserve the right to make further comments if necessary.



Giovanni KESSLER

Enclosure: 1

General remarks

In its Opinion No 2/2014 the Supervisory Committee (SC) presents its analysis of the selection process in OLAF and of the dedicated unit. The SC makes twelve recommendations to OLAF to further improve the functioning of this process.

To set the analysis and the recommendations in their context, OLAF considers it appropriate to give a general description of the objectives of the selection procedure and of the results that OLAF has achieved since its introduction.

The process of selecting cases for investigation has been centralised in a single unit since 1 February 2012. Prior to that date, investigative units had performed this task.

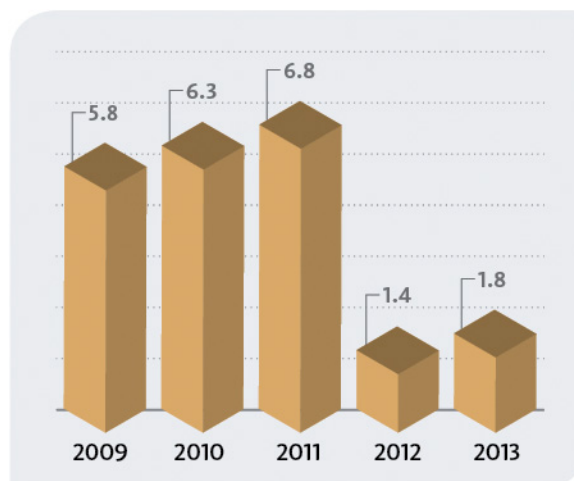
The centralisation of the selection process enables a uniform approach towards the assessment of information of possible investigative interest and towards the interpretation of the criteria adopted as references for drafting the opinion to the Director-General on whether a case should be opened or dismissed.

Centralising the selection process in one unit contributes to competent tutoring and mentoring to newcomers; to focused training in order to cope proactively with the specific needs of the selection phase; and to the efficient sharing of experience and knowledge in this specific domain.

The Investigation Selection and Review Unit (the "ISRU" or OLAF Unit 01), offers a clearer relationship with the source of information, as it represents a single contact point for keeping contact with informants.

Considerable efforts were made by OLAF on reducing the overall duration of the selection phase in the last two years, with excellent results in 2013, confirming the trend of 2012 (see graph 1). In 2013, the first complete reporting year since the reorganisation, OLAF succeeded in maintaining the selection phase at 1.8 months, despite the higher volume and complexity of incoming information. This duration is below the target of "no longer than two months" put forward in OLAF's Management Plan.

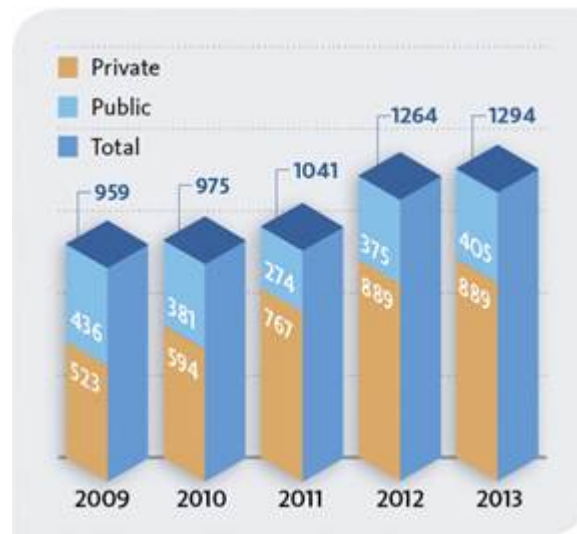
Graph 1: Average duration of case selection phase



* The average for 2012 was calculated for 11 months, following the reform of 1 February 2012

As already mentioned, OLAF managed to reduce the average duration of the selection phase while the volume of incoming information has increased (see graph 2).

Graph 2: Incoming information by year and by source



As stated above, before the creation of the ISRU, the “assessment” stage was carried out within the investigative units. The “assessment of initial information”, carried out under the former OLAF Manual of instructions, was making reference only to the “source reliability” and the “probability of information being accurate”. The assessment was mainly conducted in an operationally oriented perspective.

