

SUPERVISORY COMMITTEE

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Annual
Report
2020

June 2021



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Chair of the OLAF Supervisory Committee
Committee member since 23 January 2017, Chair since 1 March 2017

Former Member of the European Parliament, the Netherlands.



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General Secretary of Internal Security System, Portugal.
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Foreword

This annual report starts in a way in which probably many other reports on 2020 will start, given the profound effect the Corona pandemic had on the EU institutions and every citizen in Europe and the rest of the world. Despite the unprecedented impact of the COVID-19 pandemic in 2020, the Committee continued to work to its agreed plan, with the monthly plenary meetings taking place online.

During 2020, and contrary to what was the situation in the previous years, the staffing of the Committee's Secretariat was complete, and with the arrival of the new Head of the Secretariat, a fresh *élan* was introduced in its functioning. A major part of our work during 2020 was spent on exchanges and deliberations with the three institutions concerned (Commission, Parliament and Council) about the revision of Regulation 883/2013 to take account of the recent creation of the **European Public Prosecutor Office (EPPO)**.

Following an explicit request by the Committee, the new amending OLAF Regulation 2023/2223 (published in the Official Journal in 28 December 2020) made it clear, for the first time, that we should be granted access to all OLAF information and documents that we consider necessary to perform our monitoring and supervisory tasks.

This was a more than welcome legal clarification, with far reaching effects, as it allowed OLAF and the Committee to proceed with drawing up new working arrangements with OLAF in line with the provisions of the amended OLAF Regulation. This Regulation also provided the necessary conditions for the Secretariat to be administratively re-attached to OLAF in the near future, while still remaining fully independent from it.

A fixture of the Committee's regular meetings was participation by the Director General of OLAF. We wholeheartedly welcome this, as it reinforces the degree of good faith, mutual trust and respect – essential ingredients for a healthy and meaningful supervisory and monitoring framework.

In 2020 despite the constraints of the Corona crisis, the Committee delivered two opinions:

- Opinion No 1/2020 on OLAF's dismissed cases concerning members of the EU institutions
- Opinion 2/2020 on OLAF's preliminary Budget for 2020.

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The Opinion on OLAF's dismissed cases was welcomed by OLAF and also by the Parliament and Council, as it shed light to an important area where the OLAF Director-General exercises a significant degree of discretionary powers.

A major part of our work was also devoted to discussing the adoption of new working arrangements with OLAF, especially to provide the framework for the Committee's direct access to OLAF's case management system (to carry out its monitoring tasks). The discussions continued well into 2021, when the new working arrangements are expected to be adopted.

It is important to also note that new amending OLAF Regulation created the new post of **Controller** for procedural guarantees. The Controller will handle complaints against OLAF by "persons concerned" for breaches of their procedural guarantees, and will be administratively attached to the Supervisory Committee, with the necessary legal support provided by the Secretariat.

Looking into the challenges ahead, the Committee remains determined to provide OLAF with any assistance needed to make its cooperation with EPPO successful, and also ensure the smooth functioning of the new Controller.

Throughout the year, the Committee also provided regular information to Council, Parliament, Commission and other stakeholders on its monitoring activities and Opinions delivered.

Finally, the Committee is grateful for the good cooperation with the Secretariat, and thanks it for the legal support and assistance provided to its members.

Jan MULDER

Chairman of the Supervisory Committee of OLAF

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About us

(i) Supervisory Committee of the European Anti-Fraud Office (OLAF)

1. The Supervisory Committee of the European Anti-Fraud Office (OLAF) is an independent body appointed by common accord of the European Parliament, the Council, and the European Commission¹.
2. The Supervisory Committee monitors the implementation of OLAF's investigative function, to reinforce its independence in the proper exercise of the powers conferred on it by Regulation No 883/2013 (the OLAF Regulation). The Committee also monitors OLAF's compliance with procedural guarantees for people or bodies involved in investigations.
3. The Committee is composed of five independent, outside experts, nominated for 5 years ('the members')². The members perform their role in complete independence and may neither seek nor take instructions from any government or any EU institution, body, office or agency.
4. The Committee's internal Rules of Procedure³ set out the rules governing its composition, operation and working methods (the procedures under which it carries out its monitoring role within the terms of the OLAF Regulation) and lay down the material conditions under which its work must be conducted. It is important to stress that the Committee carries out its monitoring activity without interfering in the conduct of OLAF investigations in progress.

¹ Article 15.2 of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R0883-20170101>.

² To preserve the experience built up in the Committee, the members are to be replaced on an alternating basis, in accordance with Regulation 883/2013.

³ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011Q1124%2801%29>.

5. Finally, the Committee reports to the appointing institutions and informs the public, civil society and relevant national authorities of its role and activities.

(ii) The Secretariat

6. The Committee is supported in its work by a Secretariat, working on a permanent basis. In accordance with the OLAF Regulation, the Secretariat works under the Committee's direct authority and independently from the Commission. It plays a key role in facilitating and contributing to the performance of the Committee's monitoring tasks.
7. The Secretariat is made up of EU staff. It monitors OLAF activities and presents the results of its monitoring and supervision activities to the members of the Committee for consideration and approval.

