



Opinion No 2/2015

Legality check and review in OLAF

The Supervisory Committee analyzed the legality check and review conducted in the course of investigative activities of OLAF, paying particular attention to the respect of procedural guarantees and fundamental rights. The high qualifications of the personnel allocated to this area are acknowledged, however, OLAF must also ensure the availability of staff with an expertise in the domain of each of the legal systems of all the Member States. Constructive relations between the investigators and reviewers have contributed to date to the quality of the legality check and review activities and should, therefore, be encouraged. A system for both the recording of crucial reviewers' suggestions as well as their implementation should be introduced. Ultimately, the Supervisory Committee welcomes OLAF's efforts to comply with requirements concerning fundamental rights and procedural guarantees, with the proviso that further improvement of the mechanism be put in place in certain areas. A set of best practices to be developed could serve to this end.

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INTRODUCTION	3
1 PURPOSE AND SCOPE OF THE OPINION	4
2 METHODOLOGY.....	4
THE RESOURCES ALLOCATED TO THE LEGALITY CHECK AND REVIEW FUNCTION	5
1 STAFF NUMBER AND WORKLOAD.....	5
2 LEGAL EXPERTISE.....	5
3 PROCEDURES AND WORK-FORMS	6
THE LEGALITY CHECK AND REVIEW PROCESS	8
1 SCOPE OF THE REVIEW ACTIVITIES	8
2 REACTION TIME OF THE ISRU	9
3 EFFECTIVENESS OF THE LEGALITY CHECK AND REVIEW ACTIVITIES	10
4 COOPERATION WITH THE INVESTIGATION UNITS	12
5 FOLLOW-UP TO THE REVIEWERS' COMMENTS.....	13
6 LEARNING FROM THE REVIEW FINDINGS	14
CONCLUSIONS AND RECOMMENDATIONS	14



INTRODUCTION

1. Regulation No 883/2013¹ requires that the Director-General (DG) of the European Anti-fraud Office (OLAF) "put in place an internal advisory and control procedure, including a legality check, relating, *inter alia*, to the respect of procedural guarantees and fundamental rights of the persons concerned and of the national law of the Member States concerned (...)"² and adopt guidelines for the staff which shall cover details of this procedure³.
2. The task to carry out this internal legality check has been assigned to the Investigation Selection and Review Unit (ISRU)⁴. It works on the basis of the Guidelines on Investigation Procedures for OLAF Staff (GIP)⁵ and performs legality checks of the investigative activities to be carried out and legality reviews of the activities undertaken⁶. The ISRU is part of the investigative function of OLAF, but operates independently under the direct supervision of the OLAF DG.
3. In addition, the Regulation entrusts the Supervisory Committee (SC) of OLAF with the task of "monitoring developments concerning the application [by OLAF] of the procedural guarantees"⁷, which it carries out on the basis of information provided by the OLAF DG.
4. The Regulation has therefore put in place a two-layered control mechanism over the application of procedural guarantees in OLAF: a control mechanism (the ISRU and ultimately the OLAF DG) and a monitoring mechanism (the SC), aimed at ensuring that OLAF conducts its investigations in full respect of the rights and procedural guarantees of persons concerned.

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.

² Article 17(7). Recital 47 of the Regulation foresees an "internal advisory and control *mechanism*, including a legality check, with particular reference to the obligation to respect the procedural guarantees and fundamental rights of the persons concerned and the national law of the Member States concerned" (emphasis added).

³ Article 17(8).

⁴ During the investigation stage, the ISRU provides opinions on the legality, necessity and proportionality of the main investigative activities requiring prior authorisation by the OLAF DG; before the closure of an investigation or coordination case, the ISRU reviews the final report and recommendations.

⁵ The GIP entered into force on 1 October 2013 and replaced the Instructions to Staff on Investigative Procedures (ISIP).

⁶ See Articles 12 and 21 of the GIP.

⁷ Article 15(1).



Purpose and scope of the Opinion

5. This Opinion aims at examining the functioning of the internal advisory and control mechanism established within OLAF to ensure compliance with the rights and procedural guarantees of the persons involved in its investigations. The SC focused its monitoring activities on the review function of the ISRU⁸, to evaluate whether OLAF (i) has put in place appropriate and sufficient resources and tools and (ii) has ensured proper functioning of the review activities in order to achieve their objective. To that end the SC looked into the resources allocated to the ISRU to carry out its review function and analyzed the functioning of the review process.

