

## IV

*(Notices)*NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND  
AGENCIES

## OLAF

**Activity Report of OLAF Supervisory Committee****June 2009 – December 2010**

(2011/C 188/01)

**Members of the OLAF Supervisory Committee****Peter STRÖMBERG**

Chairman

Director of the Supervisory Board of Public Accountants, Sweden

**Kálmán GYÖRGYI**

General Prosecutor of the Republic of Hungary (retired), Hungary

**Luis LÓPEZ SANZ-ARANGUEZ**

Public Prosecutor at the Supreme Court, Spain

**Diemut R. THEATO**

Former Member of the European Parliament

Former Chairman of the Committee of Budgetary Control, Germany

**Rosalind WRIGHT**

Chairman of the Fraud Advisory Panel, United Kingdom

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## FOREWORD BY THE CHAIRMAN TO THE SUPERVISORY COMMITTEE'S ACTIVITY REPORT

This activity report, which is the fourth of this Committee, covers the period from June 2009 to December 2010, a period deeply marked by the death of Mr Franz-Hermann Brüner in early January 2010. When an organisation is unexpectedly deprived of its leader in such sad circumstances, it has a profound impact on its work at all levels. We noted, with satisfaction, that OLAF continued with business as usual, which was the best way to commemorate Mr Brüner's memory.

During this period, OLAF has been the focus of a number of different initiatives aiming at change. One of these is the procedure leading to the appointment of a new Director-General for OLAF, which was launched in April this year when the formal vacancy notice was published. The Supervisory Committee has been closely associated with this procedure and gave its opinion on 23 September 2010. Mr Giovanni Kessler was finally appointed by the Commission on 14 December. The SC welcomes the appointment of Mr Kessler and looks forward to a close and fruitful collaboration with him.

Another project aiming at change is the proposed reform of Regulation (EC) No 1073/1999. The SC has on several occasions given its opinion on different aspects of the proposal as it has developed over time – most recently in an opinion on the 'Reflection Paper' issued by Commissioner Šemeta some months ago. The Supervisory Committee is deeply involved in the debate, particularly since the Committee's work and status will be directly affected by the outcome; but also, and most importantly, because of the immediate effect it will have on the way OLAF functions. The Committee's first priority has always been, and will always be, the strengthening of OLAF's investigative powers and of its independence in investigations.

The Supervisory Committee ensures OLAF's independence by the regular monitoring of its investigative functions and assisting the Director-General in the discharge of his responsibilities. This Committee has now for a period of over 5 years devoted itself to that task. The Committee represents a collective experience of leadership of state authorities as well as of political bodies within the field of leading, managing and carrying out criminal and administrative investigations. Drawing on that experience the Supervisory Committee bases its formal opinions and its views on three equally important fundamental rules.

The first is always to return to the source of information, i.e. the actual case files, the Case Management System, the various reports prepared by OLAF preparatory to the launch of investigations, and reports drafted by OLAF for the Committee (e.g. the 9-months reports).

The second rule is the absolute independence of the Committee as well as of its individual members.

The third rule, which derives from the members' own experience, is the respect for OLAF's independence and a firm

commitment not to influence ongoing investigations, even when studying case files and case material related to ongoing investigations.

I wish to extend my own and the Committee's warm gratitude to the Supervisory Committee Secretariat without whose excellent work no activity in the Committee would have been possible.

### 1. INTRODUCTION

Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999<sup>(1)</sup> states that the role of OLAF Supervisory Committee (SC) is to strengthen and guarantee OLAF's independence, as well as to assist the Director-General in the discharge of his responsibilities. The SC is required to report to the Institutions on its activities on a yearly basis. During the period of this Report, the SC adopted five Opinions which were sent to the Institutions and to the Director-General of OLAF and which are attached to the Report.

In the period covered by this Report, Mr Luis López Sanz-Aranguez was Chairman of the SC until November 2009, when Mr Peter Strömberg succeeded him. Mr Strömberg's mandate was extended for a further year in November 2010.

It is important to remember that since Mr Brüner's death on 9 January 2010, OLAF has functioned without a Director-General appointed in accordance with the ad hoc procedure set out in the Regulation (EC) No 1073/1999.

During 2010, whilst awaiting the appointment of a new Director-General, the presence and the support of the SC were particularly important for the continuity of OLAF's work.

In April 2010, the European Commission launched the procedure for the recruitment of a new Director-General for the Office. This procedure concluded with the nomination of Mr Kessler on 14 December 2010. The SC looks forward to a close and fruitful cooperation with the future Director-General of OLAF.

In addition to being a summary of last year's activities, the SC hopes that this Report will be of assistance to the incoming Director-General, both in the analysis of current challenges faced by the Institution, and in the definition of the main direction of OLAF's policy for protecting the EU's financial interests.

The incoming Director-General will have to face many challenges to reinforce OLAF's efficiency and to ensure that OLAF dedicates all its efforts to a more focussed fight against fraud. Among those challenges facing the new OLAF Director-General, the SC wishes to stress the necessity of shortening the length of

<sup>(1)</sup> OJ L 136, 31.5.1999, p. 1.

OLAF investigations and to put in place the necessary changes in the organisation to ensure that the limited resources available are used to best advantage and dedicated to OLAF's core investigative tasks. One of the aims of the current Report is to give the incoming Director-General some suggestions for improving the focus of and the time taken for investigations.

## 2. SUPERVISORY COMMITTEE WORKING METHODS

### 2.1. Meetings

The SC held 16 plenary meetings in Brussels <sup>(2)</sup>. The minutes of these meetings are made available to OLAF and to the European Commission, the European Parliament, and the Council of the European Union for the sake of transparency and in order to provide them with regular information on the SC's activities.

As it did during the previous reporting period, the SC has continued the practice of inviting the Director-General of OLAF or the acting Director-General and a number of OLAF staff to its meetings. These meetings were the occasion for OLAF to inform the SC of any matters relevant to the SC's work and also for the SC to inform OLAF about its own work. As well as the regular visits to the SC meetings by the OLAF Judicial and Legal Advice Unit to present cases transmitted to the national judicial authorities, there were a number of broad areas actively discussed during SC meetings with OLAF's Director-General and management over the period of this Report. The SC focussed, in particular, on the operational aspects of OLAF's work, notably in relation to follow-up of SC Opinions in the areas of the OLAF's Annual Management Plan, draft budgets, OLAF's 9-months reports and OLAF's staffing policy. There were discussions with OLAF's Director-General, Mr Brüner, on the Commission's proposal to externalise OLAF as well as an informal exchange of views on the topic of coordination between OLAF and international organisations. In addition, presentations were made and discussions took place on the day-to-day elements of OLAF's work: for example the process for registration and storage by Commission services of OLAF documents and on access by OLAF to data held by the EU Institutions. The SC was pleased to have an in-depth presentation from OLAF on a particularly complex and important trans-border fraud case and to note the practical steps which had been taken to adapt OLAF investigatory practices in light of the lessons learned (see *infra* 3.1.5).

### 2.2. Rapporteurs and Opinions

Five Opinions were adopted by the SC during the reference period (see annexes). The practice of the appointment of rapporteurs <sup>(3)</sup> was maintained in order to increase the efficiency of the preparation and follow-up of specific items of interest to the SC. The main areas of the work of the SC in this period covered the preparation of the Opinion on the

budget, the Opinion on the Reflection Paper on the reform of Regulation (EC) No 1073/1999, the Opinion on investigation planning, the Opinion on implementation of fundamental rights and procedural guarantees in OLAF investigations, as well as the Opinion on the nomination of OLAF Director-General.

### 2.3. Secretariat

The responsibilities of the Secretariat of the SC are outlined in the SC Rules of Procedure <sup>(4)</sup>, which specify its role in facilitating and contributing to the performance of all tasks undertaken by the SC and ensuring that the SC is able to fulfil its legal mandate in full independence.

During this period, following the publication of the post of the Head of the Secretariat which became vacant in July 2009, it was agreed with Mr Brüner that no appointment to the post would be made without the approval of the SC. After a selection procedure, the acting Director-General of OLAF, as AIPN, appointed, in agreement with the SC, Ms Isabelle Jegouzo as Head of the SC Secretariat. She took up office on 16 June 2010.

In November 2009 one member left the SC Secretariat and in February 2010 a new official joined the team. Today one post remains vacant and should be filled as soon as possible.

As has been the case up to now, appointments of members of the SC Secretariat staff should always be made in agreement with the SC, thus ensuring the full independence of the SC in the performance of its duties. The necessary involvement of the SC in the recruitment process has been accepted by OLAF and the Commission.

The SC also considers that it should be involved in the annual evaluation exercise of the Secretariat staff given that the Secretariat works under its direct authority.

## 3. OLAF'S INVESTIGATIVE FUNCTION

### 3.1. Monitoring OLAF's investigative function

#### 3.1.1. Ensuring the independence of the Director-General of OLAF

The key function of the SC is to monitor OLAF's investigative function to ensure that its independence is not compromised. In this context, guaranteeing respect for the status of the Director-General is of the utmost importance.

<sup>(2)</sup> See Annex 1: Calendar of Supervisory Committee Meetings.

<sup>(3)</sup> Article 8 of the Rules of Procedure of the OLAF Supervisory Committee (OJ L 33, 7.2.2007, p. 7).

<sup>(4)</sup> The Rules were adopted by the SC in August 2006 and published in February 2007 (Rules of Procedure of the OLAF Supervisory Committee (OJ L 33, 7.2.2007, p. 7)).

Following Mr Brüner's death, the European Commission considered in its Decision of 13 January 2010 that Mr Nicholas Ilett, who had been the deputy Director-General by virtue of a decision taken by the Commission in July 2005, would automatically assume the post of acting Director-General. Following this Decision, an intense debate took place between the European Parliament and the European Commission. In this context, on 14 January 2010, the Chairman of the Committee sent a letter to Vice-President Kallas with copy to the European Parliament and to the Council in which he stated:

*The Supervisory Committee is of the opinion that for the day-to-day running of OLAF in the interim period and, in particular, the opening, conduct and closing of OLAF investigations, to be carried out in full independence it is very important that the ultimate authority of the Office should not be fettered in the exercise of his or her powers.*

*With this in mind the Supervisory Committee considers that the person carrying out the role of acting Director-General during the interim period should do so with the consensus of the European Parliament, the Council and the Commission. This person should have all necessary legitimate authority and independence status.'*

The SC considers that it is important to have at the Head of the Office a person appointed following interinstitutional consensus and backed by all institutions. This is important to support OLAF's day-to-day work.

### 3.1.2. Monitoring the length of OLAF investigations

OLAF's Director-General provides a monthly report to the SC with a summary of every investigation that has been in progress for more than 9 months ('9-months reports'). The 9-months reports set out the reasons for non-completion of investigations and the expected time for the closure of each case. These reports are the subject of ongoing analysis by the SC and the SC Secretariat.

The SC once again<sup>(5)</sup> underlines the importance of these reports which not only comply with a legal obligation but should also serve as a useful tool for improving the efficiency of investigations.

During the current reporting period, the SC has paid particular attention to OLAF's forecasts as to the expected time for completion of investigations that are made in the 9-months reports. The SC examined the forecasted timeframe for the closing of cases in 164 9-months reports received from June 2009 to July 2010. In 14 of the 164 reports no time

estimate at all was given for completion. Out of the remaining 150 reports, in 71 cases the delay in closing was several months more than expected (from 4 to 12 months). The SC notes the improvement in relation to the previous reporting period, during which approximately 23 % of the 275 9-months reports examined did not mention the expected time for completion at all. Nevertheless, it considers that the 9-months reports still need to be more precise as to why the initial timeframe was not adhered to.

### 3.1.3. Recommendations to Institutions

The Director-General of OLAF is obliged to inform the SC of cases where an institution, body or agency concerned has failed to act on the recommendations of OLAF<sup>(6)</sup>.

During this reporting period the SC has not received any reports indicating that an Institution, a body or an agency has failed to act according to OLAF's recommendations and conclusions.

### 3.1.4. Cases requiring information to be forwarded to the national judicial authorities: the effect of the judgment of the Court of First Instance in Case T-48/05

During the current reporting period, the SC examined 43 cases referred to it by OLAF, prior to transmission of information to the National Judicial Authorities (hereinafter 'NJA').

Following the *Franchet and Byk* judgement<sup>(7)</sup>, the Court of First Instance ruled that Regulation (EC) No 1073/1999 required OLAF 'to consult [the SC] before forwarding information to the national judicial authorities' and that this requirement is 'unconditional and leaves no margin of discretion'.

New working practices have been established between the SC and OLAF in order to implement the Court's decision: OLAF informs the SC 5 working days before its transmission to the NJA; the members of the Judicial and Legal Advice Unit provide the SC with a note summarising the handling of fundamental rights and procedural guarantees within the cases transmitted to the NJA. As far as procedural guarantees are concerned this note indicates, whether or not the person concerned has been informed of the opening of the investigation and if he/she has been given the opportunity to express his/her views to OLAF. It also indicates the outcome of the investigation (factual conclusions, legal evaluation, the competent judicial authority, the time-barring considerations and OLAF's recommendation).

<sup>(5)</sup> See in particular Opinion No 4/2010 on investigation planning (Annex 5) and Opinion No 5/2010 on respect of fundamental rights and procedural guarantees (Annex 6).

<sup>(6)</sup> Article 11(7) of Regulation (EC) No 1073/1999.

<sup>(7)</sup> *Franchet and Byk v Commission*, case T-48/05, paras 168-170.

The SC then makes a preliminary analysis of the information received enabling it to discuss with OLAF issues such as the respect for the rights of the persons under investigation, the legal evaluation of the facts, the competence of the addressee NJA, the duration of the investigations and the issue of time barring. Without interfering in ongoing cases, the SC may draw general conclusions from the analysis of these cases and communicate them to the OLAF Director-General with a view to improving the current practice. In particular, the SC drew conclusions relating to the respect for fundamental rights and procedural guarantees within OLAF's investigations in its Opinion No 5/2010 <sup>(8)</sup>.

Although these summaries drafted by the members of the Judicial and Legal Advice Unit enable the SC to understand the merits and the procedural issues arising from each case, the SC considers that more attention should be paid to the completeness and the accuracy of the information received. Indeed, sometimes the summaries are not comprehensive (the time-barring consideration or the recommendations are missing, the handling of the fundamental rights and procedural guarantees are incomplete or not detailed for each person concerned) or contain material errors (for example, title of investigation or relevant dates). In addition, the SC regrets that the legal control of investigative work does not appear to be carried out in a systematic way at each and every stage. From the cases examined, this lack of a continuous legal examination during investigations has led to failures in the observation of procedural requirements.

In its Opinion No 5/2010, the SC provided OLAF with an analysis grid on the respect for fundamental rights and procedural guarantees at each stage of the investigation. This grid also contains suggestions as to the assessment of the probative value of the evidence on which the conclusions of the investigation are based and the respect of the rules of the Member State concerned.

The SC recommends the revision of the summaries currently drafted by the members of the Judicial and Legal Advice Unit concerning the fundamental rights and procedural guarantees which could be based on the model of this grid.

The SC notes that, in general, the quality of most reports on investigations transmitted to the NJA could be substantially improved, with particular reference to their structure, clarity, analysis of the elements of the criminal offences at stake and

also from a linguistic point of view. Moreover, the SC noted that two case reports were transmitted to the NJA respectively 16 months and 24 months after the closure of the investigations. The SC considers that OLAF should consider implementing an electronic alert system to avoid such situations.

### 3.1.5. New working methods

In May 2010, the SC's Chairman chaired the 'Operational Cooperation between OLAF and other European Commission Directorates-General (DGs) – Follow-up of the 2007 Conference' organised at OLAF's initiative. The express intention of these conferences was to improve OLAF's cooperation with Commission Directorates-General (DGs) at an operational level to achieve better results and to reach a common understanding.

The SC believes that OLAF's leading role on detection, risk analysis and fight against fraud requires a regular exchange of relevant information between the Commission DGs. Particular efforts were made as of 2007 and Joint Fraud Prevention Strategies were developed with some DGs in 2008-09. The result was the creation of a new operational approach to large and more complex cases, involving the DGs more closely in the investigations and introducing a proactive intelligence-led approach.

In the field of Direct Expenditure where OLAF has sole responsibility for conducting investigations, this method was employed with one DG whose internal auditors were closely involved and acted as OLAF's experts during on-the-spot checks. New intelligence IT tools were also developed jointly by the DG concerned and OLAF, to better identify areas of risk.

The SC welcomes this new working method and would like to see it developed further as it allows OLAF to focus on the more serious and complex cases whilst minor wrongdoings are dealt with by Commission services at another level.

The financial situation of the EU has dramatically changed in the last 2 years. The financial crisis has led the European Commission to adopt measures to increase aid and the flow of money in certain sectors which could also lead to a rise in fraud and financial irregularities. The SC believes that new working methods are required to implement rigorous control mechanisms of fund expenditure and that serious operational cooperation between the Commission DGs and OLAF is now essential.

<sup>(8)</sup> See Annex 6.

### 3.2. **Follow-up of SC Opinion No 5/2008 – on the implementation of OLAF de minimis policy**

Following the SC's Opinion on OLAF's *de minimis* policy and the prioritisation of casework<sup>(9)</sup>, OLAF *de minimis* rules have recently been added to the Manual and are now available for the investigators.

The Supervisory Committee welcomes the initiative to clarify the implementation of the *de minimis* policy through *operational guidelines*. However these guidelines need to be read and combined with the indicative thresholds for internal and external investigations and for opening of financial follow-up paths as specified in the Annual Management Plan of OLAF.

The SC welcomes the creation of a *de minimis* annex listing the different criteria to be taken into account by the Board as to whether or not to open an external investigation and as an improvement in the area of the transparency of the decision-making process.

The SC would like to see a full analysis by OLAF of the implementation of the *de minimis* policy including relations with IDOC, in the year following the introduction of the policy.

### 3.3. **Regular monitoring at the SC's initiative**

#### 3.3.1. **Planning and strategic direction of investigations**

On 12 October 2010, the SC adopted its Opinion No 4/2010 on Investigation Planning<sup>(10)</sup>.

In its regular analysis of investigations that have been in progress for more than 9 months, the SC noted 'a lack of investigative methodology and rigour and a need for improvement in the internal levels of management and control of investigations'<sup>(11)</sup>.

Following close analysis of a sample of cases in Directorate A and Directorate B, the SC was disappointed to note a lack of consistency in approach within the operational directorates towards the planning and management of investigations. The Opinion recommends that a detailed investigation plan be developed at the outset for each investigation, setting out the objectives of the investigation, the likely resources needed for its completion and projected costing. The plan should be dynamic

<sup>(9)</sup> See Opinion No 5/2008 (OJ C 314, 22.12.2009, p. 15).

<sup>(10)</sup> See Annex 5.

<sup>(11)</sup> See in particular Opinion No 2/2009 (OJ C 314, 22.12.2009, p. 22).

and thorough enough to allow for the forecast of a date for the final decision. Investigation plans should be drafted for the Board and then regularly updated. They should cover every investigative step envisaged and be associated with a preliminary timetable for each step. These plans should be in writing and systematically annexed to the case file, facilitating their review and consultation in the event that investigators are met with demands for postponements or other kinds of delays. The management, at unit level, should examine investigation plans regularly to follow and, where necessary, guide the development of cases.

The SC was pleased to note that, immediately prior to issuing its Opinion, some ideas on improved planning were implemented by OLAF.

In addition to the planning of investigations, for each case, the SC recommends that OLAF management should design and implement procedures better to prioritise open cases, which would be adaptable according to the resources available.

The SC looks forward to a clear response from OLAF on this important matter and would welcome the inclusion of such provisions in an updated Manual.

