

OLAF's reply to the Supervisory Committee Opinion No 5/2021 on OLAF investigations lasting more than 36 months in 2019 - corrigendum

A. BACKGROUND

On 12 June 2020¹, OLAF granted to the Supervisory Committee (SC) access to 40 case files concerning investigations lasting more than 36 months, in accordance with Articles 7(8) and 15(1) of Regulation (EU) No 883/2013 (hereinafter, 'OLAF Regulation').

On 11 December 2020, OLAF received a request for clarification² from the SC Secretariat, which consisted of ten general questions and a set of case-specific questions. General questions referred to OLAF's internal control of the duration of investigations, deferral decisions under Article 4(6) of the OLAF Regulation, initial working/investigation plan, operational priority and handover notes. Case-specific questions sought an explanation for certain longer breaks during the lifecycle of investigations. OLAF's reply³ was transmitted to the SC on 18 February 2021.

On 26 April 2021, OLAF provided, during a follow-up technical meeting between OLAF staff and SC Secretariat, further clarifications regarding two specific cases (20 and 22), the internal procedure followed by OLAF in case of deferral of the rights provided for in Article 9(3) and (4) of the OLAF Regulation and the internal procedure followed by OLAF to grant the status of "operational priority" to a case.

On 22 October 2021, the SC provided its draft Opinion 5/2021 on 40 cases lasting more than 36 months in 2019 to OLAF, for comments⁴.

On 15 November 2021, a technical meeting between the SC Secretariat and the OLAF staff took place to discuss OLAF's comments to the SC draft Opinion.

On 17 November 2021, OLAF provided its comments to the SC's draft Opinion 5/2021⁵.

In December 2021, the SC adopted its final Opinion No 5/2021.

B. GENERAL REMARKS

OLAF takes note of the SC's Opinion *on OLAF investigations lasting more than 36 months in 2019*. OLAF is fully committed to implement, to the extent possible, the Committee's recommendations with a view to shortening the duration of investigations in the future.

Before providing specific remarks on the SC's conclusions and recommendations set out in the Opinion No 5/2021, OLAF would like to, in particular, welcome the following statements:

- The SC's **positive acknowledgment of progress** made concerning the information provided by OLAF in the **12-month reports (point 27)**. OLAF also trusts that the new Working Arrangements agreed with the SC and signed on 21 October 2021 and the access

¹ Ref. Ares(2020)3063059

² Ref. Ares(2020)7542544

³ Ref. Ares(2021)1336959

⁴ Ref. Ares(2021)6526750

⁵ Ref. Ares (2021)7064881

provided to the SC to information necessary for it to carry out its monitoring tasks will significantly improve the ability of the SC to fulfil its supervisory role.

- The SC's **positive findings in relation to 28 out of 40 cases**, in which the SC has found that the duration of the investigations was proportionate to their complexity and circumstances (**points 85 to 90**). OLAF also notes the SC's findings in relation to the other cases, which raised concerns for the SC.
- The SC's **positive assessment of the procedures put in place by OLAF to ensure compliance with the procedural guarantees** set out in Article 9(3) and (4) of the OLAF Regulation, and the SC's statements that these procedures provide the tools or sufficient guarantees to protect the fundamental rights of the persons under investigations. It also welcomes the SC's conclusion in **point 132** of the Opinion No 5/2021 that, in the cases analysed, OLAF has complied with the applicable procedural requirements and guarantees for deferring the information of the persons concerned of the opening of the investigation.