Methodology

6. The SC's review is based on the analysis of:
 - (a) background documentation and information concerning the ISRU's review activities provided by OLAF, upon the SC's requests, including the former Instructions to Staff on Investigative Procedures (ISIP), the GIP, the related work forms and a "Starter Kit"⁹ provided to the reviewers,
 - (b) a sample of the ISRU's opinions on proposed investigative activities or on requests to extend the scope, reclassify, split or merge a case and on final reports and recommendations and, where necessary, of other relevant documents related to the review process (requests for authorisation from the investigation units, authorisations issued by the OLAF DG and decisions taken on the basis of the ISRU's opinions in 60 cases)¹⁰,
 - (c) the complete case-files of a randomly selected sample of 42 closed investigation and coordination cases,
 - (d) interviews conducted with individual staff members of the ISRU and of investigation units, as well as with their respective Heads of Unit¹¹.
7. This analysis takes into account the applicable legal provisions and instructions to staff, namely Regulation No 883/2013 and the GIP (both of which entered into force on 1 October 2013), as well as the former Regulation No 1073/1999 and the ISIP.

⁸ The results of the SC examination of the selection function of the ISRU and the subsequent recommendations to the OLAF DG are presented in the SC's Opinion 2/2014 on *Case Selection in OLAF*, published in the SC's 2013 Activity Report as Annex 4.

⁹ The "Starter Kit" contains, *inter alia*, general guidelines for selection and review.

¹⁰ These opinions and the other documents were issued in 60 OLAF cases closed before and after the entry into force, on 1 October 2013, of Regulation 883/2013.

¹¹ The SC produced a Memorandum of the Interviews with the ISRU and the investigative Units, transmitted to OLAF for information and possible feedback. All relevant comments by OLAF [Ref. Ares(2015)3654794-4/9/2015] have been taken into account and, where necessary, are reflected in the text of this Opinion.



THE RESOURCES ALLOCATED TO THE LEGALITY CHECK AND REVIEW FUNCTION

8. The issue of sufficient resources - either human or material and procedural - is a key element to enable the ISRU to efficiently carry out its duties. The SC's analysis of this aspect aimed therefore at determining whether the resources put at the ISRU's disposal to review investigative activities were adequate and sufficient to allow the review mechanism to function properly and achieve its underlying objectives.

Staff number and workload

9. Since the creation of the ISRU in 2012, the number of reviewers varied from 9 reviewers in 2012 and 11 in 2013 to 8 reviewers in 2014¹². At the end of 2014, the unit numbered 6 staff members carrying out reviews, representing 4 full time equivalents (FTE)¹³. Some of them continue to exercise review tasks in combination with other tasks (in particular, selection of cases and this mainly for linguistic reasons). In addition, their work appears to be seasonally dependent, with peaks of activity before the summer break and at the end of the year.
10. The SC asked OLAF for relevant statistical information on the number of opinions issued by the ISRU broken down by type of opinion and sector of activity, as well as on the number of reviews per reviewer and per month. In reply, OLAF informed the SC that this information was not available since its current database for operational information (Case Management System) does not capture such data, and extracting it on a case by case base would entail time-consuming manual tasks¹⁴.
11. In the absence of that statistical information, **the SC was not able to draw an accurate conclusion with regard to the reviewers' workload and to assess whether their number is sufficient**, but only to note that their number has decreased in 2014, while at the same time OLAF reported, for the second year in a row, a high number of investigations opened¹⁵. Moreover, the fact that some of the reviewers are still exercising selection tasks is a sign that appropriate (mainly linguistic) expertise - as far as the selection function of the ISRU is concerned - is still not at a level necessary to ensure best results.

Legal expertise

12. As it appears from information provided by OLAF, law studies as well as appropriate working experience as prosecutors, criminal law judges or criminal investigators figure in the curriculum vitae of all the reviewers. They have also followed a number of training courses considered to be relevant for their tasks. The SC therefore notes that

¹² Cf. information provided by OLAF, Ref. Ares(2014)1890929 – 10/06/2014.

