



# **Activity Report of the OLAF Supervisory Committee**

**January 2011 – November 2011**

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Members of the OLAF Supervisory Committee

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## **FOREWORD BY THE CHAIRMAN TO THE SUPERVISORY COMMITTEE'S ACTIVITY REPORT**

I am pleased to submit the last Activity Report of the Supervisory Committee of the European Anti-Fraud Office (OLAF). This is the final activity report of our Committee, whose term of office began in December 2005.

The final year of our mandate was a particularly challenging one for our Committee, with the arrival of the new Director General, the acceleration of the reform of Regulation (EC) No 1073/1999 leading to a debate in which the Supervisory Committee was actively involved and the European Court of Auditors' follow-up audit of OLAF.

The time has now come to make an overall assessment of our work. The format of this last annual report for this Supervisory Committee is therefore different, in order better to reflect our activities throughout our six year mandate. As well as summarising our activities during 2011, this report is intended to provide a synopsis of the main issues on which the Supervisory Committee focused its monitoring activity.

The Supervisory Committee has remained fully committed to assisting OLAF in its fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Union and to reinforcing OLAF's independence through the regular monitoring of its investigations.

The Supervisory Committee worked closely for several years with the first Director General of OLAF, the late Mr. Franz-Hermann Brüner and, after January 2010, with Mr. Nicholas Ilett in his capacity as acting Director General. In 2010 the Supervisory Committee was actively involved in the selection procedure of the new Director General and, following his appointment in February 2011, had several meetings with Mr. Giovanni Kessler.

The Supervisory Committee has also considered it a priority to maintain regular contact with the EU institutions and OLAF's partners and stakeholders, in particular since OLAF relies upon these bodies for the effective enforcement of its recommendations following investigations. The Supervisory Committee appreciates the good relations it has enjoyed with the European Commission, the European Parliament, the Council and the European Court of Auditors, with whom it has had regular meetings to discuss matters of common interest concerning OLAF. The Supervisory Committee can only hope that in the future this fruitful relationship will be continued.

As OLAF's critical friend, the Supervisory Committee has supported OLAF when needed, encouraging it to maintain its good practices, whilst underlining those aspects relating to the implementation of its investigative function needing improvement.

In particular, the Supervisory Committee has consistently stressed the need for OLAF to concentrate on its core investigative activity and to focus its efforts on larger cases, by developing a consistent and robust "*de minimis*" policy. The Supervisory Committee also recommended that OLAF endeavour to expedite the investigation process by way of better management, improved planning of all investigative activities and more effective prioritisation of case work. Moreover, the Supervisory Committee has regularly highlighted the need for adequate and clear procedural investigation rules and recommended improvement

of both the rules contained in OLAF's Manual and of their implementation at every stage of investigations.

Our work throughout 2011 can be seen as yet another example of our supporting yet critical role. The Supervisory Committee issued a total of five Opinions relating to OLAF's investigative function. The first upon the request of the acting Director General; the Supervisory Committee supported OLAF's need for access to European Commission personnel databases at the evaluation phase of an investigation. The second Opinion was drafted at the request of the new Director General and confirmed OLAF's competence to investigate alleged corruption on the part of members of the European Parliament. The third Opinion covered OLAF's draft budget for 2012; the Supervisory Committee supported the wish of OLAF management to be free to determine how cuts in expenditure for the coming year, imposed on it by the European Commission, should be allocated within OLAF. In its fourth Opinion the Supervisory Committee examined the proposal of the European Commission to reform Regulation (EC) No 1073/1999 concerning investigations conducted by OLAF. The most recent Opinion of the Supervisory Committee explores OLAF's practice of transmitting to the institutions, bodies, offices or agencies concerned, case reports drawn up following internal investigations closed without follow-up; the Supervisory Committee drew attention to the consequences of this practice in the areas of the efficiency and the independence of OLAF's investigations.

The Supervisory Committee is encouraged that, over the years, OLAF has taken steps to implement many of its recommendations. However, the Supervisory Committee is aware that a number of issues still require improvement. In particular, OLAF needs to take measures in order to refocus its attention on its investigative function and to improve its overall efficiency by better management of investigations, particularly with regard to their length and to control their management and supervision. The Supervisory Committee hopes that the reorganisation of OLAF which will take effect on 1<sup>st</sup> February, 2012, will remedy these problems. The progress made by OLAF, more particularly in the specific areas mentioned above, remains to be monitored by the next Supervisory Committee.

Throughout our mandate, we have developed a constructive relationship with OLAF. Numerous meetings with the OLAF management team and OLAF staff have been the occasion for valuable exchanges of views and sharing of information. The Supervisory Committee would like to thank the staff of OLAF and its Director General for their readiness to co-operate with the work of the Supervisory Committee throughout our mandate and to make our task an easier and more enjoyable one than would have been possible without their assistance.

I particularly wish to express my own and the Committee members' debt to the staff of our Secretariat, without whose industry and loyal support none of our work would have been possible. They have been a pleasure to work with.

Diemut Theato,  
Chairman,  
Supervisory Committee, OLAF

## 1 INTRODUCTION

1. The Supervisory Committee (SC) of the European Anti-Fraud Office (OLAF) was established for the purpose of reinforcing OLAF's independence by the regular monitoring of its investigative function, whilst refraining from interfering with the conduct of investigations in progress. The SC also assists the Director General of OLAF (hereinafter OLAF DG) in the discharge of his responsibilities, with the aim to support OLAF's work and to ensure that its investigations are carried out to the highest standards.
2. The SC discharges this role by delivering opinions to the OLAF DG, in which it makes recommendations to OLAF for improvement where it deems appropriate and necessary. The SC also submits annual reports to the EU institutions on its activities.
3. This activity report covers the six year period of the mandate of the SC whose members began their term of office in December 2005.
4. The SC's main responsibility during its mandate has been to ensure that OLAF's independence is in no way compromised. The SC considers that the risks of undue influence on the opening, pursuit and conduct of an investigation can come from any source and has paid particular attention to those more subtle pressures which could potentially affect OLAF's independence, such as efforts by the institutions, bodies, offices, agencies, Member States or other third parties, to obstruct OLAF either at the opening stage or during the course of an investigation: by refraining from or delaying the transmission of evidence or documentation to OLAF, by hindering it in its investigatory activities or by unduly restricting OLAF's resources, whether operational, financial or human. The monitoring by the SC of OLAF's investigations has therefore covered a wide range of issues.
5. The SC paid particular attention to **the implementation of the legal provisions set out in Regulation (EC) No 1073/1999 guaranteeing OLAF's independence**: the guarantees associated with the post of the OLAF DG, and the existence and powers of the SC. The SC actively participated in the recruitment procedure of the new OLAF DG and expressed its views on the amendments to the reform of Regulation (EC) No 1073/1999<sup>1</sup> with regard to this procedure, as well as to those amendments pertaining to the OLAF DG's mandate, status, role and independence.
6. The SC carefully monitored **the execution of OLAF's investigative function** in order to be able to identify any undue pressure on OLAF which might lead to its independence being compromised. On the basis of a thorough examination of a representative sample of a diverse range of case files and numerous discussions with OLAF's investigators, managers and directors, the SC assessed those aspects it considered to be essential for the efficiency, effectiveness and independence of OLAF's investigative work: OLAF's competence and powers of investigation, duration of investigations, respect by OLAF of procedural rules during investigations, cooperation and information exchange with Member States and with the institutions, bodies, offices and agencies in relation to OLAF's investigative function.

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<sup>1</sup> See the European Commission's Reflection paper on the reform of OLAF of 6 July 2010, SEC(2010) 859 and the SC's Opinion No 3/2010; see also the European Commission's Amended Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999 of 17 March 2011, COM(2011) 135 final and the SC's Opinion No 4/2011.

7. The SC assessed **the impact of OLAF's management on investigations**. In particular, the SC paid special attention to issues such as management of investigations, budget, as well as administrative organisation and staff policy in relation to OLAF's investigative function and OLAF's procedural investigation rules.

## **2 LEGAL GUARANTEES FOR OLAF'S INVESTIGATIVE INDEPENDENCE**

8. Although OLAF is formally part of the European Commission (EC) from an administrative viewpoint, it is independent from it as regards its investigative activities. The legal framework governing OLAF's investigations sets out two sets of guarantees aimed at ensuring OLAF's operational independence and the "proper conduct of investigations"<sup>2</sup>: the independence of the OLAF DG and the role of the SC.

### **2.1 Independence of the OLAF Director General**

9. The opening, conduct and closing of OLAF's cases is a matter exclusively for the OLAF DG. Therefore, his independence is an indispensable prerequisite for OLAF to carry out its administrative investigations free from outside influence or pressure. In several of its Opinions, the SC expressed its views as to his recruitment, the means of ensuring his independence and the issue of deputy representation.

#### *2.1.1 Recruitment of the OLAF DG*

10. During 2010, the SC was actively involved in the appointment procedure for the post of the DG and issued its Opinion No 2/2010 on the nomination of the OLAF DG. The SC stated that the successful functioning of OLAF requires from its DG strong leadership, good management skills and the proven ability to manage large teams. More specifically, the SC highlighted that the OLAF DG should have the ability and determination to lead a complex, multi-task organisation within an international environment in order to deliver concrete results in the fight against fraud and corruption in Europe. He should have sufficient background in this field in order to command the loyalty and the respect of a highly specialised team, and in order to ensure credibility both within and outside OLAF.

11. Moreover, in its Opinion No 3/2010, the SC welcomed the new recruitment procedure as foreseen in Article 12(2) of the amended Regulation (EC) No 1073/1999. This procedure fully corresponds to the requirement of independence and the joint agreement of the three institutions – European Parliament (EP), Council and EC – serves to reinforce the position of the OLAF DG.

#### *2.1.2 Means of ensuring the independence of the OLAF DG*

12. The OLAF DG must carry out his duties in full independence. Moreover, he has the overall responsibility for ensuring the independence of OLAF as a whole in its operational activities, a duty in which he has always been supported by the SC. The legal framework

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<sup>2</sup> Considerandum 5 of the EC Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), (1999/352/EC, ECSC, Euratom).



governing OLAF's investigations sets out several means enabling the OLAF DG to act independently. The SC expressed its views with regard to some of them in its Opinions and previous Annual Reports.

13. *Inter alia*, it is within the competence of the OLAF DG to decide upon the opening, conduct and the reporting of investigations without the need to either seek or accept outside instructions<sup>3</sup>. In addition, the OLAF DG may bring an action against the EC should he consider that a measure taken by the latter calls his independence into question. In the light of recent misunderstandings between the European Parliament and OLAF, the SC stated in its Opinion No 4/2011 that, in the amended proposal for Regulation (EC) No 1073/1999, this possibility should be extended to all institutions, bodies, offices and agencies<sup>4</sup>. In such a case he should inform the SC immediately and seek its full support.

14. Furthermore, unlike others Directors General within the EC, the OLAF DG has the power to act as Appointing Authority or as authority authorised to conclude contracts of employment<sup>5</sup>. Given that he should manage human resources in a way that best responds to the operational needs of OLAF, the SC believes that this role should be strengthened, thus making him free to recruit investigative staff with the necessary skills and qualifications to carry out all OLAF operational activities. This should be solely the responsibility of the DG, and not related to the recruitment procedures for the rest of the EC. This responsibility should not be surrendered to the EC. The SC would once again reiterate the need for a better developed human resources policy by introducing a strategy to reflect the operational priorities set by management<sup>6</sup>.

15. Finally, the SC emphasised in its Opinion No 4/2011 that the continued independent conduct of OLAF's investigations is essential and no delegation of the DG's investigative duties to one or more OLAF staff members should either detract from the appointed person's responsibility to the institutions or jeopardise his independence<sup>7</sup>.

### 2.1.3 *The Deputy DG*

16. In January 2010, the institutions were faced with a situation where no person had been appointed to the post of the OLAF DG as required by Article 12 of Regulation (EC) No 1073/1999, at which time the EC appointed an acting DG without prior consultation or agreement of the two other institutions (European Parliament and Council). The SC expressed the view that the person carrying out the role of acting OLAF DG during an interim period should do so with the consensus of the three institutions<sup>8</sup>.

17. In the light of these events, the SC therefore considered it important to ensure the continuity of the independent conduct of OLAF's investigations through the creation, in Regulation (EC) No 1073/1999, of the post of a standing Deputy Director General to replace the DG were the latter to resign, retire, be on sick-leave or otherwise be unable to

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<sup>3</sup> Article 12 (3) of Regulation (EC) No 1073/1999.

<sup>4</sup> Opinion No 4/2011, para. 6.

<sup>5</sup> Article 6 (1) of the EC Decision of 28 April 1999 cited above.

<sup>6</sup> Opinion No 3/2011.

<sup>7</sup> Opinion No 4/2011, point 4.2.1.

<sup>8</sup> SC Activity Report 2009-2010, point 3.1.1.

fulfil his obligations<sup>9</sup>; such a Deputy to be chosen from amongst the OLAF Directors in consensus with all three institutions.

## **2.2 Role of the Supervisory Committee**

18. The SC was established in order to reinforce OLAF's independence by regular monitoring of the implementation of OLAF's investigative function. The independence of the SC is a key factor for the operational independence of OLAF itself. Therefore, the SC's resources (that of access to OLAF case files by the SC and support from the SC Secretariat) should be appropriate and adequate to enable it to fulfill its role and perform its functions in full independence. The SC has regularly expressed its views on this matter both in its Annual Reports and its Opinions.

### *2.2.1 Access by the SC to OLAF case files*

19. As stressed in its Opinion No 4/2011, the SC's monitoring activity as an independent body should not be based solely on information it receives from OLAF. The SC must be able to carry out its own analysis using not only the documents and information obtained from OLAF under Regulation (EC) No 1073/1999, but also all the documentation that the SC considers necessary to carry out this task. In this context, access by the SC and its Secretariat to OLAF's case files is essential to obtain information relevant to the SC's mission to strengthen OLAF's independence by the regular monitoring of its investigative function.

### *2.2.2 The SC Secretariat*

20. SC members are assisted in the performance of their duties by a Secretariat, which is provided by OLAF<sup>10</sup>. The SC has always stressed the need for the SC Secretariat to work independently under the supervision and direction of the Chairman of the SC and its members. In the SC's view, the independent functioning of the Secretariat requires that additional safeguards be included in the text of Regulation (EC) No 1073/1999 itself, such as those proposed by the SC in its Opinion No 4/2011<sup>11</sup> regarding the number of members of the Secretariat, as well as their nomination and evaluation.

21. Throughout its mandate, the SC has continually stated its requirement for an adequately staffed Secretariat as to its number and level: one Head of unit, four administrators and three assistants. The SC is very disappointed therefore to note that not only were its repeated recommendations not fully taken into account by OLAF, but what is more the new OLAF structure provides for a reduction from eight to six posts. The SC also notes with concern that the appointment of the next Head of the SC Secretariat has been made by OLAF DG; both these decisions having been taken without any prior consultation with the SC.

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<sup>9</sup> Opinions Nos 3/2010 and 4/2011.

<sup>10</sup> Article 11 (6) of Regulation (EC) No 1073/1999.

<sup>11</sup> Opinion No 4/2011, para. 41.

22. It is the SC's assessment that, in the future and in accordance with Article 11 of its rules of procedure<sup>12</sup>, members of its Secretariat be appointed at the suggestion of the SC, by an authority other than that of DG OLAF, to carry out their work accountable to and in full compliance with instructions received solely from the SC and to be periodically evaluated by the SC<sup>13</sup>. With the experience of its six year term of office the SC considers that its independence, together with that of its Secretariat, would be illusory were the SC Secretariat staff to continue to be appointed, managed and graded by the office it is responsible for monitoring.

### **3 MONITORING THE IMPLEMENTATION OF OLAF'S INVESTIGATIVE FUNCTION**

23. Throughout its mandate, the SC has made the fullest use of those legal mechanisms provided for it by the legislator with regard to the regular monitoring of OLAF's investigative function in order to ensure that its independence is not compromised. On the basis of information sent to it by the OLAF DG<sup>14</sup> or acting on its own initiative<sup>15</sup>, the SC scrutinized those aspects of OLAF's investigative function that it considered to be essential for safeguarding its operational independence: OLAF's competence and powers of investigation, duration of investigations, respect for procedural rights, cooperation and exchange of information with Member States and the institutions, bodies, offices and agencies.

