

Summary of OLAF's comments to the 2014 Activity Report of the OLAF Supervisory Committee

On 4 May 2015, the OLAF Supervisory Committee (SC) presented its Activity Report for 2014 to the Institutions. This is the third annual report of the current Committee. As in the two previous reports, the tone is critical, without acknowledging positive achievements of OLAF or the efforts of OLAF to answer the SC's requests in a complete and timely manner.

The text of the Activity Report is accompanied by the Opinions and other documents of the SC adopted since the publication of the 2013 Report in spring 2014. OLAF has replied to the SC's Opinions and other documents in a timely manner. OLAF's full replies and comments can be found on OLAF's website: http://ec.europa.eu/anti_fraud/about-us/reports/official_responses_from_olaf_en.htm

The present document summarises OLAF's main comments on the SC 2014 Activity Report.

1. OLAF's opening of 225 external investigations and 198 coordination cases in February 2012 (SC Report 3/2014)

The SC claims in its Activity Report and in its Report 3/2014 that *"the OLAF Director-General opened all 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 interest of the Union – which is in contradiction with the legal requirements for opening an OLAF investigation, in force at the time"*.

Comment:

- In 2011, OLAF had a large number of cases under initial assessment, without a decision yet taken on whether to formally open them as an investigation or not. In February 2012, on the occasion of the OLAF reorganisation, and as result of a comprehensive case assessment process, OLAF opened out of them 225 external investigations and 198 coordination cases. This measure led, on the one hand, to a reduction of the existing backlog of cases under initial assessment. On the other hand, it improved the rights of the persons concerned: by law, these rights are better protected during an investigation than during the initial assessment phase.
- The decision was in line with the legal provisions applicable at that time which did not set any legal requirement of "sufficiently serious suspicion" of fraud for the opening of external investigations or coordination cases, and did not fall short of relevant case law.
- The analysis of the SC is therefore erroneous.

2. The average duration of investigations, the change of method of calculation (SC Opinion 05/2014)

The SC claims in its Activity Report and on the cover page of Opinion 05/2014 that the improvement in the average duration of OLAF's investigations *"is due to the introduction of new calculation methods"*.

Comment:

- The decrease of the average duration of OLAF's investigations is not due to a change in the calculation method. As is demonstrated by the SC itself (Opinion 5/2014, chart 2) the average duration has decreased significantly – independent of whether the "old" (pre- 2011) or "new" (post-2011) method of calculation is used. The SC hence contradicts itself.
- OLAF used the same "new" method of calculation to recalculate the results of previous years relative to the average duration of investigations. Thus, OLAF has ensured the *"full comparability of the information presented"*, which is what the SC calls for.
- In its 2014 Annual Report, OLAF will present results on the average duration of its investigations based on both calculation methods.

In Opinion 5/2014, the SC states that the decrease in the average duration of investigations as reported by OLAF in 2012 and 2013 was due to a combination of two factors, notably the change in the method of calculation and the inclusion into the statistics of cases with *"atypically short duration"*. The SC re-calculates (cleans) OLAF's results and arrives at an increase in the average duration by excluding the 225 investigations opened in February 2012. The SC further increases the calculated average duration of OLAF's investigations by excluding particularly short investigations.

Comment:

- OLAF considers that the SC exercise of cleaning OLAF's statistics is arbitrary and misleading. OLAF cannot exclude neither exceptionally short nor exceptionally long investigations from its statistics, as long as the cases are real and reported in OLAF's case management system. Also, if one were to follow the SC logic of cleaning, the statistics for all previous years would have to be cleaned to ensure full comparability, an exercise for which there is no established or logical basis.
- In the last years, OLAF has invested significant resources to reduce the duration of its investigations and this can be seen in the results of the Office for the last years (cf. OLAF Report 2013: the average duration of investigation cases was 20.8 months in 2010, it fell to 17.5 months in 2013) .
- OLAF would appreciate it if the SC acknowledged OLAF's achievements as regards the decrease in the average duration of investigations, rather than engaging in random or selective cleaning of OLAF's statistics of *"atypically short investigations"* to arrive at an average higher than the one calculated by OLAF.

3. SC access to information, notably on cases lasting more than 12 months (SC Opinion 4/2014 and SC Opinion 5/2014)

The SC concludes that the information provided by OLAF on cases lasting more than 12 months is insufficient for the SC to "*monitor the duration of OLAF's investigations*".

