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From: Mr Johan DENOLF, Chairman of the OLAF Supervisory Committee
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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 4: Opinion No 2/2014: Case selection by OLAF

Delegations will find attached ANNEX 4 to the Activity Report of the OLAF Supervisory Committee for the period February 2013 - January 2014.

Encl.: ANNEX 4: Opinion No 2/2014: Case selection in OLAF

SUPERVISORY COMMITTEE



Opinion No 2/2014

Case selection in OLAF

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SUPERVISORY COMMITTEE



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INTRODUCTION

1. On 1 February 2012, OLAF's investigative procedures and internal organisation were significantly changed. New Instructions to Staff on Investigative Procedures (ISIP) were issued and a new Investigation Selection and Review Unit (ISRU) was created. This unit deals with both the selection and review of cases¹ and provides opinions on the basis of which the Director-General (DG) of OLAF takes decisions on opening or dismissing cases, on the main investigative activities, on the final report and on the recommendations. The ISRU is thus involved in the whole lifecycle of an investigation or coordination case and most of the decisions taken by the DG in the investigation area are based on its opinions. Therefore, the internal rules, the organisation, the competences, the efficiency and the quality of the work of the ISRU have a major and direct influence on the performance of the whole OLAF investigative function. The Supervisory Committee (SC) has therefore decided to pay particular attention to the execution by this unit of its role.

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Scope and purpose of the SC's review

2. The SC's review has focused on the selection function of the ISRU – and, in particular, on the selection process². The SC's analysis takes into account the legal provisions and instructions to staff in force at the time when the analysed opinions were delivered, namely Regulation 1073/1999³ and the ISIP. However, the SC's recommendations are made in the light of the current Regulation No 883/2013⁴ and the new Guidelines on Investigative Procedures (GIP), both of which entered into force on 1 October 2013.
3. On 1 February 2012, the assessment of the incoming information of possible investigative interest to OLAF was transferred from the investigation units to the ISRU. A centralized decision-making system was created, consisting of two levels: the decisional level, represented by the DG, and the advisory level, represented by the ISRU. Such centralisation may help to improve the efficiency and consistency of the selection of cases, provided that the ISRU carries out its function in an effective, competent and transparent manner, according to clear principles and drawing on the expertise of

¹ During the selection stage, the ISRU is in charge of processing the incoming information and provides the DG with opinions on the opening or dismissal of cases; during the investigation stage, it provides opinions on the necessity and legality of the main investigative activities requiring prior authorisation by the DG; before the closure of an investigation or coordination case, the ISRU reviews the final report and recommendations.

² Article 5 of the ISIP.

³ Valid until 30 September 2013.

⁴ 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.

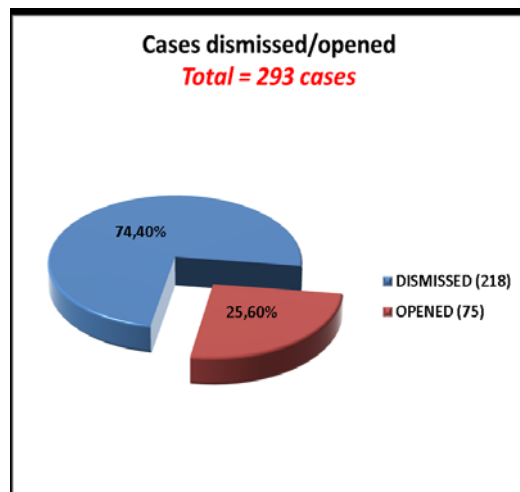


investigative, analytical and legal units. The SC's review has as its objective to verify whether those requirements have been satisfied.

Methodology

4. The SC selected a sample of opinions on the opening or dismissal of cases: it consisted of a statistical sample of opinions from all the cases created between 1 September 2012 and 31 March 2013 plus all opinions of May 2013 and plus further 20 opinions selected by the DG. According to the criteria submitted by the SC, OLAF identified 314 opinions⁵ of which 1 contained erroneous numbering and 20 were submitted in duplicate (appearing twice on OLAF's lists). Therefore the total number of opinions eligible to be examined by the SC came to 293, of which 218 opinions (74,4%) recommended the dismissal of cases and the remaining 75 opinions (25,6 %) recommended the opening of investigation or coordination cases (*figure 1*). All the recommendations have been followed by the DG.

