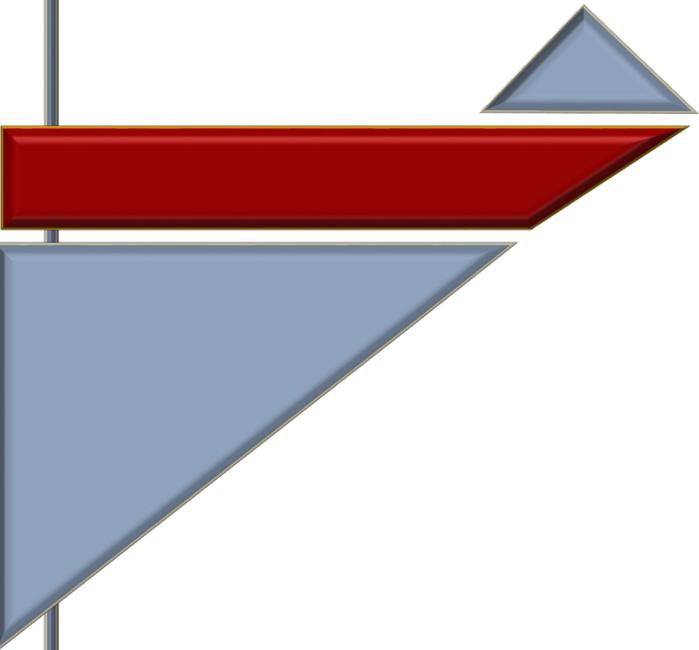


SUPERVISORY COMMITTEE

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Opinion No 5/2021

**Analysis of OLAF investigations
lasting more than 36 months in 2019**

December 2021

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TABLE OF CONTENTS

1. Introduction.....	3
2. Legal basis and purpose of the SC monitoring	5
3. Access to case-related information and Methodology	7
4. Duty of the DG OLAF to report to the Supervisory Committee.....	9
4.1 Analysis of reporting by OLAF to the SC on the 40 cases	9
4.2 Reasons provided by OLAF for not having completed investigations in the twelve-month period.....	10
4.3 Measures proposed by OLAF to speed up the investigations	13
5. Analysis of the continuity of investigations	13
5.1 Analysis of OLAF’s internal control mechanism for managing the duration of investigations	15
5.1.1 Internal control of the progress of investigations during their lifecycle – current practice as explained by OLAF	15
5.1.2 Checks on the continuity of investigations at the end of investigations	17
5.2 Analysis of other OLAF internal tools for managing the duration of investigations.....	19
5.2.1 Investigation planning.....	19
5.2.2 Prioritising investigations.....	21
6. Proportionality of the duration of OLAF investigations.....	22
6.1 Analysis of the proportionality of the duration of the 40 cases.....	23
7. Duty of OLAF to respect procedural guarantees	29
7.1 Analysis of the deferral procedure put in place by OLAF	30
7.1.1 Deferral of information under Article 9(3) of the OLAF Regulation	30
7.1.2 Deferral of the opportunity to comment under Article 9(4) of the OLAF Regulation	32
7.2 Analysis of the deferral procedure applied by OLAF in the 40 cases.....	34
ANNEX I – List of Abbreviations	36
ANNEX II – List of Cases [<i>CONFIDENTIAL</i>].....	37

1. INTRODUCTION

1. The duration of OLAF investigations is a matter of common interest for both OLAF and its Supervisory Committee (the ‘SC’). The Committee, whose role is to reinforce OLAF’s independence through regular monitoring, including monitoring the duration of its investigations, considers it of outmost importance that OLAF investigations are conducted continuously and over a period proportionate to their circumstances and complexity as provided by Article 7(5) of Regulation (EU) No 883/2013¹ (‘the OLAF Regulation’).
2. However, the general principle above on the duration of an investigation is not fleshed out by specific, clear and detailed guidelines for investigators. Article 8(5) of the current GIPs (Guidelines on Investigation Procedures for OLAF’s staff)² merely states that ‘investigations shall be conducted continuously and without undue delay in order to enhance their efficiency and the effectiveness of Recommendations.’ Similarly, OLAF’s internal instructions on the continuous conduct of investigations³, which are not publicly available, only require managers of investigative units to ‘continuously monitor the duration of investigations and take all necessary measures to avoid periods of inactivity.’
3. The Committee has paid particular attention over the years to the issue of duration of OLAF’s investigations, and has raised concerns about the lack of clear and detailed provisions in the GIPs on managing the length of OLAF investigations. Such rules would strengthen legal certainty and their absence can be detrimental to the transparency of OLAF procedures, especially for the persons concerned. The Committee regrets that OLAF has chosen to adopt a piecemeal approach rather than addressing this issue through a comprehensive revision of the GIPs.
4. In its activity report⁴ of 2019, the Committee found that almost 40% of individual cases reported in 2019 by OLAF to the SC exceeded 24 months. The Committee considers the duration of investigations an important indicator of the effectiveness of OLAF’s

¹ Regulation (EU) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18/09/2013, p. 1–22) as amended by Regulation (EU, EURATOM) 2016/2030 and Regulation (EU, EURATOM) 2020/2223. Also available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R0883-20210117>.

² The investigations analysed in this opinion were conducted under the 2013 *Guidelines on Investigation Procedures for OLAF’s staff* (the 2013 GIPs) - Ref. Ares(2013)3077837 - 18/09/2013 - (https://ec.europa.eu/anti-fraud/sites/default/files/gip_en.pdf). These guidelines were recently amended on 11 October 2021 and replaced by the new version (the 2021 GIPs) Ref. Ares(2021)6071905 - at https://ec.europa.eu/anti-fraud/sites/default/files/gip_2021_en.pdf). Article 8(4) of the 2013 GIPs was worded similarly to Article 8(5) of the 2021 GIPs.

³ OLAF internal note on instructions concerning the continuous conduct of investigations (Ref. Ares(2014)2316620 - 11/07/2014).

⁴ 2019 annual activity report of the supervisory committee of OLAF, paragraphs 52 and ss.

action and devotes particular attention to it in its opinions as well as in its annual activity reports.

5. To better understand how OLAF manages and controls the duration of its investigations and how it complies with the general principle under Article 7(5) of the OLAF Regulation, (proportionality of the duration of the OLAF investigation), the Committee conducted an in-depth analysis of 40 investigations lasting more than 36 months in 2019⁵.
6. In analysing those cases, the Committee identified certain shortcomings in OLAF's procedures that could have had an impact on the duration of OLAF investigations. In particular, the SC noticed a high degree of heterogeneity in OLAF's investigative practices and in how activities are recorded in case files. The SC found that OLAF does not have (i) a formal, and well defined internal procedure to monitor the duration of its investigations; (ii) a work or investigation plan; (iii) internal rules for defining and assigning operational priority. These weaknesses are mainly the result of OLAF lacking specific and detailed provisions in the GIPs on issues of continuity and the duration of investigations.
7. To address the above shortcomings and with a view to shortening the duration of investigations in the future, the SC makes a number of recommendations to the Director-General of OLAF (OLAF DG). These recommendations should be taken into consideration in the ongoing revision of the GIPs⁶ in order to ensure a consistent working method across all OLAF units. This is important as GIPs are the only guidelines, instructions or manual the OLAF Regulation requires OLAF to make public⁷, thus giving the people under investigation the required degree of transparency and legal certainty. Comprehensive and meaningful GIPs will also assist the future Controller of Procedural Guarantees⁸ in handling complaints against OLAF for procedural irregularities.

⁵ At the time of the adoption of this Opinion OLAF has closed all investigations under analysis.

⁶ Following the entering into force of the amendment of the OLAF Regulation by Regulation (EU, Euratom) 2020/2223, OLAF has revised the GIPs in two steps. The 'first phase' of the revision focused mainly on transposing the provisions of the revised OLAF Regulation regarding the EPPO. This phase has been finalised and the new GIPs entered into force on 11 October 2021. OLAF is at the moment carrying out a more comprehensive revision ('second phase'), which will include the issues currently addressed in other internal instructions and guidelines, the practices that will be established in the framework of OLAF cooperation with the EPPO, recommendations from OLAF stakeholders, as well as issues identified by OLAF staff over the years. This is expected to be finalised in 2022.

⁷ Article 17(8), last sentence of the OLAF Regulation specifies that the guidelines must be 'published for information purposes on the Office's website in the official languages of the institutions of the Union'.

⁸ Article 9a of the OLAF Regulation create the role of a Controller of Procedural Guarantees to handle future complaints against OLAF lodged by a person concerned in an OLAF investigation.

2. LEGAL BASIS AND PURPOSE OF THE SC MONITORING

8. The SC was established to strengthen and guarantee OLAF's independence by carrying out regular monitoring of its investigative function and to assist its Director-General in the discharge of his/her responsibilities.
9. Monitoring the duration of OLAF investigations is one of the Committee's main duties. As stated in the second paragraph of Article 15(1), the SC "shall in particular monitor developments concerning the application of procedural guarantees and the duration of investigations" in the light of the information supplied by the Director-General in accordance with Article 7(8).
10. The obligation to conduct administrative procedures within a reasonable time is a general principle of EU law and part of the right to good administration under Article 41(1) of the Charter of Fundamental Rights⁹. According to case-law, if the duration of a procedure is not set by EU law, the reasonableness of the period of time taken is to be appraised in the light of all of the circumstances specific to each individual case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the parties to the case¹⁰.
11. It follows from this case-law and from Article 7(5) of the OLAF Regulation¹¹ that OLAF's investigations should be conducted *continuously* and cannot be *extended beyond a reasonable time*, which must be assessed according to the circumstances and complexity of each case¹².
12. If an investigation cannot be closed within 12 months of its opening, Article 7(8) of the OLAF Regulation¹³ requires the Director-General of OLAF to formally report to the SC at the expiry of the 12-month period and every six months thereafter. The report should indicate the reasons for not closing the case and, where appropriate¹⁴, the remedial measures to speed up the investigation.

⁹ [Case T-447/11 - Catinis v Commission, 21 May 2014](#), paragraph 34 and the case-law cited.

¹⁰ [Case T-447/11 - Catinis v Commission, 21 May 2014](#), paragraph 34; [Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission \[2002\] ECR I-8375](#), paragraph 187.

¹¹ Article 7(5) of Regulation (EU) No 883/2013 reads: 'Investigations shall be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case.'

¹² Article 7(5) Regulation (EU) No 883/2013 and Case T-48/05, Case *Franchet and Byk v Commission*, 8 July 2008, paragraph 274.

¹³ Article 7(8) Regulation (EU) No 883/2013 states: 'If an investigation cannot be closed within 12 months after it has been opened, the Director-General shall, at the expiry of the 12-month period and every six months thereafter, report to the Supervisory Committee, indicating the reasons and the remedial measures envisaged with a view to speeding up the investigation.'

