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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 2: Opinion No 2/2013: Establishing an internal OLAF procedure for complaints

Delegations will find attached ANNEX 2 to the Activity Report of the OLAF Supervisory Committee for the period February 2013 - January 2014.

Encl.: ANNEX 2: Opinion No 2/2013: Establishing an internal OLAF procedure for complaints



Opinion No 2/2013

on

Establishing an internal OLAF procedure for complaints

Annex 2

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The Supervisory Committee of the European Anti-Fraud Office (OLAF) examined the options for redress open to persons involved in OLAF's investigations regarding potential violations of their rights and procedural guarantees. The Committee found that such persons do not have sufficient and immediate remedies to redress potential violations either through an external (an EU or national court, the European Ombudsman or the European Data Protection Supervisor) or internal mechanism (OLAF itself). The Committee believes that the new Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF has not resolved the problem, since it does not introduce a mechanism for dealing with individual complaints. The Committee expressed the opinion that the current legislative gap could be closed by putting in place a transparent and efficient complaints procedure within OLAF, to deal with complaints alleging potential breaches of fundamental rights and procedural guarantees in the course of an OLAF investigation. The Committee therefore recommended that the Director-General of OLAF institute such an internal procedure and put forward concrete suggestions with regard to its implementation.

Introduction



1. OLAF has been given far-reaching powers of investigation in order to efficiently carry out its mission to protect the financial interests of the EU. The exercise of these powers is very likely to touch upon the fundamental rights of persons concerned by investigations¹, and therefore their respect by OLAF is essential. It contributes – as the SC has already emphasised² – not only to ensuring the effectiveness and efficiency of OLAF's investigative activities, but also to consolidating its reputation, credibility and ultimately its independence.
2. OLAF is obliged to ensure the protection of fundamental rights by safeguarding the procedural guarantees as listed by the EU Charter of Fundamental Rights³. In addition, the EU legislator decided to enhance OLAF's accountability for its investigative activities by reforming its legal framework⁴ which resulted in the adoption of Regulation (EU, Euratom) No 883/2013⁵ (hereinafter, the Regulation).
3. The SC welcomes the changes brought by the Regulation but would like, nevertheless, to point out that the mechanisms put in place to enforce the procedural guarantees need further improvement. The Regulation provides for a legality check⁶ and a monitoring mechanism⁷, but does not establish a mechanism for dealing with individual complaints which would be, in the SC's view, indispensable for ensuring effective protection of fundamental rights.
4. In the SC's opinion, persons involved in OLAF investigations do not have sufficient and immediate remedies to redress potential violations of their rights and the recent reform of the legal framework has not solved that problem. Therefore, the SC takes the view that the Director-General of OLAF ((hereinafter, the DG) should swiftly establish a transparent and stable internal procedure for dealing with individual complaints.

I. Insufficiency of the existing redress mechanisms

5. Persons considering that, in the course of an investigation, OLAF breached their fundamental rights and wishing to complain, have at their disposal various means of

¹ Although little consideration was given to this aspect when OLAF was created, the few procedural guarantees defined in the former Regulation (EC) No 1073/1999 were developed by the case-law of the EU General Court.

² See the SC's Opinion No 5/2010 on *Respect for fundamental rights and procedural guarantees in investigations by the European Anti-Fraud Office*, point 3.

³ See in particular Article 41 of the Charter.

⁴ One of the objectives of the reform was to reinforce the protection of fundamental rights and procedural guarantees within OLAF's investigations.

⁵ 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.

⁶ The legality check relates, *inter alia*, to the respect of procedural guarantees and fundamental rights of persons concerned (Article 17(7)).

⁷ Article 15(1).



judicial and non-judicial review which, however, may be insufficient, for the reasons stated below.