Since the setting up of ISRU and the OLAF reorganisation, the following benefits have been achieved:

- A wider guarantee of consistency, following a selection process articulated in several formal steps, embedded also in a template designed to encompass all relevant issues (competency, sufficiency of the information, reliability of the source, credibility of the allegation, proportionality, subsidiarity/added value, efficient use of resources, special priority criteria) and providing an enriched and exhaustive analysis;
- A higher level of transparency and objectivity of the whole investigative process, since the analyses carried out by the selector in a separate unit, other than the investigative one, represent further layers of control and a different perspective for looking at the same allegations;
- An enhanced coherence as in fact, before the OLAF reorganisation, only the investigator and its Head of Unit and the Board were involved in the investigative process. At present, the selector, the Head of Sector, the Head of the ISRU and the Director-General give contributions to the investigative process, in addition to those provided later in the process by the investigator, the Head of Sector and the Head of the Investigative Unit.
- An increased efficiency and effectiveness of the investigative decision-making process. The number of finalised selections and the correspondent number of decisions has greatly increased.

OLAF's replies to individual recommendations

Recommendation 1

Improve the resources allocated to the ISRU

OLAF should take appropriate measures to ensure that ISRU has at its disposal sufficient and adequate resources to carry out its selection tasks.

In particular, OLAF should:

- a) Increase the number of selectors with investigative experience;**
- b) Apply the principle of specialization of selectors more rigorously;**
- c) Ensure that the selectors have the appropriate (legal, linguistic and sectorial) expertise and provide them with sufficient training;**
- d) Improve the functioning of the FNS, in order to allow it to cope with the upload of documents of greater size;**
- e) Adopt proper procedures for dealing with whistle-blowers.**

It should be noted that OLAF has experienced, like other Commission services, staff cuts in recent years, despite an ever growing workload. OLAF's management has repeatedly raised the question of the lack of resources, with the SC, the Commission and the other Institutions. Nevertheless, OLAF has prioritised the ISRU, devoting the adequate resources, in a situation of general scarcity of resources.

a) The ISRU comprises selectors of various backgrounds - not only former OLAF investigators - covering large areas of expertise. This composition is aimed at achieving a good balance between specialisation, background and languages. In this respect, the ISRU has recently recruited (in 2013) staff from the main spending DGs of the EU Commission (DG AGRI, DG REGIO), internal financial services (DG BUDG) and intelligence services (EUROPOL). These new recruits have further contributed to achieving a well-balanced mix of specific competences in the use of data-bases, knowledge of financial flows and expertise in operational/investigative analysis. It is to be noted that, given the number of available investigators, a transfer of investigative resources to the ISRU, as suggested in the SC Opinion, would deprive the investigative directorates of their own specialised staff.

Moreover, all Heads of Sector of the ISRU have investigative experience and provide advice on a continuous basis to the selectors.

b) The selectors are specialised. Three sectors at the ISRU were introduced in October 2013. The selection activity is organised into three subject areas: "EU staff, direct expenditure, external aid and new financial instruments", "Customs, tobacco and counterfeiting" and "Structural funds and agricultural expenditure".

The allocation of cases to selectors in terms of sector, subject matter and complexity of the case, always takes into account the selector's particular background and professional experience, among other factors. Entrusting selectors with cases outside their sector happens only occasionally and in duly justified situations. The linguistic skills are one of

several factors taken into consideration at the time of the recruitment and attribution of cases.

c) As stated above (under a) and b)), the selectors have the appropriate expertise and, when needed, they can rely on the Heads of Sector and Head of Unit's advice.

OLAF is fully committed to the training of its staff. The ISRU staff regularly undergoes training which is specifically adapted to their needs. At present all ISRU staff have benefited from training on databases and open sources, and further training activities will be carried out in the future.

