



## *Opening of cases in OLAF in 2012*

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*Report 3/2014 from the Supervisory Committee  
of the European Anti-fraud Office (OLAF)  
to  
the European Parliament, the Council, the Commission and the Court of Auditors*

*(pursuant to Article 15(9) of Regulation No 883/2013)*

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# PART ONE

## Introduction

1. The Supervisory Committee (SC) of the European Anti-fraud Office (OLAF) monitors the implementation of the Office's investigative function, in order to reinforce its independence and the proper exercise of the competences conferred upon it by Regulation No 883/2013<sup>1</sup>. The SC also assists the Director-General of OLAF (OLAF DG) in the discharge of his responsibilities to ensure that investigations are carried out to the highest standards.
2. In the framework of its 2012 monitoring activities, the SC noted that at the moment of the reorganisation of OLAF (1 February 2012) 423 cases<sup>2</sup> were opened on the same day and by a single decision of the OLAF DG.
3. At that time, the SC expressed its intention<sup>3</sup> to examine to what extent this single decision was in line with the criteria established by the case-law of the European Court of Justice, which stated that a decision by the OLAF DG to open an investigation cannot be taken unless there are “sufficiently serious suspicions” relating to acts of fraud, corruption or other illegal activities detrimental to the financial interests of the EU<sup>4</sup>.

## Supervisory Committee's requests for information and OLAF's replies

4. In 2013 and 2014, the SC tried to assess the cases in question, with particular focus on the justification for opening the investigations, on the investigative measures carried out, on their duration and on their results (i.e. recommendations issued by OLAF). As a consequence, the SC addressed several requests for information and for access to the case files to the OLAF DG :
  - (a) **23 September 2013** – a request for general information, to which OLAF replied on 18 October 2013<sup>5</sup> and explained the rationale behind the opening of cases on the same day.
  - (b) **18 December 2013** – a request for statistical data necessary for preparatory work, to which OLAF replied on 10 January 2014 and provided the SC with the number of on-going cases and of cases closed with or without recommendations by sector, type of recommendations and the amount recommended for recovery.

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<sup>1</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1–22.

<sup>2</sup> In the OLAF 2012 report, the total number of cases reported is 419. The difference comes from the existence of duplicate cases.

<sup>3</sup> See SC 2012 Activity Report, § 20.

<sup>4</sup> See judgments of 10 July 2003, *Commission of the European Communities v European Investment Bank*, case C- 15/00 and *Commission of the European Communities v European Central Bank*, case C-11/00, paragraphs 164, respectively 141.

<sup>5</sup> Ref. Ares(2013)3289248.

(c) **15 April 2014** – a request for access to a sample of cases - discussed on 12 May between the SC Chairman and the OLAF DG for which the latter requested additional clarifications.

(d) **26 May 2014** – the repeated request for access to a random sample of cases with detailed justifications from the SC, underlining the fact that the information previously provided by OLAF was not sufficient to review the legality of opening decisions.

In his reply of 12 June 2014, the OLAF DG rejected the SC's justifications for access to case files and demanded further explanation. He also claimed that the examination of 423 cases opened *en masse* was "*unrelated to the monitoring of systemic aspects of the Office's investigative function*" and that "*the link between the one-off opening of a large number of cases and OLAF's independence is not self-evident and therefore [he] would be grateful if [the SC] could clarify [its] request*". Finally, the OLAF DG underlined that reviewing the legality of each individual OLAF act, or examining the existence of "sufficiently serious suspicions" for the opening of individual cases "*does not fall within the prerogatives of the SC*".

5. The SC appreciates and recognises OLAF's efforts to deliver the general and statistical information requested by the SC, but wishes to underline that this information is largely insufficient for the purpose of its assessment. Therefore, the SC regrets that its requests for access to a sample of cases have not been satisfied and considers that the justification provided by the SC to the OLAF DG was sufficient.

## **Results of the cases**

6. As a result of the lack of access even to a random sample of case files in question, the SC's assessment is based only on the limited information provided by OLAF, which could not be properly verified.
7. The SC paid special attention to the explanations provided by the OLAF DG, who informed the SC that, prior to the reorganisation of OLAF, the investigation units were instructed to review all on-going assessments (whether a case should be opened or not) and, as a result, they proposed the opening of 423 cases (225 investigations and 198 coordination cases). The decision to open this number of cases was taken by the OLAF DG without going through the normal procedure. This decision concerned only external cases and was a one-off measure to allow a smooth implementation of the new organisational structure of OLAF. The OLAF DG stated that the cases in question were not opened automatically, but on the basis of "thorough assessments"<sup>6</sup>.
8. To prioritise their handling a special investigation team was established to deal exclusively with these cases. No information was provided to the SC concerning this measure (i.e. date of the decision to establish the special investigation team, criteria for appointing the investigators, results of their activity etc.).
9. The SC took note of the statistical information provided by OLAF. On 1 February 2012, OLAF opened the 423 cases in question, most of them in the sectors of agriculture and

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<sup>6</sup> Letters of the OLAF DG of 18/12/2013 and 12/06/2014.

structural funds. This constituted more than a half of the total number of cases opened in OLAF in 2012 (718 cases)<sup>7</sup>.