Figure 1: Cases dismissed/opened



5. The SC's review is based on:
 - (a) an analysis of the selection of the ISRU's opinions;
 - (b) an analysis of the relevant background documentation made available by OLAF – including the ISIP, the GIP, the related work forms, a "Starter Kit" provided to the selectors⁶, as well as statistical information provided by OLAF⁷ or extracted from the OLAF Case Management System (CMS);
 - (c) interviews - according to a semi-structured model - with individual staff members of the ISRU, as well as with staff of investigation units, as immediate recipients of the work of the ISRU (where cases are not dismissed).

⁵ Selecting one in three cases created between 01.09.2012 and 31.03.2013 came to a total of 237 cases of which 11 were found by OLAF to be duplicates of pre-existing cases = 226 opinions; all opinions delivered for the month of May 2013 = 68 opinions.

⁶ It contains, *inter alia*, general guidelines for selection and review.

⁷ Covering two periods of reference: February 2012 to December 2012 and January 2013 to November 2013.



6. The details of the analysis and of the findings are presented in Part II of this Opinion. In Part I the SC presents its conclusions and recommendations made to the DG.

PART I RESULTS AND RECOMMENDATIONS

Need to improve the resources allocated to the ISRU

7. The SC's examination of allocation of resources to and within the ISRU revealed that, generally, there are experienced selectors in the unit, covering a wide range of specialisations. However, each selector deals with different sectors, including those where they have less expertise, which, in particular with regard to selectors who have no investigative experience, may have affected the quality of the assessment carried out. The limited number of the training courses completed by the selectors does not appear to compensate for the lack of previous experience. The SC found also that legal knowledge was not sufficiently demonstrated in many opinions and that language expertise was sometimes missing (see paragraphs 31-35 and 38).
8. The SC is of the opinion that the fact that selectors are required to assess information in domains with which they are not always familiar may increase the risk of losing time when having to switch between different sectors and of performing incomplete assessments of incoming information. Selectors need to be experienced and properly trained to perform selection tasks. Selectors should also concentrate their efforts on tasks and sectors in which they are most qualified.
9. The SC equally noted that it was neither possible nor productive to strictly adhere to the mandatory 2-month period foreseen in the ISIP for completing the selection of cases. Therefore, the SC welcomes the fact that the new Guidelines on Investigation Procedures eliminated this overly rigid time limit, which allows for a better balance to be struck between OLAF's objective to improve the efficiency and effectiveness of its investigation and coordination cases (by speeding up the period dedicated to the assessment of incoming information) and the need to avoid excessive time pressure (which might be damaging to the quality of the assessment) (see paragraphs 39-40).
10. Lastly, the SC noted that the adoption of clear instructions for dealing with whistle-blowers, as well as technical improvement of the Fraud Notification System (FNS) would also be desirable (see paragraphs 41-44).



Recommendation 1:

Improve the resources allocated to the ISRU

OLAF should take appropriate measures to ensure that ISRU has at its disposal sufficient and adequate resources to carry out its selection tasks.

In particular, OLAF should:

- a) Increase the number of selectors with investigative experience;
- b) Apply the principle of specialization of selectors more rigorously;
- c) Ensure that the selectors have the appropriate (legal, linguistic and sectorial) expertise and provide them with sufficient training;
- d) Improve the functioning of the FNS, in order to allow it to cope with the upload of documents of greater size;
- e) Adopt proper procedures for dealing with whistle-blowers.

11. The SC also noted that the reviewers have been entrusted not only with review tasks, but also with the selection of cases. The SC would point out that, the tasks of the selectors being fundamentally different from those of the reviewers, combining their responsibilities is questionable. The SC is therefore of the opinion that the attribution of cases for selection to the reviewers, in order to compensate for the insufficiency of the language expertise within the unit and resulting in an increase of the reviewers' workload, should remain a temporary and exceptional solution (see paragraphs 36-37).