The Secretariat helps the Committee members carry out their duties efficiently, reinforcing OLAF's independence. During 2020, faced with the challenges arising from COVID-19, the Secretariat, like the rest of the Commission, adapted its operations to an online environment and carried out the work programme as agreed with the Supervisory Committee.

Mission statement

Article 15(1) of Regulation (EU) No 883/2013:

The Supervisory Committee shall regularly monitor the implementation by the Office of its investigative function, in order to reinforce the Office's independence in the proper exercise of the competences conferred upon it by this Regulation.

The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General in accordance with Article 7(8).

8. The Committee was established to strengthen and guarantee OLAF's independence by regularly monitoring its investigative function, and to help its Director-General discharge of his/her responsibilities. It is fully committed to this remit.

The Committee exercises this role by assisting OLAF's Director-General in a way that best enables OLAF to improve its effectiveness as a

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rigorous and impartial EU investigatory body, entirely independent from undue external pressure and interference. The Committee will always support OLAF's efforts to improve the quality of its work and to play a key role in the new European area of justice. In this regard, OLAF's assistance to, support for and cooperation with the EPPO will be crucial for protecting the EU's financial interests.

9. The Committee provides OLAF's Director-General and the institutions with detailed opinions and reports on OLAF's ongoing investigations (without interfering in them). During the whole reporting period the Committee was very much involved in establishing a solid working relationship with OLAF's Director-General, to improve the quality of the information OLAF regularly sent the Committee.

During 2020, the Committee and OLAF discussed new working arrangements to improve access to the Committee's information (in anticipation of the access rules under the new amending OLAF Regulation 2020/2223).

This applies in particular to reports on investigations running over 12 months, individual complaints against OLAF's investigations, and OLAF's recommendations which were not followed by the relevant authorities. The Committee also participates actively in the yearly inter-institutional exchange of views on OLAF's performance, consistently maintaining the view that OLAF's investigation policy priorities should be in line with the main areas of EU budget expenditure.

10. The Committee is accountable to the institutions that appointed its members, and its last annual activity report was discussed with the Commissioner for Budget and Human Resources, the Secretary General of the Commission, the European Parliament's Committee on Budgetary Control (CONT) and the Council's Working Group against Fraud.
11. The Committee held 10 plenary meetings⁴ and continued the practice of inviting OLAF's Director-General and his staff to its meetings to discuss and be informed about any matter relevant for the Committee's and OLAF's work.

During the reporting period, Committee members were appointed as rapporteurs to work on and follow up specific areas of the Committee's

⁴ From January 2020 to December 2020.

work plan. They worked in close cooperation with the Secretariat to draw up draft opinions and reports to be adopted by the Committee.

Monitoring tasks of the Supervisory Committee

- (i) Monitoring OLAF's budget and resources: Opinion 2/2020 on OLAF's Preliminary Draft Budget⁵

Article 6(2) of Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office, as amended by Decision of 27 September 2013 2013/478/EU:

2. After consulting the Supervisory Committee, the Director-General shall send the Director General for budgets a preliminary draft budget to be entered in the annex concerning the Office to the Commission section of the general budget of the European Union.'

Article 15(1) third paragraph of Regulation (EU) No 883/2013:

The Supervisory Committee shall address to the Director-General opinions, including where appropriate, recommendations on, inter alia, the resources needed to carry out the investigative function of the Office [...]

Recital 37 of Regulation (EU) No 883/2013:

The Office should enjoy independence in the discharge of its functions. To reinforce that independence, the Office should be subject to regular monitoring of its investigative functions by a Supervisory Committee, composed of outside independent persons who are highly qualified in the Office's areas of activity. The Supervisory Committee should not interfere with the conduct of ongoing investigations. Its duties should also include assisting the Director-General in discharging his responsibilities.

12. The Committee regrets that the flow of information supplied to it from OLAF regarding OLAF's preliminary draft budget for 2021 was marked

⁵ https://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2-2020_on_olaf_draft_budget_2021.pdf.pdf.

Monitoring tasks of the Supervisory Committee

by delays. However, we accept that this is due to the exceptionally late adoption of the new MFF and related budget together with the impact of the COVID-19 outbreak.

13. During 2020, the Committee issued an opinion on OLAF's **preliminary draft budget for 2021** and analysed the implementation of OLAF's budget approved for 2020.

In examining the 2021 preliminary draft budget, we focused particularly on:

1. OLAF's human resources strategy;
 2. the financial and operational impact of implementing OLAF's new case management system (the 'OCM'),
 3. the budget impact on OLAF of the EPPO's creation.
14. The Committee found OLAF's preliminary draft budget for 2021 to be in line with the resources needed to conduct investigations efficiently.
 15. The Committee again voiced its concerns about the way the project for OLAF's **case management system (OCM)** has been implemented so far.

It reiterated its recommendation from previous years that the Director-General ask the Commission's Internal Audit Service (IAS) to carry out a post-implementation evaluation of the OCM, focusing in particular on all the costs of the project since its inception, users' experiences and efficiency gains over OLAF's previous case management system ("CMS").

For the Committee such an audit or even an 'end of project' internal evaluation report should allow OLAF's Director-General to decide whether it should ultimately replace the OCM by another solution already used by similar EU investigative and enforcement authorities.

During 2020 OLAF informed the Committee that the OCM could not be completed in time due to new functionalities which needed to be further developed. The Committee reiterated its wish that this project is finally completed by early 2021 and reserved the right to look (in the near future) into the actual added value of this project.

