

22 August 2017

OLAF's comments on main issues from the 2016 Activity Report of the OLAF Supervisory Committee

The OLAF Supervisory Committee (SC) formally transmitted its Activity Report for 2016 to the European Parliament, Council, Commission and European Court of Auditors on 24 May 2017. The report was adopted on 20 January 2017, and is the fifth and last annual report of the previous Committee¹. The report covers the Opinion 1/2016 *OLAF's Preliminary Draft Budget for 2017* of 11 November 2016 and Opinion 2/2016 *on the OLAF Annual Activity Report* of 20 January 2017. Previous Opinions, such as Opinion No 2/2013 of December 2013, are also mentioned. OLAF's replies to all Opinions of the SC can be found on its website: http://ec.europa.eu/anti-fraud/about-us/supervisory-committee/exchanges-between-olaf-and-its-supervisory-committee_en

OLAF takes good note of the report and has thoroughly examined it. This document contains OLAF's comments on the main issues from the 2016 SC Activity Report, issues discussed between OLAF and the Committee in the SC plenary of 21 June 2017. References to headings refer to the SC Activity Report.

ACCESS TO INFORMATION FOR SUPERVISORY FUNCTIONS

In **paragraph 1** of its report the Committee mentions that its restricted access to information from OLAF "*persisted during 2016, thus undermining the effectiveness of the Committee's supervisory role*". In **paragraph 2** it is stated that "*The core of the concern is a fundamental difference between the Supervisory Committee and the OLAF Director-General in the perception of the role of the Committee.*" **Paragraph 3** mentions that "*In 2016, the Committee was unable to access any requested individual case files. Instead it was provided with a sample of files selected by OLAF. In addition, there was difficulty accessing information in other areas.*"

OLAF's comment:

OLAF disagrees with the Committee's description of its access to OLAF investigation files and general information.

- In 2016, the Committee requested access to only **one individual investigation** file. Since the investigation in question was (and still is) *sub judice*, OLAF provided the SC with background information, and proposed a meeting with relevant OLAF investigators to clarify any SC questions. OLAF also suggested that the SC requests access to a random sample of OLAF investigation files, rather than to one individual investigation file, which would allow the Committee to monitor systemic issues. The SC did not reply to these proposals.
- In addition, in 2016, the Committee **requested and was granted access to a sample of 62**

¹ The Supervisory Committee was completely renewed on 23 January 2017.

investigation files, in the context of a different analysis concerning the duration of OLAF's investigations. OLAF regrets that this is mentioned by the Committee only in a footnote (footnote 9, on page 10 of the Report). The SC Report mentions that "*instead*" of the access to the individual investigation file, the Committee received a sample of investigation files selected by OLAF, which is not correct, since the access to the individual investigation file and the sample of investigation files related to two different exercises.

- Also in 2016, in the context of exchanges on the Committee's various analyses, **OLAF proposed to the SC full access to two samples of investigation files**. The first sample concerned investigation files for which OLAF recommendations were issued between 2 February 2012 and 31 December 2014, and where a decision by national judicial authorities to dismiss or indict had been taken. The second sample concerned access to investigation files for which disciplinary recommendations were issued between 1 February 2012 and 31 December 2015. The SC has not yet replied to OLAF's offers and the SC rapporteurs for these analyses left the Committee in January 2017.
- Concerning the **Committee's access to OLAF general information**, in 2016, **OLAF has continued to keep the SC regularly informed** of the Office's activities, implementation of its investigative function, and action taken by way of follow-up to investigations in line with the Regulation 883/2013 and the Working Arrangements. OLAF transmitted to the Committee 562 documents with information on cases lasting more than 12 months and informed the Committee of 266 recommendations, issued between 16 October 2015 and 15 October 2016, as a result of OLAF's investigations, and a further 67 instances in which information was transmitted to judicial authorities of the Member States.
- **Other relevant documents were also transmitted to the SC in 2016**, such as OLAF's mid-term report, information on OLAF's preliminary draft budget, instructions on drafting financial recommendations, information on complaints and OLAF's recommendations not followed.

As explained above, OLAF has given access to the Committee to various case files. OLAF does not consider that there is "*a fundamental difference*" in the perception of the role of the SC. On the contrary, OLAF recognises the importance of proper supervision and has actively worked towards complying with all its obligations under Regulation 883/2013, in full transparency, in 2016 as in previous years. The SC statement that the restricted access to information persisted during 2016, "*thus undermining the effectiveness of the Committee's supervisory role*" is therefore not based on facts, thus unfair.

In **paragraphs 4 to 6**, the SC mentions the Joint Opinion of the Legal Services of the Commission, Parliament and Council, on three aspects of the relationship between OLAF and its Supervisory Committee.

OLAF's comment:

OLAF and the previous Committee have negotiated new Working Arrangements between late 2014 and November 2015. At that time an agreement was reached between OLAF and the SC Chair, Mr Pöysti, with the exception of three outstanding points, for which it was agreed to consult the Legal Services of the Institutions, and to apply their ensuing Opinion.