¹³ Cf. information provided by OLAF, Ref. Ares(2014)3391990 – 14/10/2014.

¹⁴ Ref. Ares(2014)1890929 – 10/06/2014.

¹⁵ In 2014, OLAF opened 234 investigations. Altogether, 474 investigations were ongoing as of the end of 2014 (cf. OLAF Report 2014, p. 15 and 17). It would mean that taking into account the situation at the end of 2014, statistically, one (FTE) reviewer was responsible for a legal review of all the relevant investigative activities in over 118 ongoing investigations, on average, per year.



all the reviewers have relevant educational and professional backgrounds as well as a high level of expertise.

13. However, it appears - from the ISRU's opinions examined by the SC - that checks of compliance with national law are limited mainly to verifying whether the Final reports mention the relevant provisions of the national law of the Member State concerned. Given the reduced number of reviewers, it does not appear that their legal expertise can fully cover the various legal systems of all Member States, so as to allow them to check not only the *existence* of a reference to relevant national law in the Final reports, but *compliance* with it *per se*.¹⁶
14. To compensate for this the reviewers have the possibility to consult, on an informal basis, a network of in-house law specialists, scattered throughout the various units. In addition, OLAF established "country mini-profiles", detailing the relevant provisions of criminal law applicable in each of the Member States (containing definitions of financial crimes, applicable sanctions, and prescription periods). However, the SC fears that the additional measures adopted (such as an informal in-house network or the country mini-profiles) are not sufficient to compensate for the unit's overall lack of expertise in the area of the national laws of all the 28 Member States.
- 15. The fact that the ISRU's legal expertise is not of a scope to cover the legal systems of all the Member States is a matter of concern for the SC¹⁷. As long as the ISRU's legal expertise does not cover all the Member States, the objective of ensuring compliance with the national laws and admissibility of OLAF's reports and evidence gathered by it cannot be entirely fulfilled.**

Procedures and work-forms

16. The reviewers work on the basis of the GIP and a number of other guidelines for reviewers included in a "Starter Kit". The consultation process between the ISRU and the investigation units in cases where a negative opinion on the Final report and recommendations is envisaged is formalized in the GIP, while the same process with regard to the opinions on investigative activities during the investigation is described only in the Starter Kit.
17. While Articles 12 and 20 of the GIP provide the practical framework for the procedure to be followed by the ISRU to carry out its review activities, the results of the legality

¹⁶ See though information provided by OLAF, Ref. Ares(2015)3654794-04/09/2015, on para 16 of SC's "Memorandum of interviews with the ISRU and the investigative Units".

¹⁷ Already in its 2012 Activity Report, the SC "identified shortcomings in the implementation by OLAF of this control procedure" and "in the legality check area", in particular in relation to the respect of the applicable national rules (cf. Annex 3, sections 2 -3). In October 2013, the SC adopted a position paper on Reinforcing procedural safeguards in OLAF (cf. 2013 Activity report, Annex 6) in which it argued for the necessity of establishing a strong, dedicated judicial unit within OLAF, consisting of national magistrates who would provide the Director-General with "independent and formal legal advice" also in the area of the national laws of all the Member States (cf. para 18). For further SC recommendations concerning the reviewers in the ISRU, check also SC Opinion No 2/2014 on Case Selection in OLAF, in particular Recommendations 2 and 12.



checks and reviews are formalized in work-forms. Since the SC has already given its views on the amended ISIP¹⁸ - its analysis is now focused only on the work-forms.