#### **3.1 OLAF's competence and powers of investigation**

24. In its Opinion No 3/2010, the SC expressed its wish to have, in the amended Regulation (EC) No 1073/1999, a clear definition of OLAF's competence and powers of investigation at each stage, especially regarding OLAF's powers to carry out on-the-spot checks and inspections as provided by Regulation (Euratom, EC) No 2185/96<sup>16</sup>. Recent challenges have shown that OLAF's power to have immediate and unannounced access to any information held by institutions, bodies, offices or agencies<sup>17</sup> also needs to be reinforced.

25. OLAF has been prevented from having immediate and automatic access to the EC's databases containing personal data when considering whether to open an investigation. The SC's Opinion No 1/2011, issued at the request of the OLAF DG, supported OLAF in the dialogue with the EC on this matter (for further details, see below point 3.5.1).

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<sup>12</sup> OJ L 308, 24.11.2011, p. 114-120.

<sup>13</sup> See point 44 of the European Court of Auditors' Opinion No 6/2011 on the amended proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999, OJ C 254, 30.8.2011, p. 1-8.

<sup>14</sup> Article 11 (7) of Regulation (EC) No 1073/1999.

<sup>15</sup> Article 11 (1) of Regulation (EC) No 1073/1999.

<sup>16</sup> Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996, p. 2-5.

<sup>17</sup> Article 4(2) of Regulation (EC) No 1073/1999.

26. OLAF's competence to open and conduct an internal investigation concerning Members of the European Parliament, as well as its power to have immediate and unannounced access to any information held by this institution and to its premises has also been challenged. Again, the SC supported OLAF and, following a request from the OLAF DG, issued its Opinion No 2/2011 in which it stated that preventing OLAF from exercising this key investigative activity following an interpretation made by an institution, body, office and agency of OLAF's mandate was a limitation of OLAF's independent conduct of investigations.

27. In its Opinion No 4/2011, the SC expressed its regret that, to date, OLAF's competence to conduct investigations and its investigative powers had not been clearly defined, in particular with regard to investigations within the institutions, bodies, offices and agencies<sup>18</sup>.

### 3.2 Duration of investigations

28. The SC paid close attention to the duration of OLAF's investigations, with particular regard to the operation of time limits and to unexplained delays in the course of investigations. In addition, the length of investigations was monitored in order to verify that potential undue delays were not related to any reason that would have compromised their independent conduct or jeopardized their results. The SC examined a total of 425 cases lasting more than nine months, as well as a number of cases remaining open after more than four years of investigation. The findings were presented in two Opinions<sup>19</sup> and set out in each annual report of the SC.

29. Having recommended in its Opinion No 1/2007 that the form of the reports submitted to the SC by OLAF relating to investigations lasting more than nine months indicate more clearly the reasons for exceptional delays in investigations<sup>20</sup>, the SC has been better able to identify the reasons for such delays and, as a result, OLAF has largely eliminated unexplained reasons, having changed the format of the "nine months reports".

30. This is not to say that the SC is satisfied that investigations are completed within an acceptable time-frame. On the contrary, the SC has observed that investigations, sometimes of comparatively simple matters, often take an inordinately long time to complete. Notably, there are currently 36 cases whose investigations have already lasted more than 4 years<sup>21</sup>. This may be as a result of insufficient numbers of experienced staff allocated to particular investigations, or it could result from investigators being diverted from completing one investigation before they begin another. This is a matter which greatly concerns the SC which has addressed the problem by, *inter alia*, suggesting better methods of control and planning of investigations so that managers may better deploy their investigators and direct the course of investigations more efficiently<sup>22</sup>.

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<sup>18</sup> Opinion No 4/2011, para.5.

<sup>19</sup> Opinions Nos 1/2007 and 2/2009.

<sup>20</sup> The SC recommended including information relating to when the facts under investigation took place; time barring (prescription) periods of acts under investigation; the legal description of the irregularity under investigation; potential sanctions or legal consequences of the acts under investigation and the expected time for completion together with a reasoned explanation.

<sup>21</sup> October 2011.

<sup>22</sup> Opinion No 4/2010.

### 3.3 Respect for procedural guarantees within investigations

31. OLAF's independence relies to a large extent on its ability and willingness to respect fundamental rights and procedural guarantees when conducting its investigations. By failing to do so, OLAF would open itself to criticism, resistance from concerned parties and political interventions. For this reason, the SC has always taken a keen interest in OLAF's respect for these rights and guarantees and has made considerable efforts both to assess the way OLAF ensures respect for fundamental rights and procedural guarantees and to actively promote the development of relevant standards in this field applicable to OLAF.

32. When examining cases transmitted to the national judicial authorities, the SC paid particular attention to the substantive and procedural aspects of investigations. On the basis of these cases, the SC assessed the way in which OLAF ensures respect for fundamental rights and procedural guarantees within its investigations. The SC's findings and recommendations are summarised in the Opinion No 5/2010. In this Opinion, the SC found that, overall, OLAF respects fundamental rights and procedural guarantees. The SC identified, however, specific problems such as procedural shortcomings, administrative errors and divergent practices within the investigative units.

33. The SC made recommendations aimed at improving the current practice in carrying out investigations. In particular, the SC suggested specific measures that should be taken by OLAF to reinforce respect for fundamental rights and procedural guarantees at each stage of an investigation. In addition, it recommended that OLAF make specific improvements to the OLAF Manual<sup>23</sup> and ensure that its rules are respected. Furthermore, the SC recommended the reinforcement of the mechanisms of both the control of the impartiality and the confidentiality of investigations and their duration. Finally, it provided OLAF with an analysis grid in respect of fundamental rights and procedural guarantees, to be used as a guide for investigators during investigations and for the management team when controlling their legality.

34. The SC notes with satisfaction that, in response to its Opinion No 5/2010, the OLAF DG decided to implement most of its recommendations within OLAF.

35. The SC also contributed to the debate on the reform of Regulation (EC) No 1073/1999, urging the EC and the legislator to take advantage of this reform to reinforce the protection of fundamental rights and procedural guarantees of those persons involved in OLAF's investigations. The SC issued three Opinions on this subject.<sup>24</sup>

36. In particular, the SC highlighted that, when setting standards for procedural guarantees, the balance between the interests of concerned parties and the efficiency of the conduct of investigations must always be borne in mind. This balance is particularly delicate when regulating an administrative procedure that contains no coercive measures and has a rather limited impact on the legal status of the person concerned. There is a risk that giving too much weight to the procedural aspects of a case will detract from the efficient conduct of the investigation. One example of that is the complex question of deferral of OLAF's obligation to give the person concerned the possibility of making his views known and the

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<sup>23</sup> OLAF Manual – Operational Procedures.

<sup>24</sup> Opinions N<sup>os</sup> 2/2006, 3/2010 and 4/2011.

need for OLAF to obtain the prior agreement of the Secretary General/President of the institution, body, office or agency concerned (see point 3.5.4 below).

### **3.4 Cooperation and information exchange with Member States**

37. The efficiency of OLAF's operational activity depends greatly on its cooperation with Member States and on the contribution made by them both during the investigation and in the follow-up stages. In this respect, the monitoring of OLAF's investigative function by the SC was twofold.

38. The SC was particularly conscious of the importance of improving the flow of information between the Member States' authorities and OLAF. The SC sought, in particular, to ensure that Member States avoid acting in a way which might actively hinder OLAF in its investigative activity; for example, by refraining from or delaying the transmission of evidence or documentation to OLAF. When examining reports on cases lasting more than nine months, the SC noted a number of cases where OLAF reported the lack of cooperation by the Member States as the reason for not having completed investigations within this period.<sup>25</sup> While this reason has been inaccurately used in some of the cases examined, it has been rightly identified in others. The SC also noted that OLAF has encountered problems in identifying the appropriate competent national authorities able to provide it with the assistance needed, when carrying out, for example, on-the-spot checks on the premises of economic operators. For this reason, the SC, in its Opinion No 4/2011, supported the amendment to Regulation (EC) No 1073/1999 which aims to oblige each Member State to identify quickly the relevant national competent authority to assist OLAF in its investigations, mainly in the area of direct expenditure.

39. A thorough analysis of those cases where OLAF has faced lack of co-operation from Member States is still needed.

40. Secondly, bearing in mind that OLAF has no prosecuting power, the SC considers that close co-operation between OLAF and the national judicial authorities, as well as proper follow up of OLAF's recommendations remain essential for the successful outcome of OLAF's investigations. In the light of these considerations, the SC examined those cases requiring information to be transmitted to these authorities. In so doing, the SC's intention was to assess both the quality and usefulness of OLAF's investigation reports for them and to identify the reasons why some cases were not taken up by them<sup>26</sup>. The SC also wanted to ensure that conclusions of investigations were solely based on elements having evidential value in the judicial proceedings of the Member State in which their use proved necessary<sup>27</sup>.

41. The SC noted that, in some cases, the national judicial authorities did not follow OLAF's recommendations for various reasons: prescription (statute of limitations), lack of prioritisation, or obvious lack of evidence. However, the SC noted that the cases where these authorities were prevented from taking action due to prescription diminished progressively as the quality of information provided in the reports improved, in particular the analysis of criminal offences allegedly committed and of the applicable rules in the Member State to which the report was forwarded.

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<sup>25</sup> Opinion No 2/2009.

<sup>26</sup> For further developments concerning the findings of the SC on this issue, see its previous Activity Reports.

<sup>27</sup> Recital 10 and art 9.2 of Regulation (EC) No 1073/1999.

42. The SC believes that the majority of these problems could be avoided by the early involvement of experts in the respective national legal systems, be it the magistrates of the Judicial and Legal Advice Unit, or a similar function built into the investigative organisation of OLAF.

### **3.5 Cooperation and exchange of information with the institutions, bodies, offices and agencies in relation to OLAF's investigative function**

43. To fulfil its remit, it is essential that OLAF carries out its role with the full support and confidence of the institutions, bodies, offices and agencies. Without their trust and confidence, OLAF cannot carry out complete and effective investigations in absolute independence, given that many cases necessarily involve the co-operation of their staff.

44. The SC has always stressed that close cooperation between OLAF and the institutions and competent bodies, as well as proper follow-up of OLAF's recommendations is essential for the successful outcome of OLAF's investigations. However, the SC is anxious to ensure that all parties cooperating with OLAF avoid acting in a way which might actively impede OLAF's work. Therefore, the SC has paid particular attention to and monitored those aspects of this cooperation relating to OLAF's operational independence: access by OLAF to information held by the institutions, relations with the Investigation and Disciplinary Office (IDOC) and other EU institutions' services, follow-up by institutions of OLAF's recommendations, those situations where OLAF defers the obligation to enable the person concerned to make his views known, transmission of case reports, provision of information by OLAF to institutions, bodies, offices and agencies and exchange of views with the institutions.

#### *3.5.1 Access by OLAF to information held by the institutions*

45. One area which has been brought to the attention of the SC where trust and confidence appears to have broken down is the access by OLAF to databases held by the EC. Article 4(2) first paragraph of Regulation (EC) No 1073/1999 recognises clearly the right for OLAF to have immediate and unannounced access to any information held by the institutions, bodies, offices and agencies. However, the SC noted that since its creation, OLAF has encountered difficulties in obtaining access to information held by certain institutions. Such institutions are particularly reluctant to give OLAF quick and discreet access to certain categories of personal data, due to a very restrictive interpretation of Regulation (EC) No 45/2001<sup>28</sup>. The SC expressed the view that such a position is a sign of mistrust vis-à-vis OLAF and could also undermine its investigative independence.

46. In May 2011, the SC delivered an Opinion<sup>29</sup> giving its view that quick and discreet access be given, especially at the initial stage of an investigation, before the opening of a file by OLAF, so that OLAF can assess whether the material necessarily meets its criteria

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<sup>28</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1–22.

<sup>29</sup> Opinion No 1/2011.

for investigation. This is particularly relevant in cases where a potential conflict of interest may have arisen.

47. OLAF needs to have access to information contained in the Human Resources databases maintained by the EC. In particular, OLAF requires access to data relating to individual employees and their family members (referred to as “family tree” data).

48. The issue is an historic one and no agreement on the way forward has yet been reached. It is to be hoped that, in following the SC’s recommendations and the dialogue which OLAF and the EC have now embarked upon, a solution to this long-standing problem may be reached.

49. The SC believes that the reform of Regulation (EC) No 1073/1999 should also be the occasion to address this issue. In its Opinion No 4/2011, the SC stated that the new regulation should include provisions allowing a fair balance between the need for OLAF to have access to information held by the institutions prior to the opening of a case and at any stage of an investigation and relevant data protection rules.

50. The SC also recommended that OLAF systematically send it any information concerning delays in reporting or the failure to report fraud cases, as well as failure by an institution, body, office or agency, to provide access to information held by them.

### 3.5.2 *Relations with IDOC and other EU institutions’ services*

51. The manner of OLAF’s deployment of its limited investigative resources is a constant concern to the SC. The SC believes OLAF needs to concentrate its efforts on those cases likely to have a successful outcome and to offer value for money. Only by using its resources in an effective and efficient manner will OLAF be able to carry out investigations into the more serious cases of fraud or irregularity affecting the financial interests of the EU, leaving other cases to be dealt with by more appropriate bodies, such as IDOC, the European Commission’s Security Office or the competent services of the other institutions.

52. In the light of these considerations, the SC recommended that OLAF develop an in-house “*de minimis*” policy in accordance with OLAF’s investigation policy and priorities, in order for it to allocate its resources, wherever possible, to the investigation of more serious cases. The SC reviewed this policy and summarized its findings in its Opinion No 5/2008. The SC proposed a set of recommendations taking into account, *inter alia*, the necessity for cooperation with both the IDOC and other EU institutions’ services. Work sharing with them is based on outlining a delineation of responsibilities for investigation. Consequently, the SC encouraged OLAF to improve the process of exchange of information and cooperation with these services, but underlined that no cooperation arrangement agreed should limit either OLAF’s key competencies or its independence to investigate.

53. The SC followed-up the implementation of its Opinion<sup>30</sup> and was pleased to note that OLAF “*de minimis*” rules had been added to the OLAF Manual<sup>31</sup>. The SC also welcomed the initiative to clarify the implementation of the “*de minimis*” policy through operational

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<sup>30</sup> See the SC’s Activity Report 2009-2010, point 3.2.

<sup>31</sup> See Annex 9 of the Manual.



guidelines, as well as the creation of a “*de minimis*” annex listing the different criteria when judging whether or not to open an external investigation.

### 3.5.3 *Follow-up by institutions of OLAF’s recommendations*

54. The OLAF DG is under an obligation to inform the SC of cases where the institution, body, office or agency concerned has failed to act on OLAF’s recommendations<sup>32</sup>. The SC has addressed this issue in every Annual Report and noted that only two such cases have been reported to it during its six-year mandate. As a consequence, this small number of reported cases did not enable the SC to come to any general conclusion or make any recommendations. The SC expressed its concerns that the absence of reports may indicate a lack of a proper follow-up mechanism and recommended that OLAF set up as soon as possible a systematic reporting system for such cases. In the SC’s view, OLAF’s independence could be seriously threatened if it fails to react when counterparts disregard its recommendations.

### 3.5.4 *Agreement of the Secretary-General/President of an institution, body, office or agency to defer the obligation to give the person concerned the possibility to make his views known*

55. When carrying out internal investigations, OLAF must obtain the prior agreement of the Secretary General or the President of the institution, body, office or agency concerned whenever it decides to defer the obligation to give the person concerned the possibility of making his views known. This requirement aims to ensure that the rights of defence of the persons concerned are respected.<sup>33</sup> However, the SC expressed the view that where an institution refuses or delays giving its agreement, OLAF’s investigative independence may be compromised<sup>34</sup>. The SC noted that on several occasions the transmission of OLAF’s case files to the national judicial authorities was prevented by a delay in the granting of an agreement by the institution or body concerned. The SC stated in its Opinion No 4/2011 that the new regulation should therefore contain provisions allowing for the avoidance of such situations in the future and regarded the manner in which this problem has been addressed in the present proposal for reform of Regulation (EC) No 1073/1999 as inadequate.

