



The Director-General

Brussels

**NOTE FOR THE ATTENTION OF MR JAN MULDER,
CHAIRMAN OF THE OLAF SUPERVISORY COMMITTEE**

Via the Secretariat of the Supervisory Committee

**Subject: OLAF's reply to the Supervisory Committee Opinion 2/2016
on the OLAF Annual Activity Report**

Dear Mr Mulder,

Following the transmission of 9 February 2017 of the adopted Supervisory Committee Opinion 2/2016 on the OLAF Annual Activity Report, please find attached OLAF's reply.

Since the Opinion 2/2016 is published on the Supervisory Committee's website, we would appreciate if you would also publish OLAF's reply, in line with the usual practice.

Yours sincerely,



Giovanni KESSLER
27 MARS 2017

Encl.: OLAF's reply to the Supervisory Committee Opinion 2/2016 on the OLAF Annual Activity Report

Cc: M. Kaduczak
M. Hofmann, C. Scharf-Kroener, M. D'Ambrosio, C. Arwidi, I. Sacristan,
C. Ullrich, D. Dalheimer, A. Burea

OLAF's reply to the Supervisory Committee Opinion 2/2016 on the OLAF Annual Activity Report¹

I. Background

On 30 May 2016, OLAF transmitted to the SC Supervisory Committee (SC) the OLAF Report 2015². On 30 June 2016, the Office sent to the Committee the OLAF Annual Activity Report (AAR) for 2015³.

By note of 15 September 2016⁴, the SC Chair informed OLAF that the Committee had appointed a rapporteur. On the same date⁵, the SC rapporteur sent OLAF the SC draft Opinion on the OLAF AAR and OLAF Report for the year 2015. He requested OLAF to communicate to the Committee "*comments, requests for amendments, additional information accompanied by the relevant supporting documentation*" in relation to the SC draft Opinion. On 6 October 2016⁶, OLAF provided its reply.

By note of 13 October 2016⁷, the SC invited OLAF to a contradictory meeting and sent a new annotated version of the SC draft Opinion, including modifications made following OLAF's comments. This (only) contradictory meeting took place on 19 October (NB: paragraph (8) of the present Opinion speaks erroneously of two contradictory meetings). During the contradictory meeting, and by note of 20 October, the SC asked for additional information, which was provided by OLAF on 26 October⁸.

On 9 February 2017, the SC sent OLAF its Opinion 2/2016, adopted on 20 January 2017 and limited to the OLAF AAR only. This document outlines OLAF's reply to the final SC Opinion 2/2016. References to headings or paragraphs refer to that SC Opinion.

II. Purpose and methodology

The SC announced in its two letters of 15 September 2016⁹ that the work on the Opinion on the OLAF AAR would follow the *SC Procedure for the preparation and adoption of Opinions and Special Reports* of 6 July 2016¹⁰; OLAF noticed that parts of the procedure were left out, presumably to allow a faster adoption of the Opinion following the change in the SC composition.

OLAF welcomes the decision of the SC to focus its final Opinion on the more pertinent issues. Indeed, the draft discussed in the meeting of 19 October touched upon a very wide range of topics, some of them only indirectly linked to the AAR or the OLAF Report.

¹ The SC Opinion 2/2016 has been transmitted to OLAF by note Ares(2017)729825 of 9 February 2017

² Ares(2016)2495554

³ Ares(2016)3119982

⁴ Ares(2016)5347454

⁵ Ares(2016)5361417

⁶ Ares(2016)5797655

⁷ Ares(2016)5914182

⁸ Ares(2016)6135401

⁹ Ares(2016)5347454 and Ares(2016)5361417

¹⁰ Ares(2016)3219268

As a general remark on the SC recommendations, OLAF would like to point out that the AAR's purpose is to reflect the results and outcome of targets from the Strategic Plan and the Management Plan for a given year. These documents are part of the Commission's strategic planning and programming cycle¹¹. Therefore, the AAR cannot introduce new indicators unless they were previously set out in the Strategic or Management Plans. Any recommendations of the SC to introduce new elements into the reporting can therefore at the earliest be considered for the Management Plan 2018 which would allow for the reporting on this indicator to take place from the AAR 2018.

III. Duration of investigative actions carried out by OLAF

1. Recommendation of the Supervisory Committee:

The Supervisory Committee recommends that the Director General of OLAF:

(i) Reports on the duration of pre-investigative work, including average time taken to initiate selection.

