

SUPERVISORY COMMITTEE

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Opinion No 3/2021

Supervision of OLAF
internal investigations

- Strategic conclusions and best practices -

(Extract)

September 2021

The present document is the public version of the Opinion 3/2021 of the Supervisory Committee on the supervision of internal investigations, adopted on 21 October 2021¹.

Background

On 21 October 2021, the Committee adopted Opinion 3/2021 on the supervision of internal investigations. In the Opinion, the Committee assessed the way OLAF conducted four internal investigations into serious allegations relating to the discharge of professional duties or serious misconduct by members and officials occupying senior positions in the EU institutions, bodies and agencies.

OLAF put these investigations at the disposal of the Committee, which examined them in detail in the course of last year after a thorough organization of the case files. The Committee made a comparative analysis of the four investigations and monitored OLAF's activities and decisions from the perspective of an impartial observer. It examined, in particular:

- (i) the requirement of sufficient suspicion to justify the opening of the investigations;*
- (ii) their scope;*
- (iii) the use of the different investigation tools; and,*
- (iv) the final investigative reports and the legal review of the investigations.*

In looking at these stages of the investigation, the Committee focused on the following questions:

- (i) whether the suspicion to open the investigations was well-grounded;*
- (ii) whether the investigations were conducted in a fair and impartial manner;*
- (iii) whether there was consistency in conducting the investigations; and*
- (iv) whether OLAF carried out thorough investigations.*

The Committee analysed in depth all relevant documents in light of the applicable OLAF legal framework. It also took into account OLAF agreements with third parties; the case-law of the EU Courts, the EU Charter of Fundamental Rights, as well as the administrative arrangements in force between OLAF and the relevant EU institution at the time of the conduct of the investigations.

The Committee found discrepancies among the four cases in relation to all above stages. Accordingly and with the view to assisting OLAF in improving its strategy and reinforcing its independence, the Committee drew conclusions and issued recommendations. They are both presented below, in Chapter 5.

¹ With a view to protect the privacy and integrity of the individuals concerned by the investigations, the Committee produced a non-confidential version. Disclosure of any information that could lead to the identification of the persons concerned would have an adverse effect on their reputation and would violate their presumption of innocence. In the interests of transparency, the Committee publishes Chapter V of the opinion containing its conclusions and recommendations. Where necessary, certain confidential segments of Chapter V have been replaced by [...]

CHAPTER V Conclusions and Recommendations

Main conclusions, best practices and equal treatment

- (i) The purpose of these conclusions and recommendations is the reinforcement of OLAF's independence and credibility, and to set out how the different investigations carried out in the area of internal sensitive cases also brought to light a number of difficulties in applying and interpreting in a consistent manner provisions of Regulation (EU) No 883/2013, and OLAF's Guidelines of Investigation Procedures (GIPs). Examination of these difficulties should make it possible to identify solutions to the problems.
- (ii) The Committee, in accordance with its mandate, carried out a comparative analysis of four specific OLAF investigations concerning alleged illegal activities, serious misconduct, and breach of obligations by members and officials occupying senior or leadership positions in the EU institutions, bodies and agencies. These cases shared several common traits including the high responsibilities of the people concerned by the investigations and the reputational damage that their actions [...] could cause to the trust of citizens in the EU.

When dealing with such investigations, OLAF needs to act in a very diligent manner and abide strictly by the applicable rules and procedures in order to avoid any perception in the eyes of the public of biased or unequal treatment or even external interference.

- (iii) The analysis of the four cases raised questions about OLAF's compliance with the principle of **independent, impartial, and thorough** conduct of investigations. Had the hybrid status of OLAF adversely affected the independence of its investigative function?² Was the requirement of a sufficient suspicion to open the investigations well founded? Was the fair and impartial conduct of investigations ever put at risk or compromised during the decision-making process? Was there a consistent approach to these four cases in the way OLAF made use of its powers of investigation? Given the sensitive nature of these cases, did OLAF carry out a thorough investigation in such a way as to dispel any doubt with regard to the impartiality and independence of its conduct?

