

**SUPERVISORY COMMITTEE**



**Activity Report  
of the OLAF  
Supervisory Committee**

**January 2012 – January 2013**

17 April 2013

Members of the OLAF Supervisory Committee

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## Table of contents

<b>I</b>	<b>INTRODUCTION</b> .....	5
<b>II</b>	<b>MONITORING OF OLAF'S INVESTIGATIVE FUNCTION</b> .....	6
<b>1</b>	<b>Scope of the SC's monitoring and working arrangements with OLAF</b> .....	6
<b>1.1</b>	<i>Scope of monitoring</i> .....	6
<b>1.2</b>	<i>Implementation of new working arrangements with OLAF</i> .....	7
<b>2</b>	<b>Monitoring of OLAF's investigative function at the Supervisory Committee's initiative</b> .....	8
<b>2.1</b>	<i>Instructions to Staff on Investigative Procedures and their implementation</i> .....	8
<b>2.2</b>	<i>SC's Opinions and reports on individual cases</i> .....	12
<b>3</b>	<b>Monitoring of OLAF's investigative function - information on individual cases sent by the OLAF DG</b> .....	13
<b>3.1</b>	<i>Information provided to the SC</i> .....	13
<b>3.2</b>	<i>Findings of the SC</i> .....	18
<b>3.3</b>	<i>Reform of Regulation (EC) No 1073/1999</i> .....	22
<b>III</b>	<b>MANAGEMENT OF OLAF'S INVESTIGATIVE FUNCTION</b> .....	22
<b>1</b>	<b>OLAF investigation priorities</b> .....	23
<b>2</b>	<b>Administrative organisation, budget and staff policy in relation to OLAF's investigative function</b> .....	24
<b>2.1</b>	<i>Budget</i> .....	24
<b>2.2</b>	<i>Administrative organisation and staff policy</i> .....	24
<b>IV</b>	<b>RELATIONS WITH OLAF, EU INSTITUTIONS AND OTHER STAKEHOLDERS</b> .....	25
<b>1</b>	<b>Relations with OLAF</b> .....	25
<b>2</b>	<b>Relations with EU institutions</b> .....	26
<b>3</b>	<b>Relations with other stakeholders</b> .....	27
<b>V</b>	<b>SUPERVISORY COMMITTEE WORKING METHODS</b> .....	27
<b>1</b>	<b>Meetings and Rapporteurs</b> .....	27
<b>2</b>	<b>Secretariat</b> .....	28
	<b>Annex 1</b> .....	29
	<b>Annex 2</b> .....	30
	<b>Annex 3</b> .....	36

## **FOREWORD BY THE CHAIRMAN**

The present Supervisory Committee of OLAF took office as from January 2012 and this Activity Report which I am pleased to submit covers our first year of mandate.

The Supervisory Committee is fully committed to support OLAF in the exercise of its mandate of fighting fraud, corruption and irregular activities affecting the financial interests of the European Union, as well as to reinforce its independence by regular monitoring of its investigative function and by advising and offering constructive criticism where appropriate. To this end, we have tried, over the period since we have been in office, to build up a comprehensive picture of the way OLAF exercises its investigatory functions, by both monitoring OLAF's cases in the light of the new procedures put in place in 2012 by the OLAF Director-General and examining its new organisational structure in order to decide whether it gives optimum space for carrying out OLAF's work with efficiency and economy.

The new Supervisory Committee was, during its first year of mandate, confronted with a number of significant changes: the internal reorganisation of OLAF and the adoption of the new Instructions to Staff on Investigative Procedures, new working arrangements between OLAF and the Supervisory Committee, the on-going reform of the Regulation (EC) No 1073/1999. Difficulties arose also from the divergence of views between OLAF and the Supervisory Committee with regard to the execution of the tasks entrusted to the latter. The resignation of a Member of the European Commission as a result of an investigation by OLAF, and the monitoring by the Supervisory Committee of this particular investigation represented another major challenge for the new Committee.

Nevertheless, we have delivered hard-hitting opinions and reports in which we have analysed how OLAF is exercising its investigative function, the proposed reform of the Regulation (EC) No 1073/1999 or OLAF's budget.

The Supervisory Committee's Members are, as a body, devoted to having the best working relations with OLAF. Still, a healthy degree of tension between OLAF and the Committee would be normal, as in any relationship between a supervisor and a supervisee. In order to do our utmost to reinforce better mutual understanding, the Committee will, in its second year of office, take the initiative to propose new working arrangements based on how it sees its own tasks. The Committee sees itself, in accordance with Regulation (EC) No 1073/1999, as a monitoring body which uses a matrix system to determine and flag up systemic problems: horizontal by sampling and vertical by monitoring individual cases. However, our ultimate aim as an independent Committee is and will remain to assist the Director-General in the discharge of his functions and thus to contribute to increasing the effectiveness of OLAF's investigations and to reinforcing its investigative independence. We firmly intend to continue down this path.

I would particularly like to thank and congratulate the Secretariat of the Committee for its unstinting work and invaluable support over the period we have been in office.

Johan DENOLF,

Chairman of the OLAF Supervisory Committee

## I INTRODUCTION

1. The role of the Supervisory Committee of the European Antifraud Office (hereinafter, SC) is set out in the Regulation (EC) No 1073/1999<sup>1</sup> and in the Decision establishing OLAF<sup>2</sup>. The SC is the guarantor of OLAF's independence and it supervises the investigatory function of OLAF through regular monitoring aimed at ensuring the proper conduct of investigations. The monitoring by the SC of OLAF's investigative function is carried out according to the SC Rules of Procedure<sup>3</sup>. It is in particular based on the examination of individual OLAF case files and other data available to the SC, which allows drawing specific and general conclusions and recommendations communicated to the Director-General of OLAF (hereinafter, the OLAF DG) and, where necessary, to the relevant EU institutions.
2. The monitoring of individual cases is essential for drawing systemic or generic conclusions and identifying possible systemic deficiencies in the investigative function of OLAF. The SC focuses in particular on examining whether fundamental rights and procedural guarantees are respected in OLAF investigations and whether the cases are dealt with efficiently, effectively, in due time and according to the relevant rules and legal provisions.
3. That obviously requires the necessary access to OLAF's investigatory casework which was continuously ensured by OLAF until March 2012. However, at the beginning of the mandate of the current SC, new arrangements were introduced by the OLAF DG with regard to the access for the SC to relevant information on OLAF's cases, which made it difficult for the SC to exercise its tasks properly, due to the lack of sufficient and timely delivered information.
4. It has determined the activities of the SC during the reporting period. A significant amount of time and resources was devoted to discussions with the OLAF DG, in meetings and in extensive correspondence, on restoring the SC monitoring tools. It resulted in adopting interim working arrangements which unfortunately did not prove to be effective.
5. Nevertheless, the SC adopted, unanimously, two formal Opinions, a position paper and a report. It examined 83 cases transmitted to national judicial authorities and 188 OLAF reports on cases lasting more than nine months. The SC also made an analysis of the text of the reform of the Regulation (EC) No 1073/1999 on the basis of the SC's experience in the monitoring of OLAF's investigations.

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<sup>1</sup> Article 11 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> Articles 4-6 and recital 5 of the Commission Decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), 1999/352/EC, ECSC, Euratom, OJ L 136, 31.5.1999, p. 20–22.

<sup>3</sup> OJ L 308, 24.11.2011, p. 114.

6. This first activity report of the current SC covers the full year from its appointment at the end of January 2012 till January 2013. The SC Members were Christiaan Timmermans (Chairman, January-October 2012), Johan Denolf (Chairman since October 2012), Herbert Bösch, Catherine Pignon and Rita Schembri<sup>4</sup>. In January 2013 the SC welcomed a new Member, Jens Madsen who replaced Ch. Timmermans.

## II MONITORING OF OLAF'S INVESTIGATIVE FUNCTION

*Article 11.1 of Regulation (EC) N° 1073/1999:*

*The Supervisory Committee shall reinforce the Office's independence by regular monitoring of the implementation of the investigative function.*

*Recital 10 of Regulation (EC) N° 1073/1999:*

*... investigations must be conducted ... with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value.*

### 1 Scope of the SC's monitoring and working arrangements with OLAF

#### 1.1 Scope of monitoring

7. The role of the SC is to monitor OLAF's investigative function in order to ensure that its independence is not compromised and that investigations are conducted according to the highest quality standards. By thoroughly examining individual cases the SC is in a position to identify risks of undue influence on the opening, conduct and closure of OLAF investigations which would be a threat to OLAF's investigative independence. Therefore, it is often indispensable to examine the complete files of individual cases - or their representative samples - and to discuss them with OLAF investigators and managers to complete a thorough examination of the investigation methods.
8. Legitimacy and accuracy of analyses conducted by the SC as an independent body requires also examination of factual elements in cases, assessing the course of investigation in closed cases, reviewing particular areas. It is therefore for the SC to determine the optimal methods for the monitoring of OLAF's investigative function.

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<sup>4</sup> Ms Schembri withdrew from the works of the SC as from October 2012 and resigned in March 2013, when she was replaced by a new Member, Mr Tuomas Pöysti.

## 1.2 *Implementation of new working arrangements with OLAF*

9. In the light of the above considerations, the SC deeply regrets that its relationship with OLAF was particularly difficult during the reporting period and that the terms of cooperation between OLAF and the SC significantly changed shortly after the new SC began its mandate. The OLAF DG designated, as a contact point for the SC, a unit dealing exclusively with policy matters, while requests addressed by the SC to OLAF concern mainly investigative matters with which that unit does not deal directly. Moreover, the new modalities of cooperation with regard to the SC's access to relevant case-related information strongly limited the ability of the incoming SC to perform its tasks.
10. From March 2012, the SC encountered obstacles to its monitoring function consisting in an excessive and discretionary restriction – without prior notification to the SC - of the access of the SC to case files in the OLAF's Case Management System (CMS)<sup>5</sup>, a wrong application of the data protection rules<sup>6</sup> resulting in inscrutability of OLAF reports by the SC, delays in providing the requested information resulting, among others, from a lengthy and unreliable internal administrative procedure.
11. These difficulties prevented the SC from performing its tasks, as explained further in this report. More fundamentally, they seem to be linked to the OLAF DG's questioning of the SC's competence to examine – in the framework of its systemic monitoring of OLAF's investigative function - individual cases, and in particular of its task with regard to the protection of fundamental rights and procedural guarantees<sup>7</sup>.
12. The SC must insist that the OLAF DG cannot exercise a discretionary power to define the scope of the SC's role when deciding to grant or not to grant case related information or when deciding on the extent of information required by the SC. Such an interpretation would lead to the demolition of the SC's role. The present SC fully shares the opinion of their predecessors who underlined that the SC's access to relevant case related information should not be left to the discretion of the OLAF DG<sup>8</sup>.
13. On 11 September 2012 and after lengthy discussions with OLAF, the SC agreed to temporary working arrangements proposed by OLAF. Those working arrangements

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<sup>5</sup> The CMS is an electronic files management system providing OLAF with a single resource for all information in relation to OLAF casework. The CMS allows investigators to manage all information in relation to their case files, providing an electronic registry of all documentation related to each file. Each case record contains the history of a file from the initial information, thorough selection, investigation and any require monitoring activities. In September 2008, the SC and OLAF reached an agreement on the establishment of the CMS-Supervisory Committee Module with the purpose of facilitating the discharge of the SC's duties, while respecting obligations of personal data protection. This agreement was partially implemented as to automatic access to closed investigation until March 2012.

<sup>6</sup> See part 3.1.3 of this report.

<sup>7</sup> See, in this respect, judgment of 8 July 2008, *Franchet and Byk v Commission*, case T-48/05.

