

SUPERVISORY COMMITTEE



Safeguarding OLAF's investigative independence

Report from the Supervisory Committee of the European Anti-fraud Office (OLAF)

to

the European Parliament, the Council, the Commission and the Court of Auditors

(pursuant to Article 15(9) of Regulation No 883/2013)

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1. Introduction

1. The Supervisory Committee (SC) of the European Anti-fraud Office (OLAF) monitors the implementation of OLAF's investigative function, in order to reinforce its independence in the proper exercise of the competences conferred upon it by Regulation No 883/2013¹.
2. OLAF underwent major reforms in 2012 and 2013, when its organisational structure changed, and a new Regulation governing its activities entered into force. More changes are foreseen: the establishment of the European Public Prosecutor's Office (EPPO) would modify OLAF's role², whilst the proposed amendment of Regulation 883/2013, with a view to establish a Controller of procedural guarantees for OLAF³, would have an important impact on its functioning.
3. In the framework of its monitoring activities, the SC has analysed the likely impact of these changes on OLAF's investigative function and has identified a number of potential threats to OLAF's investigative independence and the SC's ability to reinforce it. The objective of this report is to present to the European Parliament, the Council, the Commission and the Court of Auditors, in accordance with Article 15(9) of Regulation 883/2013, the results of the SC's assessment and proposals for possible improvements.

2. OLAF's investigative independence

2.1 *Legislative proposal regarding the Controller of procedural guarantees*

4. On 11 June 2014, the Commission adopted a proposal to amend Regulation 883/2013, which foresees the creation of a *Controller of procedural guarantees*. He would review and provide recommendations on complaints lodged by persons concerned by OLAF investigations. He would also deliver a prior authorisation to OLAF, in cases where OLAF intends to inspect offices of members of EU institutions or to remove any documents or data from these offices.
5. This proposal follows the 2013 Commission Communication on *Improving OLAF's governance and reinforcing procedural safeguards*⁴ accompanying the legislative proposal on the establishment of the EPPO. The SC expressed its views on this Communication both in its position paper on "*Reinforcing procedural safeguards in OLAF*"⁵ and in its Opinion No 2/2013⁶. Nevertheless, the Commission did not include the SC in any preparatory work and its Secretariat did not participate in the Commission's

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 L 248, 18.9.2013, p. 1–22.

² Investigations into EU fraud or other crimes affecting the financial interests of the EU will be under the exclusive competence of the EPPO, while OLAF will remain responsible for administrative investigations in areas which do not fall within the latter's competence (i.e. irregularities affecting the EU's financial interests, and serious misconduct or crimes committed by EU staff without a financial impact).

³ COM(2014)340 final, 11.06.2014.

⁴ COM(2013)533 final, 17.07.2013.

⁵ October 2013 (see the text of this paper in the SC Activity Report 2013, Annex 6).

⁶ December 2013 (see the text of this Opinion in the SC Activity Report 2013, Annex 2).

Inter-service Consultation. Following a preliminary examination of the finalized draft proposal, on 28 May 2014 the SC expressed a negative position⁷.

6. The SC considers that the impact assessment misrepresented the SC's analysis and that the proposal contains provisions which may compromise the independence of the Director-General of OLAF (OLAF DG) and the inter-institutional balance. The SC has identified the following elements leading to its negative position:
 - The foreseen powers of the Controller and, in particular, his competence as an external body to prevent the OLAF DG from undertaking certain investigative measures, appear to compromise the investigative independence of OLAF, while at the same time overlapping with the current tasks of OLAF's Investigation Selection and Review Unit (in charge of, *inter alia*, carrying out the prior legality control of OLAF's investigative measures, including inspection of offices and seizures of documents and data).
 - The attachment of the Controller to the Commission, while he would authorize certain investigative measures concerning Members of the Commission as well as Members of other Institutions, may affect the inter-institutional balance necessary for OLAF to conduct internal investigations within and on behalf of all the EU Institutions with mutual trust and equal treatment.
 - Having authorized certain investigative measures, the Controller would have to then control his own decision if he received a complaint against OLAF concerning those measures. It is a clear case of an institutionalized conflict of interest.
 - The competences of the Controller appear to overlap with the competences of the SC (e.g. in cases where procedural guarantees are not respected due to excessive duration of investigations or to a violation of the independence of OLAF), without any possibility of cooperation. This would lead to a conflict of competences and an uncoordinated duplication of work.
7. The SC regrets that its concerns regarding the independence of OLAF and the SC's own competences were not taken into account by the Commission at all. The SC therefore now calls on the legislator to consider the SC's analysis of the Commission's legislative proposal: **the procedural solutions foreseen in the text are generally recommendable, but a new body to implement them would be redundant – the review of procedural guarantees should continue to be carried out by the SC (or a Controller within the SC), with additional competences set out in the legislative proposal, while a prior authorization of intrusive investigative measures should remain with a legal review unit in OLAF (or a senior Review Advisor) with additional safeguards and subsequent control by the SC.**

