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Opinion N° 3/2015

Opinion on the OLAF draft Investigation Policy Priorities (IPPs) for the year 2016

Introduction

- 1) Based on its analysis of the 2014 IPPs the Supervisory Committee issued the following recommendations to OLAF:

(1) To issue guidelines on application of the three selection principles established by the Regulation, including on the application of financial indicators as a proportionality criterion;

(2) To enter into a constructive dialogue with the stakeholders on the determination and implementation of IPPs, in particular with regard to financial indicators and possible follow-up of dismissed cases;

(3) To provide the SC, by 6 March 2014, with an assessment of the results of the implementation of the IPPs for 2012 and 2013 together with a summary of the feedback provided by the stakeholders; in the following years those documents should be attached to the new draft IPPs transmitted annually to the SC.¹

Having examined the 2015 IPPs, the Committee concluded that it should maintain all its recommendations, although some improvements were noticed, in particular OLAF had taken into account several documents from its stakeholders to determine the IPPs for 2015.

- 2) By note received on 6 January 2016, OLAF transmitted to the Committee, for consultation until 21 January, its draft IPPs for the year 2016.

Analysis

Guidelines

- 3) Compared to the last exercise, the Committee notes that **OLAF has included in its Vademecum on case selection some guidelines for implementing the IPPs.**

¹ Point 27, Opinion 1/2014



Interpretation of Article 5 of Regulation 883/2013

- 4) The wording used in Article 5 suggests that the determination of priorities for OLAF is part of a wider exercise for the definition of a real investigation policy at EU level in the matter of “*fraud, corruption any other illegal activity affecting the financial interests of the Union*”.
- 5) Article 5 is not asking for additional selection criteria to be determined on an ad-hoc or discretionary basis by OLAF management, but rather calls for the definition of a global, coherent policy, supporting the individual decisions of the Director-General of OLAF for starting investigations, in conformity with EU law, in particular specific requirements set by Article 5 itself:
 - **Legal requirements:** a “*sufficient suspicion*” regarding credibility of the allegations generating the potential case and the “*proportionality of the means employed*”.
 - **Performance requirements** in the management of human and financial resources: “*An efficient use of OLAF’s resources*”. Indeed, OLAF remains an administrative office investigating fraud and irregularities, and not a criminal prosecutor: where a criminal prosecutor is acting for the redress of wrong-doings made to society as a whole, OLAF is a part of an administrative framework aimed at protecting the financial interests of the Union (Article 325 TFEU). Therefore financial amounts at stake are of prime importance, when deciding on the opening of a case.
 - **Demonstration of an added-value**, as regards internal investigations.
- 6) On one hand, in his instruction note to the selection unit accompanying the guidelines on case selection, the Director-General of OLAF enumerates criteria to be considered, when deciding on opening an investigation to the following, after verification of OLAF’s competence²:
 - *Sufficient information*: “*The information is sufficient to justify the opening of an investigation*” (“*sufficient information*” differs from “*sufficient suspicion*”, this drives the assessment from a qualitative to a quantitative perspective)
 - And falls within the *Investigation Policy Priorities (IPP)* established by the Director-General
- 7) On the other hand, guidelines issued by OLAF to orientate the case selection process encompass all the selection criteria listed in Article 5, but in a different order, compared both to the above instructions and to the wording of Article 5:

² “5.3 The Investigation Selection and Review Unit shall provide an opinion on the opening or dismissal of a case to the Director-General. The opinion on the opening of an investigation or coordination case shall be based on whether the information falls within OLAF’s competency to act, the information is sufficient to justify the opening of an investigation or coordination case and falls within the Investigation Policy Priorities (IPP) established by the Director-General.” (Note of the Director-General of OLAF to Head of Unit 01 of 06/06/2015, unreadable Ares ref.)

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- Sufficient suspicion (and not “*sufficient information*”)
- Other criteria:
 - o Proportionality
 - o Efficient use of investigation resources
 - o Subsidiarity
 - o Added-value
- Investigation Policy Priorities, which are thus the last element to be considered by the selectors.

8) On the contrary, the wording of Article 5 provides a hierarchical order in the application of the selection criteria:

- Sufficient suspicion
- Investigation policy priorities and the Annual Management Plan
- “*That decision shall **also** take into account the need for efficient use of the Office’s resources and for proportionality of the means employed*”³.