18. The work-forms contain several sets of questions to which the reviewers reply on the basis of their analysis of the relevant case-related documents. The work-forms have been amended several times. The last relevant major modification was introduced when Regulation No 883/2013 entered into force. The SC is pleased to state that its suggestions were taken into account¹⁹.
19. The SC noted that the work-forms contain closed-ended questions which invite mainly positive or negative replies ('yes/no')²⁰. It is up to each reviewer to develop their answers and to provide more explanations. As a consequence, the opinions vary from one reviewer to another, depending on their individual drafting style: some reviewers reply to those questions in a succinct manner²¹ without providing any explanations, while others explain the reason why they have considered that a specific investigative activity was compliant (or not) with the relevant rules and include in their explanations specific circumstances and laconic legal reasoning.
20. The SC examined, for example, the questions in the work-forms²² and the related checks on **conflict of interests** and noted that they consist only of verifying whether any potential conflict of interests has been declared and, if so, whether the OLAF DG has been informed. In the SC's view, these questions could (and should), however, be supplemented by additional ones²³. This could allow for an equally thorough check on the existence of possible irregularities and encourage the reviewers to better justify their findings.
21. Another example concerns the **deferral of the right of a person concerned to comment on facts concerning him**: while the question in the work-form invites a "yes/no" answer²⁴, the SC takes the view that the reviewers should not only check if OLAF has taken a decision to defer this right, but also whether this decision was duly justified, especially taking into account that the GIP did not foresee an *ex ante* control by the ISRU of the use of the exception clause of Article 9(3) of the Regulation.

¹⁸ See SC's 2013 Activity Report, annex 5.

¹⁹ These suggestions were outlined by the SC in its Opinion No 5/2010, on the basis of which the SC drew up an evaluation grid for the purpose of assessing compliance with fundamental rights and procedural guarantees.

²⁰ See though information provided by OLAF, Ref. Ares(2015)3654794-04/09/2015, para 50 of the SC's "Memorandum of interviews with the ISRU and the investigative Units".

²¹ The reviewers often replied "yes"/"no" to the questions in the work-form. In some cases, they gave only one answer to a set of questions, while not all the questions were applicable.

²² Point 1.7 of the work-form: "Has any potential conflict of interest been declared and, if so, has the Director-General been informed".

²³ For example, questions such as (i) whether the investigator who declared a conflict of interest participated in any activity concerned with the collection of evidence or in the drafting of the Final report, (ii) whether he was removed from the case and/or (iii) whether conclusions which might have affected the objectivity of the case file were removed from the report, (iv) reasons duly justifying a decision to maintain him in the case.

²⁴ Point 1.2.2 of the work-form: "Has OLAF taken a decision to defer the right of the person concerned to comment on facts concerning him?"



22. As to the checks on the **duration of investigations**, the SC finds insufficient the mere answer "yes/no" to the question as to whether the duration of an investigation was proportionate to the circumstances and complexity of the case, as is the case with most of the ISRU's opinions. Instead, the SC would suggest that the reviewers substantiate their answers by indicating the exact periods of inactivity (if any), the specific reasons/circumstances and the reason they consider that the duration of an investigation was (or was not) proportionate.
23. Finally, while Recital 23 of Regulation No 883/2013 requires that **exchanges of information** concerning investigations should be governed by the principle of proportionality and by the need-to-know principle, it is not apparent from the questions of the work-form²⁵ how compliance with these principles is verified during the review process, since these questions and the related answer merely mention that the transmission, notification and information letters have been drawn up.
24. The SC would therefore suggest that further improvements appear necessary with regard to both the questions in the work-form and the actual checks made by the ISRU. The use of these work-forms as check-lists has the advantage of codifying a standardized process of evaluation by the ISRU of compliance with legal requirements and thus of ensuring consistency. This, however, entails in some instances the risk of lack of thorough review and its relevant justification.
- In other words, the work-forms applied by the ISRU may be very useful provided that (i) the replies to the questions in the work-forms are substantiated and go beyond a simple positive/negative answer, where necessary, and (ii) additional checks and verifications are carried out, where issues other than the ones contained in the work-forms that may affect the quality of the actual legality check carried out, arise in the course of an investigation.
25. **The SC recognizes OLAF's efforts to establish consistent, uniform and streamlined procedures to ensure compliance with legal requirements and procedural guarantees. The SC welcomes the significant improvement in the work-forms used by the ISRU to present the results of their legality check and review activities and encourages the OLAF DG to give them further consideration in order to invite comprehensive and reasoned replies from the ISRU, based on case-related circumstances and legal arguments, where necessary.**

THE LEGALITY CHECK AND REVIEW PROCESS

Scope of the review activities

26. The GIP gives a mandate to the reviewers to assess the *legality, necessity and proportionality* of the activities to be carried out or already undertaken by the investigators. During the interviews with OLAF staff, two questions were raised concerning the reviewers' mandate.