OLAF would also like to note the following:

- The SC's acknowledgement that an analysis of the duration of the investigation cannot simply rely on the number and length of the activity breaks in an investigation, but instead **requires an overview of the whole investigation case-file** and, in line with Article 7(5) of the OLAF Regulation, an **understanding of the particular circumstances and complexity of each case (point 43)**. OLAF fully agrees with the statement of the Committee. In this context, OLAF would like to point out the need to make the difference between periods of investigative inactivity and an inactive investigative team. Besides external circumstances, outside OLAF's control, there may also be internal circumstances triggering such periods. In particular, periods of investigative inactivity can be the result of excessive caseload, absence of staff members or the unfeasibility of reassigning a case to another investigator. OLAF investigative activities can also be suspended for a certain time for operational reasons, such as waiting for replies to requests, in particular with partners outside the EU. They can also be the result of the unavailability of translation capacity in certain languages. OLAF would like to emphasise that these situations do not entirely depend on the investigative team and, therefore, steering the conduct of investigations running in parallel in an environment of scarce resources requires a considerable degree of managerial flexibility and discretion.
- In this context, it is important to point out **OLAF's excessive workload compared to OLAF's human resources**, bearing in mind the declining availability of resources over the last years. Therefore, to improve the effectiveness and efficiency of OLAF's investigations, OLAF appreciates the Committee's support on OLAF's resources needed to carry out its investigative function.
- Finally, OLAF notes that the **Committee would like OLAF to build on the recommendations made by the Committee**, in the second revision of the OLAF's *Guidelines on Investigation Procedures* (hereinafter, 'GIP'). OLAF informed the SC on 29 October 2021⁶ that the **revised GIP** had been adopted and since 11 October 2021 have replaced the previous guidelines. The purpose of the revision was to transpose the provisions of the revised OLAF Regulation⁷ into internal guidelines for OLAF in order to supplement the procedural rules on the conduct of investigations, as well as to align the GIP with the requirement of cooperating with the European Public Prosecutor's Office (EPPO). OLAF further continues to revise the GIP. The second phase will include issues, which are currently addressed in other internal instructions and guidelines, as well as further practices that will be established in the framework of OLAF cooperation with the

⁶ Ref. Ares(2021)6672538.

⁷ As last amended by Regulation (EU, Euratom) No 2020/2223.

EPPO. The revision also takes into account recommendations made by OLAF stakeholders, including notably those of the SC.

- In the same context, **OLAF's reorganisation** of 16 June 2021 resulted in the creation of **Unit 03 'Operational Coordination and Liaison Office'**. One area of expertise of the unit covers the development of investigative procedures, which means the implementation of the OLAF Regulation, but also other rules and regulations and further revision of the GIP.
- Finally, OLAF's **specific remarks** outlined in section C below follow the structure of the SC's Opinion No 5/2021. OLAF would like to point out that the specific remarks in the SC's Opinion are addressed to specific situations. Consequently, it is important that these remarks are dealt with in the context of the situations to which they refer, without assuming that they constitute a general issue for the Office.

C. SPECIFIC REMARKS

1. INTRODUCTION

Point 6: OLAF notes that point 6 of the Opinion No 5/2021 refers to "*continuity and the duration of investigations*". However, the two key parameters to be evaluated in relation to the duration of investigations are the "continuity" and the "proportionality" of the duration to the circumstances and complexity of each case, as required by Article 7(5) of the OLAF Regulation and as reflected in the titles of **sections 5 and 6** of the Opinion No 5/2021. These two parameters are also those reviewed by OLAF at the final stage of investigations⁸.

Point 6: as the SC makes reference to a "*high degree of heterogeneity in OLAF's investigative practices*" (also in **point 84**), OLAF would like to clarify that a heterogenic practice is linked to the specificities of each of the management modes of the EU budget that OLAF is investigating.

2. LEGAL BASIS AND PURPOSE OF THE SC MONITORING

3. ACCESS TO CASE-RELATED INFORMATION AND METHODOLOGY

Point 20: OLAF welcomes the SC's statement that all the information needed to fulfill its mandate under the OLAF Regulation has been received.

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

4.1 Analysis on OLAF reporting to the SC on the 40 cases

Point 27: OLAF welcomes the SC's statement on the improved new reporting template.