¹⁴ The wording 'where appropriate' was added to the text of Article 7(8) of the OLAF Regulation by amending Regulation (EU, Euratom) 2020/2223.

13. The Committee's monitoring activity in the specific context of investigations lasting more than 12 months serves the following purposes:
- a) First, by regularly monitoring the duration of OLAF investigations and the reasons for any undue delays, the SC is seeking to reinforce OLAF's investigative independence and impartiality. It does so by verifying that there has been no external or internal interference in the impartial conduct of an investigation, that equal treatment is ensured, and that the delays incurred are proportionate to and justified by the complexity and/or circumstances of the case concerned.
 - b) Second, a lengthy investigation that cannot be justified by the circumstances and/or complexity of a given case can have serious, negative consequences for the rights of defence of the persons concerned (right to have investigations concerning them handled within a reasonable time, Article 41 of the EU Charter of Fundamental Rights).
 - c) Third, the Committee's monitoring also aims to ensure that the results and findings of an OLAF investigation are appropriately followed up by the EU institutions, bodies, offices and agencies and by the Member States concerned. In that regard, it is important that indictment at national level and/or administrative recovery of sums due to the EU budget is not compromised because of time barring issues (prescription under the applicable national laws) or because national judicial authorities are unable to conduct a proper investigation into facts that occurred a long time ago.
 - d) Lastly, by monitoring the length of investigations, the SC checks that the human and financial resources allocated to OLAF are used efficiently¹⁵.

¹⁵ Article 15, third subparagraph, of the OLAF Regulation states: "The Supervisory Committee shall address to the Director-General opinions, including where appropriate, recommendations on, inter alia, the resources needed to carry out the investigative functions of the Office [...]".

3. ACCESS TO CASE-RELATED INFORMATION AND METHODOLOGY

14. Every month the Director-General of OLAF provides the SC information on investigations lasting more than 12 months using a template report (the 12-month report). The content and quality of these reports were the subject of intensive discussions between the SC and OLAF over the past years¹⁶.
15. In 2019, the Committee received 587 reports from OLAF concerning 375 individual investigations lasting more than 12 months. The quality of the information provided in these reports did not enable the Committee to effectively and meaningfully carry out its supervisory role under the OLAF Regulation. The Committee informed the Director-General of the result of its analysis in November 2019¹⁷.
16. The Committee also noted that almost 40% of the investigations reported in 2019 exceeded 24 months¹⁸, 10% of which exceeded 36 months. The Committee thus decided to focus its monitoring work on investigations lasting more than 36 months in 2019,¹⁹ and requested full access to the relevant case files (40 cases in total)²⁰. The OLAF Director-General subsequently granted access²¹.
17. Between August 2020 and April 2021, the SC carried out an in-depth analysis of the 40 cases lasting more than 36 months to assess whether their duration was ‘proportionate to the circumstances and complexity of each case.’ To this end, the SC examined:
 - a) all the 12-month reports of the 40 cases in question received by the Committee;
 - b) the complete case files; and

¹⁶ The Supervisory Committee came to the conclusion that the quality of the information provided by OLAF with the current reporting system is not sufficient to enable the Committee to monitor developments on the application of procedural guarantees and the duration of investigations in accordance with Article 7(8) of the OLAF Regulation. See previous annual activity reports of the Supervisory Committee of OLAF – i.e. SC Annual Report 2019, paragraphs 38 and ss; SC Annual Report 2018, paragraphs 45 and ss.; SC Annual Report 2017, paragraphs 24-29, 48, 61 and 65; SC Annual Report 2016, paragraphs 30-33, SC Annual Report 2015, paragraphs 30-33 and paragraphs 1-9, SC Annual Report 2014, paragraphs 26-28, SC Annual Report 2013, paragraphs 18-19, SC Annual Report 2012, paragraph 36; SC Opinion No 2/2017 - Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19) paragraphs 30-31; SC Opinion No 4/2014 on Control of the Duration of Investigations conducted by OLAF paragraphs 18 and ss.

¹⁷ Note for the attention of Mr Ville Itälä, Director-General of OLAF of 27 November 2019 (Ref. Ares(2019)7307894).

¹⁸ 16.5% of individual cases were ongoing for over 24 months; 11.2% over 30 months; 4.5% over 36 months; 4.8% over 42 months; 0.8% over 48 months and 0.5% for over 48 months.

¹⁹ At the end of 2019, 40 OLAF investigations had been ongoing for over 36 months (17 cases over 36 months, 18 individual cases over 42 months; 3 over 48 months and 2 for over 48 months).

²⁰ Notes for the attention of Mr. Ville Itälä, Director-General of the OLAF of 15 May 2020 (Ref. Ares(2020) 2568565 - 15/05/2020) and 4 June 2020 (Ref. Ares(2020)2878915).

²¹ Note for the attention of Jan Mulder, chairman of the Supervisory Committee of 12 June 2020 (Ref. Ares(2020)3063059).

- c) additional case-related information provided, upon request, by the OLAF DG.
18. For the purpose of its analysis, the SC took a number of aspects in consideration in order to ensure a fair and balanced result:
- a) On the issue of continuity, the SC monitored the intensity of the investigative activities over the whole lifetime of the investigation. The reasons given by OLAF in its 12-month reports regarding the duration of investigations were checked against the content of each case file. The SC also closely analysed the investigation activities from one reporting period (12 months) to the next.
 - b) The SC drew on OLAF's internal tools and procedures for managing the duration of the investigation. It focused its analysis on investigation planning and operational prioritisation for each investigation. It also looked at handover notes whenever there was a change in the investigation team, and the opinions of Unit 0.1 on closing the case, where available.
 - c) On procedural guarantees, the SC paid special attention to the information provided to the person(s) concerned, including giving them the opportunity to comment.
 - d) Lastly, having carried out a preliminary assessment of the proportionality of the duration of each investigation, the SC grouped the cases into three categories: i) cases where the SC considered the duration was proportionate to the circumstances and complexity; ii) cases where the SC found a lack of internal control by OLAF; and iii) cases that raised concerns.
19. The SC Secretariat held two working meetings²² with OLAF staff to obtain a comprehensive overview of the way OLAF manages the duration of each investigation and to discuss the preliminary findings of the Committee. The SC acknowledges that the meetings were useful as they provided useful input to the SC and boosted mutual cooperation and trust with OLAF staff.

20. As a final introductory remark, it is worth pointing out that this is the first time, after several years of protracted discussions on the content and quality of the information provided by OLAF, that the Supervisory Committee received all the information needed to fulfil its mandate under the OLAF Regulation. It is also important to stress that the Committee's analysis does not question the validity or the soundness of OLAF's decisions in the 40 cases in question and/or the conclusions reached by OLAF. By monitoring the duration of the selected cases, the Committee only seeks to get a better understanding of the reasons behind the length of these investigations, and to identify and address, whenever possible, any shortcomings and loopholes in the procedure applied by OLAF to improve the applicable framework and the efficiency of OLAF investigations.

²² Technical meetings between the SC and OLAF of 26/04/2021 and 15/11/2021.

4. DUTY OF THE DG OLAF TO REPORT TO THE SUPERVISORY COMMITTEE

21. If an investigation cannot be closed within 12 months of opening, Article 7(8) of the OLAF Regulation requires the OLAF DG to report to the SC information on those investigations at the expiry of the 12-month period and every six months thereafter. In these reports, the OLAF DG sets out the reasons for not completing the case and indicates the remedial measures to speed up the investigation.
22. According to Article 11(4) of the current GIPs²³ the investigation unit handling the given investigation prepares the report to be submitted to the SC. This report is then countersigned by the line Director and then approved by the Director-General before being sent to the SC. The report is registered in the OLAF case management system (OCM) and forms part of the case file.
23. It is important that OLAF, in line with Article 7(8) of the OLAF Regulation, provides the SC with **sufficient, appropriate and reliable information** on OLAF investigations. The Committee must have access to all information needed for (i) understanding how OLAF has planned and handled an investigation (ii) the internal decision-making process, and the (iii) overall timeline of the investigation.
24. This is now emphasised by the new amending OLAF Regulation 2020/2223, which provides that the Committee **should be granted access to all OLAF information and documents it considers necessary for the performance of its monitoring and supervisory tasks**²⁴.

4.1 ANALYSIS OF REPORTING BY OLAF TO THE SC ON THE 40 CASES

25. The SC received 253 reports in total related to the 40 cases analysed.
26. Concerning the content of the reports, until 2019, OLAF used an old reporting format²⁵ that lacked any meaningful content. The Committee had repeatedly and constantly highlighted that the lack of information provided in these reports severely

²³ The analysis of the SC in this opinion were conducted under the 2013 GIPs. Article 11(4) of the 2021 GIPs replaced Article 11(5) of the 2013 GIPs - Ref. Ares(2013)3077837 - 18/09/2013. The two Articles contained similar wording.

²⁴ In new Article 15(1), the last sentence of OLAF Regulation states: 'the Supervisory Committee shall be granted access to all the information and documents it considers necessary for the performance of its tasks, including reports and recommendations on closed cases and cases dismissed, without however interfering with the conduct of investigations in progress, and with due regard to the requirements of confidentiality and data protection.'

²⁵ OLAF used this format of report from 2013 until April 2019.

limited the Committee's ability to carry out its supervisory mandate under the OLAF Regulation²⁶.

27. From the second quarter of 2019, the reports provided to the SC were based on a new reporting template that was revised again in July 2019²⁷. The Committee considered the revised templates an improvement on the one that OLAF used between 2013 to March 2019. It also made clear that the templates *alone* did not provide the quality and completeness of information needed by the SC to efficiently carry out its monitoring activity²⁸.
28. From the end of 2019 to mid-2021, and in anticipation of the new amending OLAF Regulation and the changes regarding SC access to information on OLAF investigations, the Committee and OLAF's Director-General engaged in a constructive discussion to provide the SC with at least partial direct access to the case-related information available and registered in OLAF's case management system (OCM). On 21 October 2021, the Director-General of OLAF signed with the Committee new working arrangements that give the Committee regulated **direct access** to the OCM²⁹. In November 2021, as follow-up, OLAF created a specific module in the OCM for the SC access³⁰. This form of access should put an end to the many and protracted difficulties that the Committee faced over the last years in trying to obtain access to meaningful and complete information on OLAF's investigative activities that fall within the Committee's mandate.

4.2 REASONS PROVIDED BY OLAF FOR NOT HAVING COMPLETED INVESTIGATIONS IN THE TWELVE-MONTH PERIOD

29. In the context of the 253 reports, OLAF provided a total of 150 justifications for the delay of the investigations. OLAF cites the complexity of the matter as the most frequently mentioned reason to justify the duration of an investigation (**43.33%** of the reasons provided by OLAF).