16. Regarding **human resources**, based on recommendations by the European Court of Auditors, which were accepted by the Commission, and the adverse effects of transferring OLAF staff to the EPPO, the Committee supported OLAF's request for additional posts.

In particular this would strengthen OLAF's expertise on national judiciary matters and ensure its investigative function continues to be properly implemented. Moreover, we believe OLAF's future workload is likely to increase, requiring an appropriate increase in resources.

(ii) Monitoring of cases

Article 15(1) of Regulation (EU) No 883/2013:

The Supervisory Committee shall regularly monitor the implementation by the Office of its investigative function [...]

Article 4 of Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office, as amended by Decision of 27 September 2013 2013/478/EU:

[...] [The Supervisory] Committee shall be responsible for the regular monitoring of the discharge by the Office of its investigative function.

Joint Opinion of the Legal Services of the European Parliament, Council and Commission of 5 September 2016:

The Joint Opinion underlines that Regulation (EU) No 883/2013 empowers the Supervisory Committee to receive information from the OLAF Director-General:

- *on cases in which information has been transmitted to national judicial authorities even when no investigation has been carried out by OLAF;*
 - *on additional case-related information concerning all cases, including ongoing investigations and not only information on closed cases;*
 - *as to the reporting obligations of the OLAF Director-General, Regulation (EU) No 883/2013 implies an active duty of information for OLAF. In that regard, the granting of purely passive electronic access to OLAF databases would not be sufficient to fulfil the OLAF Director-General's obligations as laid down in Regulation (EU) No 883/2013.*
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17. To strengthen OLAF's independence and help the Director-General discharge his duties, the Committee actively and regularly monitors the way OLAF conducts **investigations**. The Committee appointed rapporteurs to monitor certain sensitive internal investigations as well as other cases where OLAF's Director-General decided, after assessing incoming information, not to open an investigation ('dismissed cases').

Monitoring tasks of the Supervisory Committee

18. The Committee recalls that, as an independent body, it has a privileged position for carrying out the monitoring and supervisory tasks assigned to it. When examining cases reported by OLAF, the Committee ensures that its work remains focused on:
 - potential risks to the independent conduct of investigations;
 - compliance with procedural guarantees and fundamental rights;
 - compliance with the general principles and rules of investigations;
 - assessment of the quality of the files and the information contained in the OCM;
 - compliance with the rules set out in the Guidelines on Investigation Procedures for OLAF staff (GIPs).

(iii) Monitoring the duration of OLAF investigations

Article 15(1) of Regulation (EU) No 883/2013:

The Supervisory Committee shall regularly monitor the implementation by the Office of its investigative function, in order to reinforce the Office independence in the proper exercise of the competences conferred upon it by this Regulation.

Article 15 (1) second paragraph of Regulation (EU) No 883/2013

The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of the information supplied by the Director-General in accordance with Article 7(8).

Article 7(5) of Regulation (EU) No 883/2013

Investigations shall be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case.

Article 7(8) Regulation (EU) No 883/2013

If an investigation cannot be closed within 12 months after it has been opened the Director-General shall at the expiry of a 12 month period and every six months thereafter, report to the Supervisory Committee indicating the reasons and the remedial measures to speed up the investigation.

General remarks

19. Monitoring the duration of OLAF investigations is one of the main ways the Committee contributes to OLAF's independence.
20. The obligation to conduct administrative procedures within a reasonable time is a general principle of EU law and part of the right to good

administration (Article 41(1) of the Charter of Fundamental Rights⁶).

According to case law, where the duration of a procedure is not set by EU law, the reasonableness of the period of time taken is to be appraised in the light of all of the circumstances specific to each individual case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the parties to the case⁷.

21. It follows from this case law and from Article 7(5) of the OLAF Regulation⁸ that the procedure before OLAF should be conducted continuously and cannot be extended beyond a reasonable time, which must be assessed by reference to the circumstances and complexity of each case⁹.
22. The Committee considers it also crucial to emphasise its role, as clarified by EU case law¹⁰, and underlines the scope of its monitoring activity in the specific context of investigations lasting more than 12 months.
23. First, by regularly monitoring the duration of OLAF's investigations and the reasons for any undue delays, the Committee is seeking to verify that no external or internal interference in the impartial conduct of an investigation takes place, that equal treatment is ensured, and that the delays are proportionate and justified by the complexity and/or circumstances of the case concerned.
24. Second, a lengthy investigation that cannot be justified by the circumstances/complexity of a given case may have serious negative consequences on:
 - (i) the rights of defence of the persons concerned (who have a right to have investigations concerning them handled within a reasonable time, under Article 41 of the Charter of Fundamental Rights), and

⁶ Case T-447/11 - *Catinis v Commission*, 21 May 2014, paragraph 34 and the case law cited.

⁷ Case T-447/11 - *Catinis v Commission*, 21 May 2014, paragraph 34; Joined Cases C- 238/99 P, C- 244/99 P, C- 245/99 P, C- 247/99 P, C- 250/99 P to C- 252/99 P and C- 254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I- 8375, paragraph 187.

⁸ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999. OJ L 248, 18/09/2013, p. 1–22.

⁹ Article 7(5) Regulation 883/2013 and Case T-48/05, Case *Franchet and Byk v Commission*, 8 July 2008, paragraph 274.

