

SUPERVISORY COMMITTEE

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Opinion No 1/2021

OLAF's recommendations not followed by the relevant authorities

January 2021

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Executive summary

The lifecycle of an OLAF investigation does not end when the final case report (“final report”) is adopted, rather when the relevant authority takes a final decision on OLAF’s recommendation(s).

OLAF’s Supervisory Committee acknowledges that OLAF’s recommendations, especially *financial*¹ and *disciplinary*², are usually followed by the recipients. However, when it comes to recommendations to open a criminal investigation at national level, figures from the last five OLAF annual reports (2013-2018) show that the indictment rate has decreased from 53% to 36%.

To understand better how the recipients of OLAF’s recommendations (EU institutions bodies and agencies, and Member States) followed up on them, the Committee has conducted an analysis of all OLAF recommendations that were not followed by the authorities concerned (from 1 March 2016 to 28 February 2018).

Regarding *judicial* recommendations, the Committee has identified three main weaknesses that could explain the low ratio of indictment recorded in recent years:

1. **OLAF’s current monitoring procedures are unsatisfactory.** OLAF appears to focus more on data and statistics collection than on assisting and accompanying the national authorities in the overall process that follows the final case report. Furthermore, the monitoring tasks fall on OLAF’s investigative units (i.e. OLAF investigators), which do not always possess the necessary monitoring knowledge, thus distracting investigators from their core tasks of carrying out an investigation.
2. Once they have assessed OLAF’s case report, the **relevant authorities rarely conduct further activities**, unless they have already opened a parallel investigation into the same case. Therefore, the quality of the OLAF’s reports, the evidence gathered, and the strength of OLAF’s recommendations are fundamental for assessing the case at national level.
3. When a potential criminal liability is at stake, **OLAF’s investigative activities do not always meet the standards of proof** expected by the recipient authorities to follow up a recommendation.

¹ OLAF only provides the amounts recommended for financial recovery and the financial impact on the EU budget, but not whether these amounts have actually been (partially or fully) recovered, nor the action taken by national authorities in that regard. However, the number of OLAF’s financial recommendations that were not followed, compared with the number of recommendations issued in that same period, remains low (see footnote 80).

² In 63% of OLAF’s disciplinary recommendations issued between January 2016 and December 2018 the competent authority took a decision following a recommendation from OLAF.

To improve this situation, the Supervisory Committee makes a number of recommendations to the Director-General of OLAF:

- **review the current system of monitoring procedures** applied to the entire investigation, by putting in place dedicated follow-up teams of experts in judicial, financial, and disciplinary follow-up issues, thus relieving investigators of this task.
- improve the current reporting to the Committee, by OLAF, of **Recommendations that have not been followed**.
- ensure the **file OLAF forwards to the judicial authorities**:
 - (a) clearly mentions the evidence gathered and the considerations that led to the conclusion that there is a reasonable suspicion that a criminal offence was committed
 - (b) includes an analysis of the national procedural requirements for criminal proceedings, such as: (i) the jurisdiction and territorial competence; (ii) the alleged offence; (iii) the person concerned; (iv) the statute of limitation.
- establish **timely** cooperation with **judicial authorities**.
- **report annually the amounts recovered** following OLAF's financial recommendations.
- guarantee the financial recommendations are in line with the principle of **proportionality**.
- establish uniform and homogenous **administrative and penal standards** to protect the fundamental rights and procedural guarantees of persons concerned, and strengthen the admissibility of evidence.

The Committee trusts that many of the weaknesses highlighted in this Opinion, especially those related to the procedural requirements and rules on evidence under national law, will be addressed once the European Public Prosecutor's Office (EPPO) becomes operational and the relevant investigations are handled directly by the European prosecutors there.

The Committee notes that not all Member States are members of EPPO. Therefore, OLAF should continue improving its monitoring system, and pay special attention in those non-participating Member States.

Introduction

1. The Supervisory Committee of the European Anti-fraud Office (OLAF) devotes special attention in its annual activities reports to the outcome of OLAF's investigations. The follow up by the competent national authorities (e.g. recovering money, prosecution, etc.) on the basis of OLAF's final reports provide useful indications regarding the effectiveness of OLAF's investigative function, and also enable Member States (MS) and EU institutions to better assess the level of protection afforded to the EU's financial interests at national level³.
2. OLAF's investigation of fraud against the EU budget, corruption and serious misconduct within the European institutions, require significant efforts in terms of human, material, and financial resources. If OLAF discovers irregularities or fraud, EU citizens expect OLAF's recommendations to be pursued, fraudsters convicted and the harm to the EU budget rectified.
3. According to the last OLAF annual report⁴, only around 36% of the cases forwarded to national judicial authorities have led to indictments. The indictment rate is continually declining each year. Various stakeholders have repeatedly expressed their concern about the relatively low rate of prosecutions, indictments and convictions following OLAF referrals of final reports to Member States' judicial authorities. The European Commission has also highlighted the need to strengthen the rule of law within the Union *when problematic patterns start to emerge, such as slow and limited follow-up to OLAF final reports*⁵.
4. To increase the effectiveness of the final reports forwarded to the national judicial authorities, OLAF should take the following action:
 - improve its monitoring procedure, by assisting further and accompanying the national authorities during the follow-up process.

³ As Article 325 TFEU states, it is a shared responsibility (Members States and European Union) to *counter fraud and any other illegal activities affecting the financial interests of the Union*.

⁴ See https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf (page 36 and following).

⁵ See Communication from the Commission on "Strengthening the Rule of Law within the Union - A blueprint for action" - 17.7.2019 – COM (2019) 343 final. (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN>), p 15.

- improve the way it collects and assesses evidence valuable for the purposes of a criminal investigation initiated by national authorities.
 - establish timely cooperation with the relevant authorities, so it can take all necessary investigative steps during its investigation and anticipate and address any future adverse issues arising from the criminal procedure at national level.
5. OLAF does not have the power to conduct criminal inquiries, only administrative investigations. If OLAF expects that its investigation should lead to a successful criminal prosecution, then gathering the necessary evidence should be done in a different way than establishing administrative irregularities (the burden of proof has higher standard in criminal proceedings). Although it is not for OLAF to build a strong criminal case for further prosecution in a Member State, the different burden of proof applied in administrative investigations should be reflected clearly in the reports sent to the national authorities.
 6. Work on this Opinion was conducted under the OLAF Regulation 883/2013⁶. However, in making its recommendations, the Committee has taken into account, where relevant, the changes introduced by the new amending OLAF Regulation 2020/2223 that entered into force on 17 January 2021⁷.
 7. The Committee believes that, once the European Public Prosecutor's Office (EPPO) is fully operational, this should go a long way to remedying the above shortcomings, as a number of criminal investigations will be initiated directly by European Prosecutors instead of OLAF. However, since not all Member States will participate in the EPPO, OLAF will need to pay special attention to how its investigations are followed up in those countries.

⁶ Regulation (EU, Euratom) 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, 18.9.2013, p. 1.

⁷ Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, OJ L 437, 28.12.2020, p. 49. Unless otherwise stated in this Opinion, references to the OLAF Regulation refer to the provisions of Regulation 883/2013 not amended by Regulation 2020/2223.

Methodology

8. As a preliminary remark, the Committee wishes to emphasise that “follow-up” as a concept is not defined in the OLAF Regulation. It could be understood in many ways, depending on the institution/body in charge of following up and on the different nature of each recommendation (judicial, financial, and disciplinary).
9. The analysis by the Committee of OLAF recommendations that were not followed is based on OLAF’s own definition of what the term “*recommendation not followed*” implies. A potential reference is OLAF’s own internal guidelines⁸ which lay down how the procedures for the monitoring and assistance activities should be set out.
10. Thus, for OLAF’s **judicial** recommendations, OLAF refers to five stages of implementation, starting from the reporting period when a recommendation is issued, up to the indictment or dismissal stage. According to OLAF’s internal guidelines, when a person is **indicted**, OLAF’s investigation unit *must monitor the progress of the judicial proceedings including any appeal and it must record the final outcome in the monitoring module, and enter the results either as an acquittal or a conviction.* In cases where a person has been **convicted**, OLAF’s investigation unit *must record the details of the final judgment including the length of any sentence and/or the amount of any financial penalty imposed.* This is a wide-ranging responsibility on investigators in trying to collect such data from the national authorities. In particular, OLAF considers that a judicial recommendation is not followed when OLAF receives information that *a decision to dismiss has been taken concerning all of the persons either identified by OLAF or by the competent authorities, without indictment.* In that regard, the Committee notes that an indictment is just one of the possible outcomes of criminal proceedings when assessing whether a recommendation has been followed up.
11. Likewise, five stages are also laid down in OLAF’s guidelines for **disciplinary** recommendations. In particular, a disciplinary recommendation is not followed when OLAF has received information that the *EU disciplinary authority has decided that no case can be made against the official concerned, or where the case is closed following an administrative inquiry, with or without a pre-disciplinary phase.*

⁸ OLAF adopted several internal guidelines on financial (21-12-2016 and 18-07-2017), disciplinary (12-05-2014) and judicial (12-05-2014) monitoring.