OLAF considers that such an indicator on the time elapsed between registration of incoming information and opening of a selection procedure can be established. The target to be set for this indicator would have to take into account that the initiation of a selection procedure requires a prior check on whether a selection or an investigation has already been opened on the same matter.

OLAF will consider the introduction of such an indicator for the Management Plan 2018. That would allow for the reporting on this indicator to take place in the AAR 2018.

2. Other remarks:

In paragraphs (11) and (12), the SC makes reference to the introduction of a new methodology which included on-going investigations into the calculation of the average duration of investigations. In the Committee's opinion the use of this new methodology distorted the real picture. The Committee welcomes the fact that OLAF has started to report again on *the duration of closed investigations only* in its OLAF Report and asks for this indicator to be introduced also in the AAR.

OLAF explained in its replies to the SC Opinion 5/2014 *Statistics on investigative performance of OLAF (part I) - OLAF external reporting on the duration of investigations* that the duration of OLAF's investigations has been decreasing independently of the calculation method, and that the use of a new methodology did not distort the picture. On the contrary, OLAF considers that the most useful indicator from a managerial point of view is *the duration of investigations closed and on-going*, as it captures the stock of on-going cases, while the *duration of closed investigations only* gives a partial and limited image of the performance of the Office: only measuring the duration of *closed* investigations does not take account of the extent to which old cases are being kept open, as this would be excluded from the statistics.

OLAF presented statistics using both methods of calculations in its OLAF Reports 2014 and 2015. As regards the AAR, in 2015, the Secretariat-General and DG Budget introduced some changes to the strategic planning documents with the aim of simplifying the exercise and reducing the number of objectives and indicators¹². OLAF's investigative

¹¹ https://ec.europa.eu/info/strategy/how-priorities-are-set_en

¹² Ares(2015)5332669

performance indicators are listed in the Strategic Plan for the period 2016-2020. These are: *Average duration of selections*, *Percentage of selections closed whose duration is no longer than 2 months*, *Average duration of investigations [closed and on-going]* and *Percentage of investigations closed with recommendations*. Furthermore, there is an indicator on the monitoring of the implementation of OLAF's recommendations. This is in OLAF's view an adequate set of indicators for its activity.

Under paragraph (16) the SC mentions that "there is no data available on the peer review or revision of decisions leading to the dismissal of information during the selection process". In reply, OLAF would point out that it is the decision of the OLAF Director-General to open or dismiss a case after considering all the relevant information and the opinion provided by OLAF Unit 01 Investigations selection and review (see Article 6 GIP). The opinion prepared in OLAF Unit 01 is revised by the Head of Sector and Head of Unit before reaching the OLAF Director-General.

In the same paragraph, the SC mentions that "there is no data available on the mitigating measures implemented to avoid conflict of interest situations within the decision-making process leading to the dismissal of incoming information". OLAF would point out that all OLAF staff has the obligation to report any situation of conflict of interest. Furthermore, OLAF's case management system requests every selector to whom a selection case is assigned to declare the absence of a conflict of interest. Finally, it should again be pointed out that each draft selection opinion of unit 01 is reviewed by two persons other than the selector, i.e. the Head of Sector and the Head of Unit.

In paragraph (18) the SC asks OLAF to justify the use of the benchmark of 20 months for the duration of its investigations, while the Regulation 883/2013 mentions 12 months. OLAF would clarify that 12 months is not a benchmark for the duration of its investigations, but a period after which OLAF has to report to the SC. OLAF's experience shows that 12 months is too short to be considered a realistic duration for its investigations due to their complexity (which has been even acknowledged by the SC in its Opinion 4/2014). OLAF strives to keep the average duration of its investigations below 20 months, which OLAF considers a realistic target. In addition, the Office aims at having less than 30% of its investigations lasting more than 20 months. OLAF would point that over the years it has worked to reduce the duration of its investigations and set more ambitious targets. For example, the 2010 Management Plan refers to 24 months¹³, the 2013 Management Plan to 21 months¹⁴, while since 2014 the Management Plan refers to 20 months.