For the Committee, these are important questions that the Director-General of OLAF, OLAF managers and investigators should always ask themselves when dealing with an investigation, and in particular, with investigations that can cause serious damage to the reputation of the EU.

- (iv) The EU legislator gave OLAF autonomous and well-defined powers. OLAF enjoys a wide discretion in the opening and the conduct of administrative internal investigations where it plays a leading role; however, the use of such a discretionary power cannot lead to the exercise of arbitrary powers.

² The hybrid status of OLAF reflects the fact that although OLAF enjoys an investigative autonomy under the applicable legal framework it also reports to the Commission for its other duties (including anti-fraud policies).

Having identified risks for the independent and impartial conduct of investigations due to both a lack of genuinely independent internal control procedures to guarantee the legality of the investigations in progress, and shortfalls in the implementation of clear investigation standards and guidelines, uniformly applied for all investigations, the Committee is now deeply concerned with regard to the resulting unequal treatment of the persons under investigation. Rigorous scrutiny of these issues is therefore required by OLAF.

I- Independence of the investigations and the decision making process: (Recitals 3, 17, 18, 20, 37, 41 and 42; Articles 5, 6, 15 and 17 of Regulation (EU) No 883/2013, amended 2020, Article 1 of the GIPs)

I.1 Criteria for opening of an investigation, effectiveness and accountability: analysis of a “sufficient suspicion” in the selection stage (Articles 5, 6 of Regulation (EU) No 883/2013, Article 5 of the GIPs)

- (v) The Committee examined the rationale underpinning the decision of the Director-General of OLAF to open an investigation, and the justification to establish a “sufficient suspicion” (of serious wrongdoing), a requirement that acts as a safeguard against the risk that an opening decision may be perceived to have been biased, calling into question OLAF’s independence.

The “suspicion” was well founded and based on accurate information and positive indications for some of the cases. By contrast, the Committee noted that the assessment and justification of the “sufficient suspicion” requirement was not always accurate and complete in investigations opened in response to anonymous allegations, where OLAF had to obtain the documentation necessary to corroborate the allegations made from another EU institution [...]. OLAF should pay close attention to this matter.

- (vi) The Committee has difficulties in understanding OLAF’s approach during the selection process not to use in full its powers to gather necessary and complete information from an EU institution, [...], especially given the fact that that institution had previously opened and closed inquiries on the same allegations investigated by OLAF.

The Committee is aware that reconciling the need for the other institutions to be kept informed of an investigation while at the same time ensuring its independence and confidentiality can, at times, be a difficult balancing act for OLAF. However, at the selection stage, checking the accuracy of any incoming information is crucial in order to enable the Director-General of OLAF to decide whether to open a case, to define the scope of the investigation, and for the investigation unit concerned to determine the investigation work-plan and the activities to be undertaken.

- (vii) In conclusion, the Committee is concerned by the lack of a uniform approach in this field and considers that having established a framework of practical arrangements with the EU institutions, OLAF should put in place strict internal procedures for the handling of sensitive cases “by the book”. Moreover, and as a matter of principle, the intelligence and operational analysis support Unit should participate in the selection process for the analysis of information coming from anonymous sources.

- (viii) The expected review of the guidelines on investigation procedures (GIPs), following the entry into force of the new OLAF Regulation (EU) 2020/2223, should address the above concerns by including the notion of “sufficient suspicion” (at present formally absent in Article 5 of the GIPs) and ensuring that the Committee is

informed of the opening of sensitive cases where the reputation of the EU could be at stake. In such cases, this practice will reinforce the perception of OLAF's independence and accountability especially when the decision to close an investigation with no recommendations is taken in less than 12 months, and thus lies outside the regular monitoring remit of the Committee.

