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COVER NOTE

From: Mr Johan DENOLF, Chairman of the OLAF Supervisory Committee
date of receipt: 1 April 2014
To: Mr Christos STAIKOURAS, President of the Council of the European Union

Subject: Activity Report of the OLAF Supervisory Committee: February 2013 - January 2014
- ANNEX 5: Supervisory Committee's observations on investigation procedures in OLAF

Delegations will find attached ANNEX 5 to the Activity Report of the OLAF Supervisory Committee for the period February 2013 - January 2014.

Encl.: ANNEX 5: Supervisory Committee's observations on investigation procedure in OLAF

SUPERVISORY COMMITTEE



SUPERVISORY COMMITTEE'S OBSERVATIONS ON THE AMENDED ISIP

GENERAL CONSIDERATIONS

In general, the Committee considers that by their content, the Instructions to Staff on Investigation Procedures (ISIP), which as of February 2012 replaced the OLAF Manual, constitute the governing principles of OLAF investigative procedures. They merit completion by the institution of operational guidelines (practical guidance according to Recital 18 of the amended Regulation) aimed at a concrete definition of the implementation of these guidelines in order to ensure a transparent, coherent implementation, to ensure respect for the equal treatment of all persons. Such guidelines would be useful when confronting those obstacles or difficulties faced by investigators, which are not mentioned in the ISIP.

SPECIFIC COMMENTS

1. The selection procedure (chapter 1)

Decision on the opening of a case

Regarding the conditions governing the opening of cases, the ISIP refer, in Article 5.3, to the existence of *information sufficient to open an investigation or coordination case*. However, they do not refer to the *sufficient suspicion*, as provided in the amended Regulation. The existing European jurisprudence has established “sufficiently serious suspicion” as a precondition for the opening of the investigation. Given the importance of that condition for the sake of the guarantee of fundamental rights, the SC considers this notion should be explicitly mentioned.

The measures the ISRU is entitled to take prior to the decision whether to open a case

The ISIP provide the possibility, *inter alia*, to *take a statement from any person able to provide relevant information*. The glossary defines a statement as a written record of evidence relevant to an investigation provided by a person within the framework of an OLAF case, which could be applied to a witness. The SC questions to what extent and what type of measures the ISRU is entitled to take prior to the opening of a case taking into consideration the procedural guarantees as outlined in the ISIP following the opening of the case. Clarification on this point would appear useful.

The internal competencies within the ISRU

Whilst enjoying the power of assessment and proposal to open an investigation, the ISRU has, in addition, the responsibility for reviewing the legality of a certain number of investigative measures as foreseen by the investigation units. In order to clearly set out the principle of an independent legality control within OLAF, it would be appropriate to clearly define in the ISIP the separation of selectors and reviewers in this unit.



Dismissed cases where there are grounds for sufficient suspicion

As pointed out by the SC in its annual report, the text of the Reform strengthens the primacy of the principal of opportunity in the opening or investigations without establishing a subsequent duty for the Director-General to inform the competent authorities of the Member State or the institution concerned when he decides not to open an investigation.

As further mentioned by the SC in its annual report, the ISIP does not make any provision for those cases where there may be sufficient grounds for suspicion but which may not necessarily lead to a decision to open an investigation.

2. The provisions regarding the investigations and coordination cases (chapter II)

The nature of the investigations

The SC notes that any reference to the administrative nature of the investigative measures OLAF is entitled to conduct has been deleted. There could therefore be a risk of confusion for persons and the public at large as to the extent of its powers.

The SC notes that the distinction between internal and external investigations has also been removed also and endeavours to understand the reasons supporting this change given that this categorisation is provided for in the text of the amended Reform, as well as in the previous ISIP. The SC would suggest it to be of a particular importance to maintain this distinction, since the powers and the investigative measures OLAF is entitled to carry out do not appear to be similar, according the scope of the investigation.

The scope of the legality check during an investigation

The ISIP establishes a prior legality check of specific and limited investigative measures.

As the SC has pointed out in its annual activity report, some others investigative measures may have a significant impact on procedural guarantees and fundamental rights, for example measures that could be seen as “interference by a public authority” with the exercise of the right to respect for private life could result in an interference with fundamental rights.

The text of the Reform has specifically foreseen that the Director-General shall put in place an internal advisory and control procedure including a legality check relating, *inter alia*, to respect (...) of the national law of the Member States concerned.

It appears therefore that the ISIP should include provisions for organizing a wider internal control covering, in particular, verification of the consistency of the gathering of elements for investigations when requested from Member States.



3. Cooperation with others agencies (Europol, Eurojust)

The ISIP do not contain provisions relating to the rules applicable for the implementation of cooperation, in particular the content and procedures for the exchange of information with other agencies liable to carry out investigations or to coordinate action by Member States in the areas of competence shared with OLAF.

In this regard the SC shares the Recommendations 3 and 4 as issued by the European Court of Auditors in its follow-up report 2011 to its Special Report No 1/2005 on the management of OLAF.

4. Decisions of the Director-General

In order to ensure transparency and impartiality where the Director-General decides not to follow the opinion of the ISRU at important stages (*inter alia*, the opening or dismissal of cases, closure decisions, extension of the scope of an investigation), the ISIP should provide a reasoned decision from the Director-General.

In several sections of the ISIP (Articles 5.4, 8.1), reference is made to “*the financial and other interests of the EU*”. This wording should be clarified, in light of recital 6 of the amended Regulation.

Article 13.4 - In the view of the Supervisory Committee, the ISIP should specify the principle according to which inspections of EU premises are conducted in the presence of the Member or official concerned, prior to providing provisions for inspection in the case of absence of the person concerned from the office.

5. Specific changes

The SC would like, in particular, to know the reasons for the modifications to the following Articles:

- 14.6: on-the spot checks,
- 15.2: digital forensic operations within inspections or on-the-spot checks,
- 16.2 et 16.5: interviews,
- 18.1 et 18.2: the opportunity to provide comments,
- 19.10: the final report and proposed recommendations.