OLAF disagrees with the assumption that the limited use of references to the relevant sectorial legal instruments is a "*clear indicator that the appropriate legal knowledge is either missing or not being sufficiently applied within the unit*"¹. Once OLAF's competence is determined under Regulation (EU, Euratom) 883/2013, no detailed reference to the legal sectorial basis is required for the Director-General to take a decision. Only where specific consideration is to be given to particular aspects, the relevant legal reference is further detailed in the opinion.

d) OLAF is aware of and is currently addressing the problems with the Fraud Notification System (FNS), notably through a new contract for maintenance. Both the character and the size limit of the FNS will be increased in the new release expected at the end of April 2014. In particular, the character limit will be raised to 10000 characters; the file size limit will be raised to 20 MB and it will be possible to attach more than one file at a time.

e) In dealing with whistle-blowers, OLAF complies with the Staff Regulations and the Commission's Guidelines on Whistleblowing (SEC(2012)679final) of December 2012). According to the procedure in place experienced, dedicated staff is given the task of interacting with whistle-blowers. OLAF will further consider the need for additional internal guidelines for dealing with cases of whistle-blowing.

Recommendation 2:

Separate structurally the selectors from the reviewers

OLAF should place the selectors in an organisational structure separate from the reviewers. OLAF should also reduce, as much as possible, the number of cases for selection allocated to the reviewers.

Furthermore, OLAF could consider either decentralising the selection function to the investigative Directorates, or introducing a rotation system whereby investigators from each investigation unit are allocated, for a period of time, to the ISRU.

As explained in the reply to Recommendation 1 b) above, the newly established organisational structure of the ISRU (selectors are grouped in three sectors), clearly separates reviewers from selectors. Since the establishment of this new structure, reviewers are entrusted with selections only in exceptional cases, in order to make best use of the existing resources.

¹ Paragraph 34 of Opinion No 2/2014

Decentralising the selection function to the investigative directorates is contrary to the objectives of the OLAF reform, which aimed to achieve greater coherence and consistence in the selection process and to allow the investigative units to focus on their core task.

Introducing a rotation system whereby investigators from each investigative unit are allocated for a period of time to the ISRU would deprive the investigative directorates of their own specialised staff, pose problems with the reallocation of the workload of these investigators and be disruptive to the continuity of the investigations which have to be conducted without unjustified delays. OLAF will nevertheless consider the feasibility of such a rotation system.

Recommendation 3:

Improve the assessment of the criterion "OLAF's competence to act"

OLAF should require the selectors:

- a) to better explain the concrete illegal or irregular activities to which the allegations refer and the way in which they affect the financial interests of the EU;**
- b) to make systematically reference to the relevant legal instruments.**

In addition, OLAF could also consider compensating for the lack of sufficient legal expertise by the introduction of appropriate training courses and procedures for consultations with OLAF's Legal Advice Unit.

The opinions of the ISRU do not show inconsistencies with regard to the definition of OLAF's competence to act, nor have revealed a lack of clarity with regard to the identification and definition of the alleged illegal or irregular activities under examination.

Bearing this in mind:

- a) The analysis and definition of the alleged irregular and/or illegal acts together with a reference to the respective financial instrument or source of funding is made on a systematic basis in the opinions of the ISRU. Such opinions thus specify the existence or lack of OLAF's competence to act upon allegations referring to matters involving the EU budget. Equally, an analysis of the alleged wrongdoing and justification for the existence or lack of a potentially serious matter related to the discharge of professional duties is performed each time when a case involves allegations of internal nature.
- b) The relevant legal basis for the opening or dismissal of cases is always mentioned in the Decision of the Director-General.

The ISRU possesses sufficient capacity in terms of legal expertise. Reviewers are lawyers and former magistrates, and their legal expertise is also used for internal advice. Moreover, the OLAF's Legal Advice Unit and also the Legal Service of the Commission are consulted every time that the particularities of a case require it.

As mentioned also in the reply to the Recommendation 1 c), OLAF regularly organises appropriate training courses and will continue to do so in the future.

Recommendation 4:

Further develop and clarify parameters for evaluating the "sufficiency of information"

OLAF should establish a list of concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions.

The parameters for evaluating the "sufficiency of information" are enumerated in the form adopted for the "opinion on opening decision" and the ISRU always provides the necessary justification. OLAF is nevertheless open to consider the SC's advice on these parameters, with the view to present them in an even more structured way.

Furthermore OLAF will consider the need to establish a concrete list of indicators to build on the criteria already used for assessing the reliability of the source, the credibility of allegations and sufficiency of suspicions.