⁷ Letter addressed to the OLAF Director-General and to the Cabinets of the Commission, ref. Ares(2014)1756696 - 28/05/2014.

2.2 OLAF's participation in Clearing House meetings

8. A report recently launched by Transparency International (TI) on *The European Union Integrity System*⁸ highlights that the informal practice of holding bi-monthly "Clearing House" meetings between the OLAF DG and the Secretariat General of the Commission, where closed discussions are held on on-going OLAF investigations, may arguably pose "*a question on the genuine level of the Office's independence*" from the Commission, especially given that the SC has received no reporting whatsoever on these meetings. The TI report also underlines the fact that the absence of any form of monitoring of what information is divulged and the ways in which the exchange might influence the outcome of an investigation may put "*the independence of the Office at greater risk*". Finally, the report highlights the imbalance in OLAF's inter-institutional relationships due to the fact that such meetings take place only with the Commission and not with the other EU institutions.
9. The SC is very concerned by the lack of transparency of this practice and its inherent risks with regard to OLAF's investigative independence. The SC receives no information or reporting on these meetings and has the means neither to monitor the information provided by OLAF to the Commission, nor to ensure that this exchange of information does not influence the outcome of investigations.
10. While understanding that the aim of such meetings would be to enable the Commission to pre-empt media scrutiny of cases liable to attract public attention and be exposed⁹, the SC believes that this practice, if maintained, should be clarified and formalized by the Commission and OLAF. Moreover, appropriate guarantees should be put in place to ensure more transparency (on a need-to-know basis), to avoid possible undue influence on on-going investigations, to protect personal data (in particular of whistle-blowers) and to maintain the inter-institutional balance.
11. The monitoring of the "Clearing House" meetings could be carried out by the SC either on-the-spot (i.e. with the participation of an SC member as an observer in these meetings) or ex-post (i.e. monitoring by the SC of the cases discussed)¹⁰. In the absence of an agreement concerning the monitoring methods, the SC has called on OLAF to refrain from participation in the "Clearing House" meetings until a solution guaranteeing its independence is found.¹¹

⁸ http://www.transparencyinternational.eu/wp-content/uploads/2014/04/EU_Integrity_System_Report.pdf

⁹ See p. 162 of the report.

¹⁰ The SC's involvement, as an observer, either on-the-spot or ex-post, would offer all the required guarantees, since the SC Members are bound by the obligation of confidentiality and cannot intervene in on-going investigations, while at the same time they shall monitor developments concerning procedural guarantees and shall guarantee OLAF's independence.

¹¹ The SC decided to further assess this matter and, on 26 May 2014, sent a request for information to the OLAF DG, who replied on 27 June 2014 and provided the SC with general explanations on the meetings. He also stated that any request for information on the organisation of Clearing House meetings should be referred to the Secretariat-General of the Commission, since the Commission is the organiser of such meetings.

2.3 OLAF's activities related to the cigarettes sector

12. OLAF is responsible for coordinating and developing the Commission's policy related to the fight against illicit trade in tobacco products, covering in particular the relations with the cigarettes manufacturers with which the EU and the Member States have concluded international agreements. Under those legally binding and enforceable agreements with the world's 4 largest tobacco manufacturers, they agree, *inter alia*, to pay a collective total of \$2.15 billion to the EU and countries participating in the agreement. OLAF manages the implementation of those agreements, but, at the same time, OLAF conducts investigations into the illicit trade in cigarettes and other tobacco products.
13. The SC is concerned that this mixture of tasks could create some confusion as to the roles that OLAF could play in the fight against fraud at the EU level in the cigarettes sector¹². Therefore, the SC wonders if the implementation of the Commission's policy with regard to the cigarettes sector should continue to be carried out by OLAF and invites the institutions to give further consideration to this matter.

