

SUPERVISORY COMMITTEE



Opinion No 1/2020

OLAF's dismissed cases concerning
Members of the EU Institutions

April 2020



TABLE OF CONTENTS

1	Introduction.....	2
2	OLAF's legal and organisational framework.....	4
3	Methodology.....	6
4	Duration of the case selection procedure.....	7
5	Source of information and institutions concerned.....	12
6	Evaluation of the activities carried out.....	16
7	Reliability, credibility and OLAF competence.....	20
8	Justification for dismissing cases: lack of a consistent approach.....	21
9	Notification and transmission of the decision to dismiss a case.....	23
10	EPPO and dismissed cases.....	25
	ANNEX I. List of abbreviations.....	27
	ANNEX II. Workflow.....	28
	ANNEX III. List of OLAF cases analysed under the Opinion – 60 dismissed cases.....	29



1 INTRODUCTION

1. Under Regulation No 883/2013 (the OLAF Regulation)¹, the European Anti-fraud Office (OLAF) is subject to regular monitoring of its investigative functions by the Supervisory Committee (SC). The purpose of this monitoring is to strengthen OLAF's independence in the proper exercise of the powers conferred upon it by this Regulation.
2. It is therefore essential that the SC is able to monitor the entire cycle of an investigation carried out by OLAF, including the key decision on whether to open an investigation under Article 5 of the OLAF Regulation. Safeguarding and strengthening the independence of OLAF's investigative function remains of paramount importance each time the Director-General of OLAF takes any decision during an investigation.
3. OLAF's independence is strengthened through regular monitoring of its investigations by the SC. This is the main tool available to the SC to ensure that: (i) there is no external interference in OLAF's investigative function; (ii) all relevant decisions are adopted according to the principles of legality and impartiality; and (iii) all relevant decisions comply with the Charter of Fundamental Rights of the European Union and the procedural guarantees².
4. According to Article 5 of the OLAF Regulation, the Director-General 'may open an investigation when there is **a sufficient suspicion**, which may also be based on information provided by any third party or anonymous information, that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union'. In doing so, the Director-General must take into account OLAF's investigation policy priorities and annual management plan, the need for efficient use of OLAF's resources, and the principle of proportionality. The Director-General therefore enjoys wide discretion in taking such a decision.
5. If the Director-General decides not to open a case, then the case is dismissed³. The Investigation Selection and Review Unit of OLAF (Unit 0.1) supports the Director-General in this process by submitting an opinion on the opening or dismissal of a case.
6. The Director-General's discretionary power under the OLAF Regulation to open an investigation or dismiss a case is counterbalanced by the role entrusted to the SC to closely

¹ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L248, 18.9.2013, p. 1-22.

² At https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

³ Article 6 of the Guidelines on Investigation Procedures for OLAF Staff at https://ec.europa.eu/anti-fraud/sites/antifraud/files/gip_en.pdf.

SUPERVISORY COMMITTEE



monitor whether such decisions have been taken in full independence and impartiality, and in line with the applicable procedural guarantees⁴.

7. In its Opinion No 2/2014, on case selection in OLAF⁵, the SC thoroughly analysed OLAF's selection process. The present Opinion is based on a review of 60 dismissed cases provided by OLAF (covering the period 2014-2016), and focuses on how OLAF handles the dismissal of cases which concern members of the EU institutions.
8. OLAF Regulation covers internal investigations⁶, (i.e. investigations within the EU institutions, bodies, offices and agencies, also known as 'BOAs') into fraud, corruption and any other illegal activity affecting the financial interests of the EU. These investigations are particularly sensitive due to the risk of reputational damage to the EU and the potential risk to the independence of OLAF.
9. Opinion No 2/2014 also takes into account the forthcoming implementation of the European Public Prosecutor's Office (EPPO) Regulation⁷ and the fact that in the future, the decision to open or dismiss a case will require the harmonisation of rules and procedures, and close coordination between OLAF and EPPO.
10. By monitoring⁸ dismissed cases on members of the EU institutions, the SC aims to strengthen OLAF's investigative independence by verifying that: (i) there is no external interference in the conduct of OLAF's investigatory functions; (ii) OLAF's decisions are taken impartially and without delay; (iii) that no preliminary activities carried out adversely affect the intended results of an investigation; and (iv) that any failure to send the dismissal decision to other partners does not adversely affect the intended results of an investigation.
11. The aim of the Opinion was not to assess whether the decision of the Director-General of OLAF to dismiss a particular case was justified. Rather, the SC decided to look into: (i) how OLAF collected, handled and analysed all the necessary information before deciding to dismiss an internal investigation concerning members of the EU institutions; and (ii) OLAF's compliance with the applicable legal framework. The SC reserves the right to revisit this Opinion in the future and examine whether the Director-General's decision to dismiss a case was the correct one.

⁴ See OLAF Supervisory Committee, Opinion No 2/2017, accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013, Paragraphs 12-16, at https://ec.europa.eu/anti-fraud/sites/antifraud/files/sc_opinion_2_evaluation_report_883_en.pdf (Article 19).

⁵ http://europa.eu/supervisory-committee-olaf/sites/default/files/documents/publications/opinions/4_2-2014-opinion_2_2014_case_selection_en.pdf.

⁶ Article 4 of the OLAF Regulation and Article 2(1)(b) of Commission Decision of 28 April 1999 establishing OLAF (https://europa.eu/supervisory-committee-olaf/sites/default/files/commission_decision_2013_478_en_consolidated.pdf).

⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), OJ L283, 31.10.2017, p. 1 at <https://eur-lex.europa.eu/eli/reg/2017/1939/oj>.

⁸ The SC monitor remit is provided for in Article 15 of the Regulation No 883/2013.

12. The analysis of the 60 dismissed cases (period 2014-2016) has brought to light the lack of a systematic and consistent approach in several areas of the life cycle of a case – from the moment information is gathered or received up until the moment when a case is finally dismissed. This lack of consistency, given the wide discretionary powers of OLAF's Director-General in this field, risks damaging the principles of impartiality, independence and legal certainty.
13. To prevent this risk, the SC has addressed eight recommendations to the OLAF Director-General in this Opinion. In another forthcoming Opinion, the SC will rely on the analysis of the 60 dismissed cases, and the conclusions drawn from these cases, to look more closely into the decisions taken by the OLAF Director-General in 4 finalised investigations concerning members of the IBOAs.
14. The SC acknowledges OLAF's improvement to overpass such weaknesses. In 2018 and 2019, OLAF has put in place several measures in order to streamline the selection activities, improving the consistency of the opinions delivered to the DG while putting, at the same time, a particular emphasis on the reduction of the duration of the whole process.

2 OLAF'S LEGAL AND ORGANISATIONAL FRAMEWORK

15. The OLAF Regulation grants the Director-General the discretion to open an investigation (Article 5), and gives OLAF the right of access to any relevant information held by the IBOAs when this is necessary to assess the relevant facts (Article 6). OLAF has also published internal guidelines on investigation procedures (the GIP) for OLAF staff to ensure that investigations are carried out in a consistent way⁹.
16. To carry out its investigative tasks, and on the basis of Article 1(5) of the OLAF Regulation, OLAF has also set up administrative arrangements with the competent authorities of the IBOAs¹⁰.
17. Two examples of these arrangements are described in the bullet points below.
- Article 3 of the Practical Arrangements between the European Parliament and OLAF of 19 July 2013 set out the rules for communications between both institutions during the selection process of the cases.
 - The Administrative Arrangements on cooperation and a timely exchange of information between the European Commission and OLAF from 29 January 2015¹¹: (i) lays down the steps OLAF can take during an investigation or the selection process (inspections or

⁹ Published on 1 October 2013, at https://ec.europa.eu/anti-fraud/sites/antifraud/files/gip_en.pdf.

¹⁰ See the list of institutions and agencies of the European Union in the following link https://europa.eu/european-union/about-eu/institutions-bodies_en.