#### 3.3.2. **Implementing fundamental rights and procedural guarantees in OLAF's investigations**

The respect by OLAF for fundamental rights and procedural guarantees in the conduct of investigations is directly linked to the independence and the efficiency of its work. The cases brought before the European Court of Justice pointed to some failures and weaknesses in the conduct of OLAF's investigations<sup>(12)</sup>. Therefore, the SC decided to assess the way in which OLAF ensures the respect of these rights and guarantees.

The SC issued its Opinion No 5/2010 on Respect for fundamental rights and procedural guarantees in investigations by the European Anti-Fraud Office<sup>(13)</sup> based on the analysis of 28 cases transmitted to national judicial authorities from December 2009<sup>(14)</sup> to October 2010. It carried out an analysis of the current legal framework applicable to OLAF's investigations (legislation and case-law), as well as of the implementation of the fundamental rights and procedural guarantees.

<sup>(12)</sup> See *Camos Grau v Commission*, 6 April 2006, case T-309/03; *Nikolaou v Commission*, 12 September 2007, case T-259/03; *Franchet and Byk v Commission*, 8 July 2008, case T-48/05.

<sup>(13)</sup> See Annex 6.

<sup>(14)</sup> The new OLAF Manual entered into force on 1 December 2009.

The SC noted that the persons concerned by internal investigations are protected by a set of rules laid down in various legal instruments. The situation is different in the area of external investigations, where there are no specific rules and the protection guaranteed by the national legislation applicable to the on-the-spot checks can vary from Member State to Member State.

The SC considered that OLAF generally respects fundamental rights and procedural guarantees of the persons concerned. Where it identified specific problems, the SC made recommendations to OLAF aimed at improving the current practice. In particular, the SC recommended that OLAF amend the Manual and ensure that its provisions are applied.

The SC noted also that the lack of clear rules of procedure, especially concerning external investigations, leads to a variation in practices within OLAF. The reform of Regulation (EC) No 1073/1999 should be the occasion for clarification of the legal framework, particularly with regard to external investigations. OLAF's powers of investigation need to be reinforced, especially with regard to the need to carry out interviews. The SC pointed out that this clarification should not lead to over-regulation. The legislator must take into account the specific nature of OLAF's investigations which are administrative and represent only a preliminary stage of a larger procedure, in which respect for the rights of defence of the persons concerned is guaranteed during the follow-up procedures. Imposing on OLAF procedural obligations without taking into account this specific nature as well as the diversity of internal and external investigations would limit the effectiveness of the fight against fraud without necessarily improving the respect for fundamental rights.

The SC listed the general principles governing the conduct of investigations, as well as of the fundamental rights and procedural guarantees to be respected by OLAF. The SC recommended the reinforcement of the mechanisms of control of the impartiality and the confidentiality of investigations, as well as of their duration. In addition, the SC suggested measures that should be taken by OLAF to reinforce the respect of fundamental rights and procedural guarantees at each stage of an investigation. Finally, the SC provided OLAF with a grid analysis of the method of implementation of fundamental rights and procedural guarantees to be used by the investigators during investigations and by the management team when controlling the legality of the investigations.

The SC also regrets that its previous recommendations (see in particular recommendation XI of the 2008-09 Activity Report) regarding the need for a better and earlier involvement of the members of the Judicial and Legal Advice Unit in the investigation process, have not been sufficiently taken into account by OLAF. The SC reiterates that the members of this unit should be

in a position to provide legal advice at all stages and in all the cases where it is required, in particular in matters concerning the respect of fundamental rights and procedural guarantees of parties to an investigation. Provisions meeting these recommendations should be clearly set out in the new OLAF Manual – Operational Procedures as was the case previously.

In its recommendation X of its report 2008-09, the SC expressed the wish 'to be informed of all complaints that OLAF has received or has examined from parties to an investigation where fundamental rights and procedural guarantees appear to have been compromised'. The request includes not only cases transmitted to judicial authorities but all cases. The SC received two notifications from OLAF during the time period covered by this report. It also received one direct notification from the parties involved in one case.

#### 3.4. **OLAF's procedural investigation rules and OLAF Manual – Operational Procedures**

The SC has followed with interest successive developments with regard to the OLAF Manual and has communicated to OLAF a significant number of written remarks during the drafting process.

The SC appreciates the improvements in the form and content of the new Manual. However, as far as operational procedures are concerned, this latest version does not meet the expectations of the SC in that it is not a set of hard and fast rules intended to guide investigators at every stage of their investigations.

The SC has repeatedly said that it was important that case procedures clearly indicate for each type of investigation which are the different procedural actions from the outset to the conclusion. The SC has also expressed concerns as regards 'assessment of initial information' due to the absence of clear deadlines prior to the decision to open a case. The aim of this stage was to determine the existence of sufficiently serious suspicions and close attention was to be paid not to conduct any operational activity within this stage. In line with this idea the SC required further clarification as to the so-called preparatory fact-finding mission which should not overlap with and anticipate the actual investigation. The SC regrets that these comments addressed to OLAF were not integrated in the OLAF Manual eventually adopted.

In addition, the SC believes that the Manual should be a dynamic document, capable of being updated at any time, which should serve as a *vademecum* for use by investigators to which they can refer during their investigations. In particular, the SC considers that its recommendations with regard to the planning of investigations, the protection of fundamental rights and the respect for procedural guarantees should be incorporated into the Manual.



In-depth training on the Manual should continue to take place on a regular basis.

In addition to an improvement of the legislative framework, the SC believes that OLAF should draft a simple set of rules focussing mainly on the different steps of investigations but also taking into account the rights of individuals, the data protection requirements, and the requirements for on-the-spot checks. The Manual should then be adapted and draw on this set of rules in order to give clear instructions to the investigators.

The Manual should also include examples of good practice developed in the various types of investigations including templates validated by the management of OLAF to which each new investigator could refer.

### 3.5. **Administrative organisation, budget and staff policy in relation to OLAF's investigative function**

#### 3.5.1. **Administrative organisation and staff policy**

Well-qualified staff is key to a successful investigation policy. In the framework of its monitoring mission of OLAF's investigative function, the SC considers that it is its duty to ensure that OLAF's human resources policy allows OLAF to carry out its mission effectively<sup>(15)</sup>.

The SC considers that the definition of a comprehensive Human Resources strategy should be one of the first priorities of the new Director-General.

#### *Determination of internal priorities*

In order to draft a human resource strategy adapted to its needs, OLAF should perform an in-depth analysis of its own internal priorities. In this regard, the SC would once again emphasise the need for OLAF to focus on its core business and to reinforce its investigative capacity. The SC would recommend that the new Director-General give due consideration to the allocation of resources within OLAF to address the question of staffing balance between operational Directorates A and B combined and Directorate D which should act primarily in support of the investigative activities of OLAF.

Moreover, the SC considers that within the area of OLAF investigative work, priorities should be set having in mind the possible synergies with other parts of the Commission or with Member States. The SC welcomes OLAF's recent policy

of focussing on the larger and more complex fraud cases to be investigated in close collaboration with the Directorate-General concerned and supported by IT intelligence.

#### *Building a comprehensive Human Resources (HR) policy*

Based on an analysis and definition of OLAF's core business such as that set out above, resources should be adapted and concentrated to allow for a focus on priorities. In defining its HR policy OLAF should, in particular, take into consideration:

- (i) the suitability of the qualifications of the staff whose main tasks fall within the responsibility of OLAF. OLAF currently benefits from a wide diversity of professional qualifications amongst its staff (legal professionals, investigators, customs officers, forensic specialists and IT specialists, amongst others). This body of knowledge represents a particularly valuable and rich source of expertise whose synergies should be better exploited;
- (ii) the importance of developing a policy of mobility allowing OLAF's staff to develop their careers within all the Institutions and allowing OLAF to benefit from the diverse experience available inside and outside the Institutions. In this regard, the SC would support an initiative to promote and increase the mobility of OLAF staff;
- (iii) the importance of a comprehensive training policy, taking particular note of the characteristics of OLAF's investigative duties. This policy should be adapted to a regular turnover of staff in order to avoid any loss of competences, in particular with regard to the investigative function;
- (iv) the need to design a clear policy regarding the recruitment of temporary agents with extensive and specific experience in the Member States in the field of investigations.

The SC also recommends that OLAF should make the best use of the recruitment possibilities opened up by recent competitions. The SC welcomes the recent extension of the date of validity of the list of candidates but regrets the length of the recruitment procedures for candidates.

Furthermore, the SC points out the need to clarify OLAF's policy regarding temporary staff. All members of staff should benefit from a clear vision of their status and potential career development. The SC regrets the lack of clarity in this regard which, over the past few years, has sometimes led to serious personal difficulties for members of OLAF staff.

<sup>(15)</sup> See Annex 2: Opinion No 1/2010 OLAF's Preliminary Draft Budget for 2011.

During the first half of 2010, the President of the SC visited the various units and directorates within OLAF. These visits flagged up, inter alia, the heavy administrative burden on OLAF investigators. This is something that requires further reflection, to allow investigators the maximum time possible to concentrate on their investigative function.

### 3.5.2. Budget

The SC takes note of some level of improvement in the management of missions and travel expenditures. It recommends that this policy be further extended and that an assessment of the need for missions in order to carry out investigations be systematically carried out. Due consideration should also be given to the options provided by information technologies such as video conferencing to avoid the need for complex and costly travel.

## 4. RELATIONS WITH OLAF, THE EU INSTITUTIONS, OLAF PARTNERS AND STAKEHOLDERS

### 4.1. Relations with OLAF

The SC has continued to develop a constructive relationship with the OLAF management team and officials during the period of this Report. Numerous formal and informal meetings have been the occasion for valuable exchanges of views and sharing of information.

On separate occasions in February, March, April, May and June 2010 the SC Chairman met members of staff of the OLAF Investigations and Operations units and of the Operational and Policy Support units. The aim of those meetings was to maintain its close connection with the operational areas of OLAF and to listen to comments and suggestions on how to improve the investigative function.

During his visit, the Chairman met most of the team members of the thirteen units together with all the Heads of Unit. The items discussed included:

- (i) the limitations of the legal basis for OLAF's work in some sectors and the reform of Regulation (EC) No 1073/1999;
- (ii) the heavy administrative burdens and bureaucratic workload for investigators;
- (iii) the need for a proactive investigation policy;
- (iv) the obstacles in working relations between OLAF and the Institutions, the Member States and third countries.

A memorandum on the visit will be discussed with the new Director-General of OLAF.

Members of OLAF staff, including, on several occasions, the Director-General himself and later the acting Director-General, attended SC meetings in the period covered by this Report.

In September and November 2010, OLAF outlined for the SC the difficulties it had encountered in achieving what it regards as a reasonable level of access to sections of some Commission databases. This issue has been ongoing since 2007. OLAF considers that this difficulty in accessing Commission databases could potentially reduce its capacity to carry out investigations effectively and independently and in November 2010, asked the SC to deliver a formal opinion. A rapporteur was appointed within the SC to start working on this file.

All five Members of the SC attended OLAF's 10th Anniversary Conference on 12 October 2009 where the Chairman and a member of the Committee delivered speeches.

The SC participated in the conference on the perspectives for a European Public Prosecutor 'Protecting the financial and fundamental interests of the Union', at the Court of Cassation in Paris on 11 February 2010, in the 10th OAFCN seminar in Budapest on 13-15 October 2010 and in the fraud prosecutors' conference in Paris on 18 and 19 November.

### 4.2. Relations with EU Institutions

#### 4.2.1. Relations with the European Commission, the European Parliament and the Council of the European Union

Being an interinstitutional body, the SC is particularly committed to sustaining a close working relationship with the Commission, the Parliament and the Council.

The renewal of the Parliament in Spring 2009 and the appointment of the new Commission in February 2010 allowed the SC to start building new and closer ties with newly appointed institutional partners.

The SC welcomes the commitment of Commissioner Šemeta, as the new Commissioner in charge of OLAF, to develop a fruitful relationship with the SC. He attended the SC meetings in March and July 2010 and a member of his cabinet attended the SC meetings in September, October and November. These meetings were of mutual benefit with regard to those projects concerning the reform of OLAF. The SC very much appreciates the support given by Commissioner Šemeta and his cabinet to OLAF and to its own work.

During the reporting period, the SC also met with the Deputy Secretary General of the Commission, Mr Alexander Italianer on 21 October 2009 and the Chairman of the Committee on Budgetary Control of the European Parliament (COCOBU) Mr Luigi de Magistris on 17 November 2009. The SC made a presentation of its 2008-09 Activity Report to the Working Group for the Fight against Fraud of the Council during the Swedish Presidency on 25 November 2009 and to the Committee on Budgetary Control of the European Parliament (COCOBU) on 3 December. The SC also sent a written answer to questions asked by the European Parliament on this occasion. The SC is gratified by the positive feedback and support it received. On 15 December 2010, the SC received Ms Catherine Day, Secretary General of the Commission where, inter alia, issues relating to OLAF's access to Commission databases and human resources were discussed.

#### 4.2.2. Relations with the European Court of Auditors

The SC rapporteur met with the Court of Auditors in Luxembourg on 21 September 2009 to discuss matters of common interest and the involvement of the SC in the planned audit of OLAF.

In February 2010, representatives from the Court of Auditors attended the SC meeting to discuss and present the scope of their follow-up to the Special Report 1/2005 on OLAF. In June of the same year the SC Secretariat was visited by the auditors in charge who requested copies of the minutes of the SC meetings together with the most recent SC Opinions. Further documents were also handed over in October 2010 at their request.

#### 4.2.3. Contribution to the reflection on the reform of OLAF

Following his nomination, Commissioner Šemeta took the decision to relaunch the reform of Regulation (EC) No 1073/1999, at that time still pending before the Council and Parliament. In order to unblock discussions between the Institutions, the Commission adopted a Reflection Paper<sup>(16)</sup> on 7 July 2010 which would serve as a basis for further progress in the reform process.

On 14 July 2010 Commissioner Šemeta attended the SC's meeting where he presented the document and the SC welcomed the Commissioner's gesture to invite contributions from the SC to the ongoing debate and the Commission's document. Accordingly, the SC adopted its Opinion No 3/2010 on the Reflection Paper on the Reform of the European Anti-Fraud Office (OLAF)<sup>(17)</sup> on 23 September 2010

In its Opinion, the SC welcomed the Commission's determination to progress with the reform of OLAF to reinforce the protection of the EU's financial interests, particularly in the context of the current economic and financial crisis. It noted the Commission's approach to defer to a later stage the consolidation of the anti-fraud legislation into a single legal framework, in order to await, in particular, the debate on the creation of a European Public Prosecutor's Office.

The SC agreed that there was a need to reform the governance of OLAF in order to improve its efficiency but regretted that the Reflection Paper did not put more emphasis on the investigative competence of OLAF, despite the new opportunities opened up by the Treaty of Lisbon. Furthermore, the SC also stressed the need to reinforce the responsibility of OLAF management in the area of the conduct and control of investigations, principally with the intention of shortening the duration of investigations and improving OLAF's efficiency.

Regarding the proposal to develop an interinstitutional dialogue, the SC conceded that such dialogue could improve institutional support for OLAF's fight against fraud but stressed that this dialogue should, under no circumstances, lead to political interference in investigations. As guardian of OLAF's independence, the SC proposed to take the lead in managing this dialogue.

The SC expressed strong concerns with regard to the proposal to create the post of Review Adviser which could have the effect of increasing the administrative burden on OLAF as well as duplicating or even undermining the core functions of the SC. The SC did, however, support the creation of the post of an internal Complaints Officer, within OLAF, to act as a first contact dealing with complaints from those under investigation regarding the way in which their investigation has been handled.

The SC welcomed the will, as expressed by all EU Institutions, to strengthen its role, but strongly disagreed with the proposal as set out in the Reflection Paper, whereby the SC would receive only statistical data in order to carry out its work. The SC fully shares the views that it should not interfere with OLAF's operational work but considers that full access to case files is essential to safeguard OLAF's independence by monitoring the efficiency and effectiveness of its investigatory procedures.

The SC attended two meetings at the Council to present its Opinion. The SC strongly supports the Commission's intention to move forward with this reform, with a view to strengthening the effectiveness and independence of OLAF's investigative function, and will be pleased to make further contributions to the later stages of the debates.

<sup>(16)</sup> SEC (2010)859.

<sup>(17)</sup> See Annex 4.

#### 4.3. Selection procedure of the OLAF Director-General

Article 12(2) of Regulation (EC) No 1073/1999 stipulates that the European Commission shall draw up a list of the candidates having the necessary qualifications following a favourable opinion of the SC.

In order to fulfil this requirement, the SC was closely associated with the first stages of the selection procedure. It analysed the CVs of the candidates and one member of the Committee attended the pre-selection panel which met at the beginning of July 2010 and the Consultative Committee of the Appointments which met on 10 September 2010 as an observer. At its meeting of 23 September 2010, the SC delivered its Opinion No 2/2010<sup>(18)</sup> on the six candidates whose names had been communicated by the European Commission. This Opinion was communicated to the Commission and to the other Institutions.

#### CONCLUSIONS AND RECOMMENDATIONS

- I. The SC has examined the time frame for closure of the investigations in 164 cases and is disappointed to note that, despite its previous recommendations, OLAF is still not applying systematic and effective working methods and internal checks to avoid unjustified delays in its investigations. Although there has been a reduction, with respect to the previous period, in the number of cases in which there is no mention of the expected date for completion of the investigation, OLAF has still not given precise explanations of the reasons for these delays.
- II. The SC reiterates the need for: (i) greater supervision of reports on cases that last longer than 9 months; (ii) introduction of a system for informing the SC regularly, after an investigation has been in progress for 9 months, that the expected time for completion has been exceeded; (iii) introduction of an alert system in the Case Management System (CMS) to review the reasons for periods of inactivity exceeding 3 months. Strict control of the length of investigations is also necessary in order to dispel doubts as to their independence, and this is an essential matter for the SC.
- III. The SC has examined 40 cases conducted by OLAF's two Investigations and Operations Directorates and has repeatedly found a lack of proper planning of investigations, which has a negative impact on the effectiveness of OLAF's work and the length of its investigations. OLAF's Manual of Operational Procedures provides guidelines for drawing up an initial work plan at the assessment stage, but lacks provision for a full investigation plan once the investigation starts.
- IV. The SC has recommended that OLAF implement a policy of full planning of all stages of investigations, with regular checks, realistic timetables and periodic updates to ensure compliance. As a result of the SC's work in this field, OLAF has become aware of the need to adopt a common approach to the strategic planning of cases, and has begun to draw up detailed work plans once a case is opened. The SC is currently assessing the effectiveness of the measures taken by OLAF.
- V. The SC considers that OLAF should apply a clear prioritisation policy for casework. On this point, the SC welcomes OLAF's willingness to refer minor cases which might be adequately resolved by disciplinary measures to other competent bodies (the Investigation and Disciplinary Office of the Commission – IDOC). However, the SC recommends that further work be done on objectively establishing the criteria for such referral. The Manual should be amended in order to set out clearly OLAF's *de minimis* policy.
- VI. The SC supports OLAF's initiatives in detecting and analysing risks in the fight against fraud on the basis of a regular exchange of information with other Directorates General of the European Commission. This working practice makes it possible to implement a pro-active investigation policy and focus on the most serious and complex cases. The SC therefore urges that these mechanisms be developed as soon as possible owing to the current economic situation in the European Union.
- VII. The SC considers that some amendments to the OLAF operational Manual are needed in order to incorporate current practices, as well as specific requirements deriving from established case-law or current legislation. In particular: (i) better definition of each stage of the investigation in order to ensure full respect for fundamental rights and procedural guarantees and provide useful guidance to the investigators; (ii) precise definition of the initial assessment period and its length. In-depth training on the Manual should continue to take place on a regular basis.
- VIII. The SC considers that respect for fundamental rights and procedural guarantees is essential for OLAF's independence. The SC has examined 43 investigations before OLAF sent information on them to the national judicial authorities and has conducted an analysis of respect for fundamental rights and procedural guarantees in every

<sup>(18)</sup> See Annex 3.

single case. The SC considers that in general OLAF respects these rights and guarantees. However, it has drawn up specific recommendations for reinforcing the current mechanisms for monitoring procedural principles, in particular the principles of impartiality, confidentiality and reasonable length of investigations.