I.2 The scope of the investigation: legal certainty and impartial conduct of investigations
(Recitals 18, 22, Articles 2, 7 and 17 of Regulation (EU) No 883/2013 amended, Articles 6, 8 and 12 of the GIPs)

- (ix) The Committee noted that OLAF experienced difficulties in applying the rules for the definition and/or extension of the scope of the investigation, in some cases with regard to the relevant persons under investigations (*ratione personae*), and in other cases with regard to the scope as such of the investigation (*ratione materiae*). Furthermore, the analysis of [...] [CASES 2 and 3], revealed a tendency by OLAF to define rather widely the scope of the investigation in the opening decision, something which, as it happened in the case examined here, would lead OLAF to pursue lines of investigation not always clearly in conformity with the principle of impartiality.

Defining a very broad scope of investigation could increase the risks of mismanagement and the need to comply with procedural guarantees. It could also have adverse consequences for the appropriate use of OLAF's resources and the duration of the investigation.

The Director-General of OLAF should therefore ensure that **effective mechanisms for regular legal supervision and managerial oversight** are put in place as far as internal investigations concerning members and senior staff of the EU institutions bodies and agencies are concerned, including cases where there is a risk of a reputational damage for the EU.

I.3 Investigations opened at the OLAF Director-General's own initiative: working methods
(Recital 17, Article 5.2 of Regulation (EU) No 883/2013)

- (x) The Committee notes that investigations opened at the initiative of the Director-General of OLAF are a characteristic of OLAF's independence. OLAF's management and operational methods of such investigations should have no shortcomings given the potential for OLAF to establish the investigation strategy at the earliest stage and to exploit all means at his disposal for the correct and successful conduct of an investigation³.
- (xi) The Committee has serious concerns regarding how the power of the Director-General of OLAF to open an investigation on his own initiative and, in particular, OLAF's conduct of the investigation [in CASE 1] [...] was implemented [. In this case, OLAF does not appear to have used all the means at its disposal to carry out a thorough investigation and to complete the investigative work in line with the initially defined scope of the opening decision.

³ Within the category of investigations concerning members and senior staff of EU institutions, bodies and agencies.

The Committee notes furthermore the lack of consistency between the scope of the investigation as defined in the opening decision and the decision closing the investigation. For the Committee, any change in the scope of the investigation must be duly justified and documented in the case file in the interests of transparency and the impartial and independent conduct of the investigation. It deeply regrets that the perception of independence and objectivity of the investigation was undeniably damaged by OLAF drawing up the final report making only passing reference to a modification of OLAF's legal analysis, inconsistent with its previous investigative actions and with the scope of the investigation.

- (xii) The Committee regrets the way OLAF drew up the final report in [...] [*CASE 1*], as OLAF appears not to have thoroughly investigated all the allegations set out in the opening decision. The Committee strongly believes that the legality check performed by Unit 01 – the same unit that prepared the opening opinion and also reviewed the final case report and the closure decision - should have been entrusted to another entity within OLAF in order to guarantee a properly independent legality check. The Committee urges OLAF to seriously reassess the way such sensitive investigations are to be reviewed internally before a case is closed. For that reason, the Committee has made a specific recommendation below.

II- **Carrying out the investigation function: exploiting OLAF's powers of investigation and strengthening the effectiveness and legitimacy of the fight against serious misconduct and illegal activities**

(Recitals 3, 4, 7, 10, 11, 13, 15, 16, 19 and 41; Articles 4, 6, 7, 8, 9 and 10 of the Regulation (EU) No 883/2013, Articles 8, 9, 10, 11, 13, 15, 16, 17 of the GIPs)

II.1 **Thorough investigation and investigation planning: working methods**

- (xiii) The Committee puts great emphasis on the need to draw a proper investigation work-plan and considers that when investigations lack a proper investigative action plan for each stage of an investigation, there is an increased danger that investigators may divert their activities away from the objectives set at the outset of the investigation, leading to a lack of accountability and thereby impugn the independence of the investigation itself.
- (xiv) In some instances, the Committee found examples of a good practice in drawing an investigation plan. In those cases, the investigators drew comprehensive investigation plans with regard to the allegations made, the purpose of the investigation, the timeframes, and the investigation activities to be undertaken. These plans were also updated in line with the progress of the investigation. Effective cooperation and communication between staff of the Intelligence and Analysis support Unit and the investigators in the course of the investigations in [...] [*CASES 2 and 3*] also contributed to the outcome of these investigations.
- (xv) By contrast, no preliminary examination of the information collected and obtained in the selection process and no work plan seems to have been drawn in the investigation concerning [...] [*CASE 1*].