<sup>8</sup> See SC's Opinion No 4/2011, point 40.

implemented a three-step approach based on the Opinion issued in 2007 by the European Data Protection Supervisor<sup>9</sup> who had at that time voiced concerns on the automatic access by the SC to personal data contained in in the CMS. On 21 December 2012, the OLAF DG forwarded to the OLAF Directors instructions aimed at implementing the working arrangements.

14. After evaluating the sufficiency and usefulness of information received from OLAF following implementation of the arrangements, the SC considered - for the reasons highlighted further in this report - that the way in which they were applied still did not allow it to perform properly its tasks. The SC therefore informed the OLAF DG of the necessity to review the arrangements in order to ensure that the SC is getting sufficient and accurate information. The SC thus took the initiative to propose in the near future new working arrangements and it appreciates the OLAF DG's willingness, expressed in January 2013, to accept them.

## **2 Monitoring of OLAF's investigative function at the Supervisory Committee's initiative**

*Article 11.1 of Regulation (EC) No 1073/1999:*

*At the request of the Director or on its own initiative, the committee shall deliver opinions to the Director concerning the activities of the Office, without however interfering with the conduct of investigations in progress.*

*Article 11.8 of Regulation (EC) No 1073/1999:*

*The committee may submit reports to the European Parliament, the Council, the Commission and the Court of Auditors on the results of the Office's investigations and the action taken thereon.*

### **2.1 Instructions to Staff on Investigative Procedures and their implementation**

15. In February 2012, the OLAF DG circulated new Instructions to Staff on Investigative Procedures (hereinafter ISIP), replacing the former OLAF Manual and aiming at simplifying and clarifying the investigative procedures. The SC welcomes the publication of the ISIP on OLAF's webpage, for the sake of transparency. Introduction of these Instructions was combined with key changes to the OLAF's organisation chart.

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<sup>9</sup> Opinion on a notification for prior checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on Regular monitoring of the implementation of the investigative function, 19 July 2007, case 2007-73.



16. The SC took therefore the initiative to examine the ISIP and appointed two *rapporteurs* who met OLAF staff, in particular those in charge of the drafting of the ISIP. The *rapporteurs* held also several working meetings with the SC Secretariat. Due to the significant workload during the reporting period and to the insufficient number of staff in its Secretariat, the SC had to postpone the adoption of the planned Opinion on the ISIP.
17. The SC noted that the ISIP anticipated, in many regards, the reform of the Regulation (EC) No 1073/1999, yet to be adopted by the legislator. Specific considerations on the compliance of these instructions with the text of the future Regulation are made in Annex 3 to this report. Before drawing the final conclusions, the SC decided to take also into account results of monitoring of individual cases conducted, partially or entirely, under the ISIP.
18. The SC analysed these cases in the light of the rules set out in both the former OLAF Manual and in the ISIP, and assessed the changes brought by the latter. Significant changes were noted, *inter alia*, in the procedure for opening and closing of cases, conduct of investigative activities and their prior legality check, as well as final quality and legal review.

### 2.1.1 *Opening and closing of cases*

19. The SC paid special attention to the procedure foreseen in the ISIP for opening the investigation and coordination cases. The assessment by the SC of the selection process is still on-going<sup>10</sup> and its results will be presented in the forthcoming Opinion. Apart from this outstanding issue, the SC noted an increase of the number of cases opened as from 1 February 2012 and the change of the practice regarding the power to open and close investigations.
20. As to the first aspect, the SC noted that, in application of the transitional measures set out in Article 30(2) of the ISIP, all information *not* involving Members, officials and other servants of the EU, registered in OLAF prior to 1 February 2012 and under assessment, had to be opened as an investigation or coordination case<sup>11</sup>. Consequently, the OLAF DG opened, by decision of 31 January 2012, a total of 423 cases<sup>12</sup>. The SC intends to examine to what extent this decision is in line with the criteria established by

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<sup>10</sup> See paragraph 71 of this report.

<sup>11</sup> Article 30(2) of the ISIP: "From 1 February 2012 all assessments of information involving Members, officials or other servants of the EU registered in OLAF prior to 1 February 2012 must be treated by the investigation unit concerned under the procedures applicable at the date of registration. The investigation unit must make proposals for either opening an investigation or coordination case, or for the case to be dismissed and must submit them to the Investigation Selection and Review Unit for an opinion in accordance with the new procedures".

<sup>12</sup> 221 investigations and 202 coordination cases.

the case-law of the European Court of Justice, which stated that a decision by OLAF DG to open an investigation cannot be taken unless there are “sufficiently serious suspicions” relating to acts of fraud, corruption or other illegal activities detrimental to the financial interests of the EU<sup>13</sup>.

21. As to the second aspect, the SC noted from the cases examined that the previous practice of delegating the power to open and close investigations from the OLAF Director-General to the Director in charge of operations and investigations changed after the new Director-General took up office in February 2011, as a result of the implementation of a recommendation of the European Ombudsman<sup>14</sup>. This change is currently reflected in the ISIP, as recommended<sup>15</sup>. Taking into account that OLAF's investigative independence is defined by Regulation (EC) No 1073/1999 in relation to its Director-General *in personam*, the SC welcomes this change and appreciates that OLAF complies henceforth with the European Ombudsman's recommendation.

### 2.1.2 *Conduct of investigative activities and their prior legality check*

22. Since the legality control of investigative measures - aimed at ensuring that evidence was gathered lawfully, in full respect of fundamental rights and procedural guarantees, as well as of procedural requirements of the Member States - is a key function in OLAF, the SC considers that the systematic legality check of a certain number of investigative measures, as set out in the new ISIP, is undeniably a step forward in reinforcing OLAF's accountability and the legitimacy of its actions.
23. This key function was entrusted to a newly created unit – the Investigation Selection and Review Unit - which, apart from the legality check during the investigation, also advises the OLAF DG on the possible opening of investigation or coordination cases, and carries out the final legal review of cases, before their closure. Given the central role that this unit plays throughout the whole lifecycle of cases, the SC decided to monitor – in the framework of its analysis of the ISIP<sup>16</sup> - the execution by this unit of the various tasks entrusted to it, as well as to examine how its functions match with those of other units.

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<sup>13</sup> See judgments of 10 July 2003, *Commission of the European Communities v European Investment Bank*, case C-15/00 and *Commission of the European Communities v European Central Bank*, case C-11/00, paragraphs 164, respectively 141.

<sup>14</sup> See the Draft recommendation of the European Ombudsman in his inquiry into complaint 856/2008/BEH against the European Anti-Fraud Office of 9 December 2010. The Ombudsman concluded that OLAF did not establish that its practice of delegating the power to open and close decisions from the Director-General to the Director in charge of investigations and operations was in accordance with the law and recommended OLAF to reconsider it.

<sup>15</sup> See the Decision of the European Ombudsman in his inquiry into complaint 856/2008/BEH against the European Anti-Fraud Office of 11 November 2011.

<sup>16</sup> See paragraph 17 of this report.

24. Without prejudice to the content of the future Opinion on the ISIP and in view of the Annual Report of the Investigation Selection and Review Unit<sup>17</sup>, the SC would look into the following issues: 1) criteria for opening and closure of cases and the channels of communication with the investigation and support units during the assessment stage, 2) professional competences within the Investigation Selection and Review Unit, 3) internal aims/objectives for duration of assessment and their practical application, 4) conduct of the legality check, 5) distribution of cases opened or closed per sector, type of complainants and country, 6) internal written guidelines of the unit concerning the fundamental rights and procedural guarantees.
25. Meanwhile, the SC was pleased to note some improvement with regard to prior authorizations required for OLAF staff from the DG in order to carry out certain investigative measures. The relevant provisions in the ISIP and the related legality check before their execution<sup>18</sup> seem to be an appropriate remedy to some shortcomings that the SC noted throughout the cases examined and which occurred before the introduction of the ISIP<sup>19</sup>.
26. The SC believes, however, that further improvements are required. The ISIP set out a limited list of the investigative activities which require prior legality check<sup>20</sup>. In the light of its monitoring experience, the SC noted that OLAF gathered or tried to gather evidence by other measures which are not listed in the ISIP, and consequently do not require, supposedly, a prior legality check. The SC recommended therefore to the OLAF DG to put in place a thorough verification of the legal basis prior to the implementation of any measure that could result in a potential interference in the fundamental rights of persons involved in OLAF's investigations.

### *2.1.3 Final quality and legal review*

27. The final quality and legal review of the Final Report and proposed recommendations<sup>21</sup> is carried out on the basis of a standard form, which contains predefined items to be

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<sup>17</sup> See the 2012 Annual Report of OLAF Unit 0.1 (Investigation Selection and Review Unit).

<sup>18</sup> See Articles 11(6) and 12 of the ISIP.

<sup>19</sup> E.g. there were cases where decisions on the appointment of staff or the written authorities to carry out investigative activities were issued after the investigative activities had been carried out or were completely missing.

<sup>20</sup> Article 12(1) of the ISIP: "Where the investigation unit envisages conducting an investigative activity which requires the Director-General's authorisation in accordance with Article 11(6) or an investigative mission in a third country, the investigation unit must submit a request for a decision on the proposed investigative activity to the Investigation Selection and Review Unit". Article 11(6) foresees that "members of the investigation unit carry out the following investigative activities upon production of the Director-General's written act showing their identity and capacity, and the investigative activity they are authorised and mandated to carry out: a. Interviews with persons concerned; b. Inspections of premises; c. On-the-spot checks; d. Forensic operations; e. Checks and inspections under sectorial rules".

<sup>21</sup> Article 21 of the ISIP.

checked by the Investigation Selection and Review Unit. The SC noted that the review was conducted on the basis of this limited list of items and the reviewers did not seem to check other aspects which might be at stake, especially with regard to the compliance by OLAF with procedural guarantees and fundamental rights of persons concerned.

28. The SC takes the view that the standard work form used could be further improved, in order to include other aspects (i.e. compliance with national rules, requests for access to documents or to the file, right not to incriminate oneself, the reasonable time requirement, impartiality, right to privacy). In May 2012 the SC proposed to OLAF a grid for the evaluation of the respect of fundamental rights and procedural guarantees prior to the transmission of cases to national judicial authorities.

## 2.2 *SC's Opinions and reports on individual cases*

29. The SC examined thoroughly a case transmitted in October 2012 to the national judicial authorities and leading to the resignation of a Member of the European Commission. The SC was informed of OLAF's intention to transmit the case to the national judicial authorities, but did not receive access to the case in conformity with its request within the timeframe provided for by the working arrangements. This prevented the SC from carrying out the examination of the respect of fundamental rights and procedural guarantees *prior* to the transmission of the case. According to the judgement of the General Court, OLAF's failure to consult the SC before forwarding information to the national judicial authorities could be seen as an infringement of Article 11(7) of Regulation (EC) No 1073/1999<sup>22</sup>.

30. The SC examined the application, in this case, of the new ISIP to the opening of the investigation (respect of the principle of proportionality), to its conduct (respect of the principles of legality and impartiality), to the respect of fundamental rights and procedural guarantees, of personal data protection requirements, and to the closing of investigation.

31. In carrying out its analysis, the SC discovered a number of potential problems and issued recommendations to the OLAF DG in Opinion No 2/2012 adopted on 11 December 2012<sup>23</sup>. The SC considered it appropriate to elaborate also a report under Article 11(8) of Regulation (EC) No 1073/1999 on possible systemic problems discovered and including necessary recommendations addressed to the EU institutions<sup>24</sup>. The SC considered that they had a need to know of the issues raised by the SC at the procedural level and of the recommendations made to the OLAF DG, which may serve as new elements for reflection on how to improve the text of the

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<sup>22</sup> See judgment *Franchet and Byk v Commission* quoted above, paragraphs 163 to 170.

<sup>23</sup> For confidentiality reasons, Opinion No 2/2012 is not annexed hereto.