¹³ <https://myintracomm.ec.europa.eu/DG/OLAF/legislation-policy-guidelines-tools/Planning-Reporting-Evaluation-Audit/Documents/mp-10.pdf>

¹⁴ <https://myintracomm.ec.europa.eu/DG/OLAF/legislation-policy-guidelines-tools/Planning-Reporting-Evaluation-Audit/Documents/restricted/mp-13.pdf>

IV. Complaints linked to the protection of fundamental rights and procedural guarantees

1. Recommendation of the Supervisory Committee:

The Supervisory Committee recommends that the Director General of OLAF:

(ii) Ensures a full management and reporting system encompassing all complaints about which OLAF has been informed.

OLAF considers that a full management and reporting system encompassing all complaints about which OLAF has been informed is already in place. All complaints are managed by OLAF's Legal Advice Unit.

OLAF will continue reporting to the SC on procedural complaints on an annual basis; this encompasses complaints to the Director-General based on the complaint procedure made public by OLAF as well as any decisions taken on complaints based on Article 90a Staff Regulation. In addition, OLAF will continue to include in the OLAF Report a section on complaints and in its AAR an indicator on the timeliness of OLAF's responses to the European Ombudsman and the EDPS.

2. Other remarks:

In paragraph (19) the SC notes that OLAF reported four complaints in 2015, limiting itself to the complaints received on the basis of the procedure on complaints published on its website. The SC regrets that other complaints are not reported, and mentions in particular complaints to the European Ombudsman, complaints before national authorities, complaints to the mediation service of the European Commission, complaints on personal data processing and "access to the case files".

OLAF shares the view that complaints linked to the protection of fundamental rights and procedural guarantees need to be taken very seriously, and require in-depth examination and attentive follow-up. The complaint procedure made public on the OLAF website offers one path to potential complainants, which exists in addition to other possibilities available to them under EU law. Indeed, a person involved in an OLAF investigation may, depending on the circumstances of the matter at hand and the perceived grievances, bring an action before the EU Courts, file a complaint with the European Ombudsman, or in order to exercise their rights under data protection law specifically, address a complaint to the European Data Protection Supervisor (EDPS). EU staff may also prevail themselves of Article 90a Staff Regulation.

OLAF has, since 2014, provided the SC on an annual basis with information on the complaints received by it under the procedure allowing persons involved in OLAF investigations to alert the Director-General about issues relating to the handling of procedural guarantees. These complaints are most relevant for the mandate of the SC as they are followed up by OLAF itself and are not already taken in hand by an independent body such as the European Ombudsman.

The OLAF Report 2015 offers a broader overview of the activities in this field in its section 2.5 "*Complaints on OLAF's investigative activity*". This section includes information on the four complaints lodged to the Director-General in 2015. In addition, OLAF reports in this section on the complaints received by other bodies of which it is aware.

Furthermore, OLAF's AAR, in line with the standardised structure of this type of report, includes an indicator on the timeliness of OLAF's responses to the European Ombudsman

and the EDPS. The target for such replies is set at 100% timely replies, underlining the importance accorded to the cooperation by the Office with these authorities.

Cases before the EU Courts and inquiries opened by the European Ombudsman are, as a rule, publicly documented and can be accessed via the relevant websites.¹⁵ With regard to cases before the EU Courts, OLAF may or may not have further information internally. In the vast majority of such cases, procedural matters relating to OLAF investigations will be raised at the stage of the further action by an EU institution, body or agency which will be party to the proceedings (however not OLAF).

"Complaints before national authorities" are difficult to monitor or report on. Insofar as an OLAF investigation, as the SC rightly notes, represents a preliminary stage to a possible further action by EU or national authorities including judicial authorities, steps taken by OLAF can be the object of contestation in the framework of these national proceedings (which fall in the monitoring phase for OLAF). Depending on the circumstances, OLAF may or may not be informed of issues raised at this stage and may or may not be in a position to report the information in view of applicable confidentiality requirements. Against this background, a systematic public reporting on such "complaints" is not deemed appropriate as a complete and relevant picture cannot be achieved.

OLAF is not aware of "complaints to the mediation service of the European Commission". In relation to requests for access to file, the OLAF legal framework does not provide persons involved in OLAF investigations a right of access to file. These persons may however request access to OLAF documents transmitted to competent EU or national authorities from those authorities in accordance with their own procedural rules if those authorities intend to adopt an act adversely affecting the person and base their proceedings on elements established during the OLAF investigation.¹⁶ Should a matter of access to file be raised in a complaint to the Director-General of OLAF, this would be dealt with under the complaint procedure and reported to the SC in the context of the annual reporting on such complaints.

