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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 6: Paper on Reinforcing procedural safeguards in OLAF

Delegations will find attached ANNEX 6 to the Activity Report of the OLAF Supervisory Committee for the period February 2013 - January 2014.

Encl.: ANNEX 6: Paper on reinforcing procedural safeguards in OLAF



Reinforcing procedural safeguards in OLAF

- in view of the monitoring experience of the OLAF Supervisory Committee -

Present supervision structure

1. The European Antifraud Office (OLAF) and its Supervisory Committee (SC) have been established by Commission Decision of 28 April 1999¹. The scope of supervision has been reinforced and specified by Regulation No 883/2013² of 11 September 2013. The SC is the guarantor of OLAF's independence and it supervises the investigatory function of OLAF through regular monitoring aimed at ensuring the proper conduct of investigations. The SC focuses in particular on examining whether fundamental rights and procedural guarantees are respected in OLAF's investigations and whether the cases are dealt with efficiently, effectively, in due time and according to the relevant rules and legal provisions.

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SC recommendations and Commission proposals

2. In its Annual Activity Report 2012 (in particular in Section 2 of Annex III), the SC recommended, on the basis of its monitoring experience and in view of the identified shortcomings, a number of actions aiming at reinforcing procedural safeguards in OLAF's investigations. The SC recommended in particular introduction of transparent and stable procedures for the internal legality check and for independent review of complaints. The SC recommended also clarification of OLAF's powers in different types of administrative investigations and insisted on providing the SC with effective tools for monitoring the respect of procedural guarantees and fundamental rights by OLAF.

¹ Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), 1999/352/EC, ECSC, Euratom (OJ L 136, 31.5.1999, p. 20) as recently amended by Commission Decision of 27 September 2013, 2013/478/EU (OJ L 257, 28.9.2013, p. 19).

² 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).

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3. That need to strengthen the procedural safeguards and legality checks seems to be a common conclusion of the European Parliament, the Council, the Commission, the Court of Auditors and the SC as expressed in their exchanges of opinions on OLAF investigative activities.
4. Such strengthening should be considered in view of the Commission's proposal for the establishment of the European Public Prosecutor's Office (EPPO). Creation of the EPPO would be a change of paradigm by transferring cases of possible criminal fraud from administrative investigations in OLAF to criminal investigations conducted by European prosecutors. Such change is to result in a substantial reinforcement of the procedural guarantees for persons concerned by investigations.
5. Even with the establishment of the EPPO, OLAF would still have a significant role to play in the protection of the EU against offences and irregularities affecting its financial interests. There is a high degree of uncertainty when it comes to the geographical coverage of the EPPO which most probably will be established by enhanced cooperation of some Member States - their number remains unknown, but almost surely not all of them are going to participate. Therefore investigations of similar nature might be in future conducted in parallel by the EPPO and OLAF, depending on a Member State, which would require strengthening the procedural safeguards in OLAF's investigations, so that they could match the foreseen EPPO standards.
6. Therefore, the SC welcomes with satisfaction the Commission's Communication on *Improving OLAF's governance and reinforcing procedural safeguards in investigations*³. The SC is currently analysing possible consequences of particular solutions proposed there and is looking forward to discussing them with the Institutions and with OLAF. As the first reflection, the SC considers the substance of the proposals as positive, providing for instruments potentially enabling to improve the current level of safeguards. At the same time, some structural solutions, as proposed in the Communication, should be reconsidered with particular regard to the independence of OLAF and of the SC, to ensure avoiding conflicts of competences with respect to the supervision of OLAF as well as duplication of work and inefficient allocation of resources.

³ COM(2013)533 final, 17.07.2013.