6. Firstly, they may seek the direct judicial review by an **EU Court** (action for annulment, action for damages and request for interim relief) or indirect judicial review by **EU and national courts** (preliminary ruling procedure).⁸ However, it should be noted that these actions are governed by rather strict rules on admissibility⁹ and must fulfil a number of conditions to trigger a right to reparation¹⁰. Even when an action is successful, “*Judicial protection is obtained long after the contested investigative act and the act as such is not affected by the EU court's ruling; only compensation for the prejudice created by that act is obtained*”¹¹.
7. Secondly, persons wishing to complain may address themselves to the **European Data Protection Supervisor (EDPS)**, who is specifically entrusted¹² with the competence of hearing and investigating complaints lodged by persons whose personal data are processed by OLAF. However, the material scope of his review is limited to the protection of personal data and privacy.
8. Thirdly, the **European Ombudsman (EO)** is competent to investigate complaints regarding maladministration¹³ against OLAF, namely failure to act in accordance with the law, to respect the principles of good administration, or breaches of fundamental rights. Nevertheless, it is the EO's view – which the SC fully shares – that an institution “*in frequent contact with people who may have reason to complain should provide for a first line complaints mechanism allowing for their problems to be addressed and solved rapidly, before, in the event that resolution is not successful, having to turn to other*

⁸ For a thorough overview of the different kinds of judicial review of OLAF's investigative acts, see J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-fraud Office (OLAF) - An Analysis with a Look Forward to a European Public Prosecutor's Office*, Europa Law Publishing, 2011, p. 203. See also X. Groussot, Z. Popov, *What's wrong with OLAF? Accountability, due process and criminal justice in European anti-fraud policy*, *Common Market Law Review* 47, 2010, p. 605-643.

⁹ For example, the actions for annulment introduced against OLAF investigative acts have constantly been declared inadmissible on the grounds that none of such acts has to date been deemed to bring about a distinct change in the applicant's legal position.

¹⁰ In actions for damages, there are three conditions to be met in order to trigger a right to reparation: the infringement of a rule of law intended to confer rights on persons; a sufficiently serious breach of this rule; the existence of a direct causal link between the breach of the rule of law and the damage allegedly suffered by the complainant.

¹¹ J.F.H. Inghelram, *Judicial review of investigative acts of the European Anti-Fraud Office (OLAF): a search for balance*, *Common Market Law Review* 49, 2012, p. 601–628.

¹² Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.01.2001, p. 1.

¹³ According to the definition given by the EO, “*Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it*” (see the EO's Annual Report 1997, p. 23).



*redress mechanisms, such as Ombudsmen and courts*¹⁴. The SC's considers that this statement also applies to OLAF.

9. Fourthly, **the SC** itself - as the OLAF's supervisory body - is quite often the addressee of individual complaints which it takes into consideration as a valuable source of information concerning OLAF's investigations and thus triggering the SC's monitoring activity. The SC's role, as emphasized by a ruling of the EU General Court¹⁵ and confirmed by Regulation 883/2013, is to monitor developments concerning the application of procedural guarantees and the duration of investigations¹⁶ which cannot be carried out without examination of individual cases. However, the SC was not established as a complaints body and its supervision takes place only *ex post*, since the SC cannot intervene in on-going investigations. Furthermore, the SC regrets the lack of appropriate monitoring tools at its disposal and the absence of a specific reporting obligation for the DG to inform the SC of complaints addressed to him and, in particular, on the way they were dealt with.
10. In addition to the external mechanisms, the SC notes that an internal mechanism for dealing with individual complaints is not completely absent from the legal framework governing OLAF's investigations. Any official or other servant of the EU who is the subject of an internal investigation has the right to submit to **the DG** a complaint against an act adversely affecting him in connection with investigations by OLAF¹⁷. However, according to the existing EU case-law, OLAF's investigative acts do not constitute acts adversely affecting the persons concerned within the meaning of Article 90a of the Staff Regulations and therefore are not challengeable acts¹⁸.
11. Moreover, the SC would point out that OLAF staff who are aware of possible illegal activities or serious violations of professional duties that might trigger potential breaches of fundamental rights and procedural guarantees within an investigation have the additional possibility to report wrongdoing within OLAF to **the President of the SC**, on the basis of Article 22a of the Staff Regulations and of the agreement between the DG and the SC¹⁹.