12. Regarding the OLAF **financial** recommendations, the five different stages laid down cover the period up until OLAF has received information that the *competent national or EU authorities have decided not to initiate recovery proceedings*, (no recovery stage) or that the *competent national or EU authorities have initiated recovery proceedings* (recovery proceedings stage)⁹.
13. We need to differentiate between defining when an OLAF recommendation is not followed (which is for OLAF to decide), and conducting a follow-up in accordance with the stages defined by OLAF itself. OLAF should be consistent with its own internal rules. The analysis shows that OLAF itself does not always follow up cases as laid down in these rules. With judicial recommendations, OLAF's follow-up stops at the indictment level, and not at the final outcome of the national proceedings, whereas for financial recommendations, OLAF does not collect information on the actual amounts recovered.
14. That said, in December 2019, OLAF set up a **pilot Monitoring Task Force**¹⁰ whose mission is to support the OLAF Director-General in discharging his duties with regard to monitoring OLAF's recommendations and reporting to the Commission and the European Parliament. Moreover, on 16 June 2020, OLAF carried out an internal departmental reorganisation (adopting a new organisation chart), to streamline its activities and adapt to the upcoming start of operations by EPPO. In this new chart, the pilot Task Force became a permanent part of OLAF's structure.
15. The Task Force is expected, in close cooperation and coordination with the Commission and other European institutions, bodies and agencies, to collect information on the implementation of OLAF's financial, judicial, disciplinary and administrative recommendations. It will analyse the results of this monitoring exercise, to gather the intelligence needed for a concrete and effective follow-up on the outcome of OLAF's recommendations.

⁹ Recovery proceedings include:

- (i) recovery of amounts by the Commission via recovery orders issued, offsetting of debts and de-commitment, and recovery by Member States of debts relating to EU funds to be recovered from economic operators (e.g., traditional own resources);
- (ii) amounts charged to the Member States, including debt liability apportionment between the Commission and Member States in certain budget sectors (e.g. agriculture) and financial responsibility decisions taken by the Commission;
- (iii) amounts prevented from being unduly spent or lost;
- (iv) amounts declared irrecoverable (e.g. amounts written off due to bankruptcy or other).

¹⁰ The Task Force is a dedicated team tasked with identifying both specific and systemic issues in the implementation of the EU budget, based on irregularities or fraud discovered by OLAF. This should improve the recovery of misspent EU funds, and reveal systemic obstructions and challenges.

16. The Committee welcomes this initiative and will support the need for additional resources to effectively carry out this task.
17. This Task Force seems at present to focus more on the financial recommendations than the judicial recommendations. According to OLAF, the Task Force is expected to extend its scope to administrative and judicial recommendations in the future. The Committee believes that, as well as collecting and verifying data and statistics, which can help to assess **process**, the Task Force should focus more on assessing **impact**, to identify the reasons why OLAF's recommendations are not yet followed, and provide any assistance needed by the recipient services.
18. This Opinion analyses 46 recommendations (in 43 cases) issued from 1 October 2013 until 13 December 2017, which were not followed by the relevant national authorities and for which OLAF received **replies from these authorities between 1 March 2016 and 28 February 2018**. In May 2019, the Committee asked OLAF for access to the files on the 43 cases (which were reported by OLAF to the Committee in 2017 and 2018)¹¹.
19. Although this Opinion focusses on the 2016-2018 period, the Committee believes that the situation has not materially changed since then. The Committee gave OLAF (in February 2020) the opportunity to provide information on the measures taken to improve the monitoring procedure, and on the ratio of OLAF's recommendations that had not been followed (especially with regard to the judicial recommendations). In November 2020, OLAF was also given the opportunity to comment on this Opinion. The Committee acknowledges OLAF's efforts to improve the follow-up of financial recommendations¹². The Committee invites the OLAF Director-General to improve follow-up for judicial recommendations (i.e. issuing new instructions and/or guidelines on drafting and monitoring judicial recommendations)
20. Finally, the Committee reiterates that its analysis of the decisions taken by the competent judicial authorities on OLAF's recommendations does not question the validity or soundness of those decisions. Rather, by looking into these decisions, the Committee seeks to get a better understanding of the reasons why OLAF's recommendations are not followed up by the national judicial

¹¹ Ref. Ares(2017)4312085 and Ares(2018)4048050.

¹² The *'Instructions on drafting Financial Recommendations and related sections of the Final Report'* issued by OLAF in October 2016 improved the way OLAF's staff drafted and calculated financial recommendations. OLAF's new "Guidelines on Financial Monitoring" (issued in July 2017) tried to shorten and simplify the monitoring of financial recommendations. Both documents are internal and not publicly available. These are good examples of how to improve the quality of financial recommendations. However, for judicial recommendations there is only a guideline from 2014, which has not been updated.

authorities, and where appropriate, to issue recommendations to the OLAF Director-General.

Case management file

21. In October 2016, OLAF's Content Management System (OCM) was brought into production, replacing the previous Case Management System (CMS). The implementation of this tool had a direct impact on the current analysis, because 38 out of 43 cases reviewed were issued before the OCM became operational.
22. The Committee acknowledges that IT changes of such magnitude can and often do adversely affect the management of a case file. The analysis of the 43 cases in question confirms that the transition from the CMS to the OCM had a much higher impact on the overall management of OLAF's cases than anticipated. Not least, the migration process (from CMS to OCM) was not systematically planned, with all case files transferred to a single specific OCM folder without any apparent methodical filing structure (for example, categorised and clearly labelled by activity). This made it very difficult for the Committee to identify and analyse the relevant registered documents.
23. As the OLAF guidelines in monitoring phase state: "*it is essential that OLAF documents are correctly registered otherwise it will not be possible to identify them*"¹³. These guidelines set out the procedures for the monitoring and assistance activities and they envisage also procedures for registering documents and updating the case management tools. Although the OCM became operational in October 2016, the judicial monitoring module (monitoring the follow-up of OLAF recommendations) only came online in August 2019, whereas the financial monitoring module had been operational since November 2018¹⁴. The disciplinary and administrative modules of the OCM are planned for 2021. For more than two years, OLAF had no monitoring module in place. According to OLAF, the project end-date for this will be in 2021 and will also depend on the impact of the new amending OLAF Regulation 2020/2223 on OLAF operational procedures. That said, the Committee acknowledges the more recent efforts and improvements in the OCM made by OLAF, and will encourage **OLAF's Director-General to ensure that by mid 2021 the OCM is fully operational.**

¹³ OLAF adopted several internal guidelines on financial (21-12-2016), disciplinary (12-05-2014) and judicial (12-05-2014) monitoring.

¹⁴ However, the data migration took place in 2019, and the module is not expected to be used until 2020.

OLAF recommendations not followed - in figures

24. The Committee has often expressed the view that the rate of convictions cannot serve as a meaningful benchmark for measuring the effectiveness of (criminal) justice. Nor should OLAF's achievements be measured merely by statistics, as there is not a "right percentage" for indictments. In addition, the number of prosecutions and convictions following OLAF recommendations should be compared with the rate of prosecutions and convictions which follow criminal reports by national administrative authorities. However, as statistics of this kind were not readily available to the Committee, the latter could not make this comparison. Moreover, experience shows that acquittals and dismissals are more frequent in cases of complex economic crimes than in other cases, due to the complexity of the facts, the multiple and sometimes unclear rules, and other aspects that make prosecution and conviction difficult or impossible. So we believe that measuring OLAF's success by reference to the number of indictments may not always be the appropriate method. The very fact that an investigation was initiated at national level – regardless of whether an indictment followed – may in some cases be enough to measure the effectiveness of a judicial recommendation.
25. That said, the analysis of the rate of indictments in recent years could be used to identify certain 'red flags'. As such, the fact that the indictment rate for judicial recommendations has been declining every year, from 53% to 36% (see Table 1), is a cause for concern.

Period	% of Indictment	Source
2007-2014	53%	OLAF annual report ¹⁵
2008-2015	47%	OLAF annual report ¹⁶

¹⁵ OLAF annual report 2014 (Figure 28)
https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_report_2014_en.pdf.

¹⁶ OLAF annual report 2015 (Figure 22)
https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2015_en.pdf.