As regards the notion of "sufficient suspicions", OLAF recalls what stated in its answer to SC's Opinion 2/2012: *"Such a notion emanates from the jurisprudence of the ECJ in cases C-11/00 and C-15/00 [...]. The selection should take into consideration the sufficiency of the information for the opening of an investigation. Particular consideration must be given to the reliability of the source and the credibility of the allegations. Those criteria are sufficient to fall within the notion elaborated by the ECJ and furthermore are consistent with the rules and best practices developed by various law enforcement institutions². In the conduct of its selection, the ISRU relies on information available to OLAF without undertaking investigative activities thereby avoiding jeopardising any subsequent investigation."*

Recommendation 5:

Clarify the application of the proportionality principle

OLAF should clarify the application of the proportionality principle and provide the selectors with clearer guidelines.

In particular, OLAF should better assess the forecast of the manpower required and other foreseeable costs, weighted against the likelihood of financial recovery and/or of prosecution, and deterrent value. Financial indicators, which are relevant for the assessment of the seriousness of the risk involved, should be used as an element of reference and as internal guidelines on the application of the proportionality principle.

The ISRU already assesses the manpower required and other foreseeable costs, and weigh them against the likelihood of financial recovery and/or prosecution, and the deterrent value. OLAF is nevertheless open to advice from the SC on how to better apply the proportionality principle.

As concerns the financial indicators, such indicators were included in the Investigative Policy Priorities (IPP) of 2012 and 2013. They were not conceived nor used by OLAF as

² For example, Article 12 of Council Decision 2009/936/JHA adopting the implementing rules for Europol analysis work files.

an "exclusion criterion", but used as one of several criteria to assess whether an investigation should be opened or not. The financial impact was never a *conditio sine qua non*. Considering that there has been, and to a certain extent still is, a persistent misunderstanding among some of our interlocutors regarding the financial indicators, that these were highly criticised, that it is very difficult in most cases to assess the potential financial impact of a new case for which only limited information is available during the selection phase, and that the indicators had a limited weight in the overall assessment, the Director-General decided not to include financial indicators in the IPPs for 2014.

OLAF intends to monitor whether not having explicit financial indicators available in the selection process leads to the opening of too many cases for the Office to handle. If so, the Director-General will give consideration to their possible reintroduction.

Recommendation 6:

Clarify the parameters for the evaluation of the criterion "efficient use of resources"

OLAF should apply more rigorously and, where necessary, clarify the application of some of the indicators established in the IPPs for evaluating the "efficient use of resources".

In particular, OLAF should better assess the following indicators: size of workload of investigation units and its impact on the on-going investigations, as well as the availability of expertise. To that end, OLAF could improve the cooperation between the ISRU and the investigation units.

In the course of the selection process, the ISRU consults with the respective investigative units to determine, among other things, the possible impact of the opening of a new investigation on their on-going activities. In addition, since the introduction of the Sectors, each Head of Sector of the ISRU regularly liaises with their counterparts in the investigative units.

Recommendation 7

Apply with caution the subsidiarity principle

Pay special attention to cases it decides to dismiss on grounds of subsidiarity/added value reasons

- a) Verify that the recipient authority does have the necessary powers to take forward cases dismissed by OLAF on grounds of subsidiarity/added value;**
- b) Establish an appropriate system of monitoring (prompt, systematic and clearly evidenced) of cases dismissed on grounds of subsidiarity/added value and report in a transparent manner on the result of this monitoring exercise.**

a) Following a dismissal decision, OLAF may transmit information to Commission Services and to Member States authorities after having verified their competence to take action.

Contrary to what is stated by the SC in its opinion, no cases of "serious suspicion of fraud" is forwarded "for further action" to the Services of the Commission or to other EU

institutions, bodies, offices or agencies on the basis of their "appropriate powers to undertake (possibly investigative) actions in individual cases".³

In the context of the Fraud Prevention and Detection network OLAF has discussed and distributed to the relevant DGs the "Guidance note for treatment of dismissed cases"⁴, in which it is stated that OLAF informs the Commission Services if it appears that the information might be of interest to them and concerns matters which are within their competence. OLAF has never delegated its investigative powers.

b) The establishment of a system of monitoring is not required by the OLAF Regulation and would be very difficult to implement due to resource constraints. However, OLAF does monitor the follow-up to its recommendations, issued after the investigation is concluded. If OLAF receives new information of possible investigative interest as a reaction or follow-up in relation to a dismissed case, the ISRU considers opening a new selection.