II. Lack of a complaint procedure in Regulation No 883/2013

¹⁴ See the Special Report of the EO in own-initiative inquiry OI/5/2012/BEH-MHZ concerning FRONTEX, 12 November 2013, point 43.

¹⁵ *Franchet and Byk v Commission* (No 2), 8 July 2008, case T-48/05.

¹⁶ Article 15(1) of Regulation No 883/2013.

¹⁷ See Article 14 of the former Regulation (EC) No 1073/1999. Its content has been included in Article 90a of the Staff Regulations and as a consequence has been deleted from Regulation No 883/2013.

¹⁸ See *Commission v Antonello Violetti and Others and Nadine Schmit*, 20 May 2010, case T-261/09.

¹⁹ See the note of the Director-General to OLAF staff (I/011472 of 10 November 2008) and the note JUR(2008)45321 of 1 April 2008 of the Commission's Legal Service.



12. The SC notes that the intention of the EU legislator was to strengthen the protection of procedural guarantees applicable in OLAF's investigations (a) by inserting in the Regulation detailed provisions concerning the procedural guarantees and (b) by enforcing them by means of an enhanced review. As a result, Article 9 of the Regulation contains now explicit procedural guarantees and thus defines and clarifies the contents of those foreseen in the Charter. On the other hand, although the EU institutions involved in the legislative process all agreed on the need for a review of potential violation of fundamental rights and put forward various proposals aimed at establishing both an *ex ante* legality check (relating, *inter alia*, to the respect of procedural guarantees of persons under investigation, during all stages of the investigation) and an *ex post* review procedure for handling individual complaints²⁰, it seems that no consensus was finally reached, since the Regulation does not explicitly put in place any such procedure.
13. The SC would point out that in the past, *via* its internal rules, OLAF put in place a review procedure open to all persons concerned in internal and external investigations in which procedural guarantees were allegedly not respected in a manner possibly having an impact on the conclusions of the investigation²¹. This procedure evolved under the influence of interinstitutional discussions on reforming the OLAF legal framework. Since the Commission's proposal of 17 March 2011 contained provisions on a review procedure²², the Instructions to Staff on Investigation Procedures (ISIP)²³ adopted by the OLAF DG as of 1 February 2012 anticipated the forthcoming legislative changes with the setting up of a procedure for dealing with complaints concerning an alleged failure to respect procedural guarantees²⁴. However, that Commission's proposal, which was subject to negotiations during the legislative process, was ultimately not maintained. Therefore, when the ISIP were replaced by the new Guidelines on Investigation Procedures (GIP), which entered into force on the same day as the new OLAF Regulation (1 October 2013), this internal procedure disappeared.
14. As a result, neither the Regulation nor OLAF's internal rules foresee any formal procedure for dealing with individual complaints. Therefore, the objective of improving the mechanisms for redressing potential breaches by OLAF of procedural guarantees of

²⁰ During the legislative process, the EU institutions put forward various proposals: an independent Review Adviser with the participation of the SC, a Review Panel consisting of senior officials of OLAF and of the Commission's Legal Service, two separate procedures (legality check by legal experts of OLAF and complaints to the Review Adviser *via* the SC), a review procedure to be set up by the DG within the Office.

²¹ See the former OLAF Manual – Operational Procedures, version July 2011, point 5.1.6.

²² Article 7b: this procedure aimed at dealing with requests from persons concerned by an investigation, to have an independent opinion regarding the respect of the procedural guarantees provided for in the Regulation.

²³ Replacing the former OLAF Manual – Operational Procedures.

