



EUROPEAN ANTI-FRAUD OFFICE

The Director-General

Brussels

**NOTE FOR THE ATTENTION OF MR TUOMAS PÖYSTI,  
CHAIRMAN OF THE OLAF SUPERVISORY COMMITTEE**

Via the Secretariat of the Supervisory Committee

**Subject: Supervisory Committee Opinion No 3/2015 on OLAF draft  
Investigation Policy Priorities (IPPs) for the year 2016**

Dear Mr Pöysti,

The Supervisory Committee Opinion 3/2015 on OLAF draft Investigation Policy Priorities (IPPs) was transmitted to the Institutions and published on the Supervisory Committee website on 19 April 2016.

The Supervisory Committee did not follow the procedure set out in the third paragraph of Article 15 (1) of Regulation 883/2013 ("*The Supervisory Committee shall address to the Director-General opinions*"). Therefore I ask the Supervisory Committee to comply with the provisions of Regulation 883/2013 and address all Opinions to me.

You will find OLAF's comments on the Opinion enclosed to this note.

Yours sincerely,

Giovanni Kessler

Encl: OLAF's comments on the SC Opinion 3/2015 OLAF draft Investigation Policy Priorities (IPPs) for the year 2016

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## **OLAF's comments on the Supervisory Committee Opinion No 3/2015 OLAF draft Investigation Policy Priorities (IPPs) for the year 2016**

### **EXECUTIVE SUMMARY:**

- I. OLAF took on board the 2014 recommendation of the Supervisory Committee (SC)<sup>1</sup> and consulted with all Commission services on the substance of the draft IPPs for 2016, including on the reintroduction of financial indicators. The Commission as well as the European Parliament and the Council were consulted, in the framework of the inter-institutional Exchange of Views in September 2015, in which representatives of the SC participated.
- II. Articles 1 to 7 of OLAF's Guidelines on Investigation Procedures (GIP) for OLAF staff, adopted in 2013 after consultation of the SC, focus on case selection. In addition, specific technical guidance has been issued in the internal guidelines on case selection adopted in 2015. These guidelines aim to provide detailed practical guidance to selectors on how to apply the selection principles that are established by Regulation 883/2013 and further described in the GIP. The GIP (Article 5.3) and the guidelines on case selection (point 5) both invite selectors to take the IPPs into account when assessing proportionality.
- III. The Commission procedures for impact assessments and evaluation cannot apply to the establishment of the IPPs. However, OLAF monitors the application of the IPPs internally and will consider how this assessment can be deepened.
- IV. In line with Article 17 (5) of Regulation 883/2013, the IPPs are determined by the Director-General of OLAF under his statutory competence, and therefore an inter-service consultation under Commission rules would appear to be an inappropriate procedure. In any case, a Commission inter-service consultation would never include other institutions or Member State authorities. As per Article 16(2) of Regulation 883/2013, the annual Exchange of Views is the procedure established to consult the IPPs with all the EU institutions.
- V. The feedback received from the Commission's services, including DG TAXUD's concerns, has been clearly understood and reflected in the IPPs for 2016.

*In line with Article 17(5) Regulation No 883/2013 and Article 1 of the Working Arrangements between OLAF and the SC, OLAF forwarded the draft IPPs of the Office for 2016 to the SC on 21 December 2015<sup>2</sup> and invited the SC to comment by 21 January 2016.*

*On 14 January 2016<sup>3</sup>, the SC requested OLAF to provide additional information<sup>4</sup> within two working days. OLAF provided the requested documents on 15 January 2016<sup>5</sup>.*

<sup>1</sup> Recommendations included in *Opinion No 1/2014 on OLAF Investigation Policy Priorities of 6 February 2014*

<sup>2</sup> Ares(2015)5982369 - 21/12/2015

<sup>3</sup> Ares(2016)202120 - 14/01/2016

<sup>4</sup> The full minutes of the FPDNet of 8 July 2015; complete feedback received from the members of the FPDNet following request from OLAF; the original note sent to the FPDNet, ahead of its July 2015 meeting.