- IX. The SC considers that the difference between OLAF's internal and external investigations must be taken into account when addressing the issue of fundamental rights and procedural guarantees. Respect for these rights must be proportional to the nature, objectives and effectiveness of the investigation. In addition to analysing the procedural guarantees applicable to OLAF's investigations in the light of current legislation and case-law, the SC has produced a form which is intended to provide a useful guide for investigators at each stage of the investigation.
- X. The SC insists that in order to ensure effective respect for fundamental rights and procedural guarantees it is necessary to establish checks on the legality of the investigations, based on greater and continuous involvement of the Judicial and Legal Assistance Unit. Throughout its mandate, the SC has recommended to reinforce this Unit and involve it at a much earlier stage in the investigative process. The SC regrets that the legal control of investigative work is not carried out in a systematic way at each and every stage. This lack of a continuous legal examination during investigations has led to failures in the observation of procedural requirements. The SC also recommends that the new Director-General give thought to the structure and organisation of this unit.
- XI. The SC recommends that a comprehensive Human Resources strategy be devised following an in-depth analysis of OLAF's priorities and working methods. This strategy should allow for: (i) better allocation of resources within OLAF in order to better focus on the main investigative tasks; (ii) better use of synergies within OLAF, in particular by building on the diverse qualifications of OLAF staff; (iii) adequate administrative support for investigation activities; (iv) increased mobility within OLAF and the Commission; (v) better development of the training policy to enable mobility to be developed without detriment to the quality of the investigations.
- XII. The SC recommends that the Institutions take advantage of the reform of Regulation (EC) No 1073/1999 to regulate the interim situation concerning the post of Director-General of OLAF, so that where there is a period in time between the leaving of office for any reason of one Director-General and the appointment of another, the acting Director-General's powers should be clearly defined. This rule would respect the agreement among all the Institutions to guarantee OLAF's legitimacy and independence in these transitory periods.
- XIII. The SC recommends that the Institutions take advantage of the reform of Regulation (EC) No 1073/1999 to clarify the legal framework in which OLAF operates, reinforce its powers of investigation and independence and provide it with precise procedural rules. The SC stresses that it is essential for OLAF to be operationally independent and reiterates its willingness to make its experience available in this reform process.
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## ANNEX I

## CALENDAR OF SUPERVISORY COMMITTEE MEETINGS

## 2009

Month	Meeting date
JUNE	Tuesday, 9th – Wednesday, 10th
JULY	Tuesday, 7th – Wednesday, 8th
SEPTEMBER	Wednesday, 23rd – Thursday, 24th
OCTOBER	Tuesday, 20th – Wednesday, 21st
NOVEMBER	Tuesday, 17th – Wednesday, 18th
DECEMBER	Tuesday, 15th – Wednesday, 16th

## 2010

Month	Meeting date
JANUARY	Tuesday, 12th – Wednesday, 13th
FEBRUARY	Tuesday, 9th – Wednesday, 10th
MARCH	Tuesday, 16th – Wednesday, 17th
APRIL	Tuesday, 27th – Wednesday, 28th
JUNE	Tuesday, 1st – Wednesday, 2nd
JULY	Tuesday, 13th – Wednesday, 14th
SEPTEMBER	Thursday, 2nd (all day)
SEPTEMBER	Thursday, 23rd (all day)
OCTOBER	Tuesday, 12th – Wednesday, 13th
NOVEMBER	Tuesday, 9th – Wednesday, 10th
DECEMBER	Tuesday, 14th – Wednesday, 15th

## ANNEX 2

## OPINION No 1/2010

## OLAF's Preliminary Draft Budget for 2011

Brussels, 30 June 2010

At the meetings of 27 and 28 April and 1 and 2 June 2010, OLAF's Supervisory Committee examined OLAF's preliminary budget for 2011 and adopted the following Opinion.

**I. Presentation of the provisional budget for 2011**

As it does every year, OLAF presented the main points of the provisional budget for the following year to the Committee. For 2011, the Committee notes that this is a transitional budget relating to the current interim period that followed the death in January 2010 of OLAF's Director-General, Franz-Herman Brüner. Given that the powers of acting Director-General were limited to dealing with current issues, the acting Director-General has been unable to take decisions or carry out engagements leading to commitments for the future Director-General after his or her election by the Institutions.

The Committee notes that the overall provisional budget was 3,19 % higher than that of 2010. The Committee wishes OLAF to place greater emphasis on the training of its entire staff. The Committee notes that the budget for overseas missions has increased proportionately in line with the increase in the cost of living and expresses the wish that this area be always subject to effective monitoring by the heads of unit and directors of OLAF.

The amount of the budget line granted to the Committee remains stable in relation to the 2009 and 2010 figures.

The Committee notes that OLAF staff numbers have remained stable at 384 agents and expenses have not increased disproportionately. Provisional appropriations for salaries and payments to staff have increased by 4,13 % in total, including the salary adjustments.

**II. Allocation and management of OLAF's human resources**

*The Committee notes that the number of vacant posts has dropped. In 2010 it was 24 and in 2011 it should be eighteen. The Committee welcomes this positive trend which helps to improve OLAF's capacity to handle its activities.*

With regard to temporary staff, the Supervisory Committee welcomes a series of positive developments in 2008, 2009, and 2010, in particular the launch and publication of the results of external and internal competitions in the field of combating fraud. This has already enabled OLAF to recruit in January 2010, as officials, 11 former temporary agents (nine for an indefinite period and two for a fixed period), who passed external competitions. This was made possible following an amendment to the establishment plan and the negotiation of a rectifying budget with the budgetary authority.

Following the recent publication of the results of internal competitions, a similar exercise should be carried out by OLAF to offer posts as officials to those having passed the competitions. This should enable OLAF to recruit 13 temporary agents for an indefinite period and two for a fixed period in 2010. In addition, three former temporary agents having passed external competitions passed an internal competition at a higher level.

Although organising these competitions was a significant undertaking and fulfilled OLAF's commitments, the overall impact on the 92 temporary agents involved in the exercise is limited in so far as only 21 of them have passed one of the competitions. A further four temporary agents on fixed-term contracts have also been able to benefit from the competitions. To date therefore 63 temporary agents affected by the 2007 negotiation have been unable to benefit from the competitions, either because they did not pass or because they could not, or declined to take part. An even larger number have been prevented from registering for the competitions because of the grades for which the competitions were open, the qualifications required and the length of time since they obtained their qualifications. The Supervisory Committee points out that it would be highly desirable for these temporary agents to continue to contribute their skills and knowledge to OLAF and that it would make sense to offer them, at the earliest opportunity, genuine prospects for career development. It should not be overlooked that the oldest temporary agents have been working at OLAF for over 10 years. It would be appropriate to allow them to enjoy the benefits of reclassification.

It would also be useful for OLAF to ask EPSO to organise competitions allowing recruitment of the highly specialised people needed by OLAF. It would be extremely harmful to OLAF's future effectiveness, and indeed its independence, if it were unable to retain such specialists. It would be very time-consuming and expensive to train new specialists were the absence of genuine prospects to lead some staff to leave OLAF.

The Committee notes that there are still some fixed-term temporary agents at OLAF whose contracts it has not been and certainly will not be possible to renew in the future. Such situations are difficult to sustain, on a human level, in so far as the people concerned know that the period of work will inevitably come to an end. Once again the Committee requests that OLAF draw up and quickly implement an appropriate, consolidated recruitment policy offering standard lengths of contract to Member States' candidates who are investigative specialists. Such recruitment would have the merit of allowing OLAF to try and attract the best candidates from national services. It would also make it possible to update the knowledge of investigators already working for OLAF and, most importantly, to enable them to make adjustments and improvements to their investigation technique. The Commission's proposed spread of 80 % officials and 20 % temporary agents should be considered merely an aspiration, rather than a target set in stone. OLAF should never restrict or altogether dispense with the recruitment of specialists in the fight against fraud. Its independence in investigations does not rest on the ratio of officials to temporary agents but, rather, on investigation skills and a desire to implement the best investigative techniques. The recruitment of temporary agents should also enable OLAF to work more effectively and to improve cooperation with the Member States' authorities.

The Committee notes that OLAF's organisational structure, as at 1 April 2010, comprised only one head of unit post held by a temporary agent. It would also clearly be worthwhile analysing, at some stage, the necessary balance to be struck in this area between officials and temporary agents.

The Committee expresses its disappointment that OLAF has yet to define a proper human resources policy and this despite its recommendations as set out in its Opinions on previous budgets (Opinion No 2/2007 – Opinion No 3/2008 – Opinion No 3/2009). Similarly, the Committee stresses, as in previous years, the need for careful reflection as to the appropriateness of the allocation of resources to OLAF's core business. The Committee has noted OLAF's comments as to the indivisible nature of its work and with regard to the contribution of all areas of the Office to its duties; it nevertheless considers that particular consideration is needed with regard to the relative proportion of staff dedicated directly to investigative activities. As in its earlier opinion, the Committee believes that an overall evaluation and determination of priorities should be carried out with regard to OLAF's various areas of activity as well as to their respective importance.

**Recommendations:**

**The Committee urges OLAF to establish, as soon as possible, a human resources strategy based on an analysis of work priorities and the appropriate allocation of resources to same. This strategy should offer realistic job prospects in the short and medium term.**

**The Committee recommends that OLAF pay particular attention to the different categories of temporary agents currently working in OLAF and to try as far as possible to find appropriate solutions adapted to these groups, in particular with regard to the opportunities for reclassification.**

### III. The secretariat of the Supervisory Committee

The notional number of staff within the Supervisory Committee secretariat is eight. On 1 February 2010 a new administrator joined its ranks and was allocated to a vacant post. A temporary AST agent post has been vacant since November 2009 and should be replaced by an official post.

In addition, a vacancy notice for the post of head of the secretariat was published in June 2009, ahead of the retirement of the former head at the end of July 2009. The new head of the Supervisory Committee secretariat was recruited on 16 June 2010.



The existing staffing level of the secretariat will be satisfactory in terms of the tasks for which the Committee is currently responsible when all posts have been filled. However, if changes to the applicable regulations – in particular changes of the kind voted for by the European Parliament on 20 November 2008 as part of the revision of Regulation (EC) No 1073/1999 – were to enter into force, the Committee's remit would be broadened and that would necessitate a significant expansion of the secretariat's workforce. Only such an increase in the number of staff within the Supervisory Committee secretariat would guarantee the Committee's genuine independence, which in turn is a crucial factor in safeguarding OLAF's independence.

**Recommendation:**

**OLAF should organise for the definite allocation of eight posts to the Supervisory Committee Secretariat.**

**If, as part of the revision of the regulation applicable to OLAF, the tasks assigned to the Supervisory Committee were to expand, it would be essential for the secretariat's resources to be increased accordingly in order that the Committee could continue to work effectively and efficiently.**

**IV. Conclusion**

The Committee accepts the idea that the current provisional budget should be a reflection of the current transitional period.

However, the Committee expressly wishes that immediately following his entry into office, the new Director-General of OLAF request from the budgetary authority the necessary means, in particular with regard to the management, investigation policy and staff recruitment policy of OLAF.

The Supervisory Committee supports OLAF's budget proposal for 2011 and trusts that the above recommendations will be taken into consideration.

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## ANNEX 3

## OPINION No 2/2010

**for the attention of the European Commission**

*(delivered in accordance with Article 12(2) of Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office)*

Brussels, 23 September 2010

**Legal framework:**

Article 12(2) of Regulation (EC) No 1073/1999 (referred infra as Regulation 1073/1999), concerning investigations conducted by the European Anti-Fraud Office (OLAF), provides that the Supervisory Committee shall deliver a favourable opinion on the list of candidates for the position of Director of OLAF transmitted by the Commission for consultation with the Council and the European Parliament.

Article 15 of the Rules of Procedure of the OLAF Supervisory Committee provides that 'after examining the applications for the post of Director-General of OLAF, the Supervisory Committee shall issue an opinion containing an explanatory statement setting out the criteria used to assess the candidates' merits' and that 'it shall also contain the opinion of the Committee on the candidates [...]'.

**Procedure:**

By decision of 17 March 2010, the Commission decided to advertise the post of OLAF General Director internally (pursuant to Article 29(1)(a)(i) and (iii) of the Staff Regulations) as well as externally (pursuant to Article 29(2) of the Staff Regulations). The post was accordingly advertised internally (under vacancy notice COM/2010/842 published on 9 April 2010) and externally (under vacancy notice COM/2010/10255, published, inter alia, in OJ C 91 A of 9 April 2010). In both cases, the deadline for submitting the application was set as 7 May 2010. The post was advertised as a position of 'Director-General' since the grade of publication corresponds to that grade.

On 12 May 2010, the Commission decided to adopt the procedure to be followed for the selection of the post of OLAF's Director-General. A member of the Supervisory Committee attended the pre-selection panel and the CCA as an observer.

On 21 September 2010, the Commission transmitted a list of six names to the Supervisory Committee.

According to Article 12(2) of Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999, 'the Commission shall [...] after a favourable opinion has been given by the Supervisory Committee, draw up a list of suitable qualified candidates'. Therefore, the Supervisory Committee considers that its main role in the procedure is to ensure that the selected candidates have the necessary qualifications to fulfil the position of Director-General.

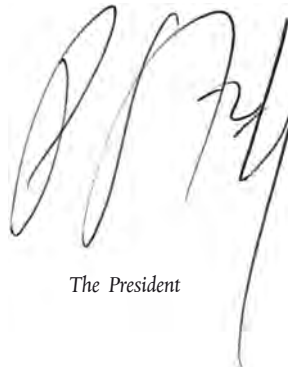
**Opinion of the Supervisory Committee**

The Supervisory Committee considers that the Director-General of OLAF should have the ability and determination to lead a complex, multi-task organisation in a multinational context in order to deliver concrete results in the fight against fraud and corruption in Europe. He or she should have sufficient background in this field in order to command the loyalty and the respect of a highly specialised team, and in order to ensure credibility both within and outside OLAF. He or she should show proof of outstanding management capacities in order to confront the current challenges of OLAF which have often been described by the Supervisory Committee in its various opinions. He or she should have sufficient experience of the work in an international and multicultural context in order to quickly address the specific challenges of such a complex institutional environment. Moreover, as guardian of the independence of OLAF, the Supervisory Committee attaches a particular importance to the commitments of the candidates to the independence of the organisation as well as to their vision as regards the specific role of OLAF within the European institutions.

All these requirements are appropriately listed in the vacancy notice.

Following examination of the applications submitted by the persons concerned, and the reports of the pre-selection panel and of the CCA, the OLAF Supervisory Committee unanimously adopts a favourable opinion on the candidature of three candidates and adopts on a majority basis a favourable opinion on the three remaining candidates.

*For the OLAF Supervisory Committee*

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, positioned above the text 'The President'.

*The President*

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## ANNEX 4

## OPINION No 3/2010

## on the Reflection Paper on the Reform of the European Anti-Fraud Office (OLAF)

Brussels, 23 September 2010

## INTRODUCTION

The Supervisory Committee (SC) thanks the Commission for the Reflection Paper (henceforth RP) of 6 July 2010 and supports its wish to relaunch the reform of Regulation (EC) No 1073/1999.

The SC would like to stress the importance of defining new ambitions for the European Anti-Fraud Office (OLAF) and the necessity to reform it in the context of the dramatic changes in the area of European public financing in the last 2 years. The financial crisis has prompted the European Institutions and the Commission in particular, to adopt measures to increase financial resources in certain sectors. This policy must be accompanied now by measures to monitor the commitment and use of European public expenditure. European citizens must be certain that OLAF has the necessary means to combat any increase in fraud, corruption or any other illegal activity likely to undermine the EU's financial interests.

The SC notes that the consolidation of the anti-fraud legislation into a single legal framework will be considered at a later stage and be linked to the debates on the creation of a European Public Prosecutor's Office.

The SC takes note of the proposal to enhance interinstitutional dialogue and considers that it could represent an instrument to ensure broad political support for OLAF's fight against fraud. However, this dialogue cannot imply political guidance of investigations. As guardian of OLAF's independence, the SC is prepared to take the lead in the organisation of this dialogue.

The SC notes that the RP lays emphasis on questions relating to governance of OLAF and agrees with the necessity to find remedies in order to improve OLAF's efficiency and reduce the duration of procedures. Nevertheless, such remedies cannot only consist of changes to organisational structure and the SC regrets that the RP does not make any proposals with regard to the competence of OLAF in investigations both internal and external. In this context, the SC would like to stress the new opportunities opened up by Article 325 TFEU which calls for an 'effective and equivalent protection in the Member States and all the Union's Institutions, bodies, offices and agencies.'

The SC emphasises that the planned reform should, under no circumstances, reduce OLAF's operational independence. It maintains strongly that the current institutional architecture must be retained: integration of OLAF into the Commission, independence of the Director-General in his/her investigative function and the monitoring of OLAF's independence by a SC composed of experts from outside the Institutions are all essential features which must be preserved. On the other hand, the SC is concerned that the proposal to create a Review Adviser could increase the administrative burden on OLAF and could undermine the essential functions of the SC. The status of this new body is unclear.

Whilst the SC appreciates the will expressed by all EU Institutions to strengthen its role, it nevertheless wishes to stress that the proposal as set out in the RP, whereby the SC would receive only statistical data in order to carry out its work, would deprive it of any means to exercise appropriate monitoring of OLAF. It is essential that the SC has full access to case files in order to safeguard OLAF's independence by monitoring the efficiency and effectiveness of its investigatory procedures.

In the context of the reform process, the SC also warns of the risk of 'overregulation', which would deprive OLAF of the necessary room for manoeuvre in its work. Moreover, any additional legal obligation in the regulation could, at a later stage, give rise to judicial review. The SC shares the concerns raised by the Commission with regard to the length of investigations and the necessity to better ensure the protection of fundamental rights. As explored below, the SC considers that it is the responsibility of the leadership of OLAF to manage investigations in such a way that swift handling and full respect of procedural rights are maintained and guaranteed, while the SC plays a monitoring role in this regard. The SC also considers that the next Director-General of OLAF should be consulted on this reform.

The present document is a contribution from the SC to the debate. It takes into account the interinstitutional discussions which have already taken place and aims to express the SC's views on the main points of the RP. Based on an analysis of how the efficiency of investigations could be improved (Part I), it will make proposals regarding the organisational aspects of OLAF (Part II).

## 1. STRENGTHENING THE EFFICIENCY OF OLAF'S INVESTIGATIVE FUNCTION

### 1.1. Reinforcing OLAF's powers of investigation

The SC considers it essential to the reform that provisions concerning external and internal investigations be reinforced. The three Institutions have made alternative proposals to deal with this key matter which should be carefully studied.

In particular, further clarification is required regarding OLAF's powers to carry out on-the-spot checks and inspections as provided by Regulation (EC) No 2185/96 in cases of fraud, corruption or illegal activities linked to contracts, grant agreements and decisions concerning EU funding.