Point 28: OLAF would like to emphasise that the Working Arrangements between OLAF and its Supervisory Committee and the OCM module implementing these arrangements should put an end to the difficulties encountered so far by the SC to obtain access to information about OLAF's investigative activities that fall within the Committee's mandate.

4.2 Reasons provided by OLAF for not having completed investigations in the twelve month period

As regards **point 32 b)** and the statement that '*no reasons were provided by OLAF for such decisions in the remaining cases*', OLAF will study how to better document the prioritisation of cases.

⁸ Point 1.5 of the Opinion on the final report and recommendations.

As regards **point 35**, OLAF has difficulties to estimate the time it takes third parties to provide OLAF with requested input. The time needed depends on external factors, which are not fully under OLAF's control. For some categories of investigations, OLAF could explore what patterns of time are needed for third party replies based on previous experience. However, there will always be a case-by-case component in this assessment.

4.2 Measures proposed by OLAF to speed up the investigations

Point 37, OLAF would like to clarify that in all 12 and 18-month reports concerned, it was considered that no remedial measures were required at that stage.

Point 38: as regards the statement "*Few of the reports provide clear timeframes for the next steps or to complete the investigation*", OLAF would like to point out that since October 2013, when Regulation (EU) No 883/2013 repealed and replaced Regulation (EC) No 1073/1999, there has been no compulsory requirement in the OLAF Regulation that the Director-General indicates "*the expected time for completion*" of an investigation⁹.

As regards **point 39**, OLAF would like to stress that Article 7(8) of the OLAF Regulation provides that if an investigation cannot be closed within 12 months after it has been opened, the SC should be informed, but it does not provide that an investigation should be finalised within 12 months. It has been current practice for OLAF management to closely follow the lifecycle of an investigation and actively monitor the investigative steps needed to bring it to an end by also using other tools.

Regarding SC's suggestion that each investigation reaching a duration of 12 months should be the subject of "*remedial measures or other steps to speed it up and ultimately complete it*", it should be recalled that Article 7(8) of the OLAF Regulation requires, on one hand, remedial measures regarding such investigations only "*where appropriate*" and, on the other hand, biannual follow-up reports. This leaves room for tightening scrutiny in line with "case-ageing". Accordingly, in its recommendations 1c) and 4c), the SC proposes further layers of scrutiny when an investigation reaches a duration of 24 and 36 months respectively, to ensure appropriate monitoring.

5. ANALYSIS OF THE INVESTIGATION CONTINUITY

5.1 Analysis of OLAF's internal control mechanism for managing the duration of investigations

Point 42 refers to periods of inactivity (from 3 months to more than one year) in the lifecycle of almost all cases analysed. OLAF would like to point out that the breaks in OCM are sometimes artificial. This is because even though activities happen, they are only recorded in large batches in OCM. Periods of inactivity in OCM do not necessarily mean that the investigative activities have been suspended during those periods. In this respect, for instance, when the investigators receive documents (which, many times, are voluminous), they start to analyse them without any specific or systematic records of their analysis activity in OCM. In addition, the so called "periods of inactivity" are also attributable to the time of waiting for the contributions of operational stakeholders or OLAF support units (i.e.: operational analysis unit). Similarly this will be seen in 2021, considering the suspension of cases that OLAF presented to the EPPO for their decision on taking over.

Point 45 refers to the fact that '*OLAF did not record properly in the OCM the circumstances behind certain periods of inactivity*'. OLAF would like to point out that the 12 and 18-month reports often provide sufficient justifications about the reasons behind a "period of inactivity". For instance, it is usual practice to indicate in these reports not only the date of the request for information but also the date of the reception of a reply.

⁹ This requirement existed only in Article 11(7) of Regulation (EC) No 1073/1999.