10. OLAF's annual reports indicate that in the years 2008-2011 the number of cases closed without recommendations was always slightly smaller than the number of the cases closed with recommendations (i.e. the cases closed without recommendations constituted normally less than a half of all closed cases).<sup>8</sup> According to the data received from OLAF, on 8 January 2014, out of 423 cases in question, there were 333 cases closed, 305 were closed without recommendations (i.e. over 90% of all the closed cases) and 28 were closed with recommendations. OLAF describes it as "the result of the exceptional number of cases opened due to the reorganisation"<sup>9</sup>.

### **Supervisory Committee's assessment**

11. The main purpose of the SC monitoring activity was to assess whether the opening of the cases in question complied with the legal requirement of establishing "sufficiently serious suspicions". The OLAF DG challenged the SC's competence to examine the fulfilment of this requirement.<sup>10</sup> For the SC, however, it is its basic responsibility to ensure that the OLAF DG exercises his prerogatives properly, in full independence and in accordance with the law.
12. The SC understands the OLAF DG's argument that the requirement to establish "sufficiently serious suspicion" applied formally only to investigations and not to coordination cases. The SC accepts also that a special procedure could have been useful for organisational reasons.
13. However, the SC believes that this does not relieve the OLAF DG from complying with the requirement of a measured and individual assessment of the necessity to open cases. Although it was specified only by the case-law and was introduced in the Regulation concerning investigations conducted by OLAF only in 2013, this requirement stems from the principle of proportionality enshrined in the EU law (no action of the Union may exceed what is necessary to achieve the objectives of the EU Treaties<sup>11</sup>) and was, as such, also applicable in 2012.
14. During the month of January 2012, OLAF staff completed 671 assessments awaiting evaluation<sup>12</sup> and proposed the opening of 423 cases. Thus, in one month, more assessments leading to the opening of cases were finalised than during the two previous years combined (2010-2011).
15. The SC takes note of the OLAF DG's statement that "*the average duration of these 423 cases was 8 months which indicates that the matters under assessment were of substantial and complex nature and required further action by the Office*"<sup>13</sup>. However, the SC notes that it is three times less than the average duration of other cases and the number of cases

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<sup>7</sup> See the OLAF Report 2012, p. 3.

<sup>8</sup> *Idem*, p. 21.

<sup>9</sup> *Idem*, p. 22.

<sup>10</sup> Letter from the OLAF DG to the SC, Ref. Ares(2014)1925567 - 12/06/2014.

<sup>11</sup> Article 5 of the Treaty on the European Union.

<sup>12</sup> According to OLAF monthly reports on operational activities.

<sup>13</sup> Letter of the OLAF DG of 18/12/2013.

in question closed without any recommendations was, proportionally, unprecedentedly high.

16. These facts and statistics triggered the SC's concern that the cases were opened regardless of the status of their evaluation (since some of them remained in this phase for a few days, while others for several years<sup>14</sup>) and that there was no sufficient individual assessment - duly motivated and registered in each case file - of the initial information received by OLAF.
17. The SC is also concerned that the number of cases irregularly opened and swiftly closed without any results (or even without any investigative measures undertaken) could have seriously distorted OLAF's statistics in 2012 and in the following years.
18. For one year, since the SC began its examination of the issue, **OLAF failed to provide any satisfactory evidence that the opening of the cases in question had been carried out in accordance with the obligatory legal requirements.** Moreover, the SC regrets that, in the course of its monitoring activities, the OLAF DG questioned his supervisors' competence to assess whether the 423 cases were opened and conducted in accordance with the law.

*November 2014*

## PART TWO

### Introduction

19. On 5 November 2014, the text of Report 3/2014 (here presented as Part One) was adopted by the plenary of the OLAF Supervisory Committee, but at the same meeting the OLAF Director-General promised an immediate access to a sample of cases in question. On 12 November 2014, access to a sample of 41 cases and to limited statistical information concerning 423 cases open on 02/02/2012 was granted to the SC.