Therefore, the Joint Opinion of the Legal Services concerns these three points and has been issued in the context of the Working Arrangements between OLAF and the SC, which have in the meantime been discontinued by the Committee. OLAF is ready to implement the Joint Opinion and integrate it

in new Working Arrangements.

OLAF welcomes the openness showed by the new Committee to reconsider the need for Working Arrangements and is waiting for the Committee's decision in this sense.

PROCEDURAL GUARANTEES AND FUNDAMENTAL RIGHTS IN OLAF INVESTIGATIONS

Complaints on OLAF's investigations

In **paragraphs 17 to 19**, the SC makes reference to its Opinion No 2/2013, its related recommendations and the fact that it has not received a detailed report on complaints lodged against OLAF activities, including complaints known to OLAF and lodged before other instances or bodies.

OLAF's comment:

In line with the SC recommendation in its Opinion No 2/2013, OLAF reports annually to the SC on complaints received regarding procedural guarantees, specifying their subject matter, OLAF's response and the Office's time of processing. OLAF reported to the SC on 4 June 2015, on 12 January 2016 and on 8 February 2017.

As regards complaints not addressed to OLAF, but to other specific competent bodies, in its Opinion No 2/2016 *on the OLAF Annual Activity Report* of January 2017, the Committee requested OLAF to ensure a full management and reporting system encompassing all complaints about which OLAF has been informed. OLAF considers that a full management and reporting system encompassing all complaints about which OLAF has been informed is already in place (see also OLAF Report 2016, page 42).

DURATION OF OLAF INVESTIGATIONS

Investigations lasting more than 12 months

Paragraph 23 refers to the periodical reporting by OLAF on cases lasting more than 12 months (as per Article 7(8) Regulation 883/2013). It seems that the Committee has prepared statistics based on OLAF's periodical reporting which are included in the table on page 9 (*Duration of investigations since Opening Decision adopted: sample of 377 cases July 2016*). In **paragraph 24**, the SC mentions that "*the Regulation establishes a 12-month benchmark*" for the duration of OLAF investigations.

OLAF's comment:

OLAF considers that paragraphs 23-25 and the accompanying table are not easily understandable and potentially misleading.

- Paragraph 23 of the report mentions that in 2016 the Committee analysed 477 reports concerning 377 investigations lasting more than 12 months, without specifying the reporting period covered by the analysis. As acknowledged in the report, in July 2016, at the Committee's

request, OLAF transmitted to the SC additional information on 371 investigations lasting more than 12 months. It is not clear for OLAF from where the SC got the figure of 377 investigations.

- The illustration of the number of investigations in the table is not accurate. It gives the incorrect impression that there are 1043 investigations in total (377 cases lasting more than 12 months, plus 338 cases lasting more than 18 months, plus 230 cases lasting more than 2 years, plus 84 cases lasting more than 3 years, plus 13 cases lasting more than 4 years plus 1 case lasting more than 5 years). In fact, the title of the table mentions 377 investigations.
- Contrary to what the SC mentions in paragraph 24, and as stressed by OLAF on various occasions, Regulation 883/2013 does not set any benchmark for OLAF concerning the duration of its investigations. Article 7(8) of Regulation 883/2013 only provides for OLAF to inform the SC of reasons and remedial measures taken for investigations lasting more than 12 months.
- The percentages presented in paragraph 24 refer only to the population of 377 investigations analysed by the Committee, and are not representative for OLAF's overall performance on the duration of its investigations. This is not clearly reflected in the text of the SC Report.
- As can be seen from the Annual Management Plans of the past years, the Office aims at having less than 30% of its investigations lasting more than 20 months. At the end of 2016, 21% of the investigations lasted more than 20 months, the lowest value in the past years. At the end of 2015, 22% of OLAF on-going investigations lasted more than 20 months. This information is not mentioned in the Report of the Committee.

Qualitative analysis of 477 reports on investigations lasting more than 12 months

According to the SC, in over half of the reports on investigations lasting more than 12 months transmitted by OLAF there were either no reasons for non-completion of investigations, or reasons were considered insufficient. In a high number of reports the SC found that no remedial measures were indicated or there was a reason for concern about the adequacy of those measures. In **paragraph 33** the SC concludes that it cannot give assurance that investigations are conducted continuously and without delay having regard to the circumstances and complexity of the cases.

OLAF's comment:

In line with Article 7(8) of Regulation 883/2013, OLAF periodically informs the SC of the reasons and remedial measures envisaged to speed up investigations lasting more than 12 months. As mentioned by OLAF in previous related exchanges with the Committee², more than half of OLAF investigations last more than 12 months, this being the norm rather than the exception.

At the same time, the average duration of OLAF investigations has been decreasing over the last years, and ranges from 18,9 months (in 2016) to 25,9 months (in 2009). Therefore, in most cases, describing "remedial" measures after only 12 months of investigation is an artificial exercise.