In **point 46**, the SC recommends that periods of inactivity and breaks in the lifecycle of an investigation, which last more than three months, are well documented and registered in the case file and thus immediately visible to management. OLAF would like to mention that management has several tools and modalities to be regularly informed by the investigators concerning the advancement of the cases, such as sector meetings, unit meetings, bilateral meetings within the unit, monthly management meetings with the Director, meetings with the Director-General for cases of long duration. These tools are used in addition to the 12 and 18-month reports.

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

Recommendation 1

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

- a) Create an automatic flag system mechanism in the OCM to make periods of inactivity of over three months immediately visible in the OCM and to OLAF's management;*

OLAF considers the flagging system as a positive suggestion to improve the traceability of the continuity of investigations and a good tool for managers. The recommendation is also feasible for implementation in OCM and OLAF is currently working on this.

As OLAF pointed out to the SC, the periods of inactivity refer mainly to lack of registration of activities in the system. Such periods of inactivity should be flagged as recommended for the management to be aware and request appropriate explanations about inactivity in the system. This process would facilitate the recording of notes to the file or other that would justify periods of apparent inactivity in OCM.

- b) Ensure that obstacles encountered by the case team that have or could have a substantial impact on the duration of an investigation, as well as all decisions taken to that effect by the case team or OLAF's management are properly documented and registered in the case file of each investigation in the OCM;*

OLAF considers the recommendation as a relevant element, amongst others, to monitor the continuity of investigations by the OLAF management. In this context, OLAF would like to point out that written traces of obstacles materially impacting the duration of investigations can be found in the files. These are the basis for the explanations provided in the Supervisory Committee reports. OLAF will pursue this good practice while avoiding any duplications and thus making the best use of its limited resources.

- c) Set out in the GIPs clear internal procedures for the managing of the duration of an investigation. In particular, OLAF should establish, for cases over 24 months, a specific review procedure in order to allow the Director-General to decide how best to speed up the handling of such investigations, and also establish a special procedure for cases which are running over 36 months;*

OLAF recognises that clear internal procedures for handling the duration of investigations constitute an adequate managerial tool to monitor the duration of investigations. Thus, OLAF welcomes this recommendation. In that regard, OLAF would like to point out that the OLAF management closely follows the lifecycle of an investigation and actively monitors the investigative steps needed to complete a case. Management also pays particular attention to cases lasting longer than 36 months. This is in line with Article 7(8) of the OLAF Regulation, which requires reports from a duration of 12 months, and every six months thereafter.

As OLAF clarified to the SC regarding cases whose duration does not exceed 36 months, an internal procedure for handling the duration of an investigation can be improved through an adequate case management approach, including updates in investigation plans. On the other

hand, cases running over 36 months should trigger the adoption of specific remedial measures.

OLAF is considering a gradual approach in accordance with which the rules will become more stringent as cases are ageing. In case the duration of an investigation exceeds 24 months, there should be a flagging, which would trigger managerial decisions for such cases. Then, once a case reaches 36 months, the measures to be taken should become even more stringent. Hence, management would be systematically involved in the supervision and adoption of measures for such cases.

OLAF welcomes the recommendation and will reflect on a procedure with gradual steps for investigations reaching 12, 24 and 36 months to be established in the GIP. The procedure will be a tool for the management to adequately monitor the duration of investigations.

Other remarks

In **point 54 i)** regarding internal overview mechanisms and **point 54 ii)** regarding the SC's findings, the SC states, amongst others, that *"In particular, the tools which OLAF used to "monitor" the duration of the investigations were not part of the case file (in OCM) in most of the cases analysed"*. OLAF invites the Committee to read OLAF's comments under recommendation 1a), b) and c).