<sup>5</sup> Ares(2016)231138 - 15/01/2016.

On 27 January 2016<sup>6</sup>, the SC informed OLAF that it has decided to prepare an Opinion in this regard.

On the basis of the information provided, the SC adopted its draft Opinion ("Opinion N° 1/2016") on 17 February 2016 and sent it to OLAF on 1 March 2016<sup>7</sup> for comments within 10 working days. OLAF replied on 14 March 2016<sup>8</sup> providing limited comments and informing the SC that it had started analysing the draft Opinion, and since this would require a more lengthy consultation across the Office, OLAF would provide its comments once the Opinion had been finalised and adopted by the Committee.

Regrettably the final Opinion ("Opinion N° 3/2015") was not addressed to the Director-General of OLAF, as provided for in Article 15(1) of Regulation 883/2013, and as is usual practice.

OLAF's detailed comments on the Opinion and the recommendations made therein are set out below.

## 1. Introduction

In accordance with Article 5 of Regulation 883/2013, the IPPs are used by OLAF during the selection process, as one of several criteria for deciding on the opening of OLAF's investigations. The IPPs do not aim at excluding those cases that do not fall under their scope, but rather serve as an instrument to prioritise certain incoming information.

The IPPs for 2014, 2015 and 2016 were determined based on an analysis of information resulting from OLAF's investigative activities, an examination of key documents issued by stakeholders (in particular Commission Reports on the Protection of the European Union's financial interests, the European Court of Auditors Annual Reports, and European Parliament Resolutions)<sup>9</sup> and oral and written consultations of OLAF's stakeholders.

### *Application of the IPPs*

The first step in the selection phase, i.e. the phase leading to the Director-General's decision whether or not to open an investigation, is to establish whether OLAF is competent to investigate. Once this is confirmed, the available information is examined in order to determine, in accordance with Article 5 of Regulation 883/2013, whether there is sufficient suspicion that there has been fraud, corruption, any other illegal activity affecting the financial interests of the Union, or serious wrongdoing by EU staff or a member of an institution.

Only after establishing the existence of sufficient suspicion do OLAF selectors proceed to the analysis of the criteria of (i) proportionality, (ii) efficient use of investigative resources

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<sup>6</sup> Ares(2016)446838 - 27/01/2016.

<sup>7</sup> Ares(2016)1049209 - 01/03/2016.

<sup>8</sup> Ares(2016)1281330 - 14/03/2016.

<sup>9</sup> References are included in footnotes on the IPPs, published as part of the OLAF Management Plan, e.g. Commission Reports on the Protection of the European Union's financial interests – Fight against fraud: 2011 (COM(2012) 408 final); 2012 (COM(2013) 548 final); 2013 (COM(2014) 474 final); 2014 (COM(2015) 386); Study financed by the European Commission (OLAF): Identifying and Reducing Corruption in Public Procurement in the EU, 2013; ECA Annual Report concerning the Financial Year 2012 (OJ Reference: 2013/C 331/01, 14.11.2013); ECA Annual Report concerning the Financial Year 2013 (OJ Reference: 2014/C 398/01, 12.11.2014) and ECA Annual Report concerning the Financial Year 2014 (OJ Reference: 2015/C 373/01, 10.11.2015); EP Resolution of 3 July 2013 on the Annual Report 2011 on the protection of the EU's Financial Interests – Fight against fraud (A7-0197/2013 / P7-TA (2013) 0318) para 16-31; EP Resolution, para 36-40. Commission Communication on stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products COM(2013) 324 and Action Plan SWD(2013) 193 and Council conclusions of 10 December 2013 on stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products in the EU (16644/13).

and (iii) subsidiarity (i.e. whether a national body may be better placed to intervene or whether an EU institution, body, office or agency may be better placed to act).