9) This wording clearly indicates that, after checking the existence of a sufficient suspicion, the IPPs are the second major element in the appreciation of whether or not to open an investigation, always in conjunction with the need for an efficient use of the Office’s resources and the respect of the proportionality principle which is a general principle of the Union (Article 5 (1) TEU).

10) The Committee is also concerned by the OLAF DG's statement that OLAF “*only uses the IPPs where the criteria set out in the Regulation would suggest a dismissal of the case*”, given that such a selection practice goes against the wording and spirit of Article 5 of Regulation 883/2013, as explained above.

Consultation and input from stakeholders

11) From the documents transmitted by OLAF, the dialogue with the Commission’s stakeholders was limited to a discussion in the Fraud Prevention and Detection Network (FPDnet)⁴, followed by a short written contribution from three Commission Directorates General⁵ and one agency⁶ at the unit level.

³ “1. The Director-General may open an investigation when there is a sufficient suspicion, which may also be based on information provided by any third party or anonymous information, that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union. The decision by the Director-General whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of the Office established in accordance with Article 17(5). That decision shall also take into account the need for efficient use of the Office’s resources and for proportionality of the means employed. With regard to internal investigations, specific account shall be taken of the institution, body, office or agency best placed to conduct them, based, in particular, on the nature of the facts, the actual or potential financial impact of the case, and the likelihood of any judicial follow-up.”

⁴ which is a Commission internal platform for sharing best practices in this domain

⁵ GROW, EMPL, TAXUD

⁶ EASME

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- 12) The IPPs were not subject to a formal Commission inter-service consultation⁷, especially with regard to:
- Reintroducing appropriate financial indicators
 - The evaluation of previous IPPs
 - And the possible follow-up of the cases showing sufficient suspicion of fraud, but dismissed on the basis of the IPPs or the selection principles.
- 13) A proper inter-service consultation helps indeed in the building of a common approach at Commission level, while the approach adopted in the stakeholders' consultation drives OLAF to gather the specific requests of the different services, which are introduced into the IPP as specific additional criteria without forging a global investigation policy, as required from OLAF under Article 5 of Reg. 883/2013 and Article 325 TFEU.
- 14) As regards the input from the Commission's spending Directorates General reported by OLAF, the Committee raises the following concerns, which should be considered by OLAF when determining the IPPs:
- *“Cases of fraud "of significant impact or of a structural nature" as it provides flexibility”*: investigation policy criteria should not be subject to the sole discretionary appreciation of OLAF, but agreed by its stakeholders, which are subject to the financial protection duties of Article 325.
 - *“Despite that they might have a negative reputational impact”*: OLAF investigation policy is part of the duty to protect EU financial interests as set out in Article 325 TFEU. The reputation of the Institution is outside the scope of OLAF's core duties as investigating body, but rather belongs to the duties of the Commission itself. Therefore, it should not be considered as such when defining investigation policy priorities.
 - *“Therefore they deem the current practice where the financial impact is taken into account when applying proportionality principle is more appropriate”*: as explained above, financial criteria and proportionality principles are requirements of a different nature; the consideration of financial and human resources of OLAF is an additional requirement as set out in Article 5, and it should be considered only after the first two criteria - of a sufficient suspicion and the IPPs – are applied.
 - *“Maintain certain IPPs related to customs and anti-dumping duties, and tobacco smuggling. For the latter they suggested adding illegal manufacturing and alcohol”*: DG TAXUD mentions illegal manufacturing, but does not refer to illegal manufacturing “of tobacco”, as OLAF did in its draft IPPs.
 - *“Package of directives, which will have to be progressively followed-up through implementation in the Member States”*: the monitoring of the application of EU law is a competence of the Commission itself (Article 17 TEU), not of OLAF as the

⁷ The transmission note says “For your further information, I also attach a summary of the Fraud Prevention and Detection Network meeting of 8 July 2015 (Annex 2), together with the feedback from the members of this network on the IPPs, in particular on the financial indicators”



investigating body. This monitoring is unrelated to potential cases of fraud, corruption or irregularities.