¹¹ This agreement has been replaced by a new one on 4 December 2018.

SUPERVISORY COMMITTEE



access to databases held by the Commission); (ii) lays down the duty of IBOAs to cooperate with OLAF; (iii) lays down the Commission's duty to supply information to OLAF before opening an investigation (Article 6); and (iv) includes specific provisions about the selection process in internal investigations (Article 9).

18. The GIPs were supplemented by further internal instructions, including the guidelines on case selection, which aim to give guidance to selectors¹² on: (i) how to verify and process the information for the opening of an investigation; and (ii) how to document this in the applicable workforms filled in by OLAF staff. There are four such workforms: (i) 'Opinion on opening decision'; (ii) 'Decision to open an investigation case'; (iii) 'Decision to dismiss a case'; and (iv) 'Information on decision to dismiss a case'.
19. The guidelines on case selection are in turn accompanied by the vademecum on case selection. The vademecum consists of both the workforms to be used by selectors and detailed instructions for how to fill in these workforms.
20. According to the guidelines on case selection, a single point of entry should be set up to centralise all incoming information of potential investigative interest and questions from citizens.
21. On 1 February 2012, the assessment of all incoming information of possible investigative interest to OLAF was transferred from the relevant investigation units in each OLAF directorate to the Investigation Selection and Review Unit (Unit 0.1). The Investigation, Selection and Review Unit is directly under the control and management of the OLAF Director-General.
22. A centralised decision-making system was thus created consisting of two levels: the decisional level, represented by the OLAF Director-General, and the advisory (non-compulsory) level, represented by Unit 0.1.
23. Although this Opinion covers the period 2014-2016, the SC notes that in 2018 and 2019, OLAF put in place two measures in order to improve the selection process.
24. First, in June 2018, a Selection Handbook was adopted by Unit 0.1 to serve as the main toolkit to give guidance to the selectors on how to verify and process information for delivering the opinion to the OLAF Director-General. According to OLAF, the Handbook groups together, in a single document, all relevant legislative provisions, instructions and best practices regarding the selection process¹³.

¹² During the selection phase, Unit 0.1's selectors are responsible for analysing information of possible investigative interest to provide an opinion on whether an investigation or coordination case should be opened, or whether the case should be dismissed.

¹³ The Selection Handbook is an internal working document prepared for the purposes of Unit 0.1 which is not legally binding and is not public available.



25. Second, in March 2019, the OLAF Director-General approved the new structure of the Unit 0.1 which according to OLAF has had a positive impact on the overall selection process¹⁴.

3 METHODOLOGY

26. The SC requested¹⁵ an anonymised list of OLAF's dismissed cases registered in 2014-2016 that concerned members of the EU institutions. OLAF provided a list of 60 dismissed cases¹⁶. Initially, the SC was granted access to 30 of these 60 cases (the 30 cases were chosen by OLAF's Director-General). However, for the purpose of the analysis, the SC asked for – and was granted access to – the remaining 30 dismissed cases of the list drawn up by OLAF. The 60 cases were anonymised and numbered from 1 to 60.

27. To monitor OLAF's handling of the dismissed cases that concerned members of the EU institutions, the SC based its assessment on the following six criteria:

- Duration of the selection procedure – Analysis of the period from the moment in which the information reached OLAF to the moment the case was dismissed.
- Source of information – Analysis of the different sources of information.
- Evaluation activities – Analysis of the activities carried out (or not) by selectors, and comparison between the open¹⁷ and dismissed cases provided by OLAF.
- Cooperation with EU institutions/Member States.
- Reasons given for dismissing a case – Analysis of how OLAF justifies its power to act and dismiss a case.
- Information/transmission of the dismissed case – Analysis of the way OLAF sent or notified (or did not send or notify) a dismissed case to the EU institution or Member State concerned.

28. The rapporteurs¹⁸ held a meeting with OLAF staff on 7 March 2019 to get a better overview of OLAF's rules and procedures when assessing and dismissing a case.

29. In carrying out its assessment, the SC drew up eight recommendations to the Director-General of OLAF to address a number of weaknesses and issues identified that should be further improved.

¹⁴ According to OLAF, all these measures have had a significant impact in the time taken to attribute new cases.

¹⁵ Ref. ARES(2017)424572.

¹⁶ Ref. ARES(2017)1498616.

¹⁷ As part of its monitoring of OLAF's activities, the SC has also analysed 4 dosed investigations concerning members of the EU (2 from European Parliament, 1 from the European Commission, and 1 from the Court of Justice of the EU) on which the SC will issue a separate opinion.

¹⁸ According to Article 8 of the SC rules of procedure, the SC may appoint one or more rapporteurs from among its members to prepare for the SC discussion. The rapporteur(s) must consider matters entrusted to their responsibility and submit a draft report to the SC.



In December 2019, the SC forwarded to OLAF its draft Opinion for its comments on the facts underpinning the recommendations made. In February 2020, OLAF provided its comments as well as additional information regarding measures that it had recently taken which could address some of the recommendations in question. The Secretariat of the SC also met in February 2020 with OLAF services to discuss OLAF's comments. The SC has duly considered these comments and further information prior to adopting its Opinion.

30. The SC emphasises that the methodology used for this Opinion has the sole purpose of contributing to improving the exercise of OLAF's powers, in particular by strengthening the impartiality and independence of OLAF's case-selection process.

4 DURATION OF THE CASE SELECTION PROCEDURE

31. The reasonable time within which an administrative procedure should be conducted (guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union¹⁹) should be understood as referring not only to the duration of an investigation. Instead, it should be understood as referring to the whole cycle of the administrative procedure, from the moment the relevant information reaches OLAF until the procedure is completed. Therefore, all activities conducted during the selection phase to decide whether to open an investigation, and the investigation itself, 'should be done continuously and over a period which must be proportionate to the circumstances and complexity of the case'²⁰.
32. The workflow (see Annex II) reveals the key role played by Unit 0.1 of OLAF and its Single Point of Entry, from the moment information reaches OLAF until the decision to dismiss the relevant case. The SC is aware of the different means by which OLAF receives information (i.e. the Fraud Notification System, general enquiries, information from OLAF staff, etc.) and welcomes any initiative to centralise and coordinate the flow of incoming information. However, as the workflow shows, and the analysis of the dismissed cases confirms, a number of weaknesses on the issue of duration can be identified. For example, some of the steps do not include a time limit. This gives OLAF wide discretion, especially when there is no established process to justify an extension after a certain period of time has elapsed.
33. In addition, a lengthy selection procedure that ends with a decision to dismiss a case may have significant negative consequences, especially where that decision is not notified to anyone outside OLAF.
34. The SC upholds the view expressed in its Opinion No 2/14 that an overly rigid two-month time limit for completing the selection of cases may be counterproductive and not always realistic. It is true that a decision to open or close a case should be based on a substantive assessment and comply with a formal time limit. However, this approach should be balanced and proportional

¹⁹ Ref. 2012/C 326/02.

²⁰ See Article 7(5) of the OLAF Regulation.



to the activities carried out. This approach should also be duly justified and approved at the level of Unit 0.1, a procedure that is not implemented at present. What is most important here is that, where serious allegations are raised against members of the EU institutions, no decision should be taken before all the measures necessary to properly assess the available information have been taken. Otherwise, a decision to dismiss a case taken solely so as not to exceed the two-month time limit would undermine OLAF's investigatory functions.