²⁴ Article 23 of the ISIP - "23.1 Where a natural person concerned by an investigation has requested a review of the handling of his procedural guarantees, the Director-General appoints a member of OLAF staff not connected with the investigation, to conduct such a review. 23.2 The person entrusted with the review must act independently in his review of the complaint and report his findings to the Director-General. 23.3 The Director-General may take appropriate action in respect of any failure to respect procedural guarantees and will inform the complainant".



persons under investigation has not been achieved. The SC would point out that the recent Communication from the Commission on *Improving OLAF's governance and reinforcing procedural safeguards in investigations*²⁵ supports the SC's view and its repeated recommendations²⁶ concerning the introduction of transparent and stable procedures for an internal legality check and for an independent review of complaints. This Communication also confirms the need for further improvements to the Regulation, by establishing of the office of a “*Controller of procedural safeguards*”.

15. With its longstanding experience in monitoring OLAF's investigative function and thereby compliance by OLAF with fundamental rights and procedural guarantees, the SC is therefore concerned by the lack of a transparent procedure for dealing with individual complaints and takes the view that, at least during the transitional period, until further amendments to the Regulation are adopted, the current gap should be closed by the DG re-establishing an internal procedure for complaint in OLAF.

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III. The way forward: an internal procedure for complaints

16. In OLAF's view, the notion of "complaints" covers (i) complaints concerning procedural guarantees in the context of investigative actions, (ii) complaints against a reply by OLAF to a request for access to personal data and (iii) complaints from whistle-blowers (concerning either OLAF's obligation to inform them on the action taken following their fraud reporting or the protection of their identity)²⁷. According to information provided by OLAF, in the last three years there were 25 complaints concerning OLAF's investigation activity, of which 13 were addressed to the EO²⁸, 8 were addressed to the EDPS²⁹ and 4 were requests for review addressed to OLAF³⁰. OLAF is also aware of other complaints, addressed to other bodies (e.g. to the SC), but it does not have any systemic overview, register or statistics related to them.
17. Taking into account the number of cases opened by OLAF (718 in 2012³¹) and the fact that complaints against OLAF are addressed, in particular, to the EDPS, the EO and the SC³², the small number of complaints addressed to OLAF itself may lead to the conclusion that

²⁵ COM(2013)533 final, 17.07.2013.

²⁶ See the SC's Annual Activity Report 2012, specifically Section 2 of Annex III.

²⁷ OLAF does not count as "complaint" the applications for access to documents (including confirmatory applications), the requests for access to personal data, staff complaints (Art. 90 of Staff Regulations), motions to courts, complaints addressed to the Commission which do not concern directly OLAF, letters from informants/whistle-blowers unhappy with OLAF's decision to dismiss a case.

²⁸ 7 complaints in 2013, 3 complaints in 2012 and 3 complaints in 2011.

²⁹ 5 complaints in 2012 and 3 complaints in 2011.

³⁰ 1 request in 2013, 2 requests in 2012 and 1 request in 2011.

³¹ See the OLAF 2012 Activity Report.

³² See the Annual Activity Reports of the EDPS and the EO. The SC itself received 7 complaints in 2012 and 14 complaints in 2013, concerning, *inter alia*, alleged failure to respect fundamental rights and procedural guarantees, breach of confidentiality of investigations, duration of investigations.



the absence of a transparent and independent procedure for handling complaints in OLAF effectively deters potential complainants from exercising their rights.