The SC favours a clear definition of OLAF's powers at each stage of its investigations. The progress made in the Reform outlining the details of these stages is noteworthy but could be further improved.

- Explicit reference should be made to intelligence analysis.
- Regarding the 'opening of investigations' the SC would welcome a differentiation between internal and external investigations.
- In order to allow OLAF to concentrate on the most serious cases, a *de minimis* policy should be included in the future Regulation.
- The 'investigation procedure' stage requires a more structured legal approach and the related provisions could be revisited.

The SC also points out that Article 325 TFEU provides an effective and equivalent level of protection of the EU's financial interests in all Member States and all the EU's Institutions, bodies, offices and agencies. Furthermore, contrary to former Article 280 TEC, Article 325 TFEU no longer excludes the adoption of measures that concern the application of national criminal law or the national administration of justice. The new options made available by the Lisbon Treaty should be used to introduce provisions which would allow enhancement and improvement in cooperation between OLAF and the national judicial authorities. For example, in order to better ensure the equivalent level of protection of financial interests within the entire EU, consideration should be given to further assess the legal value of OLAF evidences within the EU. Moreover the new Regulation should guarantee, with regard to internal investigations, that the same procedures apply to all Institutions, bodies, offices and agencies.

## 1.2. Duration of investigations

The SC has regularly stressed the excessive duration of investigations and welcomes all measures which could improve the situation.

The SC considers that direct control of the duration of investigations should first be carried out internally by those primarily responsible i.e. OLAF management and the Director-General. The SC should regularly monitor this aspect of OLAF's activities and support the control of OLAF's Director-General over deadlines.

Overall, the SC agrees with the mechanisms proposed by the RP with regard to the regular transmission of information at the various stages of the procedure. This transmission is of the utmost importance for the SC to ensure the respect of OLAF's independence by excluding external interference in the impartial conduct of investigations and ensuring that delays do not prevent the intended result of an investigation, for example, by running up against any time barring issues.

The SC also welcomes the introduction of a deadline for the assessment period and considers that, as a general rule, this first part of the investigation should also fall within its monitoring responsibilities, thus providing an added guarantee of OLAF's operational independence with regard to the opening of investigations.

In this regard, the Regulation should provide for transmission to the SC of the following information.

- (1) Reports on investigations which have not been closed in 12 months (including the assessment period); the report will explain why the investigation has not been concluded and estimate the timeframe needed for its completion. Sufficient follow-up mechanisms should be ensured.
- (2) For cases lasting more than 30 months, OLAF shall submit every 6 months an overall progress report on the investigations to the SC containing the measures taken to close the cases.
- (3) Statistical reports on OLAF's operational activities, including performance indicators based on qualitative parameters, which can be used by the SC as an additional tool for its monitoring.

### 1.3. Strengthening defence rights

The RP rightly outlines the need to strengthen the monitoring of OLAF's investigations, in particular with regard to the respect of fundamental rights and procedural guarantees. In this regard, the SC considers that, on the one hand, the rules governing OLAF's investigations should be clarified concerning defence rights and, on the other, the accountability of OLAF should be increased with regard to the internal procedures in place for the implementation of these rights.

#### 1.3.1. Clarifying the rules

The SC welcomes the will of the Institutions to clarify the rights and obligations of persons under investigation, the rights and obligations of OLAF, the Institutions and the Member States before, during and after an investigation.

The SC will make further proposals in its forthcoming opinion on this subject.

#### 1.3.2. Enhancing the procedures

The SC considers that it is **first and foremost the responsibility of the Director-General of OLAF and of the management team to decide whether or not to open an investigation and to ensure the respect of the fundamental rights of persons under investigation.**

It falls within the remit of the Director-General of OLAF to put in place adequate internal controls and monitoring mechanisms. **In this regard the SC wishes to express its serious concerns with regard to the creation of a Review Adviser.**

The SC considers the status and competence of the Review Adviser to be unclear. As an official designated by OLAF DG, he/she cannot be independent. In addition, the creation of a Review Adviser could raise the following problems:

- a shift in the institutional balance of OLAF since the addition of a Review Adviser could both impede the role of the SC whilst at the same time depriving it of access to essential information for its monitoring role,
- a risk of increased delays in already over-lengthy investigations,
- a significant risk of loss of ownership and responsibility for OLAF management team of the control of respect of fundamental rights,
- duplication of other existing mechanisms (the Ombudsman, the a posteriori judicial review, etc.),
- potential additional cost to the EU budget.

Bearing in mind the importance of ensuring appropriate respect for fundamental rights within OLAF, the SC is prepared to consider the creation of the role of a Complaints Officer who would analyze complaints against OLAF and advise OLAF's Director-General in this regard. Such a function exists in many national administrations and OLAF could follow some already existing best practices. A 'review panel' as proposed in the RP could also be a possibility. **In any event, the creation of this function should not overlap with the powers and responsibilities of the SC** and the SC should in all cases be notified of all complaints.

Whilst the SC appreciates the Commission's desire to put in place independent and external control mechanisms, it nevertheless believes that within the general architecture governing the organisation of OLAF, the SC is the only body which meets this requirement. Therefore, the SC suggests that its role in the monitoring of procedures, particularly with regard to the respect for fundamental rights and with regard to delays in investigations, should be strengthened in the following way:

- The Regulation could provide that the SC would deliver, on an annual basis (possibly in the framework of its annual report), an analysis of OLAF's compliance with respect for fundamental rights in its investigations. This report would be based on the information sent to the SC by OLAF concerning the actions it has taken to ensure full respect for fundamental rights and on the SC's own monitoring activities.
- Where necessary and in exceptional circumstances, the Director-General could invite the SC to carry out special checks when serious shortcomings are brought to his/her attention during an investigation. The results of this checking would be disclosed only to the Director-General of OLAF.

#### 1.4. Cooperation between OLAF and the Institutions, bodies, offices and agencies on its investigative function

The SC favours clarification within the Regulation of those rights and obligations which apply to OLAF and the Institutions in the context of the fight against fraud. This is of particular importance as the Commission could be held responsible for OLAF's activities.

##### 1.4.1. Information to the Institutions and bodies concerned

OLAF has a duty to communicate to the Institutions, bodies, offices and agencies as soon as possible, at the beginning of its investigations, any necessary information concerning fraudulent behaviour by persons subject to the statutes, persons working for an institution or a delegation. Such an obligation to inform the Institution could also be considered to apply to economic operators receiving grants or contracts paid directly or indirectly out of the EU budget. Communication of this information could be subject to confidentiality measures to protect the investigation. These communications aim at allowing the Institution to manage as far as possible the financial and administrative consequences of such behaviour in order to limit the financial consequences. In the course of an investigation, OLAF could still communicate additional information which would be useful for the Institution concerned. At the conclusion of its investigations, OLAF communicates to the Institution concerned its findings and recommendations.

The SC welcomes the idea of enlarging its role with regard to the supervision of exchange of information between OLAF and the Institutions as set out in the RP. In order to allow the SC to play this role, OLAF should notify the SC on a regular basis (every 3 or 6 months for example) as to what information has been transmitted to the Institutions in open cases. At the same time, the SC should also be alerted of any cases where appropriate confidentiality has been ignored.

OLAF should also set up a regular reporting system to the SC for cases where an institution, body, office or agency has failed to act on OLAF's recommendations. OLAF should also transmit all final reports on investigations and on closure of follow-up and an annual report summarising the follow-up given by the administrative authorities and the judicial authorities of the Member States and, if necessary, of the third countries to the transmissions they receive.

##### 1.4.2. Access by OLAF to information held by EU Institutions, offices, bodies and agencies

Since its creation, OLAF has encountered difficulties in obtaining access to information from certain Institutions and, in particular, access to certain databases. It causes problems for the intelligence aspect of OLAF's activities. The SC considers that further attention should be given to this issue which could create real threats to OLAF's independence.

OLAF should systematically send to the SC any information concerning delays in reporting or the failure to report fraud cases, as well as failure by an institution, body, office or agency, to provide access to information held by them.

#### 1.5. Cooperation between OLAF and the Member States

The SC endorses the reinforcement of cooperation by imposing on the MS the obligation to assist and support OLAF in the conduct of investigations, to send any document that could be useful to an investigation and to report to OLAF on the action taken following receipt of its investigation report. The SC welcomes the regular reporting on the progress made by the MS authorities to OLAF and OLAF should systematically inform the SC of cases where there is a lack of cooperation from MS authorities.

The SC is conscious that OLAF has often encountered difficulties relating to the identification of competent contact persons to assist with its investigators in the MS (e.g. on-the-spot checks on direct expenditure) and confirms the need for every MS to name appropriate contact points for OLAF within their national administrations.

MS should inform OLAF of the particulars of the national contact persons for OLAF. It is for OLAF to inform and, where appropriate and depending on OLAF's capacities, train the staff of those national administrations in order to promote better understanding of EU procedures and OLAF's needs. This will create a better synergy between services and make OLAF's investigations more effective. It should be remembered that, given its limited resources, OLAF cannot handle all the fraud cases brought to its notice and therefore it should be possible for some of them to be transferred to national administrations, taking account in particular of the thresholds put in place by OLAF for the opening of investigations in the fields concerned.

#### 1.6. Cooperation between OLAF and EUROJUST, EUROPOL, international organisations and third countries

OLAF should have the legal means, under the general umbrella of the Commission, to conclude cooperation agreements with agencies, Member State administrations, third country services and international organisations in order to accelerate its proceedings and make the fight against fraud more effective.

Clauses providing for checks by the Commission (or institution, body, office or agency concerned) and OLAF must be included in all financing contracts even when the EU budget is not the sole financing body.

## 1.7. Enhancing the statute and role of OLAF management

### 1.7.1. Status, nomination and powers of OLAF Director-General

As previously stated in the current Opinion, the SC believes that the best way to improve the functioning of OLAF is to grant its Director-General sufficient powers and authority to ensure the efficient functioning of investigations together with full respect for fundamental rights. This can only be achieved if the Director-General of OLAF is granted on the one hand full membership of the Commission's senior staff and, on the other, broader autonomy, functional independence and responsibility.

— Title:

The SC therefore proposes that the current title of OLAF's Director be replaced by the title of Director-General which would place him or her at the same hierarchical level as his/her peers in the other Directorates-General.

— Term of mandate:

The SC is in favour of a non-renewable mandate in order to reinforce the OLAF Director-General's independence.

— Appointment procedure:

The SC considers that the appointment procedure currently set out in the Regulation should be retained.

The SC agrees with the EP with regard to the necessity of avoiding delays in the appointment procedure. Given that the SC is thoroughly versed in the functioning and needs of OLAF, the binding nature of the SC's Opinion on the candidates should be retained. The SC's knowledge is unique and valuable when it comes to appointing a new Director-General; its involvement is an important element ensuring the independence of the Director-General.

— Intervention by OLAF in proceedings before national judicial authorities:

The SC considers that the potential involvement of OLAF in proceedings before national judicial authorities, as a recognised investigative expert, as is already the case in some Member States, should be possible in all EU countries. It would increase the visibility of OLAF and ensure that national judicial authorities have a better understanding of the results of its investigations.

— Intervention by the Director-General in proceedings before the European Court of Justice (ECJ):

The procedure laid down in Article 12(3) must be retained. OLAF does not have *locus standi* and cannot therefore participate in EU court proceedings. However, where an OLAF investigation or the results of an investigation are challenged before an EU court, it would be important to ensure that the Court is properly informed, and to allow OLAF to put forward its arguments or statements of grounds, at the preliminary stage of the proceedings and during the hearing before the ECJ.

### 1.7.2. Nomination and status of OLAF senior management

The Regulation should provide for specific rules ensuring the continuity of OLAF's activities, in case of the absence or unavailability of the Director-General. These rules should also ensure that in such cases the operational independence of OLAF is preserved and that there is some degree of interinstitutional consensus behind the procedure for the replacement of the Director-General.

Such replacement may take place by allowing, in accordance with the applicable rules for delegation within the Commission, the Director-General to delegate powers whilst taking into account OLAF's particular profile, namely independence in the investigative function and the necessity to have some degree of interinstitutional consensus. It is also possible to provide for a specific position of deputy Director-General, whose appointment procedure would, to some extent, be comparable with that of the appointment of the Director-General. This would ensure independence and respect the involvement of the three Institutions, whilst taking into account the opinion of the Director-General to avoid any possible conflicts between them.

## 2. POLITICAL GOVERNANCE AND DIALOGUE WITH THE INSTITUTIONS: REINFORCEMENT OF INDEPENDENCE

### 2.1. Interinstitutional dialogue

The SC could agree to the introduction of a regular interinstitutional dialogue covering the fight against fraud and corruption. The SC believes that this could be the occasion to **reach a strong political consensus regarding the protection of the financial interests of the EU and that such regular exchanges could support OLAF's activities. In any case, the SC considers that this dialogue should under no circumstances be an occasion to undermine the operational independence of OLAF. It is for this reason that, as principal guardian of OLAF's independence, the SC proposes to manage this dialogue.**



It should allow the Institutions to meet regularly at the invitation of the SC and to debate the priorities in the fight against fraud. It should replace neither the existing bilateral relations between DG OLAF and the Institutions nor those between the SC and the Institutions.

## 2.2. The Supervisory Committee

The SC welcomes the statement that all the European Institutions agree that the SC plays an important role and that its powers must be strengthened.

### 2.2.1. The role of the SC

It approves the statement of the RP to the effect that the SC must be given additional tasks. Given its experience, the SC considers that its role is to ensure respect for OLAF's independence by monitoring OLAF's operational activities, the effectiveness of its work, compliance with investigation rules and with fundamental rights and thus provide support to the Director-General of OLAF.

The SC will issue opinions at its own initiative or at the request of the OLAF DG concerning, in particular, the length and effectiveness of investigations, procedural guarantees and compliance with pre-established standardised criteria concerning the initiation of or refusal to initiate an investigation, or concerning operational instructions, in particular those set out in the OLAF Manual.

The Supervisory Committee is aware, and confirms, that it must not interfere in ongoing investigations. However, should it identify in a case report or file a serious or potentially serious procedural irregularity or malpractice likely to have negative implications for OLAF and/or the European Institutions, the SC Chairman must inform the OLAF DG immediately.

### 2.2.2. Composition and appointment procedure

The SC agrees with the idea of appointing and renewing its members in stages to ensure the continuity of its work and to preserve expertise.

### 2.2.3. The SC's resources

Transmission of Information by OLAF to the SC and access to data

**The SC is extremely concerned** with regard to the views expressed in the RP concerning access by the SC to documents, in particular the idea of confining access to 'statistical data'. There appears to be a contradiction in the RP which considers that the role of the SC should be enhanced, while at the same time limiting its access to information. As a result the SC would be unable to exercise effective control over OLAF's activities. **The proposal as expressed in the RP would deprive the SC of its main task and tool for action: to maintain OLAF's independence through the regular monitoring of its investigations.**

Limiting the SC's access to data, as proposed in the RP, appears to be motivated partly by the fear that the SC would interfere in OLAF's conduct of investigations and partly by the requirements set out in data protection legislation. On the first point, the SC would like to stress that **no such interference has occurred during its mandate** and that it has always strictly fulfilled its obligations in this regard. Regarding data protection, the SC agrees in general with the idea of access on a 'need to know' basis. It nevertheless considers that it would be unable to perform its monitoring function if it were deprived of access to the appropriate information.

This monitoring function cannot be performed on the basis of statistics alone. The SC regularly receives statistics supplied by OLAF which can support its analysis but would under no circumstances be sufficient to allow the SC to fulfil its tasks. Effective monitoring can only be carried out on the basis of examination of documents forming part of the investigation.

This monitoring is a guarantee of the independent conduct of investigations and also for the persons involved (in particular as regards the length of investigations and the potential protection of their fundamental rights) and for the European Institutions. Regular monitoring by the SC of the implementation of the investigative function guarantees the OLAF's independence and the respect for the fundamental rights of persons involved. Moreover, given the intention of the European Institutions to establish an interinstitutional dialogue on the functioning of OLAF and the fight against fraud, a dialogue which could be chaired by the SC, there is a contradiction in asking it for its opinion while at the same time depriving it of all means of forming an opinion.

The SC therefore considers that the future Regulation should clarify the rules of access to information relevant to monitoring of investigations.

The new Regulation should specify more clearly the type of information to be transmitted to the SC:

- In addition to the reports and information described in points 1.2, 1.4 and 1.5, OLAF should transmit to the SC all cases intended for transmission to national judicial authorities and all cases where it is suspected that a criminal offence may have been committed but which are not transmitted due to time-barring restrictions under the applicable national legislation.
- The SC should also have access, upon written request, to any case files, giving reasons where appropriate.

#### Secretariat Services

Support services for the SC Secretariat are provided by OLAF and the members of the secretariat are appointed by the Appointing Authority in agreement with the SC. The secretariat should be adequately staffed to allow it to perform all the tasks entrusted to it.