<sup>24</sup> For confidentiality reasons, the report is not annexed hereto.

Regulation (EC) No 1073/1999. The relevant analysis has been attached to this report as Annex 3.

32. The power of the SC to issue formal opinions on individual cases was challenged by the OLAF DG. The SC strongly disagrees with that and underlines that examination of individual cases and formulating the relevant conclusions is an indispensable element of the SC's monitoring tasks making it possible to communicate swiftly the results of its work and the potential problems discovered. It allows the OLAF DG to react promptly to risks and to take the appropriate measures to improve OLAF's investigative activity, where necessary. During the reporting period, the SC informed the OLAF DG of the results of its monitoring of another individual case and also issued recommendations to him.
33. Moreover, when the SC's findings in an individual case raise issues on a more systemic level concerning the way in which OLAF is conducting its investigations, it is obviously the SC's remit to address such issues. Article 11(1) of Regulation (EC) No 1073/1999 does not preclude the SC from delivering opinions on individual cases, provided that it does not interfere with investigations *in progress*. The SC underlines that, at the time when its Opinion No 2/2012 was issued, the OLAF investigation was already closed and therefore the recommendations made by the SC were intended to improve OLAF's future investigative activities and not to interfere with the investigative measures already taken by OLAF in that specific investigation.

### **3 Monitoring of OLAF's investigative function - information on individual cases sent by the OLAF DG**

#### ***3.1 Information provided to the SC***

##### ***3.1.1 Investigations in progress for more than nine months***

*Article 11.7 of Regulation (EC) No 1073/1999:*

*Where an investigation has been in progress for more than nine months, the Director shall inform the Supervisory Committee of the reasons for which it has not yet been possible to wind up the investigation, and of the expected time for completion.*

34. The SC received 188 nine-month reports during the reporting period<sup>25</sup>. The sector with most cases lasting more than nine months is that of external aid and pre-accession

<sup>25</sup> Meanwhile, 46 out of 188 investigations lasting more than 9 months were closed (25% in the reporting period).

funds<sup>26</sup>, while the ones with the least cases are the tobacco and counterfeit goods sector<sup>27</sup> and the new financial instruments sector<sup>28</sup>. 113 of the 188 nine-month reports were transmitted in January 2013, after an internal review of OLAF's practice revealed that the SC had not received information on a number of cases lasting more than nine months. The OLAF DG decided to take measures to improve this practice, such as to send to the SC aggregate monthly information on these cases and to put in place additional safeguards to avoid that an investigation unit would miss the deadline to provide the information. The SC appreciates the OLAF DG's commitment to improve the information transmitted to it in a timely manner.

35. The information contained in the nine-month reports (in particular elements such as the description of the case, the investigative steps taken, the financial impact, the time barring considerations and the future investigative steps proposed) is essential for the analysis by the SC of the duration of those cases. In addition, valuable information used to be provided to the SC in the assessments of the initial information, which have been regularly sent to the SC, as a result of a formal arrangement signed on 31 March 2008 by the former OLAF DG. This supplementary information (i.e., reasons for the opening of an investigation and, generally, a working plan), allowed the SC to assess whether investigations were opened in full independence, without any undue external pressure and if they were conducted in an efficient manner.
36. When the present SC took office, it noted a major change of methodology in this area and in particular from the second half of 2012 when the nine-month reports were delivered irregularly and their scope varied significantly. As from September 2012, and without prior arrangement with the SC, OLAF changed significantly this practice: a substantial amount of information contained in the nine-month reports was blackened, and the factual elements provided to the SC were regularly insufficient. Moreover, the Opinions of the Investigation Selection and Review Unit, which replaced the assessment of the initial information following the adoption of the ISIP, were not provided to the SC. As a consequence, the SC could not have a clear understanding of the cases and could not assess properly whether the duration of the cases is justified.
37. Occasionally, the nine-month reports did not comply with the requirements of Article 11(7) of Regulation (EC) No 1073/1999<sup>29</sup>. The SC noted in particular that essential information such as the time-barring consideration was often missing<sup>30</sup>, also in the final reports<sup>31</sup>. The SC had thus major difficulties in identifying cases which may not be taken up by national judicial authorities due to time-barring reason.

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<sup>26</sup> 67 reports (35% of the total number of nine-month reports received by the SC).

<sup>27</sup> 5 reports.

<sup>28</sup> 12 reports.

<sup>29</sup> For example, the expected time for completion of the investigation was not indicated in five cases.

<sup>30</sup> There was no reference to time-barring aspects in 89 out of 188.

<sup>31</sup> Until 1 February 2012, that information was generally included in the Final Case Report or in a document summarizing the main aspects of the case provided to the SC by the former Judicial and Legal Advice Unit.

### 3.1.2 Recommendations to institutions

*Article 11.7 of Regulation (EC) No 1073/1999:*

*The Director shall inform the committee of cases where the institution, body, agency or office concerned has failed to act on the recommendations made by it.*

38. The SC did not receive, during the reporting period, any information on cases where an institution, body, agency or office concerned failed to act on recommendations made by OLAF. The SC is concerned that this situation was not due to complete implementation of OLAF's recommendations, but rather to the lack of a necessary reporting system between OLAF and recipients of recommendations.

39. The SC noted that, following the entering into force of the new ISIP, OLAF introduced a new standard form for drafting the recommendations for action to be taken by the EU institutions, bodies, offices or agencies following OLAF's cases<sup>32</sup>. The SC appreciates these changes and hopes that they would allow both OLAF and the SC to properly monitor the outcome of OLAF's recommendations in the future. The SC also welcomes OLAF's commitment to improve this aspect of its activity, as indicated in its annual Management Plan.

### 3.1.3 Cases requiring information to be forwarded to national judicial authorities

*Article 11.7 of Regulation (EC) No 1073/1999:*

*The Director shall inform the committee of cases requiring information to be forwarded to the judicial authorities of a Member State.*

40. The number of cases referred to the SC during the reporting period increased significantly in comparison to previous years<sup>33</sup>, as a result of measures put in place in OLAF to speed up the closure of cases, in particular the long lasting ones. The SC was therefore confronted with a paradoxical situation when it had to monitor a higher number of cases, while at the same time its monitoring tools were significantly limited by OLAF.

<sup>32</sup> This form includes a separate paragraph by which they are required to report to OLAF, within the timeframe indicated, any action or decision taken as a result of the recommendations.

<sup>33</sup> From an average of 40 cases per year to 83 cases during the reporting period.

41. As from March 2012, the access of the SC and its Secretariat to the electronic files of OLAF's closed cases (in the CMS) was cut. While understanding the data protection reasons as provided by the OLAF DG<sup>34</sup>, the SC considered that the procedures put in place for transferring relevant data did not ensure sufficient and accurate information, as explained below. Therefore the SC dedicated significant time and effort to discuss with the OLAF DG establishing viable procedures for transfer of necessary information.
42. From March until September 2012, the implementation of a first set of instructions circulated to the managers was rather chaotic and the practice throughout the investigation units varied<sup>35</sup>. This seems to be due mainly to the fact that, after the reorganisation of OLAF and the adoption of the ISIP as from 1 February 2012, the task of informing the SC of cases requiring information to be forwarded to the national judicial authorities was decentralised from the former judicial advice unit to investigative units in charge of the cases. The SC proposed to OLAF (in May 2012) a grid for the evaluation of the respect for fundamental rights and procedural guarantees in those cases, aimed at facilitating their analysis by the SC, but this was not entirely taken into account by OLAF.
43. The information transmitted was, most of the time, insufficient, and as a consequence the SC had to request full access in the CMS to the electronic version of OLAF's case files. Some of these requests were either refused<sup>36</sup> or dealt with after very long delays. After reiterating the requests, the SC was provided, as an intermediary step, with extensive information on the cases instead of full access to the CMS. While in some cases this supplementary information was considered as sufficient by the SC, in other cases the SC had to repeat again its requests for access to the CMS, due to the fact that the information provided was either still insufficient or inaccurate. Since the SC's monitoring is based entirely (before having access to the case files), on the information provided by OLAF, the SC would expect this information to be reliable and accurate.
44. After the adoption, in September 2012, of working arrangement between the SC and OLAF<sup>37</sup>, the above mentioned instructions were modified (in December 2012). While appreciating the improvement, to a certain extent, in the forwarding by OLAF of

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<sup>34</sup> See paragraph 13 of this report.

<sup>35</sup> Not all the documents required were transmitted to the SC: sometimes the SC received only the cover letter, without any other supporting document, while in other cases it received, on the contrary, a copy of the full case files; some cases were transmitted *via* internal mail and without requesting for an acknowledgment receipt from the SC, being a proof for OLAF that it informed the SC prior to the transmission of the case to national judicial authorities; the acknowledgment receipt was also often not recorded in the CMS.

<sup>36</sup> Initially, the access was not granted to 18 cases (one in March 2012, 17 in May 2012) on the ground either that reference by the SC to the need to examine the handling by OLAF of fundamental rights and procedural guarantees was insufficient or that a motivation based on Article 11 of Regulation (EC) No 1073/1999 alone (for instance, to check possible infringements of OLAF's investigative independence or the reasons for which it was not possible to wind up the investigation) was insufficient to justify access to case files which contain personal data. The OLAF DG finally agreed to grant access to all those cases after the adoption of the working agreements in September 2012.

<sup>37</sup> See paragraph 13 of this report.



information to the SC<sup>38</sup>, the SC noted, however, that, in practice, the information transmitted still did not allow it to perform properly its monitoring function - for several reasons: the information scope was drastically reduced and therefore by far insufficient<sup>39</sup>; this already very limited information sent to the SC was, in some cases, excessively blackened, although not containing personal data and despite a clear need-to-know for the SC<sup>40</sup>; sometimes, the new instructions were applied in a different way even within the same investigation unit; the instructions concerning the timeframe for forwarding information to the SC<sup>41</sup> were not entirely satisfactory, since the appreciation of the exceptional reasons that could justify the shortening of the 5-day period foreseen is left to the discretion of the Director-General alone and no procedure to consult the SC in such cases is foreseen.

45. The SC reminds that the three-step approach agreed with OLAF in September 2012 was aimed mainly at striking a fair balance between the data protection requirements as expressed by the EDPS in his Opinion of 2007 and the need for the SC to receive appropriate information allowing it to fulfil its remit. However, the SC regrets that OLAF went beyond the need to protect personal data, by both reducing significantly the information provided to the SC and excessively and unnecessarily redacting this already limited information. As a result, the SC had to systematically request for access to the full case file, while this could be sometimes avoided by providing sufficient information when the case is transmitted to the national judicial authorities.
46. The SC underlines that sufficient information on cases, either transmitted by OLAF on the basis of Article 11(7) of Regulation (EC) No 1073/1999 or requested by the SC, is essential for proper monitoring of OLAF's investigative function. In particular, the SC would point out that:
- it cannot identify potential pressure or attempts to violate OLAF's investigative independence (such as a refusal from EU institutions, bodies, offices or agencies or from Member States to cooperate with OLAF, refusal or unjustified delays in providing OLAF with assistance or information, serious difficulties in their

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<sup>38</sup> Since September 2012, none of the requests of the SC was denied, and they were generally dealt with in due time (1 to 14 working days - in exceptional circumstances).

<sup>39</sup> The transmission letter to the national judicial authority and the recommendations are not to be included in the documents to be forwarded to the SC anymore. As to the content of the shortened and anonymised version of the Final Report, the OLAF DG's instructions foresee that this should contain "*information boxes providing details of the investigation, financial and other impact together with the case summary*", but the sections containing information on the investigative activities carried out and evidence collected or coordination activities carried out, the amounts to be recovered or prevented from being unduly spent, the legal evaluation of the facts, including description of EU legislation breached, possible national legislation concerned, any time barring periods applicable, the comments of the person(s) concerned and the conclusions of the case are to be removed entirely.