²⁶ SC Annual Report 2019, paragraphs 38 and ss., SC Annual Report 2018, paragraphs 45-49, SC Annual Report 2017, paragraphs 24-29, SC Annual Report 2016 paragraphs 30-33, SC Annual Report 2015, paragraphs 30-33 and paragraphs 1-9, SC Annual Report 2014, paragraphs 26-28, SC Annual Report 2013, paragraphs 18-19, SC Annual Report 2012, paragraph 36. SC Opinion No 2/2017 - Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19) paragraphs 30-31; SC Opinion No 4/2014 on Control of the Duration of Investigations conducted by OLAF paragraphs 18- 20 and 45-49.

²⁷ Out of 253 reports in the 40 cases, the Committee received 71 reports using the new template proposed by OLAF.

²⁸ The Supervisory Committee did carry out an analysis of the new revised reporting template proposed by OLAF. It shared with OLAF the results of its analysis by letter dated 27 November 2019 and proposed an alternative solution.

²⁹ Articles 12, 13, 14 of the working arrangements between OLAF and SC publicly available at: https://europa.eu/supervisory-committee-olaf/document/download/6c5dd42e-3319-4b9d-9d5b-3b1ab11c1fdd_en.

³⁰ Communication from OLAF to the Head of the Secretariat of the SC dated 9/11/2021 - Ref. Ares(2021)6883300.

30. The circumstances in which a case could be considered complex can vary from case to case, depending on the subject matter and type of the case. Complexity is typically mentioned by OLAF when documents are numerous and difficult to examine because of their format, volume³¹ and language. Complexity is also mentioned when inter-jurisdictional difficulties and other legal issues arise, when the case could potentially involve many persons, many businesses and countries, when the scope of the investigation is broad or when transactions are difficult to analyse.
31. The SC notes that the criteria for defining the complexity of the matter are not always clear in the reports; in many cases the reports contain general explanations³².
32. In **26%** of cases OLAF reported, OLAF cited ‘internal reasons’ to justify the duration:
- a) HR issues³³. This category covers the internal turnover of OLAF staff, the workload of investigators or of support units as well as the lack of resources in OLAF. The internal turnover of staff is often due to internal restructuring of OLAF units, reallocation of staff within OLAF, staff departures, long-term absences or even the retirement of the lead investigator.
 - b) Higher priority to other investigations. Management decisions to assign a higher priority to other investigations were the reason given in 7.38% of the 12-month reports, but no reasons are given for such decisions. With the exception of a handful of cases where OLAF explained that priority was given to older or more complex cases³⁴, no reasons were provided by OLAF for such decisions in the remaining cases. For the Committee, it is essential for the purposes of transparency and accountability to provide meaningful reasons in the case files as to why management decides to give priority to other cases.
 - c) Extension of the scope of the investigation. This represents 6.04% of all the reasons provided by OLAF.
33. External circumstances that have an impact on the duration of OLAF’s investigation is the third category of reasons mentioned in the 12-month reports, representing **23.33%**.

³¹ Analysis of the ‘extensive set of document gathered’ alone represents the 22.25% of the total reasons provided by OLAF in the 12 months reports submitted.

³² I.e. in many reports it is stated that the investigator(s) in charge had to analyse a ‘large number of documents’ or a ‘vast amount of information’ or ‘several projects’, without specifying the number or the time needed for studying them. If there are legal issues, very rarely are they substantiated.

³³ HR issues account for 12.08% of all reasons provided by OLAF for not having completed investigations in the 12-month reports.

³⁴ OLAF provided information regarding the priority given to older or more complex cases in 15 reports related to cases 3, 10, 11, 15, 18, 19, 21.

34. Circumstances beyond OLAF’s control and leading to the extension of the duration of an investigation include:
- a) Difficulties in cooperation with stakeholders. In these cases, progress on an investigation depended on input from other stakeholders or outside sources which was either not provided or only after a significant delay.
 - b) Pending results of national investigations or audits. In these cases, OLAF’s investigative activities were suspended pending the results of ongoing criminal or administrative national investigations or audits conducted in parallel.
 - c) Awaiting input from European institutions, national authorities or individual companies. In these cases, progress on a case depended on input from other entities.
35. The SC finds that OLAF did not always provide a meaningful explanation as to why external factors had an impact on the duration of an investigation. For instance, it is not always clear how long it would take for third parties to provide a reply or assist OLAF.
36. The last reason reported by OLAF is ‘other circumstances’ given in 7.33% of cases.

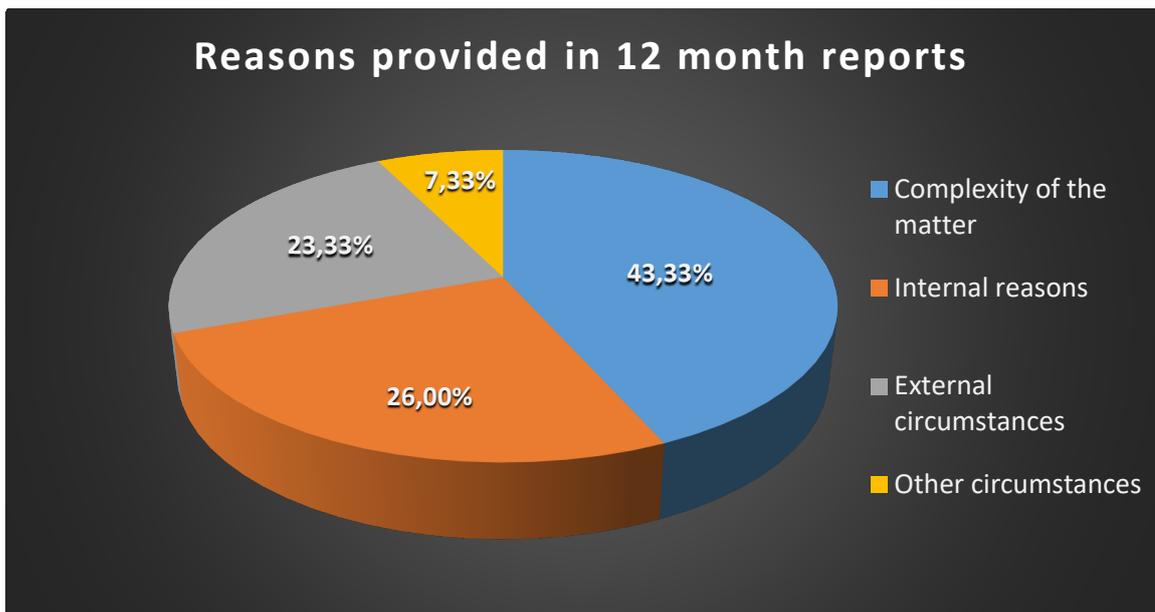


Figure 1³⁵

³⁵ Percentages of Figure 1 have been calculated on the basis of the total number of justifications (150 total reasons) provided by OLAF in the 12 months reports.

4.3 MEASURES PROPOSED BY OLAF TO SPEED UP THE INVESTIGATIONS

37. The Committee notes that in 10 of the cases analysed, OLAF did not indicate any remedial measures in the first two reports³⁶ or in the first four reports³⁷.
38. The 12-month reports mention only the current state of the case, i.e. the fact that the final report was submitted to management for approval. They do not specify the remedial measures taken to speed up the investigation. In almost all other reports, the section on remedial measures taken to speed up the procedure indicates either that the investigation is at a final stage and in the process of being closed, or that it is still ongoing and investigative steps remain pending. Few of the reports provide clear timeframes for the next steps or to complete the investigation. The SC has already pointed out³⁸ that the fact that an investigation is in the process of completion at the time of the drafting the 12-month report does not relieve OLAF of its duty to inform the SC of the remedial measures taken during the investigation.

39. The Committee considers the indication of remedial measures taken or envisaged by OLAF to speed up the procedure is an important aspect of the internal control and management of each investigation. The Committee considers that once an investigation reaches 12 months, OLAF management should adopt a gradual scrutiny of the “case-ageing”, and come up with remedial measures or other steps to speed it up and complete it. Although some cases will always take more than 12 months to complete, OLAF management should closely follow the lifecycle of an investigation and actively monitor the investigative steps needed to bring it to an end.

5. ANALYSIS OF THE CONTINUITY OF INVESTIGATIONS

40. Article 8(4) of the current GIPs states that ‘investigations shall be conducted continuously and without undue delay in order to enhance their efficiency and the effectiveness of Recommendations.’ OLAF’s internal instructions on the continuous conduct of investigations³⁹ also require managers of investigative units to continuously monitor the duration of investigations and take all measures needed to avoid periods of inactivity.
41. The SC regrets that no other internal provisions or guidelines are available to investigators or managers specifically on the duration of OLAF investigations.

³⁶ Cases 1, 2, 3, 4, 5, 6, 7 and 8.

³⁷ Cases 33 and 40.

³⁸ SC Opinion 4/2014, *Control of the duration of investigations conducted by the European Anti-fraud Office*, par. 35.

³⁹ OLAF internal note on instructions concerning the continuous conduct of investigations (Ref. Ares(2014)2316620 - 11/07/2014).

42. The SC identified periods of inactivity (from three months to over one year) in the lifecycle of almost all cases analysed. In six cases⁴⁰, the SC identified only one break of a few months (from 4 to 10 months), while in 12 cases⁴¹ the break lasted over a year. In 17 cases⁴², there were several breaks over the lifecycle of the investigation, while in five cases⁴³ the SC noted no significant breaks in activity registered in the OCM.
43. The SC acknowledges that an analysis of the duration of the investigation cannot be based simply on the number and length of the activity breaks in an investigation. It must take an overview of the whole investigation case file and, in line with Article 7(5) of the OLAF Regulation, an understanding of the specific circumstances and complexity of each case.
44. For this reason, the SC considers that periods of inactivity must be properly recorded and justified in the case file, and that obstacles or delays encountered by the case team during the lifecycle of the investigation should always be registered and traceable in the OCM (i.e. in the form of a note to the file). This would help OLAF management to effectively monitor progress in an investigation and ensure the required degree of transparency and accountability.
45. The SC's analysis shows that, in most cases, OLAF did not record properly in the OCM the circumstances behind periods of inactivity⁴⁴. In particular, reasons for delays or obstacles encountered by the case team in most of the investigations are not registered either in a note to the file, in minutes of meetings between the case team and the management, or in any other similar document. In some cases, it is only after reading all the documents registered in the case file that the reasons could be presumed. In other cases, the period of inactivity is not recorded in the case file and no reasons can be identified, even after reading the entire case file⁴⁵. In its previous Opinion 4/2014, the Committee also found that in some investigations, the periods of inactivity were not clearly identified in the case file⁴⁶.