² Notably in OLAF's reply of 20 April 2015 to the SC Opinion No 4/2014 - *Control of the duration of investigations conducted by the European Anti-Fraud Office*, and in OLAF's reply of 6 March 2015 to the Supervisory Committee's *Analysis on the duration of OLAF investigations*.

OLAF is willing to further work on improving the quality of the information provided to the Committee on investigations lasting more than 12 months, in particular in the context of the Working Arrangements, as already discussed with the previous Committee.

FOLLOW-UP OF OLAF'S RECOMMENDATIONS

Disciplinary recommendations

In **paragraph 44**, the SC concluded that it did not have enough qualitative information at its disposal to oversee the usefulness of OLAF's disciplinary recommendations. Furthermore, the Committee considers that it has not enough quantitative information to assess the ratio of recommendations followed up compared to the total number of disciplinary recommendations issued.

OLAF's comment:

Upon request, in the context of the Committee's analysis on disciplinary recommendations, OLAF provided to the SC in May 2016 copies of 30 disciplinary recommendations issued following OLAF's investigations. Furthermore, in June 2016, to facilitate the Committee's analysis, OLAF offered a sample of cases which led to disciplinary recommendations. OLAF also suggested that if the sample was not sufficient for the SC analysis, OLAF could discuss access to additional cases. The SC has not replied to the offer of a sample of cases.

Judicial recommendations

In **paragraph 52**, the SC mentions that it did not have enough substantial information at its disposal to oversee the ratio of recommendations followed up compared to the total number of judicial recommendations issued. *"Consequently, the Supervisory Committee considers that the information transmitted by OLAF is not sufficient to fulfil the OLAF Director-General obligations established in Article 17(5) of Regulation 883/2013."* (**paragraph 53**).

OLAF's comment:

OLAF Regulation (article 17.5 (a)) provides for OLAF to inform the Committee *"of cases in which the recommendations made by the Director-General have not been followed"*. OLAF has done so, and reported to the Committee in June 2015³ and June 2016⁴, on judicial, disciplinary and financial recommendations not followed. Therefore, OLAF fulfilled its obligations in line with Regulation 883/2013.

In addition, during February-July 2016, there have been several exchanges between OLAF and the SC on the subject of OLAF's judicial recommendations. OLAF has provided the Committee with extensive background information.

In February 2016, the Committee asked for access to all the cases where a dismissal or indictment took place following OLAF's judicial recommendation between 2012 and 2014. OLAF's proposal of 20

³ Ares(2015)2362498 of 5 June 2015; retransmitted to the SC on 19 May 2016 (Ares(2016)2336179)

⁴ Ares(2016)2867755 of 20 June 2016

and 31 May 2016 was to provide a sample of 50% of this relevant case population, which represented 42 dismissals by the national judicial authorities and 18 indictments. The SC has not replied to OLAF concerning its proposal.

In **paragraphs 55-56**, the SC refers to OLAF's analysis on the follow-up of its judicial recommendations by Member States, indicating that it has not been informed at the end of the reporting period of OLAF's analysis. In **paragraph 56** the SC also notes that "*the reform of the Regulation of 2013 strengthened and clarified OLAF's investigative powers in the collection of physical evidence*".

OLAF's comment:

At the end of January 2017, OLAF sent to the Committee its analysis on Member States follow-up to OLAF's judicial recommendations issued between 2008 and 2015. The SC activity report has been adopted before OLAF's transmission of the analysis.

OLAF is not aware of how the reform of Regulation 883/2013 strengthened OLAF's investigative powers in the collection of physical evidence, and would appreciate further clarifications from the SC on this point.

In **paragraph 58**, the SC refers to a working group set up by the OLAF Director-General to address a request of the Committee for information concerning the follow up of OLAF's judicial recommendations. The Committee indicates that at the end of the reporting period, the Committee had not received the results of the work carried out by OLAF.

OLAF's comment:

This statement is not correct. By note of 31 May 2016⁵, OLAF transmitted to the Committee the results of the working group, gathered in 14 documents amounting to circa 800 pages of information. This information is not even mentioned by the SC in its Report.

FOLLOW-UP BY OLAF OF THE SUPERVISORY COMMITTEE RECOMMENDATIONS

In **paragraph 77**, the SC mentions that the reporting by the OLAF Director-General does not reflect the current state of play of the Committee's recommendations, and that the Committee is concerned about the non-implementation of its five "high priority" recommendations, and the lack of sufficient information from OLAF Director-General.

OLAF's comment:

OLAF reports annually on the follow up of SC recommendations, which is in line with standard practice of other control bodies. OLAF's reporting for SC recommendations issued during 2016 took place in February 2017⁶. However, OLAF's reporting of February 2017 has not been taken into account by the SC in their 2016 Annual Report.

⁵ Ares(2016)2514982 of 31 May 2016

⁶ Ares(2017)853133 of 16 February 2017

The Committee has not previously informed OLAF of what recommendations it considers as "high priority". According to OLAF reporting of February this year, OLAF has implemented four out of the five high priority recommendations, and one is ongoing.