<sup>40</sup> Some of the investigation units have blackened-out information such as the type of the investigative activity carried out by OLAF, the EC's Directorate General to which the Final Report was forwarded or the national authority with which OLAF cooperated, the stage of the national proceeding or the amount to be recovered.

<sup>41</sup> The new instructions mention that "the documents to be forwarded to the Supervisory Committee must be provided **in general** 5 working days before the transmission is made to the judicial authorities. Any shortening of the 5-day period must be justified by exceptional reasons such as urgency or sensitivity of the matter under investigation. Any proposal to shorten the 5-day period must be approved by the Director General".

relations, excessive requests or instructions addressed to OLAF and its respective reactions) without access to information that could be possibly found in OLAF case related documents;

- it cannot monitor compliance by OLAF with respect of fundamental rights and procedural guarantees relying only on the information provided in the Opinions of the Unit 0.1, which, additionally, does not tackle all the issues indicated in an evaluation grid proposed by the SC to OLAF;
- it cannot monitor the duration of the investigations and their proper conduct in the absence of relevant information on the investigative activities carried out and their chronology, including potential periods of inactivity and it cannot identify cases which may not be taken by the national judicial authorities by reason of time barring in the absence of indications on time barring periods applicable;
- it cannot assess the results of OLAF's investigations and the actions taken thereon without knowing the conclusions of investigations and the related recommendations to EU institutions or competent authorities of Member States.

### **3.2 Findings of the SC**

47. On the basis of monitoring of OLAF cases and in view of the ISIP, the SC drew a number of conclusions with regard to systemic aspects of the conduct of OLAF's investigations, which would require further consideration and improvements in the text of the amended Regulation (EC) No 1073/1999. These conclusions are presented in Annex 3 to this report. Other results of the monitoring by the SC of mainly cases transmitted to national judicial authorities are summarised below.

#### **3.2.1 Investigative independence**

48. The SC examined, throughout the cases referred to it, those areas where OLAF's investigative independence may be at stake, in particular cooperation and exchange of information with the institutions, bodies, offices and agencies and the Member States in relation to OLAF's investigative function.

49. The SC was able to identify, on the basis of the examination of Final Reports and case related documents, those aspects of cooperation with the EU institutions and bodies that may create potential obstacles to OLAF's independent conduct of investigations: delays or omissions in responding to OLAF's requests for information; reluctance to inform OLAF of cases of possible fraud; requests addressed by the EU institution concerned to the OLAF DG to change the investigator(s) in charge, as a condition for allowing their

access on the premises of the institution or for providing OLAF with information or documents; request addressed to a Commissioner by an EU institution concerned putting into question some investigative measures and inviting him to take, with regard to the OLAF's investigator(s) in charge, the "necessary measures". The SC appreciates that, in the latter case, the Commissioner replied by stating that OLAF's independence required that he did not intervene in on-going investigations and referred the matter to the OLAF DG.

50. In addition, the SC noted that OLAF generally cooperated swiftly with the authorities of the Member States, which provided it with assistance and information when requested or on their own initiative. However, the SC also noted that, in some cases where important delays (up to nine months) between the finalisation of the investigation and the transmission of the case to the national judicial authorities elapsed, this was due to the reluctance of these authorities to take up those cases. The SC encourages OLAF to maintain close contacts with the competent authorities of the Member States in order to improve their cooperation. The SC hopes that the entering into force of the amended Regulation (EC) No 1073/1999 will bring significant changes in this area.

### 3.2.2 *Respect by OLAF for fundamental rights and procedural guarantees*

51. The SC noted shortcomings in the cases it examined during the reporting period, which were usually due to the transitional character of the year 2012, when most of the investigations were conducted partially under the rules set out in the former OLAF Manual and partially under the new ISIP. Most of the shortcomings were due to the insufficiency of procedural rules set out in the former OLAF Manual or to deficiency in their implementation<sup>42</sup>.

52. The adoption of the ISIP and the internal reorganization of OLAF aimed at reinforcing, *inter alia*, the protection of fundamental rights and procedural guarantees and at giving priority to the protection of the identity of sources. The SC appreciates these improvements, but notes that some problems nevertheless continued even after the adoption of the ISIP, for the same reasons (lack of clear rules in the ISIP or deficiencies in their implementation)<sup>43</sup>. Taking the view that these problems would require further

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<sup>42</sup> Investigative activities were carried out without the written authorisation required by Article 6 of Regulation 1073/1999; disclosure by OLAF of the identity of a whistle-blower to his institution; disclosure by OLAF of confidential information and personal data of a staff member of an EU body and person concerned in an OLAF investigation to another EU institution, while the need-to-know of the latter was not established.

<sup>43</sup> Investigative measures taken by OLAF on the basis of an incorrect legal basis or even without a clear legal basis and in the absence of any prior legal analysis; lack of information to the persons concerned of the closure of the investigations despite a recommendation by the Ombudsman: "*The fundamental right to good administration laid down in Article 41 of the Charter of Fundamental Rights of the European Union requires that a person who has been the object of an investigation can reasonably expect to be informed, within a reasonable time, of the results*

clarification in the text of the new Regulation (EC) No 1073/1999, the SC makes the necessary recommendations in Annex 3 to this report.

53. The SC noted also that, in some of the cases it examined, the persons concerned lodged complaints alleging OLAF's failure to respect fundamental rights and procedural guarantees before the European Court of Justice, the European Data Protection Supervisor, and the European Ombudsman. To date, and as far as the SC is informed of, the actions for annulment of OLAF's decisions were rejected as inadmissible by the Court of Justice, while the Ombudsman did not find any instance of maladministration. Moreover, the European Data Protection Supervisor found that OLAF generally complied with the data protection rules, with the exception of one case where he considered that OLAF violated the right to protection of personal data by unnecessarily disclosing the identity of a whistle-blower to his institution. In the light of this decision, SC would remind OLAF of its previous recommendations with regard to the protection of whistle-blowers and informants, as expressed in the SC's Opinion No 5/2011.
54. In some cases, an internal review procedure was put in place in OLAF, at the request of the persons concerned. The SC noted that the internal review lead to the conclusion that OLAF acted within its competence and respected the fundamental rights and procedural guarantees of the persons concerned.
55. The SC also received seven complaints addressed directly to it. The SC noted that most of them were also submitted to the EU competent authorities mentioned above. The SC took them into account, for information purposes only, in the framework of its monitoring of OLAF's investigative function. In the light of the current text of Regulation (EC) No 1073/1999, the SC does not see itself as a complaint body, but is nevertheless interested in being informed by OLAF of such complaints, in order to be able to better identify potential systemic problems related to conduct of investigations.

### 3.2.3 *Duration of cases*

56. In order to identify potential pressure or attempts to violate OLAF's investigative independence, the SC paid special attention to the duration of cases and especially to reasons for long duration. The SC examined this issue throughout the cases lasting more than nine-months and those forwarded to the national judicial authorities.
57. In many of these cases, the SC had major difficulties in identifying the reasons for their long duration. While reasons concerning the duration of the assessment period<sup>44</sup> could generally be found in the nine-month reports, not all the reports sent to the SC indicated

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*of such an investigation once it has been closed"* (see Decision of 16 February 2012 closing inquiry into complaint 3136/2008/(IP)EI against the European Anti-Fraud Office).

<sup>44</sup> This refers to cases opened under the rules of the former OLAF Manual.

them<sup>45</sup>. Similarly, reasons for the duration of cases after their opening are also normally indicated in the nine-month reports, but rarely in the Final Reports, and the SC does not have any other reporting instrument allowing it to assess the duration of cases after the nine-month reports were provided, unless it requests access to the full case files. Moreover, the SC noted that the date indicated in the nine-month reports for the completion of the investigation was not always respected<sup>46</sup>, but OLAF does not provide any explanation to the SC in this respect. The SC decided to monitor this aspect in the forthcoming period.

58. When it had access to the full case files, the SC examined carefully the chronology of the investigative steps carried out and identified significant periods of inactivity, going from several months up to two years. Without a comprehensive overview of the reasons explaining the long duration of the cases examined, due to the insufficiency of relevant information, the SC could, however, identify some reasons, of both internal and external nature.
59. Amongst the ones related to the organisation of the investigative work within OLAF, the SC noted the inappropriate management of some cases (lack of control from the management team and lack of an appropriate system to warn of periods of inactivity), changes of the staff allocated to some investigations (especially after the internal reorganisation of OLAF, when a number of investigators left the investigative units and their investigative *portfolios* had to be redistributed), workload of the investigators in charge and need to prioritize tasks. On the other hand, the main factor, external to OLAF, that had an impact on the duration of the cases was the need for OLAF to wait for responses from its stakeholders (EU institutions, bodies, offices and agencies or the Member States) to its requests for information<sup>47</sup>, or to wait for the outcome of the national judicial proceedings in the Member States<sup>48</sup>.
60. Throughout the cases examined during the reporting period, the SC became also aware of some of the measures taken by the OLAF DG in order to accelerate the closure of an important number of investigation or coordination cases. For example, he fixed precise and relatively short deadlines within which the OLAF investigators had to finalise the case reports and propose the closure of the cases. In addition, he appointed, for sectors with an important number of cases such as the agricultural and structural funds

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<sup>45</sup> This was the case for example in several cases from 2008 and 2009, where the assessment period lasted between 12 and 24 months, and no reasons were provided in the nine-month reports.

<sup>46</sup> 48 out of the 188 cases where the SC received nine-month reports indicate that the expected dates for completion were between March and December 2012. To date, these 48 cases are still open.

<sup>47</sup> For example, in one of the cases lasting more than nine months examined by the SC, the 13 months period for the assessment of the initial information was due to the need for OLAF to wait for detailed documentation from the Member State concerned.

<sup>48</sup> For example, in a 2008 case examined by the SC, the judicial proceedings is still on-going in two Member States and for this reason the expected date for completion of the OLAF case could not be indicated in the nine-month report.

sectors<sup>49</sup>, a special investigation team with the appropriate linguistic and sectorial knowledge, made up of investigators, as well as legal, policy and intelligence officers entrusted with dealing, as priority, with those cases, in order to close as many as possible by the end of 2012. The Investigation Selection and Review Unit was also instructed to treat with priority the proposals for closure put forward by the special investigation team. Due to the significant workload during the reporting period and to the insufficiency of human resources within its Secretariat, the SC could only note the results of these measures in terms of numbers<sup>50</sup>.

### **3.3 Reform of Regulation (EC) No 1073/1999**

61. The ISIP anticipated in many aspects the content of the reform of Regulation (EC) No 1073/1999. The alignment of these instructions with the future text of the Regulation together with their departure from the Regulation in force created inconsistencies in the investigation area that may have resulted in procedural flaws within the investigations conducted during the reporting period. The SC monitored some OLAF investigations conducted in accordance with the ISIP and analysed the text of the reform of Regulation (EC) No 1073/1999. The SC's considerations, aiming at highlighting the risks of a lack of clearer procedural rules in certain areas, are summarised in Annex 3 to this report.

## **III MANAGEMENT OF OLAF'S INVESTIGATIVE FUNCTION**

*Article 11.7 of Regulation (EC) No 1073/1999 :*

*The Director shall forward to the Supervisory Committee each year the Office's program of activities referred to in Article 1 of this Regulation. The Director shall keep the committee regularly informed of the Office's activities, its investigations, the results thereof and the action taken on them.*

<sup>49</sup> For example, these two sectors had 302 out of 423 cases which were automatically converted into investigation or coordination cases as from 1 February 2012, of which 281 were still opened on 1 June 2012.

<sup>50</sup> 42 out of 75 cases requiring information to be transmitted to the national judicial authorities and which were closed and forwarded to the SC after 1 February 2012 were dealt with by the two units responsible for the agricultural and structural funds sectors.