46. It is not disputed that periods of inactivity and breaks in the lifecycle of an investigation, which last more than three months, whether justified or not, can have an adverse effect on the duration of the investigation. Therefore it is of outmost importance that those breaks are well documented and registered in the case file and thus immediately visible to management. Management can then decide with full knowledge of the case on the measures needed in terms of staff allocation, planning and prioritisation.

⁴⁰ Cases 1, 4, 7, 12, 14 and 31.

⁴¹ Cases 3, 9, 13, 17, 18, 20, 25, 26, 27, 28, 29 and 30.

⁴² Cases 5, 6, 10, 11, 15, 16, 19, 21, 22, 24, 32, 35, 36, 37, 38, 39 and 40.

⁴³ Cases 2, 8, 23, 33 and 34.

⁴⁴ Very few exceptions were represented by Cases 4, 12, 13, 14 or 22.

⁴⁵ I.e. Cases 3, 5, 6, and 9.

⁴⁶ SC Opinion 4/2014 par. 53.

5.1 ANALYSIS OF OLAF'S INTERNAL CONTROL MECHANISM FOR MANAGING THE DURATION OF INVESTIGATIONS

47. Ensuring that investigations are conducted 'continuously and over a period proportionate to the complexity and circumstances of the case' is first and foremost the responsibility of OLAF's management team⁴⁷. When the management team identifies cases that require special measures to ensure the continuation of an investigation, it should inform the Director-General without delay.
48. OLAF explained to the Committee that the duration of OLAF investigations is subject to a two-layered control within OLAF:
- a) oversight by the management team (Heads of sector, Heads of unit, Directors, and ultimately the Director-General) through the whole lifecycle of an investigation, and
 - b) verification of the continuity of investigations when an investigation is completed.

5.1.1 Internal control of the progress of investigations during their lifecycle – current practice as explained by OLAF

49. OLAF confirmed that the OCM lacks an automatic mechanism to flag periods of inactivity in a case file. However, it added that OLAF recently put in place a number of tools (used by all investigative units) to manage investigations with a view to improve monitoring of the duration of investigations⁴⁸.
50. Responsibility for monitoring the duration of investigations falls primarily on the Heads of the lead units. Progress in all cases is regularly discussed at bilateral meetings between investigators and Head of units, who in turn report weekly to their line respective Director. For this purpose, each unit keeps progress tables, which are regularly updated and shared with senior management.
51. Cases lasting longer than expected are discussed in regular (weekly) meetings at unit or sector level. Cases lasting longer than 30 months are also discussed in monthly meetings between the management of the individual units and the Director. The objective of these meetings is to find where problems arise and how to address them. OLAF has informed the SC that the Office has recently started to implement the policy of flexible resource use, which allows staff resources to be used across all investigative units.

⁴⁷ In its **annual management plan**, OLAF sets targets every year regarding the output 'reasonable duration of investigations'. In 2020 and 2021, the average duration of OLAF investigations was 24.3 months (see OLAF Annual Management plan for 2020, at https://ec.europa.eu/info/publications/management-plan-2020-european-anti-fraud-office_en) and OLAF Annual Management plan for 2021 at https://ec.europa.eu/info/publications/management-plan-2021-european-anti-fraud-office_en).

⁴⁸ OLAF Reply of 18.02.2021 (Ares(2021)1336959) to Questions 1, 2 and 3 of the SC request for clarification dated 11.12.2020 (Ares(2020)7542544). OLAF provided clarification at a technical meeting held on 26.04.2020.

52. OLAF informed the SC that senior management carries out a second level of scrutiny of the duration of investigations using the ‘Monthly Investigation Performance’ tool (MIPs) analysis. The MIPs, prepared by the Monitoring and Reporting unit (unit C4)⁴⁹, are discussed every month at the OLAF Directors’ meeting.
53. The last level of scrutiny is carried out by the Director-General. OLAF informed the SC that as of 2019, the Director-General has started holding individual meetings with the teams and line management on cases that are older than 36 months with a view to ensuring that the investigations are completed as soon as possible. Lastly, OLAF reported that one of the tasks of the soon-to-be-appointed Deputy Director-General of OLAF would be to monitor closely the duration of OLAF investigations.
54. The SC welcomes the above measures taken by OLAF management but is concerned that:
- i. The internal overview mechanisms described above are not formalised in any internal document, instruction or in the GIPS.
 - ii. The SC’s examination of case files showed a lack of consistent and uniform approach⁵⁰, at least in the traceability and recording in OCM, of the internal oversight carried out by the management team⁵¹. In particular, the tools that OLAF used to monitor the duration of the investigations were not part of the case file (in OCM) in most of the cases analysed. Only in some cases⁵² could the SC find notes to the file summarising the status quo of the case, decisions taken by the case team or OLAF management, and the steps agreed to speed up the investigation.

55. Having formal and clearly defined internal provisions in the GIPs for handling the duration of investigations is an important indicator of the effectiveness of OLAF’s work as it enables, on the one hand, investigators to conduct their cases effectively, and on the other hand, management to take timely and appropriate measures when needed.

⁴⁹ As of 16 June 2021, following OLAF’s reorganisation, unit C.4 “Monitoring and Reporting” became in charge of issuing the MIPs (this was done before by unit C.2 “Intelligence and Operational Analysis”).

⁵⁰ The Committee noted this lack of uniform approach in the internal oversight carried out by OLAF in its previous Opinion 4/2014 where it recommended that OLAF optimise the implementation of the measures put in place to manage the duration of its investigations.

⁵¹ I.e. regular meetings between investigators and their line managers, instructions to the case team from the D-G of OLAF or the Directors etc.

⁵² I.e. Cases 4, 12, 13, and 14.

Recommendation 1:

The SC recommends that the Director-General of OLAF should:

- a) create an automatic flag system mechanism in the OCM to make periods of inactivity of over three months immediately visible in the OCM and to OLAF's management;*
- b) ensure that obstacles encountered by the case team that have or could have a substantial impact on the duration of an investigation, as well as all decisions taken to that effect by the case team or OLAF management are properly documented and registered in the case file of each investigation in the OCM;*
- c) Set out in the GIPs clear internal procedures for the managing of the duration of an investigation. In particular, OLAF should establish, for cases over 24 months, a specific review procedure in order to allow the Director-General to decide how best to speed up the handling of such investigations, and also establish a special procedure for cases which are running over 36 months;*

5.1.2 Checks on the continuity of investigations at the end of investigations

56. When an investigation has been completed, a team of reviewers examines the final case report and the proposed recommendations in order to issue an opinion to the Director-General. Until June 2021, this work was carried out by the Investigation Selection and Review Unit (Unit 0.1)⁵³ which examined whether the investigation was conducted continuously and without undue delay and whether the length of the investigation was proportionate to the circumstances and complexity of the case⁵⁴. OLAF informed the Committee⁵⁵ that, as of 16 June 2021, in the context of a reorganisation, the review and selection functions were separated and assigned to the 'Review Team', placed under the responsibility of the Deputy Director-General (DDG)⁵⁶. The Committee welcomes the action taken by the Director-General. It is in line with a recent recommendation made by the Committee in its Opinion 3/2021.

57. In the context of the 40 cases, the SC analysed the opinions issued by Unit 0.1⁵⁷. It found there was a degree of heterogeneity in the analysis carried by Unit 0.1 of the continuity of the investigations. In 11 cases⁵⁸, the opinion provides information only on

⁵³ Article 20 and 21 of the 2013 OLAF GIPs.

⁵⁴ 'Opinion on the final report and recommendations' of Unit 0.1 - Point 1.5 'Continuity of the investigation' presents the following two questions: 1) Are there any indications that the investigation has not been conducted continuously and without undue delay? 2) Are there any indications that the length of the investigation has not been proportionate to the circumstances and complexity of the case?

⁵⁵ Note from the OLAF Director-General to the Chairman of the Supervisory Committee of 10/08/2021 Ref. Ares(2021)5050638.

⁵⁶ As a result, the OLAF GIPs were amended. See Articles 26 and 27 of the new OLAF GIPs, which entered into force on 11 October 2021.

⁵⁷ [CONFIDENTIAL]

⁵⁸ Cases 1, 6, 12, 17, 26, 27, 28, 29, 30, 31 and 37.

the periods of inactivity noted in the OCM⁵⁹. In three cases⁶⁰ the opinion identifies periods of delays and specifies the reasons for the delays. In seven cases⁶¹, the opinion clearly draws conclusions on the proportionality of the length of the investigation and the delays the investigations faced, but the conclusions are not substantiated. In only a few cases does the opinion issued by Unit 0.1 explain whether the duration of the investigation was⁶² (or not⁶³) proportionate to the circumstances and complexity of the case. In the remaining cases⁶⁴, the opinion simply states that ‘no such indications’ [of undue delays or that the investigation was not proportionate] were found or that the investigative unit had provided sufficient reasons to justify the length of the investigation⁶⁵. Lastly, in four cases, the opinion states that it was not possible to conclude on the continuity of the investigations due to the specificity of the OLAF Content management system⁶⁶ or the complexity of the case⁶⁷.

58. The SC considers the assessment carried out at the end of the investigation to be extremely relevant for the purposes of monitoring the efficiency of OLAF activity. For the Committee, it is important that the opinions to be issued by the Review Team identify the exact periods of any inactivity, and draw clear and substantiated conclusions on whether the length of the investigation was proportional to the circumstances and complexity of the case. In its Opinion 4/2014, the Committee had reached the same conclusion and had recommended to OLAF to review and reinforce the process of verifying the continuity of investigation carried out at the end of the investigation⁶⁸.

59. By reviewing every OLAF case before closure, the Review Team will be able to identify any shortcomings and remedial steps needed to improve the handling and conduct of investigations, in general. However, what the Review Team will not be able to do is recommend specific remedial measures to speed up an investigation. For that reason, the SC recommends that the duration of an investigation is assessed at an earlier stage.

⁵⁹ I.e. the information would underline that in a specific year there were very few activities performed, if any, or that there were limited activities traced in OCM in the relevant case-file.

⁶⁰ Cases 13, 33 and 36.

⁶¹ In Cases 9, 10, 11, 21 and 38, Unit 0.1 raised concerns about the duration of investigations and considered the length of these investigations not proportionate to the circumstances of the case. In Cases 8 and 18, Unit 0.1 clearly considered that the investigation was conducted continuously or that there was no undue delay.

⁶² Case 33.

⁶³ Cases 15, 24 and 25.

⁶⁴ In the following 11 cases: Cases 2, 4, 7, 14, 16, 19, 20, 23, 32, 34 and 35.

⁶⁵ Case 5.

⁶⁶ Cases 3, 39 and 40.

⁶⁷ Case 22.

⁶⁸ SC Opinion 4/2014, par. 60-61 and Recommendation 5.

Recommendation 2:

The SC therefore recommends that the Director-General of OLAF should ensure that all opinions issued by the Review Team contain an evaluation of the ‘duration of the investigations’. All opinions should indicate the exact periods of inactivity identified and draw clear and substantiated conclusions as to whether the length of the investigation was proportionate to the circumstances and complexity of the case.