18. The SC notes, from its monitoring experience, that in the previous years the handling of complaints appeared to be carried out on a case-by-case basis rather than through a stable and consistent procedure. The SC shares the EO's view that a case-by-case approach is not *"the best way to ensure the efficient and transparent handling of complaints"*³³ and that without a proper complaint procedure *"compliance [with fundamental rights] cannot ultimately be effective"*³⁴. Such a procedure is a key element of OLAF's accountability and legitimacy, because protecting fundamental rights *"is not only to the benefit of persons under investigation but also of OLAF, whose legitimacy can only increase when fundamental rights are (seen to be) effectively protected"*³⁵.
19. The SC considers that, from the OLAF perspective, a complaint procedure would help (i) the detection by OLAF of any breach of its own legal obligations, thus allowing for a prompt reaction, (ii) monitoring by OLAF of compliance with fundamental rights and procedural guarantees by its own staff, (iii) avoiding the risk of discriminatory treatment of persons concerned, (iv) settling possible disputes before they aggravate³⁶.
20. In the SC's opinion, Article 41 of the Charter of Fundamental Rights³⁷ (right to good administration) would offer a sufficient legal basis for establishing an internal procedure for dealing with individual complaints. Complainants are entitled to expect from OLAF that their "affairs" are "handled" – according to the principles defined by the Charter.
21. The SC therefore believes that the DG should put in place a transparent and efficient internal procedure for dealing with all the types of complaints related to OLAF investigative activities, including not only complaints alleging potential breaches of fundamental rights in the course of an OLAF investigation, but also those concerning duration of investigations, legality of OLAF's acts, breaches of confidentiality, refusals to provide information. The following practical recommendations are without prejudice to the forthcoming legislative proposals³⁸ or to the SC's position as expressed in its paper on *Reinforcing procedural safeguards in OLAF - in view of the monitoring experience of the*

³³ See the EO's Decision closing his inquiry into complaint 3072/2009/MHZ against the Commission, 5 April 2011, point 27.

³⁴ See the Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), 9 April 2013, point 79.

³⁵ J.F.H. Inghelram, *Judicial review of investigative acts of the European Anti-Fraud Office (OLAF): a search for balance*, quoted above, p. 627.

³⁶ See the Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ quoted above, point 47.

³⁷ Article 41(1) of the Charter: *"Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union"*.

³⁸ See the Commission's proposal quoted above.



*Supervisory Committee*³⁹ - they should be regarded as transitional measures until the current legal framework is improved.

22. The SC would firstly point out that it is for the DG to establish and define the exact scope and content of rules on handling of complaints in OLAF. In so doing, the DG should take into consideration a number of requirements triggered by the right to good administration. Recommendations by the EO and the Code of Good Administrative Behaviour should be also taken into account. Without establishing an exhaustive list, the SC would point to the following requirements:

- fairness and impartiality, including, *inter alia*, the requirement that a complaint should be treated by a person not related to the investigation or not in the direct line of hierarchy of the person(s) related to the investigation⁴⁰ and the necessity to set out a minimum level of guarantees ensuring the functional independence of the person handling a given complaint;
- the requirement to state reasons for the decisions taken following a complaint⁴¹;
- a reasonable time-limit for handling a complaint⁴²;
- the right of access to one's file (subject to limitations explicitly foreseen in the Charter⁴³);
- the right to address OLAF in one of the EU official languages and to have an answer in the same language⁴⁴;
- the requirement to inform the complainant of any possible alternative forms of redress⁴⁵.

23. Secondly, with regard to the person entrusted with the handling of complaints, he should have the appropriate competencies, qualifications and experience. Such person should have

³⁹ This paper was adopted at the SC's plenary meeting on 8 October 2013 and transmitted to the three appointing Institutions on 24 October 2013.

⁴⁰ See the Decision of 26 June 2008 of the EO on complaint 1354/2007/VIK against the European Economic and Social Committee, point 2.3: "*it is good administrative practice that complaints against a Community official should normally not be answered by this very same official, but by the superior of this official or by another appropriate official/body*".

⁴¹ See Article 18 of the European Code of Good Administrative Behaviour. See also the Draft recommendation of the EO in the inquiry into complaint 1183/2012/MMN against OLAF, 15 November 2013.