56. As the guardian of OLAF’s independence, the SC should be informed systematically of all cases in which institutions, bodies, offices or agencies have refused to give or unnecessarily delayed their agreement to defer the obligation to ask the person concerned to make his views known.

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<sup>32</sup> Article 11(7) of Regulation (EC) No 1073/1999.

<sup>33</sup> Court of First Instance, *Franchet and Byk v Commission* (no 2), 8 July 2008, case T-48/05, para. 151.

<sup>34</sup> See Opinion No 5/2010, paras. 36-37.

### 3.5.5 *Transmission of case reports and provision of information by OLAF to institutions, bodies, offices, agencies*

#### *Ø Supply of information by OLAF to institutions, bodies, offices, agencies*

57. Under the current legislation, OLAF has a legal obligation to inform an institution, body, office or agency in cases where an internal investigation shows that a member or staff member may be concerned, with the exception of cases requiring absolute secrecy for the purposes of the investigation or where the investigation falls within the competence of a national judicial authority. In its Opinion No 4/2011, the SC expressed its concerns with regard to the legislative proposal amending Regulation (EC) No 1073/1999 and modifying these rules<sup>35</sup>, because it might deprive OLAF of its option to keep its investigation confidential wherever necessary.

#### *Ø Transmission of case reports by OLAF to institutions, bodies, offices, agencies*

58. The SC took note of OLAF's decision to send to the EC, in response to its request, all final case reports drawn up following internal investigations closed without follow-up. In addition, OLAF decided to apply a similar policy to the other institutions and bodies, unless otherwise requested. The SC decided to assess this practice, with the express purpose of determining whether it could jeopardize OLAF's investigative independence. The SC's Opinion No 5/2011 gives an overview of the SC's findings following the examination of 17 cases, as well as of the SC's opinion with regard to the legal basis for these transmissions and compliance of this practice with EU law.

59. More specifically, the SC expressed its concern that this transmission could affect the rights of the persons implicated in investigations and lead them to bring an action for damages before the European Court of Justice, which would be detrimental to OLAF's credibility and reputation. Transmission of final case reports which contain sensitive information about witnesses, informants and whistleblowers might also jeopardize the success of investigations by discouraging them from coming forward and assisting OLAF and by disclosing unnecessary information related to other ongoing OLAF investigations. At the very least, this practice may give other institutions inappropriate means to influence OLAF's investigative activity, which would be detrimental to the public's trust and confidence in OLAF's independence.

60. The SC recommended that OLAF reconsider its decision to transmit these case reports to the institutions, bodies, offices or agencies concerned without taking all necessary measures in order to ensure that this practice complies with EU law and does not jeopardize the efficiency and independence of its investigations.

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<sup>35</sup> Article 4 (6) of the amended proposal: "In exceptional cases where the confidentiality of the investigation cannot be ensured, the Office shall use appropriate alternative channels of information".

### 3.5.6 Exchange of views with the institutions

61. One of the objectives of the reform of Regulation (EC) No 1073/1999 is to improve OLAF's governance and to enhance its cooperation with the institutions, while respecting its operational independence. The regular interinstitutional dialogue initially proposed has been replaced by a less formal exchange of views between the European Parliament, the Council and the European Commission, with the participation of OLAF and the SC. The SC expressed its views concerning both proposals in its Opinions No 3/2010 and 4/2011.

62. The SC stated that either a formal dialogue or an exchange of views with the institutions could support OLAF's activities, but that they should under no circumstances weaken the operational independence of OLAF<sup>36</sup>. In particular, the SC noted that the proposal that OLAF should take appropriate action while taking into account the opinions expressed in the exchange of views, may have the effect of undermining the independence of the DG. The DG could well be put under pressure by the institutions, particularly regarding the establishment of the strategic priorities for OLAF's investigative policies.

## 4 MONITORING THE IMPACT OF MANAGEMENT ON OLAF'S INVESTIGATIVE FUNCTION

63. From the outset and throughout its mandate, the SC has continually stressed the need for OLAF to implement a robust and effective leadership policy, to lay down clear investigatory rules and ensure that investigations are appropriately managed. Furthermore, the SC places great importance on the introduction of internal control mechanisms in relation to the duration of investigations and the respect for procedural guarantees within investigations and situations of potential conflict of interest. All these matters have a direct impact on the independent conduct of investigations and have therefore been closely monitored by the SC.

### 4.1 Management of investigations

#### 4.1.1 Planning and strategic direction of investigations

64. The SC's analysis of the nine months reports<sup>37</sup> indicated a lack of investigative methodology and that many delays in processing case files could be avoided by better management and planning of investigations. The SC was concerned by these findings and considered that where investigations lacked proper planning at each stage of the case, there was an ever-present danger that investigators might divert their activities from the objectives set at the outset of the investigation. This may lead to a lack of accountability and thereby impugn the independence of the investigation itself. Bearing in mind that good

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<sup>36</sup> Opinion No 3/2010, point 2.1 and Opinion No 4/2011, point 4.3.

<sup>37</sup> Opinions N<sup>os</sup> 1/2007 and 2/2009.

investigation planning is the key to successful and focused investigations, the SC therefore examined a number of OLAF cases with a view to ascertaining whether and to what extent investigation planning assists OLAF in the carrying out of its investigations.

65. In the SC's Opinion No 4/2010, the recurrent lack of proper planning of investigations was noted. This has a negative impact on the effectiveness of OLAF's work and the length of its investigations. The SC also noted that OLAF's Manual provided guidelines for drawing up an initial work plan at the assessment stage, but lacked provision for a full investigation plan once the investigation starts.

66. The SC stressed the need for OLAF to curb the excessive length of some investigations by establishing clear investigatory procedures and deadlines. The SC recommended that OLAF implement a policy of proper planning of all stages of investigations, with regular checks, realistic timetables and periodic updates to ensure compliance. In particular, it recommended that a detailed investigation plan be developed at the outset for each investigation, setting out the objectives of the investigation, the likely resources needed for its completion and projected costing. Moreover, the SC suggested that investigation plans should be regularly examined by the management, at unit level, in order to follow and, where necessary, guide the development of cases.

67. As a result of the SC's work in this field, OLAF has become aware of the need to adopt a common approach to the strategic planning of cases, and has begun to draw up detailed work plans once a case is opened. Moreover, the SC is pleased to note that, from the very beginning of his mandate, the new OLAF DG requested that changes be made to the Manual to implement the SC's recommendations.

68. The effectiveness of the measures taken by OLAF needs to be further assessed.

#### *4.1.2 Internal control of investigations*

69. The SC laid particular emphasis on the importance of adequate internal mechanisms for quality control and the avoidance of delays as well as a fully functioning feedback system and evaluation of investigations for ensuring the independence and efficiency of OLAF's investigations. The existence of a sound control system and benchmarks would not only facilitate the follow-up by OLAF management of performance as well as identification of problem areas, but also would allow corrective action to be taken on the basis of lessons learnt, following recommendations made.

70. In the light of these considerations, the SC paid particular attention to the adequacy and effectiveness of these mechanisms, especially in the framework of its monitoring of the duration of investigations and the respect by OLAF of fundamental rights and procedural guarantees.

### *Ø Control of duration of investigations*

71. Two of the SC's Opinions<sup>38</sup> highlighted a number of shortcomings in the conduct of investigations, some of which relate to operational factors and others which are the result of weaknesses in planning or internal organisation. In particular, the SC noted that the increase in the length of investigations was often due to shortcomings in the management of some investigations or insufficient management supervision of the real reasons for their length, the estimates of time limits for their completion and the scheduling of investigative measures to be performed. For the SC, these various findings indicated inadequate supervision and control of the day to day management of cases.

72. The SC regrets that, despite its repeated recommendations, the measures implemented to achieve regular verification of the length of investigations have not been applied in a sufficiently systematic way. The SC therefore reiterates the need for effective and efficient control of the duration of investigations.

### *Ø Control of impartiality in investigations*

73. In the SC's view, impartiality in the conduct of investigations goes hand in hand with OLAF's operational independence. Therefore, the SC has repeatedly recommended that OLAF establish the strict internal control mechanisms necessary to prevent any conflicts of interest likely to harm OLAF's independence and reputation<sup>39</sup>. In its Opinion No 5/2010, the SC made specific recommendations in order for OLAF to bolster the current control mechanisms concerning impartiality in investigations. When assessing the respect by OLAF of fundamental rights and procedural guarantees within its investigations, the SC paid particular attention to this issue and regrets that the measures taken by OLAF to date remain insufficient.

### *Ø Control of legality of investigations*

74. The SC noted with concern that the legal control of OLAF's investigative work was not carried out in a systematic way at each and every stage. This lack of a continuous legal examination during investigations has led to failures to observe procedural requirements. The SC regularly expressed the view that in order to ensure effective respect for fundamental rights and procedural guarantees it was necessary to establish checks on the legality of the investigations, based on greater and continuous involvement of the members of the Judicial and Legal Advice Unit<sup>40</sup>.

75. The SC addressed the issue of the additional role played by these magistrates in each of its previous Activity Reports. Not only are they the main point of contact with the national judicial authorities, but they also play an important role in ensuring that the

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<sup>38</sup> Opinions Nos 2/2009 and 5/2010.

<sup>39</sup> See the SC's Activity Reports 2005-2007 and 2008-2009.

<sup>40</sup> See the SC's previous Activity Reports and the Opinion No 4/2011.

evidence contained in the files which are transmitted to national judicial authorities conform to the legal requirements of the respective Member State. Given this important role, the SC repeatedly encouraged closer involvement of the magistrates in the investigations. The SC notes that OLAF staff with legal and judicial experience will join the newly created investigation selection and review unit. The SC considers that, regardless their place in OLAF's new organisation, they should keep their previous role. In order to comply with its legal obligation<sup>41</sup> to transmit reports and information obtained during its investigations to Member States, OLAF needs to have experts in legal and investigative procedures from the greater part of the Member States.

76. The effectiveness of the transmissions of case reports and information by OLAF to the national judicial authorities following its internal reorganisation needs to be addressed in the future.

#### Ø *Review adviser*

77. The SC's role is essentially to carry out systemic analysis of OLAF's investigations and not to deal with individual cases. In its Opinion No 4/2011 the SC considered that there was a clear need to assign the tasks of reviewing procedures or handling of complaints to an independent person. This person should have a clear mandate which does not overlap with that of the SC and be provided with guarantees of his own independence. In particular, the SC stated that this person should be able not only to analyse complaints against OLAF, but also to act on his own initiative by regularly ensuring respect for procedural rights throughout the investigative process.

## **4.2 Budget, administrative organisation and staff policy in relation to OLAF's investigative function**

78. The SC is legally obliged to give an opinion on OLAF's draft annual budget proposal<sup>42</sup>. The SC's Opinions Nos 1/2006, 2/2007, 3/2008, 3/2009, 1/2010 and 3/2011 have addressed issues on technical budgetary matters as well as on matters of principle.

79. More specifically, the SC underlined that the most essential measure to be taken to guarantee OLAF's independence in investigations is the allocation of sufficient resources to OLAF. Solid funding must be guaranteed over time. In times of economic recession budgetary cuts are necessary throughout the whole EU. OLAF can by no means be granted any immunity from such restraints, but, as an independent investigative body, it needs to enjoy the fullest budgetary independence possible. In line with the SC's recommendation in its Opinion No 3/2011, the OLAF DG alone should have the freedom to decide where budget cuts that affect OLAF should be allocated.

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<sup>41</sup> Articles 9 and 10 of Regulation (EC) No 1073/1999.

<sup>42</sup> Article 6(2) of the EC Decision of 28 April 1999 cited above.

80. The SC has emphasised the importance for OLAF to ensure the proper staffing and budgetary allocations for its core investigative functions. OLAF is dependent for its investigations on people with skills in highly specialized areas, who are not easily available through the normal recruitment procedures provided by the EC. The SC has repeatedly underlined the necessity for OLAF to have and maintain its own staffing policy. This would allow it to attract temporary agents from Member States' investigative and judicial bodies and to offer them an attractive career path by way of salary and promotion or the possibility of becoming permanent employees.

81. In its various opinions on OLAF's budget, the SC also called for OLAF temporary agents to be promoted as foreseen in the OLAF DG's decision of 30<sup>th</sup> June, 2005. The SC is greatly disappointed that until now, despite promises to this effect, no such action has been taken.

### **4.3 OLAF's procedural investigation rules (the Manual)**

82. Throughout its mandate the SC voiced its concern that OLAF investigations are carried out on the basis of a variety of instructions and practices with a lack of clear rules. The SC regularly emphasised that the adoption of a clear, practical and useful guide for investigations, including deadlines within which separate stages of an investigation must be completed, would provide a consistent framework for OLAF's investigations and would reinforce its operational independence. The need for adequate and clear procedural investigation rules, which would increase the legality, the efficiency and the transparency of investigations, as well as OLAF's accountability, was a constant issue for discussions between the SC, the OLAF DG and OLAF investigators. In addition, when examining different aspects of the implementation of OLAF's investigative function, the SC assessed the usefulness of the OLAF Manual.

83. The SC has followed with great interest the progress of the updating of the Manual. The SC examined several versions and, in its previous Annual Reports gave OLAF a significant number of written comments. The SC persistently expressed its disappointment that none of the versions met its expectations. Despite progressive improvements at every drafting stage in its form and content, the new Manual does not yet constitute a set of hard and fast rules capable of guiding investigators at every stage of an investigation. The SC has therefore repeatedly recommended its improvement. In particular, the SC urged OLAF to implement the recommendations made in its previous Activity Reports and various Opinions, in particular with regard to the *de minimis* policy, the planning of investigations and the protection of fundamental rights and procedural guarantees<sup>43</sup>. The SC also recommended that the Manual include examples of good practice developed in investigations, as well as for in-depth training on the Manual to take place on a regular basis.

84. The Manual is now being reviewed following the proposed changes to OLAF's structure and the new way of working. The updated version will require in depth evaluation and the SC will need to be consulted during the drafting process.

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<sup>43</sup> See the SC's Opinions N<sup>os</sup> 5/2008, 4/2010 and 5/2010.

## CONCLUSIONS

In previous annual reports the SC concluded that no actual threats to OLAF's independence had either occurred, been reported to the SC, or noted by it.

In this report, the SC has, among other issues, reported on:

- a) OLAF's ability to access the premises of Members of the European Parliament;
- b) OLAF's access to certain personal data in files held by the European Commission;
- c) the transmission by OLAF to the institutions, bodies, offices and agencies concerned of final case reports drawn up following internal investigations closed without follow-up;
- d) OLAF's obligation to obtain prior agreement from the Secretary-General or President of the institution, body, office or agency before deferring the obligation to enable the persons concerned by internal investigations to make his views known.

The SC regrets that the above-mentioned issues call into question OLAF's independence from the institutions in carrying out its investigations.

- a) OLAF's power to enter the premises of the European Parliament was not only questioned, but also hindered, by the European Parliament, in contravention of what the SC regards as clear legal provisions ;
- b) The SC noted unwillingness on the part of the European Commission to allow OLAF direct and immediate access to certain personal data, motivated by a very narrow interpretation of the rules on the protection of personal data;
- c) The SC noted with concern that OLAF has complied with a request from the European Commission to regularly forward to it its final reports on internal cases closed without follow-up, despite the fact that these reports may contain very sensitive information;
- d) The SC notes the potential for the institutions, bodies, offices or agencies to block the progress of any ongoing internal investigation by the refusal or delay in granting agreement to defer the obligation to give the person concerned the possibility to make his views known.

The SC is reluctant to go as far as to say these examples are signs of any deliberate intention on the part of the institutions in question to hamper OLAF's investigative independence, however, they have the overall effect of partially eroding OLAF's independence in practical terms.

The SC emphasizes that the independent functioning of OLAF can only be assured if the SC's independence is guaranteed. The undermining of the proper functioning of the SC Secretariat by OLAF can only serve to jeopardize the independence of the SC and therefore that of OLAF itself.

It is the SC's view that this is clearly a development in the wrong direction. The incoming SC is advised to keep a close eye on any future developments which could affect the independence of OLAF.