OLAF recommendations not followed - in figures

2009-2016	44%	OLAF annual report ¹⁷
2010-2017	42%	OLAF annual report ¹⁸
2012-2018	36%	OLAF annual report ¹⁹

Table 1 Indictment rate OLAF's recommendations 2007-2018

26. The latest OLAF annual report²⁰ shows a slightly higher rate of indictment, at 39%. However, this figure is based on OLAF's recommendations issued in the last 5 years and not in the last 7 years as was the case in the table above.
27. In July 2020 the Committee received information about OLAF's judicial and disciplinary recommendations for January to December 2019 that had not been followed. This showed that in just one calendar year (2019), OLAF reported 40 cases of judicial recommendations not being followed-up (no indictment). This is a much higher number than the 15 judicial recommendations not followed-up in 2017 (January to December).
28. For OLAF's disciplinary recommendations, the rate of success is higher. According to OLAF's latest annual report, in around 63% of disciplinary recommendations issued between January 2016 and December 2018, follow-up action was taken by the competent authority²¹.
29. For financial monitoring, OLAF only provides the amounts recommended for financial recovery and the financial impact on the EU budget. So it is not possible, based on data made public by OLAF, to know whether these amounts have been actually (partially or fully) recovered and/or what action national authorities took in that regard. This will be assessed in a specific chapter.

¹⁷ OLAF annual report 2016 (Figure 12)

https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2016_en.pdf

¹⁸ OLAF annual report 2017 (Figure 15)

https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2017_en.pdf

¹⁹ OLAF annual report 2018 (Figure 14)

https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf (page 36 and following).

²⁰ OLAF's annual report 2019 (Figure 7)

https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2019_en.pdf

²¹ "The disciplinary recommendations issued by OLAF concern serious misconduct of EU staff or members of the EU institutions and are directed to the authority having disciplinary powers in the institution concerned. When making such recommendations, OLAF does not specify the type of action that should be taken". See page 45 of the OLAF annual report 2018.

30. In 2015, OLAF conducted an internal analysis entitled ‘*Member States follow-up to OLAF’s judicial recommendations issued between 1 January 2008 and 31 December 2015*’²². The Committee welcomes this kind of analysis, as it can help OLAF learn how to make future recommendations more effective. However, the conclusions in that study regrettably appear not to have led to any further follow-up or had an impact in the way OLAF conducts its investigations.
31. The current analysis is based on 43 cases in which OLAF addressed 46 recommendations to the relevant authorities²³ (37 judicial, 6 financial, and 3 disciplinary). In 34 of these cases the recipients were Member States (16)²⁴. For the rest, 6 OLAF reports were sent to the European Commission and 3 to other EU institutions, bodies, offices or agencies (IBOAs)²⁵. Only 4 of the 16 recipient Member States are currently not participating in EPPO²⁶.
32. According to the information submitted by OLAF to the Committee, the type and frequency of reasons given by the competent authorities for not following up on OLAF’s recommendations could be grouped as follows:

Number	Reason provided
1	Difficult to collect evidence
2	Disproportionality
1	EU contribution could not be established
7	Insufficient evidence
5	Intentionality not proven
10	Lack of evidence
1	Lack of procedural conditions
1	Lack of jurisdiction
11	No criminal offence

²² Not publicly available, ref. Ares(2017)461597).

²³ A single case could include more than one recommendation (e.g. judicial and disciplinary).

²⁴ Austria, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Romania, Slovakia, Spain, The Netherlands, United Kingdom.

²⁵ European Centre for the Development of Vocational Training, the Court of Justice, European Investment Bank.

²⁶ EPPO participants: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Portugal, Romania, Slovakia, Spain, and Slovenia.

OLAF monitoring procedure

3	No legal framework for the recommendations
2	No reason provided
3	No responsibility on the part of the person concerned
2	Open an administrative proceedings and not criminal
1	Responsible [person] not identified
4	Time-barred

Table 2 Reasons given by competent authorities for not following OLAF's recommendations, as reported by OLAF

33. The analysis of the type and frequency of reasons given by the authorities for not following up on OLAF's recommendations in 2019, as reported to the Committee, leads to similar conclusions. The number of cases dismissed due to lack of or insufficient evidence is constantly rising each year (22 cases in 2019). The lack of sufficient evidence and the fact that no criminal offence could be identified (12 cases) continue being the main reasons for dismissing OLAF's recommendations.

OLAF monitoring procedure

34. Once an OLAF investigation has been closed, a final case report is drawn up, under the authority of OLAF's Director-General. Under Article 11 of the OLAF Regulation, this report details the legal basis for the investigation, the procedural steps followed, the facts established and their preliminary classification in law, their estimated financial impact, whether the procedural guarantees were complied with and the conclusions produced by the investigation. The report is accompanied by recommendations by the Director-General of OLAF on whether or not further action should be taken. Where appropriate, the recommendations (i) indicate any disciplinary, administrative, financial and/or judicial²⁷ action by the institutions, bodies, offices and agencies of the EU, and

²⁷ Article 9 of the GIP defines those kind of recommendations in the following way:

"19.6. Where the investigation establishes that a criminal offence may have occurred in a Member State, the investigation directorate shall propose that the Director-General make Recommendations for action to be taken by the **judicial** authorities of the Member States.

by the competent authorities in the Member States concerned, and (ii) specify in particular the estimated amounts to be recovered, as well as the preliminary classification in law of the facts established²⁸.

35. It is important to bear in mind that the way OLAF monitors such recommendations is crucial for their successful implementation. The lifecycle of an investigation does not end when the final case report is adopted. Follow-up steps taken by the recipient of a final case report are as important as OLAF's investigation itself.
36. The monitoring process conducted by OLAF should, as a minimum, cover the following steps:
- (i) follow up progress in implementing the recommendations (i.e., regular contacts with and updates from the relevant authorities);
 - (ii) provide, where needed, assistance to the competent authorities;
 - (iii) duly record the different stages and outcome of the monitoring exercise in OLAF's case management system (OCM).
37. In 2012, following an internal reorganisation, responsibility for monitoring OLAF's recommendations passed to OLAF's investigative units (i.e. OLAF investigators). Previously, the monitoring – of the whole follow-up cycle for a recommendation, until the case was completely closed – had been carried out by specific units made up of prosecutors, judges or experienced officials. The lack of monitoring knowledge on the part of the investigators had already been mentioned in the past by the Committee²⁹.

19.7 Where the investigation establishes that a disciplinary offence may have occurred, the investigation directorate shall propose that the Director-General make Recommendations for **disciplinary** measures to be taken by the relevant EU institution, body, office or agency.

19.8 Where the investigation establishes an amount to be recovered or prevented from being unduly spent, the investigation directorate shall propose that the Director-General make Recommendations for action to be taken by the relevant EU institution, body, office, agency or competent authority of the Member State.

19.9 Where the investigation establishes the need for a case-related administrative action to be taken, the investigation directorate shall propose that the Director-General make Recommendations for **administrative** measures to be taken by the relevant EU institution, body, office or agency³⁰.

²⁸ These requirements remain unchanged under the new OLAF Regulation 2020/2223 (Article 11).

²⁹ See the Supervisory Committee activity report 2012. Page 32.(https://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/annual-reports/scaar_2012_supcom_en.pdf).

38. Given OLAF's current staffing levels³⁰, with fewer investigators handling an increasing number of ongoing investigations, the Committee considers that the investigative units should be relieved of monitoring tasks. The current monitoring system has proved to be inefficient and could distract investigators from the core tasks in carrying out an investigation. Although investigators should continue playing an advisory and supporting role in the follow-up phase (and when a coordination case is opened), monitoring the follow-up of OLAF's judicial, financial and administrative recommendations requires specific knowledge and should be conducted by dedicated teams. The fact that the Task Force Monitoring partially relieves investigators from their monitoring tasks proves that such tasks need to be conducted by experts with different skills and knowledge
39. It was for that reason that in its previous Opinion No 2/2017³¹, the Committee recommended that OLAF, *put in place follow-up teams with experts in judicial follow-up and in checks of evidence gathering*. These teams, part of a single unit, should closely cooperate with the relevant authorities and provide them with the kind of legal or investigative assistance necessary to give effect to OLAF's recommendations. The Committee suggests that OLAF's Director-General consider creating such a unit or teams within the current organisation, so as to increase the effectiveness and visibility of the monitoring tasks. This is a cost-effective measure when compared with the costs of a high number of recommendations not being followed.
40. The Committee acknowledges the initiative taken by the Director-General to set up a Task Force monitoring the follow up to OLAF's recommendations. OLAF has informed the Committee that the Task Force is currently focusing on financial recommendations, but in the future would also cover judicial, administrative and disciplinary recommendations. Given that this Task Force Monitoring could address the above mentioned proposal of having in place "follow up" teams, the Committee would suggest that the Task Force should not only focus on data collection, but also on identifying the reasons for which OLAF's recommendations have not yet been followed, and provide any needed assistance to the recipient services.