⁴² See Article 17(1) of the European Code of Good Administrative Behaviour, which elucidates the "*reasonable time*" requirement of the Charter by establishing a two months period from the date of receipt of a request or complaint. Article 17(2) allows for an extension of this period if it is justified by the "*complexity of the matters which it raises*". The SC notes with interest the EO's statement that extension of the time limit within which an EU institution may deal with a complaint can be justified by the complexity of the issues raised, but not by an alleged lack of sufficient human resources or internal obstacles within its own services, since "*in accordance with the principles of good administration, the EU institutions have the duty to ensure that they provide their various services with sufficient resources to fulfil the tasks which have been entrusted to them*" and to "*structure their various services in a such a way as not to hinder the performance of the institution's duties, including in particular, the need to treat complaints by citizens within a reasonable time*" (see EO's Decision closing his inquiry into complaint 2288/2011/MMN against the European Investment Bank, 25 September 2013, pt. 28, 30).

⁴³ This right may be limited by the need to respect the legitimate interests of confidentiality and of professional and business secrecy.

⁴⁴ See also Article 13 of the European Code of Good Administrative Behaviour.

⁴⁵ See, in this respect, the Decision of the EO on complaint 1512/2007/JMA against the European Commission, 5 June 2008. Article 19 of the European Code of Good Administrative Behaviour may also be relevant in this respect.



well defined tasks and benefit from access to appropriate resources. He should have access to all relevant case-related information and OLAF staff should fully cooperate with him.

24. Regarding particularly the requirement of independence, the SC would stress that any effective *internal* complaint procedure, which would necessarily imply the handling of a complaint by an OLAF (senior) official, requires that this person act, when carrying out his review duties, in full independence of the DG. This is a key element in ensuring external credibility and public trust. The SC acknowledges the difficulty of implementing such a requirement, since this person should report to the DG on his findings while the latter remains the appointing authority deciding on the career progress of all OLAF officials⁴⁶.
25. The SC would indicate three possible solutions to that problem.
- (i) Firstly, the SC Secretariat being the only part of OLAF with regulatory guarantees of independent functioning with regard to the DG⁴⁷, the most logical solution would be to place the (senior) official entrusted with handling complaints under the Head of the SC Secretariat, but without involving him in any regular work of the SC.
 - (ii) Secondly, the official could be nominated as a "complaint" advisor to the DG, but his functional independence should be safeguarded by the right to inform the SC whenever he considers that a measure taken by the Director-General puts his independence into question⁴⁸ and by the obligation to report on all his findings related to the complaints not only to the Director-General, but also to the SC⁴⁹.
 - (iii) Thirdly, the task could be entrusted to the OLAF Legal Advice Unit, but then its Head should have equal safeguards as a "complaint advisor" - in his capacity of the handler of complaints.
26. Finally, the SC considers that information on how to address complaints to OLAF, together with a description of the procedure for handling them, should be published on OLAF's website, for the sake of transparency and legal certainty. Moreover, the SC should be regularly informed of the complaints received by OLAF and the way they have been handled, this allowing it to properly perform its role of monitoring developments concerning the application of procedural guarantees and the duration of investigations.

⁴⁶ See the concerns expressed by civil society representatives with regard to the compatibility of the principle of independence with the fact that a person works in the interest of a specific entity (see the Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ quoted above, point 78).

⁴⁷ Recital 40 of Regulation No 883/2013.

⁴⁸ As it was suggested by the Commission in its proposal of 17 March 2011, Article 7b.2.

⁴⁹ *Idem*. See also Article 14 a) of the European Parliament legislative resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (COM(2006)0244 — C6-0228/2006 — 2006/0084(COD)), OJ C 16E , 22.1.2010, p. 201–223.



Supervisory Committee's recommendations

In the light of the above considerations, the Supervisory Committee:

- (1) **Recommends** that the Director-General set up an internal procedure for dealing with individual complaints concerning OLAF investigations;
- (2) **Invites** the Director-General to consult the details of the procedure with the SC, before its adoption;
- (3) **Recommends** that the Director-General publish the procedure on OLAF's website after its adoption;
- (4) **Expects** the Director-General to report regularly to the SC on complaints received by OLAF and the way they have been handled.

Adopted in Brussels, December 2013

For the Supervisory Committee

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, enclosed within a thin black rectangular border.

Chairman