Calendar of Supervisory Committee Meetings

2011

Month	Meeting date
<b>JANUARY</b>	<b>Monday, 17<sup>th</sup> -Tuesday, 18<sup>th</sup></b>
<b>FEBRUARY</b>	<b>Tuesday, 15<sup>th</sup> – Wednesday,16<sup>th</sup></b>
<b>MARCH</b>	<b>Tuesday, 15<sup>th</sup> – Wednesday 16<sup>th</sup></b>
<b>APRIL</b>	<b>Wednesday, 6<sup>th</sup> – Thursday, 7<sup>th</sup></b>
<b>MAY</b>	<b>Tuesday, 10<sup>th</sup> – Wednesday 11<sup>th</sup></b>
<b>JUNE</b>	<b>Tuesday, 28<sup>th</sup> – Wednesday, 29<sup>th</sup></b>
<b>SEPTEMBER</b>	<b>Tuesday, 6<sup>th</sup> – Wednesday 7<sup>th</sup></b>
<b>OCTOBER</b>	<b>Wednesday, 5<sup>th</sup> (all day)</b>
<b>NOVEMBER</b>	<b>Wednesday, 8<sup>th</sup> – Thursday, 9<sup>th</sup></b>
<b>NOVEMBER</b>	<b>Tuesday, 29<sup>th</sup> – Wednesday, 30<sup>th</sup></b>

**List of Opinions adopted by the SC between  
1 December 2005 and 30 November 2011**

**2005-2007**

**Opinion 2/2006** concerning the reform of the Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)

**Opinion 3/2006** Performance indicators for OLAF

**Opinion 1/2007** OLAF's Reports of Investigations that have been in progress for more than nine months

**Opinion 1/2006** OLAF's Preliminary Draft Budget for 2007

**Opinion 2/2007** OLAF's Preliminary Draft Budget for 2008

**2007-2008**

**Opinion No. 1/2008** "Prima facie Non-Cases"

**Opinion No. 2/2008** OLAF's Annual Management Plan for 2008

**Opinion No 3/2008** OLAF's Preliminary Draft Budget for 2009

**2008-2009**

**Opinion No 5/2008** OLAF de minimis policy

**Opinion No 1/2009** OLAF's Annual Management Plan for 2009

**Opinion No 2/2009** OLAF's Reports of Investigations that have been in progress for more than nine months

**Opinion No 3/2009** OLAF's Preliminary Draft Budget for 2010

**2009-2010**

**Opinion No 1/2010** OLAF's Preliminary Draft Budget for 2011

**Opinion No 2/2010** Opinion on the nomination of the Director General of OLAF

**Opinion No 3/2010** on the Reflection Paper on the Reform of OLAF

**Opinion No 4/2010** Investigation Planning

**Opinion No 5/2010** Respect for fundamental rights and procedural guarantees in investigations by OLAF

## 2011

**Opinion No 1/2011** Access by OLAF to personnel data held by the Commission

**Opinion No 2/2011** Powers of the European Anti-Fraud Office (OLAF) for the independent conduct of internal investigations within the EU institutions

**Opinion No 3/2011** OLAF's Preliminary Draft Budget for 2012

**Opinion No 4/2011** on the Amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999

**Opinion No 5/2011** Transmission by the European Anti-Fraud Office (OLAF) to the institutions of final case reports drawn up following internal investigations closed without follow-up

**OPINION No 1/2011**

**Access by OLAF to personnel data held by the Commission**

Brussels, 30 May 2011

**1. Background**

- 1.1 In the context of assessing initial information received by OLAF, Unit C4, “Operational Intelligence”, which supports the two Directorates in charge of Investigations and Operations, needs to be able quickly, accurately and discreetly to identify, particularly where allegations of conflicts of interest may arise, an alleged person. To do this, OLAF needs to have access to information contained in the Human Resources databases maintained by the Commission. In particular, OLAF requires access to data relating to individual employees and to their family status and connections, the home addresses and telephone numbers and dates of birth of the employees and their family members. This latter data is referred to as “family tree” data.
- 1.2 OLAF is anxious that, in accessing this information, the reputation of innocent individuals working in the Commission or other EU bodies is not harmed and that where allegations made are groundless that fact can be verified without disseminating the allegations made – sometimes, based on very flimsy grounds. Equally, where the allegations turn out to be well founded, OLAF is anxious that, at this preliminary stage, as few people as possible are alerted to the allegations, so that the person who may potentially be the subject of an investigation is not alerted prematurely.
- 1.3 OLAF proposes, therefore for a limited number of staff in C4 to have direct, read-only, confidential “Pull” access to the family tree data, allowing them to see a limited set of data to be able to validate allegations prior to the opening of an investigation.

**2. Current Position**

- 2.1 Article 4 (2) Regulation EC 1073/1999 provides that
  - the Office shall have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises. The Office shall be empowered to inspect the accounts of the institutions,

bodies, offices and agencies. The Office may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing.

- 2.2 This provision enables OLAF to have unrestricted access (providing that it complies with the requirements of paragraph 1 of Article 4<sup>1</sup>) to data held by the Commission, including data relating to Commission personnel. The provision applies to OLAF internal investigations which are underway.
- 2.3 The Secretariat-General is prepared to grant OLAF “push” access to the family tree data, but not “pull” access, as requested. The reason provided for refusal of pull access is data protection. As controller of the personal data, the Commission asserts that it must filter requests and provide only the personal data that it deems legitimate, necessary and proportional for OLAF to ask. This “filtering process” appears to be applied only to requests made by OLAF, as other services within the Commission having a direct “pull” access without the intervention of the controller.
- 2.4 The Supervisory Committee is concerned that this limitation on OLAF’s direct, read-only confidential access to family tree data may prejudice its independence in relation to its investigatory function.

### **3. Meetings with the Secretariat-General and with the EDPS**

- 3.1 The Supervisory Committee and members of the Secretariat have met with the staff of the Secretariat General on two occasions, on the 25 November 2010 and 8 December 2010 and with the Secretary General herself on the 15 December 2010 to discuss this issue. The Secretariat General recognises that OLAF “has indeed the right to access any database it considers relevant for investigative purposes for the opening and throughout the duration of an investigation, even before the formal opening decision, when linked to a specific CMS case number” but it maintains that OLAF cannot have direct "pull" access.
- 3.2 Since OLAF’s request for access to data is covered by the provisions of article 7.2.2 of EC Regulation 45/2001, OLAF and the Supervisory Committee have sought the views of the EDPS and, in consequence have had two meetings with Mr Hustinx, the EDPS, on 15 December 2010 and 25 March 2011.

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<sup>1</sup>.Article 4, Paragraph 1:

“The Office shall carry out administrative investigations within the institutions, bodies, offices and agencies (hereinafter internal investigations).

These internal investigations shall be carried out subject to the rules of the Treaties, in particular the Protocol on privileges and immunities of the European Communities, and with due regard for the Staff Regulations under the conditions and in accordance with the procedures provided for in this Regulation and in decisions adopted by each institution, body, office and agency. The institutions shall consult each other on the rules to be laid down by such decisions.”

#### 4. The position regarding data protection

4.1 A requirement for compliance with Article 7.2. paragraph 2 of Regulation 45/2001<sup>2</sup> is the need to establish necessity for the transfer of the data from the Commission to OLAF.

4.2 Necessity must be verified. If the type and amount of data accessed varies on each occasion, then the verification of necessity should take place ex ante for each individual access. If there are categories of similar limited access for the same purpose, which can be verified ex post by both sides, then it may be possible to cluster them together to verify necessity. This is part of the structure that should be developed between the data controller and the data recipient. The solution must address the question of necessity, and be verifiable. It must also include a strict purpose limitation.

4.3 In the situation outlined above, OLAF is able to pre-define the necessity of the transfer of the data because the necessity is always the same: identification of the individual(s) allegedly involved in a matter under assessment or investigation. As explained by Unit C.4, OLAF needs access to a limited number of data fields in the Commission data bases for the purpose of ensuring the proper identification of a Commission staff member allegedly involved in a fraud or irregularity. The data fields which OLAF will access for this purpose are:

- date of birth,
- address,
- address in case of accident, and
- telephone number.

(Other relevant data fields, such as Name, statute, ID no., organisational entity and dates of working for that entity are available to all Commission staff in Sysper2).

4.4 In cases where allegations of conflict of interest involving a family member are involved, OLAF will also need to access the "family tree" data in order to verify the identification of the relatives who may be concerned, including partner and relatives in the ascending and/or descending line. The data fields in these cases would be:

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<sup>2</sup> Article 7

##### **Transfer of personal data within or between Community institutions or bodies**

Without prejudice to Articles 4, 5, 6 and 10:

1. Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.
2. Where the data are transferred following a request from the recipient, both the controller and the recipient shall bear the responsibility for the legitimacy of this transfer.

The controller shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data. If doubts arise as to this necessity, the controller shall seek further information from the recipient.

The recipient shall ensure that the necessity for the transfer of the data can be subsequently verified.

3. The recipient shall process the personal data only for the purposes for which they were transmitted

- name,
- date of birth.

Access will be made by one of a small group (three or four) of trained intelligence staff. Furthermore, OLAF keeps a careful log file of each instance of access to such data bases. It logs the following information:

- which data base was accessed,
- the date,
- the staff member accessing the data,
- the number of the request in the CMS intelligence module which triggered the need for the access, and
- the OF case number.

4.5 OLAF expects these records to be logged automatically by the CMS, later this year. These access logs are available for review by the controller, the Data Protection Officers, and the EDPS at any time.

4.6 In such circumstances, where the purpose of the transfer is limited to the identity of individuals, and accurate log files are kept, the Supervisory Committee believes that the requirements of Art. 7(2) are satisfied without having to ask the controller's permission before each individual access.

## **5. Interpretation of Article 7.2. of EC Regulation 45/2001**

5.1 Article 7.2 of EC Regulation 45/2001 appears to allow for a number of different scenarios. It could be read as creating a structured dialogue between the data controller and the data recipient, as both need to verify the necessity of the transfer.

5.2 It appears that "pull" access is not accorded on an automatic basis but it is granted on request within the Commission in other contexts. In the following instances, "pull" access gave rise to problems, but in the last example below, it was accorded:

- Communication between Sysper 1 and Sysper 2 - Sysper 1 was problematic because it allowed pull access without sufficient safeguards/traceability of who had access.
- PNR - This involved pull access by a third country, which is unacceptable.
- ABAC and payment transactions - could not function without pull access.

Indeed, "push" access can also be unacceptable, if personal data is sent without verifying necessity.

5.3 It does not appear, therefore, that there is any fundamental data protection bar in principle to allowing OLAF access to the data sought.

## **6. The way forward**

- 6.1 The Supervisory Committee considers that the need for OLAF to have access on a “pull” basis to personnel data held by the Commission to establish, prior to the opening of an investigation whether a person can be identified or eliminated, is essential to its work. To deny OLAF this access could threaten its independence in its investigatory function.
- 6.2 The Supervisory Committee recommends a modification to the "Memorandum of understanding concerning a code of conduct in order to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission."<sup>3</sup> This provision could set out a protocol for access to Commission data at the selection phase, along the same lines as that provided for in Article 4.2 of Regulation EC 1073/99 for investigations which have been commenced.
- 6.3 The Committee therefore suggests that a practical way forward is for negotiations to commence to find a solution between OLAF and the Commission. One practical suggestion would be for an external mediator to be appointed who has the trust and confidence of both OLAF and the Commission. An appropriate mediator could be someone such as a former high level official or Commissioner. The Supervisory Committee therefore recommends that agreement be sought as soon as possible with the Commission to appoint a suitable mediator to resolve this problem.
- 6.4 The Supervisory Committee would hope and expect that agreement can be reached on this issue. The Supervisory Committee recommends that the reform of Regulation 1073/99 would provide an ideal and opportune moment to amend Article 4 to include access by OLAF to information held by the institutions prior to the opening of a case and also at any stage of an investigation.

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<sup>3</sup> SEC 871, 14.8.2003 (consolidated).



**OPINION No 2/2011**

**Powers of the European Anti-Fraud Office (OLAF) for the independent conduct of internal investigations within the EU institutions**

Brussels, 13 June 2011

**Background**

1. On 20<sup>th</sup> March 2011 The Sunday Times newspaper published a press article entitled “An MEP claims to earn more than €450.000 a year moonlighting for clients. He is one of three ready to take cash to help change EU laws”. The press article explained how reporters “posing as a lobbying firm” offered cash for amendments to legislation to three Members of the European Parliament (MEPs) (up to €100.000 per year in two cases) and “they went on to do so” and amendments were tabled. Journalists reported meetings in the EP premises and outside, phone conversations, e-mails, correspondence and sending of invoices between them and some of the MEPs. Following the disclosure of this undercover investigation by the Sunday Times two of them resigned as MEPs by the next day and a third one was expelled from his group.<sup>1</sup>
2. On 22<sup>nd</sup> March the European Anti-Fraud Office (OLAF) opened an internal investigation on the following legal basis: “Article 4 of Regulation (EC) 1073/99 in conjunction with European Parliament Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests (Annex XII Rules of Procedure of the European Parliament).”
3. On 15<sup>th</sup> April 2011 the Director General of OLAF requested an Opinion from the Supervisory Committee (SC) on OLAF’s powers to open and conduct internal investigations within the institutions and the limitation posed by the privileges and immunities of their Members, in particular in the case of MEPs to the right of immediate and unannounced access to any information held by the institutions and to their premises.

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<sup>1</sup> The Sunday times press article 20, March, 2011

## **OLAF's powers for the independent conduct of internal investigations**

4. Article 12 of Regulation (EC) 1073/99 provides that the Director General of OLAF shall not take instructions from any institution in the performance of his duties with regard to the opening and carrying out internal investigations.

### *Internal investigations in relation to irregular conduct*

5. OLAF is responsible for the initiation and conduct of administrative investigations within the institutions for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Union.

It has powers to investigate to that end any serious matter relating to the discharge of professional duties such as to constitute a dereliction of the obligations of the officials liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of the members of institutions.<sup>2</sup>

6. The SC notes that the responsibility of OLAF concerning internal investigations within the institutions includes all activities relating to the need to safeguard **Community interests against irregular conduct liable to give rise to administrative or criminal proceedings.**
7. These activities have been listed in detail in the European Parliament (EP) Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, based on recital (5) and on Article 4 (1) of Regulation (EC) 1073/1999.

Situations such as **conflict of interest, the duty to behave with integrity as regards the acceptance of benefits, refraining from action or behaviour which might reflect adversely upon the member's position or serious misconduct,** fall within the scope of OLAF's investigations.<sup>3</sup>

8. The SC takes the view that all these matters form part of the facts allegedly committed, and, as such, they fall within the scope of OLAF's investigation powers as indicated in Rule 10 of the Rules of Procedure of the EP: "Internal investigations conducted by the European Anti-Fraud Office-OLAF".

### *Internal investigations on activities affecting the financial interests of the EU*

9. The SC considers that fraud, corruption and any illegal activities affecting the "financial interests of the European Union" encompass those which even if not

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<sup>2</sup> Article 1 of Regulation (EC) 1073/99.

<sup>3</sup> See Article 10 of the Rules of Procedure of the EP, recitals (2), (3) and (4) of the Interinstitutional agreement on 25 May 1999 and of the EP Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests of 18 November 1999, as well as articles 11, 12, 13, 14, 16, 17 and 22 of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities.

directly related to the *budget* of the Community, are capable of harming *the financial interests* of the Community **in a broad sense** by adversely affecting its assets.<sup>4</sup>

10. The SC agrees with the Advocate General's Opinion in the case referred to above, that "the source of the assets in question is not decisive (...); **ensuring the proper use of all funds held by the institutions**, bodies, offices or agencies of the Community **must be regarded (...) as forming part of the financial interests of the Community** and may thus be the subject of measures adopted on the basis of Article 280(4) EC".<sup>5</sup>
11. The SC recalls the Court of Justice rulings on this matter which considered that the expression "financial interests of the Community" seems wider than the expression "items of revenue and expenditure of the Community": "...the fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the European Community's objectives and places it within the framework of the Community, so that **the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.**"<sup>6</sup>
12. The SC underlines that **the proper use of the funds** that the EP has at its disposal in order to cover the exercise of the Parliamentary mandate: salary of its members, reimbursement of expenses (travel, telephone expenses...), payment of allowances etc. is based on the compliance with the Financial Regulation and on the principle that those funds are reserved **exclusively for the funding of activities linked to the exercise of a Member's mandate**<sup>7</sup> and not to work for purposes determined by a private payment.