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**Annex to the SC Opinion on the reflection paper on the reform of OLAF**

*This paper is based on the opinion of the SC and summarises the SC's response to the questions put forward in Annex 1 of the RP.*

	Main points of the Reflection Paper	Position of the SC
1.	<p><b>Governance and dialogue with the Institutions</b></p> <p><i>(see point 2.1 of the SC's Opinion)</i></p>	<p><i>Type of dialogue and participants</i></p> <ul style="list-style-type: none"> <li>— The SC could agree with the introduction of an interinstitutional dialogue, <b>providing that it does not, under any circumstances, interfere with OLAF's operational independence.</b></li> <li>— This dialogue should allow a strong political consensus to be reached in order to support OLAF's activities.</li> <li>— <b>As the guardian of OLAF's independence, the SC should manage the dialogue.</b></li> </ul> <hr/> <p><i>Content of the dialogue</i></p> <p>The dialogue should allow for a debate on priorities in the fight against fraud and should replace neither the existing bilateral relations between DG OLAF and the Institutions nor those between the SC and the Institutions.</p>
2.	<p><b>Role of the SC</b></p> <p><i>(see points 1.2, 1.3, 2.2 of the SC's Opinion)</i></p>	<p><i>2.1 Responsibilities of the Members</i></p> <ul style="list-style-type: none"> <li>— The SC considers that its role is to ensure respect of OLAF's independence by monitoring OLAF's operational activities, the effectiveness of its work, compliance with investigation rules and with fundamental rights and thus provide support to the Director-General of OLAF.</li> <li>— The SC should issue opinions on its own initiative or at the request of the DG.</li> <li>— The Supervisory Committee should not interfere in ongoing investigations. However, should it identify in a file a serious procedural irregularity, the SC Chairman must inform the OLAF DG.</li> </ul> <hr/> <p><i>2.2 The term of the mandate</i></p> <ul style="list-style-type: none"> <li>— The SC favours a partial renewal of its Members, in order to ensure the continuity of its work and to preserve expertise.</li> </ul> <hr/> <p><i>2.3 Resources (new issue)</i></p> <ul style="list-style-type: none"> <li>— The SC is concerned regarding the proposal to confine its access to statistical data, which would deprive the SC of its main task and tool of action.</li> <li>— Clear rules should be defined concerning transmission of information by OLAF to the SC and the SC's access to data.</li> <li>— OLAF should send regular reports to the SC <i>(see points 1.2, 1.4 and 1.5 of the SC's Opinion)</i>.</li> <li>— The SC's Secretariat should be adequately staffed.</li> </ul>
3.	<p><b>The appointment and status of the DG of OLAF</b></p>	<p><i>3.1 OLAF DG Appointment procedure (see point 1.7.1 of the SC's Opinion)</i></p> <p>The Director-General must exercise sufficient powers and authority to ensure the efficient functioning of investigations together with full respect for fundamental rights; he/she should be therefore granted, on the one hand, full membership of the Commission's senior staff and, on the other, broader autonomy, functional independence and responsibility.</p> <ul style="list-style-type: none"> <li>— Status (new issue): the DG must have the same hierarchical level and thus the same title as his/her peers in the other Directorates-General of the EC.</li> <li>— Term of mandate: the SC is in favour of a non-renewable mandate.</li> </ul>

	Main points of the Reflection Paper	Position of the SC
		<ul style="list-style-type: none"> <li>— Accelerating the appointment procedure: the current appointment procedure should be kept. The binding nature of the SC's Opinion on the candidates should be retained, as a guarantee of the independence of the DG.</li> <li>— Ensuring continuity: <i>deputising rules (see point 1.7.2 of the SC's Opinion)</i> <ul style="list-style-type: none"> <li>— specific rules should be provided in the Regulation, ensuring the continuity of OLAF's activities, in case of the absence or unavailability of the Director-General, providing that the operational independence of OLAF is preserved and that there is some degree of interinstitutional consensus behind the procedure for the replacement of the Director-General.</li> </ul> </li> </ul> <hr/> <p>3.2 Powers of the DG</p> <ul style="list-style-type: none"> <li>— <i>Intervention of the DG before the ECJ: (see point 1.7.1 of the SC's Opinion).</i> <ul style="list-style-type: none"> <li>— The procedure laid down in Article 12(3) must be retained.</li> <li>— Wherever an OLAF investigation is challenged before an EU court, OLAF should be able to present its arguments before the ECJ.</li> </ul> </li> <li>— <i>Intervention of the DG before national courts: (see point 1.7.1 of the SC's Opinion).</i></li> <li>— OLAF's intervention, as a recognised investigative expert, should be possible in all Member States.</li> </ul>
4.	<p><b>Procedural guarantees of persons concerned by investigations</b></p> <p><i>(see point 1.3.1. of the SC's Opinion)</i></p>	<ul style="list-style-type: none"> <li>— The rules governing OLAF's investigations with regard to the rights and obligations of persons under investigation, the rights and obligations of OLAF, the Institutions and the Member States should be clarified in the Regulation.</li> <li>— The SC will make further proposals in its forthcoming opinion on this subject.</li> </ul>
5.	<p><b>Checks on legality</b></p> <p><i>(see point 1.3.2 of the SC's Opinion)</i></p>	<ul style="list-style-type: none"> <li>— The decision whether or not to open an investigation, as well as the control of the respect of fundamental rights and procedural guarantees are first and foremost the <b>responsibilities of the Director-General</b> of OLAF and of the management team.</li> <li>— The SC has <b>serious concerns with regard to the creation of a Review Adviser</b> (see arguments in point 1.3.2).</li> <li>— The DG could put in place adequate internal controls and monitoring mechanisms such as a 'Complaints Officer' or 'Review Panel', which should not overlap with the powers and responsibilities of the SC. All complaints should be notified to the SC.</li> <li>— In order to ensure independent control, the SC could: <ul style="list-style-type: none"> <li>(i) deliver, on an annual basis, an analysis of OLAF's compliance with the rules regarding respect of fundamental rights in its investigations;</li> <li>(ii) where necessary and in exceptional circumstances, at the request of the Director-General, the SC could carry out special checks on possible shortcomings during an investigation.</li> </ul> </li> </ul>
6.	<p><b>Reinforced cooperation with EU Institutions and bodies and increased efficiency of the investigations</b></p> <p><i>(see points 1.1, 1.2 and 1.4 of the SC's Opinion)</i></p>	<p><i>Reinforcing OLAF's powers of investigation (new issue)(see point 1.1 of the SC's Opinion)</i></p> <ul style="list-style-type: none"> <li>— Provisions concerning external and internal investigations should be reinforced.</li> <li>— A clear definition of OLAF's powers at each stage of its investigations is needed (addition of an explicit reference to intelligence analysis, clarification of internal and external investigations with regard to their opening, etc.).</li> <li>— The new options made available by the Lisbon Treaty (Article 325 TFEU) could be used for the introduction of provisions allowing enhancement of and improvement in cooperation between OLAF and the national judicial authorities.</li> </ul>

	Main points of the Reflection Paper	Position of the SC
		<p>— Uniform procedures should be applicable to all Institutions, bodies, offices and agencies with regard to internal investigations.</p> <hr/> <p><i>Information to the Institutions and bodies concerned (see point 1.4 of the SC's Opinion)</i></p> <p>— The SC welcomes the idea to monitor the exchange of information between OLAF and the Institutions on the basis of regular reports from OLAF, in full respect of confidentiality of the investigations.</p> <p>— OLAF should regularly report to the SC on cases where an institution, body, office or agency has failed to act on OLAF's recommendations.</p> <hr/> <p><i>Access by OLAF to information held by EU Institutions and bodies (see point 1.4 of the SC's Opinion)</i></p> <p>— Appropriate measures should be taken to allow OLAF to have access to information held by all EU Institutions, bodies, offices and agencies.</p> <p>— OLAF should inform the SC of all cases where delays in reporting fraud cases or failure to report them have occurred, as well as cases where institutions refused OLAF's access to the information.</p> <hr/> <p><i>Duration of investigations (see point 1.2 of the SC's Opinion)</i></p> <p>— The regular monitoring of the duration of investigations should be carried out by the OLAF DG and the management team.</p> <p>— The SC should regularly monitor this aspect of OLAF's activities and support the control of OLAF's Director-General over deadlines.</p> <p>— The SC agrees in general terms with those proposals made by the RP.</p> <p>— Regular transmission of information to the SC at the various stages of the procedure should take place (see point 1.2).</p> <p>— The SC welcomes the introduction of deadlines for the assessment period, which should be also part of the SC's monitoring.</p>
7.	<p><b>Reinforced cooperation with the Member States competent authorities</b></p> <p><i>(see points 1.1, 1.4 and 1.5 of the SC's Opinion)</i></p>	<p><i>Follow-up of OLAF cases</i></p> <p><i>(see points 1.4 and 1.5 of the SC's Opinion)</i></p> <hr/> <p><i>Cases having no or only minor financial impact</i></p> <p>The SC agrees with the proposals of the RP (the codification of the principle of the <i>de minimis</i> policy, transmission of 'minor' cases to IDOC or other similar bodies) <i>(see point 1.1 of the SC's Opinion)</i>.</p> <hr/> <p><i>Need for reinforced cooperation (new point)</i></p> <p>— The obligation to assist and support OLAF's activities should be reinforced <i>(see point 1.5 of the SC's Opinion)</i>.</p> <p>— OLAF should systematically inform the SC of cases where there is a lack of cooperation from Member States authorities.</p> <p>— The Regulation should provide that Member States install and name the appropriate contact points for OLAF in the national administrations.</p>
8.	<p><b>Agreements with EUROPOL and EUROJUST, international organisations and third countries</b></p> <p><i>(see point 1.6 of the SC's Opinion)</i></p>	<p>— OLAF should have the legal means to conclude, under the umbrella of the EC, cooperation agreements in order to accelerate its proceedings and make the fight against fraud more effective.</p> <p>— Clauses providing for checks by the Commission (or institution, body, office or agency concerned) and OLAF must be included in all financing contracts.</p>

## ANNEX 5

## OPINION No 4/2010

## Investigation Planning

Brussels, 12 October 2010

## 1. Summary

- 1.1. In order to carry out effective investigations which meet their targets, are cost-effective and make the best use of resources, it is essential to formulate investigation plans at the outset of each investigation and to revisit the plans throughout the life of the investigation to review changes necessitated by the development of the enquiries.
- 1.2. The Supervisory Committee, exercising its role under Regulation (EC) No 1073/1999 to monitor the investigatory function of OLAF, has examined a random selection of 40 cases from Directorates A and B to ascertain whether and to what extent investigation planning assists OLAF in the carrying out of its investigations. As was pointed out in the Activity Report of the Supervisory Committee for 2008/9, examination of case planning and the strategic direction of cases is an essential part of the work of the Supervisory Committee in monitoring investigations to assess whether OLAF is working efficiently and making maximum use of its limited resources.

## 2. Background

- 2.1. The purpose of an investigation plan is threefold: first, to concentrate the minds of the Director, the Head of Unit and the investigators on the objective of the investigation; second, to set a timeframe for the investigation and allocate appropriate resources to it; third, to ensure there is a framework against which managers can assess how far the investigation has progressed, whether there are any undue or untoward delays in the investigation which need to be addressed or whether the direction of the investigation has changed from the initial assessment and whether the investigation should be discontinued.
- 2.2. Where investigations lack proper planning at each stage of the case, there is an ever-present danger that investigators may divert their activities from the objectives set at the outset of the investigation, leading to a lack of accountability and thereby impugn the independence of the investigation itself.
- 2.3. There is no ideal template for an investigation plan and each case is of course unique. However, there is much to be gained from adopting a project management approach and process in relation to each case opened, which would provide Heads of Unit with a workable and practical system to maintain control over each investigation, to assess its progress and be aware of the projected work plan of each investigator in his or her Unit, so as to be able to deploy resources appropriately in relation to the case demands of the Unit. The purpose of effective planning is to decrease, rather than add to, any unnecessary administrative burden on investigators and Heads of Units.
- 2.4. The Supervisory Committee also observes that a fine balance must be struck between too prescriptive a control over the activities of investigators who, after all, are experienced professionals and a lack of direction and management of the cases. It is vital that investigators be motivated and encouraged to use their expertise and experience to carry out investigations efficiently; at the same time, it is equally important that Heads of Units manage the cases effectively.
- 2.5. OLAF has a wide range of cases under investigation, ranging from simple and straightforward internal cases involving one or two potential 'offenders' who are suspected of fraud or financial irregularities, in relation to, for example, claims for reimbursement of medical expenses or other benefits, up to and including external cases of enormous complexity involving enquiries in several jurisdictions. On the other hand, an increasing number of complex monitoring, coordination and assistance cases, which do not involve pure OLAF investigation work, often require long-term involvement, over which OLAF has little control. Hence, each type of case has different requirements in terms of the resources required, the time likely to be taken in investigation and the target amount of money which may be recoverable.
- 2.6. Investigations carried out by Directorates A and B differ in relation to the fields covered by the respective directorates and notably in so far as all internal investigations are carried out within Directorate A (Unit A.1 and A.2) and customs and co-ordination cases are predominantly carried out in Directorate B.

- 2.7. The Supervisory Committee wishes to ensure that OLAF makes best use of the limited resources available to it to carry out all investigations that it undertakes effectively and efficiently and as economically as possible. Concern has been expressed more generally, including from sources outside the Supervisory Committee, that some investigations take too long (the Supervisory Committee has already observed <sup>(1)</sup> that over 78 % of investigations as at December 2008 were still in progress 9 months after they had been opened) and that the returns, particularly in terms of monies recovered, do not represent value for money or demonstrate efficiency in relation to the conduct of investigations. The Supervisory Committee considers that effective planning of investigations could lead to a more precise focus on the objectives of an investigation, the shortening of the period of investigation and the avoidance of repeated missions. This exercise was undertaken in order to examine whether investigation planning is carried out by OLAF, is consistent across the Directorates and the Investigation Units and whether good practice is disseminated.
- 2.8. The advantages of good planning enable investigators to scope the intended enquiries, to set the objectives to be achieved and determine how long the enquiries are expected to take. At the same time, to ensure that managers are informed as to what progress is being made in any investigation and to be able to deploy their investigatory staff to best effect, it is essential that they know what work each member of their team is engaged on at any time and when they expect to complete it so as to be able to deploy them on another assignment. Good relevant management process within OLAF enables managers to keep on top of their cases and investigators to have direction for the course of the investigations.
- 2.9. The objectives of the investigations must refer as well to the likely outcome of each case. For example for cases which are likely to be transmitted to national judicial authorities, objectives must reflect legal advice from national experts from Directorate C and for those cases where recovery is planned the objectives should reflect the likely amount to be recovered and the necessary elements to do this. This will assist members of Units C 2 and C3 who will take this work forward.
- 2.10. In its special report 1/2005 the European Court of Auditors stated:

'77. With regard to preliminary work (assessments), analyses are still rudimentary. The support units (magistrates, follow-up and operational analysis) have taken little part in defining objectives and planning the strategy to be adopted in each investigation. The Executive Board has not insisted strongly enough on the need for clear formulation of the objectives and expected results of investigations (see paragraphs 20 and 22).

Some investigation acts still need to be justified more convincingly, the objectives set for the investigators in each case need to be clarified and there must be more insistence on work programmes to support proposed decisions. Regarding the Executive Board, it would be worth considering smaller groupings each of which would bring together managers working on files that have common features (3). This kind of approach would reduce the participants' burden of work on examining files and would encourage more rational and more thorough analysis of draft decisions. It would also allow coordinated follow-up of the portfolio of current cases and the introduction of a system of prioritisation. Nothing would prevent all the subgroups of the Executive Board from coming together, if the need arose, to deal with matters of principle in which all the services have an interest.

78. Supervision of investigations by the Office's management has generally proved inadequate (see paragraphs 28, 35 and 36). The duration of investigations has not been brought under control (see paragraph 24).

Heads of Unit must ensure that priorities are as far as possible respected and must both be aware of and control investigators' actual workload. In the course of an investigation, the search for evidence must take precedence over mere collation of information already available. From this point of view, the Office must make better use of the means it has available (witness hearings, on-the-spot visits to collect documents, operational analyses, etc).'

- 2.11. The Supervisory Committee mentioned the need for investigation planning in its Opinion No 2/2009 on 9-months reports:

*II-A lack of investigative methodology and rigour and a need for improvement in the internal levels of management and control of investigations.*

*The key to successful and focussed investigations is good investigation planning.*

<sup>(1)</sup> Opinion 2/2009.

A detailed investigation plan should be developed by the investigation team at the outset of each and every investigation, thoroughly enough to allow for the forecast of a date for the final decision. The indication of the 'expected time for completion' is not only a legal obligation from OLAF towards the SC but also an essential tool for managing investigations and avoiding the negative consequences of their excessive duration.

This plan should cover every investigative step envisaged and be associated with a preliminary timetable for each step. This planning should be in writing and systematically annexed to the case file, facilitating its review and consultation in the event that investigators are met with demands for postponements or other kinds of delays.

The management, at Unit level, should examine investigation plans regularly to follow and, where necessary, guide development of cases.

Similarly in its recommendations in the last Supervisory Committee Activity Report 2008-09:

Conclusion No IV The SC has noted an inadequate level of supervision and control of the day-to-day management of investigations which OLAF should address. Detailed investigation plans should be drawn up for every investigation opened with timeframes or deadlines agreed and set for all phases of the investigation cycle, including evaluations and follow-up activities and a system of assessing the results, based on key performance indicators.

### 3. Current Practice

- 3.1. The OLAF Operational Manual gives guidance to the investigator for an initial work plan to be drawn up at the evaluation stage of a case.

#### 3.2.2.2 (7) Initial work plan suggestions

This section should outline the scope and the main investigative steps in so far as they can be anticipated at this stage of the procedure. The following items, aimed at informing the Board as to the main aspects of the investigation, should be included:

- data, information and documents to be secured,
- other information to be obtained and from what source,
- investigation activities to be undertaken,
- indication of costs and benefits of planned actions.

The case handler together with the intelligence officer should plan and identify the scope of the intelligence, technical and computer forensic requirements foreseen for the investigation stage of casework....

#### 3.2.2.2 (9) Revision of initial work plan

Each revision of the work plan shall be documented.....

#### 3.3.6.4 Transmission of information to the OLAF Supervisory Committee....

##### (2) Statutory information to the Supervisory Committee

##### (a) 9-months report

Article 11(7) of Regulation (EC) No 1073/1999 provides that where an investigation has been in progress for more than 9 months, the Director-General informs the Supervisory Committee of the reasons why it has not yet been possible to conclude the investigation, and of the expected time for completion. This report is also used as a supervision tool and if necessary refers to a revised work plan (our emphasis) covering every investigative step envisaged and, where possible, a timetable for each step. Work carried out externally should be clearly indicated in the report ...



- 3.2. There is no further reference in the Manual to a work plan, still less to a full investigation plan for use at a later stage once an investigation has been opened. The purpose of the initial work plan, which is drawn up during the evaluation stage, is to provide an indicator for the Board that the investigator in charge of the evaluation has already reflected on the manner of undertaking the investigation. As a general rule this would involve the most obvious tasks suggested by an analysis of the facts carried out within the framework of the evaluation.
- 3.3. From an examination of the case files (paragraph 1.2 above), the Supervisory Committee notes that the initial work plans consistently fail to include all, and in some cases, hardly any of the features recommended in paragraph 3.2.2.2 (7) of the Manual.
- 3.4. When the case is opened, the Supervisory Committee would expect the investigators in charge of the case, in consultation with their Head of Unit, to draw up a full investigation plan setting out all the elements referred to in paragraph 2.4 above and 6.8 and 6.9 below.
- 3.5. In the course of the preparation for this Opinion, the Directors of Directorates A and B, together with Heads of Units (A1, A2, and A4, B2 and B3) of Directorates A and B were consulted for their experience of drawing up initial work plans and investigation plans. There did not appear to be any consistency of practice or written guidance (apart from the Manual reference, above) across investigation units, still less across the two investigation Directorates.
- 3.6. Where good practice was evident, in so far as clear time management charts were kept by some Heads of Units (predominantly in Directorate B) and quarterly case reports were drawn up and reviewed on a regular basis, again, in Directorate B, these practices were not consistently adopted in Directorate A.
- 3.7. Overall, there was no or no sufficient attempt made to communicate and disseminate good practice across both Directorates and ensure it was taken forward.
- 3.8. The Time Management System appears to be little used, if at all; reluctance to use it stemming from a perception that the data produced in the TMS is historical (that is, it records past events) and is not regarded as useful for case management.
- 3.9. There are many international examples of good practice in drawing up and using investigation plans (for example, the UN, Serious Fraud Office, City of London Police Economic Crime Department and others) that we have examined.

#### 4. Perceptions of Heads of Unit

- 4.1. In consultation with Heads of Unit in Directorates A and B, it was noteworthy that Heads of Unit (particularly those of B2 & B3) in Directorate B, clearly keep tight control over the movements and tasks allocated to their investigators and were able to identify at a glance which staff members were available to be deployed on further work and which were fully committed for a foreseeable time on a particular case. This was borne out in the quarterly case reports that each investigator is required to complete and discuss with the respective HoU in Directorate B. These reports comprise a short account of the 'Current Situation' in the investigation, actions taken in the previous quarter, actions foreseen in the next quarter and an updated estimated of the date for completion of the investigation.
- 4.2. In Directorate A, on the other hand, the Supervisory Committee found little indication of written evidence on the basis of the historic case files examined that planning of investigations has taken place at all in the past.
- 4.3. The Director of Directorate A has recently (June 2010) issued to his staff 'Action Point 13', which addresses the need to put in place 'significant improvement of the investigation planning and time scheduling' in cases in this Directorate. This Action Point requires that all assessment reports proposing the opening of an internal or external investigation 'shall display a detailed, consistent and comprehensive working plan... each specific activity will be described and what is expected from it will be explained'. It goes on to say that 'once the case is opened, it is required that the working plan, as agreed by the Board, is developed through a time schedule for each of the specific investigation activities' which will be signed by the investigator in charge of the case, the Head of Unit and representatives of other units where they are involved.

- 4.4. The Action Point also addresses the need to carry out a cost/benefit analysis where overseas missions are envisaged and suggests that 'missions are limited to the strict needs of the investigation' and that 'repeated missions are to be avoided [unless] there are genuine new elements that lead OLAF to go again on the same mission'.