As a further remark, under paragraph (20) the Committee confuses its requests. The quotes in this paragraph and the note referenced in footnote 9 do not relate to a request for information concerning complaints, but to a SC request concerning the follow-up to OLAF judicial recommendations and judicial cooperation with national authorities to which OLAF replied on 25 February 2016¹⁷.

¹⁵ See in particular <http://curia.europa.eu/> and <https://www.ombudsman.europa.eu/en/cases/home.faces>.

¹⁶ See in particular Order of the Court of First Instance, *Gómez-Reino v Commission*, T-215/02, p. 65; judgment of the Court of First Instance, *Nikolaou v Commission*, T-259/03, p. 242 and 246; judgment of the Court of First Instance, *Franchet and Byk v Commission*, T-48/05, p. 255 to 258; and judgment of the General Court, *Catinis v Commission*, T-447/11, p. 63 and 64.

¹⁷ OLAF DG note of 25/02/2016 Ares(2016)980350 was in reply to SC note of 10/02/2016 Ares(2016)710596 on Supervisory Committee analysis on the follow-up to OLAF judicial recommendations and judicial co-operation with national authorities

V. Implementation of the Committee's recommendations addressed to OLAF

1. Recommendation of the Supervisory Committee:

The Supervisory Committee recommends that the Director General of OLAF:

(iii) Reports in full on the follow up given to the Committee's recommendations, considering their implementation in agreement with the Committee.

OLAF reports annually to the SC on the implementation of the recommendations. OLAF considers that it is the Director-General's discretion to decide on what to report in the AAR and therefore on the level of detail as regards the follow-up to SC recommendations. This approach is in line with the note of DG BUDG to the Chair of the Committee of 14 March 2016¹⁸.

2. Other remarks:

In paragraph (21) the SC mentions that OLAF has reported in the 2015 AAR on the follow-up of 15 recommendations, while the Committee has issued 26 recommendations. OLAF is committed to report on the follow-up to the SC recommendation on a yearly basis. It has therefore sent to the SC on 15 January 2016¹⁹ its reporting on the implementation of the 15 recommendations received in the year 2015²⁰. The same reporting has been included in the 2015 AAR.

In 2016, OLAF has received 14 recommendations included in three SC Opinions²¹ and has sent to the SC its reporting on their implementation on 16 February 2017²². The reporting on these recommendations will be included in the 2016 AAR.

The SC is of the opinion that the position taken by OLAF as regard the number of implemented recommendations does not correspond to the Committee's understanding. It presents in paragraph (24) the level of implementation as assessed by the Committee. OLAF would point out that the assessment included in paragraph (24) is different from a preliminary assessment communicated by the SC to OLAF in a note of 14 November 2016²³. OLAF has therefore no clear understanding of the Committee's position. OLAF would agree to organise a meeting with the Committee to clarify these matters.

In paragraph (25) the Committee mentions that for future recommendations a formal commitment from OLAF for specific actions would be asked, and only recommendations with such a commitment would be followed-up. OLAF welcomes this approach and would have been in favour of applying it already for the recommendations included in this Opinion on the AAR.

¹⁸ Ares(2016)1280453

¹⁹ Ares(2016)222388

²⁰ The 15 recommendations included in the 2015 AAR were received by OLAF in 2015, with the exception of three recommendations received in 2014 and not reported in the previous reporting exercise: 5 recommendation from Opinion 3/2014 *OLAF's preliminary draft budget for 2015* (Ares(2014)1563337 - 15/05/2014); 5 recommendations from Opinion 4/2014 *Control of the duration of investigations conducted by OLAF* (Ares(2015)1365949 - 27/03/2015); 3 recommendations from Opinion 5/2014 *Statistics on investigative performance of OLAF (part I) - OLAF external reporting on the duration of investigations* (Ares(2015)1451013 - 01/04/2015); 2 recommendations from Opinion 1/2015 *OLAF's preliminary draft budget for 2016* (Ares(2015)2016051 - 12/05/2015).

²¹ SC Opinion 2/2015 *Legality check and review in OLAF* (Ares(2016)167588 - 12/01/2016), SC Opinion 3/2015 *Opinion on the OLAF draft Investigation Policy Priorities (IPPs) for the year 2016* (Ares(2016)1847448 - 19/04/2016) and SC Opinion 1/2016 *OLAF's Preliminary Draft Budget for 2017* (Ares(2016)6937026 - 13/12/2016)

²² Ares(2017)853133

²³ Ares(2016)6405298