#### *Duty to inform and to cooperate with OLAF*

13. Article 7.1 of Regulation (EC) 1073/1999 provides that the institutions, bodies, offices and agencies shall forward to the Office without delay any information relating to possible cases of fraud or corruption or any other illegal activity.
14. The SC stresses the fundamental **duty to fully cooperate with OLAF**, to supply information and to provide assistance in the practical conduct of investigations that all institutions and their members have. The unequivocal fulfilment of these duties allows OLAF to carry out investigations **under equivalent conditions** in all the Community institutions, bodies, offices and agencies.<sup>8</sup> The lack of cooperation puts into question the credibility of the tools that the institutions adopted to fight against any kind of fraud, corruption, illegal activities or irregular conduct.

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<sup>4</sup> Opinion of the Advocate General Jacobs, case C-11/00 *Commission v ECB* para 118.

<sup>5</sup> Current Article 325 of the EU Treaty. See case C-11/00, Opinion of the Advocate General Jacobs para 118.

<sup>6</sup> See cases C-11/00 *Commission v ECB* and C-15/00 *Commission v EIB*.

<sup>7</sup> See Statute for Members of the EP-Decision of the EP of 28 September 2005 (articles 9 and 10), Decisions concerning implementing measures for the Statute for the Members of the EP of 19 May and 9 July 2008 and subsequent Decisions amending those Implementing measures (articles 10, 25, 28, 32, 61, 62, 66, 67, 68...) and Rules of Procedure of the European Parliament March 2011 (Rule 9 and Rule 10)

<sup>8</sup> See Article 3 « **Assistance from the security office** » "At the request of the Director of the Office, the European Parliament's security office shall assist the Office in the practical conduct of investigations" and Recital para 6 EP Decision of 18 November 1999.

15. The SC considers that the rules laid down in the Rules of Procedure of the EP **comprising the measures needed to facilitate the smooth running of investigations conducted by OLAF shall be rigorously respected.**<sup>9</sup>

*Initial stage of the investigation*

16. The SC considers that it is premature to categorically deny OLAF's powers to investigate the alleged facts at the initial stage of the investigation; especially in cases of alleged corruption and irregular behaviour, the complexity of which does not allow for verification of all illegal activities at the beginning of the investigation.

*OLAF's access to premises of the institutions: privileges and immunities of MEPs*

17. The SC points out that those internal investigations can be conducted **only if OLAF is guaranteed access to all premises** of institutions, bodies, offices and agencies and to all information and documents held by them. This key power must be exercised in full independence by the Director General of OLAF and the institutions' security offices shall assist OLAF in its practical conduct.<sup>10</sup>
18. **OLAF shall carry out administrative investigations** within the institutions that shall be carried out **subject to the rules of the Treaties, in particular the Protocol on Privileges and Immunities**. OLAF shall **have the right of immediate and unannounced access** to any information held by the institutions, bodies, offices and agencies, and **to their premises**. It shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. OLAF may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing.<sup>11</sup>
19. The Protocol of Privileges and Immunities of the European Union contains several rules on privileges and immunities of the MEPs (articles 7 to 9), in particular that MEPs shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties. However, immunity cannot be claimed when a member is found in the act of committing an offence.
20. The SC points out that, on this matter, the Court of First Instance held that **“the Protocol refers to the Members of Parliament only in a general fashion and contains no provision explicitly governing internal investigations in the Parliament (...)**. As the President of the Court of First Instance was able to observe in paragraph 107 of the order in *Rothley and Others v Parliament*, **the risk cannot be excluded a priori that, in conducting an investigation, the Office [OLAF] might perform an act prejudicial to the immunity enjoyed by every Member of the**

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<sup>9</sup> See Rule 10 of the Rules of Procedure of the EP and EP Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests adopted on 18 November 1999.

<sup>10</sup> See recital (11) of Regulation (EC) 1073/99 and article 3 of the Inter-institutional agreement and of the relevant Decisions of each institution.

<sup>11</sup> Article 4 of Regulation (EC) 1073/1999.

**Parliament. However, if that were to occur, any Member of the Parliament faced with such an act could, if he considered it damaging to him, avail himself of the judicial protection and the legal remedies provided for by the Treaty.”<sup>12</sup>**

21. The SC considers this to be a sensitive area where the position upheld by the Advocate General in case C-167/02 is worth reading; “As regards the measures taken by OLAF during the course of an internal investigation, whilst it is difficult to pronounce in the abstract on the admissibility of future proceedings, it seems probable to me that, as the Court of First Instance held and as the other parties have suggested, Members of the Parliament who considered their rights to have been infringed would have various opportunities to bring judicial proceedings. The Commission points to a number of legal acts which might be challenged in that way: the decision of the Director of OLAF to open an internal investigation as required by the second paragraph of Article 5 of the Regulation; various measures taken by OLAF in the course of an investigation, **including the decision to have access to an office, to seize documents or to request oral information**; as well as the agreement, explicit or implicit, of the institution in question.

It appears to me, however, **that the need for discreet and expeditious action in the detection of fraud renders some such risk unavoidable.** It should, moreover, be noted that the contested measure contains **provisions designed to minimise the danger.** Thus, Article 5 of the model decision requires **Members to be informed rapidly of their implication in an investigation, as long as that would not harm the investigation.** That article also prevents Members from being named in OLAF’s conclusions without their first having been heard except insofar as national investigative procedures require the maintenance of absolute secrecy”.<sup>13</sup>

22. The SC considers that OLAF should act with scrupulous respect of those rules and following a thorough assessment of the risk involved on each case and the proportionality of the measure to be taken.
23. The SC recalls that the Court of Justice found that, in case T-17/00, the provisions “relating to cooperation with OLAF or to supplying it with information are intended – whatever their exact scope may be – **to impose obligations upon Members** of the Parliament, so that it is in the first instance for Members, in any given case, either to act upon those obligations or not to comply with them if they are persuaded that it is open to them to do so without infringing Community law. If, **in a specific case, one of the Members of the Parliament adopts that approach, any subsequent measures taken by the Parliament with regard to that Member and to his disadvantage will, in principle, be subject to judicial review.**”<sup>14</sup>

As regards the various measures that OLAF could take when exercising its investigative powers, the Court of Justice bore in mind the risk that OLAF might perform an act prejudicial to the immunity enjoyed by every Member of the EP and

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<sup>12</sup> See Case T-17/00, *Willi Rothley and Others v European Parliament*, judgement of 26 February 2002, para 72 and 73.

<sup>13</sup> See Opinion of Advocate General Jacobs in Case C-167/02 P, *Willi Rothley and Others v European Parliament* para 56 to 61.

<sup>14</sup> See case C-167/02 P para 49.

recalled that the review of the legality of acts of the institutions has been entrusted to the Community Courts.<sup>15</sup>

24. The SC considers that the institutions, bodies, offices and agencies (which are not the “person concerned” by an OLAF investigation) shall fully cooperate with OLAF and refrain from taking measures hindering OLAF’s investigation powers.

The SC believes that preventing OLAF from exercising this key investigative activity following an interpretation made by an institution, body, office and agency of OLAF’s mandate is a limitation of OLAF’s independent conduct of investigations.

25. The SC recommends that OLAF follow a rigorous implementation of the rules of procedure and the existing jurisprudence in this area.

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<sup>15</sup> See case C-167/02 P para 46, 50 and 51.

**OPINION No 3/2011**

**OLAF's Preliminary Draft Budget for 2012**

Brussels, 14 July 2011

On 16/03/2011 and 10/05/2011 the OLAF Supervisory Committee (SC) examined “OLAF's Preliminary Draft Budget for the European Anti-Fraud Office for 2012” and adopted the following opinion:

**a) OLAF's administrative independence vis-à-vis the Commission**

The OLAF budget proposal for 2012 was fully in line with that requested by the Commission in pursuing the zero growth policy for 2012 for all Commission services. However, the SC was informed that the Commission recently introduced a requirement for additional budget reductions to accommodate anticipated difficulties in the 2012 Budget negotiations with imposed reductions of 1,47% (€ 857 000) on the OLAF Draft Budget proposal. These reductions, in comparison with the OLAF original proposal, would be in the following three areas:

- 75 000 (2,8%) of external staff
- 159 000 (4,8%) other management expenditure (namely mission expenses)
- 587 000 (4,9%) Buildings and related costs
- 36 000 (2,25%) Financing anti-fraud measures

Whilst the SC acknowledges the political realities faced by the EU in the current difficult economic climate and the resulting need for further efforts on the part of the EU institutions to achieve savings in all areas of the administrative expenditure, the SC would like to express its concern with regard to the proposed additional budget cuts. In particular, in budget lines relating to staff management (A3 01 02), which would have a direct impact on the conduct of OLAF's investigation activities. The SC would question the proposed enforced cuts to the budget lines of OLAF's operational activities. OLAF is an investigative service and it is precisely in times of financial crisis when it should exercise increased control over both expenditure and revenue. According to OLAF the additional expenditure cuts proposed by the Commission would have the following implications for the operational departments:

- Discontinuation of five or more contractual agent contracts;
- Termination of two interim staff contracts;
- Delay in the launching of the recruitment process for the replacement of Directors for Directorates B and C;
- Additional delays in the temporary agent reclassification exercise which concerns, for the most part, investigators from the operational units mainly in the highest grades.

Specifically, the SC would like to point out that, in order to strengthen OLAF's independence in its function as an investigative body, Regulation 1073/99 explicitly grants OLAF's Director General, as authorising officer, sole responsibility for the preparation of the draft budget following consultation with the SC. Furthermore, the principle of OLAF's budgetary autonomy was further reinforced by the Commission in 1999<sup>1</sup> when a special budget heading for OLAF was created.

Moreover, it goes without saying that whilst OLAF is administratively attached to the Commission, it should be fully independent in the conduct of its operational activities and henceforth be provided with sufficient resources for its investigatory capability. OLAF must accordingly retain the financial resources and manpower it needs to perform its tasks at least to the level which has been agreed during previous budgetary negotiations in terms of its personnel capacity. In the SC's view the principle of budgetary autonomy should be respected by the Commission, particularly since no budget increase vis-à-vis the adopted Budget 2011 has been proposed by OLAF. If, despite what is stated above, reductions take place up to the amount proposed by the Commission, OLAF should be expressly allowed to make such cuts as it sees fit to parts of its budget.

To summarize, the SC strongly disagrees with the position of the Commission during the budgetary discussions.

**Recommendations:**

- The SC supports OLAF's proposal for its Draft Budget 2012 which foresees no increase in administrative expenditure.
- The SC strongly disagrees with additional savings in personnel costs which should be reconsidered by the Commission to avoid adverse impact on OLAF case work.
- If additional savings are to take place anyway, the SC recommends that the Director General of OLAF should be allowed to freely allocate the effects to any budget line he decides.

**b. OLAF's operational independence and human resources management**

The personnel headings of OLAF Draft Budget account for nearly 70% of total administrative expenditure. For this reason the SC would like to reiterate once again the need for a better developed human resources policy by introducing a strategy to reflect the operational priorities set by management.

<sup>1</sup> Decision (EC) 1999/352 of 28 April 1999 on establishing the European Anti Fraud Office (OLAF).



As already emphasised in previous SC Budget opinions, human resources management is the key investigation support function and should serve to underpin the efficiency and effectiveness of the investigative work. In the absence of a clear strategy in this area, it is difficult for the SC to form an opinion on the efficient and effective use of the resources of the administrative budget.

The SC fails to understand why, after six years, no action has yet been taken by the European Commission on the re-grading of all OLAF temporary agents. This has been a possible option since June 2005 and has been raised by the SC many times with OLAF's senior management. The SC is deeply concerned with regard to this situation.

The SC favours a better formulated human resources policy since it will strengthen OLAF's investigative function and thereby OLAF's operational independence through more efficient and effective management of investigations.

**Recommendation:**

- OLAF to develop its human resources strategy based on clear policy to be agreed by management.
- All OLAF temporary agents to be regraded as appropriate.

**c. SC budget and secretariat staff**

The SC confirms its position regarding the provision in the Draft Budget 2012 for eight Secretariat staff (five officials level AD and three official level AST). This would enable the SC to fulfil its legal mandate in full independence. The total number of eight posts required for the Secretariat is in line with that previously requested by the SC. In addition it is important that the SC is able to fulfill its monitoring and controlling function as conferred on it by the three institutions. Therefore the Parliament, the Council and the Commission should make sure that the present level of staff in the SC's secretariat is maintained.

**Recommendations:**

- Eight staff members to be reserved for the SC Secretariat in the Draft Budget 2012.

**d. Conclusion**

The SC supports OLAF's budget proposal for 2012, but strongly disagrees with the cuts and proposals made by the European Commission. Therefore the SC gives a negative opinion on the draft proposal of the European Commission for the OLAF Draft Budget 2012.

**OPINION No 4/2011**

**on the Amended proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999**

Brussels, 20 September 2011

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## 1. INTRODUCTION

1. The Supervisory Committee (SC) welcomes the amended proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999. The Committee appreciates the efforts made by the European Commission to set in motion the reform of Regulation (EC) No 1073/1999 and the Commission's intentions to reinforce the efficiency, effectiveness and accountability of OLAF, while preserving its independence in the field of investigations. However, the SC recommends that certain aspects of the reform would benefit from further clarification and some amendment.

2. The SC has analysed both the proposals for the revised text prepared by the Commission<sup>1</sup> and amended by the Council<sup>2</sup> together with the European Parliament's resolution<sup>3</sup>. In addition, the SC has taken into account its own previous opinions on the reform of Regulation (EC) No 1073/1999<sup>4</sup>, together with the opinions of the European Court of Auditors<sup>5</sup> and of the European Data Protection Supervisor<sup>6</sup>. This opinion follows the objectives set by the EC in its amended proposal of 17 March 2011.

## 2. STRENGTHENING THE EFFICIENCY AND EFFECTIVENESS OF INVESTIGATIONS

### 2.1. Clarifying OLAF's role

3. The SC notes that the term "administrative investigation" as outlined in the current regulation<sup>7</sup> covers both investigations within the institutions and external investigations relating to economic operators. Experience has shown that this dichotomy has often proved artificial and confusing. Indeed, if an economic operator has enjoyed an unfair advantage, it may have been as a result of the actions of a person subject to the Staff Regulations. It is therefore necessary to clarify Article 1 of the new regulation, to indicate that OLAF was set up in order to conduct administrative investigations, these investigations being either internal, external or both. It should be noted that OLAF's roles also include co-ordinating operations between the competent authorities of Member States (MS).

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<sup>1</sup> Amended Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No 1074/1999 - /\* COM/2011/0135 final - COD 2006/0084 \*/.

<sup>2</sup> See the amended text of the Council dated 28.06.2011.

<sup>3</sup> European Parliament legislative resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (COM(2006)0244 — C6-0228/2006 — 2006/0084(COD)), OJ C 16E , 22.1.2010, p. 201–223.

<sup>4</sup> Opinion No 2/2006; Opinion No 03/2010 on the Commission's Reflection Paper.

<sup>5</sup> Opinion No 6/2011 (pursuant to Article 325 TFEU) on the amended proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (Euratom) No 1074/1999, OJ C 254, 30.8.2011, p. 1–8.

<sup>6</sup> Opinion adopted on 1.06.2011.

<sup>7</sup> Article 1.

4. The SC welcomes the effort made in Article 2 of the text to define certain concepts such as “administrative investigations”, “person concerned” and “Staff Regulations”. Even were this exercise to be worthwhile, it remains limited to the extent that it should have defined the many other concepts relating to the fight against fraud such as “financial interest of the EU” or “corruption” contained in Regulation (EC) No 1073/99. This exercise will be complete only when the legislator consolidates the texts of all the relevant EU anti-fraud legislation.