### Methodology

20. The objective of the SC's analysis was to establish whether in opening of the 423 cases in question (constituting a majority of cases opened by OLAF in 2012) the OLAF DG had respected the requirements set forth in the applicable legislation<sup>15</sup>, case law<sup>16</sup> and internal

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<sup>14</sup> The date of the initial registration of incoming information varied from 22.06.2007 to 25.01.2012 for cases opened *en masse* on 1 February 2012.

<sup>15</sup> Article 5 of Regulation 1073/1999.

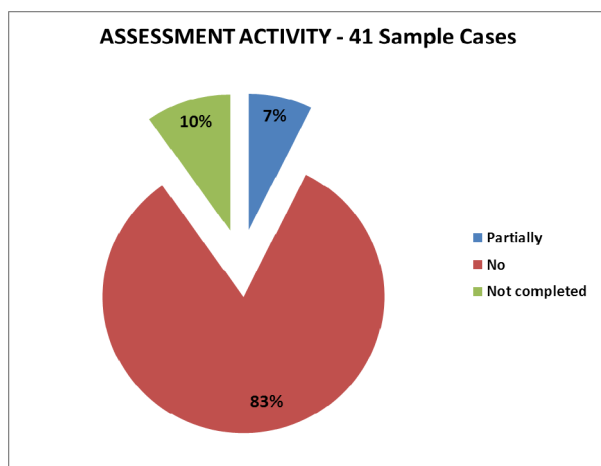
<sup>16</sup> The European Court of Justice stated that a decision by the OLAF DG to open an investigation cannot be taken unless there are "sufficiently serious suspicions" relating to acts of fraud, corruption or other illegal activities detrimental to the financial interests of the EU" (See judgments of 10 July 2003, *Commission of the European Communities v European Investment Bank*, case C- 15/00 and *Commission of the European Communities v European Central Bank*, case C-11/00, paragraphs 164, respectively 141). However, it must be

OLAF rules<sup>17</sup>, in particular the requirement to conduct assessment of any received information and to establish, as a prerequisite of opening an investigation, a “*sufficiently serious suspicion*” that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union”.

21. For that purpose, the SC searched in the files not only for documents identified as “assessment” or “evaluation”, but also any other documents or traces of activities which could have indicated that the assessment had been conducted (in particular: description of the initial information, exchange of information with the sources, the handover notes, legal and review opinions, final case reports, opinions on a final case report).

## Results of the Supervisory Committee's analysis

22. The SC noted that over 70% cases in question concerned agriculture and structural funds.
23. The SC did not find any documents identified as “assessment” or “evaluation” in the whole sample of case files. The SC discovered traces of activities which could have been possibly used for assessment of incoming information in only 17% cases (see the chart below).



24. In only 6 cases out of the sample of 41 cases, the SC was able to find a clear estimation of the possible financial impact as conducted by OLAF.
25. In none of the cases in the sample did the SC find any document confirming that the “*sufficiently serious suspicion*” had been established before opening the case.
26. The SC noted that majority of the cases in question lasted rather shortly after the opening and often only few investigative activities were conducted. Out of 367 cases closed at the time of the statistical review by the SC, 253 cases closed as the first ones had the average duration of less than 12 months. (It had an impact on the average duration of cases as calculated in OLAF statistics for the given year and the following years).

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noted that since 1 October 2013 Regulation 883/2013 introduced the concept of 'sufficient suspicion' (Article 5(1) and the jurisprudence quoted above has effectively been overruled.

<sup>17</sup> OLAF Manual –Operational Procedures, point 3.2.2.

27. The SC would underline that the requirements for opening an OLAF investigation have been introduced by the legislator and earlier by the European Court of Justice to provide a legal framework for the discretionary powers of the OLAF DG. They are, however, not only procedural rules – they are there also to safeguard the rights of the individuals and economic operators. Opening an OLAF investigation may in itself change their legal situation. For instance, under the rules applicable in 2012 for the Commission Early Warning System, the mere opening of an OLAF investigation against an economic operator could have been, as far as the SC is informed, a circumstance leading to the Commission’s decision not to enter into a contract with that operator, without him being ever informed of the reason. An analysis of that issue would, however, go beyond the competence of the Supervisory Committee of OLAF.

## Conclusions

28. On the basis of the sample of cases provided by OLAF, the SC established the following:

- OLAF did not conduct any appropriate assessment of the incoming information for none of the cases in question,
- for the vast majority of cases there was not even a trace of any assessment activity;
- **the OLAF Director-General opened all the cases in question without establishing beforehand the existence of a sufficiently serious suspicion that there had been fraud, corruption or any other illegal activity affecting the financial interests of the Union – which is in contradiction with the legal requirement for opening an OLAF investigation, in force at that time.**

*January 2015*

For the Supervisory Committee

The Chairman