³⁰ From 2013 to 2018, the number of OLAF staff decreased from 435 to 389 as a result of cost-saving measures in the Commission budget and the transfer of posts from OLAF to the EPPO. In this regard, see Supervisory Committee Opinion No 1/2018 on OLAF's preliminary draft budget: https://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_olaf_pdb_19072018_adopted.docx.pdf.

³¹ 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).

Recommendation 1:

The Director-General of OLAF should reinforce the existing structure of his Office, including the new Task Force Monitoring, with experts in judicial, financial and disciplinary follow-up.

To encourage competent authorities to cooperate and ensure OLAF's recommendations are followed, the Director General of OLAF should ensure that the above mentioned reinforced structure should be responsible for:

- a) providing the necessary legal or investigative assistance to the relevant authorities;*
- c) maintaining regular contacts with the appropriate EU institutions and national authorities;*
- d) closely monitoring the overall implementation process for OLAF's recommendation by the competent authorities.*

Competent authority reporting to OLAF

41. According to Article 11 of the previous OLAF Regulation, the competent authorities in the Member State concerned had to *'in due time, send to the Office information on action taken'* after the Director-General had sent them his recommendations. The IBOAs were also expected to take such action, in particular of a disciplinary or legal nature, and report on this to OLAF, within a time limit laid down in the relevant recommendations. Mutual agreements between OLAF and some of the IBOAs provide further details on which information has to be provided to OLAF. The new amending OLAF Regulation 2020/2223, strengthens the follow up of OLAF recommendations; thus, regarding recommendations drawn up following external investigations the recipient authorities will now have to report back to: OLAF on any action taken, not in *"due time"* but *"within the time limit laid down in [these] recommendations"*. Likewise, regarding recommendations sent to IBOAs, the new amending OLAF Regulation 2020/2223 also states that IBOAs *"shall take such action, in particular of a disciplinary or legal nature, as the results of the internal investigation warrant, and shall report thereon to the Office, within a time-limit laid down in the recommendations accompanying the report, and, in addition, at the request of the Office."* Finally, Member States may notify to OLAF the relevant national authorities competent to deal with such reports and recommendations³².

42. To streamline and align the way information is provided by the competent national authorities, OLAF has asked national judicial authorities to fill in a template. The template offers different options for why the recommendation

³² See paragraphs 3, 4 and 5 of Article 11 of Regulation 2020/2223.

has been dismissed (i.e., time-barring, lack of evidence, non-priority, etc.). In some of the cases reviewed here, the authorities also attached to the template a copy of their decision and/or provided additional explanations of their follow-up actions³³. The Committee considers that although the template is useful for statistical purposes, it does not provide OLAF with a good understanding of the actions taken by the authorities and the reasons they did not follow up the recommendations.

43. By and large, there are no consistent practices emerging from the obligation on the competent authorities to inform OLAF of how they have followed up on its recommendations. In some Member States there is not even a statutory obligation for prosecutors to provide written reasons for their decision to close an investigation³⁴. Therefore, the current reporting system under Article 11 of the OLAF Regulation is insufficient.
44. The Committee supports any legislative change at both national and EU level which would allow OLAF to receive meaningful and complete information on the actions taken by the competent authorities on its recommendations. OLAF should identify the documents (e.g. copy of the judicial decision) and information needed to follow up on its recommendations.

Recommendation 2:

The Director-General of OLAF should try to strengthen further the obligations on competent authorities to report to OLAF on their actions – especially to inform OLAF of the reasoning behind their decision and forward a copy of the decision itself. Through cooperation with these authorities, the Director-General should ensure that Article 11 of the OLAF Regulation becomes an effective tool for following up OLAF's recommendations.

OLAF reporting to the Committee

45. Under the third paragraph of Article 17(5) of the OLAF Regulation, the OLAF Director-General has an obligation to periodically inform the Committee of cases where his recommendations have not been followed.
46. To fulfil this obligation, the Director-General sends the Committee, once a year, a chart with an overview containing basic information on the follow-up

³³ See Case No 31, where the national authority informed OLAF about different alternatives in case OLAF does not agree with the decision. The Committee welcomes such level of feedback.

³⁴ See Case No 4.

given to OLAF's recommendations³⁵. This type of basic information is not enough for the Committee to carry out an in-depth examination of the reasons why a recommendation is dismissed (OLAF does not give the Committee access to the case file, templates or any justifications provided by the competent authority in the context of its annual reporting to the Committee, but only upon a specific request). However, this does enable the Committee to identify 'red flags', and come to relevant conclusions, which OLAF should carefully consider – as already highlighted by the Committee in its last annual reports. The Committee also welcomes OLAF's decision to adapt the reporting system to the calendar year (January-December) – as requested by the Committee in its 2018 Activity Report³⁶. In addition, OLAF should also inform the Committee on a regular basis, and as soon as it becomes aware, that its recommendations have not been followed, instead of the current practice of informing the Committee only once a year. This would enable the Committee to conduct a timely monitoring of OLAF's investigative function. The planned/upcoming new functionalities in OLAF's case management system (OCM) should make this enhanced reporting practice feasible. The Committee would therefore welcome the addition to the OCM of (i) certain key features in its monitoring modules for recommendations and (ii) a monitoring dashboard for the Committee³⁷.

Recommendation 3:

The Director-General of OLAF should improve the current system for reporting to the Committee, informing it of any decision not followed as soon as OLAF becomes aware of it. This should be made possible thanks to the new automatic reporting possibilities to be built into the OCM.

³⁵ It contains the following information: OLAF case number; the date the recommendation was issued, identification details for the recipient, a short summary of the recommendation, date of the reply stating that the recommendation would not be followed, the reasons given by the authority concerned, and in some cases, additional comments by OLAF.

³⁶ See the Supervisory Committee Activity Report 2018 (footnote 2), paragraph 52.

³⁷ The dashboard is needed by the Committee as an interface enabling it to extract, in a structural way, information from the case file that is useful for the monitoring activity.

Judicial recommendations

47. The figures in Table 1³⁸ show that OLAF's judicial recommendations are less and less aligned with the recipient's final decision. The level of indictment is falling every year, and it can be expected that the final number of convictions would also be even lower³⁹.
48. Apart from the impact that the lack of a strong monitoring procedure has arguably had on those figures (37 of OLAF's 46 judicial recommendations were not followed), this low compliance rate also points to the way in which OLAF arrives at its conclusions and recommendations about potential criminal liability.

Administrative versus criminal investigations: standards on procedural guarantees and admissibility of evidence

49. Article 1.4 of the OLAF Regulation clearly confers on OLAF the power to conduct administrative investigations. But OLAF does not have the power to conduct criminal inquiries. In assessing the facts, OLAF investigators do not seek primarily to establish that a criminal offence was committed or build up a criminal case⁴⁰. OLAF's remit is not to document and prove in its final reports all elements of a crime (*actus reus* and *mens rea*) beyond reasonable doubt, within the meaning of criminal law principles. The Regulation only indirectly tackles the burden of proof that applies to OLAF, by speaking about information forwarded to the competent authorities in the Member States “*giving grounds for suspecting the existence of fraud*”⁴¹, “*facts which could give rise to criminal proceedings*”⁴², or “*suspected fraud, corruption or any other illegal activity*” which may be the subject of a

³⁸ See paragraph 31 above.

³⁹ OLAF's internal guidelines state that the investigation unit should follow up a recommendation as far as the possible conviction of the person indicted. The Committee would thus suggest that OLAF report both the indictment and the possible conviction, as was its practice in the past. See OLAF Annual report 2011, where a detailed table of the judicial outcome is provided from 2007 to 2011 (page 21). https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/olaf_report_2011_en.pdf.

⁴⁰ By building a case, OLAF should put together the set of evidence gathered to prove a criminal offence in the context of a particular criminal procedure, with specific guarantees and rights for all persons concerned.

⁴¹ Article 13 (1) of Regulation No 883/2013.

⁴² Article 11 (5) and Recital 29 of Regulation No 883/2013.

criminal investigation⁴³. Article 11(2) of the former OLAF Regulation provided that final reports constituted admissible evidence in national administrative or judicial proceedings in the same way as national administrative reports, and were “subject to the same evaluation rules” as national administrative reports and had “the same evidentiary value as such reports”. The new amending OLAF Regulation now states that OLAF final reports ‘*shall constitute admissible evidence: (a) in judicial proceedings of a non-criminal nature before national courts and in administrative proceedings in the Member States*’⁴⁴.