## 1 OLAF investigation priorities

62. OLAF's Annual Management Plan contains, in an annex, a set of Investigation Policy Priorities (IPP), which are used by OLAF to decide on the opening of investigations. The IPP are defined as priority criteria taken into consideration by OLAF to decide on the opening of investigations, once the competence of OLAF and the seriousness of suspicion is established. Five major criteria are defined: proportionality, efficient use of investigative resources, subsidiarity/added value, special policy objectives for 2012 combined with a financial impact. For 2012, different thresholds were defined according to the different areas considered<sup>51</sup>.
63. The establishment of these priorities would allow OLAF to better focus its limited resources, while their publication reinforces the transparency of OLAF's work, which the SC appreciates. In order to evaluate the planning and strategic direction of investigations, the SC intended to start a review of the process of selection of incoming information in OLAF in the light of the investigation priorities, *de minimis* policy and the annual management plan. Particular attention was to be given to “dismissed cases” having regard to the potential consequences of the opportunity principle in conjunction with the principle of exclusivity. Unfortunately, due to the serious understaffing of the SC Secretariat and problems with the access to case files, the SC had to postpone that review to a following year.
64. Without prejudice to a forthcoming analysis, the SC conducted, however, a preliminary reflection on this subject and noted that the financial threshold in sectors such as Customs or Structural funds is very high<sup>52</sup>. The SC is concerned that potential fraud or irregularities likely to have a lower, but still high financial impact may not be taken up into consideration, despite clear evidence. The SC believes that OLAF should therefore reinforce its cooperation with the Member States, either transmitting them relevant information or providing them assistance in the framework of coordination cases when it decides not to take up a case, thereby achieving its mission, as an investigation service, to contribute to the effective and dissuasive character of the measures against fraud, corruption and irregularities affecting the financial interests of the EU.

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<sup>51</sup> See the Investigation Policy Priorities for 2012.

<sup>52</sup> In the Customs sector, the likely financial impact is over €1 million, while in the Structural Funds sector the likely financial impact is €00 000 in the European Social Fund and Cohesion Fund, and €1 Million in ERDF (European Regional Development Fund).

## **2 Administrative organisation, budget and staff policy in relation to OLAF's investigative function**

*Article 6(2) of Commission Decision establishing OLAF:*

*After consulting the Surveillance Committee, the Director shall send the Director-General for Budgets a preliminary draft budget to be entered in the special heading for the Office in the annual general budget.*

### **2.1 Budget**

65. The SC examined OLAF's Preliminary Draft Budget for 2013 and delivered its Opinion No 1/2012 on the subject, in which it supported OLAF's proposal, subject to the SC's recommendations being taken into account<sup>53</sup>. The SC noted in particular that, despite clear legal provisions stating that it must be consulted on the preliminary draft budget of OLAF *before* it is sent to the EC Director-General for Budget<sup>54</sup>, the OLAF DG transmitted it to the Committee, up till now, after "technical" meetings/arrangements with the DG Budget. The SC regrets that in this way substantial and meaningful consultation could not have taken place and that the transmission of the preliminary draft budget became just a formality. The SC stressed therefore that it must be effectively consulted about the *next* preliminary draft budget by means of a real and substantive exchange of opinions between the Director General and the Committee *before* it is sent to the Director-General for Budget in any form.

### **2.2 Administrative organisation and staff policy**

66. The SC continued to take a close interest in OLAF's staff policy, as it is central to the success of investigations, and SC took note of the changes resulting from the internal reorganisation of OLAF as from 1 February 2012. Without prejudice to a future assessment of the benefits of this reorganisation, the SC appreciated the strategy of concentrating resources on investigations, separating investigative structures from policy structures and refocusing on essential investigative activities as a step forward in reinforcing the efficiency of the OLAF's investigative activity.

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<sup>53</sup> See Opinion No 1/2012, annexed to this report.

<sup>54</sup> Article 6(2) of Commission Decision 1999/352/EC, ECSC, Euratom.



67. Noticing that the internal reorganisation of OLAF resulted in significant shifts of staff and modifications in their job description or even in completely new allocation of tasks, the SC recommended to the OLAF DG, in its Opinion No 1/2012, to develop a human resources strategy based on a needs analysis of OLAF's current activities, and focused on training, career development, succession planning and appropriate balance between the staff providing support services and the staff performing core investigative tasks<sup>55</sup>. The SC urged the OLAF DG to take a final decision on the issue of temporary agents and made also recommendations with regard to the staffing of its Secretariat (number of staff members, conditions for their appointment, appraisal and promotion).
68. The SC also supported the OLAF DG in his request to the EU institutions to reinforce OLAF's ability to conduct investigations by allocating to it sufficient staff resources. In December 2012, the OLAF DG and the SC Chairman wrote a common letter to the Presidents of the European Commission, the European Parliament and the Council of the European Union, bringing to their attention the staffing situation of OLAF. They highlighted the vital role that OLAF plays in protecting the EU financial interests, especially in times of austerity facing increasing fraud and irregularities. They underlined that the call upon OLAF to reduce its overall number of staff, while in the same time the number of allegations of fraud reported to OLAF, as well as of the investigations opened by it in 2012 increased significantly, will inevitably result in a reduction of OLAF's essential investigative capacity. The SC regrets that the staffing situation of OLAF did not change following this request.

## **IV RELATIONS WITH OLAF, EU INSTITUTIONS AND OTHER STAKEHOLDERS**

### **1 Relations with OLAF**

69. Apart from regular meetings with the OLAF DG<sup>56</sup> the SC met also on several occasions<sup>57</sup> with OLAF management and staff, exchanging views on issues such as OLAF Management Plan, OLAF budget or results of the SC's monitoring of individual case files. In particular, Mr L. Kuhl, Head of OLAF Unit D1, attended the SC meeting on 27 September 2012 and presented to the SC the current state of play with regard to the negotiations concerning the European Public Prosecutor's Office. Mr Kuhl answered questions from the SC regarding, *inter alia*, the positions of both OLAF and the SC

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<sup>55</sup> The SC noted - after receiving the OLAF Annual Management Plan for 2013 - that some indicators concerning the management of human resources are henceforth included.

<sup>56</sup> 8 meetings on 23 January 2012, 21 March 2012, 27 June 2012, 26 September 2012, 22 October 2012, 20 November 2012, 11 December 2012, 23 January 2013.

<sup>57</sup> 4 meetings on 21 March 2012, 26 September 2012, 20 November 2012 and 22 January 2013.

within such a body. The SC pays much attention to this project and expressed its wish to be more involved in its development.

## **2 Relations with EU institutions**

70. As an inter-institutional body, the SC is particularly committed to having solid relationship with the EU institutions, whose members it met on several occasions during the reporting period.
71. The Commissioner responsible for taxation and customs union, audit and anti-fraud, Mr. Algirdas Šemeta, attended the SC meeting of 23 January 2012, where he thanked the outgoing SC Members for the quality of their work and welcomed the incoming SC. Commissioner Šemeta indicated that the new SC was taking office at a very interesting moment given the reorganisation of OLAF as of 1 February, 2012 and the upcoming reform of the Regulation (EC) No 1073/1999. Commissioner Šemeta went through the most significant changes which would be made. He expressed his hope that in the future the close contact between his cabinet and SC would be maintained. In addition, two bilateral meetings took place between him and the SC Chairman.
72. The SC also met with the European Parliament's Commission on Budgetary Control (hereinafter, the CONT Committee) and with some of its members, and discussed issues related to the reform of the Regulation (EC) No 1073/1999 and the analysis by the SC of OLAF's individual cases. In November 2012, the SC met - at its own initiative - the CONT Committee, in order to explain the problems that the SC encountered to fulfil its mission of regular monitoring of the implementation of OLAF's investigative function.
73. In December 2012 the President of the CONT Committee invited the SC to provide them with the conclusions related to the OLAF case leading to the resignation of a Member of the European Commission. The SC replied to this request in writing and three of its Members attended also a meeting of the CONT Committee held *in camera*. On both occasions, the SC informed the CONT Committee that it had adopted an opinion on the subject of that particular case, which had been sent to the OLAF DG. However, in view of the legal obligations imposed by Article 8 of Regulation (EC) No 1073/1999 to respect the confidentiality of the investigation, the SC was not in a position to submit this opinion or its conclusions to the CONT Committee at that stage, since this would have revealed elements of an OLAF case under judicial proceedings in a Member State.
74. During the reporting period, the SC also met with Dr Ingeborg Grässle, member of the CONT Committee and *rapporteur* for the reform of the Regulation, who attended the SC meeting in April 2012. Ms Grässle supported the SC and its work, stating that the SC were regarded as a major partner by the EP in their cooperation with OLAF and therefore the EP was paying particular attention to the SC's working conditions, in order to allow it to properly carry out its monitoring functions.

### **3 Relations with other stakeholders**

75. In response to an invitation from the British House of Lords<sup>58</sup>, on 7 November 2012 the SC gave evidence in the framework of the House's inquiry into the fight against fraud affecting the EU financial interests. The SC gave an overall description of their responsibilities stressing that its role was not only to supervise the implementation of OLAF's investigative function and thus assess the proper conduct of investigations, but also – and in particular – to assist the OLAF DG in the discharge of his responsibilities. The SC highlighted that it fulfils its role by regular monitoring of OLAF's cases, by delivering opinions to the OLAF DG, by challenging, questioning and making recommendations to OLAF for improvement where this is deemed appropriate and by submitting reports to the EU institutions.

## **V SUPERVISORY COMMITTEE WORKING METHODS**

### **1 Meetings and Rapporteurs**

76. From January 2012 to January 2013, the SC held 11 plenary meetings in Brussels. The Chairman, the *rapporteurs* and the members of the Secretariat met also regularly to work on particular issues as well as on preparation of and follow up to the plenary meetings.

77. For every major issue examined, the SC appointed a *rapporteur*. It was the case in particular for the OLAF budget, the reform of Regulation (EC) No 1073/1999, the analysis of the OLAF DG's Instructions to Staff on Investigative Procedures, the analysis of “dismissed cases” in general and of specific cases transmitted to national judicial authorities. The *rapporteur* worked with the SC Secretariat to prepare a draft Opinion or paper to be discussed in the plenary meetings.

### **2 Secretariat**

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<sup>58</sup> The EU Sub-Committee (Justice, Institutions and Consumer Protection) of the House of Lords published on 17 April 2013 its 12<sup>th</sup> on The Fight Against Fraud on the EU's Finances (<http://www.publications.parliament.uk>).

78. The responsibilities of the SC Secretariat are set out in the SC's Rules of Procedure<sup>59</sup>, which stipulate that it shall contribute to the efficient performance of the tasks assigned to the SC, in particular with regard to its monitoring function. The Secretariat must be able to function independently and assist the SC in its tasks. Taking into account, on the one hand, that the SC's Members are experts from outside the EU institutions who hold high positions in their own countries and thus exercise their function of SC Members in parallel to the regular work in their countries, and on the other hand that they hold plenary meetings once a month, it is of the utmost importance for them to rely on a strong and adequately staffed Secretariat. This would guarantee the SC's genuine independence, which in turn is a crucial factor in safeguarding OLAF's independence.
79. For this reason, the SC strongly disapproves that, at the beginning of the mandate of the current Members in 2012, the OLAF DG unilaterally removed 25% of posts from the Secretariat, replaced two staff members and appointed a new Head of the Secretariat (being also the SC Secretary), without the prior information and consent of the SC. This action was contrary to the previous practice established by the SC and OLAF in agreement with the European Commission according to which appointments of members of the SC Secretariat staff should only be made in agreement with the SC, thus ensuring the full independence of the SC in the performance of its duties. As to the appointment of the Head of the SC Secretariat, this practice is precisely provided for in the SC Rules of Procedure<sup>60</sup>. The SC decided to endorse the appointment of its new Head of the Secretariat, without, however, accepting the change of the established practice, and requiring the OLAF DG to have prior consent of the SC to any changes in the SC Secretariat.
80. The SC indicated constantly to the OLAF DG the need of additional staffing in its Secretariat. At the end of the reporting period, the OLAF DG accepted to grant an additional post to the SC Secretariat, but by now it has not been happened yet.
81. In a Position Paper transmitted on 23 May 2012 to the European Parliament, the Council and the Commission, the SC highlighted that its independent and effective functioning requires an independent and adequately staffed Secretariat which is under the exclusive control of the Committee<sup>61</sup>.