In this phase, they furthermore examine whether the information falls under the IPPs set by OLAF for the year. Should this be the case, a negative consideration in light of proportionality, efficiency or subsidiarity principles would be overturned into a positive decision to open an investigation.

#### *Consultation and input from stakeholders*

In addition to the information provided by the above-mentioned key documents issued by stakeholders, OLAF consulted the Commission services in the FPDNet<sup>10</sup> to provide their feedback on the draft IPPs 2014, 2015 and 2016. Following recommendation 2 of the SC Opinion 01/2014 on the IPPs (*"The Supervisory Committee recommends that the Director General enter into a constructive dialogue with the stakeholders on the determination and implementation of IPPs, in particular with regard to financial indicators and possible follow-up of dismissed cases"*), OLAF in the 2015 consultation exercise on the draft IPPs 2016 explicitly asked in writing whether the network's members had alternative or additional proposals for the future IPPs than those put forward by OLAF. In addition, OLAF asked whether services saw an added value in re-introducing financial indicators in the selection phase. No service expressed itself in favour of reintroducing financial indicators and some explicitly rejected the idea, as they had already done in previous consultation rounds. The OLAF Director-General has also met with Directors-General of spending DGs, to discuss issues related to the IPPs.

More importantly, in accordance with Article 16(2) of Regulation 883/2013, the IPPs were discussed during the Inter-Institutional Exchange of Views on 8 April 2014 and on 28 September 2015, as a main point on the agenda. Representatives of the Commission, Council, European Parliament, as well as the SC and OLAF, were present at this occasion and expressed their views on the issue.

Therefore, OLAF considers that its IPPs for the year 2016 have been determined based on a comprehensive consultation of all stakeholders.

## **2. Replies to the recommendations made by the SC**

- I. *The Supervisory Committee recommends that OLAF determine IPPs, based on an impact assessment, the evaluation of the implementation of previous IPPs, the definition of specific performance indicators and a systematic linkage with EU spending priorities and EU policy priorities in the fight against financial crimes.*

In particular, under paragraphs 16 and 17, the Opinion refers to the Commission's **Better Regulation Package**, adopted in May 2015. Impact assessments and evaluations are indeed tools of the Commission to prepare and define its policies and legislative initiatives. The determination of the IPPs is not a legislative process to which the Better Regulation Package would apply. Furthermore, when determining the IPPs, OLAF's Director-General is exercising his duties related to the investigative function and has therefore to act in complete independence, in line with Article 17(3) of Regulation 883/2013. Therefore, applying Commission policy tools in this context would be inappropriate.

For the same reason, it would also be inappropriate to agree the IPPs with OLAF's stakeholders, as requested under paragraph 14 subpoint 1 of the SC Opinion. Article 17(5)

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<sup>10</sup> The Fraud Prevention Network (FPDNet) is an inter-service working group comprised of anti-fraud contact points in all Commission services and established through the Commission Anti-Fraud Strategy in 2011.

of Regulation 883/2013 is clear about the fact that it is the responsibility of OLAF's Director-General to determine the IPPs, and not a collegial decision of the Commission.

The fact that the Commission's Better Regulation rules cannot apply in this case, does not mean that OLAF does not consult its stakeholders on the content of the IPPs. As already set out in the introduction above, all Commission services were consulted on the draft IPPs for 2016 and their feedback was explicitly requested. This can be seen very clearly from the minutes of the FPDNet, which, in January 2016, were transmitted to the SC at its request, together with the list of participants<sup>11</sup>. On that same occasion, the SC also received the preparatory note that, in July 2015, had been sent to all the members of the FPDNet requesting their feedback. Contrary to what the SC states in its Opinion (paragraph 25) that the consultation was limited to three spending Directorates-General and one agency, **all Commission services were consulted in writing**, and a very large majority also participated in the oral discussion at the FPDNet meeting. Three Directorates-General and one agency chose to reply in writing to OLAF's note after the meeting and to give their opinion on a possible inclusion of the financial thresholds in the future IPPs.