Moreover, if the Director-General decides not to open an investigation, he may ask to be informed of the action taken only on matters related to internal investigations (Article 5.5 of Regulation (EU, Euratom) 883/2013).

It is to be noted that the legal obligations of Member States national administrations to report on (the results of their investigations on) irregularities and cases of fraud having an impact on the EU budget apply also to cases that OLAF dismisses and transfers to them, in the context of the sectorial reporting systems.

Recommendation 8. Improve the quality of the motivation of opinions

Improve quality, clarity and consistency of the motivation of the opinions on opening decisions.

Amending the work-form "opinion on opening decision" in order to include specific reference to a number of items, to be chosen by the selector from pre-determined lists, which could include references to:

- a) Relevant legal instruments (when assessing OLAF's competence to act)**
- b) Concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions (when evaluating the sufficiency of information)**
- c) Concrete and measurable indicators for assessing the IPPs**

OLAF is considering amending the existing forms, following an internal consultation involving the ISRU, the investigative and the investigative support units.

The use of a pre-determined list, as suggested by the SC, is to be balanced against the need to appropriately consider the often complex scenarios to be analysed. Such an analysis can rarely be limited to the use of a check list, as it would potentially imply excessive simplification, and the risk of weakening the argumentation of the opinion.

Furthermore, it should be noted that the selection process is only a first preliminary assessment of the allegations and does not involve any investigative activities.

³ Paragraph 20 of Opinion No 2/2014

⁴ Ares(2013)622043 of 10 April 2013

Recommendation 9. Increase transparency of the selection process

In particular

- a) Give better feedback to the source of information on the action (not) taken by OLAF following the information provided by the source;**
- b) Reinforce internal consultation and the exchange of information between ISRU and the investigation (and investigation support) units.**

a) OLAF takes into consideration the Draft recommendation of the European Ombudsman.⁵ As a general rule, the source is notified by the ISRU of the dismissal of the case. When other EU or national authorities are the source, OLAF generally provides information on dismissed cases.

b) There is close cooperation and exchange of information and experiences between investigative units and the ISRU. Internal consultation is carried out on a regular basis with the investigative units.

As explained in the two OLAF notes "Investigation Selection and Review Unit (Unit 01)" and "Unit 0.1's opinion on opening decision"⁶, to which the SC makes reference, such cooperation is mainly targeted at achieving a better understanding of the investigative unit's resources and verifying potential links between new incoming information and existing cases. Other instances of cooperation between the ISRU and the investigative units are motivated by the need to make best use of language skills not elsewhere accessible.

In autumn 2013, OLAF undertook a set of initiatives to improve internal consultation and to adequately report on it in its opinions. These included (i) periodical meetings of the Heads of Sector of the ISRU with the investigative units according to their field of competence, (ii) the systematic exchange of views on the ratio workload/resources between the investigative units and the ISRU, (iii) the attendance of the ISRU's meetings by staff of Directorates A, B or C in order to exchange views about the opened cases and their follow up in the investigative units, about fraudulent modus operandi and red flags detected during the investigations, and (iv) mention of cooperation with the investigative unit and its outcomes in the "opinion on the opening decision".

The existing system for handling incoming information foresees an exchange and sharing of information on a need-to-know basis. It is OLAF's opinion that such a system does not lead to a "lack of transparency and accountability"⁷, but rather strikes the right balance between confidentiality and efficiency. Moreover, with the reorganisation of ISRU in three sectors and the appointment of their respective Heads of Sector, a further layer of control was added, resulting in an even higher level of consistency within the sectors and a more structured exchange of views within the unit and with the relevant partners. OLAF is willing to further reinforce the internal consultation and the exchange of information between ISRU and the investigation (and investigation support) units.