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<sup>59</sup> See Article 11 of the SC's Rules of Procedure.

<sup>60</sup> See Article 11.

<sup>61</sup> The Committee considered that in this respect the present text of the Regulation (EC) No 1073/1999 could be improved by providing for supplementary guarantees and proposed therefore to stipulate in the amended Regulation that (i) the total appropriations for the Supervisory Committee and its Secretariat shall be separately indicated under a specific budget line for OLAF within the section of the general budget of the Union relating to the Commission and that (ii) the number of staff of the Secretariat shall at least correspond to 2% of the number of staff of OLAF.

## Calendar of Supervisory Committee Meetings

### 2012

Month	Meeting date
<b>JANUARY</b>	<b>Monday, 23<sup>rd</sup> – Tuesday, 24<sup>th</sup></b>
<b>FEBRUARY</b>	<b>Tuesday, 21<sup>st</sup> – Wednesday, 22<sup>nd</sup></b>
<b>MARCH</b>	<b>Tuesday, 20<sup>th</sup> – Wednesday, 21<sup>st</sup></b>
<b>APRIL</b>	<b>Tuesday, 24<sup>th</sup> – Wednesday, 25<sup>th</sup></b>
<b>MAY</b>	<b>Tuesday, 29<sup>th</sup> – Wednesday, 30<sup>th</sup></b>
<b>JUNE</b>	<b>Tuesday, 26<sup>th</sup> – Wednesday, 27<sup>th</sup></b>
<b>SEPTEMBER</b>	<b>Tuesday, 25<sup>th</sup> – Wednesday, 26<sup>th</sup></b>
<b>OCTOBER</b>	<b>Tuesday, 23<sup>rd</sup> – Wednesday, 24<sup>th</sup></b>
<b>NOVEMBER</b>	<b>Tuesday, 20<sup>th</sup> – Wednesday, 21<sup>st</sup></b>
<b>DECEMBER</b>	<b>Monday, 10<sup>th</sup> – Tuesday, 11<sup>th</sup></b>

### 2013

<b>JANUARY</b>	<b>Tuesday, 22<sup>nd</sup> – Wednesday, 23<sup>rd</sup></b>
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**Opinion No 1/2012**

**OLAF's Preliminary Draft Budget for 2013**

Brussels, 26<sup>th</sup> June 2012

At the meetings of 24<sup>th</sup> and 25<sup>th</sup> April, 5<sup>th</sup> and 6<sup>th</sup> June and 26<sup>th</sup> June, 2012, OLAF's Supervisory Committee examined OLAF's preliminary budget for 2013 and adopted the following opinion.

In accordance with Article 11 of the Regulation 1073/1999<sup>62</sup> the mission of the OLAF Supervisory Committee (SC) is to reinforce the independence of OLAF in the exercise of OLAF's investigative function. To do this and to ensure that OLAF is able to function in an efficient and effective manner a specific budget article within the Commission budget was created for OLAF. In this context, and with a view to the powers conferred by the Commission on the SC<sup>63</sup>, the SC has considered OLAF's Preliminary Draft Budget (PDB) and delivers the following Opinion.

**I. Resources**

Allocation of resources to priority activities

The SC has regularly recommended to OLAF in its previous opinions on the budget to allocate more staff to OLAF's core business – investigations – by shifting them from the support units. The SC has also proposed to clarify the distinction between investigative and operational activities of OLAF.

Therefore the SC takes note of the reorganisation of OLAF put in place on 1 February 2012 which resulted in the following changes:

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<sup>62</sup> 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>63</sup> Article 6 of the Commission Decision 1999/352/EC, ECSC, Euratom of 28<sup>th</sup> of April, 1999 establishing the European Anti-fraud Office, OJ L 136, 31.5.1999, p. 20–22.

In 2011:

Directorate A (investigations and operations):	84	(17%)
Directorate B (investigations and operations):	84	(17%)
Directorate C (operational support):	125	(25%)
Directorate D (administration and general affairs):	181	(36%)
General Director:	17	(%)
SC:	8	(%)
Total staff:	499	(100%)
Total investigation:	168	(34%)
Total investigation + <i>operational</i> support:	293	(59%)

Since 1 Feb 2012:

Unit O.1 (investigation S&R):	25	(5%)
Directorate A (investigations I):	95	(19%)
Directorate B (investigations II):	100	(20%)
Directorate C (investigation support):	86	(17%)
Directorate D (policy):	110	(22%)
Directorate R (resources):	68	(13%)
General Director:	13	
SC:	6	(%)
Total staff:	503	(100%)
Total investigation:	220	(44%)
Total investigation+ <i>investigation</i> support:	306	(61%)

It is too early to assess the reorganisation's benefits and the influence on efficiency of the Office, but the strategy of concentrating resources on investigations, separating investigative structures from policy structures and refocusing on essential investigative activities might go into the right direction.

## Follow up of investigations

According to recent ECA's statistics<sup>64</sup>, in 2008 only 10% and in 2009 only 4% of OLAF investigations led to convictions by national judicial authorities. Even if it is factored in that there may be other methods of follow-up to investigations which require the input of other institutions and not necessarily that of Member States, the ultimate effectiveness of the work of the Office must be closely analysed as a crucial focal point.

In this context the Committee is worried that the reorganisation of OLAF brought also the disappearance of the specialised follow-up unit, with follow-up responsibilities being transferred to investigators. The latter generally will not have the specific knowledge (legal, linguistic) and status to provide assistance to national authorities in the judicial follow-up or even to monitor it effectively. This may lead to disassociation between OLAF investigations (which are in fact a preparatory measure) and an actual sanction or remedy in judicial, administrative or disciplinary procedures.

Proper follow-ups ensure that the ultimate results of investigations are achieved. Without this OLAF can do laboriously great work without leading to appropriate outcomes.

## HR strategy

Reorganisation of the Office resulted in significant shifts of staff and modifications in their job description or even a completely new allocation of tasks. In such circumstances the SC reiterates the position of the previous Committee that it is essential to have an appropriate human resources strategy built on the identified and real needs of the organisation and its priorities, with the aim of giving direction and maximising the use of existing resources. A crucial element of that strategy should be the continuous training related to internal mobility and overall restructuring. It should address the optimum balance between administrators performing core investigative tasks and assistants that provide support services. The human resources strategy should also address working relations with DG Administration, recruitment, specialised training, in-house mobility and career development of both permanent and temporary staff, as well as succession planning.

## Temporary agents

Although substantial effort has already been made over the years, the SC must repeat from its previous opinions that the difficulty in putting in place a system of promotion (or reclassification) of temporary staff remains a concern. The SC finds it disappointing that no

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<sup>64</sup> Cf. ECA Special Report No 2/2011, Annex III, page 40, Table B.



solution has yet been found to this problem, being an element of the general issue of motivation for the staff of OLAF.

It would be commendable to give a clear response to the temporary agents whether such a promotion is at all foreseen, so that they can take appropriate decisions concerning their career.

**Recommendations:**

- **An effective follow-up of investigations must be ensured.**
- **A human resources strategy based on a needs assessment of OLAF's current activities should be developed and focus given to training, career development, succession planning and appropriate balance between assistants providing support services and administrators performing core investigative tasks.**
  - **Issue of temporary agents to be ultimately decided and communicated to them.**

## **II. Budgetary procedure**

The Commission Decision establishing OLAF is clear that the Supervisory Committee must be consulted on the preliminary draft budget (PDB) of OLAF *before* it is sent to the Director-General for Budgets<sup>65</sup>.

Up to now the Director General of OLAF has transmitted the PDB to the Committee after "technical" meetings/arrangements with the DG Budget. In this way substantial and meaningful consultation with the Committee could not take place and the transmission of the PDB to the Committee has become just a formality. The SC believes that to provide effectively an opinion on the PDB is one of its core tasks.

**Conclusion:**

- **The Supervisory Committee must be effectively consulted about the next PDB by means of a real and substantive exchange of opinions between the Director General and the Committee *before* the PDB is sent to the Director-General for Budget in any form.**

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<sup>65</sup> Article 6 (2) of the Commission Decision 1999/352/EC, ECSC, Euratom cited above provides: "After consulting the Surveillance Committee, the Director shall send the Director-General for Budgets a preliminary draft budget to be entered in the special heading for the Office in the annual general budget".

### III. The Secretariat of the SC

#### Budget line

To be fully informative and representative of the total cost of oversight the budget line for the SC should incorporate the total cost of operations, that is, all the SC Members' expenditure as well as that of its Secretariat which includes their salaries, training, travel, etc.

OLAF has the privilege of transferring its funds freely from one line item to the other according to exigencies. By joining up the total cost of the Supervisory Committee's function in a separate budget line it is ensured that funds targeted for use by the SC are actually used for the supervisory function. However, unspent funds remaining unutilised could be redeployed to other headings within the OLAF Budget. Such redeployment should only be possible with prior notification of the SC and its approval.

The Head of the SC Secretariat should be sub-delegated as the authorising officer to manage the total fund allocation for the SC's operations under the control of the Committee. Having one budget line which incorporates all expenditure will facilitate the management and efficiencies of the oversight framework whilst at the same time any unused funds are passed on to other OLAF Budget lines by the Director General upon the approval of the SC.

A separate budget line has the benefit of transparency and reflects also the autonomy of the SC. At the same time, this separate budget line will inform the three institutions appointing the SC about the resources specifically allocated to this supervisory function.

#### Staff

The SC maintains its position, as expressed in its previous opinions on the OLAF budget, on the minimum requirement of eight Secretariat staff, which is equivalent to the current needs of the SC. This represents about 2% of OLAF staff<sup>66</sup> which the SC deems the minimum number required for it to carry out its monitoring function efficiently.

The SC does not agree with the decision, taken by the DG in September 2011 and effected on 1<sup>st</sup> Feb 2012 without consulting the current SC, to reduce the headcount of its Secretariat by 25%.

Furthermore the SC is of the opinion that with regard to the appointment of the head of the Secretariat and other staff for its Secretariat, including internal transfers, it should be closely consulted with the Committee, as indicated in its Rules of Procedure<sup>67</sup>.

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<sup>66</sup> According to the OLAF report for 2011, there are 437 staff in the Office.

<sup>67</sup> Article 11 (3) of the SC's Rules of Procedure provides as follows: "In any case, the Head of the Secretariat shall inform the Supervisory Committee about the candidates for membership of the Secretariat. Once the applications are known, the Committee shall discuss in the plenary session whether they meet the Committee's working needs with a view to submitting a proposal for their appointment to OLAF's Director-General" (OJ L 308, 24.11.2011, p.114-120).

The SC acknowledges that the Commission staff rules and the appraisal and promotion system do not currently permit the SC Members to evaluate the performance of the staff of the Secretariat directly. However, the SC considers that even though the appraisal of the Head of Secretariat and promotion of all the staff are ultimately decided by the Director General of OLAF, he should make these decisions on the basis of the opinions of the Committee under whose direct authority the Secretariat works, as it is foreseen in the SC's Rules of Procedure<sup>68</sup>. This will ensure the continuous independence of the Secretariat in their day to day functions.