The IPPs 2016 were also thoroughly discussed during the **inter-institutional Exchange of Views** on 28 September 2015 where the Commission, the European Parliament and the Council were consulted and gave their opinions. This is not mentioned in the Opinion of the SC, although representatives of the Committee participated in that meeting. Under paragraph 15 of the Opinion, there is only a statement that: "*As far as the consultation of institutional stakeholders is concerned, OLAF was not able to provide the Committee with any document supporting the consultation of the Institutions*". The SC is well aware, given that it had participated in the Exchange of Views as well as in the technical preparatory meetings that the institutions agreed not to establish any official minutes. The fact that OLAF could not provide such non-existent documents cannot be used to argue that a proper institutional consultation did not take place.

On **substance**, it should be noted that the IPPs follow a risk-based approach where the level of the spending is only one factor to be taken into account. The IPPs therefore do not have any direct link with the Commission's spending priorities although OLAF does give consideration to these spending priorities (e.g. infrastructure network projects) and remains open to assess how these priorities could be further developed. It should also be noted that OLAF cannot circumvent the need to establish sufficient suspicion to open an investigation.

- II. *The Supervisory Committee recommends that OLAF revise its instructions and guidelines to selection officers in order to fully reflect the importance of the IPPs in the case selection process. These revised guidelines should be submitted to the Supervisory Committee, prior to their adoption, in line with the requirements of Article 17(8) of the Regulation.*

OLAF appreciates the positive reaction of the SC to the adoption in 2015 of OLAF internal **guidelines on case selection**. It emphasises, however, that appropriate guidelines for this purpose have been in place at the latest since the entry into force of the GIP on 1 October 2013, which replaced the former Instructions to Staff on Investigative Procedures (ISIP). The GIP was duly consulted with the SC prior to its adoption on 7 February and 5 July 2013. Articles 1 to 7 of the GIP are devoted to treatment of incoming information and to the selection process. Article 5 of the GIP expressly refers to the need to take into account the IPPs in the opinion which serves as a basis for the exercise of the opening discretion. More technical guidance has been given in the guidelines on case selection in 2015. These guidelines refer to IPPs, not only instructing selectors to indicate whether

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<sup>11</sup> Ares(2016)231138 of 15/01/2016.

they are relevant, but also inviting selectors to take these policy considerations into account when assessing proportionality, if applicable (point 5.1.1). OLAF is accordingly committed to systematically reflect in each single selection the importance of the IPPs in the discretionary case selection process.

There is no revision scheduled for these guidelines in the near future. However, if and when the revision of this document takes place the comments of the Committee will be given further consideration.

III. *The Supervisory Committee recommends that OLAF, with the aim of establishing IPPs for 2017, undertake as of now, a complete impact assessment of IPPs for previous years, in consultation with all stakeholders in the Commission, the other Institutions, Member States' authorities concerned and external parties involved. Useful external expertise could be also sought.*

As to the request to establish an impact assessment or an evaluation of IPPs for previous years, reference is made to our reply under recommendation I above as regards the Commission's Better Regulation Package. In short, it would be inappropriate for OLAF to apply any such external procedure meant for legislative initiatives to determine or evaluate its IPPs.

However, the implementation of previous IPPs is already monitored internally. On this basis their relevance in a non-negligible number of opened investigations has been identified. This was considered for the update to the IPPs in 2016. OLAF will nevertheless consider deepening its assessment of the IPPs.

IV. *The Supervisory Committee recommends that OLAF organise an inter-service consultation, in line with Commission procedures, when adopting the IPPs (consultation with all stakeholders in the Commission, the other Institutions, Member States' authorities concerned and external parties involved).*

Just as an impact assessment or evaluation, an inter-service consultation is a Commission tool to prepare its policies, and can therefore not be reconciled with OLAF's independence in investigative matters. Furthermore, it should be noted that an inter-service consultation does not include other institutions or Member States' authorities, as suggested in the recommendation. Nevertheless, OLAF intends to continue its practice of consulting all relevant Commission services in the framework of the FPDNet and the institutions in the framework of the Exchange of Views.