²⁵ Point 3 of the work-form.



27. On the investigative side, it is believed that the reviewers' role should be limited to checking the legality of the investigative activities. In their opinion, the assessment of the necessity and proportionality is closely linked to operational aspects of a case and, in case of disagreement, may be perceived as interference with the investigative strategy of a case. In addition, it requires appropriate investigative experience, which the reviewers might not necessarily have. Furthermore, some investigators see a potential conflict of interest in the situations when a reviewer carries out an *ex post* final review of investigative activities which have been previously authorized by the OLAF DG on the basis of the opinion of the same reviewer, issued as a result of an *ex ante* legality check of those activities. An opinion was also expressed that the division of tasks and possible overlaps with the work of the OLAF Legal Advice Unit should be given further consideration²⁶.
28. The SC notes that, three years after the reorganization, it appears that **the ISRU's competence to assess the necessity and proportionality of investigative activities is perceived differently within OLAF**. Without making a specific recommendation in this respect, the SC would like to draw the attention of the OLAF DG to the foregoing aspects and invite him to give them further consideration with a view to striking the appropriate balance between the necessity of ensuring that these checks are carried out and that of not impeding the strategy of an investigation.

Reaction time of the ISRU

29. The SC notes that, unlike the selection process, the legality check and review process is not subject to any time constraints²⁷. During the interviews with OLAF staff it was generally indicated that the control carried out by the ISRU represents an additional stage in the overall investigation procedure, thereby extending the duration of investigations. It was felt that, while the investigators are under pressure to shorten the duration of the investigations, supplementary delays increasing it are due to the need to wait for the ISRU's opinions, thus raising the issue of whether the ISRU's actions should also be defined by clear deadlines.
30. While it is clear that the time needed for the ISRU to reply to the investigation units' requests is a factor to be taken into consideration when assessing the overall duration of an investigation, the SC considers that the sample of cases it has analysed was not sufficient to evaluate the timeliness of the ISRU's reaction to requests for authorizations, especially those concerning specific investigative activities.
31. **Notwithstanding that the review phase may occasionally entail delays, the SC would call on the OLAF DG to analyse the average time needed by the ISRU to issue opinions on requests for authorizations/final reports and, on this basis, to reflect upon the necessity of establishing a possible time framework for the ISRU to provide its opinions.** In doing so, OLAF should ensure flexibility of the legality

²⁶ See though information provided by OLAF, Ref. Ares(2015)3654794-04/09/2015, on para 48 of SC's "Memorandum of interviews with the ISRU and the investigative Units".

²⁷ See though information provided by OLAF, Ref. Ares(2015)3654794-04/09/2015, on para 50 of SC's "Memorandum of interviews with the ISRU and the investigative Units".



check and review process while at the same time taking into consideration the need to avoid disrupting the investigation planning by unnecessary delays in issuing authorizations.

Effectiveness of the legality check and review activities

32. The legality check and review activities are aimed at ensuring respect of legal requirements and procedural guarantees and thus either at preventing - *ex ante* - any potential breach of them or at ensuring - *ex post* - that situations incompatible with such requirements and guarantees are promptly detected and remedied swiftly and effectively. On the other hand, they are aimed at providing information by which the management can identify and solve the issue of potential non-compliance with the applicable rules and procedural guarantees. The effectiveness of the legality check and review activities carried out by the ISRU can be assessed by the extent to which they achieve these objectives.
33. The SC would like to make the following observations on the implementation of the ISRU's advisory and control function as regards *verification of compliance* with procedural and legal requirements:
- (i) The mechanism of negative opinions is a strong instrument which has a corrective effect in the sense that it allows swift and effective uncovering of potential procedural failings (both before and after they occur) and adoption of appropriate remedial measures. Not only the negative opinions issued – rather small in number – but also those only envisaged (and eventually not issued) – have led to an improvement in investigative practices and thereby to ensuring compliance with legal requirements and procedural guarantees²⁸. In such cases, the legality check and review activities are likely to fully meet their objectives.
- (ii) In a few cases examined by the SC, the ISRU did not detect shortcomings and inconsistencies discovered subsequently by the SC (e.g. regarding the legal basis for opening and closing cases²⁹, the time-limit for submitting comments by the person concerned on facts concerning him³⁰, the duration of the investigations³¹, the absence of the opening decision in the CMS). However, the SC noted that, in those cases

²⁸ This was noted especially in investigations conducted under Regulation 1073/1999 and then 883/2013. The changes brought by the latter made it mandatory, for example, to give the person concerned the opportunity to comment on facts concerning him. The mechanism of negative opinions allowed for this requirement to be fully respected in those cases where the investigators envisaged closing the investigation without applying this procedural guarantee.