5. The SC is disappointed to note that OLAF's competence to conduct investigations has not been clearly defined, especially relating to investigations within the institutions, bodies, offices and agencies. The wording of Article 1 of the amended proposal excludes from OLAF's competence cases which have no impact on the financial interests of the EU<sup>8</sup>. However, the SC notes that other legal instruments that are still in force empower OLAF to conduct internal investigations on matters which go beyond the protection of the financial interests of the EU<sup>9</sup>. Moreover, recent experience has shown that there is a need to have clear rules concerning investigations within the institutions of allegations of serious misconduct by persons not subject to the Staff Regulations, which may have no impact on the financial interests of the EU, but may result in disciplinary or criminal proceedings. Consolidation of the anti-fraud legislation might have avoided such inconsistencies or filled in the gaps of the texts currently in force. The SC believes that, in the absence of such consolidation, which it regrets, the definition of OLAF's competence in the amended proposal needs further clarification.

6. The SC therefore considers that the Director General of OLAF (DG) should be empowered to bring an action before the Court of Justice if he considers that a measure taken by any institution (and not only by the Commission, as proposed) calls into question his independence or the independent conduct of his investigations. Similarly, he, or any OLAF staff member delegated by him should be empowered to intervene in cases, in connection with the conduct of OLAF's investigations, brought before the national courts, as proposed in Article 12 a) of the EP resolution.

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<sup>8</sup> Article 1 stipulates that OLAF "shall conduct administrative investigations for the purpose of fighting fraud, corruption and any other illegal activity *affecting the financial interests of the European Union. To that end* it shall investigate serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of officials and other servants of the Union liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations of officials and the Conditions of employment of other servants of the European Union".

<sup>9</sup> For example, the EC Decision of 28 April 1999 establishing OLAF (999/352/EC, ECSC, Euratom) empowers it "to investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities likely to lead to disciplinary and, in appropriate cases, criminal proceedings or an analogous breach of obligations by Members of the institutions and bodies, heads of the bodies or members of staff of the institutions and bodies not subject to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities" (Article 2). Such an approach is confirmed in the 6th recital of the preamble, which underlines that "the responsibility of the Office should involve, over and above the protection of financial interests, all the activities linked with the protection of Community interests from irregular acts likely to lead to administrative or penal proceedings". Moreover, Article 86 of Staff Regulations empowers OLAF to launch administrative investigations to verify whether failure by an official or former official to comply with his obligations under these Staff Regulations has occurred.

## 2.2. Shortening the duration of investigations

### 2.2.1. Shortening by OLAF of the duration of investigations

7. The SC has always urged strongly that OLAF carry out investigations within the shortest timeframe possible. The SC notes that the resources available to OLAF are limited and this will remain the case during times of budget austerity. Institutions must nevertheless clearly demonstrate that even during such times, the fight against fraud remains a priority. OLAF must set realistic priorities in its investigation policy, focus its strength on investigative activities and the fight against fraud and assist MS in judicial follow-up. The reduction in the duration of investigations can only be achieved through greater involvement of management in controlling the investigations including careful planning of these investigations<sup>10</sup>. The time taken to open investigations must also be strictly limited regardless of the information source<sup>11</sup>.

8. The SC considers that the amended proposal does not sufficiently take into account cases where national investigations are conducted in parallel with OLAF's investigations. Where OLAF's obligation to ask the person concerned to make his or her views known is deferred in order not to prejudice an investigation carried out by national authorities, OLAF cannot close its investigation as long as the national investigation is still open. The amended proposal should take this aspect into consideration, in order to allow OLAF to conduct its investigations "continuously", as required by Article 6.

### 2.2.2. Monitoring the duration of investigations

9. The SC shall be informed of the *reasons* why OLAF has failed to complete an investigation within 12 months. This notification must be repeated every six months thereafter<sup>12</sup>. Monitoring by the SC of the duration of investigations would be effective only if the amended proposal stipulates that the SC shall also be regularly informed of the measures envisaged to speed up the investigation<sup>13</sup> and the estimated time for its completion<sup>14</sup>.

10. The SC notes that the person entrusted with the review procedure shall give, at the request of a person concerned, an opinion regarding the duration of an investigation<sup>15</sup>. This opinion should also be sent to the SC to enable the SC to monitor developments concerning the duration of investigations, in the light of the opinions and analysis reports regularly drawn up by the person entrusted with the review procedure<sup>16</sup>. In this regard, the SC notes that the text of the amended proposal needs to be revised<sup>17</sup>.

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<sup>10</sup> See SC's Opinion No 4/2010.

<sup>11</sup> See Article 5 (4) of the EC proposal.

<sup>12</sup> Article 6 (6) of the EC proposal.

<sup>13</sup> As stated in the Council's proposal.

<sup>14</sup> As currently stated in Article 11 (7) of Regulation (EC) No 1073/1999.

<sup>15</sup> Articles 7 b (3) and 6 (4) of the amended proposal.

<sup>16</sup> Article 11 (1) b) and (8) of the amended proposal.

<sup>17</sup> Article 7 b stipulates that the person entrusted with the review procedure shall communicate his opinion only to the Director General and send a reasoned reply to the person concerned.

## **2.3. Improving cooperation and information exchange with institutions, bodies, offices and agencies**

### **2.3.1. Provision of information by OLAF to institutions, bodies, offices and agencies**

11. The current regulation provides that where investigations reveal that a member, manager, official or other servant may be personally involved, the EU institution, body, office or agency to which he belongs shall be informed<sup>18</sup>. The provision of such information may be deferred in cases requiring absolute secrecy for the purposes of the investigation or where the investigation falls within the competence of a national judicial authority. The SC considers it important to maintain these exceptions in the new regulation. Indeed, at the beginning of an investigation it is not always possible for OLAF to identify all persons involved and uncontrolled disclosure may be detrimental to the effectiveness of investigation and harmful to the institution concerned. The SC therefore strongly disagrees with the new wording of Article 4 (6) second paragraph<sup>19</sup>. Besides being vague, this provision deprives OLAF of any discretion and the ability to keep its investigation confidential, at least for some time. An unconditional obligation of this kind could undermine OLAF's independence. The SC suggests that the decision to defer information could be taken every 3 months, via a reasoned, written decision which would be attached to the case file. The SC and the person entrusted with the review procedure should be informed. This would enable the person entrusted with the review procedure to act on his own initiative in the event of a serious problem e.g. a potential violation of procedural rights in cases where the person concerned was not informed of the ongoing investigation.

12. The amended proposal provides that OLAF shall, without delay, inform the institution, body, office or agency concerned of the investigation in progress where it appears that it might be appropriate to take precautionary administrative measures to protect the financial interests of the EU<sup>20</sup>. The SC would accept this obligation where it is possible to defer the provision of this information, both in internal and external investigations. The SC therefore prefers the text adopted by the European Parliament.

### **2.3.2. Follow-up by institutions, bodies, offices and agencies of OLAF's recommendations**

13. The institutions, bodies, offices and agencies shall inform OLAF of the follow-up given to the recommendations made in reports following an internal investigation<sup>21</sup>. Moreover, the DG must inform the SC where these bodies have failed to act on the recommendations in OLAF's report<sup>22</sup>. The SC is disappointed to note that, in the past, OLAF has not made regular use of this opportunity. In the future this provision will be important in the framework of the exchange of views with the institutions as a means to overcome any difficulties.

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<sup>18</sup> Article 4 (5) of Regulation (EC) No 1073/1999.

<sup>19</sup> The EC proposal is drafted as follows: "In exceptional cases where the confidentiality of the investigation cannot be ensured, the Office shall use appropriate alternative channels of information".

<sup>20</sup> Article 6 (5) of the amended proposal.

<sup>21</sup> Article 9 (4) of the amended proposal.

<sup>22</sup> Article 11 (7) a) of the amended proposal.

### 2.3.3. Access by OLAF to information held by institutions, bodies, offices and agencies

14. The SC remains concerned that OLAF does not have unrestricted access to staff databases held by the institutions. Despite the fact that Article 4 (2) first paragraph of Regulation (EC) No 1073/1999 (which remains unchanged in the amended proposal) recognises clearly the right for OLAF to have immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, in reality the institutions are reluctant to give OLAF rapid and discreet access to some categories of personal data, because of a very restrictive interpretation of Regulation (EC) No 45/2001<sup>23</sup>. In the SC's view, such a position is a sign of mistrust vis-à-vis OLAF and could also undermine its investigative independence.

15. The SC believes that allowing OLAF quickly and discreetly to verify facts without disseminating the allegations made would avoid any perceived risks. The new regulation should therefore include provisions allowing a fair balance between the need for OLAF to have access to information held by the institutions prior to the opening of a case and at any stage of an investigation and relevant data protection rules.

## 2.4. Improving cooperation and information exchange with Member States

### 2.4.1. Operational assistance from Member States

16. Increased efficiency of OLAF's operational activity requires better cooperation with MS. When monitoring the implementation of OLAF's investigative function, the SC has noted that OLAF has often had difficulty in identifying the national competent authorities able to provide it with the assistance needed, for example when carrying out on-the-spot checks on the premises of economic operators. This difficulty is even more important in cases related to direct expenditure, where the institutions or agencies, but not the MS, manage EU funds. The amended proposals are intended to set up an anti-fraud coordination service, which will facilitate proper coordination between all competent authorities at national level and ensure an effective cooperation and information exchange with OLAF<sup>24</sup> or alternatively facilitate an effective cooperation and information exchange with OLAF<sup>25</sup>. The new regulation should oblige each MS to identify quickly the relevant national competent authority to assist OLAF in investigations, especially those related to direct expenditures.

### 2.4.2. Transmission of information by OLAF to Member States

17. In line with the ruling of the Court of First Instance of the European Union (Case T-48/05 *Franchet and Byk*), the SC has always verified the quality of transmissions by OLAF to

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<sup>23</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1–22.

<sup>24</sup> Article 3 (4) of the EC proposal.

<sup>25</sup> Article 3 (4) of the Council's proposal.

judicial authorities of the MS. Without interfering in ongoing investigations, the SC has seen a steady improvement in the quality of these transmissions. The SC has also expressed concern about the assistance provided by OLAF to the national judicial authorities during criminal proceedings related to the protection of the financial interest of the EU which have been previously opened on their own initiative and the relatively disappointing outcomes. The SC believes that monitoring of judicial follow-up by the SC must remain a priority. It is important that the SC continues to receive copies of the transmissions to the judicial authorities of MS as it is currently done.

18. OLAF may at any time forward information obtained in the course of external investigations to the competent authorities of the MS concerned<sup>26</sup> or has the obligation to forward to the judicial authorities of the MS concerned information obtained in the course of internal investigations concerning facts which require investigative proceedings within the jurisdiction of a national judicial authority<sup>27</sup>. In the latter case, OLAF must first inform the institution concerned. Prior to transmission, the person concerned must have been allowed to comment on the facts alleged against him in accordance with Article 7a (4). However, it is possible to defer this requirement with the approval of the institution concerned. If the institution does not respond within one month, it shall be deemed to be accepted. The SC considers this provision to be very complex and to provide little protection for the person concerned. It would also be likely to have a negative effect on any national criminal investigation. The SC suggests that the procedure be entrusted to the person charged with the review procedure, who alone has full access to the case file and can appreciate the interests of all concerned. The proposal also does not address the problem where an institution refuses to approve the deferral of the right of the person concerned to make his or her views known.

19. Where the report<sup>28</sup> drawn up after an *internal* investigation reveals the existence of facts which could give rise to criminal proceedings, OLAF has an obligation to transmit this information to the judicial authorities of the MS concerned, unless internal measures allowing for more appropriate follow-up are available in the light of the nature of the facts and the scale of the financial impact. The SC notes that, despite having its own specialists in criminal law, OLAF has no competence to act in the area of criminal law. Indeed, OLAF's main task is to conduct "administrative investigations", which should not affect a MS bringing criminal proceedings<sup>29</sup>. The SC notes that the Commission's intention was to clarify the "*de minimis*" policy and to allow OLAF to forward the case to the Investigation and Disciplinary Office of the Commission (IDOC) or to the institutions, bodies, office or agency concerned, instead of sending it to the competent national judicial authorities. However, IDOC or the institutions, bodies, office or agency concerned could also decide not to forward to these authorities the information received from OLAF. Were this to be the case, the MS would be deprived of any power to bring a criminal prosecution. The SC therefore strongly disagrees that there should be any exception in the regulation which could prevent OLAF's notifying MS of facts which could give rise to domestic criminal proceedings.

20. The SC is also disappointed to note that the obligation to inform the judicial authorities of the MS concerned, where the report drawn up reveals the existence of facts which could give rise to criminal proceedings, does not apply to *external* investigations. It is

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<sup>26</sup> Article 10 (1) of the amended proposal.

<sup>27</sup> Article 10 (2) of the amended proposal.

<sup>28</sup> Article 9 (5) of the EC proposal. The Council's proposal envisages internal administrative measures, in particular disciplinary and financial sanctions.

<sup>29</sup> Article 2 of the amended proposal.



not clear if this possibility is provided for by Article 9 (3). Therefore, further clarification of the text is required.

#### 2.4.3. Follow-up by Member States of OLAF's recommendations

21. When requested by OLAF, the competent authorities of the Member States must inform it regarding the action taken following transmission by OLAF of its investigation reports<sup>30</sup>. The SC considers it important for OLAF to have a regular exchange of information on cases transmitted to MS, especially since not only does OLAF have an obligation to report to the SC on cases in which the competent authorities of the MS have failed to act upon OLAF's recommendations<sup>31</sup>, but, additionally, the exchange of views as established in Article 11a might refer to the relations between OLAF and the competent authorities of the MS. The SC therefore supports the EP proposal to put in place a regular reporting obligation for MS. Such an obligation would improve cooperation between OLAF and MS, without necessarily introducing cumbersome and formal procedures.

### **2.5. Encouraging cooperation between OLAF and Europol, Eurojust, third countries and international organisations**

22. Article 10a of the amended proposal<sup>32</sup> allows OLAF to agree to administrative arrangements with Eurojust, Europol, third countries and international organisations, aimed at facilitating their cooperation. The SC considers it important for OLAF to be able to agree to such arrangements, in order for it to better protect the financial interests of the EU. These arrangements would allow a reinforced cooperation, which would be to the benefit of all parties concerned.

## **3. ENHANCING OLAF'S ACCOUNTABILITY**

### **3.1. Strengthening procedural rights**

23. The SC emphasises that the amended proposal should maintain a balance between the protection of the rights of persons and the independent conduct of investigations. The SC has already expressed its concerns regarding the requirement for OLAF to obtain the prior agreement of the Secretary General or the President of the institution to which the person concerned belongs, when deciding whether to defer the obligation to ask the person concerned to make his or her views known<sup>33</sup>. The SC considers that this requirement could impair the

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<sup>30</sup> See Article 9 (3) of the EC proposal and Article 9 (4) a) of the Council's proposal.

<sup>31</sup> See Article 11 (7) a) of the EC proposal. The Council maintained this obligation only regarding institutions, bodies, offices or agencies and deleted the reference to the MS authorities.

<sup>32</sup> This Article was considerably modified by the Council.

<sup>33</sup> SC's Opinion No 5/2010.

operational independence of OLAF in the event of refusal or delay, as has occurred several times in the past, despite appearing to represent a guarantee of the rights of defence. The SC considers that the new regulation should contain provisions allowing for the avoidance of such situations in the future (see point 29 of this opinion). Indeed, the provision in the amended proposal stipulating that failure of the institution, body, office or agency to reply within one month shall be deemed to be agreement thereto<sup>34</sup>, demonstrates that no progress has been made in this area. This is not sufficient, given the lack of any alternative in the event of refusal. The SC reiterates its wish to be informed systematically of all cases in which institutions, bodies, offices or agencies have refused to give their agreement to defer the obligation to ask the person concerned to make his or her views known.

### 3.2. Setting up a review procedure

24. The SC notes that the Review Adviser proposed by the Commission in 2006 was replaced by a review procedure to be set up by the DG within OLAF. The SC is not convinced that this new procedure fully meets the objective of the amended proposal to further reinforce the procedural rights of persons concerned in OLAF's investigations. Indeed, the review procedure does not allow a *regular* control of the legality of investigations, nor does it establish sufficient guarantees in order to ensure the independence of the person(s) entrusted with it. The SC therefore suggests that the new regulation should allow for both a regular internal control of the legality of investigations at precise stages of the investigation as well as a complaints mechanism or review procedure to be carried out by an independent person reporting to the SC.