(xvi) As for the conduct of the investigations, the analysis of the Committee also revealed certain weaknesses in the investigation practices and methods followed⁴. The Committee's view is that in sensitive internal investigations, whenever OLAF makes use of its discretion to decide which investigative measures need to be taken and at what time, OLAF should clearly record in the case file the reasons for doing so and conversely why it chooses not to take a specific investigative measure. In particular, key decisions such as: closing an investigation without even attempting to interview the person concerned; the failure to investigate [...], which are at the heart of the allegations under investigations; the failure to get the assistance from the competent national authorities; the late registration of documents in the case file that is, after the case is closed, all such steps, decisions and measures call for a proper justification in the interest of accountability, transparency and above all, the impartial conduct of an investigation.

II.2 Organisation of case files: transparency, accountability, confidentiality (Recital 18 of Regulation (EU) No 883/2013, Articles 2, 3, 4, and 8 of the GIPs-)

(xvii) The Committee reviewed OLAF's organisation of the case files in these four cases. The Committee found an overall lack of rigorous and systematic organization in both the indexation and the filing of OLAF documents. This risks rendering the managerial oversight and overall monitoring of the relevant investigations if not ineffective, at least troublesome.

The Committee trust that the new OCM and the rules to be put in place will address these concerns. It is imperative that the structure, filing rules and naming conventions to apply for the registration of documents that are part of an investigation file are clear, meaningful and consistently and uniformly applied by all investigators.

III- Legality check and control procedures: independent conduct and closing of the investigation (Recital 47, Article 17 of Regulation (EU) No 883/2013, Articles 12, 19, 20, 21, 22 of the GIPs- Recital 16 Regulation 2020/amending Regulation (EU) No 883/2013- Recitals 19, 20, 47, 51, Articles 7 and 9 of Regulation (EU) No 883/2013, Article 8 of the GIPs)

(xviii) The Committee has identified serious shortcomings in the area of the legality check, internal advisory, and control procedures. The rules applied by the ISRU-Unit 01 for the legality check in the highly sensitive cases analysed by the Committee have proved to be inefficient. There is a current lack of rigour and an absence of an efficient mechanism for giving internal legal advice and control of the investigation process. A continuous and consistent legality check by specialized legal staff, part of the investigation team from the outset of the case is now a necessity.

⁴ The duration of some investigations with no clear justification, the lack of interview of the person concerned, length of time prior to questioning some witnesses, no request from OLAF to the person concerned to produce the contract with a major international Financial Organisation (FO), no measures were implemented by OLAF as to secure the archives and to control lobbyists' practices.

- (xix) The decision-making system governing the various stages of the investigation should be more transparent involving the input from experts of other Units in planning the strategy and defining objectives in the investigation. The concentration within a single Unit of the control of all key activities at each stage of the investigation is not a balanced mechanism for the guarantee of appropriate legal control. The Committee strongly recommends that the Director-General of OLAF take the initiative to rebalance the assignment of responsibilities to the different units and Directorates so as to put in place an effective system of independent and objective controls for the legality check and review, a vital element in the proper conduct of investigations.

**IV- Design of methods of preventing and combating fraud and corruption
(Article 1.2 of Regulation (EU) No 883/2013, Article 19.10 of the GIPs)**

- (xx) Lessons can be drawn from experiences during the case and actions to be taken based on these experiences, such as improvements in OLAF's internal organization, in investigative techniques, in cooperation with national authorities and with the EU institutions. The Committee considers that a formal structure for the sharing of lessons learned as well as for good practice should be put in place.
- (xxi) Serious consideration should be given to the creation of a special service dedicated to the design of methods for investigation of potential corruption involving lobbyists, the revolving door issue, conflicts of interests, and the breach of the duty of integrity and transparency, all require special attention from OLAF. Having identified failures in the tools for access to information in these areas, urgent work with the Commission needs to be addressed in this field of common concern.