²⁹ In the sample of the cases of Unit B2 examined by the SC, most of them were opened as investigations and closed as coordination cases, without any decision taken by the OLAF DG to change the type of case. In some cases of other units, the Final report mentions a legal basis for the opening decision different from the one in the decision itself. While it can be assumed that this was a clerical mistake, the fact remains that it was not noticed in the framework of the review process.

³⁰ According to Article 9(4) of Regulation 883/2013, the time-limit for submitting comments “shall not be less than 10 working days *from receipt of the invitation to comment*” (emphasis added). However, in some cases the person concerned was invited to provide comments within 10 days (without sometimes specifying whether they were “working” days or not) *from the date of the letter*. Again, it was not remarked upon in the framework of the review process.

³¹ Concerning this aspect, see the SC’s Opinion 4/2014 on *Control of the duration of investigations in OLAF*.



examined, the substance of the rights of the persons concerned was not affected and their procedural guarantees have ultimately been complied with.

(iii) It is not clear from the opinions whether actual compliance with some procedural guarantees is systematically and duly checked by the ISRU. This might be due to the manner in which the questions in the work-form are formulated, which means that it is not clear from the ISRU's opinions whether, for example, the reviewers have verified that the person concerned was only *informed* of his rights³² or whether these rights *have effectively been complied with*. The same observation can be made with regard to the authorisations given by the OLAF DG: on the basis of the questions in the work form, the reviewers verify the *existence* of an authorization by the OLAF DG for a specific investigative activity³³, but it does not appear from their opinions whether, in carrying out that activity, they have verified that the investigators have *produced* it, as required by the Regulation³⁴.

34. As regards the implementation of the ISRU's advisory function through the reviewers' *reporting on findings* to the OLAF DG, the SC reiterates its observations with regard to the closed-ended nature of the questions in the work-form, inviting "yes/no" answers, and notes that a significant number of the opinions do not specify concrete case-related details. In addition, the SC found contradictory statements in some opinions³⁵. In those cases where this contradiction was due to the questions in the work-forms themselves, measures have been taken to modify them and no further contradictory answers were noted in the opinions using the latest version of the work-form³⁶. Moreover, the SC noted that in the opinions on legality checks of the proposed investigative activities there is systematically no explanation whatsoever as to why it was considered that the legality, necessity and proportionality conditions were fulfilled. Finally, there were a number of cases where two Final reports were registered in the CMS (the second report being an amended version of the first one, very likely as a result of the discussions with and suggestions of the reviewers). However, the reasons for changes and/or the changes themselves are not systematically registered in the CMS and, as a consequence, the ISRU's intervention is not visible, while at the same time the reasons

³² For example, with regard to the right of the person concerned to be assisted by a person of his choice, the manner in which the question is drafted in the work form ("Has the person concerned been informed of his right to be assisted by a person of his choice?") invites an answer indicating whether the person concerned was *informed* about his right (which might be done either in the letter inviting him to the interview, or in the preliminary statement at the beginning of the interview), and not necessarily whether this right was fully respected during the interview. The same goes for other rights and procedural guarantees (i.e. right to avoid self-incrimination, or to express himself in a language of his choice).

³³ Second sentence of Article 6(2) of the Regulation.

³⁴ First sentence of Article 6(2) of the Regulation.

³⁵ For example, in one investigation concerning a third country, the opinion on the Final report states that it has been drawn up taking into account the national law of the *Member State* concerned (point 1.8 of the work form), while the reply to the question whether the recommendations made have been drawn up taking into account the national law of the Member State concerned is "not applicable" (point 2 of the work form).