5.2 ANALYSIS OF OTHER OLAF INTERNAL TOOLS FOR MANAGING THE DURATION OF INVESTIGATIONS

5.2.1 Investigation planning

60. In order to carry out effective investigations, it is essential to draw up investigation plans at the outset and update them whenever necessary.
61. The purpose of an investigation plan is threefold:
 - a. to focus the work of the investigation team and management on meeting the agreed objectives;
 - b. to set a reasonable timeframe for the investigation and allocate appropriate resources to this end; and
 - c. to ensure there is a framework for managers to identify any undue delays that need to be addressed, to assess whether the direction of the investigation has changed from the initial assessment and whether the investigation should be discontinued.
62. Where investigations lack proper planning, there is a danger that the team may deviate from the initially agreed objectives, and that accountability and transparency will suffer, thus undermining the independence of the investigation itself.
63. The SC has mentioned the need for investigation/working planning several times in the past⁶⁹.
64. Article 9(1) of the previous version of the GIPs stated that the ‘investigation unit shall conduct a preliminary examination of the information collected or obtained during the selection process in order to establish what investigative or coordination activities are required.’ They did not provide any additional guidance to OLAF staff on this issue. As part of the recent amendment of the GIPs, OLAF amended Article 9(1) to include the requirement for investigation units to ‘outline an initial work plan.’ The Committee welcomes this development and expects that further guidelines (GIPs) will be issued to investigators on drafting and regularly updating work plans in the OCM.

⁶⁹ See, i.e. SC Activity Report 2017, par. 55 and 64; SC Opinion 4/2014; SC Opinion 4/2010; SC Opinion 2/2009, Conclusion IV of the Supervisory Committee Activity Report 2008-2009.

65. The SC's analysis revealed a lack of consistency in the way OLAF formulates, updates and registers investigation plans in the case file. In most cases⁷⁰, formal investigation plans were not drawn up. Only in some cases⁷¹ was an initial working plan drafted, with no traces however of any subsequent update. In certain cases⁷², a summary of activities and planning was set out in various documents registered in OCM such as notes, emails, and minutes of management meetings. Only in very few cases⁷³ did the case file include an initial working plan and regular updates.

66. OLAF has confirmed⁷⁴ that drafting a work plan is a good practice followed by investigative units on a case-by-case approach. It is the responsibility of Heads of units to maintain and discuss the work plan with the investigators at the start of each investigation to give guidance and monitor implementation of the planned investigative activities. The work plans are discussed with senior management when necessary.

67. The SC notes once again⁷⁵ that this **case-by-case approach creates fragmentation** in OLAF's investigation planning and leads to differing practice within the Office.

68. For the SC, a more consistent approach would be beneficial to OLAF's operations. Having working plans drawn up at the start of an investigation and updated whenever required provides OLAF management with a concrete tool to monitor the duration and progress of investigations and make best use of its staffing resources. Ultimately, the purpose of a working plan is to decrease, rather than to increase the administrative burden on investigators and Heads of units.

69. For these reasons, OLAF should adopt a **consistent and uniform approach to strategic case planning** across all investigative units.

70. The current good practice of early planning that the SC has already identified in some of OLAF's investigations⁷⁶ should thus become the norm.

Recommendation 3:

The SC recommends that the Director-General of OLAF adopt a consistent and uniform approach to strategic case planning across all investigative units. In particular, OLAF should revise the GIPs to ensure that a detailed investigation plan is drawn up for every opened investigation, regularly updated and annexed to the case file of each investigation.

⁷⁰ Cases 1, 6, 7, 15, 16, 25, 26, 27, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39 and 40.

⁷¹ Cases 2, 3, 5, 8, 9, 10, 11, 17, 19, 20, 21, 28 and 31.

⁷² I.e. Case 24.

⁷³ Cases 4, 12, 13, 14, 18, 22 and 23.

⁷⁴ OLAF Reply of 18.02.2021 (Ares(2021)1336959) to Questions 7 and 8 of the SC request for clarifications dated 11.12.2020 (Ares(2020)7542544).

⁷⁵ See SC Activity Report 2017, par. 55 and 64; SC Opinion 4/2014; SC Opinion 4/2010; SC Opinion 2/2009, Conclusion IV of the Supervisory Committee Activity Report 2008-2009.

⁷⁶ For example, the SC could mention Cases 12, 13, 14 and 23.

5.2.2 Prioritising investigations

71. The analysis conducted by the SC showed that OLAF lacks clear internal rules to define and assign operational priority to a case. The current GIPs do not provide any guidance to OLAF staff on this issue.
72. In 12 investigations⁷⁷, OLAF reported to the SC that the investigation was delayed due to internal management decisions to assign higher priorities to other cases.
73. In 16 investigations⁷⁸ OLAF decided, at a certain point during the lifecycle of the investigation, to grant operational priority to these cases. The case files do not explain the criteria or circumstances taken into account by OLAF nor do they include the applicable management decisions. The only place where the SC found that priority was given to these cases was in the 12-month reports under the heading ‘measure to speed up the procedure.’
74. OLAF confirmed⁷⁹ that there are no agreed criteria for granting priority to a case. It is granted on a case-by-case basis by the Director-General on a proposal by the Head of unit, and in close cooperation with the Director, taking into consideration multiple aspects such as sensitivity, urgency, financial impact and duration.

75. It is the Committee’s view that OLAF should establish a clear system of operational priorities for opened cases, based on objective and transparent criteria.

76. To ensure the required degree of transparency and accountability, OLAF should always register the reasons and the decision for granting priority to a case in the OCM.

77. Although it is for OLAF to decide on specific rules on the need to prioritise certain investigations, the Committee considers that when an investigation lasts more than 36 months, it should then become a priority with all the operational implications this entails, both in terms of the management of OLAF overall investigations and of staffing resources.

Recommendation 4:

The Director-General of OLAF should amend the GIPs to include clear rules on the assigning operational priority to a case. In doing so, the GIPs should:

- a) establish clear objective criteria*
- b) ensure that the decisions to grant priority to a case are recorded in the case file in the OCM*
- c) automatically assign priority to investigations running for over 36 months, and take specific steps to speed up the investigations.*

⁷⁷ Cases 1, 3, 6, 9, 10, 11, 13, 15, 18, 19, 21 and 22.

⁷⁸ Cases 1, 2, 3, 4, 5, 6, 8, 10, 12, 18, 22, 26, 27, 31, 34 and 37.

⁷⁹ OLAF Reply of 18.02.2021 (Ares(2021)1336959) to Question 9 of the SC request for clarifications dated 11.12.2020 (Ares(2020)7542544). OLAF provided clarifications at the meeting held on 26.04.2020.

6. PROPORTIONALITY OF THE DURATION OF OLAF INVESTIGATIONS

78. The reasonable duration of administrative procedures is a principle enshrined in Article 41 of the Charter of Fundamental Rights. Thus, investigations conducted by OLAF must be concluded within a reasonable period of time. This is consistent with the need for legal certainty which, when balancing all the rights involved, takes precedence over the exercise of the powers of an administrative body⁸⁰. This is also in line with the principle of sound administration, which requires that authorities conduct a diligent procedure within a reasonable time⁸¹.

79. Article 7(5) of the OLAF Regulation clearly establishes a link between reasonableness of the duration of an OLAF investigation and the specific circumstances of the case ('investigations shall be conducted continuously over a period which must be proportionate to the circumstances and complexity of the case'). According to case-law, it is not possible to determine or quantify a particular time period that can be judged as reasonable. Instead, the circumstances of each case must be taken into consideration.

80. That said, when assessing whether the duration of an investigation is reasonable, the EU Courts have considered the following criteria, among others:

- the complexity of the case⁸²;
- the volume of documents examined by OLAF during the investigation and the volume of documents recorded in the case file⁸³;
- the amount and complexity of investigative steps; and
- the conduct of the parties involved⁸⁴.

81. For the EU Courts, assessing what constitutes a 'reasonable duration' of an investigation does not require evaluating all the above-mentioned criteria. It can be based on just one criterion in relation to the circumstances of the case⁸⁵.

⁸⁰ [Case T-166/16 Panzeri v. Parlement européen](#), para. 103.

⁸¹ [Judgment of the European Union Civil Service Tribunal in Joined Cases F-124/05 and F-96/06,- A and G v Commission](#) par. 390-393.

⁸² [Case T-447/11 Catinis v Commission; Joined Cases F-124/05 and F-96/06 A. and G. v Commission.](#)

⁸³ [Case T-166/16 Panzeri v. Parlement européen.](#)

⁸⁴ [Case T-447/11 Catinis v Commission; Joined Cases F-124/05 and F-96/06 A. and G. v. Commission.](#)

⁸⁵ [Joined Cases C 238/99 P, C 244/99 P, C 245/99 P, C 247/99 P, C 250/99 P to C 252/99 P and C 254/99 P Limburgse Vinyl Maatschappij and Others v Commission.](#)

6.1 ANALYSIS OF THE PROPORTIONALITY OF THE DURATION OF THE 40 CASES

82. The SC had access to the full case file of all 40 cases⁸⁶, and thus a better understanding of the specific circumstances and difficulties faced by the case teams which have had an impact on the duration of these cases.

83. In its analysis, the SC paid particular attention to the (i) 12-month reports submitted by OLAF, (ii) the analysis carried out at the end of the investigation by Unit 0.1 and (iii) the additional explanations and clarifications provided by OLAF on the duration of each specific case⁸⁷. The Committee notes that OLAF lacks guidelines or instructions to investigators on how to assess the complexity of an investigation in concrete terms.

84. Analysing the 40 cases revealed a **high degree of heterogeneity in OLAF's practice** and the way the investigative activities carried out were registered in the OCM. In examining the proportionality of the duration of the 40 cases in question, the SC categorised the cases into three main groups.

85. The first group comprises 28 cases⁸⁸, whose duration was indeed proportionate to their circumstances and complexity. This group includes:

(a) Cases where no breaks occurred and the investigation activities were constant during the whole lifecycle of the investigation⁸⁹;

(b) Cases where even though there were activity breaks, these were not significant and were justified⁹⁰.

86. In cases under group (a) the SC found that the complexity of the matter under investigation was the main reason for the length of the investigation (involving many persons concerned, jurisdictions or projects, elaborate and intensive investigative actions/activities carried out).

87. In cases under group (b) the SC found several aspects that, either alone or combined, had an impact on the duration of the investigation. In some of these cases, the complexity of the matter and the elaborate investigative activities carried out by OLAF were the main reasons that had an adverse impact on the duration of the investigation⁹¹. In other cases, the SC found the following reasons were the main cause of the length of the investigations:

- new aspects arising in the course of the investigation that required additional investigative activities⁹²;

⁸⁶ The Director-General of OLAF granted full access to the case file of the 40 cases by means of the Note for the attention of Jan Mulder, chairman of the Supervisory Committee of 12 June 2020 (Ref. Ares(2020)3063059).