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

Recommendation 2

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

Pursuant to the OLAF Regulation, the role of the reviewers is to control the legality of the investigative procedures, the respect of procedural guarantees and fundamental rights and the correct application of the EU and of the national law. In this context, the reviewers also assess the compliance with the requirements of Article 7(8) of the OLAF Regulation (i.e. whether investigations have been conducted continuously and whether their duration has been proportionate to the complexity and circumstances of the case). The reviewers carry out an *ex post* review, distinct from the managerial control of the duration, which takes place during the investigation. The duration of investigations is determined by the investigative activities and, as such, is part of the investigative strategy and falls into the competence of the operational management represented by Heads of Unit and Directors A and B. The investigative units analyse the duration of investigations in the 12/18/24/36-month reports, which are regularly submitted to the Committee. The exact periods of inactivity often depend on external factors and will be determined by investigative managers. For example, the period of analysis of voluminous information or a delay in the reply of a third country authority cannot be considered as inactivity.

Furthermore, pursuant to Article 17(7) of the revised OLAF Regulation, the reviewers' *"opinion shall be annexed to the final investigation report"*. This means that the opinion, which was initially an internal document intended for the consideration of the OLAF Director-General, is now a document accompanying the final report and transmitted to all the recipients of the final report. As such, the reviewers' opinions should not contain information from the case files, as such information would be disclosed to the recipients of the final report.

OLAF understands that the SC shares the view that the reviewers' opinion should contain an evaluation of the "duration of the investigations" element strictly from a legal point of view by verifying the compliance with Article 7(8) of the OLAF Regulation and that the reviewers' opinion will only include the outcome of the assessment, which however will be explicit. If the

reviewers detect issues regarding continuity or proportionality in the investigations, this will indeed be reflected in their opinion.

Other remarks

As regards **point 56**, OLAF notes that the SC has praised the review work in its past Opinions¹⁰. As recommended by the SC, with the 2021 reorganisation, the review function was separated from the selection function carried out by Unit 0.1 and placed under the responsibility of the Deputy Director-General, while at the same time ensuring the continuity and consistency of practices of the reviewers.

The Review Team builds on the accumulated experience of the past eight years and continues the good work based on continuity and consistency in terms of personnel, legal framework and established practices. The Review Team comprises staff members who contributed to drafting the Best Practices¹¹ and will continue updating this document, as necessary.

Point 57: the SC refers to its analysis of Opinions issued by the Unit 0.1 where it found a degree of heterogeneity in the analysis carried out by Unit 0.1 of the continuity of the investigations. OLAF would like to clarify that the apparent heterogeneity amongst review assessments is the result of the review always being carried out depending on the specificity and complexity of each case as well as on the nature of investigative activities undertaken in each specific case. Hence, even if the review practice might appear heterogenic, it is justified as each investigative case has many different characteristics and this is reflected in the complexity and length of the opinions issued by the reviewers.

5.2 Analysis of other OLAF's internal tools for managing the duration of investigations

5.2.1 Investigation planning

Recommendation 3

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

OLAF **agrees that an investigation plan** to be drawn up in the beginning of the investigation and regularly updated is an adequate management tool to guide staff and monitor the progress of an investigation. It can also help in planning when and how the support services are needed (forensics/analysts). While OLAF has already been working for some time based on compulsory work plans, OLAF will reflect on a meaningful and efficient way to update the investigation plans regularly.

Under the current practice, it is the responsibility of Heads of Unit to maintain and discuss the work plan with the investigators upon the start of an investigation in order to give guidance to the investigation and monitor the implementation of planned investigative activities. The presentation of the information and the frequency of updates depends on the instructions of each Head of Unit, and on the type and specificity of each case.¹²

OLAF considers that the new Article 9(1) of the 2021 GIP¹³, which requires that the investigation units outline an initial work plan, will allow, in the future, to develop a consistent and uniform

¹⁰ See, in particular, the SC's Opinion No 2/2015 on *Legality check and review in OLAF*.

¹¹ "Legality Check and Review Best Practices" dated July 2018.