2.4 Recruitment procedures in OLAF

14. Unlike other Directors-General of the Commission, the OLAF DG exercises, with regard to OLAF staff, the powers of the appointing authority and of the authority empowered to conclude contracts of employment delegated to him (AIPN)¹³. However, the senior management is appointed by the Commission. Therefore, in order to ensure OLAF's independence vis-à-vis the Commission, it was agreed in the past that a member of the SC would participate in the recruitment procedure of OLAF senior managers.
15. Following OLAF's reorganisation, certain Heads of Unit were granted high-level responsibilities, which are comparable to those of senior managers¹⁴. Therefore, and also for reasons of general consistency, the SC is of the opinion that it should participate, at least as an observer, in the recruitment procedure of both senior and middle managers, in order to ensure the independence of the OLAF DG and to assist him in the discharge of his responsibilities as the AIPN. The SC's participation should be formalized.

¹² The SC decided to further assess this matter and, on 22 May 2014, sent a request for information to the OLAF DG, who replied on 6 June 2014. On 20 June 2014, the SC asked for access to a sample of cases. At the time of the adoption of this report, such access had not been granted.

¹³ Article 6(1) of the Commission Decision 1999/352/EC, ECSC, Euratom establishing OLAF, as amended by the Commission Decision 2013/478/EU of 27 September 2013.

¹⁴ It is the case for the Head of the Investigation Selection and Review Unit, who reports directly to the OLAF DG. The unit provides opinions on the basis of which the OLAF DG takes decisions on the opening or dismissal of cases, on the main investigative activities, on the final report and on the recommendations and is thus involved in the whole lifecycle of OLAF cases. Also the Head of Human Resources and Budget Unit reports directly to the OLAF DG and plays a role more similar to that of a senior manager.

3. The Supervisory Committee's ability to reinforce OLAF's investigative independence

16. The SC is the only body entitled to monitor OLAF's investigative function. As such, it is the SC's role to ensure that no undue pressure affects OLAF's independence in the opening, conducting and closing of an investigation, that fundamental rights and procedural guarantees of persons involved are respected and that investigations are conducted properly.
17. To that end, the SC needs a clearly defined mandate and powers, as well as an independent structure to execute them. In order to carry out its monitoring function properly, the SC has identified a number of conditions that should be satisfied. These conditions include, in particular, proper access to case related information and the requirement that practical organisation of supervision must be decided by the supervising body (the SC), not by the supervised body (the DG or the staff of OLAF). Moreover, the independent functioning and proper staffing of both the SC and its Secretariat must be ensured, and the SC's control over its own budget, including the expenses of the Secretariat, must be guaranteed.

3.1 Supervisory Committee's role

18. Regulation 883/2013 clarified, to a certain extent, the SC's role and mandate¹⁵, in particular the fact that the SC is no longer responsible for carrying out any *prior* control of OLAF's investigations. However, it seems that a longstanding confusion still persists as to the SC's role with regard to the monitoring of individual OLAF cases. On different occasions, both the Commission and the Council expressed the view that the SC should not interfere with individual cases and should limit its task to a general monitoring of OLAF's activity in order to identify systemic problems in its functioning¹⁶. Moreover, the SC's power to issue formal opinions on individual cases was challenged by the OLAF DG¹⁷.
19. On the basis of its long-lasting monitoring experience, the SC must underline that monitoring of an investigative function cannot be properly carried out without the examination of individual cases. The SC has consistently carried out analyses of a significant number of individual case files as well as has issuing opinions on individual cases, either at the request of the OLAF DG¹⁸ or on its own initiative¹⁹.

¹⁵ The SC's role is to regularly monitor the implementation by OLAF of its investigative function, in order to reinforce its independence. The SC's tasks include, *i.a.*, monitoring developments concerning the application of procedural guarantees and the duration of investigations (Article 15 of Regulation 883/2013).