35. The OLAF Regulation does not lay down the duration of the selection period. It is only where a Member State concerned or an IBOA asks OLAF to open an investigation that such a decision must be taken within 2 months²¹. For the 60 dismissed cases that were analysed, although the GIPs do not impose any time limit, OLAF's annual management plan has set a target of 2 months on average for the selection stage during the period under analysis (2014-2016).
36. For registering the incoming information, the GIP²² provide that any information of possible investigative interest to OLAF received by a member of OLAF staff should be forwarded to the Registry without delay. If such information does not relate to an existing investigation or coordination case, it should be forwarded to the Registry no later than 5 working days following its receipt. After the information is in OLAF there are two different activities performed by two different service in OLAF: **registration** of the document (according to OLAF the average period of the registration of a document in the 60 dismissed cases was 2.05 working days) plus **allocation of a case number**. However, there is no time limit laid down either for the registration or the allocation process itself. The analysis did not reveal any issues regarding the registration process as documents were registered without delay. However, with regard to the allocation of a case number the process was marked by some long delays.
37. The SC considers that, save in duly justified cases, it would constitute good administrative practice that the 5 working days also include the registration phase (including the allocation of a case number).
38. The analysis of the duration of the dismissed cases takes into account two different periods set out below.
 - 1) The period before the date of the allocation of an OLAF case. This is the period between the moment in which information reaches OLAF and the moment in which OLAF acts upon such information (i.e. registration and allocation).
 - 2) The period from the allocation of an OLAF case to its dismissal.

²¹ See Article 5(4) of the OLAF Regulation.

²² Article 2(1) of the GIP: 'Any information of possible investigative interest to OLAF received by a member of staff shall be forwarded to the Registry without delay. Where information does not relate to an existing investigation or coordination case, it shall be forwarded to the Registry no later than 5 working days following its receipt, or where the information is received during a mission, within 5 working days of return to the office'.



Finding: 67% of the incoming information took more than 5 working days for the registration and allocation of a case number.

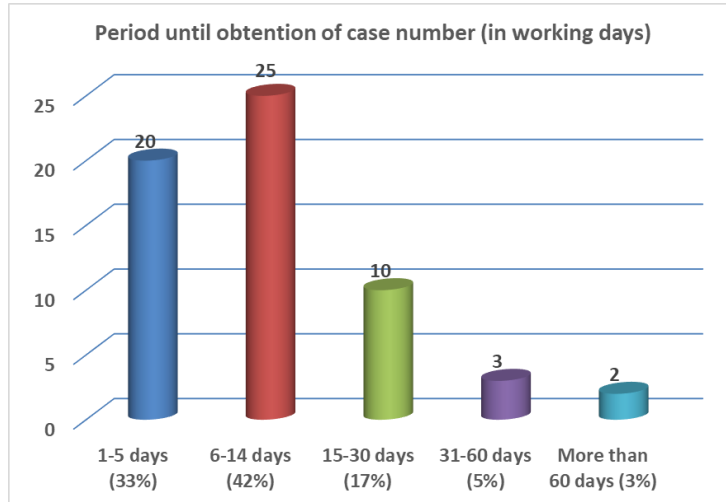


Figure 1

39. For the first period (i.e. registration and allocation of a case number), the SC notes an average duration of 19 working days (far from the 5 days). In 40 cases, the incoming information did not trigger the allocation of a case number within 5 days or less (see Figure 1). In 15 cases, the allocation of the case number took two weeks or more. There was no justification provided in the case file for these delays (i.e. complexity, language used, insufficient information).
40. In particular, the SC is concerned that: (i) in one case where serious allegations were raised against members of the EU institutions, the attribution of a case number by OLAF took 41 days (Case No 17); and (ii) in another case where serious allegations were raised, it took 188 working days (Case No 20).
41. The SC also finds that in Case No 2, where information was provided by a national authority, it took OLAF 344 working days to create a case. Adding to this the 82 working days from the day of the allocation of a case number to its dismissal, a total of 426 working days passed since the information was first sent to OLAF. There was no justification provided about the complexity of the case, the number of the investigative activities carried out, or the volume of the information involved that could justify such a delay. The SC notes that OLAF's internal and managerial checks failed to identify what is in this case a clear violation of the OLAF Regulation.
42. It is maladministration when the allocation of a case number takes days and no explanation is given to explain this long delay. Therefore, the Committee considers that, save in exceptional and duly justified cases, OLAF should always comply with the time limit of 5 working days set out for the registration/allocation of a case number.



43. In that regard, the SC notes that, following the restructuring of the Unit 0.1 in March 2019, both the registration and allocation processes take place to date within 5 working days. The SC welcomes these improvements which constitute examples of good administration.

Finding: The time limit of 2 months to decide whether to open an internal investigation on the basis of a request by a MS or IBOA is too short in some circumstances.

44. When information and a request to open an external or internal investigation comes from a Member State or IBOA, the OLAF Regulation provides that the decision to open a case should be taken within 2 months. This period should start from the moment the information is received by OLAF, and not from the moment registration takes place (allocation of a case number). If no decision is taken at the expiry of the two-month period, then OLAF is deemed to have decided not to open an investigation²³. Although OLAF should scrupulously observe this time limit, it should also be in a position, when this is duly justified, to extend this period of 2 months. Thus, the SC considers that the OLAF Regulation should be amended to grant OLAF the possibility, in duly justified circumstances, to extend the two-month time limit and inform the MS or IBOAs concerned accordingly. In addition, internal procedures should be drawn up to guarantee priority for such cases and for granting an extension.

45. Moreover, an analysis of the internal procedures of OLAF shows that OLAF only applies the two-month time limit when Member States or IBOAs have clearly asked for an investigation to be opened. However, this two-month time limit does not apply when Member States or IBOAs simply send OLAF information about possible fraud or other irregularities. Thus, in all four cases reported by Member States, it took more than 60 days for OLAF, from the moment it received the relevant information, to decide whether to open an investigation. In none of these cases was there a clear request to open an investigation – there was only a request for assistance and/or specific questions addressed to OLAF. For that reason, OLAF chose not to apply the two-month time limit.

46. In Case No 3, it took OLAF 96 working days to complete the selection procedure. However, this was due to a detailed verification of all the factual information received from a national authority, and was reflected in the full description of the activities carried out during that period. On the contrary, in Cases No 1 and 2, the activities carried out were not sequential and do not appear to be proportionate to the volume of the information received²⁴.

²³ See Article 5(4) of the OLAF Regulation: ‘Within two months of receipt by the Office of a request as referred to in paragraph 2, a decision whether or not to open an investigation shall be taken. It shall be communicated without delay to the Member State, institution, body, office or agency which made the request. Reasons shall be given for a decision not to open an investigation. If, on the expiry of that period of two months, the Office has not taken any decision, the Office shall be deemed to have decided not to open an investigation’.

²⁴ However, as an example of good practice, in Case No 1 an email was sent to the source during the two-month period explaining the reasons for not having yet completed the assessment. The email referred to the large backlog faced by OLAF and used the term ‘given the backlog’.



47. The SC acknowledges that OLAF is not bound by the two-month time limit when Member States and/or IBOAs simply send information without making a clear request to open an investigation. Nevertheless, the SC believes that, as a matter of good administration, OLAF should still treat such cases with priority and provide a reply to the MS or IBOA concerned within 2 months.

Recommendation 1:

As a matter of good administration, for cases where the information is provided by MS/IBOAs without an explicit request to open an investigation, OLAF should take appropriate procedural steps to handle those cases with priority.

In particular, the Director-General of OLAF should:

- a) adopt internal checks to identify those cases where information is provided by MS/IBOAs;
- b) ensure that, at least, a holding reply is provided within 2 months to the MSs/IBOAs concerned;
- c) ensure that any extension beyond this two-month period is duly justified and proportionate to the circumstances and activities carried out.