¹² See Ref. Ares (2021)1336959 – 18/02/2021, response to Q7 and Q8

¹³ Article 9(1) of the 2021 GIP provides that "The investigation unit shall conduct a preliminary examination of the information collected or obtained during the selection process in order to establish which investigative or coordination activities are required and outline an initial work plan."

approach to strategic case planning across all investigative units. OLAF is currently considering the possibility to further develop its internal instructions regarding updating work plans in the context of the second phase of the revision of the GIP and, in that context, will take into consideration the SC's expectation as formulated in **point 64** of the SC's Opinion No 5/2021.

Other remarks

As regards **point 64**, OLAF takes note that the SC welcomed the recent modification of the GIP to include a requirement for investigation units to '*outline an initial work plan*'.

As regards **point 65**, referring to '*(...) a lack of consistency in the way OLAF formulates, updates and registers investigation plans in the case file*', OLAF would like to underline that since the revision of the GIP an initial work plan is compulsory. This practice was already ongoing in most units, which were also recording the work plan in OCM.

5.2.2 Prioritisation of investigations

Recommendation 4

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

a) Establish clear objective criteria

OLAF recognises the need to assign an 'operational priority to cases' and agrees that investigators should have guidance in the form of priorities in order to know how management expects them to handle the (sometimes) very heavy workload. OLAF takes due note of the recommendation and **will assess the feasibility of establishing in the GIP broad principles concerning priorities that will allow for sufficient managerial flexibility. Based on experience, OLAF does not intend to revert to the former Investigation Policy Priorities.**

b) Ensure that the decisions to grant priority to a case are recorded in the case file in the OCM

OLAF welcomes the recommendation of the SC to record the decisions to grant priority in the case file in the OCM. In order to implement it, **OLAF will reflect on an adequate follow-up of this recommendation in the course of 2022.**

c) Automatically assign priority for investigations running for over 36 months, and take specific steps to speed up the investigations.

OLAF would like to point out that it already monitors systematically at DG level cases which are running over 36 months, in line with Article 7(8) of the OLAF Regulation.

OLAF agrees to reflect on a formal specific procedure with remedial measures when an investigation reaches 36 months. This would mean setting investigations as priority in many of the cases. However, OLAF sees an operational need to decide which specific measures are applicable to each case, thus implying that the priority would not be automatic but part of the managerial discretion.

6. "PROPORTIONALITY" OF THE DURATION OF OLAF'S INVESTIGATIONS

Recommendation 5

The Director-General of OLAF should ensure that:

- a) *Critical decisions which substantially impact the duration of an investigation (i.e. whenever an exceptional extra time for the analysis of the data/evidence collected is necessary due to the circumstances of the case) should always be taken at Director's level and should always be systematically recorded in the OCM. The procedure for doing so should be set out in the GIP.*

OLAF will reflect on how such decisions can be best recorded. In this context, OLAF would like to point out that the management maintains, in principle, trustful working relationships with investigators. It is important to emphasise that the Director-General and the Directors are directly involved in taking the most important decisions, by issuing authorities to conduct specific investigation activities, as referred to in Article 15.2 of the GIP.

Furthermore, as stated under recommendation 3, OLAF is currently considering the possibility to further develop its internal instructions regarding updating investigation work plans in the context of the second phase of the revision of the GIP. In that context, OLAF will take into consideration the SC's recommendation to establish a procedure for approving and recording exceptional extra periods of time necessary for the analysis of the data/evidence collected.

- b) *Rotation of staff does not affect the conduct of an on-going investigation. In particular, the DG OLAF should amend the GIP to ensure that whenever a member of the team leaves the Office, they draft a written handout note tracking all the activities carried out and evidence already collected, and setting out the work pending and the timetable that the next case team member should follow.*

OLAF considers this recommendation as already implemented in practice. In fact, an obligation for staff to draft a handover note stems from the internal Commission rules. According to these rules, a specific template has to be completed before each departure of a staff member. Should an investigator be taken off a case, a clear handover is organised between the old and the new case team. Wherever possible (unless, for instance, the former investigator goes on longer term sick leave), the handover file is discussed with the successor. A smooth handover is ensured by the Heads of Sector and Heads of Unit¹⁴. OLAF will make sure that this is done systematically in all cases. However, no modifications to the GIP are needed for this purpose. The suggested provisions on allocation and handover of cases within the unit are to be dealt with by the management internally, while the scope of the GIP, in principle, should be limited to the investigation procedures.