50. However, in criminal proceedings opened following OLAF’s investigations there is a higher standard of proof beyond reasonable doubt (especially for the *mens rea*). Therefore, in the final reports, OLAF should duly document the factual circumstances concerning the suspicion of any offence committed.
51. In addition to the standards of proof, OLAF should also apply high standards of procedural guarantees. The need to strengthen the procedural rights and guarantees in the OLAF investigations is discussed in Committee Opinion 2/2017⁴⁵. The Committee believes that the standards for protecting the fundamental rights and procedural guarantees of the persons concerned have a direct influence on the admissibility of evidence in subsequent proceedings brought before national authorities. In the above-mentioned Opinion, the Committee stressed that⁴⁶ *special attention should be paid to avoiding differences in standards, especially if the standards of relevant national proceedings or the standards applied by the EPPO are higher*. Aligning standards (administrative and penal) will also facilitate the transfer of evidence from administrative to criminal proceedings and the transfer of evidence between jurisdictions⁴⁷. The new amending OLAF Regulation 2020/2223 contains a number of provisions which strengthen

⁴³ Recital 34 of the Regulation No 883/2013.

⁴⁴ Article 11.2(b) of the new amending OLAF Regulation 2020/2223, further provides that in criminal proceedings, OLAF final case reports will constitute admissible evidence in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors and be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and have the same evidentiary value as such reports.

⁴⁵ 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). http://europa.eu/supervisory-committee-olaf/sites/default/files/sc_opinion_1_2017_olaf_budget.docx.pdf. See Chapter III.

⁴⁶ See paragraph 33 of Opinion No 2/2017.

⁴⁷ It would not prevent situations in which evidence has been obtained under the law of one Member State, but contrary to the law of another in which the final (or, in the case of OLAF, subsequent) proceedings take place, and where the case is resolved. EPPO will have to handle and get around this kind of issues.

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significantly the level of procedural guarantees⁴⁸. In fact, Article 12e.3 states that when OLAF performs supporting measures requested by the EPPO, the EPPO and OLAF should ensure that the applicable procedural safeguards of Chapter VI of the EPPO Regulation are observed.

52. The analysis of the 46 recommendations not followed shows that the **procedural standards** applied by OLAF and the admissibility of the evidence gathered was not questioned by the judicial authorities concerned. In none of these cases did a national authority signal a breach of the fundamental rights or procedural guarantees as a reason for dismissing the case. Therefore, the Committee believes that the **standards of proof** are the main obstacle OLAF has to overcome if it wants to increase the rate of compliance with its judicial recommendations.
53. Most of the cases show that OLAF has met high investigative standards of proof when it comes to establishing the existence of administrative irregularities. In contrast, the Committee has found weaknesses in the quality and quantity of the evidence provided to the relevant authority when the cases involve a potential criminal liability. It is the responsibility of OLAF (but not exclusively) to gather and provide as much evidence to the authority as is possible, to establish the factual circumstances of the alleged offence.
54. In other words, even if OLAF does not conduct criminal investigations, the Committee believes OLAF should apply high standards of proof in building its case. To that end, it is mainly for the investigators, working under supervision and with the assistance of the proposed follow-up teams (see Recommendation 1 above), to ensure that all the proper legality checks have been carried out, before they send a final report to the authorities⁴⁹.

Early, timely cooperation with national authorities

55. In interviews carried out by the European Court of Auditors (ECA) in four Member States, in the context of its Opinion No 1/2019, national prosecutors

⁴⁸ Reference can be made to the right of access to the final case report by the person concerned in case of a judicial recommendation (Article 9a) and of the setting up of a new complaints mechanism (Article 9b).

⁴⁹ The Investigation Selection and Review Unit of OLAF (Unit 0.1) supports the Director-General on different areas, including the legality check. In particular, Unit 0.1 has to *examine the Final Report together with the proposed Recommendations to ensure the legality of the activities undertaken during the investigation or coordination case, the respect of the rights of the persons concerned and the data protection requirements throughout the investigative procedure, as well as the overall consistency of the conclusions of the investigation. Unit 01 issues an opinion on the Final Report and the proposed Recommendations which is sent to the Director-General.*

indicated that in most cases they had no contact with OLAF before receiving the final report. They also stated that they would prefer to be informed of any suspected criminal offence much earlier than at the end of the OLAF investigation. Such early cooperation would enable them to assist OLAF and, where appropriate, start their own criminal investigation, to avoid cases becoming time-barred⁵⁰. The cases analysed by the Committee show that OLAF's communication with the national judicial authorities is often formal and insufficient. Early contacts (before sending the final case report) between the national authorities and OLAF does not appear to have taken place in most of the cases analysed⁵¹. That means that OLAF had no direct feedback from the judicial authorities about certain investigative steps that could have had an impact later on, in the decision to dismiss the case at judicial level⁵². Establishing such contacts as soon as possible and before the closure of OLAF's investigation would be beneficial for both sides, as they could make the collection of evidence more efficient and more relevant for the national authorities.

56. The Committee has stressed many times before the importance of early and timely cooperation between OLAF and the national authorities⁵³. OLAF's limited powers (compared to those of national authorities) make it difficult in some investigations to obtain conclusive evidence, as in criminal cases. The Committee remains convinced that, to build up a strong criminal case that meets all the procedural requirements for the subsequent criminal proceedings, OLAF and the national authorities should work hand-in-hand from the moment the first suspicion of fraud arises. Responsibility for better cooperation and consultation on the facts rests both with OLAF and the national authorities.
57. Such early cooperation will reduce the number of cases being dismissed due to lack of evidence, time barring or other reasons. Poor understanding of specific national circumstances (together with insufficient early involvement of the national investigation and prosecution authorities) can have various

⁵⁰ European Court of Auditors (ECA), 'Fighting Fraud in EU Spending: Action Needed' Special Report No 1 /2019 (paragraph 98). <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=48858>.

⁵¹ Where OLAF contacted the judicial authorities before sending the final case report, this was because of an ongoing investigation or because the source had also informed the national authorities.

⁵² According to OLAF, its current practice is to contact the national judiciary authority when a parallel judicial procedure exists or might exist, if there are indications of a criminal offence or substantiated findings that a criminal offence may have been committed, and whenever urgent measures in this regard are needed (period of limitation is about to expire, need to safeguard evidence).

⁵³ See the SC's Activity Report 2018, paragraph 56.

consequences: misunderstanding the relevant national legislation⁵⁴, insufficient effort put into the subsequent criminal investigation of complex cross-border cases⁵⁵ or a completely different assessment of the facts⁵⁶.

58. Early cooperation is also a suitable way to solve time-related issues in an investigation. The 46 OLAF recommendations that were not followed do not show that these inconclusive investigations take more time than other OLAF investigations⁵⁷. However, the Committee believes that the 43 cases examined here were in general old cases, or related to old facts⁵⁸. As the ECA has also pointed out, it is not “*necessarily that the time limit for a given case has already expired or is about to expire, but rather that it is already years since the alleged offence was committed*”⁵⁹.
59. The Committee is aware that early and timely cooperation is not a panacea. Even in some cases that benefited from early cooperation⁶⁰ there was no indictment. In those few cases, the work carried out by OLAF should be acknowledged, even if they were ultimately dismissed by the national judicial authorities. That said, the Committee remains fully convinced that early cooperation would increase the ratio of indictments and the efficiency of the investigations.
60. In some cases, timely cooperation could also help avoid unnecessary duplication of investigative activities. For financial recommendations, for example, the Committee found that often the person concerned had to provide the national judicial or administrative authorities with the same documents and statements they had already provided to OLAF. The principles of procedural

⁵⁴ For instance, in Case No 6, when the case was split by the national recipient authorities into separate liable projects, the relevant criminal threshold was then significantly reduced, which led to the national authorities not pursuing the case.

⁵⁵ See Case No 32, where the national authorities most probably did not use all possible means of international cooperation, and took a more passive approach to the investigation, despite the seriousness of the case.

⁵⁶ As in the Case No 28 (which was dismissed by the national authorities after different findings and different evaluations of the facts).

⁵⁷ The average duration of the 43 cases in question (2 years and 6 months) was only few months higher than the average duration of OLAF’s closed investigations, as inferred from OLAF’s annual report for 2018 (Figure 23).

⁵⁸ The total average duration of the investigation in the 43 OLAF inconclusive recommendations was 2 years and 6 months. Adding the time for the steps taken by the judicial authorities, the total average duration (from the date the OLAF case was created until the date the judicial authority confirmed that it would not be acting on the recommendation) was 4 years and 4 months. Taking into account when the alleged offence was committed, the period then becomes even longer.

⁵⁹ ECA Special report 01/2019, op. cit., paragraph 101.

⁶⁰ See for instance, Cases No 26, 36, and 37.

economy and efficiency dictate that investigative steps should not be duplicated unless this is compulsory under the applicable national law.

61. The Committee acknowledges the efforts of the OLAF Director/General⁶¹ to work closely with the judicial authorities in a number of Member States. To build on this, the Committee recommends creating instruments for cooperation not only with Member States but also with non-EU countries and even private bodies⁶². The legally non-binding administrative arrangements may be used to reinforce this kind of cooperation between OLAF and the corresponding national authorities. OLAF should identify those countries where close cooperation is at a premium, due to the number of cases, rate of indictment, level of cooperation and other considerations.