New bodies and their competences

7. At this stage, the SC is considering specifically the issues of the institutional framework for two new offices proposed by the Commission and the scope of their competences.
8. The Communication advocates establishment of a new office of a "Controller of procedural safeguards" who would "monitor compliance with the procedural guarantees applicable to OLAF investigations and of prompt handling of investigations to avoid undue delay". It is very hard to see how the Controller could avoid having his work overlapping with the work of the SC which would "monitor systemic developments regarding respect of procedural rights and reasonable deadlines for handling cases".
9. Even if the differentiation between the tasks of the Controller and of the SC could be possible argued on a theoretical level, the practical experience of the SC shows that review of individual cases is an indispensable element of systemic monitoring of OLAF. Therefore, the daily work – in the separate secretariats of both bodies - would be very similar and consist in examination of individual case files in view of respect of procedural rights and duration of investigation.
10. In its systemic analyses based on samples of individual cases, the SC could be examining, coincidentally and even unknowingly, the same case as would be examined by the Controller in the framework of his individual review. It could lead not only to redundant duplication of work, but also to issuing diverging or even conflicting recommendations to the Director-General of OLAF.
11. Furthermore, the Commission proposes to establish an office of a judicial reviewer who would authorise OLAF's intrusive investigative measures concerning Members of EU Institutions. As a result, also his work (as the SC's and Controller's work) would concern examination of the respect of procedural/fundamental rights (although *ex ante* and not *ex post*).
12. The reviewer's competences, his punctual interventions and his placement within or next to the Commission could raise serious concerns as regards OLAF's independence. In view of his placement, his competence to advise on investigative measures against Members of the Commission but also of other Institutions could affect the interinstitutional balance.
13. Also as regards the Controller, who would be similarly placed and separated from the SC, there could be concerns with regard to his independence and to the cost



effectiveness of him having a separate secretariat doing the job currently done by the SC's Secretariat.

14. Creation of two additional offices controlling OLAF but separate from the Supervisory Committee of OLAF would lead to multiplication of independent supervising structures, probably resulting in confusion or conflict of competences and duplication of work. That could ultimately decrease the efficiency of the supervision of OLAF.

Alternative solutions

15. The SC is considering other options which would retain the useful instruments proposed by the Commission, but which would at the same time incorporate them into a comprehensive and effective supervision structure.
16. To achieve the important aim of reinforcing the procedural safeguards in OLAF set forth by the Communication, the Controller should form a part of a wider supervisory committee. His independence would be strengthened and he could benefit from the expertise of the SC and its Secretariat having a long experience in examining the respect of procedural guarantees in OLAF. The whole joint structure would be stronger, more efficient and would produce an effect of synergy. A common secretariat would ensure consistency, economy of scale and allow avoiding duplication of work.
17. As regards the judicial reviewer, he could be, theoretically, also attached to a wider supervisory committee to benefit from the knowledge and independent resources of the already established structure. On the other hand, the judicial reviewer being attached to the SC (or to the Commission) would implicate the SC (or the Commission, respectively) in the decision-making process in OLAF which could jeopardise OLAF's independence.
18. Therefore, it seems more logical to place the judicial review back in a dedicated judicial unit within OLAF which would consist, as it used to be the case, of national magistrates. They could, without putting OLAF's independence in danger (as it could be the case with an external body), provide the Director-General, rather expeditiously thanks to their presence within OLAF, with independent and formal legal advice, *ex ante*, on all intrusive investigative measures and other actions requiring compliance with specific national provisions. The SC would continue to monitor, *ex post*, the judicial recommendations to the Director-General and his ensuing decisions, with a view of ensuring OLAF's independence, on the one hand, and the procedural rights of persons concerned, on the other.

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19. In the light of its monitoring experience, the SC supports the Commission's proposal to reinforce the procedural safeguards in OLAF investigations. It is particularly recommendable having regard to the abolition in the reformed OLAF of the SC's prior examination of the respect of fundamental right and procedural guarantees before an OLAF case is sent to national judicial authorities - which was considered by the Court of Justice as a crucial safeguard for persons concerned. The improved supervisory structure must be functional and efficient. The SC is looking forward to the forthcoming exchange of opinions between the Institutions under the new OLAF Regulation which could focus on working out optimal and broadly supported legislative solutions.