Other remarks

Points 78 and 79: the judgment in *A. and G. v Commission* refers to the duration of disciplinary proceedings. The Court ruled that the unreasonable duration of disciplinary proceedings may be the result both of the conduct of prior administrative investigations and of the disciplinary proceedings themselves. OLAF agrees with the SC's statement that the circumstances of each case must be taken into consideration. In addition, OLAF considers it useful to point out that, as stated in the judgment in *A. and G. v Commission*, "No specific factor is decisive. Each must be examined separately and then their cumulative effect

¹⁴ Ares (2021)1336959 – 18/02/2021, response to Q10.

evaluated. Some instances of delay (...) may not appear unreasonable in isolation but are unreasonable when considered together.”¹⁵.

6.1 Analysis of the proportionality of the duration of the 40 cases

Point 83: the SC stated that “OLAF lacks guidelines or instructions to investigators on how to assess the complexity of an investigation in concrete terms”. In that regard, OLAF would point recall its explanation to the SC¹⁶ that the circumstances in which a case could be described as complex are determined on a case by case basis and vary according to the subject matter and type of the case. Complexity could typically occur when: documents are numerous and difficult to examine for reasons of format, number and accessibility of languages; inter-jurisdictional difficulties and other legal issues arise; number of persons potentially concerned whose inter-relationship is difficult to clarify; number of economic operators and countries concerned by the investigation; pattern of transactions is complicated and time consuming to disentangle. As “complexity” requires a factual assessment on a case-by-case basis, and circumstances that may make a case “complex” may arise at any time during an investigation, it is difficult to limit such assessment to pre-determined reasons embedded in guidelines or instructions to investigators.

Point 97 refers to the seven cases which raise concerns, as identified by the SC in point 95. “The SC found that in those cases, OLAF’s investigative activities were limited mostly to collecting documents and its conclusions were mostly based on the analysis of documents received by other institutions or national authorities or from activities performed by OLAF before the breaks occurred.” In OLAF’s opinion, the nature of investigative activities as the collection of information and analysis of the information collected are two separate investigative steps. For a matter of cost-effectiveness and, especially during the COVID-19 pandemic, it is justified that some investigations rely on documents collected by other institutions, to a minor extent the analysis. With regard to the last sentence noting a low financial impact, OLAF would like to clarify that, as regards internal investigations, the financial impact is one of the criteria for opening a case or not, and a selection often depends on the seriousness of professional breaches.

7. DUTY OF OLAF TO RESPECT PROCEDURAL GUARANTEES

Recommendation 6

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

Article 29.1 of the revised GIP stipulates as follows: ‘29.1 The investigation unit shall inform the person concerned within 10 working days of the Director-General’s decision to close a case in which no evidence has been found against the person concerned. In all other cases, the investigation unit should inform the person concerned of the Director-General’s decision to close the case, unless such information is detrimental to the effectiveness of the investigation and the implementation of recommendations, or confidentiality requirements.’

OLAF agrees that persons concerned should be informed of the case closure, and does so, whenever this is possible and does not jeopardise follow-up activities. However, OLAF considers that it cannot commit to inform the person concerned systematically of his/her status even at the closure of the investigation, as there might be instances where OLAF has duly justified reasons not to do so, including those instances when OLAF closes a case and transmits information to the EPPO. The OLAF Regulation, under Article 11(7), imposes an obligation to (systematically) inform persons concerned only when no evidence has been found against that

¹⁵ Paragraph 394 of the judgment of the European Union Civil Servant Tribunal in Joint Cases F-124/05 A. and G. v Commission.