#### 3.2.1. Need for regular control of the legality of investigations

25. As the SC has already stated<sup>35</sup>, ensuring the respect for fundamental rights and procedural guarantees of persons under investigation is first and foremost the responsibility of the Director General of OLAF and of the management team. Therefore, it falls within the remit of the DG to put in place adequate internal controls and monitoring mechanisms.

26. The SC considers that the amended proposal does not allow for the setting up of such a *regular* control for two reasons. First, the review procedure would be initiated only at the request of a person concerned in an investigation. The cases where it is necessary to preserve the confidentiality of the investigation (and where the person concerned would not even be aware of the existence of the investigation) would systematically escape this form of control. Second, the mechanism proposed by the Commission (but not accepted by the Council) of an internal body to be consulted by the DG at different stages of the investigation (upon the opening of an investigation, prior to closing an investigation and whenever he deems appropriate)<sup>36</sup> is not the appropriate forum to redress any potential violation of the rights of the person concerned, since its composition, mandate and role are not clearly defined.

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<sup>34</sup> Article 7a (4).

<sup>35</sup> SC's Opinion No 3/2010.

<sup>36</sup> See Article 12 (6) of the Commission's proposal.

27. The SC therefore supports the idea of a regular review of the legality of OLAF's investigations to be carried out by those within OLAF who are experts in legal and investigative procedures and are qualified to hold judicial office in a MS, prior to the opening and again prior to the closing of an investigation, as well as prior to any forwarding of information to the competent authorities in the MS concerned<sup>37</sup>.

### 3.2.2. Need for a complaints mechanism

28. The SC is aware of the difficulty of putting in place an independent control system to assess the legality of OLAF's investigative acts. The SC takes note and agrees with the opinions of the Court of Auditors with regard to the lack of adequate guarantees of independence for the Review Adviser proposed by the Commission in 2006<sup>38</sup> and for the person(s) entrusted with the review procedure as proposed in 2011<sup>39</sup>. The SC repeats its view that, within the general architecture governing OLAF, the SC is the only body able to meet this requirement. However, neither the current regulation nor the amended proposal have entrusted the SC with the power to analyse individual complaints. The SC's role is rather to provide for systemic analysis. The SC considers therefore that there is a clear need to assign this task to an independent person.

29. The SC has expressed previously its concerns regarding the creation of a Review Adviser as proposed by the EC in 2006. However, the SC could agree with the creation of a review procedure or a complaints mechanism to be carried out by an independent person *i*) if the mandate and the role of this person were more clearly defined in order not to overlap with the powers and responsibilities of the SC and *ii*) if the guarantees of his or her independence were deemed to be adequate. In particular, the SC considers that this person should be able not only to analyse complaints against OLAF, but also to act on his/her own initiative by regularly ensuring the respect of procedural rights before information has been given to the person concerned in case of deferral of the obligation to ask the person concerned to make his or her views known and in cases transmitted to the national judicial authorities when the person concerned was not informed about the investigation. The SC also considers that the person entrusted with the review procedure should be informed of all decisions to defer the information of the person concerned and/or of the institution to which the person concerned belongs so as to be able to act on his/her own initiative. Indeed, it is particularly in these circumstances that his/her intervention might be important. This would make the intervention of the Secretary General or of the President of the institution concerned unnecessary.

30. He or she should have unannounced, automatic and permanent access to OLAF case files. New provisions could be inserted in the regulation in order to ensure the respect by this person of confidentiality of investigations and compliance with the rules of data protection. His/her opinions shall be sent to the DG. These opinions, if not binding, shall be followed by a reasoned reply from the DG in the event that he decides not to follow the recommendations made. The SC should systematically receive copies of the complaints and of the opinions of the person entrusted with their analysis. Moreover, in order to ensure the complete independence of this person, neither he nor she should be appointed by or be under the

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<sup>37</sup> Article 14 of the EP resolution of 2008.

<sup>38</sup> See the Opinion No 2/2006.

<sup>39</sup> See the Opinion No 6/2011 of the Court of Auditors, points 15 and 37-40.

authority of the DG. Were this to be the case, the independence of such a person would be illusory were his or her evaluation and promotion to depend on the DG.

### 3.3. Adoption of rules of procedures

31. The SC fully supports the idea of establishing clear rules of procedure aimed at reinforcing transparency and legal certainty. The SC favours the inclusion of these rules in a manual of procedures rather than a procedural code<sup>40</sup>. Indeed, a procedural code would need a complex procedure both for its adoption as well as for any future amendments and would also need time for adoption and the involvement of all three institutions.

## 4. REINFORCING OLAF'S INDEPENDENCE

### 4.1. Clarifying the role of the Supervisory Committee

#### 4.1.1. Role of the SC

32. The primary role of the SC is to reinforce OLAF's independence, by regular monitoring of the implementation of the investigative function. This role implies (but is not limited to<sup>41</sup>) monitoring the functioning of exchange of information between OLAF and the institutions, bodies, offices and agencies and the competent authorities of the Member States on the one hand, and monitoring developments concerning the application of procedural guarantees and the duration of investigations, on the other. It also implies monitoring of the effectiveness of OLAF's work and of the results of investigations.

33. The SC welcomes the new task of **monitoring the functioning of information exchange** between OLAF and the institutions, bodies, offices and agencies and favours the Commission's proposal, which would extend this task to the functioning of information exchange between OLAF and the competent authorities of the MS<sup>42</sup>.

34. The SC shall also **monitor developments concerning the application of procedural guarantees and the duration of investigations**. Therefore, the SC strongly disapproves of the new wording of Article 11 (7) b)<sup>43</sup>. This modification ignores the rule established by the *Franchet and Byk* case, which recognised that the SC has a role to play with regard to the protection of the rights of the persons concerned by OLAF's investigations. Indeed, the SC's

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<sup>40</sup> As proposed in Article 15 of the EP resolution.

<sup>41</sup> Article 11 (1) second phrase of the amended proposal stipulates that the SC "shall *in particular*" monitor the functioning of information exchange....

<sup>42</sup> The reference to the monitoring of the functioning of information exchange between OLAF and the competent authorities of the Member States was deleted by the Council.

<sup>43</sup> "The Director General shall inform the Supervisory Committee periodically (...) (b) of cases in which information has been forwarded to judicial authorities of the Member States and of cases in which he decided not to transmit information on internal investigations to the national judicial authorities concerned in accordance with Article 9(5)".

role in this field would be diminished, since the DG will no longer have the obligation to systematically inform the SC *before* forwarding information to the national judicial authorities, but only to "periodically" inform it of cases in which information *has already been* forwarded to these authorities<sup>44</sup>.

35. As is the case under the current regulation, the SC will continue to **monitor the results of investigations**, on the basis of information supplied by the DG regarding cases in which the institution, body, agency or office concerned has failed to act upon the recommendations made by OLAF. The SC is disappointed to note that, in the Council's proposal, this information does not include cases where the competent authorities of the Member States have failed to act<sup>45</sup>. The SC considers it important to assess the reasons for such failure (for example, time barring) and thus detect any potential interference with OLAF's independence and to make appropriate recommendations. The SC believes that there is a clear need for the monitoring of the results of OLAF's investigations and is ideally placed to assume this task. The SC has serious doubts that the proposed exchange of views with the institutions should be the sole forum for discussions concerning the effectiveness of the work of OLAF with regard to investigations<sup>46</sup>.

#### 4.1.2. SC Support

36. The SC is disappointed to note that the increases in its responsibilities and the clarification of its role have not been matched with the appropriate support for both the SC and its secretariat. The SC reiterates its concerns and remarks expressed in its previous Opinion No 3/2010 with regard to the SC's resources (information transmitted by OLAF, SC's access to data, SC's secretariat), which should be appropriate and adequate to enable it to fulfil its role and perform its functions in full independence.

37. The SC shall perform its monitoring role on the basis of the information and documents sent to it by the DG and taking into account the opinions and analysis reports as drawn up by the person(s) entrusted with the review procedure<sup>47</sup>.

38. The SC notes that the provisions of Article 7b (5) are not consistent with those of Article 11 (1) b: although Article 11 (1) b states that the SC shall "monitor developments concerning the application of procedural guarantees and the duration of investigations in the light of (...) the **opinions** and **analysis reports** regularly drawn up by the person(s) entrusted with the review procedure", Article 7b (5) mentions that this/these person(s) shall present the SC "with regular **statistical** and **analytical reports**", and not the opinions issued following a request filed by a person concerned<sup>48</sup>. The obligation for this/these person(s) to send regular reports is not equivalent to the obligation to send each and every opinion to the SC, as should be the case.

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<sup>44</sup> See point 45 of the Opinion No 6/2011 of the ECA.

<sup>45</sup> Article 11 (7) a) of the Council's proposal.

<sup>46</sup> Article 11 (2) f) of the amended proposal.

<sup>47</sup> Article 11 (1) b) and (7) of the amended proposal.

<sup>48</sup> Indeed, according to Article 7b (3), the person(s) entrusted with the review procedure shall communicate their opinion only to the DG and shall send a reasoned reply (*NB: not the opinion*) to the person concerned.

39. Moreover, the SC disagrees with the proposal whereby the SC would no longer receive any regular information concerning the cases transmitted to national judicial authorities, for the reasons stated above.

40. The SC emphasises that its work, as an independent body, cannot and should not be based solely on information received from OLAF. The SC makes its own analysis using not only documents and information received from OLAF, but also any documentation the SC deems necessary for the purpose. The last sentence of Article 11 (1) of the amended proposal has only partially taken into consideration the need for the SC to have access to data and information held by OLAF, as requested in its Opinion No 3/2010<sup>49</sup>. The SC considers that this provision is not sufficient to allow proper and adequate monitoring by the SC and thus the detection of potential interference with OLAF's independence, since the SC's access to information would be left to the discretion of the DG<sup>50</sup>. The SC therefore needs permanent and unannounced access to all OLAF's *closed* case files. In order not to interfere with the *ongoing* investigations, the SC should have access to open case files upon written request.

41. Members of the SC are assisted in the performance of their duties by a secretariat. Although provided by OLAF, the secretariat shall work in complete independence under the chair of the SC and its members. In the opinion of the SC, independent functioning of its secretariat<sup>51</sup> necessitates further guarantees provided by the text of the regulation itself: the secretariat shall be adequately staffed; members of the secretariat under the terms of the regulation shall be appointed by an Appointing Authority different from OLAF DG, at the suggestion of the SC; they shall be periodically evaluated solely by the SC<sup>52</sup>; they shall act with loyalty and in full respect of the instructions received exclusively from the SC. As it is the case for the person entrusted with the review procedure, the SC considers that the requirement for the independence of its secretariat – and consequently for the SC – is illusory if the staff of the secretariat is appointed, administered and promoted by the service which it is in charge of monitoring.

## 4.2. Clarifying the role of the Director General

42. While the SC is content with the form of the recruitment procedure for the post of the Director General which was followed after the death of the previous incumbent, it notes that the process took an inordinately long time and therefore recommends that a relatively short timeframe should be included in the Regulation for future appointments to this role.

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<sup>49</sup> Point 2.2.3 of SC's Opinion No 3/2010. Indeed, Article 11 (1) last sentence stipulates that the SC may ask OLAF for additional information on investigations in duly justified situations, without however interfering with the conduct of investigations.

<sup>50</sup> The European Court of Auditors is of the same opinion (see point 43 of its Opinion No 6/2011).

<sup>51</sup> As provided in Recital 17 of the amended proposal.

<sup>52</sup> According to the opinion No 6/2011 of the ECA, the members of the SC secretariat shall not be appointed by or subject to the authority of the DG (point 44).

#### 4.2.1. Delegation of powers and deputy representation

43. The SC is not convinced that the power of the DG to delegate the performance of his functions to one or more members of OLAF staff is without risk to the independent conduct of investigations. The SC notes that some of the functions which can be delegated are directly linked to the conduct of investigations<sup>53</sup>. Therefore, the person(s) entrusted with these functions shall act in full independence, in the manner of the DG.

44. It is important to ensure continuity in the independent conduct of OLAF's investigations by creating the function of a Deputy Director General to replace the Director General were the latter to resign, retire, be on sick-leave or otherwise be unable to fulfil his obligations. The deputy should be chosen among the Directors with the consensus of all three institutions.

#### 4.2.2. Internal body to be consulted by the DG

45. The SC supports Article 12 (6) of the amended proposal imposing an obligation on the DG to consult an internal body on the opening of an investigation or prior to the closing of an investigation and whenever he deems appropriate, but only to the extent that appropriate guarantees be added to the text in order to prevent any possible delay in the event of an emergency.

### 4.3. Setting up an exchange of views

46. The SC supports the concept of an exchange of views at political level<sup>54</sup> to discuss OLAF's investigations policy providing the purpose is to support OLAF's activities and it does not undermine its operational independence. The SC considers that the obligation for OLAF to take appropriate action whilst taking into account the opinions expressed in the exchange of views could undermine the independence of the DG. The DG could thus be put under pressure from the institutions, particularly regarding the establishment of the strategic priorities for OLAF's investigative policies<sup>55</sup>. Moreover, the SC strongly disapproves of the amendment made by the Council which it believes could seriously jeopardise OLAF's independence, since it significantly changes the meaning of Article 11 a (1) in the sense that the participation of the SC in this exchange of views would not be mandatory on every occasion<sup>56</sup>.

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<sup>53</sup> The functions which can be delegated are notably the decision on whether or not to open an investigation (Article 5) or the management of investigations (Article 6 (1)).

<sup>54</sup> This exchange of views replaces the interinstitutional dialogue proposed by the previous texts on the reform.

<sup>55</sup> Article 11a (2) a) of the amended proposal.

<sup>56</sup> In the Commission's proposal, Article 11 a (1) is drafted as follows: "The European Parliament, the Council and the Commission shall meet periodically **or upon request of one of these institutions**, the Office or the Supervisory Committee for an exchange of views at political level to discuss the Office's policy of investigations". This text was amended by the Council as it follows: "The European Parliament, the Council and the Commission shall meet periodically the Office or the Supervisory Committee for an exchange of views at political level to discuss the Office's policy of investigations ". The latest drafting can be interpreted as leaving to the institutions the possibility to meet the Office alone, without the SC being necessarily present.





**OPINION No 5/2011**

**Transmission by the European Anti-Fraud Office (OLAF) to the institutions of final case reports drawn up following internal investigations closed without follow-up**

Brussels, 17<sup>th</sup> November 2011

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## Background

1. The European Anti-Fraud Office (OLAF) conducts internal administrative investigations to determine whether fraud, corruption or any other illegal activity affecting the financial interests of the European Union have occurred. OLAF also investigates allegations of dereliction of the obligations of officials and other servants of the EU liable to result in disciplinary or criminal proceedings<sup>1</sup>. If evidence is revealed which tends to show that such has occurred, OLAF refers the results of its investigations to the appropriate authorities for disciplinary, administrative, financial or, if necessary, judicial follow-up. Reports drawn up following an internal investigation and any useful related documents are sent to the institution, body, office or agency concerned<sup>2</sup>.

2. It has been OLAF's practice, until recently, to forward only reports of internal investigations closed with follow-up. When internal investigations were closed without any further action taken, OLAF would inform the institution, body, office or agency concerned by sending a note<sup>3</sup> stating that the case had been closed without follow-up action being taken<sup>4</sup>.

3. The Supervisory Committee (SC) took note that OLAF decided to take into account a "request [from the European Commission] for also receiving all final case reports closed without follow-up". In addition, OLAF decided to inform "the other institutions that a similar policy will apply to them unless otherwise requested".<sup>5</sup>

4. The SC understands that this transmission of final case reports drawn up following internal investigations closed without follow-up will henceforth be carried out automatically, at the end of each investigation and on a systematic basis. The SC therefore took the decision to assess this practice, with the express purpose of determining whether it could jeopardize OLAF's investigative independence. The SC examined 17 internal cases closed without follow-up in which the final case reports were forwarded to the institutions or bodies concerned and assessed the legal basis for these transmissions, as well as the compliance of this practice with EU law.

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<sup>1</sup> Article 1 of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), *OJ L* 136, 31.5.1999, p. 1–7.

<sup>2</sup> Article 9 (4) of Regulation (EC) No 1073/1999.

<sup>3</sup> Notification of case closure without follow-up letter.

<sup>4</sup> This was foreseen in the OLAF Manual – Operational Procedures under point 3.4.3.6.2. This point has disappeared in the new version of the Manual, updated in July 2011.