Finding: There were 12 cases in which the duration of the selection process took more than 2 months

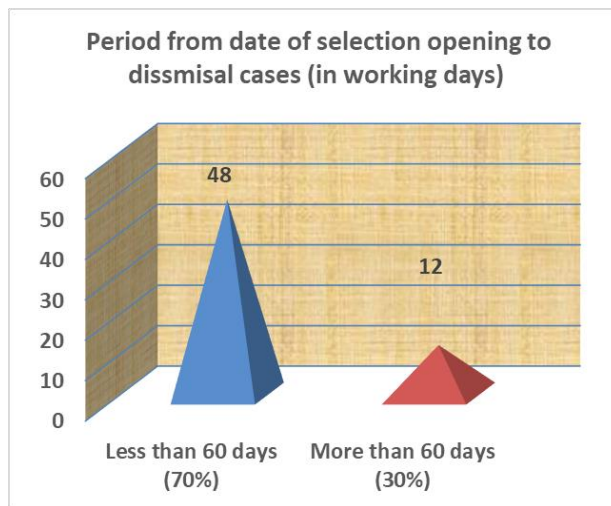


Figure 2

48. In most of the 60 dismissed cases analysed in this Opinion, the selection procedure lasted on average less than 60 days (it lasted less than 60 days in 48 cases out of 60), a target set out in OLAF's annual management plan.



49. In some of the remaining (12) cases, where the two-month target was exceeded, the time spent was proportionate to the activities carried out (Cases Nos 18²⁵ and 33). However, in other instances (Cases Nos 13, 19 and 35) the time spent was clearly not proportionate (over 100 days).
50. The SC underlines that the selection procedure should last more than 2 months only in duly justified cases. In such cases, the reasons for the extension should be properly recorded in a note to the file (OCM).

Recommendation 2:

For internal cases, and to maintain administrative consistency, when the information does not come from MS or IBOAs, OLAF should take appropriate procedural steps to ensure that the selection process is carried out in a timely manner.

In particular, the Director-General of OLAF should:

- a) adopt internal checks to identify those cases (in the OCM) where the selection process has exceeded the two-month period;
- b) ensure that any extension beyond this two-month period is duly justified and proportionate to the circumstances and activities carried out.

5 SOURCE OF INFORMATION AND INSTITUTIONS CONCERNED

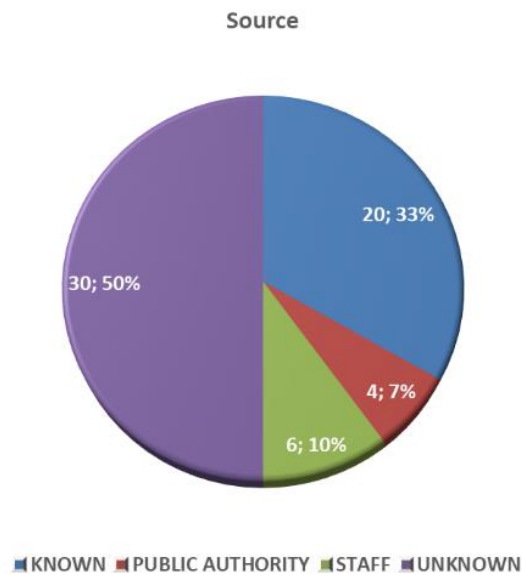


Figure 3

²⁵ In this case, the selector conducted the relevant activities in a timely fashion, although it took almost 2 months from the moment the case was opened until the moment the case was attributed to the selector.



Institution Concerned

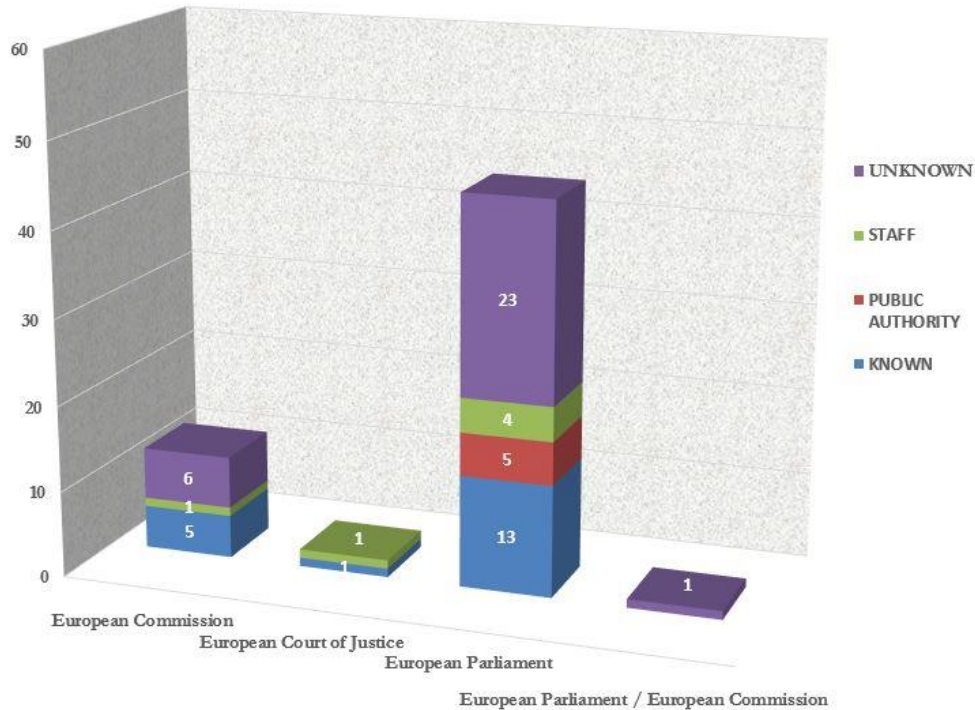


Figure 4

51. The information sent to OLAF in the 60 dismissed cases analysed in this Opinion came from different sources (see Figure 3): 4 came from MS and IBOAs, 6 came from OLAF staff, 20 came from other identifiable sources, and 30 came from unknown sources.
52. OLAF's vademecum on case selection contains specific provisions on how to handle information from different sources.
53. In particular, information coming from MS/IBOAs benefits from a presumption of validity. This is because it may be the result of an obligation to report a possible case of fraud, corruption or any other illegal activity affecting the financial interest of the EU. In such cases, OLAF can always reach the source for any clarification and even request support for any investigative steps.
54. OLAF staff (the OLAF spokesperson, investigators, etc.) are also a valuable source of information. Even if they are not the initial source of the information in question (which could have come from an informant, a journalist, etc.) they are in a privileged position to identify whether the information received falls within OLAF's remit.
55. Known or identifiable sources (members of the public, NGOs, journalists, etc.) often disclose factual information to OLAF about a matter falling within its remit. However, they may not always be in possession of all the evidence necessary to substantiate the claims brought to OLAF's attention, and/or address all the potential legal and procedural issues raised by these claims.



56. Half of the 60 dismissed cases come from unknown sources. Information from anonymous sources should be assessed carefully and to the same standards as any other source. In such cases, it may often be difficult to assess how reliable the received information might be. OLAF should therefore put more effort into checking the credibility and veracity of the allegations made.
57. None of the cases indicated that the information was provided by a whistleblower. However, the SC analysis revealed that, in one case, the source of the information should have been treated as a whistleblower (see paragraph 4).
58. In most of the cases (see Figure 4), the European Parliament is the institution concerned (45 of the cases). The rest of the cases related to the European Commission (12 of the cases), the Court of Justice (2 of the cases) and both the European Parliament and the Commission (1 case).

Finding: There is a lack of consistency in contacting the source of information. These sources of information are not always contacted for clarification about the case.

59. The SC considers that OLAF should contact the source of information in a consistent manner, especially in similar cases or when dealing with similar sources of information. The SC considers that, as a general rule, OLAF should²⁶ always try to contact the relevant sources to assess their reliability and to request any clarification or verification deemed necessary. The only reason not to contact a source is when doing so might be counterproductive²⁷. In all cases, whenever OLAF decides not to contact the source of information, this should always be recorded and justified in the case file (OCM) to guarantee impartiality and independence.
60. The analysis of the 60 dismissed cases reveals that OLAF does not always contact the source. The source was contacted in only 15 cases. In 22 cases, the source was not contacted by OLAF. In the remaining 23 cases, it was not possible to contact the source, either because the source was unknown and thus could not be reached (11 cases), or because such contact proved unsuccessful (12 cases).
61. In cases where the source was not contacted, there was no explanation in the case file (OCM) for such a decision. The SC considers that discretion on whether to contact the source should be counterbalanced by an obligation to explain this decision if OLAF chooses not to contact the source.