Main reasons for competent authorities not following up OLAF's recommendations

Lacking/insufficient evidence

62. This is by far the main reason provided by the authorities for not following up on OLAF's recommendations (26 out of 43 cases). It is not that evidence gathered by OLAF was not used by the national authorities – rather that evidence was not considered sufficient under national rules on evidence.
63. The Committee's analysis shows that the competent judicial authorities did not, generally⁶³, conduct complementary activities – except for those cases where a parallel national investigation was ongoing. Thus, if we are to make the case for these authorities to take action, the quality of OLAF'S final case reports, the strength of the recommendations they make and the evidence they contain are crucial.
64. In 26 cases dismissed because of lacking/insufficient evidence, the Committee has identified cases where OLAF's findings were very well substantiated⁶⁴. The Committee acknowledges the work done in those cases. Nevertheless, in most

⁶¹ For example the general cooperation mechanisms and contact points set up with the Bulgarian Prosecutor General's Office, and the operational cooperation mechanism agreed with the Hungarian Prosecutor General, referred to in OLAF's 2019 annual report.

⁶² For instance, in December 2012 OLAF signed a Memorandum of Understanding with the European Communities Trademark Association (ECTA).

⁶³ There are good exceptions, see Cases No 31 and 7.

⁶⁴ See Cases No 5, 26, 27, 32, 37 and 40. In Case No 34, the national prosecutor recognised that the evidence of wrongdoing was sufficient, but stated that it would have been excessively difficult to collect evidence of the *mens rea*.

of them, the evidence still did not meet the minimum necessary to indict the person concerned. In the Committee's opinion, if OLAF had had in place proper follow-up teams, it could have known in advance that its reports, in some cases, fell short of the minimum burden of proof for indictment.

65. Incomplete facts, circumstances and evidence, especially missing comments by the persons concerned or lack of evidence which could be gathered only by coercive measures, may lead national authorities to conclude early that OLAF's suspicion of fraud is not proven. For example, in several cases⁶⁵ administrative irregularities are automatically qualified by OLAF as "criminal" in nature, without rigorously substantiating the objective and subjective elements of the alleged crime. In national criminal proceedings, the burden of proof to be fulfilled by prosecutors is normally "beyond reasonable doubt", a standard higher than the one used by OLAF in some cases ("balance of probabilities"⁶⁶).
66. In one case, the Committee found that the facts determined by the recipient authorities were different from those established by OLAF⁶⁷. In two cases, financial discrepancies in the relevant documents were found by OLAF, but no further steps were then taken to identify the author, origin and actual users of these documents⁶⁸. In other cases, although recurrent patterns of irregularities are found (manipulation of tender procedures), OLAF does not then try to establish the subjective elements necessary for a finding of potential criminal liability by the person concerned under national law⁶⁹.
67. For these reasons the Committee will suggest that OLAF (its investigative and review units) strengthen and further improve the quality of the evidence gathered regarding possible criminal liability, by:
 - 1 sending the judicial authorities all the relevant annexes of the final case report, including (if necessary) the original copies of the documents

⁶⁵ See Cases No 8, 11 and 15.

⁶⁶ See Case No 31. The prosecutor dismissed the case because of insufficient evidence. After a thorough investigation he called into question all four legal grounds for OLAF's findings. A comparison of the conclusions by OLAF and those of the national prosecutors shows how a more criminal-law-focused investigation could change the scope and evaluation of the evidence. In this case OLAF opposed the prosecutor's conclusions, claiming that its facts (conclusions) were based "on the balance of probabilities". So in this case OLAF had clearly disregarded the burden of proof applied in criminal proceedings.

⁶⁷ Case No 28.

⁶⁸ Cases No 6 or 41.

⁶⁹ See Cases No 13, 14 or 16.

- gathered (or, failing that, explaining why the originals could not be obtained)⁷⁰,
- 2 fully documenting the factual circumstances related to the intention to commit a crime (*mens rea*) and the objective element of a crime committed (*actus reus*),
 - 3 including in the final case report a sufficiently detailed analysis of the evidence gathered and an explanation of how this evidence supports the conclusion that a specific person (may have) committed a specific criminal offence (according to the law of the Member State concerned)⁷¹.

No criminal offence

68. The number of cases dismissed by the national authorities because no criminal offence was found is high (11 of the 43 OLAF recommendations that were not followed). In two cases, OLAF conducted a thorough and rigorous investigation⁷². However, the competent authorities dismissed the cases without providing a clear reason for doing so, other than that there was “no criminal offence”.
69. In the rest of the cases, as pointed out above, OLAF failed to build a case for potential criminal liability (compared to the well substantiated case it was able to make for administrative irregularities⁷³). In some cases, the facts established did not constitute a criminal offence, as the amount concerned was below the limit required by national law for a criminal offence⁷⁴. In one case, the actions committed by the person concerned (active corruption) did not constitute a crime in the Member State concerned⁷⁵. In another case, the facts under investigation were old and therefore could not be taken into account as the basis for a criminal investigation⁷⁶. In these cases, the different interpretation of EU and national law by OLAF and the national authorities had an impact. Better

⁷⁰ Cases No 5 and 22.

⁷¹ Case No 28 is a good example, as it includes in its annexes a document named “detailed evidence”, which should be part of all OLAF reports. This annex included details of the suspected irregularities and their links with the evidence collected.

⁷² Cases No 32 and 35.

⁷³ Cases No 7, 15, 29, 38 and 39.

⁷⁴ Cases No 6, 29 and 30.

⁷⁵ Case No 3.

⁷⁶ Case No 39.

knowledge of the national law and closer cooperation could ensure that the findings of an investigation are better aligned with the requirements of national law.

Statute of limitation

70. Across the EU, statutes of limitation or prescription for criminal proceedings periods vary widely (with respect to the time limits, the circumstances that interrupt or suspend the limitation period, the relative or absolute nature of the limitation period⁷⁷, or the start date of continuous crimes)⁷⁸. This increases the difficulties for OLAF investigators, who need to define the potential criminal infringement and the applicable statute of limitation.
71. To overcome the risk of a statute limitation, both OLAF and the national authorities should look for a system of mutual cooperation which would prevent time-barring. This would also improve the quality of OLAF reports by focusing the investigation on particular elements of an alleged crime.
72. In 5 out of the 43 cases analysed by the Committee, the statute of limitation was reported by the recipient national authority as the reason for not following OLAF's recommendations. OLAF conducted an assessment of whether the case was time-barred in 4 of those 5 cases⁷⁹.
73. In 3 of these time-barred cases, parallel investigations were conducted by OLAF and the judicial authorities. Although this cooperation did not produce the desired outcome in these cases, the Committee strongly believes that early cooperation is a helpful mechanism for avoiding situations where time-barred considerations lead to a case being dismissed. It could, for example, be useful to hold bilateral or ad hoc meetings in specific cases, to prioritise an ongoing investigation which may become time-barred at national level.
74. The period of time for which a legal action can be brought before a national court normally starts the moment a crime is committed or completed. OLAF

⁷⁷ Relative statute is the maximum period within which a criminal action can be brought against an alleged offender, independent of the causes of suspension and interruption. Absolute statute of limitation is the maximum period including the causes of suspension and interruption.

⁷⁸ For an analysis of the impact of statutes of limitation in cases affecting EU financial interest, see: <https://www.transparency.it/impact-of-statutes-of-limitations-in-corruption-cases-affecting-eu-financial-interests/>.

⁷⁹ A good example of assessment is Case No 42. The investigators provided a detailed legal assessment of the statute of limitation. In Case No 25, it was even mentioned that *the wrongdoings were committed in 2010 and it is probable that they are already time-barred*. In Case No 37, OLAF conducted a thorough investigation of the irregularities and fraud committed. However, there was no assessment of possible time-barring issues.

should pay special attention to the duration of its investigations, based on this date. Investigators should also take into account, according to the national law, the grounds for suspending, interrupting or extending this period. OLAF's final case reports and OLAF investigations do not, in themselves, constitute grounds for suspension, interruption or extension. OLAF should develop mechanisms and procedures to deal effectively with the applicable statutes of limitation in the Member States. The Committee recalls that “18 months before expiration of the statutory limitation period, OLAF should send an interim report to the authorities of respective Member States. The form and content of the interim report would be equivalent to the final report and it would not contain recommendations”⁸⁰. The Committee notes that in the past, OLAF envisaged sending to the competent authorities such an interim report during the course of an investigation when it was clear that a criminal offence may have been committed.