¹⁶ See the Analysis of Impacts accompanying the document "Proposal for a Regulation of the European Parliament and of the Council Amending Regulation No 883/2013 as regards the establishment of a Controller of procedural guarantees", {COM(2014) 340 final}. The Commission claimed also that the SC "is not mandated (...) to examine the respect of fundamental rights in individual cases" (see Commission's Memo No 14/409 of 11 June 2014, "OLAF Reform and the new Controller of Procedural Guarantees: Questions and Answers", p. 3).

¹⁷ Regarding SC's Opinion No 2/2012.

¹⁸ On 15 April 2011 the OLAF DG requested an Opinion from the SC on the scope of OLAF's powers in conducting an internal investigation with regard to certain MEPs suspected of corruption (see SC's Opinion No 2/2011).

¹⁹ Opinion No 2/2012.

20. The SC would also point out that Article 15 of Regulation 883/2013 clearly does not preclude it from examining or delivering opinions on individual cases, provided it does not interfere with the conduct of investigations *in progress*.
21. Only by thoroughly examining individual cases, is the SC 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. Examination of complete files of individual cases or of their representative samples is indispensable for understanding and evaluating OLAF's investigation methods, for scrutinizing 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. The monitoring of individual cases is also essential for drawing systemic or generic conclusions and identifying possible systemic deficiencies in the investigative function of OLAF.
22. Moreover, since the SC's duties include assisting the OLAF DG in discharging his responsibilities, the examination of individual case files allows for specific and general conclusions and recommendations to be drawn which may then be communicated to the OLAF DG and, where necessary, to the relevant EU institutions. It also makes possible the swift communication both of the results of the SC's work and any potential problems uncovered. As a consequence, it allows the OLAF DG to react promptly to risks and to take the appropriate measures to improve OLAF's investigative activities.
23. If, on the one hand, the SC access to individual case files were to be restricted (as is the current unjustified practice of OLAF²⁰) and, on the other hand, a Controller of procedural guarantees were established as separate from the SC, then significant *lacunae* in the supervision of OLAF would be created. Such a Controller would not be competent to control cases where no complaints were lodged²¹ or no prior authorisations were required. At the same time, the SC's monitoring of "developments" of the application of procedural guarantees and of the duration of investigations would become completely illusory without the possibility to verify the necessary information within an individual case file.
24. **Therefore, the SC calls on the EU institutions to clarify the SC's role and mandate, in particular with regard to the SC's monitoring of individual cases.**

²⁰ See point 3.2 of this report.

²¹ Cf. Recommendation N° 3 in Annex 7 of the SC Activity Report for 2013 which refers to a situation where certain persons are not aware that their fundamental rights to protect personal data have been seemingly infringed.

3.2 *Supervisory Committee's access to case-related information*

25. On 14 January 2014, the SC and OLAF concluded *Working Arrangements* creating a structured framework for transmission of information on OLAF's investigative activity. Unfortunately, OLAF has implemented them in such a manner as to even further reduce the scope of information provided to the SC²². Moreover, as of 13 June 2014, OLAF has cut the SC Secretariat's access to the search engine in the OLAF Case Management System, limiting even access to statistical metadata.
26. Since concluding the Working Arrangements, which aimed to facilitate the transfer of information, the SC has **received no access** to any case files despite several justified requests and reminders. The OLAF DG has even questioned the SC's competence to review specific categories of cases. The SC considers this to be a violation not only of the Working Arrangements, but also of Regulation 883/2013²³.
- 27. Consequently, the SC is currently unable to carry out a proper supervision of OLAF's investigative function. The SC is effectively prevented from reinforcing OLAF's independence, from monitoring the respect for procedural guarantees, from monitoring the proper and efficient conduct of OLAF's investigations, from assisting the Director-General in the discharge of his functions and from providing the Institutions with the relevant reporting.**
28. The SC would point out that its difficulties in obtaining access to case files have not only undermined the effectiveness of its supervisory role, but have also raised doubts of the civil society as to the practical existence of any oversight of OLAF's investigative activities²⁴.
29. OLAF's supervision would have to be considered as insufficient or even illusory, if the SC were reduced to carrying out its monitoring tasks exclusively on the basis of some statistical information. As a prerequisite, the guarantee of OLAF's independence requires the detection of instances of potential undue influence on its investigations. The SC cannot ascertain this conclusively in the absence of proper access to investigative case files²⁵. Only the unrestricted and thorough examination of OLAF case files, with assistance and necessary explanations from OLAF investigators and managers, may allow the SC to properly fulfil its mission.
- 30. Therefore, the SC is concerned about the functioning of the Working Arrangements with OLAF and calls on the EU Institutions to ensure that the SC is able to carry out its mission effectively with appropriate and sufficient competences, in particular, through full access to OLAF case files.**²⁶

²² The information provided by OLAF is limited to lists, statistics and summary reports, which contain very little or no substantial information on OLAF's cases.