¹⁰ *Franchet and Byk v Commission*, 8 July 2008, Case T-48/05, paragraphs 167 and 168.

Monitoring tasks of the Supervisory Committee

(ii) the follow-up to the investigation (i.e. it becomes more difficult to collect evidence as time passes).

Thus, by monitoring the duration of OLAF's investigations the Committee makes sure that the procedural rights guaranteed by Article 41 of the Charter are respected.

25. In addition, the Committee's monitoring aims to ensure the results and findings of OLAF investigations are taken into account and appropriately followed up by the relevant EU institutions, bodies, offices and agencies, as well as by the Member States concerned.

The judicial, financial or disciplinary follow-up – and the potential for prosecution and recovery – may be irremediably compromised, in particular due to time-barring issues (prescription under the applicable national laws) or because the national judicial authorities cannot conduct a proper investigation for events which occurred a long time ago.

26. Finally, by monitoring the length of investigations, the Committee verifies that the human and financial resources allocated to OLAF have been used efficiently. This might have an impact on the adoption of OLAF's investigation policy priorities and its overall budget.
27. It is important to emphasise that this specific role, entrusted to the Committee by Article 7(8) of the OLAF Regulation, requires the Committee to carry out a case-by-case analysis of each inquiry which is older than 12 months, to ensure that OLAF's investigations are conducted continuously and over a period proportionate to their circumstances and complexity.

For the Committee to fulfil that mandate, it needs direct and unfettered access at least to those elements which are essential for understanding the case, identify the person(s) concerned, and follow the timeline of the investigative measures, as well as the case management-related decisions taken by OLAF. In so doing, the Committee fully respects OLAF's independence in carrying out its investigations and in no way whatsoever interferes in the conduct of such investigations.

Access to case-related information

28. The content and the quality of the information provided by the Director-General to the Supervisory Committee on cases exceeding 12 months has been a longstanding issue and the subject of intensive discussions between the Committee and OLAF over the past years¹¹.
29. In its previous annual report, the Committee reported on the detailed analysis of the revised reporting template proposed by OLAF in 2019¹². The Committee came to the conclusion that those templates, even if they could be considered an improvement over the previous ones (used by OLAF from 2013 to March 2019), still did not meet the Committee's needs in terms of the quality and completeness of the information they contained.

During the period of reference, the Committee continued its dialogue with OLAF's Director-General on ways to restore pre-2013 access to case-related information that is available and registered in OLAF's case management system (OCM).

Without this access, the Committee cannot effectively monitor OLAF's independence in conducting its external and internal investigations. The Committee expects¹³ that an appropriate solution to this important issue will be found in the course of 2021, by means of mutually agreed new working arrangements.

Reports of investigations lasting over 12 months received by the Committee in 2020

30. In its last activity report, the Committee noted that almost 40% of the individual cases reported in 2019 ran for over 24 months¹⁴. It therefore decided to focus its 2020 monitoring activity on 40 cases that had been in progress for over 36 months by the end of 2019, so it requested full

¹¹ The Committee's 2019 activity report, paragraphs 38 to 51.

¹² The Committee sent OLAF the results of its analysis in a letter dated 27 November 2019 and proposed an alternative solution. The results of the analysis are also reported in its 2019 activity report, paragraphs 55 -64.

¹³ To date, OLAF and the SC are in the process of adopting such working arrangements. The SC is confident that those arrangements will be put in place before the end of summer 2021.

¹⁴ The Committee's 2019 activity report, paragraphs 52 – 54.

Monitoring tasks of the Supervisory Committee

access to these case files. The Committee expects to deliver an opinion on these cases in the course of the 2021.

31. During 2020, the Committee received 619 reports from OLAF concerning 412 individual investigations lasting over 12 months. Of these individual cases, 33% lasted more than 12 months and 18% more than 18 months. 48% of all the cases reported exceeded 24 months (Figure 1). The sectoral breakdown of OLAF investigations is represented in Figure 2.