<sup>5</sup> See the minutes of the Directors' meeting of 23 June 2011.

## A - Analysis of case files

5. When examining the case files, the SC found two notes sent by the Secretariat General of the EC to OLAF. The first note is drafted as follows: "Comme vous le savez et comme discuté lors de la dernière réunion du Clearing House, la Commission ne peut accepter que, depuis mai 2010, l'OLAF ne communique plus les rapports finaux d'enquêtes internes clôturées sans suite concernant ses services"<sup>6</sup>. The Secretariat General indicates in this note that this transmission is foreseen by Article 9(4) of Regulation (EC) No 1073/1999. The second note<sup>7</sup> makes reference to the first one "par laquelle je [the Secretary General of the EC] rappelais l'obligation faite à l'OLAF par le Règlement 1073/1999 de transmettre tous les rapports finaux des enquêtes internes, y compris celles clôturées sans suite"<sup>8</sup>.

6. Following analysis of the cases mentioned above, the SC determined that:

- OLAF closed these investigations without any further action being taken because the alleged irregularities or frauds were unsubstantiated;
- OLAF forwarded the final case reports drawn up following these investigations to the EC, in response to its request;
- On its own initiative OLAF also forwarded these reports to the other institutions and bodies concerned, namely the Council, the European Parliament and the European External Action Service;
- OLAF quoted Article 9 (4) of Regulation (EC) No 1073/1999 as the legal basis for this transmission<sup>9</sup>;
- These reports contain information forwarded or obtained in the course of internal investigations, including the name of the staff member involved and his employing EU institution, the initial source of information, an explanation of the alleged fraud or irregularity, the steps taken and the facts gathered during the investigation, the statements of the persons involved in the matters under investigation (including, where appropriate, those of the person concerned, whistleblower or witness), OLAF's findings and the main results of the investigation;
- In some cases, this information will be used in the framework of other OLAF internal and external ongoing investigations;
- These reports also contain personal data relating, on occasions, to staff of the EU institutions or bodies who are subject to the investigation or otherwise involved in the

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<sup>6</sup> Note ARES (2011) 687782 of 27 June 2011: "As you know, and as discussed at the last meeting of the Clearing House, the Commission can not accept that, as from May 2010, OLAF no longer forwards the final reports of internal investigations closed without further action concerning its services" (our translation).

<sup>7</sup> Note ARES (2011) 725801 of 5 July 2011.

<sup>8</sup> The note "in which I recalled OLAF's obligation according Regulation 1073/1999 to forward all final reports of internal investigations, including those closed without follow-up" (our translation).

<sup>9</sup> However, only in two investigations the letter accompanying the final case report explicitly mentions this article as the legal basis for the transmission.

matters under investigation, either as whistleblowers or witnesses and, in other instances, to persons outside the EU institutions or bodies who may be involved in the matters under investigation, either as informants or witnesses;

- The categories of the data processed<sup>10</sup> are name, personnel number (for EU staff), date of birth, nationality, marital status, address, phone number, professional position, employer, bank account, statements made regarding the events under investigation by the person or about the person, evidence mentioning the person and notes regarding the relation of the person to the events under investigation;
- Some of these persons were informed only that there had been transmission to the EC of the results of OLAF's investigations and not that there had been transmission of the final case reports;
- In none of the investigations examined was personal data redacted.

## **B - Legal basis for the transmission of final case reports drawn up following internal investigations closed without follow-up**

7. In a small number of the investigations examined OLAF has cited Article 9 (4) of Regulation (EC) No 1073/1999 as the legal basis for the transmission. Furthermore, the SC notes the existence of a draft and unsigned Memorandum of Understanding concerning a code of conduct designed to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission<sup>11</sup>. The SC doubts that either Article 9 (4) of Regulation (EC) No 1073/1999 or Article 7 of the Memorandum of Understanding represents a sufficient legal basis for the transmission, for the reasons stated below.

### *a) Article 9 (4) of Regulation (EC) No 1073/1999*

8. OLAF does have a legal obligation to send the reports drawn up following an internal investigation and any useful related documents to the institution, body, office or agency concerned<sup>12</sup>. However, on reading the first sentence of Article 9 (4) in conjunction with its second sentence, which stipulates that “the institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant”, the SC interprets this provision as concerning only investigations closed with follow-up. Indeed, in the SC's view, the scope of this paragraph is such as to ensure that appropriate follow-up is given to OLAF's investigations.

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<sup>10</sup> See the opinion of the European Data Protection Supervisor on a notification for prior checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on OLAF internal investigations, 23 June 2006, case 2005-418.

<sup>11</sup> SEC(2003)871 consolidated, 14.8.2003.

<sup>12</sup> Article 9(4) of Regulation (EC) No 1073/1999.

9. This conclusion is reinforced by Article 1(3) of Annex IX of the Staff Regulations, specifying that, in cases where an investigation is closed without further action, the OLAF DG shall **inform** the official and his institution in writing<sup>13</sup>. Article 5 of the Commission Decision of 2 June 1999<sup>14</sup> also stipulates that when an investigation has been closed without any further action, the DG shall **inform** the person concerned in writing. For the SC, this information clearly refers to the results of the investigation and not to the transmission of the case report.

*b) Article 7 of the Memorandum of Understanding between OLAF and the Commission*

10. The SC notes that the Memorandum of Understanding, whilst respected both by OLAF and the EC, is still in a draft version and, as far as the SC is aware, it has not yet been signed.

11. The SC notes that while the draft Memorandum provides in its Article 7(1) that DG OLAF "will promptly forward all final reports concerning internal investigations and any useful related documents to the Commission", it also foresees a different treatment for cases closed without follow-up. Article 7(2) clearly states that "whenever a case is closed without further action, OLAF will **inform** the Commission". Again, the SC interprets this provision as requiring OLAF to inform the EC as to the results of the investigation and not to forward it the final reports.

## **C - Compliance with EU law**

12. The SC considers that OLAF's decision to send to the institutions, bodies, offices and agencies concerned all final reports drawn up following investigations closed without follow-up at the end of each investigation and on a systematic basis may breach both the requirement of confidentiality of investigations and data protection rules. Since their protection is the shared responsibility of DG OLAF and the SC<sup>15</sup>, the SC is dismayed that this decision was taken by DG OLAF without any prior consultation of the SC in order to ascertain its opinion. Moreover, the SC is surprised that neither the OLAF Data Protection Officer nor the EDPS was informed of this decision.

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<sup>13</sup>Article 1(3) of Annex IX of Staff Regulations: "If, following an OLAF investigation, no case can be made against an official about whom allegations have been made, the investigation in question shall be closed, with no further action taken, by decision of the Director of OLAF, who shall inform the official and his institution in writing".

<sup>14</sup> 1999/396/EC, ECSC, Euratom: Commission Decision of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests (SEC(1999) 802), *JO L* 149 du 16.6.1999, p. 57–59. For the other institutions, see their internal decisions implementing the Model Decision of the Interinstitutional Agreement.

<sup>15</sup> According to Article 8(4) of Regulation (EC) No 1073/1999, the OLAF DG and the members of the Supervisory Committee shall ensure that this Article [Article 8] and ex- Articles 286 and 287 of the Treaty are applied.

*a) Compliance with the requirement of confidentiality of investigations*

13. According to Article 8 of Regulation (EC) No 1073/1999, OLAF is subject to professional secrecy when transmitting information forwarded or obtained in the course of internal investigations. Transmission of information arising from OLAF's investigations must respect two concurrent conditions: (i) the "need to know" principle in relation to the recipient and (ii) the exact purpose of communicating the information (for example, ensuring follow-up of the investigation).<sup>16</sup>

14. The SC interprets this provision in two ways:<sup>17</sup> on the one hand, as sender of information forwarded or obtained in the course of internal investigations, OLAF has an obligation to assess the need to know of the recipient of its reports. In the SC's view, transmission of final case reports cannot therefore be carried out automatically, at the end of each and every investigation closed without follow-up, and on a systematic basis. On the contrary, such transmission must take place on a case by case basis, following a duly reasoned request from the EC or other institution or body. In any case OLAF cannot disclose to the recipient the information which it intends to use in other ongoing internal and external investigations without jeopardizing their successful outcome, as has been the case. On the other hand, as recipient of this information, the EC (or other institution or body) may not use it for purposes other than to prevent fraud, corruption or any other illegal activity. In the absence of any specific purpose relating to the prevention of fraud, corruption or any other illegal activity, as is the case for final case reports in investigations closed without follow-up, the transmission of all final reports in investigations closed without follow-up does not appear to be necessary.

*b) Compliance with the data protection rules*

15. OLAF must respect the right to the protection of personal data which is protected by Article 8 of the Charter of Fundamental Rights of the EU, and is closely connected with the right to respect of private life expressed in Article 7 of the Charter. Moreover, Article 8(3) of Regulation (EC) No 1073/1999 imposes on DG OLAF an obligation to ensure that EU provisions for the protection of personal data are complied with<sup>18</sup>. When sending to the institution, body, office or agency concerned reports drawn up following an internal investigation and any related useful documents<sup>19</sup>, OLAF transfers personal data of the persons concerned, whistleblowers, informants, witnesses and OLAF staff. Consequently, OLAF is legally bound by both the provisions of the Charter and the rules of Regulation (EC) No 45/2001<sup>20</sup>. The latter requires OLAF, in its capacity as a personal data controller, to transfer these reports and/or the related documents containing personal data only if this data is

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<sup>16</sup> Article 8(2) of Regulation (EC) No 1073/1999: "Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity."

<sup>17</sup> See also the SC Opinion No 5/2010, point 19.

<sup>18</sup> See also the judgement of the Court of First Instance, *Nikolaou v Commission*, 12 September 2007, case T-259/03, para. 191.

<sup>19</sup> Article 9(4) of Regulation (EC) No 1073/1999.

<sup>20</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ L* 8, 12.1.2001, p. 1–22.

necessary for the legitimate performance of tasks covered by the competence of the recipient<sup>21</sup>. When doing so, OLAF must verify that (i) the recipient has the appropriate competence and (ii) the transfer is necessary<sup>22</sup>.

16. The SC is of the opinion that automatic and systematic transmission of final case reports in investigations closed without follow-up does not comply with these requirements. The SC points out that the European Data Protection Supervisor (EDPS) has stated that "even if the transfer of information is foreseen in relevant legislation, such transfer is only lawful if it meets these two additional requirements. Whether a given transfer meets such requirements will have to be assessed on a case by case basis. Accordingly, OLAF follow-up agents should apply this rule for each particular data transfer. Doing so will avoid unnecessary transfers of information as well as transfers of information to parties that do not have the appropriate competences. To ensure compliance with this rule, the EDPS suggests that OLAF puts in place a procedure whereby a note to the file is drafted establishing the necessity of the data transfers that have taken place or will take place in the context of a given case"<sup>23</sup>.

17. The SC believes that this statement also applies to those cases closed without follow-up. Therefore, OLAF needs to assess on a case by case basis whether a given transfer to EU institutions and bodies of personal data in cases closed without follow-up meets such requirements. The evaluation of the necessity of the transfer can also be made for a specific category of files. For example, it is reasonable to believe that in some cases the EC (or other institution or body) would need to know what action OLAF has carried out following initial information coming from one of its services. However, the SC notes that, in practice, OLAF not only sent to the EC the final case reports regardless of the source of information, but also to other institutions in the absence of a specific request from them and, consequently, without evaluating their need to know.

18. Even supposing that the requirements mentioned above are complied with, final case reports may contain personal data which is not necessary for the performance of the tasks covered by the competence of the recipient. This is especially the case for whistleblowers' and informants' personal data. In this regard, the SC draws attention to the statement of the EDPS that the EC does not need to know whistleblowers' personal data in order to take the necessary measures to protect the financial interests of the EU<sup>24</sup>. OLAF cannot therefore transmit these case reports without protecting the whistleblowers, by redacting their personal data.

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<sup>21</sup> Article 7 (1) of Regulation (EC) No 45/2001. See also the opinion of the European Data Protection Supervisor on internal investigations quoted above, point 2.2.6.

<sup>22</sup> Article 7 (2) of Regulation (EC) No 45/2001.

<sup>23</sup> See the EDPS' Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office on "follow-up" data processing operations (disciplinary, administrative, judicial, financial), Cases 2006-544, 2006-545, 2006-546, 2006-547, 27 March 2007, point 2.2.6.

<sup>24</sup> See the EDPS' opinion on the Memorandum of understanding, case 2009-011, point 3.4. (Avis concernant une notification relative à un contrôle préalable reçue du délégué à la protection des données de la Commission européenne à propos de la gestion des informations transmises par l'OLAF dans le cadre du Memorandum of Understanding). The SC would also point out the statement from the European Court of Human Rights which says that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection, in particular where the employee concerned is a part of a small group of persons aware of what is happening at work and is thus best placed to act in the public interest (see the following judgements: *Guja v Moldova* [GC], no 14277/04, 12 February 2008, § 72; *Marchenko v Ukraine*, no 4063/04, 19 February 2009, § 46; *Heinisch v Germany*, no 28274/08, 21 July 2011, § 63).

19. The SC also notes that Article 27 (1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS the processing of operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. The list of processing operations likely to present such risks includes “processing of data relating to ... suspected offences, offences, criminal convictions or security measures”, as well as “processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct”<sup>25</sup>. The SC notes that the EDPS considers that the conduct of EU officials is analysed by OLAF in its internal investigations; moreover, the processing of personal data in the context of internal administrative investigations by OLAF could be seen as a processing operation relating to “... suspected offences, offences, criminal convictions or security measures”<sup>26</sup>. Since the prior checking made by the EDPS on the processing of personal data in the context of internal investigations or of the “follow-up” data processing operations did not examine the specific issue of the transfer of final case reports in internal investigations closed without follow-up, the SC considers that OLAF should have notified the EDPS for prior checking and sought his opinion.

20. The SC is concerned that this transmission could affect the rights of the persons implicated in investigations and consequently lead them to bring an action for damages before the European Court of Justice. As the EU judiciary stated, the provisions of Regulation (EC) No 45/2001 and Article 8(3) of Regulation (EC) No 1073/1999, as well as the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation (EC) No 1073/1999 confer rights on individuals who are affected by an OLAF investigation<sup>27</sup>. Where there has been violation of these rules, the EC would incur non-contractual liability for OLAF's unlawful conduct, which has already happened on several occasions. Such a conclusion would be detrimental not only to the EC, but, in particular, to OLAF whose credibility and reputation would be put into question.

21. Moreover, the SC is worried that this practice could jeopardize the success of investigations. In its capacity as an investigative body for internal cases, OLAF is highly dependent on being respected and trusted to be able to encourage witnesses and whistleblowers to come forward and point out suspected fraudulent or corrupt behaviour. This reporting practice directly threatens the necessary trust and confidence amongst potential witnesses and whistleblowers and is likely to discourage them from coming forward and assisting OLAF. On the other hand, it is important to note that where an investigation is closed without follow up it may have depended on factors that may change in the future. If the final case report in such a case is to be disseminated outside OLAF, a potential new investigation into the same matter could unnecessarily be made more difficult.

## **Conclusions and recommendations**

22. Transmission of final reports drawn up following internal investigations closed without follow up can be questioned from a number of purely legal aspects relating both to professional secrecy and data protection issues as outlined above. Moreover, this practice will inevitably affect the efficiency of OLAF's investigatory functions and, at the very least, may

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<sup>25</sup> Article 27 (2) a) and b) of Regulation (EC) No 45/2001.

<sup>26</sup> See the EDPS' opinion on internal investigations quoted above, point 2.2.1.

<sup>27</sup> Court of First Instance *Franchet and Byk v Commission* (No 2), 8 July 2008, case T-48/05, para. 218 and *Nikolaou v Commission*, 12 September 2007, case T-259/03, para. 210.



give other institutions inappropriate means to influence OLAF's investigative activity, which would be detrimental to the public's trust and confidence in OLAF's independence.

23. The SC strongly recommends that OLAF reconsider its decision to transmit to the institutions, bodies, offices or agencies concerned the final case reports mentioned in this opinion without taking all necessary measures in order to ensure that this practice complies with EU law and does not jeopardize the efficiency and independence of its investigations.