²³ Paragraph 5 of Article 15(1).

²⁴ Transparency International report, http://www.transparencyinternational.eu/wp-content/uploads/2014/04/EU_Integrity_System_Report.pdf p. 170.

²⁵ Id., p. 163.

²⁶ Id., second recommendation p. 158.

3.3 Replacement of Supervisory Committee's members

31. Under the current rules²⁷, the SC members are replaced, in the event of resignation, for the remainder of their term. In practice, this results in much shorter mandates for the replacement members (possibly even just a few months), despite the fact that they are selected from among highly qualified experts, in a complex procedure by common accord of the three Institutions and without the possibility of reappointment.
32. To avoid a waste of time and effort for the Institutions and the loss of high-level expertise in the SC, the Committee would propose that the EU legislator guarantee the full term of office also for the replacement SC members. The SC would point out that its current members began their respective mandates on different dates, meaning that these differences would naturally ensure the staggered renewal of the SC membership.

3.4 Independent functioning of the Supervisory Committee and of its Secretariat

33. The SC has an inter-institutional character, as a result of both the appointment procedure of the SC Members and the SC's mandate and tasks. In addition to the guarantees for independence of the SC itself, Regulation 883/2013 calls for OLAF to ensure also the independent functioning of the SC's Secretariat²⁸, on which the SC relies in the discharge of its duties.
34. The Transparency International Report on the *EU Integrity System* rightly underlined the potential risks of conflict of interest that might arise from the fact that the OLAF DG serves as the appointing authority for the staff of the SC Secretariat, authorises the Secretariat's expenses and may transfer unused funds from the annual budget of the SC back into the general OLAF budget, which could be ultimately "*a financial incentive for limiting the independence*" of the SC²⁹.
35. The SC addressed recommendations to the OLAF DG³⁰ with the purpose of ensuring the independent functioning of the SC Secretariat - as a precondition for the independence and effective functioning of the SC itself. The SC recognizes the progress made with regard to the number of staff and implementation of the SC Secretariat budget. The SC proposes that the current practice be formalized in the establishment plan and the independence of the Secretariat further reinforced in the area of appointment and especially promotion of the SC Secretariat staff which is still decided exclusively by the OLAF DG.

²⁷ Regulation 883/2013, Article 15(2).

²⁸ Recital 40.

²⁹ Page 163.

³⁰ Opinions 1/2012 and 1/2013.

4. Conclusions

36. On the basis of the considerations presented in this report, the Supervisory Committee of OLAF invites the EU Institutions to further reinforce the independence of OLAF and the effectiveness of its supervision through the following measures:

- (A) **Amendment and adoption of the legislative proposal on the *Controller of procedural guarantees*, so that the control of the respect of procedural guarantees in on-going, closed or dismissed cases be exercised within the Supervisory Committee and/or under its supervision;**
- (B) **Amendment and adoption of the legislative proposal, so that the legality check in OLAF, in particular concerning the invasive investigative measures, is reinforced and formalized;**
- (C) **Confirmation of the SC's mandate to monitor the proper conduct of individual OLAF cases;**
- (D) **Confirmation of the SC's right of access to OLAF case files;**
- (E) **Clarification of the relations between OLAF and the Commission, in particular with regard to the practice of the "Clearing House" meetings and of OLAF's role in the implementation of the Commission's antifraud policy in the cigarettes sector;**
- (F) **Guaranteeing transparency of OLAF's human resources policy by formalizing the SC's participation in OLAF management selection panels;**
- (G) **Rationalization of the replacement of the SC members by appointing the members from the reserve list for a full term of office;**
- (H) **Ensuring the independent functioning of the SC Secretariat by formalizing the delegation of both budgetary and human resources powers.**

Brussels, 2 July 2014



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Committee