Comment:

- According to the OLAF Regulation 883/2013, the mandate of the SC is to monitor "*developments concerning the duration of investigations*" (*emphasis added*). For investigations lasting more than 12 months, the Regulation requires OLAF to provide the SC with 1) the reasons and 2) the remedial measures envisaged. The Regulation furthermore specifies that the SC may, only in duly justified situations, ask OLAF for additional information on investigations. The Regulation is clear and does not leave room for interpretation.
- Since the investigations lasting more than 12 months are on-going investigations, they are subject to strict rules of confidentiality and data protection requirements. OLAF cannot automatically provide the SC with information unless it is expressly foreseen by the Regulation.
- OLAF has in 2014 informed the SC of 658 instances where cases lasted more than 12 months, concerning 391 investigations. The information concerning investigations lasting more than 12 months is however only a part of the case-related information that OLAF transmits to the SC, which in 2014 included also full access to 119 cases in OLAF's case management system, 343 reports with specific case-related data at the request of the SC and information on 376 recommendations issued as result of OLAF's investigations. Based on this information, the SC issued a number of Opinions and documents, as included in their Activity Report. OLAF therefore finds it difficult to understand why the SC still considers that it does not have access to sufficient information.

4. Cooperation and implementation of the Working Arrangements between OLAF and the SC

The SC states that "*the core of the problem is not poor implementation of the Working Arrangements, but a fundamental difference of views between the SC and the OLAF DG in the perception of the role of the SC.*" The SC underlines its supervisory role as "*the only body which can ensure accountability of OLAF's investigative function*". According to the SC, it requires "*independent access to information to ensure objective monitoring*".

Comment:

- The Working Arrangements between OLAF and the SC were jointly agreed and signed in January 2014, and are duly implemented by OLAF. OLAF has since long expressed its openness to discuss and change the Working Arrangements in accordance with the SC needs. Discussions on such a revision are currently on-going.
- The SC's role is clearly defined in the OLAF Regulation 883/2013.

- The SC is not the only body which can ensure accountability of OLAF's investigative function. Accountability is also ensured by national and EU courts, the European Ombudsman, the European Data Protection Supervisor, as well as through the regular reporting by OLAF to the institutions.
- OLAF has already offered the SC independent access to data. In the context of the on-going discussion of the Working Arrangements, OLAF even proposed to extend the SC access to data.

5. OLAF's implementation of the SC's recommendations

The SC states that 72% of its recommendations have not been implemented: it claims that no satisfactory actions have been taken on 20 out of 50 recommendations, and implementation of 15 other recommendations could not be verified, since OLAF did not provide sufficiently substantial information.

Comment:

- OLAF carefully considered all SC recommendations and has invested considerable resources to implement them. However, some of the SC recommendations were not clearly formulated or cannot be implemented (e.g. those that concern actions in the past). The status of such recommendations will always be "*not implemented*".
- For a majority of those actions where OLAF's follow-up action was marked as "*could not be verified*", the SC did not even attempt to conduct a verification by asking OLAF about the status of implementation before the publication of the SC Report.
- OLAF is committed to engage in a dialogue with the SC prior to issuing of their recommendations. It should be noted, however that there is no legal obligation for OLAF to implement SC's recommendations.

6. SC's observations regarding OLAF's independence

The SC expressed concerns that OLAF's participation in the Commission Clearing House meetings puts at risk OLAF's independence.

Comment:

- Clearing House meetings ensure that OLAF's work is promptly followed-up in a coherent and effective manner by the Commission. The Clearing House is also useful to allow the Commission to take rapid precautionary measures to protect the financial interests of the EU at an early stage of an OLAF investigation.
- OLAF's independence has never been affected in the eleven years of the Clearing House's existence. On the contrary, the Clearing House has contributed to a better follow-up and earlier adoption of measures designed at protecting the financial interests of the EU.

7. Budgetary independence of the SC and the SC Secretariat, and status of SC Secretariat (SC Report 1/2014 and SC Opinion 3/2014)

The SC calls for budgetary independence for itself and its Secretariat, and full independence for decisions concerning the staff of the Secretariat. The SC is concerned that its Secretariat is still *“under the exclusive administrative control of the OLAF DG”*.

Comment:

- The OLAF Regulation 883/2013 states that OLAF’s budget should include the Supervisory Committee and its Secretariat, and that the Secretariat of the Committee should be provided by OLAF.
- Within the framework of the Regulation, OLAF offers to the SC a large margin of manoeuvre concerning the recruitment and management of its staff, and the use of its budget. Moreover, in 2013, OLAF reinforced the SC Secretariat to eight staff members, the maximum number of staff that the SC has ever had. Neither the budget of the Committee, nor the one of its Secretariat has ever been cut.
- OLAF cannot do more in terms of giving the SC more independence in the management of its financial or human resources, based on the current text of the Regulation.