⁸⁷ OLAF Reply of 18.02.2021 (Ares(2021)1336959) to case-specific questions included in the SC requests for clarifications dated 11.12.2020 (Ares(2020)7542544); OLAF provided clarification in a technical meeting held on 26.04.2020.

⁸⁸ Cases 1, 2, 4, 7, 8, 10, 12, 13, 14, 16, 17, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39 and 40.

⁸⁹ Cases 2, 8, 12, 23, 33 and 34.

⁹⁰ Cases 1, 4, 7, 10, 13, 14, 16, 17, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 39 and 40.

⁹¹ Examples are Cases 16, 24, 37, 39 and 40.

⁹² Examples are Cases 4, 10 and 36.

- clear unwillingness of the person concerned to cooperate with OLAF⁹³;
- difficulties in cooperating with national authorities⁹⁴;
- difficulties in acquiring data⁹⁵ or lack of access to the necessary data⁹⁶;
- requested input from national competent authorities⁹⁷;
- difficulties in interpreting certain national rules and defining certain criminal activities under national law⁹⁸.

88. In those cases, OLAF conducted the investigative activities in a diligent manner and did as much as possible to speed up the investigation. In one particular case, where the person concerned was clearly unwilling to cooperate, OLAF demonstrated reactivity and a willingness to speed up the investigation.

89. In several cases⁹⁹, breaks in investigations and few activities carried out were due to those cases being linked to other ongoing OLAF investigations and the decision taken by the DG of OLAF to group those cases together to issue stronger Recommendations.

90. The SC also found very good examples¹⁰⁰ of OLAF drawing up work plans, interim reports and notes to the file registered in OCM. This information summarised the status quo of the case, the difficulties encountered by the case team and the next steps to be taken. In some cases¹⁰¹, even though there was no record of a written initial working plan, the case file was comprehensive thanks to detailed notes to the file.

⁹³ Example is Case 13.

⁹⁴ Example is Case 31.

⁹⁵ Example is Case 16.

⁹⁶ Example is Case 17.

⁹⁷ Example are Cases 14 and 31.

⁹⁸ Example is Case 20.

⁹⁹ Examples are Cases 25, 26, 27, 28, 29, 30 and 32.

¹⁰⁰ The SC considers the case files of the following cases to be good examples: Case 4 contains a detailed initial work plan, updates and several interim reports and note to the files; Case 10 contains an initial work plan and very detailed notes to the files; Case 12 includes an initial work plan, several updates and very detailed notes to the files on the status quo of the case and summarising the decisions taken by the management on the plan to close the case; Case 13 includes an initial work plan, updates and notes to the files properly recording all issues and difficulties encountered and the way forward; Case 14 includes an initial work plan and several updates; Cases 23 and 24 include initial work plans and regular updates, a record in the OCM of all activities done and planned as well as regular internal monitoring carried out by management; Case 31 includes an initial work plan and regular updates, a detailed handover note and several notes to the file.

¹⁰¹ Cases 33, 34 and 40.

91. The SC identified a second group comprising five cases¹⁰². For these cases, although intensive investigative activities were carried out for a certain period, there were periods of inactivity or breaks that were not sufficiently justified or recorded in the OCM. The SC found a lack of internal control from OLAF management in these cases.

92. In one case¹⁰³, the SC noticed two breaks in the procedure, one at the beginning (less than six months) and one (of almost one year) between the second and the third year of the investigation. Other than those breaks, OLAF's activity was constant. As the information in reports by OLAF to the SC was not accurate¹⁰⁴, the SC asked OLAF to provide additional clarification. OLAF's reply¹⁰⁵ confirmed the first break, which was due to the fact that the lead investigator had left the unit a few months after the start of the investigation and was replaced five months later. However, the SC did not find any handover note in the case file nor any initial work plan. OLAF's reply also provided an overview of all the obstacles encountered in this case and the chronology of the investigative activities. Finally, the SC noticed that the case was put on hold for over six months, pending an OLAF decision on how to deal with certain data received¹⁰⁶.

93. In another case¹⁰⁷, all activities carried out during the first year were reported and registered in the case file in a consistent way. In this case, there was also a change in the composition of the case team at the end of the first year of the investigation. The case file contained a detailed handover note where the initial allegations were already established. The handover note also included a detailed work plan to investigate the second allegation¹⁰⁸. Despite this, no activities were carried out in the second year of the investigation. The case became active again in the third year until it was closed. The SC understands that the break in the second year of investigation was due to priority given to other cases and to a new investigator being appointed only at the end of the second year¹⁰⁹. Apart from that break, all investigative steps were registered properly in the OCM in the form of notes to the file.

94. In the last three cases¹¹⁰ in this group, the SC noticed several breaks in the course of the lifecycle of the investigations. However these breaks appear to be due to the volume of data collected by OLAF and difficulties in analysing the data, as well as many obstacles OLAF encountered during the course of the investigations. OLAF's additional explanations to the Committee provided a good overview of those difficulties. At the

¹⁰² Cases 5, 18, 22, 35 and 38.

¹⁰³ Case 5 deals with an internal investigation.

¹⁰⁴ I.e. the 42-month report mentions a change of the lead investigator as a justification of the length of the investigation. However such change happened at the beginning of the case and no mention of this change was made in the 12-month reports.

¹⁰⁵ OLAF Reply of 18.02.2021 (Ares(2021)1336959) to case-specific questions included in the SC requests for clarification dated 11.12.2020 (Ares(2020)7542544).

¹⁰⁶ [CONFIDENTIAL]

¹⁰⁷ Case 18.

¹⁰⁸ At the end of the first year of investigation, the scope of the case was extended.

¹⁰⁹ [CONFIDENTIAL]

¹¹⁰ Cases 22, 35 and 38.

same time, the SC noticed that the analysis of the documents collected lasted several months, in one case¹¹¹ more than one year. Notwithstanding the complexity, a better work plan¹¹², HR strategy and better internal monitoring¹¹³ could have helped overcome these difficulties and even shorten the overall duration of the investigations.

95. Lastly, the SC identified a **group of seven cases**¹¹⁴ that raised concerns regarding the proportionate character of the duration of OLAF's investigations. This group includes cases where investigative activities were not continuous and the breaks were not justified. As explained below (paragraphs 96 to 102) the SC considers the duration of these investigations excessive given the circumstances and complexity of each case.

96. In all seven cases, there were significant breaks¹¹⁵ in the lifecycle of the investigations with very few, if any, activities carried out. The cases also shared the following features:

- the simple nature of the matter investigated¹¹⁶,
- few persons concerned¹¹⁷ and,
- few investigative steps required¹¹⁸.

97. The SC found that in those cases, OLAF's investigative activities were limited mostly to collecting documents and its conclusions were mostly based on the analysis of documents received by other institutions or national authorities¹¹⁹ or from activities carried out by OLAF before the breaks occurred¹²⁰. Thus the evidence taken into account to close the cases had also been available since the opening of the investigation¹²¹ or at a very early in the investigation. In some cases¹²², the SC also noted a low financial impact.

¹¹¹ Case 35.

¹¹² As an example, Case 35 lacked a work plan and a note to the file identifying difficulties encountered by the case team. The difficulty of the case could be seen only in the Final Case Report and in the clarifications provided by OLAF in the reply dated 18.02.2021.

¹¹³ Case 22.

¹¹⁴ Cases 3, 6, 9, 11, 15, 19 and 21.

¹¹⁵ In Cases 3, 9, 11, 19 and 21, the SC noticed breaks of over one year. In Cases 6 and 15, the SC noticed several breaks in the course of the lifecycle of the investigations.

¹¹⁶ [CONFIDENTIAL]

¹¹⁷ [CONFIDENTIAL]

¹¹⁸ [CONFIDENTIAL]

¹¹⁹ Cases 6, 9, 15, 19 and 21.

¹²⁰ [CONFIDENTIAL]

¹²¹ An example is Case 15.

¹²² Cases 3, 15 and 19.

98. In one of these cases¹²³, Unit 0.1 had clearly identified the periods of inactivity, while in four cases¹²⁴ it had raised concerns about the duration of investigations and considered the length of these investigations not proportionate to the circumstances of the case. In the two remaining cases, Unit 0.1 had made no reference to undue delay¹²⁵ or stated that it was unable to make a conclusion on the continuity of the investigation due to the nature of the OCM¹²⁶.
99. Those cases either lacked a written work plan¹²⁷ or had only an initial work plan but no updates¹²⁸.
100. The analysis of the case file showed that in some of these cases, the reporting of OLAF to the SC was not accurate¹²⁹. For instance, in one case¹³⁰ the SC found that the length of the investigation was due mainly to staff shortages. In particular, three lead investigators changed over the lifecycle of this investigation. OLAF confirmed¹³¹ that progress in this case was hampered by staffing issues. The first lead investigator had to deal with other high priority cases, the second lead investigator appointed left after only few months and finally, the third lead investigator, once appointed, dealt with the case as a priority and closed it soon after. When comparing the 12-month reports sent by OLAF to the SC with the case file and the additional information provided subsequently by OLAF, the SC noticed that the changes of the lead investigators were mentioned only in the last two reports to the SC¹³². No reference was made in any of these reports to the workload of the first lead investigator. Moreover, these difficulties were not registered in the case file in the OCM.
101. The SC considers that the case file does not provide sufficient justification for these breaks in the cases. In all seven cases, the SC asked OLAF to provide additional clarification regarding the reasons for the duration of these cases. OLAF's reply confirmed that there had been periods of inactivity identified by the SC. At the same time, OLAF did not provide any additional information to the information the SC already had¹³³, and when it did, the information was not traceable in the case file¹³⁴.

¹²³ Case 6.

¹²⁴ Cases 9, 11, 15 and 21.

¹²⁵ In Case 19, the Opinion simply states that 'no such indications' [of undue delays or that investigation was not proportionate] were found.

¹²⁶ Case 3.

¹²⁷ Cases 6 and 15.

¹²⁸ Cases 3, 9, 11, 19 and 21.

¹²⁹ Examples are Cases 3 and 15.

¹³⁰ Case 3.

¹³¹ [CONFIDENTIAL]

¹³² 36- and 42-month reports to the SC.

¹³³ Cases 6, 9, 11, 19 and 21.

¹³⁴ Cases 3 and 15.

102. The understanding of the Committee is that at least in five¹³⁵ of the investigations the delays were due mainly to internal reasons (staffing issues and/or priority given to other cases)¹³⁶. The SC's opinion is that those cases suffered from insufficient internal monitoring by OLAF.