**Recommendations:**

- **Separate budget line for both the SC and Secretariat should be foreseen.**
- **Eight staff members should be earmarked for the Secretariat.**
- **Appointments of the SC Secretariat staff should only be made following the approval of the SC, thus ensuring full independence of the SC Secretariat in the performance of its duties.**
- **Appraisal of the Head of Secretariat and promotion of all staff of the Secretariat should be decided by the DG on the basis of the SC's opinion.**

#### **IV. Conclusion**

The SC supports OLAF's budget proposal for 2013 with the provision that the above recommendations be taken into consideration.

In accordance with Article 7(2) of the Commission Decision of 28 April 1999, the Opinion should be transmitted to the Budgetary Authority by OLAF. Furthermore, the SC would like to be updated regularly on measures taken by OLAF towards implementation of the recommendations in this Opinion.

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<sup>68</sup> Article 11 (5) of the SC's Rules of Procedure provides as follows: "The Supervisory Committee shall periodically evaluate the work of the Head of the Secretariat and of the Secretariat members".

## **Analysis of the text of the reform of Regulation (EC) No 1073/1999 on the basis of the SC's experience in the monitoring of OLAF's investigations**

### **Introduction**

From 1<sup>st</sup> February, 2012, OLAF has conducted its investigations in accordance with the Instructions to Staff on Investigative Procedures (ISIP) that were circulated by the Director-General of OLAF (DG). These ISIP replaced the OLAF Manual- Operational Procedures and in many aspects anticipated the content of the reform of OLAF's Regulation (EC) No 1073/1999. This has meant a departure from the Regulation currently in force which has in turn created inconsistencies that may have resulted in procedural flaws within the investigations conducted during the present period.

The SC has monitored some OLAF investigations conducted in accordance with the ISIP and has analysed the text of the Reform of Regulation (EC) No 1073/1999 (henceforth the text of the Reform). The following considerations aim to highlight the risks of a lack of clearer procedural rules in certain areas concerning in particular;

1. The investigative measures that OLAF is entitled to undertake
2. The respect for procedural guarantees and fundamental rights: the role of the SC
3. The legality check of OLAF's investigations and the respect of the national law of the Member States
4. The opening of the investigation: the investigation policy priorities and the notion of "sufficient suspicion"
5. The direct participation of the OLAF Director General in the performance of investigative activities
6. The characterisation of the investigations (internal and/or external)
7. The complaints procedure against OLAF's actions.

OLAF is not in agreement with some of the concerns raised and recommendations issued by the SC during the reporting period, in particular with regard to the legal basis for some of its actions and to the role of the SC. In the circumstances, and given the state of play of the reform of the OLAF's Regulation (EC) No 1073/1999, the SC considered it necessary to address these issues to the legislator for the sake of clarity; having a clear picture of OLAF's procedural tools for the conduct of investigations is not only essential for OLAF's actions but also for the SC's fulfilment of its monitoring remit. The following considerations refer to OLAF's investigatory powers and not to any information obtained and/or forwarded in the course of the investigations.<sup>69</sup>

### **1. The investigative measures that OLAF is entitled to undertake**

#### ***Article 2 of the text of the Reform and Article 11.5 and 11.6 of the ISIP***

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<sup>69</sup> See Article 8 of Regulation (EC) No 1073/1999

- Article 2 of the text of the Reform states that "administrative investigations" shall mean "any inspection, check or other measure" undertaken by OLAF "*in accordance with* Articles 3 and 4". Those articles appear to contain an exhaustive group of investigation measures for external and internal investigations respectively (on the spot-checks and inspections, access to information held by the institutions, oral information from members and staff members etc...). Although the text of the Reform includes a more comprehensive list of investigation measures (it has explicitly included the conduct of interviews of a person concerned or a witness) the nature of these provisions is similar to the text of Articles 2, 3 and 4 of the Regulation currently in force.
- Similarly, Article 11(5) of the ISIP circulated by the DG of OLAF provides a list of the means for the collection of evidence. These methods are a reflection of the investigation measures contained in Articles 3 and 4 of the Regulation and of the text of the Reform.<sup>70</sup> However this provision does not consider this to be an exhaustive list as they are indicated as "*inter alia*".

From the monitoring experience of the SC, OLAF has undertaken investigative measures which, in the SC's view, go beyond those explicitly listed in Articles 3 and 4 of the Regulation currently in force and beyond those contained in the future text of the Reform; *inter alia*, (i) the preparation of the content of a telephone conversation for a third party with a person subject to the investigation and being present during that conversation which was recorded (ii) requesting to national administrative authorities to provide OLAF with information not directly held by them that may be considered as relating to the right to respect for private life and communications and the subsequent use, collection and storage of such information by OLAF.

OLAF's legal basis to undertake these actions is not apparent neither from the text of the Regulation or from the text of the Reform. Both being investigative measures the use of which, according to the jurisprudence of the European Court of Human Rights, could be seen as "*interference by a public authority*" with the exercise of the right to respect for "private life", " for "correspondence" and/or "*communications*" which is required to be "*in accordance with the law*"<sup>71</sup> (Article 7 of the Charter of Fundamental Rights of the EU which corresponds to Article 8 of the European Convention of Human Rights).

<sup>70</sup> 11.5 "The investigation unit collects evidence using *inter alia* the following means: a. Collecting documents and information in any format which can be used as evidence b. Collecting evidence in the framework of operational meetings c. Taking statements from any person able to provide relevant information d. Carrying out fact-finding missions in Member States e. Taking samples for scientific examination f. Conducting interviews with persons concerned or witnesses (Regulation (EC) n° 1073/99) g. Carrying out inspections of premises (Regulation (EC) n° 1073/99) h. Carrying out on-the-spot checks (Council Regulation (Euratom, EC) n° 2185/96) i. Carrying out forensic operations j. Carrying out investigative missions in third countries k. Carrying out checks and inspections under the conditions laid down in the sectoral rules" 11.6. "a. Interviews with the persons concerned; b. Inspection of premises; c. On-the-spot checks; d. forensic operations; e. Checks and inspections under sectoral rules".

<sup>71</sup>. *A. v France*, case 14838/89. See also *Malone v. the United Kingdom* ; *Kopp v. Switzerland*, *P.G. and J.H. v. the United Kingdom*, *Liberty and Others v. the United Kingdom* , *Kruslin v. France* and *Huvig v. France* , *Halford v. the United Kingdom* , *Amann v. Switzerland*

Given that OLAF shall exercise the powers conferred upon it by the EU legislator and the potentially high risks involved in this area, the SC considers that it would be important for the legislator to clarify in the text of the Reform the extent and nature of OLAF's investigatory powers.

## **2. The respect for fundamental rights and procedural guarantees : the role of the SC**

### ***Article 12.5 bis of the text of the Reform and Articles 12 and 21 of the ISIP***

- The exercise of OLAF's powers to conduct administrative investigations in order to fight against fraud, corruption or any other illegal activity adversely affecting the financial interests of the EU is subject to respect for human rights and procedural guarantees<sup>72</sup>. The Treaty of Lisbon has heightened this obligation by making the Charter of Fundamental Rights of the EU binding. The rules and principles which apply in this area exist, in part, in the current legislation (although scattered among numerous sources) and in the instructions contained in the ISIP and previously in the OLAF Manual-Operational Procedures.
- The text of the Reform has specifically foreseen that the "Director General shall put in place an ***internal advisory and control procedure including a legality check, relating inter alia to respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Member States concerned***" (Article 12 5bis).
- Such an advisory and control procedure appears to have been included in the ISIP circulated by the DG in February 2012 under the title "*Legality check during the investigation*" (Article 12), according to which the Investigation Selection and Review Unit must verify the legality of certain investigative measures requiring the authorisation of the Director General and provide him with an opinion.<sup>73</sup> Moreover, a "*Final quality and legal review*" by this Unit, **including the rights and procedural guarantees of the persons concerned, is also established** at the end of the investigation (Article 21).

The SC has identified shortcomings in the implementation by OLAF of this control procedure relating to the respect of procedural guarantees and fundamental rights during the investigation in some instances. Firstly, OLAF has not established a prior legality check of other investigative measures than the ones specifically listed in the ISIP and that could result in an interference with fundamental rights and procedural guarantees and, secondly, prior verification should be carried out by appropriately qualified judicial experts and within an appropriate time frame.

<sup>72</sup> Article 2(1) of Decision 1999/352/EC, ECSC, Euratom establishing OLAF provides that for the purposes of investigations the Office shall exercise the powers conferred by the Community legislator, subject to the limits and conditions laid down by the Treaties. See also recital 10 of Regulation (EC) No 1073/1999. This requirement was, moreover, reiterated by the Court of Justice in case C-11/00, *Commission v ECB*, 10 July 2003, para. 139.

<sup>73</sup> Article 11.6 of the ISIP: The investigative activities listed are the following: interviews with persons concerned, inspection of premises, on-the-spot checks, forensic operations and checks and inspections under sectoral rules.

The SC was seriously concerned by this and it has strongly recommended that OLAF carry out a formal and thorough legal analysis of the existence of legal bases for its actions prior to the implementation of measures that could result in interference with the fundamental rights to *inter alia* "private life" and "communications" and/or "correspondence" of the persons concerned in the investigation. As it was previously mentioned, the failure to act "in accordance with the law" would constitute an interference with the right to respect for "private life" and for "communications" and/or correspondence and be contrary to Article 7 of the Charter of Fundamental Rights and to Article 8 of the European Convention of Human Rights.

The SC would point out that breaches of essential procedural requirements during preparatory investigations might affect the legality of the final decision taken on the basis of investigations by OLAF<sup>74</sup>. They would moreover incur the legal liability of the European Commission. Given the high risk potential involved, it would be important for the legislator to give serious consideration to the integration of clear rules in this field into the text of the Reform.

*The role of the SC: Article 11.1 and 7 of Regulation (EC) No 1073/1999 and Article 11.1 and 6 and Article 12.4 of the text of the Reform*

- The monitoring of fundamental rights and procedural guarantees has become a major task for the SC in the past years and is a duty which it takes very seriously. A thorough verification of OLAF's compliance with the respect for human rights and procedural guarantees was carried out by the SC each and every time the SC monitored an OLAF case. Moreover, following the General Court ruling in the case *Franchet and Byk* the said verification was similarly completed with regard to OLAF's investigations necessitating transmission to the National Judicial Authorities (NJA) prior to their forwarding.<sup>75</sup>
- The *prior* information sent to the SC on cases to be forwarded to the NJA will be removed following adoption of the text of the Reform. The DG of OLAF will inform the SC of cases in which information has been transmitted (Article 12.4 of the text of the Reform).
- The text of the Reform indicates that "*in duly justified situations the SC may ask the Office for additional information on investigations, including reports and recommendations on closed investigations, without however interfering with the conduct of investigations in progress*".
- The SC would point out that over the last year the OLAF DG has put into question this SC's task to the extent of refusing to grant the SC access to case files for the monitoring of OLAF's compliance with the respect for fundamental rights and procedural guarantees by either putting into question the justification given by the SC, or requiring further reasons to justify specific request for access to cases. This has also prevented the SC from assisting the OLAF DG in the discharge of his duties as foreseen in the Regulation.

<sup>74</sup> Order of the Court of First Instance of 18 December 2003 in Case T-215/02 *Gómez-Reino v Commission*, para. 65. See also para. 31 of the Order of 9 June 2004 in Case T-96/03 *Camós-Grau v Commission*, in which the Court of First Instance noted that, while measures of a purely preparatory character may not themselves be the subject of an application for annulment, any legal defects affecting them may be relied upon in proceedings against the final measure of which they represent a preparatory stage.

<sup>75</sup> Case T-48/05, *Yves Franchet and Daniel Byk v Commission*.