75. The analysis of the 5 time-barred cases also shows that in 4 of them it took more than 7 years between the time the first crime was committed and the moment OLAF adopted its final case report⁸¹. Although OLAF strives to ensure that an investigation does not last longer than necessary, it should pay attention to the time elapsed since a crime was first committed.
76. Having said that, the Committee finds that the financial impact in those 5 cases was limited. In 2 of them the financial recommendations (recovery of money) were implemented, whereas in 1 case no more funds were paid to the recipients. In the remaining 2 cases, however, it was not possible for the Committee to identify the current status, as no information was found in the case files.

Procedural grounds

77. Only in few cases (3 out of 43) did the judicial authority justify the dismissal of an OLAF case on procedural grounds, and even then, this was not the only reason. The Committee acknowledges the quality of those 3 investigations in terms of the administrative standards met⁸². However, it notes that all of them

⁸⁰ See Opinion 2/2017, page 18.

⁸¹ See Case No 36, which was created in 2010 and completed in 2015, while the facts referred to an EU project running for an initial period 2000-2007. For the subsequent period 2007-2013, OLAF decided not to carry out an investigation but to wait until March 2017 when the Member State where the project was located had to provide to the Commission the final report of the financed project. However in such cases, there is a clear risk that any irregularity found after the investigation is completed would be time-barred.

⁸² See Case No 7, where OLAF investigators conducted an exhaustive investigation to establish the alleged irregularity.

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lack proper analysis from the point of view of a potential criminal offence (i.e. territorial competence, attribution of a crime to the person concerned).

78. This raises the question of whether OLAF investigators and the review unit should also examine the procedural aspects under national law when carrying out an investigation. In the Committee's view it should ultimately be for OLAF's Investigation Selection and Review Unit (Unit 0.1) to review the legality, necessity and proportionality of the investigation⁸³.

Recommendation 4:

When the investigation identifies a potential criminal offence, the Director-General of OLAF should ensure that the investigators and OLAF's review unit conduct a thorough analysis of the national procedural requirements for criminal proceedings. This analysis should, as a minimum, include consideration of (i) jurisdiction and territorial competence; (ii) the objective element of a crime committed (actus reus); (iii) the intention to commit a crime (mens rea); and (iv) the statute of limitation.

In particular, the Committee recommends that the Director-General:

*A- ensures this analysis is part of the **workforms** used by investigators when preparing the final case reports;*

*B- promotes **early cooperation** with the judicial authorities in the Member States concerned and avoids the duplication of investigative activities;*

*C- sends, where feasible, an **interim report** to the authorities in the Member State concerned 18 months before the statutory limitation period expires. This interim report would be equivalent to the final report and would not contain any recommendations; if OLAF believes that such a report cannot be sent before the statutory limitation expires, this should be justified in the case file*

*D- ensures that the case file contains an analysis of any potential **statute of limitation**, carried out as early as possible once the relevant facts have been ascertained (ideally at the moment a likely criminal offence is identified);*

*E- intensifies cooperation and communication with those national authorities where OLAF's final case reports are **systematically dismissed** on procedural grounds or because the evidence gathered is considered insufficient. Where necessary, OLAF should make proposals for legislative changes to address these issues.*

⁸³ Article 20 and 21 of the GIP.

Financial recommendations

79. The Committee's analysis included 6 OLAF financial recommendations that were not followed by the competent authority. Looking at the number of the financial recommendations issued by OLAF in the period covered by this Opinion⁸⁴, the Committee notes that, in general, OLAF's financial recommendations are always followed. However, as the European Court of Auditors has recently noted, in a significant proportion of cases the amount recovered is considerably lower than that recommended by OLAF⁸⁵.
80. OLAF does not collect information of the actual amounts recovered, arguing that the recovery process lies outside its remit. The Committee does not find this convincing. This is also against OLAF's internal guidelines on financial monitoring (Article 3.4). Thus the Committee welcomes the fact that OLAF has recently changed its practice and now asks the spending authorities to provide the relevant information.
81. The actual amounts recovered by the competent authorities⁸⁶ are key indicators of OLAF's efficiency, and they should always be made public as a matter of transparency. Therefore, OLAF should publish information not only on the number of financial recommendations issued, but also the amount of money recovered.
82. The analysis of the 6 financial recommendations which were not followed shows that the existing good level of collaboration between OLAF and the recipients of its recommendations (IBOAs) could still be further improved. OLAF received a reasoned explanation from the IBOAs in all 6 cases.

⁸⁴ 209 in 2016, 195 in 2017 and 168 in 2018. See Figure 24 of the 2018 OLAF annual report.

⁸⁵ The report from the ECA shows that in 59 of 150 cases where OLAF had issued financial recommendations, the amount recovered was 70% or lower than OLAF's recommendation. In the same report ECA also found that in 58% of the recommendations issued by OLAF to DG DEVCO, the latter did not recover the money, either *because there was no legal basis for doing so or because it decided against issuing a recovery order*.

⁸⁶ The recommended amount of money to be recovered is also a key element to be taken into consideration, as there are several scenarios (the administrative procedure is suspended because of an ongoing criminal procedure, the person suspected of fraud liquidates or dissolves the company under investigation, etc.). Such events do not and should not call into question the work done by OLAF.

83. In some cases, the IBOAs have a different interpretation of the applicable financial rules⁸⁷ when it comes to the recovery process. When issuing a recovery order, the IBOAs normally take into account several circumstances (the impact of the recovery on the national budget, political considerations, the time elapsed from when facts took place, “operational inefficiencies”, etc.) which may lead the IBOA concerned to order the recovery of an amount which is lower than that recommended by OLAF. In that regard, the Committee considers it important that OLAF and the competent IBOA cooperate closely, before OLAF adopts its final report, to ensure as much as possible that a well conducted OLAF investigation into financial irregularities receives the proper follow-up⁸⁸. According to OLAF, internal measures were adopted in 2018 to ensure proper and early communication between OLAF’s investigative units and the recipients of the financial recommendations. The Committee welcomes these measures, which do not affect OLAF’s independence, and indeed ensure a more efficient investigation process.
84. The reasons provided by the competent IBOA in the 6 dismissed cases related to (i) proportionality, (ii) the impossibility of determining the EU contribution, (iii) lack of a legal basis for the recommendation and (iv) lack of evidence.
85. In 3 cases⁸⁹, the authority concerned stated that it had no legal basis to impose administrative sanctions. The Committee is aware that EU funds are governed by many specific requirements and contractual/legal frameworks, which in some cases may affect the EU’s ability to impose administrative or financial sanctions (e.g. projects implemented outside of the EU). This raises questions (at least in those cases) about OLAF’s understanding of the applicable EU and international legislation. In fact, in 2 of these cases the Committee finds that OLAF failed to carry out a proper legal analysis of the facts⁹⁰.

⁸⁷ Regulation (EU, Euratom) 2018/1046 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1046> repealing Regulation (EU, Euratom) No 966/2012 (2012 Financial Regulation) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R0966>, the one in force at the time the 43 recommendations that were not followed were issued.

⁸⁸ Cases No 3, 20 and 43.

⁸⁹ Cases No 17, 18 and 19.

⁹⁰ Cases No 18 and 19. In those 2 cases, it should have been clear from the documents at OLAF’s disposal that neither the contractual nor the relevant legal provisions offered the possibility of the IBOA imposing administrative or financial penalties. Even when that possibility was introduced in the EU financial rules, the right to impose such administrative penalties was limited to the contracting authority, and not open to the EU.

86. Proportionality is also mentioned in 2 cases as the reason for not following up on OLAF's recommendations. Proportionality is a general principle of EU law⁹¹, and OLAF should always consider this principle when imposing a financial penalty or granting an exclusion in a specific case. For instance, when OLAF recommends to recover the full amount because of specific irregularities committed within an EU funded project, without however calling into question the successful implementation of the project itself⁹², the recovery in question is clearly not consistent with the principle of proportionality. The full recovery of a project should always be proportional to the irregularities committed. OLAF, as mentioned in the preceding paragraph, should also pay particular attention to whether the applicable contractual/legal framework allows these kinds of measures to be imposed.

Recommendation 5:

The Director-General of OLAF should also provide information in OLAF's annual report about the real outcome of the financial recommendations and of the amounts of money actually recovered by the competent authority.

The Director General of OLAF should also ensure, through timely cooperation with the IBOAs, that the financial recommendations issued are in line with the applicable legal and contractual framework and comply with the principle of proportionality.

Disciplinary recommendations

87. According to the statistics presented by OLAF in its last annual report, in around 63% of OLAF disciplinary recommendations issued between January 2016 and December 2018 a “*case was made*” by the recipient “appointing authority” following a recommendation by OLAF. This ratio shows that in most of these cases the actions taken by the appointing authority were in line with OLAF's disciplinary recommendations.

⁹¹ See Article 5(4) of the TEU: Under the principle of proportionality, the content and form of a Union action must not exceed what is necessary to achieve the objectives of the Treaty.