Recommendation 2:

Separate structurally the selectors from the reviewers

OLAF should place the selectors in an organisational structure separate from the reviewers. OLAF should also reduce, as much as possible, the number of cases for selection allocated to the reviewers.

Furthermore, OLAF could consider either decentralising the selection function to the investigative Directorates, or introducing a rotation system whereby investigators from each investigation unit are allocated, for a period of time, to the ISRU.



Need to improve the application of the selection criteria

12. The SC found that the assessment of OLAF's competence to act was insufficiently substantiated and in general little consideration was given to the relevant legal instruments (see paragraphs 47-49).

Recommendation 3:

Improve the assessment of the criterion "OLAF's competence to act"

OLAF should require the selectors:

- a) to better explain the concrete illegal or irregular activities to which the allegations refer and the way in which they affect the financial interests of the EU;
- b) to make systematically reference to the relevant legal instruments.

In addition, OLAF could also consider compensating for the lack of sufficient legal expertise by the introduction of appropriate training courses and procedures for consultations with OLAF's Legal Advice Unit.

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13. The SC notes that there are no clear instructions with regard to the indicators to be used by the selectors to evaluate whether or not the information is sufficient to justify the opening of an investigation or coordination case. As a result, evaluation of this selection criterion was not always properly carried out, while at the same time a variety of practices and a certain degree of inconsistency was noted in the ISRU's opinions. The SC concludes that OLAF's approach to assessing this selection criterion needs to be further developed and clarified. To that end, OLAF could take note of concrete indicators used by selectors in some of the opinions (see paragraphs 50-54).

Recommendation 4:

Further develop and clarify parameters for evaluating the "sufficiency of information"

OLAF should establish a list of concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions.

14. The SC notes that the Investigation Policy Priorities (IPPs) established by the DG indicate very clearly a number of concrete and measurable indicators that shall be used in the selection process. However, the SC's review of opinions revealed that these indicators are not systematically and rigorously applied, in particular with regard to "proportionality", "efficient use of resources" and "special policy objectives/criteria".
15. With regard to assessment of proportionality of OLAF's action, the SC found that, despite instructions in the IPPs, the opinions frequently contain unsubstantiated statements and,



in many of them, the proportionality test is either absent or incomplete. Moreover, the special policy objectives/criteria are not systematically used (see paragraphs 56-57 and 64-65).

Recommendation 5:

Clarify the application of the proportionality principle

OLAF should clarify the application of the proportionality principle and provide the selectors with clearer guidelines.

In particular, OLAF should better assess the forecast of the manpower required and other foreseeable costs, weighted against the likelihood of financial recovery and/or of prosecution, and deterrent value. Financial indicators, which are relevant for the assessment of the seriousness of the risk involved, should be used as an element of reference and as internal guidelines on the application of the proportionality principle.

- 16.** The SC also found that the evaluation of the criterion "efficient use of resources" was not properly carried out. The SC believes that several factors may explain that. On the one hand, the evaluation of the four indicators mentioned in the IPPs is hardly achievable without close contact with the investigation units. While the selectors may indeed check in the CMS on the workload of the investigation units (in terms of number of investigators and investigations per unit), the management of these units is better placed to appreciate whether this workload permits swift and continuous investigative activities or could slow down priority investigations. On the other hand, neither the IPPs nor other guidelines on selection⁸ establish a threshold above which the *ratio* of cases per investigator would be considered to be excessive workload. As a consequence, in the absence of clear instructions as to the way in which the size of the workload should be evaluated and of a systemic dialogue between the ISRU and the investigation units, the evaluation of the efficient use of investigative resources would appear to depend to a great extent on a personal approach of each selector. The variety of approaches and sometimes inconsistencies noted by the SC in the opinions confirm this conclusion (see paragraphs 58-60).
- 17.** The SC's review of opinions revealed that, in the few cases where an estimate of the size of the workload of investigators was made, it was not a determining factor for the dismissal of cases. The SC would support the approach that the workload of investigation units should not in itself be sufficient justification for the dismissal of a case. The lack of sufficient resources in investigation units should be tackled by other means, especially via management tools (e.g. temporary reallocation of staff).

⁸ The "Starter Kit".