#### 5. Analysis of case files

- 5.1. 40 cases were selected at random for analysis from Directorates A and B. From an analysis of these cases, it was apparent that, with one exception (see paragraph 5.7 below) no formal investigation plans were drawn up for cases in either directorate. Initial work plan suggestions, as prescribed in paragraphs 3.2.2.2 (7) and (9) of the Manual (see paragraph 3.1 above) were present in all or almost all case files (see Annex). However, even then, very little attempt was made to provide much or, in some cases, any of the information suggested in the Manual. Several cases (see Annex) consisted solely of brief and vague 'suggestions', such as:

— To open an internal investigation.

— To interview (suspect) as an interested party. It will then be assessed if and which further investigative steps are warranted (Case 5 in Annex).

- 5.2. The majority of initial work plan suggestions state merely 'interview X, interview Y', without any indication of what evidence it is intended to obtain from these witnesses or what purpose the interview is intended to serve. In some cases (see Cases Nos 11, 23, 24, 25 and 26 in Annex), the evaluator has included the words 'with a view to establishing ...' but these are the exceptions, rather than the rule.
- 5.3. Rarely were dates for the projected completion of the enquiries or timeframes for the investigation included; where they were included, they appeared to be arbitrary and unrealistic. For example, in one case (see Case No 9 in Annex), an estimate of 'two investigators/10 man days' was given, with no explanation for this estimate; in the event, the work done took 10 months to complete. The practice of including an estimate of work time in initial case assessments has now largely been discontinued.
- 5.4. The lack of evidence as regards the way the initial work plans are processed was noteworthy. No remarks or observations by management or the Board were observed in the files. This indicates that the initial work plan does not serve its purpose in guiding management decision-making. It should be pointed out that the initial work plan suggestions, set out in the Manual, as indicated above, are intended to guide the Board at the time of evaluating a case with a view to its being accepted or rejected for investigation by OLAF and not intended to guide the course of the investigation as a whole.
- 5.5. Once a case has been accepted by the Board, there appears, on the face of the case files, to be no further attempt to plan the course of the investigation.
- 5.6. Where cases were monitoring, assistance or co-ordination cases, as many cases are in Directorate B and also some in Directorate A, it is clear that the criteria set out in the Manual paragraphs 3.2.2.2 (7) and (9) for completing the Assessment of Initial Information Form are not appropriate and no criticism is made of the absence of conformity with those criteria in such cases.
- 5.7. It is noteworthy that the Supervisory Committee did not find any formal case investigation plans after the cases had been opened in case files in either Dir A or B. However, in Directorate B, case update reports are prepared every 3 months to indicate to the Head of Unit what progress has been made in each investigation.
- 5.8. The one exception, where a model investigation plan was included in the case file was Case No 41 in the Annex. This case could serve as a model for other case files: it contains full details of the allegations made, the objective of the investigation, realistic timeframes and a constructive initial work plan detailing investigation activities to be undertaken. This work plan was appropriately updated as the investigation progressed, with notations of what tasks had been completed and what assignments were still to be carried out, adding fresh tasks to be undertaken. Although this document is headed 'Work Plan', it is, in fact, a full investigation plan, of exactly the type that the Supervisory Committee would like to see included in every case.

- 5.9. It must be pointed out that although the Supervisory Committee was unable to find any documented investigation plans, with the exception referred to in paragraph 5.7 above, this does not imply that in all cases the investigation was not carried out with rigour and thoroughness: indeed, in many cases it is clear that the cases were well investigated and produced results. The Supervisory Committee, however, suggests that the timeliness and focus of all investigations would benefit from active planning at the outset of each investigation, with work plans updated as the investigation progresses.
- 5.10. The Supervisory Committee notes that if the protocol set out in Action Point 13 issued to Units in Directorate A, referred to in paragraphs 4.3 and 4.4 above is adopted and implemented throughout OLAF, most of the concerns expressed in this Opinion will have been addressed. If this provision is found to be useful in practice, as the Supervisory Committee expects it to be, it is hoped that it will be reflected in the Manual as a mandatory procedure. This should be done by the Director-General.

## 6. Recommendations

- 6.1. The Supervisory Committee recommends that a consistent, if not uniform, approach to strategic case planning be adopted across the operational Directorates.
- 6.2. The Supervisory Committee recommends that OLAF examines what information it needs to form an initial assessment of a case to enable the Board to make an informed decision as to whether or not a case should be accepted and the Form should reflect this. As it is, at the moment, completion of the Form is left to the discretion of the individual evaluator and Head of Unit and bears little if any resemblance to the criteria in the Manual especially since it is not in effective use by Board.
- 6.3. The Supervisory Committee recommends that the Board gives more detailed and careful scrutiny to the initial workplan, and makes constructive suggestions which can serve at a later stage in the investigation
- 6.4. Overall, OLAF should consider adopting a two-step approach in investigation planning – an initial assessment phase and a much more detailed plan once the case has been opened.
- 6.5. The Supervisory Committee recommends that OLAF sets out a template for an investigation plan and, while no two investigations have identical features, there are sufficiently common issues which should be present in every investigation plan. These will be different at the evaluation phase from the stage when the case is taken on for investigation. At the evaluation phase, features could be considered including the following:
- (i) The objectives and scope of the investigation:
    - What is the suspected fraud/irregularity that is to be investigated?
    - Is it likely to be criminal, disciplinary or administrative?
    - What type of evidence is going to be required to be collected to support and/or disregard the information?
    - Where is the evidence likely to be found?
  - (ii) The amount of money at stake and thought to be recoverable and what documentary evidence (and possible limitations) to support this would be needed?
  - (iii) How many investigators, intelligence officers and legal advisors are likely to be deployed on the investigation?
  - (iv) The likely timeframe for the investigation, bearing in mind that if a case is likely to be transmitted to national judicial authorities, there may be time limits imposed by national legislation which may effectively time-bar a prosecution.

- 6.6. The Supervisory Committee recommends that an investigation plan is revisited after the Board has taken a decision to open the case. The investigation plan is likely to consist of far more prescriptive and detailed tasks and timeframes for each step of the investigation, together with likely costings and suggested activities for each phase of an investigation.
- 6.7. If missions are to be included, careful consideration should be given during the planning phase to ensure the most effective use of Community funds. Moreover, the investigation plan should be drawn up bearing in mind those cases to be given priority treatment and the resources available.
- 6.8. It should be emphasised that the investigation plan is a dynamic document, to be reviewed regularly for updates prompted by developments in the investigation itself. It will be readily apparent from the plan, to the investigator as well as to the Head of Unit and the Director, that a case is proceeding well or running into difficulties. A good investigation plan allow each Head of Unit to see at a glance:
- the stage the investigation has reached,
  - whether deadlines are being adhered to,
  - whether deadlines should be modified, if new priorities are set,
  - whether each investigator has carried out the planned tasks,
  - whether each investigator has planned tasks for the coming weeks.
- 6.9. The Supervisory Committee, before the end of its mandate, hopes to assess whether and to what extent these recommendations regarding investigation planning have been implemented by OLAF.
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## ANNEX 6

## OPINION No 5/2010

## Respect for fundamental rights and procedural guarantees in investigations by the European Anti-Fraud Office

Brussels, 29 November 2010

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## 1. INTRODUCTION

1. The European Anti-Fraud Office (hereinafter 'OLAF') has significant powers to conduct administrative investigations in order to combat successfully fraud, corruption and any other illegal activity adversely affecting the financial interests of the EU. The exercise of these powers is subject to, in particular, respect for human rights and fundamental freedoms<sup>(1)</sup>. In making the Charter of Fundamental Rights (hereinafter 'the Charter') binding, the Treaty of Lisbon further heightened this obligation. The rules of Community law and, in particular, the Protocol on the privileges and immunities of the European Union, the Staff Regulations of Officials of the European Communities and the Conditions of employment of other servants of the European Communities must also be respected.
2. The Supervisory Committee (hereinafter 'the SC') notes the specific characteristics of OLAF: it is an investigatory body; it acts initially on an administrative basis; this may, where necessary, lead to judicial, financial or disciplinary proceedings during which the guarantees of fundamental rights must be upheld in full. Consequently, Community case-law has characterised certain investigative measures by OLAF as preparatory measures which do not adversely affect officials and, therefore, cannot be annulled<sup>(2)</sup>. However, breaches of essential procedural requirements during preparatory investigations might affect the legality of the final decision taken on the basis of investigations by OLAF<sup>(3)</sup>. They would moreover incur the legal liability of the Commission.
3. That is why respect for procedural guarantees during the administrative stages of investigations by OLAF is vital. Furthermore, the SC is of the opinion that the effectiveness and efficiency of OLAF's activities depend directly upon its respect for fundamental rights and procedural guarantees. It is also essential for OLAF's reputation. If OLAF's credibility is called into question, it is more likely to be put under pressure and to have its independence impaired.

### 1.1. Objective of the Opinion and method

4. The SC has consistently emphasised the need for rules of procedure which are sufficiently precise and adapted to the different stages of investigations. Compliance with a body of clear rules makes it possible to ensure the quality, efficacy, transparency and independence of investigations, as well as their observance of legality and legal certainty.
5. These rules exist in part in the current legislation and in the instructions contained in the OLAF Manual – Operational Procedures (hereinafter 'the Manual'). However, the principles applying are scattered among numerous sources (Regulation (EC) No 1073/1999 and Regulation (EC, Euratom) No 2185/96, the Interinstitutional Agreement, the Staff Regulations, etc.) and clarification is necessary. On this point, the SC holds that it is very important that advantage should be taken of the reform of Regulation (EC) No 1073/1999 for a legal clarification of OLAF's powers<sup>(4)</sup>. The SC hopes that this Opinion will contribute to the debate.
6. Drawing on the experience it has acquired in the regular monitoring of investigations and its role acknowledged by the EU judiciary in the *Franchet and Byk v Commission* ruling<sup>(5)</sup>, the SC has examined 28 investigations which required transmission of information by OLAF to the national judicial authorities for the period from December 2009 to October 2010<sup>(6)</sup>, in particular the case reports and the summaries produced by the Judicial and Legal Advice unit, summarising how certain procedural guarantees were respected over the course of the investigations<sup>(7)</sup>. It has also analysed the legal context and current practice, and the existing legislative proposals regarding reform of Regulation (EC) No 1073/1999<sup>(8)</sup>.
7. In this Opinion, the SC gives recommendations aimed at clarifying respect for the general principles which must underpin OLAF's exercise of its powers, and for procedural guarantees for the different stages of investigations. Several annexes are also appended hereto, containing in particular a suggested analysis grid on respect for fundamental rights and procedural guarantees, which could be used as a guide by investigators<sup>(9)</sup>.

<sup>(1)</sup> Article 2(1) of Decision 1999/352/EC, ECSC, Euratom establishing OLAF provides that for the purposes of investigations the Office shall exercise the powers conferred by the Community legislator, subject to the limits and conditions laid down thereby. See also recital 10 of Regulation (EC) No 1073/1999. This requirement was, moreover, reiterated by the Court of Justice in case C-11/00, *Commission v ECB*, 10 July 2003, para. 139.

<sup>(2)</sup> See, in this respect, the most recent interpretation in the judgment handed down by the General Court on 20 May 2010 in Case T-261/09 P *Commission v Violetti and others*.

<sup>(3)</sup> Order of the Court of First Instance of 18 December 2003 in Case T-215/02 *Gómez-Reino v Commission*, para. 65. See also para. 31 of the Order of 9 June 2004 in Case T-96/03 *Camós-Grau v Commission*, in which the Court of First Instance noted that, while measures of a purely preparatory character may not themselves be the subject of an application for annulment, any legal defects affecting them may be relied upon in proceedings against the final measure of which they represent a preparatory stage.

<sup>(4)</sup> See also the SC's Opinion No 3/2010 on reform of Regulation (EC) No 1073/1999.

<sup>(5)</sup> Judgment of the Court of First Instance of 8 July 2008 in Case T-48/05 *Franchet and Byk v Commission* (No 2), upholding the obligation on OLAF to inform the SC before forwarding any information to national judicial authorities for the sake of protecting fundamental rights.

<sup>(6)</sup> See Annex 4 (confidential).

<sup>(7)</sup> See Annex 2 (OLAF internal document).

<sup>(8)</sup> See Annex 1; for reform of Regulation (EC) No 1073/1999, see the European Commission's Reflection Paper of 6 July 2010 and Annex II thereto, which contains the legislative resolution of the European Parliament of 20 November 2008 and the position of the European Council.

<sup>(9)</sup> See Annex 3 (SC internal document).

## 2. GENERAL PRINCIPLES TO BE RESPECTED BY OLAF

8. OLAF's investigations must be performed in accordance with a series of rules and principles: legality, proportionality, impartiality, objectivity, fairness, reasonable time, observance of the presumption of innocence, confidentiality and professional secrecy, etc. The SC has chosen to examine only those principles which might affect its independence and for which settled case-law concerning OLAF exists.
9. The SC also wishes to point out the option available to OLAF staff of reporting to the President of the SC any factual information and evidence on possible illegal activities or serious professional misconduct within OLAF of which they become aware <sup>(10)</sup>.

### 2.1. *Impartiality in the conduct of investigations*

10. Impartiality in the conduct of investigations goes hand in hand with OLAF's operational independence. It requires a total lack of prejudice and of any conflict of interests on the part of staff <sup>(11)</sup>. The EU judiciary has attributed a broad definition to this second notion, defined as 'any situation where an official [...] is called upon to decide on a matter which could appear, in the eyes of an external third party, as a possible source affecting the official's independence on the matter' <sup>(12)</sup>.
11. The SC regrets that, despite its repeated recommendations <sup>(13)</sup>, the measures taken by OLAF to establish the strict internal control mechanisms necessary to prevent any conflicts of interest likely to harm OLAF's independence and reputation remain insufficient. The Manual lays down the obligation for investigators to notify the Director-General of any potential conflict of interest, but does not indicate any obligation to remove from the record any conclusions which might affect the objectivity of the case file <sup>(14)</sup>. The SC has noted the existence of cases in which the investigators were relieved of their responsibilities in the course of an investigation, without reasons being provided. The SC is of the opinion that such reasoning is essential for identifying the grounds on which an investigator may be removed from an investigation.

The current control mechanisms concerning impartiality in investigations must be bolstered:

- (i) reasons must duly be given for any decision to relieve an OLAF staff member of their responsibilities in the course of an investigation;
- (ii) where a conflict of interest is revealed, the Manual must lay down the obligation to remove from the case file all the findings which may be affected by partiality.

The SC appreciates the inclusion of the principle of impartiality among the guarantees listed in the proposals for reform of Regulation (EC) No 1073/1999 <sup>(15)</sup>.

### 2.2. *Reasonable time for investigations*

12. The right of people to have their affairs handled by OLAF within a reasonable time is guaranteed by Article 41 of the Charter.
13. A lengthy investigation out of proportion to the circumstances and complexity of the case may have serious negative consequences on both the rights of the defence of the persons concerned and the follow-up to the investigation. With respect to inspections carried out by the Commission in the field of competition, it was therefore decided that the time which elapses can make it more difficult for exculpatory evidence, in particular

<sup>(10)</sup> See Article 22a of the Staff Regulations and the note for OLAF staff of 10 November 2008.

<sup>(11)</sup> See Article 11 of the Staff Regulations, as well as the *Camós Grau v Commission* ruling, Case T-309/03.

<sup>(12)</sup> Judgment of the Court of First Instance of 11 September 2002 in Case T-89/01 *Willeme v Commission*, para. 47.

<sup>(13)</sup> See the SC's Activity Report, 2005-2007 (OJ C 123, 20.5.2008, p. 7); the SC's Activity Report, 2008-2009 (OJ C 314, 22.12.2009, p. 38).

<sup>(14)</sup> *Camós-Grau v Commission*, paras 104-141. Although reference is made to this judgment in the Manual, it does not lay down any distinct rules for investigators on the matter. In addition, the form which investigators must complete is not updated as far as its legal basis is concerned (see Note O/F1).

<sup>(15)</sup> See the Council and European Parliament proposals (Article 7(a)).

statements from witnesses for the defence, to be collected, or even unlikely that they will be collected<sup>(16)</sup>. Similarly, the administrative, disciplinary or judicial follow-up may be compromised, in particular due to limitation periods for the acts in question<sup>(17)</sup>, a lack of interest on the part of national judicial authorities in prosecuting acts that took place too long ago in those States which weigh the appropriateness of prosecution, or the administrative procedure exceeding a reasonable time limit<sup>(18)</sup>.

14. The SC has noted that the increase in the length of investigations is due to a number of factors:
- (a) shortcomings in the management of some investigations, such as successive changes of the investigators in charge; the SC does not dispute the fact that OLAF can encounter administrative difficulties, but notes that the persons concerned by the investigations must not suffer the consequences<sup>(19)</sup>;
  - (b) insufficient management supervision of the real reasons for the length of investigations<sup>(20)</sup>, of the estimates of time limits for their completion, of the scheduling of investigative measures to be performed<sup>(21)</sup>, or the effective conduct of investigations (the SC has, for example, noted some unexplained periods of inactivity of up to 1 year<sup>(22)</sup>).
15. The SC has also noted that periodic reports (covering periods of 3 months or 18 months) were written up for certain files to record the progress made in the investigations. They do not, however, always cover the whole period of the investigations, and the estimates of the time required to complete them are sometimes insufficiently well grounded<sup>(23)</sup>.

The SC notes that, despite its repeated recommendations, the measures implemented to achieve regular verification of the length of investigations are not applied in a sufficiently systematic way.

The SC reiterates the need:

- (i) for greater supervision of the compilation of 9-months reports<sup>(24)</sup> and the systematic establishment of a system of regular reporting beyond this time limit;
- (ii) for the establishment of a mechanism whereby periods of inactivity of more than 3 months are signalled (a '3-month list'<sup>(25)</sup>), backed up by an automatic alert in the Case Management System (CMS)).

The SC notes that regular operational meetings have helped to enhance management of the length of investigations<sup>(26)</sup> and encourages their use.

The SC appreciates the inclusion of the reasonable time of investigations among the guarantees listed in the proposals for reform of Regulation No 1073/1999<sup>(27)</sup>.

<sup>(16)</sup> See, for an application of this notion *mutatis mutandis*, the judgment of the Court of Justice of 21 September 2006 in Case C-113/04 P *Technische Unie BV v Commission*, on the length of the administrative proceedings in a competition case which gave rise to fines for the undertakings concerned. The Court of Justice reiterated that the reasonable time requirement also applied to the investigations phase, which is the first phase of the administrative proceedings, and that excessive duration of that phase may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence where they are relied upon in the second phase of the procedure (paras 54-55).

<sup>(17)</sup> See the limitation periods for proceedings concerning the irregularities referred to in Regulation (EC, Euratom) No 2988/95.

<sup>(18)</sup> On this point, it should be noted that Community case-law has clearly laid down, with respect to competition rules, that a procedure exceeding a reasonable length of time can constitute a ground for annulment in the case of a decision finding infringement and imposing penalties when the breach of the reasonable time principle prejudiced the rights of the defence of the undertakings concerned (*Technische Unie BV v Commission*, para. 47).

<sup>(19)</sup> See cases Nos 9 and 20, which lasted two years and three years respectively for a relatively limited period of work carried out and, *mutatis mutandis*, *Franchet and Byk v Commission* (No 2) cited above, para. 280.

<sup>(20)</sup> In particular in the nine-month reports (see SC Opinion No 2/2009, OJ C 314, 22.12.2009, p. 22).

<sup>(21)</sup> See on this point the SC's Opinion No 4/2010 on investigation planning.