Figure 1

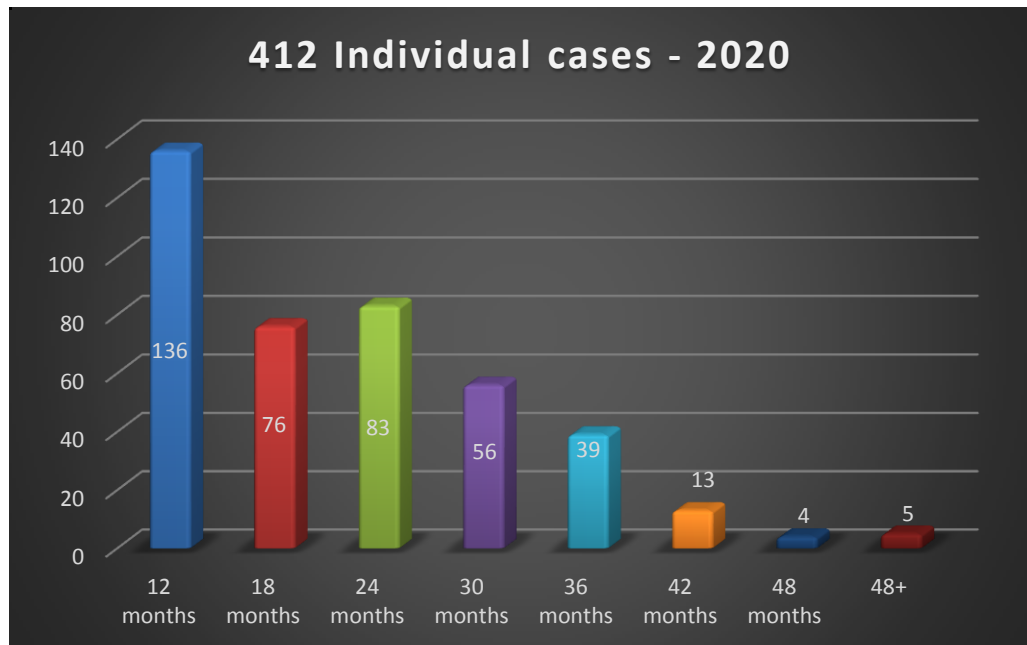
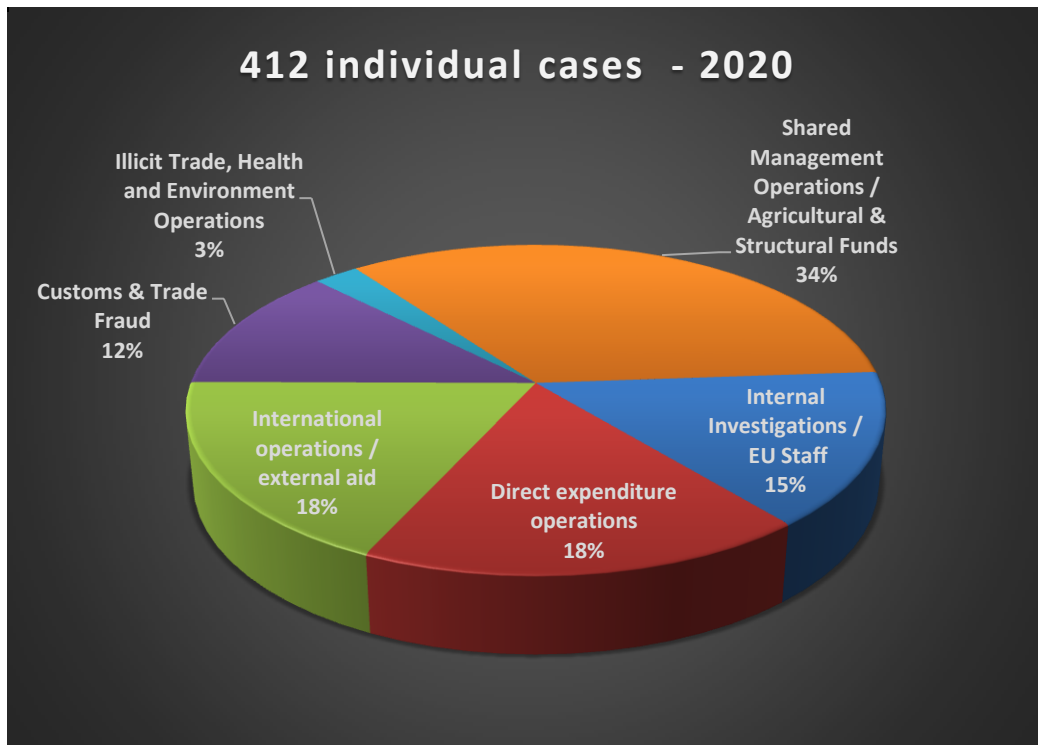


Figure 2



Monitoring the application of procedural guarantees

The second paragraph of Article 15(1) of Regulation (EU) No 883/2013:

The Supervisory Committee shall in particular monitor developments concerning the application of procedural guarantees (...).

Article 17(7) of Regulation (EU) No 883/2013:

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 (...).

Article 9 of Regulation (EU) No 883/2013: Procedural Guarantees (not reported here due to its length)

Individual complaints to OLAF about its investigations

32. Article 9 of the OLAF Regulation lists the principles and the procedural guarantees that OLAF should apply when conducting an investigation. Article 15(1) second paragraph entrusts the Committee with the specific task of ensuring that OLAF respects procedural guarantees in exercising its investigative functions. It is settled case law that OLAF must respect fundamental rights laid down in EU law, in particular in the Charter of Fundamental Rights¹⁵.
33. People or bodies affected by an OLAF investigation can submit a complaint directly to OLAF's Director-General. OLAF's procedure for dealing with such complaints is detailed and publicly available on its website¹⁶. The Director-General has taken action to ensure that reports on individual complaints are sent to the Committee at least twice a year.
34. In 2020, OLAF received 11 complaints in total. It did not receive any complaints based on Article 90a of the Staff Regulations.
35. The main allegations concerned:
 - (i) breach of the right to be heard;
 - (ii) breach of the right to have access to the investigation (in particular to documents used as incriminating evidence);
 - (iii) an allegedly wrong decision to open an investigation;
 - (iv) breach of the right to be informed of the opening of an external OLAF investigation.

Moreover, in some of the complaints OLAF is accused of irregularities/bias/lack of impartiality in conducting interviews and a conflict of interest by the investigator in charge. In assessing these allegations the Committee had access to the relevant documents in the case files.