- *“European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Social Fund all present an Error Rate well above the materiality threshold”*: first, there is a misunderstanding of the concept of an “error rate” which does not refer to fraud cases. The error rate reflects legality or regularity errors on financial transactions detected and reported by the Court of Auditors, of which a very limited number contains an intentional element (potential fraud cases transmitted by the Court of Auditors to OLAF for investigation). Moreover, and contrary to the statement made, the last three Annual Reports of the Court of Auditors (2012-2013-2014) rather show a certain stabilising of, if not a slight decrease in the reported error rates for the Directorates General concerned.

15) As far as the consultation of institutional stakeholders is concerned, OLAF was not able to provide the Committee with any document supporting the consultation of the Institutions.

Evaluation of the previous IPPs implementation

16) The Commission established as a general rule in its Better Regulation Package⁸ that *“(it) should not impose policies but prepare them inclusively, based on full transparency and engagement, listening to the views of those affected by legislation so that it is easy to implement. (It is) open to external feedback and external scrutiny to ensure we get it right. EU policies should also be reviewed regularly: we should be transparent and accountable about whether we are meeting our policy objectives, about what has worked well and what needs to change.”*

17) It would be hard to understand for EU citizens that the only (unsaid) exception to this principle would be in a major domain such as the protection of the EU budget i.e. taxpayers’ money. Especially as investigations for the protection of EU financial interests may have a negative impact on the rights and liberties of EU citizens.

18) The Committee would point out that this year, yet again, OLAF has failed to carry out an evaluation of the implementation of previous years’ IPPs. OLAF's conclusion in the transmitted documents that *“The current IPPs are based on OLAF's experience from its own investigations (...)”* seems, therefore, unsubstantiated.

19) The Committee would reiterate the importance of a regular assessment of the results of the implementation of the IPPs and regrets that, to date, it has not received from OLAF any such assessment for the IPPs 2012, 2013, 2014, 2015 and 2016, with the exception of a short statistical table on the application of IPPs for the year 2014. No operational conclusion can be drawn from this table regarding the determination of IPPs for the year 2016, in particular, in terms of financial impact and performance of the Office. Statistics on IPPs for the year 2015 are not included in that table. So again, the communication to the

⁸ COM(2015) 215 final

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Committee of the draft IPPs has not been preceded by an evaluation of their implementation in the preceding years, be it by OLAF or its stakeholders.

- 20) The Committee remains concerned that without any assessment of the impact of the previous IPPs, it is impossible to conclude whether they are correctly identified and whether their application has positive or negative consequences for the activities of the Office, in particular, in the fight against fraud and corruption and the protection of the EU's financial interests.
- 21) Consequently, the Committee is concerned that the absence of an impact assessment and evaluation of previous IPPs, renders impossible the definition of an investigation policy, i.e. an evidence-based policy, aiming at global policy objectives, in line with EU spending priorities and policy priorities in the fight against financial crimes, such as fraud, corruption, money laundering etc. This policy should determine the action of OLAF over the year(s) and not only provide subsidiary case selection criteria as is the case with the existing IPPs.



Conclusions

- 22) The Supervisory Committee considers that the definition of a real ‘investigation policy’ is the only possible reading of Article 5 of Regulation No 883/2013. The Committee notes that, as in the previous years, OLAF refrained from defining a true “investigation policy”, as required by Article 5 of the Regulation, and only indicated undocumented criteria, without impact assessment or evaluation of the implementation of previous IPPs, without performance indicators, and without systematic linkage with EU spending priorities and EU policy priorities in the fight against financial crimes.
- 23) **The Committee welcomes the adoption by OLAF in 2015 of internal guidelines for the case selection**, including the implementation of the IPPs.
- 24) According to the Committee’s opinion, **the instructions given to OLAF’s selection officers in the note of the Director-General and the selection guidelines do not reflect the importance of the IPPs in the selection process**. The Committee therefore considers that these instructions and guidelines are not in line with the requirements of Article 5 of the Regulation.
- 25) **The Committee welcomes the fact that OLAF has taken into account much of the input from its stakeholders to determine the IPPs for 2016**. However, the consultation of stakeholders (limited to three Commission spending Directorates General and one agency) appears very limited and has not been subject to a formal Commission inter-service consultation. OLAF did not indicate or assess the precise elements resulting from this consultation which support the selection of the IPPs for 2016.
The Committee cannot, therefore, consider the IPPs for the year 2016 as properly substantiated.