⁹² See Case No 19. On the contrary, in Case No 35 the recommended recovery of the total amount of the funded project was fully justified in the final case report.

Administrative recommendations

88. In only 3 of the 43 cases did the appointing authority not follow OLAF's disciplinary recommendation. The Committee has not found any systemic problems in this area.
89. However, in one case the appointing authority closed the disciplinary procedure without providing any justification⁹³. The Committee considers that a lack of proper information from the appointing authority may have an impact on OLAF's ability to accurately monitor its recommendations. Moreover, Article 11.4 of the OLAF Regulation clearly imposes a reporting duty on IBOAs. In that regard, the Committee's view is that informing OLAF only of the outcome of any disciplinary decision, without providing any reasons for it, is not in line with the spirit of the OLAF Regulation.
90. The Committee notes that in all 3 cases analysed here, the facts giving rise to a disciplinary assessment were committed more than 5 years before the appointing authority initiated a disciplinary procedure.
91. In one case⁹⁴, although OLAF found that a former official had failed to comply with his obligations under the Staff Regulations, the appointing authority, an EU agency, lacked the technical capacity to carry out a disciplinary procedure. As result, an external lawyer was hired, who concluded that there were no grounds to open a disciplinary procedure. The Committee's view is that IBOAs should avoid externalising the administrative procedure to lawyers and law firms, which may not be familiar with EU disciplinary matters. This practice could lead to OLAF recommendations being wrongly dismissed.

Administrative recommendations

92. In its annual reports OLAF provides an overview of the different recommendations issued in previous years (judicial, financial, disciplinary and administrative). In 2016, OLAF issued 32 administrative recommendations and in 2017 it issued 24⁹⁵. However, OLAF's annual reports provide no information on the follow-up actions by the recipient authorities, nor does OLAF's Director-

⁹³ Case No 1.

⁹⁴ Case No 21.

⁹⁵ See figure 25 in the 2018 OLAF annual report. https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf.

General report to the Committee information regarding compliance by the competent authorities with administrative recommendations.

93. Article 17.5 of the OLAF Regulation requires the OLAF Director-General to keep the Committee periodically informed of cases in which his recommendations *'have not been followed'*. The OLAF Regulation does not distinguish between the different types of OLAF recommendation (judicial, financial or disciplinary).
94. Although in the past OLAF did not monitor the outcome of its administrative recommendations, it now plans, by 2021, to include in its case management system (OCM) a specific module to monitor its “administrative recommendations”. The Committee welcomes this initiative as a way to increase transparency and make these recommendations more effective.
95. In many cases, OLAF administrative recommendations identify weaknesses or gaps in the relevant administrative procedures that can have a direct impact on EU financial interests and OLAF’s investigative work. The Committee supports the analysis and work carried out by OLAF in this field.

Recommendation 6:

The Director-General of OLAF should inform the Committee of all the administrative recommendations which have not been followed by the authority concerned. The Director-General of OLAF should ensure that the new case management system will enable compliance with these recommendations to be monitored.

Impact of creating the EPPO

96. The European Public Prosecutor's Office (EPPO)⁹⁶ is a decentralised, independent EU prosecution office. It has the power to investigate, prosecute and bring to judgment crimes against the EU's financial interests, as defined by the Directive on the Protection of Financial Interests of the Union (PIF Directive), revised in 2017. Through its network of Delegated European Prosecutors in the Member States, the EPPO will be embedded in, and interact with, national criminal justice systems. Prosecuted by the EPPO, crimes under the PIF directive will be adjudicated by national judges. The proposed new OLAF Regulation, currently under revision, will regulate and define the different aspects of cooperation between OLAF and EPPO, to ensure their respective mandates are properly coordinated and avoid duplication.
97. Many cases which, to date, have fallen under OLAF's remit will be dealt with by EPPO. As a result, the need to transfer evidence from OLAF's administrative investigation into the national criminal proceedings will disappear except in cases where there is support or complementary action by OLAF, where information and evidence may be exchanged.
98. OLAF has the duty to report to the EPPO any criminal conduct in respect of which it could exercise its powers⁹⁷. This duty also applies to OLAF investigations in progress. The EPPO will then have to decide whether or not to take up such cases⁹⁸ and if it decides to do so, OLAF will not continue with its administrative investigation⁹⁹. All currently open OLAF investigations taken up by EPPO will be transferred into the EPPO investigations and dealt with under the EPPO regulation and the national rules on criminal procedure. The EPPO (and, subsequently, the national courts) will have to review the evidence gathered by OLAF and decide on its admissibility. In such cases, the new amending OLAF Regulation 2020/2223 provides that in criminal proceedings in the Member State concerned, OLAF reports will constitute admissible

⁹⁶ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), OJ L 283, 31.10.2017, p. 1 at <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>.

⁹⁷ Article 24 (1) of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), OJ L 283, 31.10.2017, pp. 1–71.

⁹⁸ Article 27 of Regulation No 2017/1939.

⁹⁹ This interpretation seems to be in line with the ratio in Article 101 paragraph 2 of Regulation No 2017/1939.

evidence in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors and will have the same evidentiary value as such reports (Article 11.2b).

99. The EPPO Regulation has brought about a completely new situation - the possibility for the EPPO to ask OLAF to perform specific actions, especially to conduct administrative investigations¹⁰⁰. Although such a request would come from a prosecution body, originate in criminal proceedings and be for the purposes of collecting and giving evidence in those proceedings, OLAF's investigative actions will be under the direct supervision of EPPO through its Delegated European Prosecutors. Moreover, it will not be possible for the defendants to rely on the procedural rights and guarantees available in criminal proceedings¹⁰¹ during the "administrative actions" performed by OLAF. This may run the risk that evidence gathered by OLAF is subsequently declared inadmissible in the trial, if the procedural guarantees and rights of defence of those under investigation were not taken into account¹⁰².
100. In extreme cases, EPPO may ask OLAF to conduct an administrative investigation in a Member State which is not participating in EPPO, or even in a non-EU country. This can have negative consequences in criminal trials: bypassing the procedures for international legal assistance in criminal matters, the rights of the defence and the clearly higher standard of procedural rights and guarantees for criminal proceedings may lead to evidence being devalued and ruled inadmissible, and failure to prosecute¹⁰³. In any case, the new amending OLAF Regulation 2020/2223 foresees that when OLAF performs support measures at the request of EPPO, the EPPO and OLAF should cooperate to ensure that the procedural guarantees of the EPPO regulation are observed. This will mitigate the above mentioned risk.
101. The Committee believes that the fundamental rights and guarantees should be specified and reflected in specific procedural measures, in the same way as in investigations led by the EPPO, and in line with Chapter VI (procedural safeguards) and Chapter VIII (data protection) of the EPPO Regulation. Adopting the EPPO standard for procedural safeguards would also help disperse doubts about the admissibility or value of the evidence gathered. This

¹⁰⁰ Article 101 (3) of Regulation No 2017/1939.

¹⁰¹ See Article 41 of Regulation No 2017/1939.

¹⁰² See also: P. Palcu, "The Warranty of The Right to Defense Under an Operating European Department of Public Prosecution", (2017) 19 Journal of legal studies, DOI: 10.1515/jles-2017-0009, 122–134.

¹⁰³ See P. Klement, „OLAF at the Gates of Criminal Law“, *Eurcrim* (2017), 199.

would not impede OLAF in any way in the independent exercise of its mission, but would add value to its final reports and the accompanying evidence.

102. OLAF will be obliged to report to the EPPO – *without undue delay* – any criminal conduct that falls under EPPO’s remit¹⁰⁴. This will resolve one of the most critical issue identified in this Opinion, namely timely cooperation between OLAF and the judicial authorities and the timely launching of an investigation.
 103. Finally, the Committee considers that EPPO will be able to address some of the issues identified by the recipients of OLAF recommendations, in particular those related to “procedural reasons”, “statute of limitation”, or “insufficient evidence”¹⁰⁵. However, the case remains that for the non-participating EPPO countries, OLAF should continue its efforts to improve the ratio of indictment and the follow-up accorded to its recommendations.
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¹⁰⁴ Article 24 of the EPPO Regulation.

¹⁰⁵ Cases No 5, 22, 26, 27, 28, 32, 34, 37 and 40.

Annex I. List of abbreviations and acronyms

EC.....	European Commission
ECA.....	European Court of Auditors
EP.....	European Parliament
EPPO.....	European Public Prosecutor's Office
IBOAs.....	EU institutions, bodies, offices or agencies
Unit 0.1.....	OLAF Investigation Selection and Review Unit
OLAF.....	European Anti-fraud Office
SC	OLAF Supervisory Committee
MS	Member States
OCM	OLAF Content Management
CMS.....	Case Management System

List of 43 OLAF cases analysed under Opinion 1/2021

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