<sup>(22)</sup> See case No 9; see also case No 17, in which the assessment period lasted ten months, during which only one meeting with a Commission department was held and checks were carried out by the Operational Intelligence Unit: after being opened, the investigation lasted another seven months during which no operational activity took place.

<sup>(23)</sup> See cases Nos 5, 6, 7, 24 and 28, for which the 'three-month' reports do not cover the whole length of the investigations; cases Nos 7, 24 and 28 were completed on average six months after the estimated date, although no operational activity took place in that period and no explanation was given for the delay; in case No 28, four 'three-month' reports were made, according to which the activities carried out during the periods covered by the reports were the examination of the documentation relating to the project under investigation and the drafting of the final case file.

<sup>(24)</sup> The SC has found on a number of occasions that the legal obligation to write such reports has not been complied with.

<sup>(25)</sup> See the SC's Opinion No 2/2009 (OJ C 314, 22.12.2009, p. 39).

<sup>(26)</sup> See case No 13.

<sup>(27)</sup> See the Council proposal (Article 7(a)).



### 2.3. Confidentiality of investigations

16. The rule regarding the confidentiality of investigations is laid down in Article 8 of Regulation (EC) No 1073/1999. It also follows on from the principle of sound management guaranteed by the Charter (right to have his or her affairs handled with due respect for confidentiality<sup>(28)</sup>). It is aimed at upholding the secrecy of the investigation and at safeguarding the presumption of innocence (particularly with respect to the reputation of officials and other staff concerned by OLAF investigations<sup>(29)</sup>) and the confidentiality of personal data<sup>(30)</sup>.
17. The SC notes that the Manual does not provide clear instructions as to the material means of implementing the obligation of confidentiality.
18. More specifically, with respect to the transmission of information, a distinction should be made between two types of situation: the cases in which OLAF will have to forward information to the Institutions and/or the national authorities and those instances in which OLAF is called upon to respond to a request for information from a third party.
- Forwarding of information by the Office
19. Two cumulative conditions must be met concerning the communication of information arising from OLAF's investigations: (i) the 'need to know' principle with respect to the recipient and (ii) the exact purpose of communicating the information (for example, ensuring a follow-up to the investigation or in order to be able to add an economic operator to the Early Warning System, etc.)<sup>(31)</sup>.
20. The SC notes that this lack of clarity results in divergent practices in drawing up dissemination sheets indicating the persons who, within the Institutions or in Member States, may, in view of their responsibilities, have to be informed of information disclosed or obtained in the context of OLAF's investigations. These sheets are not compiled for all investigations and do not cover all the information transmitted.
21. The SC has also noted errors in the communication of information<sup>(32)</sup>.
- OLAF's response to a request for information/access to documents from a third party
22. OLAF frequently receives requests for information or access to documents from third parties concerning ongoing or completed cases. The EU judiciary recently ruled that, where a request is based on Regulation (EC) No 1049/2001 and seeks to obtain access to documents including personal data, the provisions of Regulation (EC) No 45/2001 concerning the protection of individuals with respect to the processing of personal data by Community Institutions or bodies and the free flow of such data, become applicable in their entirety<sup>(33)</sup>.
23. Moreover, the SC notes that, in the State aid field, the EU judiciary has acknowledged the existence of a general presumption of confidentiality as to documents relating to the Commission's investigative activities. This presumption may release the Commission from the obligation, when it refuses a demand for access to documents, to provide explanations for each individual document in order to substantiate how access to that document could specifically and effectively undermine its investigative activities, and allow it to base itself on general presumptions applying to documents of the same nature<sup>(34)</sup>. The SC wonders whether this argument might also apply to OLAF's investigations.

<sup>(28)</sup> Court of First Instance *Franchet and Byk v Commission* (No 2) cited above, para. 218.

<sup>(29)</sup> See the judgment of the Civil Service Tribunal in Case F-23/05 *Giraudy v Commission*, para. 161, in which the EU judiciary gave a particularly broad interpretation of this rule, in the light of recital 10 of Regulation (EC) No 1073/1999; see also the *Franchet and Byk v Commission* (No 2) ruling, cited above, in which the EU judiciary held that the principle of the presumption of innocence 'has its corollary in the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation No 1073/1999', para. 213.

<sup>(30)</sup> Court of First Instance Case T-259/03 *Nikalaou v Commission*, cited above paras 189-216.

<sup>(31)</sup> Second paragraph of Article 8(2) of Regulation (EC) No 1073/1999 and second paragraph of Article 8(1) of Regulation (EC, Euratom) No 2185/96.

<sup>(32)</sup> The SC has noted in this respect that (i) in the case of a number of investigation reports concerning the same person, OLAF mistakenly sent Commission departments and/or national authorities reports which were not those on which they were due to take follow-up action and (ii) a letter containing information on an investigation was sent to a third party without any indication as to the purpose of sending it (see Investigations Nos 9 and 13).

<sup>(33)</sup> Judgment of 29 June 2010 in Case C-28/08 P *Commission v The Bavarian Lager Co. Ltd.*

<sup>(34)</sup> Judgment of 29 June 2010 in Case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH*.

The SC is of the opinion that OLAF should systematically draw up dissemination sheets every time information is transferred indicating (i) the persons who, within the Institutions and in Member States, may have, in view of their responsibilities, to be informed of it and (ii) the purpose of sending it, in order to ensure respect for the rule on confidentiality.

The SC wishes to obtain access to the dissemination sheets so that it can carry out its mission of ensuring respect for confidentiality further to Article 8(4) of Regulation (EC) No 1073/1999.

When third parties request information or access to documents relating to investigations, OLAF must take into consideration the need to comply with the legislation on the protection of personal data.

### 3. PROCEDURAL GUARANTEES

24. The acts investigated by OLAF are often of a serious nature and may have serious consequences for the persons concerned, including criminal proceedings. In the interests of the persons concerned, as much as for the sake of the effective follow-up of investigations by the competent authorities, it is therefore necessary to define the procedural guarantees applicable at the various stages of an investigation and enhance respect for them.

25. In view of the different ways in which these procedural guarantees are applied, the SC has distinguished between internal and external investigations.

#### 3.1. *Internal Investigations*

##### 3.1.1. **Opening stage of an investigation**

###### 3.1.1.1. *Right of the person concerned to be informed of their personal involvement in an investigation*

26. **Time for informing** the person concerned – The person concerned must be informed ‘rapidly’ or ‘whenever’ an investigation reveals the possibility of personal involvement <sup>(35)</sup>. In the cases examined, the time taken to inform the persons concerned ranged from two to 3 weeks to 2 months. This length of time can be regarded as reasonable.

27. **Decision to defer notification** – The right to be informed may be deferred if it may prove harmful to the investigation. By requiring a written reasoned submission <sup>(36)</sup>, it is possible to verify the existence and relevance of the reasons for recourse to this exception, and thereby avoid any risk of arbitrary treatment.

The letter informing the persons concerned of the opening of an investigation and the acts concerning them should ensure respect for their right to be informed. The SC appreciates the fact that the Manual requires a reasoned written submission for the decision to defer notification of the persons concerned.

##### 3.1.2. **Implementation stage of an investigation**

###### 3.1.2.1. *Obligation of authorisation for OLAF staff*

28. According to Article 6(2) and (3) of Regulation (EC) No 1073/1999, OLAF employees must have written authorisation to take part in an investigation and must possess written authority indicating its subject matter before carrying out each measure concerned <sup>(37)</sup>. For on-the-spot checks under Regulation (EC, Euratom) No 2185/96, the written authorisation must be supplemented by a document indicating both the subject matter and the purpose of the check <sup>(38)</sup>.

###### 3.1.2.2. *The right of the interested party to express their views on all the facts concerning them*

29. Conclusions referring by name to a person may not be drawn, on completing an investigation, without that person having been enabled to express their views on all the facts that concern them <sup>(39)</sup>.

<sup>(35)</sup> See Article 4 of the Model Decision of the Interinstitutional Agreement and Decisions of each institutions and agencies together with Article 1 of Annex IX to the Staff Regulations.

<sup>(36)</sup> Point 5.1.1.1 of the Manual.

<sup>(37)</sup> According to the Manual, specific powers of investigation are exercised in the following situations: interviews with the person concerned and witnesses, access to the personnel file of a staff member of a Community institution, inspections of institutions' premises, data searches of computers, on-the-spot checks (point 3.2.2). The SC has noted that, in one of the investigations, the investigator and the employee responsible for inspecting a computer were chosen after performing investigation work for which they had written authority (see case No 23).

<sup>(38)</sup> See point 5.2 below.

<sup>(39)</sup> Article 4 of the Model Decision.

30. **Obligation to inform the person concerned** – In order to exercise effectively their right to express their views, the person concerned must be informed of all the facts concerning them. Consequently, OLAF is under an obligation to present them with those facts, orally or in writing – an obligation that goes hand in hand with the obligation to record the comments of that person <sup>(40)</sup>.
31. The information provided must be *exhaustive*. If new allegations come to light during the investigation, the person concerned must therefore be informed of them on the day of their interview at the latest. The person concerned could possibly submit written explanations at a later date or request a further interview <sup>(41)</sup>. No provision is made for such a possibility in the Manual.
32. If new allegations come to light, the investigators must phrase them *unequivocally* to distinguish them from previous allegations <sup>(42)</sup>. The Commission has already lost a case in which the EU judiciary held that the person concerned had not been informed of a distinct and specific allegation made against them during an investigation, which OLAF assessed and subsequently referred to in its final report <sup>(43)</sup>.
33. **Obligation to enable the person concerned to express their views** – OLAF must take all necessary steps to enable the person concerned to express their views before, during and after the interview:
- (a) before the interview:
- a letter must be sent *sufficiently in advance* to enable the person to make the necessary arrangements to be accompanied by a person of their choice and/or to indicate their choice of language,
  - the contents of the letter must be *sufficiently precise*, in particular with respect to the facts at issue,
  - the letter must be written in the *mother tongue* of the person concerned or in a language of which they have an in-depth knowledge;
- (b) during the interview:
- the allegations must be *clearly phrased*, in particular in the event of multiple allegations;
- (c) after the interview:
- the person interviewed must have a *real opportunity* to read and comment on the written record of the interview, to annex thereto any documents in their possession and to obtain a copy thereof.
34. The SC is of the opinion that the rules established by OLAF in this respect are insufficient. Neither the Manual nor the model letter of invitation to an interview make any reference to the obligation to send an updated summary of the allegations to the person concerned if new allegations have been added to those of which they were informed when the investigation was opened. In addition, the Manual does not indicate in which language the letter of invitation to interview must be drafted.
35. Furthermore, the SC has noted some procedural shortcomings in practice <sup>(44)</sup>.
36. **Decision to defer the obligation of hearing the person concerned** – The SC notes that OLAF has made limited use of this exception and in duly justified cases, after obtaining the prior agreement of the Secretary-General or the President of the Institution concerned <sup>(45)</sup>.
37. The prior agreement required appears to represent a guarantee of the rights of the defence <sup>(46)</sup>. Nevertheless, as responsibility for this decision is shared with the President or General Secretary of an institution, body, office or agency and the possibility of OLAF conducting its investigation is conditioned by the requirement to obtain such prior agreement, the SC wishes to draw attention to the risks related to this formality, which may compromise the independence of OLAF's Director-General, in particular in the event of refusal or delay. This procedure may lead to significant delays, which could paralyse an investigation and have consequences in terms of the time limitation on the acts concerned. In two recent cases, the SC has noted that the time required for obtaining such agreement varied between 5 months and a year. These delays prevented the transmission of the case files to the national judicial authorities <sup>(47)</sup>. Consequently, the SC views such a period of time as excessive.

<sup>(40)</sup> Court of First Instance Case T-259/03 *Nikalaou v Commission*, cited above, para. 238.

<sup>(41)</sup> As was the case in Investigations Nos 3 and 20.

<sup>(42)</sup> For example, during an investigation in which a new allegation was brought to the attention of the person concerned for the first time during an interview, this was done by way of a single, ambiguous question, worded in such a way as to leave scope for interpretation (see case No 9).

<sup>(43)</sup> Court of First Instance Case T-259/03 *Nikalaou v Commission*, cited above paras 255-265.

<sup>(44)</sup> For example, the letter of invitation to interview being sent after the deadline set for the person concerned to indicate their choice of language (case No 9); incomplete reference in that letter and subsequently to all the allegations which OLAF was to investigate and ambiguous phrasing of questions during the interview, resulting in a skewed answer (case No 9); failure to send the written record of the interview, despite the explicit indication that it would be sent after the investigation had been closed (case No 3).

<sup>(45)</sup> This exception was used in two of the internal investigations reviewed (see cases Nos 16 and 27).

<sup>(46)</sup> Court of First Instance *Franchet and Byk v Commission* (No 2) cited above, para. 151.

<sup>(47)</sup> See cases Nos 16 and 27.

The SC is generally satisfied with the rules laid down in the Manual <sup>(48)</sup>, but notes certain problems in practice.

It recommends that OLAF:

- (i) should pay particular attention to ensuring that allegations are phrased clearly;
- (ii) should indicate explicitly in the written record of interview whether the person concerned had the possibility of obtaining a copy of it, and should give reasons for any deferral in sending the record in a decision appended to the file.

The SC holds that a refusal by the President or Secretary-General of an institution to grant agreement to defer hearing a person, or a delay in so doing, may impair the operational independence of OLAF. The SC is in favour of amending Regulation (EC) No 1073/1999 as part of its reform so that the obligation is limited to that of informing the Institution concerned <sup>(49)</sup>.

As the guardian of OLAF's independence, the SC wishes to be informed systematically of all cases in which institutions have refused to give and/or delayed giving their agreement to defer the obligation to hear the person concerned.

#### 3.1.2.3. *Right to express views in the official language of their choice*

38. Although this right is not expressly provided for by the current legislation, the SC observes that, in practice, the interested parties have the possibility to express themselves in the official language of their choice. Sufficient notice must, however, be granted for them to identify their choice.

39. When they have agreed to express themselves in a language other than their mother tongue, this has been expressly indicated in the written record of the interview, although this is not laid down in the Manual. This sound practice enables OLAF to keep a written trace of their consent and to prove that the waiving of this right was unequivocal.

The SC appreciates the current practice which consists of noting the choice of language of the person concerned in the written record of the interview. The Manual should be amended to take account of this.

The SC recommends that the length of time set aside for sending the letters of invitation to interviews should be respected to enable the interested parties to make use of their right to choose the language in which they wish to express their views.

The SC appreciates that fact that this right is explicitly referred to in the reform of Regulation (EC) No 1073/1999 and notes that the proposals also allow for the possibility of asking officials and other EU staff to express themselves in an official language of which they have sufficiently in-depth knowledge.

#### 3.1.2.4. *Right to be assisted by a person of their choosing*

40. This right is not expressly laid down in the current legislation. Nonetheless, in practice, OLAF generally offers interested parties the option of being assisted by a person of their choosing. The SC consequently supports the proposal by the three Institutions to include it among the procedural guarantees to be applied in OLAF's investigations <sup>(50)</sup>.

41. The SC appreciates the rules implemented by the Manual concerning the means by which the person concerned is informed of the possibility of exercising this right <sup>(51)</sup>. It is of the view that a waiving of this right must also be expressly mentioned, as, moreover, is most often the case. This sound practice enables the OLAF employees involved in the interview to ensure compliance with the requirements according to which the waiving of a right must be shown to have been made unequivocally, must have been made in full awareness of that right (on the basis of informed consent <sup>(52)</sup> and must have been made without compulsion <sup>(53)</sup>).

<sup>(48)</sup> See point 3.3.3 of the Manual and the rules concerning the letter of invitation to interview, the conduct of interviews and the recording of statements.

<sup>(49)</sup> See the European Parliament proposal (Article 7(a)).

<sup>(50)</sup> See Article 7(a)(2) of the three proposals.

<sup>(51)</sup> OLAF Manual, points 3.3.2.2.2, 3.3.3.3, 3.3.3.4 and 5.1.3.

<sup>(52)</sup> European Court of Human Rights, judgment of 25 February 1992 in *Pfeifer and Plankl v Austria*, Series A, No 227, paras 37-38.

<sup>(53)</sup> European Court of Human Rights judgment of 27 February 1980, *Deweert v Belgium*, Series A, No 35, para. 51.

The SC recommends that any waiving of the right to be assisted by counsel of one's choice should be formalised unequivocally in the written record of the interview, duly signed by the person concerned. The Manual should be amended to take account of this.

#### 3.1.2.5. *Right not to incriminate oneself*

42. Officials and other servants are under an obligation to cooperate fully with OLAF and to lend any assistance required for the investigation. To that end, they must provide OLAF's staff with all useful information and explanations<sup>(54)</sup>. According to the Manual, they also benefit, as interested parties, from the right not to incriminate themselves<sup>(55)</sup>. These two principles must be taken together, even if the right not to incriminate oneself remains the key concern. Thus one can take the view that the person concerned cannot be compelled to admit to having committed an irregularity, whereas their duty of loyalty means that they are not allowed, for example, to refuse to respond to summonses from OLAF.

The SC appreciates the explicit inclusion of this right in the reform of Regulation (EC) No 1073/1999.

#### 3.1.2.6. *Right to the protection of personal data*

43. This right is guaranteed by Article 8 of the Charter and the European Convention on Human Rights, as well as by Article 8 of Regulations (EC) No 1073/1999 and (EC, Euratom) No 2185/96, and by Regulation (EC) No 45/2001. The SC is of the opinion that the importance of this question merits greater consideration going beyond the scope of this Opinion.

#### 3.1.2.7. *Right of access to investigation files and/or final report*

44. According to case-law, the person concerned 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) in order to obtain access to the investigation files and/or final report. The EU judiciary has consistently concluded that the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be undermined by access to these documents **before** a final decision adversely affecting the person concerned has been adopted<sup>(56)</sup>. As OLAF's investigation reports and the decisions to transmit information to national judicial authorities have not been viewed as adversely affecting people, OLAF is under no obligation to grant access to its files before such a decision has been taken. EU case-law has restricted this right precisely because it is upheld in full in the later (judicial, disciplinary or financial) stages of the investigation.
45. Nonetheless, the persons concerned submit requests for access to Commission documents, and thus OLAF documents, pursuant to Regulation (EC) No 1049/2001. Although this Regulation concerns public access to institution documents, it does not rule out the access of a person to a file concerning them, especially since that person is not required to justify their request. OLAF can, nonetheless, refuse to grant access to documents on the basis of Article 4 of Regulation (EC) No 1049/2001, especially in the course of an investigation, but also once the investigation has been completed and before any follow-up has been decided. Such refusal must be duly motivated, following concrete and individual examination of each document requested and justification of a genuine rather than hypothetical need for protection<sup>(57)</sup>.
46. The SC notes in this regard a certain contradiction, inasmuch as Community case-law, which has consistently interpreted Article 4 of the Model Decision as not implying an obligation on OLAF to grant access to its documents<sup>(58)</sup>, can easily be sidestepped by relying on Regulation (EC) No 1049/2001. The intention of the law-making instances, as is apparent from the Regulation's recitals, was to give the fullest possible effect to the right of public access to documents in order to ensure greater transparency in the work of the EU Institutions and not specifically to grant interested parties a right of access to their own files. The Charter, moreover, makes the same distinction, since it refers, in Article 41(2) and Article 42 respectively, to the access of a person to his or her file, on the one hand, and the access of any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, to documents of the Union's Institutions, bodies, offices or agencies on the other. The contradiction between these different principles requires greater thought, and solutions need to be found.

<sup>(54)</sup> See Article 1 of the Model Decision and Article 4(6) of Regulation (EC) No 1073/1999.

<sup>(55)</sup> OLAF Manual, points 3.3.3.4, 5.1.1.1 and 5.1.3.