¹⁶ See point 79 of the SC’s Opinion No 4/2014.

person. This means that, in cases where it found evidence against the person concerned, OLAF has more discretion and may not inform the person of the case closure. That said, OLAF would point out that such cases are rather exceptional and that, in principle, it does inform the person concerned.

7.1 Analysis of the deferral procedure put in place by OLAF

7.1.1 Deferral of information Article 9(3) OLAF Regulation

Point 115: OLAF would like to clarify that the restrictions may be imposed during ongoing investigations and they concern the exercise by the data subjects of their rights.

Point 118 and recommendation 6: OLAF agrees that informing the persons concerned of the investigation at the latest when an investigation is closed, is likely to enhance the respect of the procedural guarantees of the persons concerned while guaranteeing the protection of the OLAF's investigation during the investigation phase. However, it does not agree with the SC's statement that "*Not informing the person concerned of an investigation against it even after the procedure is closed can seriously undermine the public's trust in the way OLAF conducts its investigations*". Article 9(3) of the OLAF Regulation and Article 29.1 of the 2021 GIP explicitly allow OLAF not to inform the person concerned. This is also consistent with the provisions of the third subparagraph of Article 9(4) of the OLAF Regulation, which allows that, once the investigation has been completed, OLAF defers the fulfilment of the obligation to invite the person concerned to comment (with no time limitation). There might be cases where not informing the persons concerned, even at the time when an OLAF investigation is closed, can be justified by the needs to ensure proper follow-up by the relevant authorities or to comply with confidentiality requirements. The risks that OLAF may identify during its investigation (i.e. destruction of evidence, risk of influencing witnesses etc.) may persist even after the closure of OLAF's investigation. This is why OLAF should continue to have, exceptionally and in duly justified situations, the possibility to defer providing such information even after closing an investigation, and as long as it is necessary.

Therefore, while OLAF endeavours to inform the persons concerned as soon as possible, it cannot commit to do so systematically at the closure of each case, as recommended by the SC, as there might be circumstances justifying providing such information at a later stage or even imposing on OLAF the obligation to defer providing such information (i.e. when there is a link with an investigation by the EPPO, and the later requests OLAF not to inform the person concerned, providing such information would be contrary to the OLAF Regulation). That said, OLAF is aware that not informing a person concerned in a short time after the closure of the investigation would deprive that person of his/her right to make a complaint under the rules of the Complaints mechanism¹⁷. However, should such situation occur, the person concerned would likely have other remedies to contest OLAF's procedure or findings (i.e. in the context of follow-up proceedings, or of criminal investigations by the EPPO or ultimately before the EU Courts).

In any case, OLAF would also point out that, pursuant to the third subparagraph of Article 4(6) of the OLAF Regulation, it has the obligation to transmit to the SC, after the closure of an investigation, the reasoned decision by which the Director-General decided to defer the information to the person concerned. Therefore, this provision ensures that, even in closed cases, there is a scrutiny of those exceptional cases where the persons concerned is not informed of the investigation.

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

Point 123: Article 9(4) of the OLAF Regulation does not explicitly foresee that the fulfilment of the obligation to invite an EU official to comment on the facts concerning him/her may be

¹⁷ Article 9b(2) of Regulation (EU) No 883/2013 provides that complaints "*shall be lodged no more than one month after the closure of the investigation*".

deferred only after having received the agreement of the Appointing Authority of the person concerned. This is provided for in Article 1(2) of Annex IX to the Staff Regulations¹⁸. However, the fourth subparagraph of Article 9(4) of the OLAF Regulation refers to *"failure on the part of the institution, body, office or agency to respond within one month to the request of the Director-General for deferral of the fulfilment of the obligation to invite the person concerned to comment"*.

¹⁸ This provision reads as follows: *"In cases that demand absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the official to comment may, in agreement with the Appointing Authority, be deferred. In such cases, no disciplinary proceedings may be opened before the official has been given a chance to comment."*