36. Allegation group (i) – the right to be heard

The Committee notes that, to effectively exercise this right, the people or bodies concerned must be informed of all the facts concerning them.

¹⁵ Judgement of the General Court of 3 May 2018 in case T-48/16, Sigma Orionis SA v European Commission, paragraphs 104 and 105 and further jurisprudence quoted in paragraph 100.

¹⁶ https://ec.europa.eu/anti-fraud/olaf-and-you/complaints-olaf-investigations_en.

Thus, OLAF should provide a full account of the relevant facts, and keep a full record of the comments made by these people/bodies.

In almost all the complaints analysed, the complainant(s) concerned argued that:

(a) the facts set out by OLAF in the “summary of facts” were incomplete/unclear/inaccurate, thus depriving them the opportunity to comment (Article 9(4) of the OLAF Regulation);

(b) their statements (given during on-the-spot checks) were not duly recorded, or

(c) the deadline for commenting given by OLAF was too short.

In some cases, the complainants requested to be heard by means of an oral hearing or interview.

37. The Committee concluded that the above allegations were unfounded and that OLAF had provided the parties concerned with a clear and complete ‘summary of the facts’ as well as the possibility to comment on those facts. OLAF had also provided additional information and extended the deadline for replying whenever asked, and on one occasion, it also corrected ‘factual errors’.
38. Regarding the requests “to be heard by means of an oral hearing”, the Committee notes that Article 9(4) of the OLAF Regulation requires, once the investigation has been completed and before conclusions referring by name to a person concerned are drawn up, that person should be given the opportunity to comment on facts concerning them. However, it is for OLAF to choose the means by which the person concerned is given the opportunity to comment. Thus, there is no right to have an “oral meeting” or be heard orally.

39. **Allegation group (ii) – access to documents**

According to EU case law, a person being investigated cannot usefully rely on either the principle of respect for the rights of the defence or Article 41 of the Charter (right of every person to have access to their file) to obtain access to the OLAF investigation files and/or the final report.

The EU Courts have consistently concluded that the effectiveness and confidentiality of OLAF's work, and its independence, could be undermined if those being investigated have access to these documents before a final decision is made (by the recipients of OLAF's final reports) that adversely affects them.

As OLAF's investigation reports and the decisions to send information to national judicial authorities are not considered by the case law to adversely affect people, OLAF is under no obligation to grant access to its files before such a decision has been taken. The case law has restricted this right precisely because it is upheld in full in the subsequent stages (judicial, disciplinary or financial) of the investigation before the competent national or EU authorities.

40. **Allegation group (iii) – allegedly wrong decision to open an investigation**

The Committee notes that under Article 5(1) of the OLAF Regulation, the OLAF Director-General enjoys a wide margin of discretion in assessing information submitted to him and deciding whether to open an investigation to prove or disprove those suspicions. There is nothing in the complaints in question to suggest that there was *prima facie* a manifest error or abuse in the exercise of that discretionary power by the Director-General of OLAF.

41. **Allegation group (iv) – the right to be informed that an external OLAF investigation has been opened**

The OLAF Regulation does not require OLAF to notify a person concerned that an external investigation has been opened. It is OLAF's prerogative to inform the parties concerned at the appropriate moment, taking into account the peculiarities of the case and possible interference with the course of the investigation.

42. **Lack of impartiality / conflict of interest by an investigator**

The Committee recalls that OLAF investigators are EU officials and so required to carry out their duties and conduct themselves solely with the interests of the EU in mind.

This position bars them from either seeking or taking instructions from any government, authority, organisation or person outside their institution. They are required to carry out the duties assigned to them objectively, impartially and in full loyalty to the EU¹⁷.

¹⁷ The OLAF Regulation expressly states that, in accordance with the Staff Regulations (Article 11 and 11a), OLAF staff must exercise their investigative functions in full independence.

The Committee could not find any indication in the cases examined that could imply OLAF's investigation was tainted by a lack of impartiality or conflict of interest.

43. In conclusion, the Committee has not identified a breach of procedural guarantees in the cases analysed.
44. The Committee points out that with the entry into force of Regulation 2020/2223, amending Regulation 883/2013, the Controller of the procedural guarantees will in the future be responsible for handling all complaints lodged by a person concerned in an OLAF investigation¹⁸ regarding OLAF's compliance with procedural guarantees and rules governing the conduct of its investigations.

Complaints received by the Supervisory Committee against OLAF

45. The Supervisory Committee's functional mailbox¹⁹ is the channel for stakeholders and the public to inform the Committee about concerns and issues that fall under its remit.
46. The Committee often receives complaints either about ongoing OLAF investigations or alleged fraudulent activities that affect the financial interests of the EU. Such complaints fall outside the remit of the Committee, which is neither an anti-fraud body nor a board of appeal against OLAF decisions.
47. That said, the Committee's practice is to forward any relevant information to OLAF and inform the sender accordingly. In 2020, the Committee received a relatively small number of complaints against OLAF decisions or ongoing investigations. In most cases, the parties in question had already filed a complaint with OLAF (copying the Committee "for information").

¹⁸ Articles 9a and 9b of Regulation 2020/2223.

¹⁹ OLAF-FMB-supervisory-committee@ec.europa.eu.