Recommendations

26) The Supervisory Committee calls on OLAF to determine a true **evidence-based “investigation policy”**, aiming at global policy objectives, as required by Article 5 of Regulation No 883/2013. To this end:

- I. The Supervisory Committee recommends that OLAF determine IPPs, based on an impact assessment, the evaluation of the implementation of previous IPPs, the definition of specific performance indicators and a systematic linkage with EU spending priorities and EU policy priorities in the fight against financial crimes.
- II. The Supervisory Committee recommends that OLAF **revise its instructions and guidelines** to selection officers in order to fully reflect the importance of the IPPs in the case selection process. **These revised guidelines should be submitted to the Supervisory Committee, prior to their adoption**, in line with the requirements of Article 17(8) of the Regulation.
- III. The Supervisory Committee recommends that OLAF, with the aim of establishing IPPs for 2017, undertake as of now, a **complete impact assessment of IPPs** for previous years, in consultation with all stakeholders in the Commission, the other Institutions, Member States’ authorities concerned and external parties involved. Useful external expertise could be also sought.
- IV. The Supervisory Committee recommends that OLAF organise **an inter-service consultation, in line with Commission procedures**, when adopting the IPPs (consultation with all stakeholders in the Commission, the other Institutions, Member States’ authorities concerned and external parties involved).
- V. The Supervisory Committee recommends that OLAF **clarify the IPPs for 2016** when referring to the illegal manufacturing “*of tobacco*”, in the light of the contribution received from DG TAXUD.

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ANNEX

2014 INVESTIGATION POLICY PRIORITIES	2015 INVESTIGATION POLICY PRIORITIES	2016 INVESTIGATION POLICY PRIORITIES	2015 - 2016
<p>1. Cases with indications of fraud and/or corruption in relation to public procurement for infrastructure networks</p>	<p>1. Cases with indications of fraud and/or corruption in relation to public procurement for transport and infrastructure networks;</p>	<p>1. Cases with indications of fraud and/or corruption in relation to transport and infrastructure network projects, in particular public procurement procedures;</p>	<p>Scope of investigation priorities related to fraud and corruption in transport and infrastructure networks is enlarged, no longer limited to public procurement procedure issues.</p>
<p>2. Cases of fraud concerning specific projects (co)financed by the European Social Fund, the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and Pre-accession Funds and in which action by the Member States or Candidate Countries is deemed to be insufficient</p>	<p>2. Cases of fraud of significant impact or of a structural nature concerning specific projects (co)financed by the European Social Fund, the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the Pre-accession Funds, in which action by the Member States or Candidate Countries is deemed to be insufficient;</p>	<p>2. Cases of fraud of significant impact or of a structural nature concerning specific projects (co)financed by the European Social Fund, the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the Pre-accession Funds, in which action by the Member States or Candidate Countries is deemed to be insufficient;</p>	<p>Unchanged.</p>

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<p>3. Cases of fraud indicating possible abuses of origin rules and tariff classification in both preferential and non-preferential trade regimes in order to evade payment of conventional customs duty and anti-dumping duties</p>	<p>3. Cases of fraud indicating possible abuses of origin rules, tariff classification in both preferential and non-preferential trade regimes and undervaluation, in order to evade payment of conventional customs duty and anti-dumping duties;</p>	<p>3. Cases of fraud indicating possible abuses of origin rules, tariff classification in both preferential and non-preferential trade regimes and valuation-related fraud, in order to evade payment of conventional customs duty and anti-dumping duties;</p>	<p>Wording of one term adjusted</p>
<p>4. Cases of fraud involving smuggling of cigarettes and tobacco into the EU in particular via maritime transport and along the EU Eastern border</p>	<p>4. Cases of fraud involving smuggling of cigarettes and tobacco into the EU, in particular via maritime transport and along the EU Eastern border.</p>	<p>4. Cases of smuggling of tobacco and alcohol into the EU, in particular via maritime transport and along the EU Eastern border; illegal manufacturing of tobacco; and smuggling of counterfeit medicines into the EU.</p>	<p>Scope enlarged to:</p> <ul style="list-style-type: none"> - alcohol smuggling - illegal manufacturing of tobacco - Smuggling of counterfeit medicines into EU