²⁶ Article 5(1) of the GIPs specifies that the Investigation Selection and Review Unit 'shall, where necessary', contact the source. Whenever OLAF considers it not necessary to contact the source, the SC considers that OLAF should give a detailed justification of its decision.

²⁷ Case No 28 is a good example of a case where there was a well justified reason for not contacting the source.



62. Even when the source was contacted by OLAF, the analysis revealed that there was no consistent methodological approach to these contacts. In some cases, the source was contacted only once (Case No 13), whereas in other cases the source was contacted twice or more often (Case No 18). In some cases, there is a detailed account of the communication with the source (as in Case No 33, which details the date of the contact, the purpose of the contact, and how the source was contacted), whereas in other cases such information is missing (as in Case No 24). In Case No 13, where the source expressed the wish to provide more information, this proved unsuccessful as the source was contacted only once and only via email, even though a telephone number was also provided.

Recommendation 3:

As a general rule, OLAF should contact the source of information. This is to check whether the information comes from a reliable source, and to request any clarification or verification deemed necessary. The only reason OLAF should not contact the source is if doing so could undermine other future OLAF activities or is clearly unnecessary.

In particular, the Director-General of OLAF should:

- a) mention in the case file (OCM) whether the source of information was contacted;
- b) contact the source when it is a public authority or a whistleblower;
- c) keep records of all communications (date, content, means of communication) and of the number of **attempts** to communicate with the source (twice, as a minimum).

Finding: Whistleblowers are being incorrectly treated as ordinary complainants.

63. A whistleblower is an EU official or EU staff member (temporary staff, auxiliary staff, local staff, contract staff and special advisers) of any of the IBOAs who comes forward to OLAF with information they have discovered in the course of – or in connection with – their duties on matters which may be within OLAF’s remit. A whistleblower is protected from adverse consequences by the EU body (Article 22(a) and 22(b) of the Staff Regulations).

64. On 27 July 2015, under Article 22(c) of the Staff Regulations, OLAF adopted internal procedural rules on dealing with information from whistleblowers (the ‘OLAF procedure’)²⁸. On 25 September 2019, the EU formally adopted a new directive on the ‘protection of persons who report breaches of Union law’, which will better protect whistleblowers in the EU²⁹.

²⁸ Both guidelines are internal documents and are not publicly available.

²⁹ <https://data.consilium.europa.eu/doc/document/PE-78-2019-INIT/en/pdf>.



65. Dealing with a whistleblower requires OLAF to take certain additional steps [e.g. protecting whistleblowers against retaliation, as set out in the OLAF procedure; informing the whistleblower about appropriate action as set out in Article 5(2) of the GIPs, etc.].
66. Case No 52 was initially treated as being reported by an unknown source. After OLAF contacted the informant, it emerged that the source was a member of staff of the same DG concerned by the complaint. The SC considers that OLAF should have treated the source as a whistleblower in accordance with Article 22(a) of the Staff Regulation³⁰.

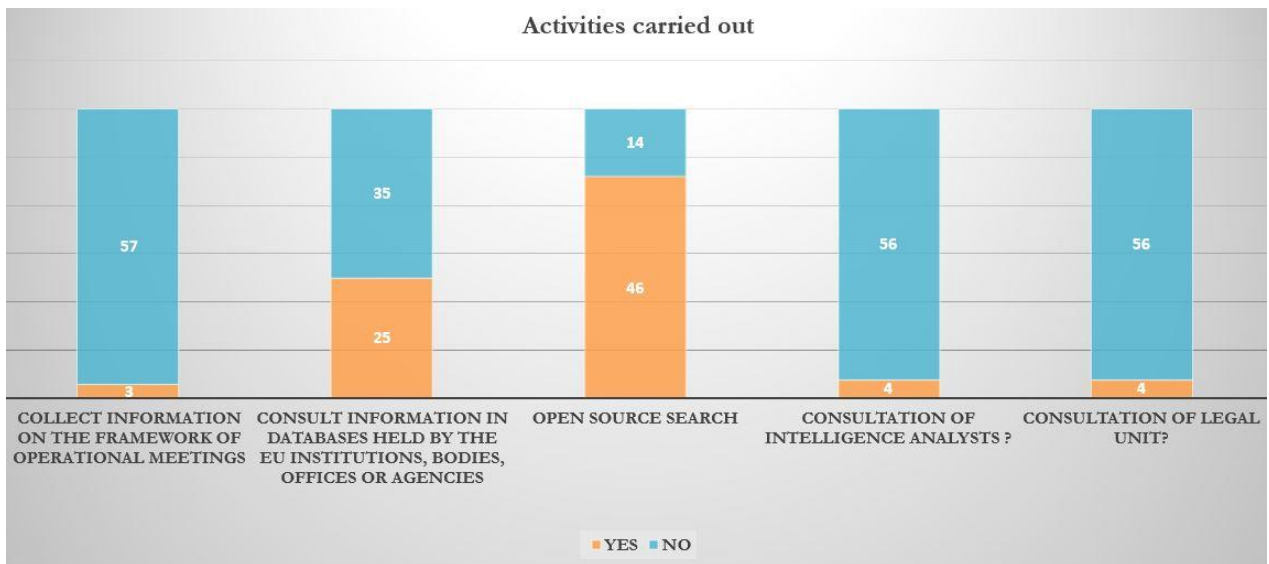


Figure 5

6 EVALUATION OF THE ACTIVITIES CARRIED OUT

67. The OLAF Regulation, the GIPs and OLAF’s vademecum on case selection empower OLAF’s Investigation Selection and Review Unit (Unit 0.1) to collect information to assess whether to open an investigation by:

- contacting (where necessary, according to Article 5(1) of the GIP) the source and the IBOA to obtain clarification and further documentation on the initial information;
- consulting relevant sources available to OLAF;

³⁰ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community. In this case, the information provided to OLAF was about the performance of the source’s duties and related to the discharge of professional duties.



- collecting (where necessary), additional information to support the selection process like the following: (i) collect information in the framework of operational meetings; (ii) take statements from any person able to provide relevant information; (iii) carry out fact-finding visits in Member States; and (iv) consult information in databases held by the IBOAs.
68. Pre-investigation activities are limited compared to the means at OLAF’s disposal during an investigation (Article 11 of the GIPs). A selector has some degree of flexibility to decide whether to carry out some of these activities (the GIPs say the investigator can decide ‘where it is necessary’). However, to avoid putting at risk legal certainty and undermining the principle of fair treatment, activities that are deemed necessary should always be carried out. Otherwise, OLAF’s dismissal decision could be taken on cases where relevant information was not collected.
69. Nevertheless, the SC acknowledges the good practices that were followed in certain cases where the selectors properly planned³¹ their activities and followed through on their implementation³². For instance, in Case No 33, the selector tried to contact the source twice (noting the date both times). OLAF’s Internal Unit was then asked for its opinion on the case, before analysing the legal framework, and checking that there was no financial damage to the EU. In addition, information was sent to Parliament for possible follow-up. This is a very good example of case handling before a case is finally dismissed.
70. However, leaving aside the above-mentioned examples, OLAF generally appears to: (i) conduct very few activities; (ii) make very little use of its own capabilities (i.e. OLAF’s intelligence unit); (iii) conduct only basic web searches; and (iv) rarely contact the IBOA concerned to verify the allegations made.

Finding: Cases are not being comprehensively investigated.