Recommendation 6:

Clarify the parameters for the evaluation of the criterion "efficient use of resources"

OLAF should apply more rigorously and, where necessary, clarify the application of some of the indicators established in the IPPs for evaluating the "efficient use of resources".

In particular, OLAF should better assess the following indicators: size of workload of investigation units and its impact on the on-going investigations, as well as the availability of expertise. To that end, OLAF could improve the cooperation between the ISRU and the investigation units.

18. The SC found that the reasons outlined as to why an OLAF action would not bring any added value to the control activities carried out by other EU or national bodies, which are better placed to act, are generally well explained. Some reasons are recurring, so it would be more efficient for OLAF to identify the main reasons and establish for the selectors a pre-determined list of possible situations where another authority is considered better placed to act (see paragraph 61).
19. The SC noted with concern that the likelihood of a follow-up by another EU or national authority seems to be insufficiently taken into consideration by OLAF. When information on dismissed cases is forwarded to national or EU authorities, it is of the utmost importance that OLAF follows up the action taken by them, in order to be able to react in an appropriate manner when a case is not effectively dealt with by these authorities (see paragraphs 62-63).
20. The SC would point out that, while the national authorities may indeed often be better placed to act, the situation is, however, different with regard to the EU institutions. When OLAF forwards information on serious suspicions of fraud to various Directorates-General of the Commission or to other EU institutions, bodies, offices or agencies for further action, OLAF must check whether they have, apart from a general competence to carry out system audits, the appropriate powers to undertake (possibly investigative) actions in individual cases. These checks are necessary especially in the EU staff sector, where OLAF has, in certain matters, sole competence, while in others it has shared competence with the EU institutions, bodies, offices and agencies, with some of which it has concluded agreements on the *de minimis* policy.



Recommendation 7:

Apply with caution the subsidiarity principle

OLAF should pay special attention to cases it decides to dismiss on grounds of subsidiarity/added value reasons.

In particular, OLAF should:

- a) Verify that the recipient authority does have the necessary powers to take forward cases dismissed by OLAF on grounds of subsidiarity/added value;
- b) Establish an appropriate system of monitoring (prompt, systematic and clearly evidenced) of cases dismissed on grounds of subsidiarity/added value and report in a transparent manner on the results of this monitoring exercise.

21. The SC's overall assessment of the way in which selectors evaluated and applied the selection criteria revealed that the quality (in terms of completeness, clarity, consistency) of the motivation of opinions depends to a great extent on the individual approach and experience of selectors. To enhance the quality, OLAF should apply more rigorously the indicators it established for the assessment of these criteria and further develop and clarify some of them.

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Recommendation 8:

Improve the quality of the motivation of opinions

OLAF should improve the quality, clarity and consistency of the motivation of the opinions on opening decision.

In particular, OLAF should consider amending the work-form "Opinion on opening decision", in order to include specific reference to a number of items, to be chosen by the selectors from pre-determined lists.

These pre-determined lists could include references to:

- a) relevant legal instruments (to be used when assessing OLAF's competence to act);
- b) concrete and measurable indicators for assessing the reliability of the source, credibility of the allegations and sufficiency of suspicions (to be used when evaluating the sufficiency of information);
- c) concrete and measurable indicators for assessing the IPPs.



Need to increase transparency of the selection process

- 22. The examination of the information flow during the selection process showed that in general OLAF is ready to provide information on dismissed cases to other EU or national authorities, while at the same time it would appear that sources of information are not systematically informed of OLAF's decisions upon completion of the selection process (see paragraphs 67-69 and 72).
- 23. The SC finds it important for the persons or entities providing OLAF with initial information to be informed of the relevant action (not) taken by OLAF. Appropriate feedback encourages fraud reporting, and it is, at the same time, a strong transparency indicator. The SC shares the view of the European Ombudsman that providing the sources of information with reasons for decisions taken by OLAF as a follow-up to that information increases transparency and strengthens trust in OLAF's functioning⁹.
- 24. The SC also noticed an apparently low level of cooperation between the ISRU and the investigation units (or investigation support units) which receive very little information on dismissed cases. The SC would point out that, when a case is dismissed, the information held (sometimes exclusively) by the ISRU may still be of interest for the investigation units (e.g. to detect new fraud mechanisms), and they could also sometimes provide, thanks to their expertise, useful feedback for the selection unit and thus increase the efficiency of the selection process (see paragraphs 70-71).