³⁶ In some opinions, the two questions concerning the continuity of the investigations contained in an earlier version of the work-form ("Are there any indications that the investigation has not been conducted continuously and without undue delay?", "Has the length of the investigation been proportionate to the circumstances and complexity of the case") were both replied to by "no", meaning the two replies contradict one another.



for changing a report which has been endorsed and countersigned by a Director are not recorded, unless a formal negative opinion is issued³⁷.

35. In the light of the above case-based observations, the SC would underline the following aspects:

(i) To demonstrate substantial compliance with the applicable requirements, the reviewers should state reasons for their conclusions (why they have considered that a specific investigative measure was or was not compliant with the applicable rules) and indicate the evidence they relied on. They should, for example, further substantiate their answers by providing case-related information, such as the date when the investigative activities took place, the reference number and/or the relevant parts of the case-related documents examined³⁸.

(ii) It would be useful for the ISRU to give assessments of their findings in the opinions³⁹ whereby these opinions could be considered as a compliance assurance guarantee.

(iii) It would also be useful, for the sake of enabling the OLAF DG to take a duly justified decision, enhancing the transparency of the decision-making process and increasing the visibility of the ISRU's work, that a note be registered in the CMS to record the reasons why a Final report has been amended and the modifications made thereto.

36. In the light of the foregoing, the SC is of the view that **OLAF should ensure more consistency in the ISRU's opinions with the case-files reviewed, in order to ensure that the ISRU detects, to the greatest possible extent, all instances of non-compliance with the legal requirements, including procedural guarantees. It should also ensure that, on the one hand, the reviewers effectively check whether the applicable requirements and procedural guarantees have substantially been complied with and sufficiently substantiate their opinions, where necessary, due to circumstances and, on the other hand, that their suggestions and comments leading to the modification of Final reports are systematically recorded in the case file.**

Cooperation with the investigative units

37. The OLAF staff interviewed defined the relationship between the ISRU and the investigative units as a permanent and intensive communication exercise which has evolved over the years. They described some difficulties inherent to the OLAF reorganization in 2012 and to the changes of the applicable procedures, but report having now overcome most of them. In addition, the prior controls carried out by the Advisers of Directorates A and B on documents submitted to the ISRU and their

³⁷ See though information provided in the meantime by OLAF, Ref. Ares(2015)3654794-04/09/2015, in para 28, 30 of the SC's "Memorandum of interviews with the ISRU and the investigative Units".

³⁸ i.e. THOR number of the investigative activity record (such as interview record, on-the-spot check record etc.), authorities issued, Final report etc.

³⁹ Such as: "compliant", "compliant but further improvement is necessary", "non-compliant".



respective interventions, were reported to play a positive role in facilitating the cooperation between the investigative units and the ISRU and in improving the quality of the documents submitted to the latter⁴⁰.

38. In order to facilitate smooth communication, informal contacts seem to be preferred, while a more formalized procedure is favoured in those cases where the issues at stake are more problematic. The analysis of individual cases by the SC confirmed this tendency, which is reflected in exchanges between the investigators and reviewers as registered in the CMS, but only in those cases where substantial modifications to the Final reports were suggested and especially in those cases where negative opinions were envisaged and eventually issued by the ISRU.
39. The SC believes that the quality of efficient legality check and review activities depends largely on maintaining regular contacts and relationships with the key actors engaged in and responsible for the review process. These contacts should be mutually beneficial: for the ISRU to be able to accomplish its work and for the investigative units to work towards improving their investigative practices and thereby ensuring full compliance with procedural guarantees. **The SC encourages OLAF to continue developing and maintaining constructive relationships between the investigative units and the ISRU.**

Follow-up to the reviewers' comments

40. The SC noted that some of the comments expressed by the reviewers in their opinions on Final reports and recommendations refer to actions that needed to be taken by the investigators prior to the closure of a case⁴¹. The analysis of individual cases showed that some of the actions recommended by the ISRU have not been systematically implemented⁴². At the same time, it has been pointed out during the interviews with OLAF staff that, while it is up to the investigators to take these comments – which are not binding – on board, the reviewers do not receive much, if any, feed-back from the investigation units as to whether these comments have been taken into account, or whether the actions recommended have been implemented or not.
41. The SC believes that ensuring follow-up on the implementation of the ISRU's suggestions for action and/or recommendations is essential for the overall success of the review process. When comments by the ISRU call for specific (in a given case) or general (at a more systemic level) measures to be taken, **OLAF should ensure not only that they are properly implemented by the investigative units, but also that the ISRU receive relevant feed-back, on a regular and systematic basis.** If implemented at a systemic level, it was suggested that this could be a task for the Advisers of the investigative Directorates or the assistants of the OLAF DG.