<sup>(56)</sup> Court of First Instance *Franchet and Byk v Commission* (No 2) cited above, paras 255-262; Court of First Instance *Nikalaou v Commission* cited above, paras 240-246; order of the Court of First Instance in Case T-215/02 *Gómez-Reino v Commission*, para. 65.

<sup>(57)</sup> See, for the specific possibility of a request for access to documents after the completion of an investigation by OLAF and the conditions governing the treatment of such requests, the judgment of the Court of First Instance of 6 July 2006 in Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* (No 1).

<sup>(58)</sup> See the case-law cited above in footnote 56.

47. In practice, the SC has noted that most requests for access to documents have been rejected by OLAF pursuant to the exceptions laid down in Article 4(1)(b) and Article 4(2) and (3) of the Regulation. This is a position which the SC supports. OLAF must, nevertheless, provide appropriate and sufficient reasons for its decisions to refuse access, so as to prevent them from being annulled by the EU courts <sup>(59)</sup>.
48. A request for access to personal data under Regulation (EC) No 45/2001 may also constitute an indirect means of obtaining access to papers held by OLAF. As stated above, the SC has yet to agree to a position on this issue.

The SC is of the view that access to OLAF's confidential documents must only be granted in duly substantiated circumstances after a concrete and individual assessment of each document. In any event, such access must not impede OLAF in any way in the independent exercise of the mission conferred upon it.

Greater thought should be given to striking a balance between the need to protect the confidentiality of OLAF's investigative activities and the ability of the persons concerned to request access to the investigation documents.

### 3.1.3. Closing stage of an investigation

#### 3.1.3.1. *Obligation to make reference to comments by the person concerned in the conclusions drawn on the completion of an investigation*

49. The SC regrets that this obligation imposed by the Staff Regulations <sup>(60)</sup> is not provided for in the Manual and is not fully respected in practice <sup>(61)</sup>.

#### 3.1.3.2. *Right of the person concerned to be informed of the completion of the investigation*

50. The right of the person concerned to be informed is only formally provided for in the event of an investigation being closed with no further action taken <sup>(62)</sup>. Nonetheless, in the cases reviewed in which there was follow-up, the SC is pleased to note that the persons concerned were systematically informed of the completion of the investigation and OLAF's recommendations for transmission. Such transmissions can be regarded as the processing of personal data within the meaning of Regulation (EC) No 45/2001 which can justify informing the person concerned. The SC, however, wishes for a clarification of the matter by the law-making instances when Regulation (EC) No 1073/1999 is reformed and is of the view that the possibility of an exemption should be retained for those cases in which confidentiality must be maintained.
51. The SC appreciates the inclusion in the reform of Regulation (EC) No 1073/1999 of the obligation on OLAF to submit its conclusions and recommendations to the person concerned before the final case file is sent to the competent authorities, subject to the need to keep them secret to avoid compromising follow-up action. However, the SC has reservations about the necessity of obtaining the agreement of the Institutions, bodies, offices and agencies in order to defer notification of the interested party <sup>(63)</sup>.

The obligation to make reference to the comments by the person concerned in the conclusions drawn from an investigation should be laid down in the Manual and respected in practice.

The SC holds that the legislative provisions on OLAF's investigations should provide for the notification of the persons concerned on the completion of investigations, except in duly justified situations. When OLAF takes a decision to defer such notification, it should only need to inform the competent Institutions, bodies, offices or agencies.

### 3.2. External Investigations

52. Persons concerned by external investigations benefit from certain rights in the same way as persons concerned by internal investigations (right of access to documents, right to respect for personal data, etc.). Since the rules for exercising those rights are the same irrespective of the type of investigation, the SC refers back to the considerations indicated above on this point.

<sup>(59)</sup> Decisions for which insufficient reasons are provided may also be viewed as examples of poor administration by the European Ombudsman: see, with reference to external investigations, the decision of the European Ombudsman in Joined Complaints 723/2005/OV and 790/2005/OV.

<sup>(60)</sup> Article 1(1) of Annex IX to the Staff Regulations.

<sup>(61)</sup> See case No 26.

<sup>(62)</sup> See Article 5 of the Model Decision and Article 1(3) of Annex IX to the Staff Regulations.

<sup>(63)</sup> See the Council proposal (Article 8(a)); see also point 3.1.2.2 of this Opinion.

53. More generally, the SC notes that the existing Community legislative provisions concerning procedural guarantees in the context of OLAF's external investigations are insufficient. External investigations are directly dependent on the state of national legislation<sup>(64)</sup>. Referral to national legislation can, however, at times compromise the principle of equivalent and effective protection against fraud, laid down in Article 325 of the Treaty on the functioning of the European Union. Reform of Regulation (EC) No 1073/1999 must be used as the opportunity for necessary clarification<sup>(65)</sup>.
54. The SC observes that the lack of clear rules in Regulations (EC, Euratom) Nos 2988/95 and 2185/96 and (EC) No 1073/1999 leads to a wide variety of practices within OLAF. The guidelines laid down by the Manual do not appear to suffice to harmonise the differing approaches within the operational units. The diversity of national rules applicable might, moreover, justify the production of a comprehensive handbook for investigators.
55. The SC also notes the existence of shortcomings in the legislation concerning the conduct of external investigations in the area of direct expenditure. As far as projects financed exclusively by the European Union, and not jointly managed with Member States, are concerned, it is often difficult for OLAF to identify the national administrative authorities to which it can turn when on-the-spot checks are carried out. In addition, the scope of OLAF's investigative powers, to which Article 7 of Regulation (EC, Euratom) No 2185/96 refers, is not clearly defined. Cases in which these shortcomings have led to delays in, or serious difficulties with, investigations have been brought to the attention of the SC. The SC therefore holds that a clarification in this particular area is needed when Regulation (EC) No 1073/1999 is reformed.
56. The entry into force of the Charter has heightened awareness of the significance of fundamental rights and procedural guarantees irrespective of the type of investigation. However, account must be taken of the specific features of OLAF as an administrative investigation service. Simply bringing the procedural obligations for external investigations into line with those for internal investigations would disregard the difference in nature between them and might seriously compromise the effectiveness of investigations without strengthening the rights of the persons concerned in any useful or meaningful way.

### 3.2.1. Opening stage of an investigation

#### 3.2.1.1. Notifying the party concerned

57. The current legislation does not establish any obligation on OLAF to inform the person concerned of their involvement in an external investigation. This lack of notification is justified by the requirements of the investigation. Indeed, the on-the-spot checks and inspections, in particular, are often carried out without prior notice. Notifying the Member State concerned in advance of the performance of an on-the-spot check (but not of an investigation being opened) is a practical requirement, in accordance with the principle of sincere cooperation<sup>(66)</sup>. It must be given 'in good time' before the on-the-spot check. In contrast, the Manual provides for the notification of the person concerned when this would not be harmful for the investigation<sup>(67)</sup>. This approach has also been adopted in the reform of Regulation (EC) No 1073/1999.
58. The SC has noted that in most external investigations the natural and/or legal persons concerned were informed either by a notification of the opening of an investigation or of a forthcoming on-the-spot check or during an on-the-spot check. When the decision was taken not to inform the interested party, reasons were generally given for this. These reasons do not, however, appear in the documents drawn up when transmitting information to the national judicial authorities.

The SC is of the opinion that prior notification of the interested party concerning the opening of an investigation is liable occasionally to prejudice its effectiveness (especially of on-the-spot checks) and to add to the procedural burden on OLAF. The reform of Regulation (EC) No 1073/1999 should take account of this risk. Before establishing an obligation to notify the person concerned, greater research into the possible consequences for the effectiveness of investigations is required.

<sup>(64)</sup> The diversity of national legislation was recently highlighted in the 2009 Annual Report from the Commission to the Council and the European Parliament on Protection of the European Union's Financial Interests – Fight against Fraud (COM(2010) 382 final 2).

<sup>(65)</sup> See, in particular, the proposals contained in the SC's Opinion No 3/2010.

<sup>(66)</sup> See Article 4 of the Treaty of Lisbon.

<sup>(67)</sup> Point 5.1.1.2.

### 3.2.2. Implementation stage of an investigation

#### 3.2.2.1. Obligation of authorisation for OLAF staff

59. In the context of the on-the-spot checks provided for by Regulation (EC, Euratom) No 2185/96, the investigators must produce a written authorisation indicating their identity and position, and a document indicating the subject matter and purpose of the investigation<sup>(68)</sup>. The second requirement ensures that the rights of the defence are safeguarded<sup>(69)</sup>.
60. In practice, the SC notes that these rules are not applied uniformly. The written authorisation is made by way of an 'appointment decision' for the persons authorised to carry out the investigation, signed by the head of unit. The written authorisation always states the subject-matter and the purpose of the investigation, but, in certain cases, the names of the investigators are not indicated, while, in others, the authorisation is accompanied by an acknowledgement of receipt for the economic operator subject to the on-the-spot check to sign. In addition, the written record of the interview or on-the-spot check does not systematically indicate whether the OLAF investigators produced their authorisation even though this would prevent any subsequent challenges.

The SC recommends that the practices in conferring authorisations on OLAF investigators should be harmonised and clear rules applied.

The written records of on-the-spot checks and/or interviews should indicate expressly whether the investigators produced their authorisations in order to avoid any subsequent challenge.

#### 3.2.2.2. Ability of the interested party to express their views on all the facts concerning them

61. The current Community legislation does not explicitly attribute any right to interested parties to express their views on all of the facts concerning them, unlike the stipulations for internal investigations. The Manual does, however, provide for the possibility of giving the interested party the opportunity to express their views before final conclusions are drawn<sup>(70)</sup>.
62. Article 7 of Regulation (EC, Euratom) No 2185/96 lists OLAF's powers during on-the-spot checks. The list is not exhaustive and does not make explicit reference to OLAF's powers to conduct formal interviews or to ask for oral explanations during on-the-spot checks<sup>(71)</sup>. Nonetheless, these powers of access 'to all the information and documentation on the operations concerned' through on-the-spot checks can be exercised by the application of national legislation. In its review of investigations, the SC has noted that formal interviews have sometimes been conducted, whereas, in other cases, the persons concerned have had the possibility to express their views during the on-the-spot checks, but not in the form of formal interviews. In addition, reasons were only provided for the fact that no interviews were carried out when transmitting the information to the national judicial authorities.
63. The SC notes that the reform of Regulation (EC) No 1073/1999 proposes the imposition on OLAF of an obligation to hear the views of the persons concerned, subject to exceptions which would justify its waiver. The SC is of the view that the explicit addition to the reform of Regulation (EC) No 1073/1999 of powers of investigation, such as the possibility to conduct interviews or to ask for oral explanations, is necessary to ensure legal certainty and the consistent and uniform application of the procedural rules.
64. However, the SC takes the view that such a clarification of the powers of investigation must not necessarily lead to the imposition on OLAF of an obligation to hear the views of the persons concerned so as not to make investigations more cumbersome and prolong the already lengthy procedure through overregulation. OLAF's administrative investigation is only the preliminary part of a much broader process. Respect for the rights of the defence must be appreciated in relation to the investigation as a whole, that is taking into account the administrative, disciplinary or judicial follow-up of investigations based on full respect for the adversarial principle. Furthermore, for Community case-law as it now stands, OLAF's external investigations do not give rise to acts having adverse effects, so any failure to ensure the full and complete application of the adversarial principle and the rights of the defence at this stage does not, in theory, cause prejudice to the persons concerned<sup>(72)</sup>.

<sup>(68)</sup> Article 6(1), second paragraph of Regulation (EC, Euratom) No 2185/1996.

<sup>(69)</sup> The reason for this twofold requirement has been explained as follows by the Community judiciary: 'the Commission is required to specify the subject-matter and the purpose of the investigation. That obligation is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence' (Judgment of the Court of Justice of 21 September 1989 in Joined Cases C-46/87 and C-227/88, *Hoechst AG v Commission*, para. 29).

<sup>(70)</sup> Manual, point 5.1.2.2.

<sup>(71)</sup> According to the Manual, OLAF derives its power to conduct interviews from Article 7 of Regulation (EC, Euratom) No 2185/96 combined with Article 2 of Regulation (EC) No 1073/1999 (see points 3.3.2.2.2 and 3.3.3.2).

<sup>(72)</sup> See *mutatis mutandis* the General Court's Judgment in *Nikolaou v Commission*, para. 246; see also the Order of the Court of First Instance of 13 July 2004 in Case T-29/03, *Comunidad Autónoma de Andalucía v Commission*.



### 3.2.2.3. Right to express views in the official language of their choice

65. Regulation (EC, Euratom) No 2185/96 lays down that investigation reports must be drawn up in keeping with national rules of procedure. Consequently, the oral explanations given by the persons concerned during on-the-spot checks must be transcribed in the language of the Member State on the territory of which the check took place. The SC has noted that OLAF has complied with this obligation. In addition, when formal interviews are conducted, the persons concerned have the possibility of expressing their views in the language of their choice.

### 3.2.2.4. Right to be assisted by a person of their choosing and confidentiality of client-lawyer correspondence

66. The right to be accompanied by a person of one's own choice is not expressly established in the current legislation. The SC consequently supports the proposal by the three Institutions to include it among the procedural guarantees to be respected in OLAF's investigations<sup>(73)</sup>. This right might also be extended to economic operators when on-the-spot checks are conducted, particularly if it is acknowledged by national legislation.
67. On this point, the SC refers to Community case-law on the Commission's powers of investigation in competition matters. What investigations in this field have in common with OLAF's investigations is the fact that they are intended to gather evidence in order to check the actual existence and scope of a given factual and legal situation. The EU judiciary has consistently ruled that, although the rights of the defence apply only to administrative procedures which may lead to the imposition of penalties, it is, nonetheless, necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures, including, in particular, checks, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings [...], other rights, for example, the right to legal representation or the confidentiality of client-lawyer correspondence, must be respected even during the preliminary inquiry<sup>(74)</sup>.

The SC appreciates the fact that the right to be accompanied by a person of one's choice has been included among the procedural guarantees proposed in the reform of Regulation (EC) No 1073/1999 and is of the opinion that it should apply both to interviews and to on-the-spot checks.

### 3.2.2.5. Right not to incriminate oneself

68. As with internal investigations, there is no specific case-law on this right and its application to OLAF's external investigations. It is, nonetheless, one of the procedural guarantees referred to by the Manual and proposed by the reform of Regulation No 1073/1999.
69. The SC must refer once again to the case-law concerning competition and notes that, in this field, the EU judiciary has held that the right of economic operators not to incriminate themselves must be observed as of the preliminary stage of investigation which comes before the adversarial stage before the Commission. Thus an economic operator can be obliged to provide all necessary information concerning such facts as may be known to it and to disclose such documents as are in its possession and which may subsequently be used against it or against another economic operator<sup>(75)</sup>. However, it cannot be obliged to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove<sup>(76)</sup>.
70. Nevertheless, the SC wonders to what extent these principles might be transposed to OLAF's investigations. Unlike the Commission in the sphere of competition, OLAF itself has no powers to impose penalties, although it may, in the event of opposition by economic operators to on-the-spot checks or inspections, benefit from the assistance of the Member State concerned, in accordance with national provisions.

## 3.2.3. Closing stage of an investigation

### 3.2.3.1. Possibility of being informed of the completion of an investigation

71. OLAF is under no obligation to inform the persons concerned of the completion of an investigation and/or of its conclusions and recommendations. Such an obligation is provided for in the Manual, except in cases where it is liable to harm the follow-up to the investigation. In practice, such notification rarely occurred in the investigations reviewed. In the context of investigations concerning direct expenditure made by the Commission directly to the beneficiaries, OLAF has not been consistent in its practice.

<sup>(73)</sup> See Article 7(a)(2) of the three proposals.

<sup>(74)</sup> Judgment of the Court of Justice of 17 October 1989 in Case 85/87 *Dow Benelux NV v Commission*, paras 26-27.

<sup>(75)</sup> See the judgment of the European Court of Justice of 18 October 1989 in Case 374/87 *Orkem v Commission*, paras 33-35; for a more recent interpretation see the judgment of the Court of Justice of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission*, paras 61-65, or the judgment of the General Court of 28 April 2010 in the Case T-446/05 *Amann & Söhne and Cousin Filterie v Commission*, paras 325-329.

<sup>(76)</sup> *Orkem v Commission*, cited above paras 34-35.

72. The SC is aware of the fact that OLAF informs the Member State of the completion of an investigation by sending a final case report in the context of investigations concerning Community expenditure handled by Member States. In so far as the investigation may be the subject of follow-up at the national level, the SC is of the opinion that it would be advisable to consult the competent national authorities before deciding whether or not to inform the person concerned of completion <sup>(77)</sup>.

The SC is of the opinion that the obligation for OLAF to inform the persons concerned of its conclusions and recommendations before the final case report has been sent to the competent Community and national authorities, as put forward by the reform of Regulation (EC) No 1073/1999, should be adapted to the rules of procedure of the Member State responsible for the follow-up.

<sup>(77)</sup> See in this respect the Council's proposal for Article 8(a) of the draft reform of Regulation (EC) No 1073/1999.

## ANNEX

**Legislation:**

1. Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999, pp. 1-7;
2. Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999, pp. 15-19;
3. Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996, pp. 2-5;
4. Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23.12.1995, pp. 1-4;
5. Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (1999/352/EC, ECSC, Euratom), OJ L 136, 31.5.1999, pp. 20-22;
6. Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45, 14.6.1962, p. 1385, modified;
7. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43-48;
8. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, pp. 1-22.

**Reform of Regulation (EC) No 1073/1999:**

1. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) {SEC(2006) 638 } /\* COM/2006/0244 final – COD 2006/0084;
2. European Parliament legislative resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (COM(2006)0244 — C6-0228/2006 — 2006/0084(COD)), OJ C 16E, 22.1.2010, pp. 201-222.

**Case-law:***European Union's Courts:*

1. 21 September 1989, *Hoechst AG v Commission*, joined Cases 46/87 et 227/88;
2. 17 October 1989, *Dow Benelux NV v Commission*, Case 85/87;
3. 18 October 1989, *Orkem v Commission*, Case 374/87;
4. 11 September 2002, *Willeme v Commission*, Case T-89/01;
5. 10 July 2003, *Commission v BCE*, Case C-11/00;
6. 18 December 2003, *Gómez-Reino v Commission*, Case T-215/02;
7. 7 January 2004, *Aalborg Portland A/S and others v Commission*, joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P;
8. 9 June 2004, *Camós Grau v Commission*, Case T-96/03;
9. 13 July 2004, *Comunidad Autónoma de Andalucía v Commission*, Case T-29/03;
10. 6 April 2006, *Camos Grau v Commission*, Case T-309/03;

11. 6 July 2006, *Franchet and Byk v Commission* (No 1), joined Cases T-391/03 et T-70/04;
12. 21 September 2006, *Technische Unie BV v Commission*, Case C-113/04 P;
13. 2 May 2007, *Giraudy v Commission*, Case F-23/05;
14. 12 September 2007, *Nikolaou v Commission*, Case T-259/03;
15. 8 July 2008, *Franchet et Byk v Commission* (No 2), Case T-48/05;
16. 28 April 2010, *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission*, Case T-446/05;
17. 20 May 2010, *Commission v Violetti and others*, Case T-261/09 P;
18. 29 June 2010, *Commission v The Bavarian Lager Co. Ltd*, Case C-28/08 P;
19. 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, Case C-139/07 P.

*European Court of human rights:*

1. 27 February 1980, ***Deweert v Belgium***, Series A No 35;
  2. 25 February 1992, ***Pfeifer and Plankl v Austria***, Series A No 227.
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