103. The SC considers that:

- i. whenever OLAF takes steps that are material to the handling of the investigation¹³⁷ this should always be done by means of a formal decision taken at Directorate level and formally registered in the OCM. Moreover, whenever exceptional steps in the procedure need to be taken¹³⁸, these steps should require a formal note to the management and management's approval of their timetable. This would not only increase transparency but would also reinforce management oversight of the duration of the investigations.
- ii. Staff retention and staff mobility do have an adverse effect on the duration of an investigation. Although these issues are often beyond OLAF's control, the SC considers that whenever a member of the case team leaves the Office, he or she should always draft a handover note tracking the activities carried out, the evidence collected and the timetable and activities pending for the next lead investigator.
- iii. Based on experience gained from previous external and internal investigations, OLAF should reflect on defining how to assess the likely complexity of an investigation in order to enable investigators to assess the issue of proportionality in a consistent and transparent manner. In doing so, OLAF could take into consideration aspects including the number of persons concerned and jurisdictions involved, the volume of documents to be examined, the nature of evidence to be collected and the envisaged investigative steps to be carried out.

Recommendation 5:

The Director-General of OLAF should ensure that:

- a) *Critical decisions which substantially impact the duration of an investigation (i.e. whenever an exceptional extra time for the analysis of the data/evidence collected is necessary due to the circumstances of the case) should always be taken at Director level and should always be systematically recorded in the OCM. The procedure for doing so should be set out in the GIPs.*
- b) *Rotation of staff does not affect the conduct of an ongoing investigation. In particular, DG OLAF should amend the GIPs to ensure that whenever a member of the team leaves the Office, they draft a written handover note tracking all the activities carried out and evidence already collected, and setting out the work pending and the timetable that the next case team member should follow.*

¹³⁵ Cases 3, 11, 15, 19 and 21.

¹³⁶ The understanding of the SC is that in Cases 3, 11 and 19 the main reason of delay was the frequent rotation of investigators. In Cases 15 and 21, the workload of the case team was combined with the fact that priority was given to other cases.

¹³⁷ I.e. decisions to group different cases or decision to stop the investigation in order to avoid jeopardising the decision of national authorities.

¹³⁸ I.e. if the analysis of a large volume of data collected requires several months.

7. DUTY OF OLAF TO RESPECT PROCEDURAL GUARANTEES

104. Investigations by OLAF are often of a serious nature and can have serious consequences for the persons concerned and for the follow-up by the competent authorities. It is therefore essential that OLAF follows all the procedural guarantees set out in Article 9 of the OLAF Regulation¹³⁹, the fundamental rights laid down in EU law, and in particular in the Charter of Fundamental Rights¹⁴⁰. Article 8.7 of the GIPs states that ‘all investigative actions must be conducted with full respect for the rights of the persons involved including the procedural guarantees and rights applicable to OLAF investigations, as well as data protection requirements, as referred to in OLAF Guidelines on Data Protection for Investigative Activities’.
105. The OLAF Regulation entrusts the Committee with the task of “monitoring developments” concerning the application of the procedural guarantees by OLAF when conducting investigations. In this Opinion, the Committee decided to focus its analysis on compliance with Article 9(3) and (4) of the OLAF Regulation concerning the ‘right of an official to be informed’ of the opening of an OLAF investigation and the ‘right of the person concerned to comment on facts concerning him before OLAF drafts its conclusions.’ In particular it focused on the use by OLAF of the exceptions provided for by the legislator to defer such rights.
106. Article 9(3) of Regulation (EU) No 883/2013 requires OLAF to inform *rapidly* an official of an EU institution that they may be personally implicated in an irregularity *so long as* this does not prejudice the conduct of the investigation¹⁴¹. The right to be informed can be deferred in exceptional circumstances. In that regard, Article 9.2 of GIPs states that ‘this notification shall be deferred where it would be harmful to the investigation to provide such information.’
107. On the right to be informed of the opening of an external OLAF investigation, OLAF is not obliged to notify a person of their involvement in an external investigation. It is for OLAF to decide when to inform the person concerned, taking into account the specifics of the case and any potential interference with the course of the investigation.
108. Article 9(4) of the OLAF Regulation provides that at the end of an investigation (external or internal) the person concerned should be given the opportunity to

¹³⁹ Article 9 of the OLAF Regulation lists the principles and the procedural guarantees that OLAF should apply when conducting an investigation.

¹⁴⁰ [Judgment of the General Court of 3 May 2018 in case T-48/16, Sigma Orionis SA v European Commission](#), paragraphs 104 and 105 and further case law quoted in paragraph 100.

¹⁴¹ Article 9(3) of Regulation No 883/2013 states: ‘**As soon as an investigation reveals** that an official, other servant, member of an institution or body, head of office or agency, or staff member **may be a person concerned**, that official, other servant, member of an institution or body, head of office or agency, or staff member **shall be informed** to that effect, **provided that this does not prejudice the conduct of the investigation or of any investigative proceedings falling within the remit of a national judicial authority.**’

comment on facts concerning him or her¹⁴². This allows OLAF to be in a position to take into account those comments, notably when drafting its final report¹⁴³. According to case-law¹⁴⁴, OLAF sufficiently respects the right of defence of people concerned by investigations by giving them the opportunity to comment on their cases.

109. This right may, however, be deferred ‘in duly justified cases where necessary to preserve the confidentiality of the investigation or an ongoing or future criminal investigation by the EPPO or a national judicial authority, the Director-General may, where appropriate after consulting the EPPO or the national judicial authority concerned, decide to defer the fulfilment of the obligation to invite the person concerned to comment.’¹⁴⁵

7.1 ANALYSIS OF THE DEFERRAL PROCEDURE PUT IN PLACE BY OLAF

7.1.1 Deferral of information under Article 9(3) of the OLAF Regulation

110. OLAF informed the SC¹⁴⁶ that it has not issued any separate internal instructions to its investigators on the deferral procedure under Article 9(3) of the OLAF Regulation. Deferring the obligation to inform the person concerned that an OLAF investigation has been opened is linked to the deferral of information to the data subject on the processing of their data. Therefore, the instructions to staff on making use of the deferral procedure are included in the *Guidelines on Data Protection for Investigative Activities*¹⁴⁷ and in the *Note of the OLAF DG to all staff concerning the New Data Protection Regulation*¹⁴⁸ issued to assist OLAF staff in applying those instructions in the light of

¹⁴² Article 9(4) first paragraph of Regulation No 883/2013 states: ‘Without prejudice to Articles 4(6) and 7(6), **once the investigation has been completed and before conclusions** referring by name to a person concerned **are drawn up, that person shall be given the opportunity to comment on facts concerning him.**’

¹⁴³ Article 9(4) second paragraph of Regulation No 883/2013 states: ‘To that end, the Office shall **send the person concerned an invitation to comment** either in writing or at an interview with staff designated by the Office. That **invitation shall include a summary of the facts** concerning the person concerned and the information required by Articles 15 and 16 of Regulation (EU) 2018/1725, and shall indicate the time limit for submitting comments, which shall not be less than 10 working days from receipt of the invitation to comment. That notice period may be shortened with the express consent of the person concerned or on duly reasoned grounds of urgency of the investigation. The **final investigation report shall make reference to any such comments.**’

¹⁴⁴ [Order of the Court of First Instance of 18 December 2003, Gómez-Reino v Commission, T-215/02](#), par. 65; [judgment of the Court of First Instance of 12 September 2007, Nikolaou v Commission, T-259/03](#), par. 245; [judgment of the Court of First Instance of 8 July 2008, Franchet and Byk v Commission, T-48/05](#), paras. 255 and 257; [judgment of the General Court of 21 May 2014, Catinis v Commission, T-447/11](#), par. 62, and [judgment of the General Court of 26 May 2016, IMG v Commission, T-110/15](#), par. 34.

¹⁴⁵ The wording ‘or an ongoing or future criminal investigation by the EPPO’ and ‘where appropriate after consulting the EPPO or the national judicial authority concerned’ was added to the text of Article 9(4) of the OLAF Regulation by the amending Regulation (EU, Euratom) 2020/2223. See also Article 22.3 of the 2021 GIPs.

¹⁴⁶ OLAF clarifications provided in a technical meeting held on 26.04.2021.

¹⁴⁷ On 25 November 2021, OLAF adopted new “Guidelines on data protection for investigative activities” (Ref. Ares(2021)7266396 – 25.11.2021) replacing the previous “OLAF Instructions to Staff on Data Protection for Investigative activities” of 2013 (Ref. Ares(2013)725205 – 19.04.2013).

¹⁴⁸ Note from the OLAF Director-General to all staff on the new data protection regulation (Ref. Ares(2019)916604 - 15/02/2019).

Regulation (EU) 2018/1725¹⁴⁹ and Commission Decision (EU) 2018/1962¹⁵⁰ laying down internal rules concerning the processing of personal data by OLAF.

111. Articles 15 and 16 of Regulation 2018/1725 impose an obligation on the data controller to provide information to data subjects on the processing of their personal data. OLAF respects the right of all data subjects to receive information by publishing data protection notices on its website. In addition, OLAF must provide a personalised privacy notice to the data subjects concerned within one month of identifying them as the person concerned. The right to receive such information can, however, be restricted on a case-by-case basis, in accordance with Article 25 of Regulation (EU) 2018/1725, Article 3 of the Commission Decision on internal rules and with the relevant provisions in the Guidelines on data protection for investigative activities¹⁵¹.
112. In practice OLAF must, *within one month* of identifying a person as a person concerned, *either* provide that person with the privacy notice *or defer* the provision of information in the interest of the purpose of the investigation, or the protection of the rights and freedoms of others.
113. The decision to defer the provision of information to data subjects under Regulation 2018/1725 is applied *at the same time* as the decision not to inform the person concerned of their potential involvement in an open investigation under Article 9(3) of the OLAF Regulation. This decision requires the Director's approval. In some cases, the Director-General takes these decisions. OLAF informed the SC that these rules were transposed and embedded in the OCM in 2019 and OLAF staff received specific training.
114. During the investigation phase, the investigation unit examines whether there is a need to maintain any restriction to the right to be informed at **intervals of six months**. OLAF informed the SC¹⁵² that 15 days before the deadline for review expires, the activity 'review' appears in the OCM dashboard of the investigator in charge as an activity to be completed. It also appears in the OCM dashboard of the Head of unit (and all persons involved in the signature process) and of the OLAF's Data Protection Officer. At any moment, the investigator can interrupt the deferral manually.

¹⁴⁹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. [EUR-Lex - 32018R1725 - EN - EUR-Lex \(europa.eu\)](#)

¹⁵⁰ Commission Decision (EU) 2018/1962 of 11 December 2018 laying down internal rules concerning the processing of personal data by the European Anti-Fraud Office (OLAF) in relation to the provision of information to data subjects and the restriction of certain of their rights in accordance with Article 25 of Regulation (EU) 2018/1725 of the European Parliament and of the Council. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018D1962>.