⁴⁰ See though the different views expressed in OLAF's note Ares(2015)3415231-17/08/2015 that link the systematic legality checks and reviews particularly to the 2012 reorganization of the Office.

⁴¹ i.e. to fill in the Data Protection Module so as to comply with the data protection requirements or to inform the person concerned or the source of information of the closure of the investigation.

⁴² At the date when the cases were examined by the SC, some of the ISRU's suggestions for action (see previous footnote) were not implemented, despite the cases being closed.



Learning from the review findings

42. The ISRU has a global and unique view on OLAF's investigative practice and its review of each and every OLAF case allows it to identify fields for possible improvement. If a non-compliance is identified, their opinions are likely to suggest measures/processes for taking corrective actions aimed at addressing any deficiencies identified during the review and at preventing them in other investigations.
43. This should enable the ISRU to focus also on how the investigative units' work can be improved to achieve best practices and standards and to address more effectively the weaknesses identified. In order for OLAF to be able to learn from review findings, the review process should include not only the regular tracking by reviewers of potential deficiencies, but also synthesizing, reporting and discussing their findings. **Such analysis would provide useful information enabling the incorporation of the lessons learned into the decision-making process, and would also enable OLAF to assess the progress achieved, to evaluate the efficiency of the review process and to measure to what extent the ISRU has contributed to the better performance of the Office.**

RECOMMENDATIONS

44. In the light of the foregoing the SC welcomes the efforts of OLAF to date to put in place an internal control and advisory mechanism with regard to fundamental rights and procedural guarantees, as foreseen in Regulation No 883/2013. The functioning of this mechanism, however, requires further improvement in order to fully meet the objectives for which it has been designed.
45. The SC therefore ***recommends*** that OLAF take appropriate measures to:
- (1) Ensure that the ISRU has at its disposal sufficient staff resources so as to cover, efficiently, the legal expertise on the national law of all the Member States;
 - (2) Consider modifying a number of questions in the work-forms used by the ISRU, so as to invite comprehensive and substantiated replies, including case-related circumstances and legal arguments, where necessary;
 - (3) Record properly in the case files the reviewers' suggestions and comments leading to eventual changes in the OLAF reports;
 - (4) Ensure systematic follow-up to the reviewers' comments and provide them with appropriate feed-back as to their implementation;
 - (5) Develop reviewers' best practices, in particular with regard to the verification of respect of procedural guarantees and proportionate duration of investigations.

The best practices referred to in Recommendation (5) should particularly:



- (a) Ensure that the reviewers systematically check whether the applicable requirements and procedural guarantees have effectively been complied with and sufficiently substantiate their opinions, where necessary, due to circumstances;
 - (b) Reflect upon the necessity of establishing deadlines for the ISRU to provide its opinions, on the basis of a thorough analysis of the average time needed by it to issue opinions;
 - (c) Ensure substantial compliance verification and more consistency of the ISRU's opinions with the case-files reviewed, so as to ensure that the ISRU detects, to the largest extent possible, all instances of possible non-compliance with the legal requirements, including procedural guarantees;
 - (d) Make an analysis of the fields now identified by the ISRU as being in need of improvement and of the measures OLAF has taken on the basis of the review findings.
 - (e) Continue developing and maintaining constructive relationships between the investigation units and the ISRU.
- (6) Ultimately, the SC invites the OLAF DG to consider the adoption in due time of an Action Plan on recommendations to be taken up in the future with a view to effectively reinforcing the internal control and advisory mechanism foreseen by the Regulation. Such an Action Plan could ideally be included in the Annual Management Plan of the Office.

Adopted in Brussels, on 15 December 2015

For the Supervisory Committee

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Tuomas Pöysti, Chairman