Cases where OLAF's recommendations were not followed

Article 17(5)(a) of Regulation (EU) No 883/2013:

The Director-General shall keep the Supervisory Committee periodically informed of the Office's activities, the implementation of its investigative function and the action taken by way of follow-up to investigations.

The Director-General shall inform the Supervisory Committee periodically: (...)

(a) of cases in which the recommendations made by the Director-General have not been followed;

48. The Committee has said many times that justice cannot be measured in numbers of convictions and OLAF's achievements cannot be assessed merely in terms of statistics. However, figures show that the indictment rate in the OLAF's judicial recommendations has been constantly coming down over the years from a 53% to a 36%²⁰, on average²¹. These figures are cause for concern.
49. In drafting an Opinion on OLAF recommendations that had not been followed, the Committee analysed 43 cases where OLAF issued recommendations as of 1 October 2013 and for which OLAF received replies from the authorities concerned, between 1 March 2016 and 28 February 2018, which did not follow the recommendations.
50. In particular, during 2020 the Committee's analysis covered 43 cases and 46 OLAF recommendations (a single case can have more than one recommendation, i.e. judicial, financial or disciplinary)

The Committee's preliminary analysis was that current OLAF monitoring procedures appear unsatisfactory for a number of reasons, including the lack of dedicated follow-up teams, the absence (until 2019) of appropriate monitoring tools in the OCM to properly follow-up implementation in

²⁰ SC Opinion N 1/2021 p. 11 and ss.

²¹ Indictment rates vary from one Member State to another.

the 43 cases analysed and reporting practices by the competent authorities, based on the use of insufficient templates.

51. The Committee's preliminary findings also showed that in several cases, OLAF investigations were well substantiated and they could hardly be the reason why OLAF's recommendations were not followed by the recipient authorities.

At the end of the year, the Committee shared its draft analysis with OLAF. The Committee adopted its Opinion on OLAF's recommendations not followed in February 2021.

OLAF's investigation policy priorities and investigation guidelines

Article 17(5) of Regulation (EU) No 883/2013:

The Director-General shall each year determine, within the context of the annual management plan, the investigation policy priorities of the Office and shall, prior to their publication, forward them to the Supervisory Committee.

Article 5(1), second sentence:

The decision by the OLAF DG whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of the Office (...).

Article 16 (2)(a), Exchange of views with the institutions:

The exchange of views may relate to: (a) the strategic priorities for the Office's investigation policies.

52. In examining OLAF's investigation policy priorities for 2020, the Committee held several meetings with the Director-General and expressed its views through the inter-institutional exchange of views.

OLAF maintained an approach very similar to previous years, choosing to focus its priorities on the following areas:

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- (i) cases involving transport and infrastructure network projects, in particular public procurement procedures;
- (ii) cases concerning projects financed or co-financed by the European Structural and Investment Funds²², the European Agricultural Guarantee Fund and the Pre-Accession Funds, in which action by the Member States or candidate countries may be insufficient, or cases which have cross-border elements;
- (iii) cases involving possible abuses of origin rules, tariff classification in both preferential and non-preferential trade regimes and valuation-related fraud, the aim being to evade payment of conventional customs duties, including tariff measures that are part of EU trade defence policy;
- (iv) cases of smuggling of tobacco, alcohol, counterfeit medicines and other goods dangerous to health and security and which could infringe intellectual property rights, and cases of illegal manufacturing of tobacco;
- (v) cases concerning humanitarian and development aid provided to migrants, refugees and internally displaced persons and cases concerning other support provided to these groups.
- (vi) cases linked to European Green Deal policies (environment, climate, food security).

²² The European Social Fund, the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.

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53. The purpose of the Committee's monitoring tasks is to strengthen OLAF's independence in the proper exercise of the powers conferred on it by the OLAF Regulation. It is therefore essential that the Committee is able to monitor the entire cycle of an investigation carried out by OLAF, including the key decision on whether to open an investigation under Article 5 of the OLAF Regulation.
54. Under Article 5 of the OLAF Regulation, the Director-General 'may open an investigation when there is **a sufficient suspicion** that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union'. In doing so, the Director-General must take into account OLAF's investigation policy priorities and annual management plan, the need for efficient use of OLAF's resources, and the principle of proportionality. The Director-General therefore enjoys wide discretion in taking such a decision.
55. The Director-General's discretionary power to open an investigation or dismiss a case is counterbalanced by the role entrusted to the Committee to closely monitor whether such decisions have been taken in full independence and impartiality, and in line with the applicable procedural guarantees²³.
56. In its Opinion No 1/2020, the Committee reviewed 60 dismissed cases provided by OLAF (covering 2014-16) and examined how OLAF handles the dismissal of cases which concern members of the EU institutions. Such OLAF investigations are particularly sensitive due to the risk of reputational damage to the EU and the potential risk to the independence of OLAF.

²³ See OLAF Supervisory Committee, Opinion No 2/2017, accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013, Paragraphs 12-16, at https://ec.europa.eu/anti-fraud/sites/antifraud/files/sc_opinion_2_evaluation_report_883_en.pdf (Article 19).