71. Two activities are carried out during the selection stage: (i) consulting databases held by EU institutions and obtaining clarifications from these same institutions (25 out of 60 cases), and (ii) conducting open-source searches (46 out of 60 cases) (see Figure 5).
72. On the consultation of IBOAs, OLAF relies on mutual agreements concluded with certain IBOAs to request information. For instance, the mutual agreements concluded with Parliament and the Commission aim to facilitate the timely exchange of information. The analysis of the 60 dismissed cases showed that, in general, both EU institutions reply to

³¹ Simply planning the relevant activities is not a guarantee that the activities will be carried out. For instance, open-source searches and consultation of EU databases are listed as being carried out in Case No 24. However, the report on this case does not give any evidence of it. In Case No 25, it is mentioned that clarification should be obtained from the source and from the European Parliament, but this clarification was never obtained. The case was dismissed because the information provided was not accurate based on a search of social media. However, the source was not contacted to clarify whether this conclusion of inaccuracy was indeed correct.

³² Cases Nos 1 and 3.



OLAF's requests for information in a timely manner. The specific analysis of the 10 cases that took longer than 3 months to take a decision to dismiss the case³³ also confirm that both Parliament and the Commission promptly respond to OLAF requests. However, in one case (Case No 33), after having sent four emails to the institution concerned asking for information, OLAF closed the case without having received the information requested. This anomaly, even if it occurs in one isolated case³⁴, should be clearly explained in the opinion of the selector and when OLAF sends its decision to the EU institution in question. For the rest of the cases, (i.e. cases which took less than 3 months to take the decision) no specific concerns have been raised. In two cases (No 8 and No 29), the information was not received on time from the EU institution. As a result, the case was dismissed without any explanation why this was the case. In Case No 52, the selector struggled to obtain relevant information.

73. The SC stresses that it is in the interest of both OLAF and the EU institutions (especially for internal investigations) that the information requested by OLAF be sent to it without delay, as set out in Article 6 of the OLAF Regulation.

74. The SC is of the opinion that the kind of information requested from the EU institutions does not always allow the latter to understand the allegations and the relevant factual background in the case. The only solution is therefore to dismiss a case. There might be a different outcome if OLAF asked for more comprehensive and more relevant information from the EU institutions and conducted a more extensive investigation. Case No 12 is a good example of this. In that case, OLAF asked the Commission for access to the whole dossier and to be able to contact the person in charge of the dossier. Such an approach should be the rule, not the exception.

75. Conversely, Case No 8 is an example of where more should have been done before deciding to dismiss the case. The case contains detailed allegations about members of the EU and potential conflicts of interest. However, OLAF did not contact the source in this case. Furthermore, Parliament was asked to provide information in the case, but the case was dismissed before OLAF received this information from Parliament. An open-source search was not carried out to examine the allegations in question. The legal analysis that OLAF carried out simply concluded, on a purely theoretical basis, that if the facts in the case were proven then an irregularity would have been committed. The case was not sent to any EU institution or to the institution concerned, nor was the source or the MS concerned informed about the final outcome.

76. In Case No 28, OLAF's opinion on the opening decision states that the source (a journalist) did not provide information 'on how the meeting was financed'. The case was dismissed and OLAF recommended: (i) asking the Parliament verify if the political party mentioned by the

³³ Cases Nos 1, 2, 3, 6, 13, 18, 19, 21, 33 and 35.

³⁴ The usual practice in the cases analysed shows good and timely cooperation. An additional question is whether the information requested meets: (i) the standards of objective verification of the allegations; and (ii) the standards required of a decision on whether to open the investigation. This will be analysed in the following paragraphs.



source actually financed this specific event; and (ii) opening a new selection case if Parliament found that the political party in question had indeed financed the event. The SC highlights that it is OLAF's responsibility (and not the responsibility of the source of information – Parliament in this case) to check whether EU funds are involved. In fact, in the same case, OLAF states: (i) that there is an open investigation being conducted by national authorities about similar allegations in the same country where the event was held; and (ii) that the European Parliament had previously raised doubts about the use of EU money in that case. Therefore, the lack of activities undertaken in this case risks undermining the principles of impartiality, independence and legal certainty.

77. In Case No 4, the selector raised the theoretical question in the opinion on the opening decision as to whether combining public and private activity 'would constitute an irregularity'. However, there is nothing in the case to suggest that this question was finally answered. The SC stresses that answering such a question, and verifying the validity of the relevant allegations, is by definition the very purpose of the selection procedure. Finally, the SC notes that only a few decisions to dismiss a case make explicit reference to an internal consultation with OLAF's Intelligence or Internal Unit. None of the cases analysed contain a recommendation to forward the information on a dismissed case to another unit because of other, related ongoing investigations. This lack of internal coordination can lead to different decisions for similar or connected cases. The SC stressed in its Opinion No 2/2014 that it was important as a matter of transparency to improve internal consultation and the exchange of information between Unit 0.1 and the investigation (and investigation support) units³⁵. As pointed out in that Opinion, when a case is dismissed, the information held (sometimes exclusively) by Unit 0.1 may still be of interest for the investigation units (e.g. to detect new fraud methods). These units could also sometimes provide, thanks to their expertise, useful feedback for the selection unit and thus increase the efficiency of the selection process. Moreover, in its recent Opinion No 2/2017, the SC: (i) pointed out the need to strengthen the selection process; and (ii) made consistent use of OLAF staff members who are experts in the relevant fields in OLAF's investigation and support units³⁶. The SC is of the opinion that those internal consultations and exchanges of information should always be kept in the case file.

³⁵ Recommendation number 9, Opinion N02/2014.

³⁶ See in particular, paragraph 15 of the Opinion, at https://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2_2017.pdf.



Recommendation 4:

OLAF should improve the effectiveness of the planned activities that aim to verify the validity of the allegations raised.

In particular, the Director-General of OLAF should carry out all necessary activities provided for by the OLAF Regulation and OLAF's internal rules in a systematic and consistent way.

Recommendation 5:

In order to strengthen internal consultation and the exchange of information between Unit 0.1 and the relevant investigation and support units, the OLAF Director-General should ensure that the case file (OCM) contains records of whether such consultations and exchanges have taken place or not.

7 RELIABILITY, CREDIBILITY AND OLAF COMPETENCE

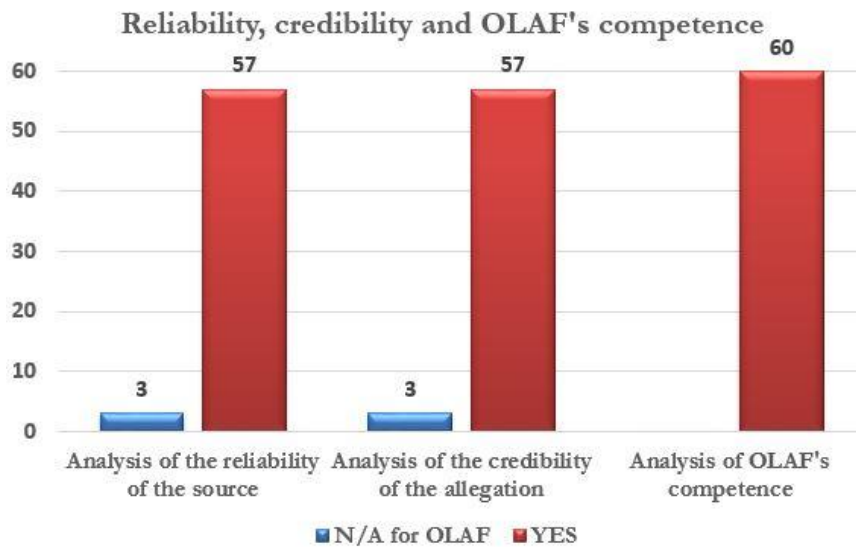


Figure 6

78. In all the 60 dismissed cases that were analysed, OLAF carried an analysis of its power to act. In 57 of these cases, the reliability of the source and the credibility of the allegations raised were also assessed by OLAF (in the 3 remaining cases, no such assessment was carried out since OLAF was not competent to act).