The text of the Reform creates a specific reporting obligation for the SC towards the institutions on the application by OLAF of procedural guarantees. Given the fact that this monitoring task cannot be dissociated from the examination of fundamental rights, the SC's remit may require full access to those cases and/or documents from OLAF's investigations that would be necessary to fulfil this key function and to reinforce the accountability of OLAF's work *vis-à-vis* the EU institutions.

The role of the SC should be reinforced as to become an effective and independent safeguard of the procedural guarantees and the fundamental rights and of the persons concerned.

The SC is clear that it should be for the SC itself and not for the OLAF DG to decide on the "*duly justified situations*" in which it may ask for additional information on investigations. Therefore, given the obstacles encountered by the SC through its monitoring experience it would be appropriate to have a clearer drafting in the text of the Reform.

### **3. The legality check of OLAF's investigations and the respect for the national laws of the Member States**

#### ***Article 12.5 bis and recital (47) of the text of the Reform and Articles 12 and 21 of the ISIP***

- OLAF's investigations must be performed in accordance with the legality principle, their conclusions must be solely based on elements which have evidential value and will be subject to the same evaluation rules as those applicable in the administrative or judicial proceedings of the Member State in which their use proves necessary.<sup>76</sup>
- The text of the Reform of OLAF's Regulation has integrated these principles into Article 12 5bis through the above referred to as an "**internal** advisory and control procedure including a **legality check, relating inter alia to the respect of the national law of the Member State**" to be put in place by the DG of OLAF.
- This internal procedure has been developed in the ISIP concerning the legality check of the investigative activities but no reference is made to the respect of the national law of the Member State. In particular Article 12.2 of the ISIP reads that, the Investigation Selection and Review Unit "*must verify the **legality of the proposed investigative activity** and may also consider the necessity of carrying out the investigative activity concerned. It must provide an opinion to the DG.*"

The SC is concerned by shortcomings on the part of OLAF in the legality check area. Deficiencies were identified both with regard to the characterisation of the investigation and the accuracy of the legal bases indicated for executing certain investigation activities, in particular in the field of on-the-spot checks controls, interviews of the person concerned and the requests to national authorities in the Member States for the gathering of evidence.

<sup>76</sup> Recital (10) and Article 9 of the Regulation (EC) No 1073/1999.



The SC is also concerned to note that OLAF does not appear to have verified how evidence is gathered in compliance with the national rules when the investigation activity at national level is prompted by a request from OLAF and concerning measures that could have an impact on fundamental rights. This is of particular importance when the evidence gathered in the investigation is not only used as a basis for the transmission of the case findings to the National Judicial Authorities but also as the grounds for OLAF's recommendations to the EU institutions concerned by an internal investigation.

The SC considers that compliance with the rules for the collection of evidence at national level within the framework of the Charter of Fundamental Rights of the EU requires prior legal verification by OLAF and it welcomes the relevant new reference made in the text of the Reform.

It is important to underline that legal requirements established in the text of the Reform need also to be integrated and developed into the guidelines adopted by the DG on investigation procedures for the Staff of OLAF.

#### **4. Opening of investigations: the policy priorities and the notion of "sufficient suspicions"**

##### ***Articles 5.(1),(5) and (6). and 12.4 of the text of the Reform and Article 5.4 of the ISIP***

- The text of the Reform strengthens the **primacy of the principle of opportunity** in the opening of investigations (Article 5.1). However it does not establish a subsequent duty for the DG to inform the competent authorities of the Member State or the institution concerned when he decides **not to open** an investigation, (Article 5 (5) and (6) "*the DG ...may without delay send any relevant information...*"). The SC has noted that according to the text of the Reform the decision of the DG not to open an investigation "shall take into account" inter alia the investigation policy priorities (IPP) that he had established and published.<sup>77</sup>
- The text of the Reform indicates that the DG **may** open an investigation when there is "sufficient suspicion". It does not go into depth as to the meaning of this notion. The existing European jurisprudence has established "sufficiently serious suspicion" as a precondition for the opening of the investigation<sup>78</sup>. A two months period has been set up for the DG to decide whether or not to open an investigation.

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<sup>77</sup> "OLAF's Investigation Policy Priorities for 2012, Financial impact": In the Customs sector, the likely financial impact is over €1 million (estimated illegal diminution of the resources). In the Agriculture sectors the likely financial impact is above €100,000 for SAPARD and above €250,000 for Agriculture (estimated misappropriation or wrongful retention of funds). In the area of Structural Funds it is €500 000 in the European Social Fund and Cohesion Fund, and €1Million in ERDF (estimated misappropriation or wrongful retention of funds);in the External Aid and centralised expenditure sectors €50,000 (estimated misappropriation or wrongful retention of funds) and in the EU staff sector, €10,000 (estimated misappropriation or wrongful retention of funds).

<sup>78</sup> Cases C-15/00 *Commission of the European Communities v European Investment Bank* and C-11/00 *Commission of the European Communities v European Central Bank*.

The setting by the DG of high financial thresholds to be taken into consideration by OLAF prior to open an investigation in various sectors and the possibility for the DG not to open an investigation even if there is "sufficient suspicion" without a parallel duty for the DG to inform the competent authorities of institutions when he decides not to open an investigation, risks resulting in areas of impunity.

Moreover, drawing on its monitoring experience, the SC considers that OLAF has not always conducted a thorough assessment of incoming information in relation to the notion of sufficiently serious suspicion. In the SC's view this assessment is essential for the safeguarding and consolidation of OLAF's independence *vis à vis* the institutions, bodies, offices and agencies and governments where one of these latter is at the origin of the referral.

### **5. The direct participation of the OLAF DG in the performance of investigative activities**

#### ***Article 6.1 and recitals 18 and 19 of the text of the Reform***

Under the current Regulation (EC) No 1073/1999, the Director General shall direct the conduct of the investigations. In principle, this approach is retained in Article 6.1 of the text of the Reform ("investigations shall be conducted under his direction by the staff of the office designated by him") and stressed in recital (19) ("the staff of the Office should conduct the investigations in accordance with the guidelines on investigation procedures and on the basis of individual instructions given by the Director General on specific cases").

Following its monitoring experience, the SC is concerned with regard to the direct participation of the OLAF DG in some investigative tasks *inter alia* interviews of witnesses.

The question of whether the DG himself can participate directly in investigative tasks is important given that it may have an impact on the respect of the principle of impartiality in internal investigations. In particular, Article 90a of the Staff Regulations states that any person to whom these Staff Regulations apply may submit to the Director of OLAF a complaint against an act adversely affecting him in connection with investigations by OLAF<sup>79</sup>.<sup>80</sup>

The SC would point out that the case law has attributed a broad definition to the notion of conflict of interest..In order to avoid the risk of situations resulting in potential conflict of interest that could jeopardize the review of OLAF's actions, the SC considers that it is important either to have a clear rule in the text of the Reform, or to establish an alternative complaint procedure in the case of the direct participation of the Director General in the conduct of the investigation..

### **6. Characterisation of the investigation: external and internal investigations**

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<sup>79</sup> Article 90a of the Staff Regulations states that "Any person to whom these Staff Regulations apply may submit to the Director of OLAF a request within the meaning of Article 90(1), asking the Director to take a decision relating to him in connection with investigations by OLAF. Such person may also submit to the Director of OLAF a complaint within the meaning of Article 90(2) against an act adversely affecting him in connection with investigations by OLAF."

<sup>80</sup> Article 23.1 of the ISIP indicates that any "natural person concerned by an investigation" may request a review of the handling of his procedural guarantees and have established a review proceeding by any member of the OLAF staff not connected with the investigation appointed by the DG.

### ***Article 6 and recital 21 of the text of the Reform, Articles 11.4 and 12.3 of the ISIP***

- Under the current Regulation (EC) No 1073/1999, the investigations carried out by OLAF consist of external investigations (Article 3), i.e. investigations outside the EU institutions, and internal investigations (Article 4), i.e. investigations carried out within those institutions. The procedural rules and guarantees differ according to the nature of the investigation.
- The text of the Reform has included a new possibility for OLAF to combine external and internal elements in one single investigation and apply the rules of Articles 3 and 4 respectively.
- The ISIP have anticipated this possibility in Article 11 and have also introduced a new procedure to "extend" the scope of the investigation<sup>81</sup>; a "legality check" prior to the extension was also envisaged (Article 12.3)

From its monitoring practice the SC has identified shortcomings in the implementation of this new procedure, in particular with regard to the extension of the scope of the investigations added to the ISIP. The SC is not clear with regard to OLAF's categorisation of investigations (internal and/or external). In the SC's view, the application of provisions concerning each category has created confusion with regard to the legal bases applicable and the accuracy of the investigation activities that OLAF can carry out, in particular, in the field of on-the-spot checks and inspections and interviews of persons as person concerned.

The SC considers that the new possibility to combine in one single investigation both internal and external aspects will not discharge OLAF in the future from properly assessing whether there are sufficient suspicions in order to change the nature of the investigation. The SC considers that further clarification in the text of the Reform is required in this delicate area given that OLAF's powers and obligations differ in the two categories of internal and external investigations.

### **7. The complaints procedure against OLAF's actions**

#### **Article 12. 5 bis and recital (47) of the text of the Reform and Article 23 of the ISIP**

- The text of the Reform has not designated a specific procedure for filing of complaints by persons concerned by OLAF's investigations but has empowered the DG "to put in place an internal advisory and control procedure, including a legality check, relating, inter alia, to respect of procedural guarantees and fundamental rights of the persons concerned...".

With the introduction of the ISIP (Article 23) the DG has replaced the "Internal review-Director General" system adopted by the OLAF Manual-Operational Procedures of December 2009<sup>82</sup>. This new system relating to "complaints concerning failure to respect

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<sup>81</sup> Article 12.3 of the ISIP.

<sup>82</sup> Internal review— Director-General OLAF Manual-Operational Procedures (5.1.6.1.). OLAF applies high standards of ethical behaviour. All persons concerned have the right, in accordance with Article 90a of the Staff Regulations and Article 14 of Regulation 1073/99, at any time to complain to the Director-General against an act adversely affecting them and committed by the Office as part of an investigation.

procedural guarantees" envisages the appointment by the DG of a member of OLAF staff not connected with the investigation to deal with the request of a natural person concerned by an investigation for the review of OLAF's handling of his procedural guarantees. The person entrusted with the review must act independently in his review of the complaint and report his findings to the DG who may take appropriate action in respect of any failure to respect procedural guarantees and will inform the complainant.

- The SC would point out the risk of any future amendment of the ISIP by OLAF which could result in the adoption of a different procedure for dealing with complaints.

The SC considers that the lack of a clearly legally defined internal system in the text of the Reform to deal with complaints against OLAF's investigations may create a legal uncertainty and be detrimental to a uniform approach towards the persons involved in OLAF's investigations. The risk of having different internal systems to deal with complaints at different periods of a single investigation lifecycle should be avoided.

The SC has received several complaints from individuals with regard to specific OLAF investigations. The SC has also examined the way in which OLAF has dealt with individual complaints. For the sake of legal certitude, serious consideration should be given with regard to the integration of clear rules in this field into the text of the Reform.

The SC considers that it should always be informed of the complaints received by OLAF relating to fundamental rights and procedural guarantees in order to be in the position to fulfil its monitoring remit.

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The Director General will appoint an OLAF senior agent, who was not involved in the investigation giving rise to the complaint, to act as an independent expert and to review the complaint (the 'Review Adviser'). The Director-General will inform the person concerned of the review findings and any action taken to remedy such a situation, in particular in cases where non-respect of the procedural rules and guarantees might have an impact on the outcome of the investigations. The reply must be sent without delay. The Review Adviser must have access to all relevant documentation and all members of staff must provide him with full assistance without delay and in the form requested. When reviewing the case, the Review Adviser acts in complete independence. He may neither seek nor take any instructions from anyone other than the Director-General of OLAF.