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Recommendation 9:

Increase transparency of the selection process

OLAF should improve the transparency of the selection process.

In particular, OLAF should:

- a) Give better feedback to the source of information on the action (not) taken by OLAF following the information provided by the source;
- b) Reinforce internal consultation and the exchange of information between the ISRU, and the investigation (and investigation support) units.

- 25. The SC noted that the conclusions of the opinions do not always clearly mention the actions that OLAF should take at the end of the selection process. When they are not completely omitted, some of these actions can only be deduced from other sections of the opinion (see paragraphs 67-69 and 72).

⁹ See the Draft recommendation of the European Ombudsman in her inquiry into complaint 1183/2012/MMN against OLAF, 15 November 2013, paragraph 28.



Recommendation 10:

Improve the clarity of conclusions of opinions

Further improvements are needed with regard to the conclusions drawn up at the completion of the selection process, which should clearly specify the actions that OLAF should take following a decision to dismiss or open an investigation or coordination case.

In particular, conclusions of opinions should clearly mention the actions that OLAF intends to take upon completion of the selection process, such as:

- a) to inform the national or EU authorities better placed to act;
- b) to protect (or not) the identity of the source;
- c) to inform (or not) the source of information of OLAF's decisions.

Need to improve the reporting to the SC

26. The SC found instances where it had not been informed of obstructions that OLAF had encountered during the selection process. Moreover, OLAF did not inform the SC of cases dismissed where the opinions recommended that information should be transmitted to national judicial authorities. OLAF's obligation to inform the SC of "cases" requiring information to be forwarded to the judicial authorities of a Member State¹⁰ covers both cases opened as investigations and cases dismissed. Although such examples may be quite rare, the SC would highlight that such situations fall within its mandate and OLAF should thus provide the SC with appropriate information (see paragraphs 54 and 71).

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Recommendation 11:

Improve reporting to the SC on risks to OLAF's independence and on dismissed cases transmitted to national judicial authorities

OLAF should improve its reporting to the SC on issues falling within the mandate of the SC.

In particular, OLAF should:

- a) Inform the SC whenever actions or omissions of EU or national authorities are likely to jeopardize OLAF's investigative independence and of the measures it intends to put in place in order to improve cooperation with these authorities;
- b) Inform the SC of all dismissed cases in which information has been transmitted to judicial authorities of Member States, in accordance with Article 17(5) of Regulation No 883/2013.

¹⁰ See Article 11(7) of the former Regulation 1073/1999 and Article 17(5) of Regulation No 883/2013.



Final remarks and recommendation

27. During technical meetings with OLAF in 2013, the SC presented some concerns arising from its examination of the ISRU's opinions and from the interviews conducted with OLAF staff, with regard to, *inter alia*, the time-frame for completing selections, the decreasing number of analysts within the ISRU and the division of tasks between selectors and reviewers. The SC notes that OLAF introduced some significant improvements during the period when this opinion was being drafted. The 2-month time limit for selection was removed from the GIP. The internal structure of the ISRU was modified on 1 January 2014: the unit is now divided into 3 sectors (two sectors dedicated to the selection and one dedicated to the review), run by heads of sectors assisting the head of unit. The SC welcomes these improvements.

28. Moreover, the SC wishes to underline that it is not its intention to substitute its own judgment on cases examined for that of OLAF, i.e. the SC is not judging whether individual cases should or should not have been opened. However, taking into consideration all of the above conclusions and recommendations and, in particular, the concerns with regard to the sufficiency of human and time resources allocated to the ISRU as well as with regard to compliance with the selection criteria, the SC believes that it would be of benefit for OLAF to carry out an internal evaluation of the activities of the ISRU, aimed at establishing, *inter alia*, the level of resources needed (number of staff and expertise), the strengths and weaknesses, the "error rate" in evaluated cases (in particular those dismissed) and the relation between selectors and reviewers.