⁵ Paragraph 23 of Opinion No 2/2014

⁶ Notes Ares (2013)1903286 of 10 June 2013 and Ares(2013)3417726 of 6 November 2013

⁷ Paragraph 66 of Opinion No 2/2014

Recommendation 10. Improve the clarity of conclusions of opinions

Further improvements are needed with regard to the conclusions drawn up at the completion of the selection process, which should clearly specify the actions that OLAF should take following a decision to dismiss or open an investigation or coordination case

In particular, the opinion should clearly mention the actions that OLAF intends to take upon completion of the selection process, such as:

- a) To inform the national or EU authorities better placed to act;**
- b) To protect (or not) the identity of the source;**
- c) To inform (or not) the source of information of OLAF's decisions.**

The "Conclusion" of an opinion is the final section of a document structured in several paragraphs and not the executive summary of it. As such, it should not be repetitive or redundant. The advice offered to the Director-General for his decision clearly comes out from the opinion.

Bearing this in mind:

- a) When OLAF applies the criteria of subsidiarity/added value to dismiss the case, the information is transferred to the competent EU or Member State's authority. OLAF notes that in this respect the SC does not mention any concrete case to support its references to "*area of impunity be created*" and "*transparency and coherency....be compromised*"⁸. OLAF is not aware of cases where this might have happened and considers that the observations were not based on the real cases analysed by the SC.
- b) When transmitting information to a competent authority, the confidentiality and protection of the identity of the source is recommended by a specific confidentiality clause in the letter of transmission.
- c) When a case is dismissed, the source is notified by the ISRU as a general rule, except when anonymous. When an investigation is opened, it is deemed appropriate to leave to the investigative unit entrusted with the case the decision on the timing and mode of notification to the source. OLAF recalls its response under SC Recommendation 9 a) above.

Recommendation 11. Improve reporting to the SC on risks to OLAF's independence and on dismissed cases transmitted to national judicial authorities

OLAF should:

- a) Inform the SC whenever actions or omissions of EU or national authorities are likely to jeopardise OLAF's investigative independence and of the measures it intends to put in place in order to improve cooperation with these authorities.**

⁸ Paragraph 67 of Opinion No 2/2014

b) Inform the SC of all dismissed cases in which information has been transmitted to judicial authorities of Member States, in accordance with Article 17(5) of Regulation (EU, Euratom) 883/2013

- a) OLAF is committed to inform the SC about meaningful cases where lack of cooperation and “*obstruction*” from Member States and institutions, bodies, offices and agencies are likely to jeopardise OLAF’s investigative independence, and to discuss the measures it intends to put in place to improve cooperation with these authorities.⁹
- b) OLAF does not share the interpretation of the Regulation (EU, Euratom) 883/2013 made by the SC on this point. The information to the SC provided by the Director-General under Article 17.5 Regulation (EU, Euratom) 883/2013 on “*cases in which the information has been transmitted to judicial authorities of the Member States*” takes into account the clarification offered by recital (45) of the mentioned Regulation, making reference to “*cases in which information has been transmitted to the judicial authorities of the Member States [...] by way of follow-up to an investigation conducted by the Office*”.

Recommendation 12. Carry out internal evaluation of the activities of the ISRU. Such evaluation could be done by OLAF’s internal auditor and/or by a special team designated by the Director General, in close cooperation with Directors A and B

The Internal Audit Capability (IAC) of OLAF works independently and plans his work on the basis of a risk assessment. He will be informed of the recommendation, which will allow him to take it into consideration in his risk assessment and to consider the possibility to integrate it into his audit plan.

The setting up of a “special team” would require resources from the investigative units, reducing the number of staff available to focus on the core investigative tasks. However, OLAF will consider how to best evaluate the activities of the ISRU. Such an evaluation requires a careful weighing of costs versus benefits.

Finally, OLAF would welcome a clarification of the reference to “*the ‘error rate’ in evaluated cases*”¹⁰ and to be informed about the source of these errors. OLAF is not familiar with the concept of “error rate” in this context and cannot see the link between this concept and the present Opinion.

⁹ Paragraph 54 of Opinion No 2/2014

¹⁰ Paragraph 28 of Opinion No 2/2014