V. *The Supervisory Committee recommends that OLAF clarify the IPPs for 2016 when referring to the illegal manufacturing "of tobacco", in the light of the contribution received from DG TAXUD.*

The SC has received all inputs from the Commission services on the IPPs 2016, including the contribution of DG TAXUD, which proposes to enlarge the scope also to the illegal manufacturing of tobacco. The relevant paragraph in DG TAXUD's reply reads in full as following: "*Concerning IPP 4 «Cases of fraud involving smuggling of cigarettes and tobacco into the EU, in particular via maritime transport and along the EU Eastern border», which we propose to maintain as 2016 priority, we would propose not only to concentrate on cigarette smuggling but also to look at **the illegal manufacturing by following the raw tobacco trail.***" Illegal manufacturing of tobacco within the EU may indeed affect the financial interests of the EU, just as smuggling. It is therefore not clear to OLAF why the Committee comes to the conclusion that "*DG TAXUD [...] does not refer to illegal manufacturing 'of tobacco'*" (paragraph 14, subpoint 4 of the Opinion). OLAF took

the recommendation of DG TAXUD on board and extended the wording of IPP 4 to clarify that the IPP refers not only to cigarette smuggling<sup>12</sup>.

### 3. Other issues to be clarified

Under paragraph 6 of the Opinion, regarding the guidelines on case selection, it should be noted that, as the Committee itself states, the note by the Director-General to the Head of Investigation Selection and Review Unit clearly and unmistakably quotes in that context Article 5(1) of Regulation 883/2013. The reference to "**sufficient information**" is linked to Article 5 of OLAF's Guidelines on Investigative Procedures for OLAF Staff. This is due to the fact that, sufficient suspicion can only be established on the basis of sufficient information. The term "sufficient information" has both a qualitative and a quantitative aspect, contrary to what the Committee seems to assume.

Regarding other concerns raised by the SC in paragraph 14, OLAF would like to remark the following: under subpoint 2, the Committee argues that the protection of "the reputation of the Institution" falls outside of OLAF's remit. However, the contribution from Directorate-General for Employment, Social Affairs and Inclusion that the Committee is referring to, does not envisage the reputation (only) of the Commission (the funds referred to are not managed directly by the Commission but in shared management with the Member States) but, more generally the reputation of the EU which, without doubt, is to be protected by OLAF. In particular, the purpose of the Article 325 TFEU to combat fraud and any other illegal activities affecting the financial interests of the Union does not only aim at safeguarding the EU's money but also protecting its reputation. This is perhaps best exemplified by the internal investigations, which often do not have any significant financial impact, but carry a great symbolic and therefore reputational importance. In this context, it should be noted that the Inter-institutional Agreement of 25 May 1999<sup>13</sup> states that the institutions and agencies "*should entrust to the Office the task of conducting internal administrative investigations with a view to bringing to light serious situations relating to the discharge of professional duties..., **detrimental to the interests of those Communities.***".

Finally, and to avoid any misunderstanding, when referring to any document sent or received, OLAF uses the **transmission date in Ares** as the date of the document. It could be that a certain document was drafted earlier by the sender or read later by the recipient. Only the transmission date in Ares cannot be altered and is easily verifiable by both sender and recipient. The draft IPPs 2016 were transmitted through Ares to the Secretariat of the SC and by email to the SC Chairman on 21 December 2015 (Ares(2015)5982369 - 21/12/2015) and not by "note of 6 January" as mentioned by the SC (paragraph 2).

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<sup>12</sup> IPP 4 reads as follows: *4. Cases of smuggling of tobacco and alcohol into the EU, in particular via maritime transport and along the EU Eastern border; illegal manufacturing of tobacco; and smuggling of counterfeit medicines into the EU.*

<sup>13</sup> Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF), OJ L 136 , 31/05/1999 P. 0015 – 0019.