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57. The aim of the Opinion was not to assess whether the OLAF Director-General's decision to dismiss a particular case was justified. Rather, it decided to look into: (i) how OLAF collected, handled and analysed all the necessary information before deciding to dismiss an internal investigation concerning members of the EU institutions; and (ii) OLAF's compliance with the applicable legal framework.
58. In short, the analysis of the 60 dismissed cases (covering 2014-16) brought to light a lack of a systematic and consistent approach in several areas, from the moment information is gathered or received up until a case is finally dismissed. This lack of consistency, given the Director-General's wide discretionary powers in this field, risks damaging the principles of impartiality, independence and legal certainty.
59. To prevent this risk, in its Opinion the Committee addressed eight recommendations to the Director-General of OLAF. The Director-General of OLAF considered the Committee's findings and observations valid for the period covered by the Opinion and informed the Committee in February 2020, that most of the recommendations made had been in the meantime implemented.

The Committee acknowledges that OLAF did indeed take recently measures in line with its recommendations, i.e. the adoption of a Selection Handbook and the approval of a new structure of Unit 0.1, in order to streamline the selection activities and improve the consistency of the opinions delivered to the Director General of OLAF. That said, the Committee regrets that it become aware of these implemented measures only in February 2020.

Revision of Regulation 883/2013 and the Controller of procedural guarantees

60. Over the last two years, the Committee played an active and constructive role in the discussions leading to the adoption of the new amending OLAF Regulation. The Committee regrets that its suggestion²⁴ for the new

²⁴ Committee Opinion No 2/2017 - Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19), paragraphs 51-56.

function of Controller of procedural guarantees to be vested in the Committee was not taken up in the new Regulation (adopted by Parliament and Council on 23 December 2020).

61. That said, the Committee notes the decision by these two bodies to administratively attach the Controller²⁵ to it. By administratively attaching the Controller to the Committee, the high standards of independence required of such a task will be maintained and overall budget expenditure reduced.
62. The new amending Regulation also requires the Committee's Secretariat to provide the Controller with the necessary administrative and legal support. In fact, the Secretariat already has significant experience, gained while assisting the Committee in its monitoring of OLAF's compliance with the procedural guarantees.

At the same time, the Committee has some doubts and concerns regarding the likely impact of the administrative attachment on the work and functioning of the Secretariat, and ultimately on the Controller's co-existence with the Committee.

63. In the Committee's opinion these concerns need to be addressed and an appropriate solution found promptly. With this in mind the Committee looks forward to the creation of the Controller, a function that could further reinforce the overall monitoring and supervisory framework applied to OLAF's investigative activities, and public trust in OLAF's fraud prevention mission and tasks.

²⁵ Article 9a-9b of OLAF amending Regulation No 2020/2223. As part of the new OLAF complaint mechanism, the Controller of procedural guarantees will be tasked with reviewing complaints lodged by people or bodies regarding OLAF's compliance with procedural guarantees and the rules applicable to investigations – in particular infringements of procedural requirements and fundamental rights.

Supervisory Committee governance

Supervisory Committee working method

64. In 2020, the Committee held ten plenary meetings, eight of which online²⁶. The Chair, the rapporteurs and the members of the Secretariat also met regularly to work on particular issues. For every major issue examined, the Committee appointed a rapporteur. The rapporteurs worked with the Secretariat to prepare draft reports, opinions or papers to be discussed in the plenary meetings. They also met with OLAF management and staff in preparing the Committee's opinions and reports. The Committee discussed its two opinions with OLAF before they were adopted.
65. Due to his appointment as European prosecutor, Mr Petr Klement resigned from his position in May 2020. He was replaced by Ms Dobrinka Mihaylova.

Secretariat recruitment

66. The Committee expects it will need more staff to cope with the arrival of the Controller, and the increased workload of the Secretariat.
67. The Committee is and will continue to be consulted in all recruitment processes for Secretariat staff. Officials assigned to the Secretariat must never seek or take instructions from any government or any institution, body, office or agency relating to the exercise of the Committee's monitoring functions. The Committee's involvement in recruitments to the Secretariat ensures and guarantees the independence of the selection process.

²⁶ The dates of the Committee meetings are available here: <https://europa.eu/supervisory-committee-olaf/activities/events>.

Location of the Secretariat

68. Following an amendment to the OLAF Regulation²⁷, the Committee Secretariat is provided by the Commission, independently from OLAF, and in close cooperation with the Committee.
69. At this stage, the Secretariat is still administratively attached to the Office for the Payment of Individual Entitlements of the European Commission ('PMO'), although still located in a separate security zone within OLAF's premises.
70. Regarding the actual location of the Secretariat, the Committee reiterates its view that a suitable place within OLAF's security zone would enable the Secretariat to work more efficiently. Likewise, the Committee's view is that the Secretariat should *administratively* be re-attached to another Directorate General, including OLAF, while remaining under the Committee's sole authority and fully independent from OLAF.
71. The Committee has informed OLAF, the European Commission, the European Parliament, the Council and the European Court of Auditors, that a more suitable place for its Secretariat must be found.

Budget matters

72. The Committee's budget for 2020 was €200,000. Due to holding meetings online because of the pandemic, the actual amount disbursed reached only €57,927.68 by December 2020 (~29%).
73. The authorising officer by sub-delegation responsible for expenditure is the Director of the PMO.

²⁷ Regulation (EU) No 2016/2030 of the European Parliament and of the Council of 26 October 2016 amending Regulation (EU) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF). The Regulation entered into force on 1 January 2017.