79. In its Opinion 2/2014 (Recommendation No 8) the SC recommended that OLAF draw up ‘concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions’. The SC acknowledges the improvements made by OLAF in assessing the reliability of the source and the credibility of the allegation raised in all cases where OLAF was competent to act. However, OLAF has not yet drawn up measurable indicators for making these assessments.

8 JUSTIFICATION FOR DISMISSING CASES: LACK OF A CONSISTENT APPROACH

80. Almost half of the cases analysed related to Members of the European Parliament (MEPs). There are recurrent allegations about payments and the duties that MEPs must perform. However, despite the similarities of the issues raised in those cases, the SC finds that there was no systematic and consistent approach in the way that OLAF dealt with them.

81. Moreover, the SC has identified several cases related to local parliamentary assistants (LPAs). The main issue with LPAs is that their contract of employment or service-provider contract is governed by private law. This means that these contracts are concluded directly with the MEP, and subject to national law. Therefore, allegations about MEPs’ expenses (paid for by the EU budget) for activities of LPAs that are not linked to an MEP’s parliamentary mandate, are (in the view of the selectors): (i) difficult to investigate under OLAF’s powers; and (ii) even more difficult to verify during the selection phase. As a selector stated in one such case, without proper investigation into the professional background and political activities of the local assistant and the MEP, it is not possible to confirm or deny the allegations.

82. Given these limitations, the SC agrees with OLAF that the only possible solution in such circumstances is to dismiss the case and send all the relevant information to the MS concerned and Parliament. However, the best solution would be to grant OLAF the power to investigate this type of recurrent allegations.

Finding: There is a lack of consistency in the handling of opened and dismissed cases – comparison of two open cases.

83. The cases analysed revealed that OLAF’s practice in this field varies widely from one case to another. In two cases, (Nos 27 and 44), the selector proposed to send the institution and MS concerned the decision to dismiss the case. However, in many other cases (Cases Nos 43, 45, 46, 47, 49 and 50) this decision was only sent to Parliament. In one instance (Case No 55)



notification that the case was dismissed was not sent to anyone³⁷. If OLAF is not in a position to conduct a proper investigation, the SC is of the opinion that the information collected and the opinion to dismiss the case should always be sent to the EU institution and the MS concerned. Therefore, the SC finds there is a lack of consistency in the way the cases are dismissed (sometimes a notification is sent, but sometimes no notification is sent).

84. The SC notes that a different approach was applied in two other open cases that raised similar issues (Case Nos 61 and 62³⁸). In those cases, OLAF considered that it was well-placed to investigate. The SC stresses that it is not up to the SC to decide whether a case should have been dismissed or instead transferred to another authority better placed to deal with it. However, the fact remains that similar cases should be treated in a consistent way to guarantee transparency and legal certainty. In this way, OLAF will be more impartial and independent.

Recommendation 6:

OLAF should apply a consistent approach when sending information to Member States and IBOAs concerning dismissed cases involving members of the EU institutions.

In particular, if OLAF is not in a position to conduct a proper investigation, the information collected and the opinion to dismiss the case should always be sent to the EU institution and MS concerned.

³⁷ According to the case file the information in the case contained insufficient corroborating or identifying elements to justify inform anyone. However, OLAF did not appear to have carried out certain basic activities (ie, requesting copies of contracts, payments etc.) that would have enabled it to reach such a conclusion.

³⁸ 2 of the 4 open cases concerning members of the European Union. See footnote 14.

9 NOTIFICATION AND TRANSMISSION OF THE DECISION TO DISMISS A CASE

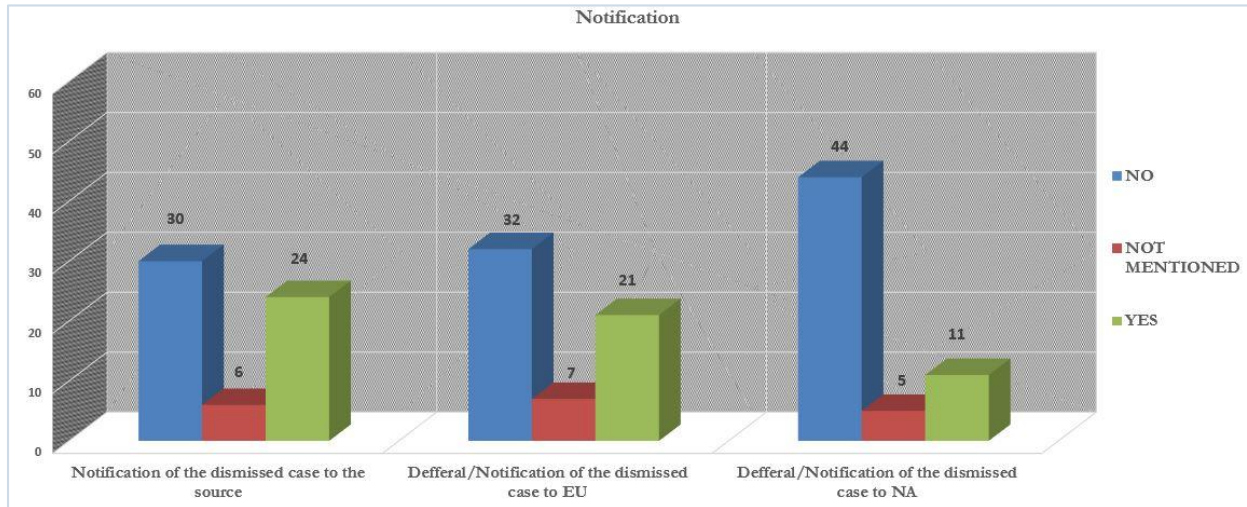


Figure 7

85. The OLAF Regulation and the GIPs distinguish between information sent to the source about a dismissed case, and informing the source about the decision to dismiss a case. In particular, once the Director-General has decided to dismiss a case, the OLAF Regulation gives the Director-General the option (Article 5(5)) to send any relevant information to the IBOA concerned for appropriate action to be taken (the OLAF Regulation says that the Director-General ‘may’ send this information). In addition, the GIPs state that OLAF’s Investigation Selection and Review Unit (Unit 0.1) ‘may’ inform the source of the Director-General’s decision to dismiss a case. However, when the source is an IBOA or a national authority, Unit 0.1 should ‘where necessary’ inform the IBOA or national authority of the decision to dismiss the case (Article 7 of the GIPs).
86. This discretionary power should be balanced by a systematic and consistent methodology by OLAF for the sake of transparency, impartiality and independence. The notification and information-forwarding processes should be handled in a consistent and systematic way. If they are not handled in this way, then the SC is unsure what criteria OLAF uses to decide to: (i) inform the source about a case being dismissed; or (ii) send information to the source because it is relevant for further appropriate action to be taken. In particular, when a case is dismissed, OLAF does not always refer in the opinion on opening decision to the actions to be taken and the reason for these actions.
87. The SC notes that no information was sent or notified to anyone in 22 dismissed cases. For the sake of transparency, such situations should be avoided, as they deprive the EU institutions and/or the Member States concerned of the possibility to use that information for further



action. In its Opinion No 2/2017³⁹, the SC concluded that the EU legislator ‘needs to solve this problem’ as part of the future amendment of the OLAF Regulation.