¹⁵¹ See Article 10 'restriction of data subject rights' of the recently adopted "OLAF Guidelines on Data Protection for Investigative Activities". The previous "Instructions on data protection for investigative activities" from 2013, as further amended in 2019 contained a similar provision (Article 11 'deferrals').

¹⁵² Complementary information received from the OLAF Data Protection Officer on 04.05.2021.

115. Restrictions imposed on ongoing investigations may apply for *as long as* the reasons for the deferral apply. Once the grounds for deferring information no longer apply, the investigative unit must provide the person concerned with the information of the opening of the investigation at the earliest opportunity. This notification **includes information on the deferral and the grounds it was based upon.**
116. Exceptionally, the information that an investigation has been opened can be deferred even after the investigation is closed. The deferral is reviewed at the end of the procedure during the final quality and legal review. Until July 2021, this review was carried out by Unit 0.1. OLAF informed the SC that in the future, this will be carried out by the Review Team placed under the responsibility of the Deputy Director-General (DDG)¹⁵³.
117. The SC welcomes the clear system put in place by OLAF and embedded in the OCM. It also considers the revision mechanism and the reminders embedded in the OCM extremely important ways to ensure the systematic application of the procedures set up for deferral by all units and to ensure transparency.
118. The deferral of the right to be informed is an exceptional measure taken to protect the conduct of the investigation whenever OLAF identifies a specific risk. Not informing the person concerned of an investigation against it even after the procedure is closed can seriously undermine public trust in the way OLAF conducts its investigations. The SC therefore invites OLAF to reflect on the option to inform the person concerned **systematically when cases are closed.** This will enhance compliance with the procedural guarantees of the persons concerned and it will ensure the protection of OLAF's investigation during the investigation phase.

7.1.2 Deferral of the opportunity to comment under Article 9(4) of the OLAF Regulation

119. Article 23(1) of the GIPs¹⁵⁴ revised in 2021 states that ‘once the investigation has been completed and prior to drawing conclusions referring by name to a person concerned, the investigation unit shall inform that person of facts concerning him and invite him to comment on those facts. These comments may be provided within the framework of an interview or in writing.’
120. As stated above, this right can exceptionally be deferred. To this effect Article 23(3) of the 2021 GIPs¹⁵⁵ states: ‘Where it is necessary to preserve the confidentiality of the investigation or an ongoing or future criminal investigation of the EPPO or of a national judicial authority, the right of the person concerned to comment on facts concerning her/him may be deferred. Where necessary, the investigation unit consults the EPPO or the national judicial authority. Where the person concerned is a Member,

¹⁵³ Article 27.2 of the 2021 GIPs states that ‘The Review Team checks whether the investigation unit has complied with the legal requirements including the rights and procedural guarantees of the persons concerned, data protection requirements and reviews the legality, necessity and proportionality of the investigative activities undertaken. The Review Team shall also check whether the Final Report corresponds to the scope of the investigation and the proposed Recommendations and case closure decision are justified in line with the findings of the investigation or coordination case.’

¹⁵⁴ Former Article 18.1 of the 2013 GIPs.

¹⁵⁵ Article 18.3 of the 2013 GIPs contained a similar wording.

official or other servant of an EU institution, body, office or agency, the right to comment may be deferred in agreement with the Secretary-General or equivalent authority.’

121. The ‘Instructions on deferral of the opportunity to comment’¹⁵⁶ set out the procedure to follow in cases where, upon completion of the investigation and before drawing conclusions referring by name to a person concerned, the investigation unit considers that the conditions for a deferral of the opportunity to comment are fulfilled in accordance with Article 9(4) third subparagraph of the OLAF Regulation. The investigation unit concerned submits to the Director-General a draft decision to defer the opportunity to comment. Until 2021, Unit 0.1 verified the legality, necessity and proportionality of the draft decision to defer, and provided an opinion to the Director-General. This prior check contributed, on the one hand, to the quality of the decision and on the other hand, to consistent practice within OLAF. The Committee understands that, following the recent reorganisation of OLAF, this check will be carried out in the future by the Review Team under the responsibility of the Deputy Director-General.
122. The exceptions to the right of the person concerned to be heard, being a restriction of a fundamental right, must be interpreted narrowly. Therefore, they must only apply where there are specific case-related reasons that justify preserving the confidentiality of the investigation and/or where the opportunity to comment will undermine the course of justice at national level. To this extent and at least until June 2021, the ‘Legality Check and Review Best practices’¹⁵⁷ laid down the grounds and factors to be considered when analysing a deferral. The Committee trusts that the Review Team will make use of this document when carrying out its new tasks.
123. As far as internal investigations are concerned, compliance with the obligation to invite an EU official to comment may be deferred only after having received the agreement of the Institution, body, office or Agency (IBOA) to which the persons concerned belongs¹⁵⁸. This is necessary to ensure that the rights of defence of officials are respected, that OLAF defers the opportunity to comment only in exceptional cases and that the assessment of the exceptional nature is made by the OLAF Director-General and the relevant IBOA.

¹⁵⁶ Note of the Director-General of OLAF of 07/06/2016 - Ref. Ares(2016)2632360.

¹⁵⁷ The ‘Legality Check and Review Best Practices’ is an internal working document prepared for the purposes of Unit 0.1 and adopted in July 2018 which set forth the best practices of the Office during the selection and review phases and gives guidance to staff in the Unit on how to verify and process information for delivering the opinion to the OLAF Director-General.

¹⁵⁸ Article 9(4) fourth subparagraph of OLAF Regulation.

124. Lastly, deferral of the opportunity to comment is also subject to an ex post review as part of the final quality and legal review before an investigation is closed¹⁵⁹.

125. The SC believes that the system put in place by OLAF on deferring the opportunity to comment provides sufficient guarantees to protect the fundamental rights of people under investigation and avoids the risk of arbitrary treatment.

7.2 ANALYSIS OF THE DEFERRAL PROCEDURE APPLIED BY OLAF IN THE 40 CASES

126. The Committee notes that OLAF has made limited use of the exceptions provided for in Article 9(3) and (4) of the OLAF Regulation to restrict the ‘right of an official to be informed’ that an OLAF investigation has been opened and the ‘right of the person concerned to comment on facts concerning them before OLAF drafts its conclusions.’

127. The analysis showed that OLAF used the Article 9(3) restriction in five cases¹⁶⁰ and it used the Article 9(4) restriction in one case only¹⁶¹.

128. In one case¹⁶², OLAF deferred notification to the person concerned of their potential involvement in the investigation and deferred the information of the processing of their personal data on the ground that there could be a risk that evidence is destroyed and witnesses influenced if the data subject become aware. OLAF took this decision rapidly, within the *one month* of identifying the person as a person concerned. The deferral lasted two months, after which OLAF promptly informed the person concerned that the investigation had been opened.

129. In another case¹⁶³ that also involved an internal investigation, OLAF deferred the information to the EU official concerned due to the risk of evidence being destroyed and obstruction of OLAF’s investigation. OLAF took this decision *rapidly* and informed the person concerned nine months after that decision was taken. However, the SC did not find in the case file any document indicating a *review* of the deferral. The SC takes note of the explications given by OLAF that at the time of the deferral there was no procedures or any templates used to monitor the deferral.

130. In three cases¹⁶⁴, OLAF decided to defer the information that an OLAF investigation had been opened for a rather long period of time¹⁶⁵. In one of those cases¹⁶⁶, OLAF decided

¹⁵⁹ The ex post review previously carried out by Unit 0.1 will in the future be carried out by the Review Team. See Article 27 of the 2021 GIPs.

¹⁶⁰ Cases 3, 4, 5, 6 and 22.

¹⁶¹ Case 4.

¹⁶² Case 3.

¹⁶³ Case 22.

¹⁶⁴ Cases 4, 5 and 6.

¹⁶⁵ Between 36 months and 42 months.

¹⁶⁶ Case 5.

to defer such information to several persons concerned in order to protect evidence collected and avoid collusion among the persons under investigation. At the end of the deferral period, all persons concerned were informed that the OLAF investigations had been opened and they were invited to an interview under Article 9(2) of the OLAF Regulation.

131. The risk that evidence could be lost and that the person under investigation could inform other persons concerned in the same investigation justified OLAF's decision to defer informing the persons earlier under Article 9(3) of the OLAF Regulation in the two other cases. In one case, the deferral decision lasted 42 months and was reviewed three times at regular intervals¹⁶⁷. In the other case¹⁶⁸, OLAF decided first not to inform some of the persons concerned that the investigation had been opened on the ground that this could jeopardise the conduct of the investigation. These deferrals were reviewed two years after the decision was taken and then every six months. In that case, OLAF also decided to use the option under Article 9(4) and deferred the rights of the persons concerned to provide comments on facts attributed to them in order to preserve a future criminal investigation by the competent national authorities. OLAF deferred the opportunity to comment for about one year, after which all persons concerned were given the opportunity to comment.

132. In conclusion, the analysis showed that, in terms of the procedure for deferring the information that an investigation had been opened, OLAF complied with the applicable procedural requirements and guarantees. It also showed that since 2019 it has put in place a much more rigorous review system that is now systematically applied in all deferral cases.

133. The SC also noticed that in the cases examined there were no specific rules laid down by OLAF on how to conduct the review of the need for the deferral under Article 9(3) of the OLAF Regulation¹⁶⁹. OLAF informed the Committee that as of 2019 a notification and review module for the deferral has been implemented in the OCM. The Supervisory Committee welcomes this improvements.

Recommendation 6:

The Director-General of OLAF should amend the GIPs to ensure, as far it is reasonably possible, the person concerned is systematically informed of their status at the end of the investigation and in any case at the closure of the investigation.

¹⁶⁷ [CONFIDENTIAL]

¹⁶⁸ Case 4.

¹⁶⁹ The review was sometimes carried out in the form of an email from the lead investigator to the director or head of unit (i.e. in cases 5 and 6); at other times in the form of a note to the file. Case 4 presents both systems.

ANNEX I – LIST OF ABBREVIATIONS

DDG.....	Deputy Director-General
D-G.....	Director-General
EPPO.....	European Public Prosecutor’s Office
GIPs.....	Guidelines on Investigation Procedures for OLAF’s staff
HoU.....	Head of Unit
IBOAs.....	EU institutions, bodies, offices or agencies
MIPs.....	Monthly Investigation Performance
OLAF.....	European Anti-fraud Office
OCM.....	OLAF Content Management System
SC	OLAF Supervisory Committee
Unit C2.....	Intelligence and Operational Analysis Unit
Unit C4.....	Monitoring and Reporting Unit
Unit 0.1.....	Investigation Selection and Review Unit

ANNEX II – LIST OF CASES [*CONFIDENTIAL*]