88. In the light of these considerations, the SC reiterates its former recommendation made in its Opinion No 2/2017 that the OLAF Director-General should regularly inform the SC ‘of his reasoned decision not to open an investigation’ and of the actions that OLAF takes after this decision⁴⁰. The SC has included this proposal in a note sent to the Commission, Parliament and Council on the proposed revision of the OLAF Regulation (the note said that ‘the Director-General shall inform the Supervisory Committee indicating the reasons of the decision’)⁴¹.
89. On the information sent to the source, the SC is of the opinion that, as a matter of transparency and good administration, the person and entities who provided the initial allegations should in principle be informed about actions taken (and that they should also be informed even if no actions are taken). The decision not to inform the source can be justified when a decision has been taken to open the case and OLAF needs to protect its investigative process. However, failing to inform the source is not justified when a case is dismissed. That said, the SC agrees that not informing the source could be reasonable in some cases, for instance, when the source is unknown (as in 30 out of the 60 cases). However, when the source is known, OLAF should inform the source or explain why this is not done (in 8 cases that was not the case). As the SC stated in its Opinion No 2/2017, this may lead to a real risk of loss of information and/or impunity of offenders.
90. When information is forwarded to a MS or IBOA, the SC considers that OLAF should closely follow-up on – and be informed of – any actions taken by them. This is especially necessary when OLAF considers that the MS or IBOA were better placed to deal with a dismissed case than OLAF. This will enable OLAF to provide further meaningful assistance to the MS or IBOA if needed.
91. The SC acknowledges that after the adoption of the Selection Handbook in June 2018, OLAF handles the notification to the source in a more consistent way.

³⁹ Paragraph 14 of the Opinion No 2/2017 Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19) http://europa.eu/supervisory-committee-olaf/sites/default/files/sc_opinion_1_2017_olaf_budget.docx.pdf.

⁴⁰ See Opinion No 2/2017, p. 11.

⁴¹ Note on comments to the amendment of the OLAF Regulation (ref. ARES(2018)5952021. Proposal for a new Article 5(7) including this obligation).



Recommendation 7:

To increase transparency and promote good administration, OLAF should clearly explain in its decision to dismiss a case whether it intends to inform – or send the dismissed case to – the relevant source.

In particular, the Director-General of OLAF should:

- a) make the required amendments in its vademecum about the opinion on opening decision to ensure that justification is provided for: (i) why the source may or may not be notified; and (ii) why information should or should not be sent to EU institutions and national authorities.
- b) avoid situations where, at the end of the decision-making process, no one is informed about a dismissed case.

Recommendation 8:

Regulation No 883/2013 should be amended to make it clear that the Director-General of OLAF should regularly inform the SC of his reasoned decision not to open an investigation.

In the meantime, the Director-General of OLAF should regularly inform the SC of the Director-General's decision not to open an investigation, and of those cases where neither the source nor the IBOA nor the Member State concerned has been forwarded the dismissal decision.

10 EPPO AND DISMISSED CASES

92. The SC continues to assess the impact that the establishment of a European Public Prosecutor's Office (EPPO) could have on OLAF. The different standards (administrative and criminal) could create some issues in aligning the procedures when OLAF exercises its powers. However, the SC considers that the procedure and rules in dismissing a case should be similar. The SC therefore considers that, when the EPPO decides that there are no grounds to initiate an investigation, it should inform: (i) the authority that reported the

SUPERVISORY COMMITTEE



criminal conduct; (ii) the victims of the crime; and (iii) other persons who reported the criminal conduct (if this is provided for by national law)⁴².

93. The SC considers that, for the sake of consistency, OLAF should also make it a general rule to inform MS, IBOAs and other complainants of its decision to dismiss a case.

⁴² Article 24.7 of the EPPO Regulation.

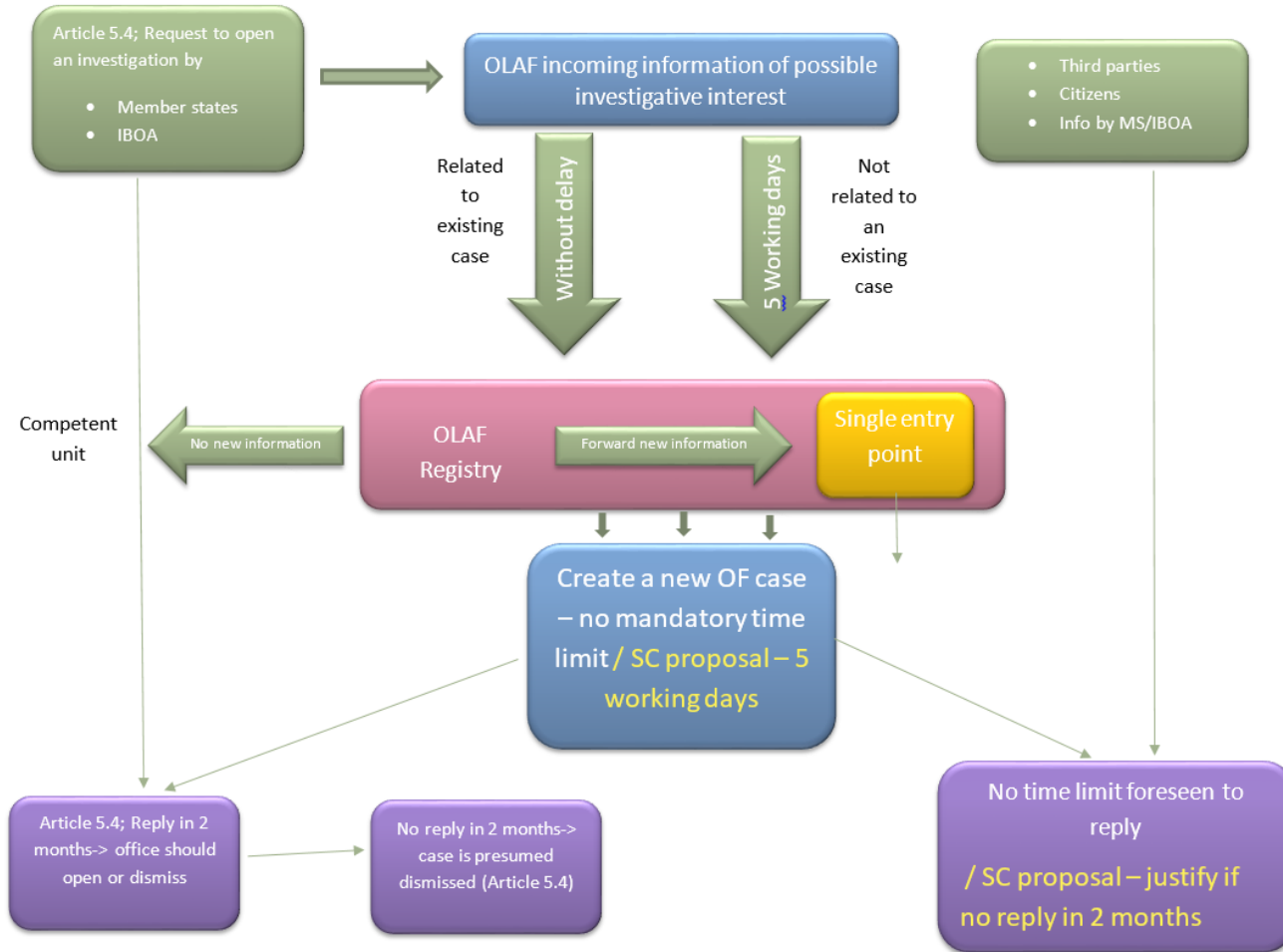


ANNEX I. LIST OF ABBREVIATIONS

EC.....	European Commission
EP.....	European Parliament
EPPO.....	the European Public Prosecutor's Office
GIPs.....	Guidelines on investigation procedures for OLAF staff
IBOAs.....	Institutions, bodies, offices or agencies
Unit 0.1.....	OLAF Investigation Selection and Review Unit
LPAs.....	Local parliamentary assistants
MEP.....	Member of the European Parliament
OLAF.....	the European Anti-fraud Office
SC.....	Supervisory Committee



ANNEX II. WORKFLOW





**ANNEX III. LIST OF OLAF CASES ANALYSED UNDER THE
OPINION – 60 DISMISSED CASES**

[Confidential]