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Recommendation 12:

Carry out an internal evaluation of the activities of the ISRU

OLAF should carry out an internal evaluation of the activities of the ISRU.

Such evaluation could be done either by OLAF's internal auditor and/or by a special team designated by the Director-General, in close consultation with Directors A and B.

The SC invites OLAF to consider the recommendations of this opinion and to report to the SC on the follow-up given to them. The SC expects to receive OLAF's report by 15 June 2014.



PART II ANALYSIS AND FINDINGS

29. The SC defined a number of indicators for the evaluation it carried out. To assess the efficiency of the selection function, the SC looked into the resources made available to the ISRU to carry out its tasks and the concrete results achieved in 2012 and 2013. The quality of the opinions was evaluated in the light of their conformity with the selection criteria established by the DG¹¹, while the transparency of the selection process was scrutinized by looking into the information flow throughout the selection process.

(1) *The resources allocated to the selection function*

30. Appropriate staff (number and expertise), sufficient time and clear instructions, appropriate technical and IT tools – those elements are critical for a successful selection process. Therefore, the SC has assessed the allocation of these resources to and within the ISRU.

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(1.1) Human resources

31. **Number of staff** –The ISRU had 16 selectors in 2012 and 2013¹², who dealt with an ever increasing amount of incoming information¹³. The average number of selections per selector was 74, meaning that an average of 3 working days was spent on one selection¹⁴. An opinion was expressed in the interviews conducted by the SC that the staffing of the ISRU may be insufficient and that the heavy workload may affect the quality of the opinions. The SC does not have the necessary means and information to compare whether the performance of the ISRU is equivalent to that of the investigators who formerly carried out the assessment of the initial information prior to the OLAF reform. The SC believes that OLAF itself could and should perform such an analysis.¹⁵

¹¹ The three selection criteria are: OLAF's competency to act, the sufficiency of information to open an investigation or coordination case and the Investigative Policy Priorities.

¹² Ares(2013)3357296.

¹³ The information of possible investigative interest received by OLAF was defined by the ISIP as "*all information received by OLAF or information gathered on OLAF's own initiative, that could be considered for the opening of an investigation or coordination case and which must be submitted to the selection procedure for analysis*". In 2012, OLAF received 1,264 incoming information items which represented an increase of 21 % compared to 2011 (Source: OLAF 2012 Activity Report, page 13). The number of incoming information items also slightly increased in 2013 compared to 2012: OLAF received 1156 incoming information items from February 2012 to December 2012, and 1222 items from January 2013 to December 2013. Source: Ares(2013)3357296.

¹⁴ According to statistics provided by OLAF, a selector dealt with, on average, 72 cases from February 2012 to December 2012 (221 working days) and 76 from January 2013 to December 2013. Source: Ares(2013)3357296.

¹⁵ Prior to the reform of OLAF, incoming information was assessed by the investigators allocated to the 8 investigation units. In 2010, the investigation units counted 152 staff members (including Heads of Unit and secretaries). Source: Special Report No 2/2011 of the European Court of Auditors, annex II.



- 32. Technical and investigative expertise** – In order to accomplish its mission, the ISRU needs to work within all the areas of OLAF's investigative competence. A wide range of expertise is covered by the staff within the unit, both through their education (economy, law, accounting/finances, biology, political sciences) and their professional experience (public finances inspectors, repression of corruption/fraud specialists, lawyers and magistrates, lecturers, auditors, customs officers, national police force, administrative assistants and secretaries). However, it appears from information provided by OLAF that some of the selectors do not have any investigative experience.
- 33.** The SC noted, from the examination of the opinions of the ISRU, that cases appear to be attributed to the selectors on the basis of their personal skills (competencies, language etc.). However, the distribution of cases per sector and per selector indicates that each selector provides opinions not only within their sectors of expertise. Statistical information extracted from the CMS showed that selectors without investigative experience dealt with a high number of cases – mostly dismissed – in very different sectors. Some of the opinions examined clearly reflected the lack of specific or investigative expertise of the selectors, who themselves sometimes acknowledged that they “are not specialist [in the matter analysed]”¹⁶.
- 34. Legal expertise** - In the opinions analysed, the SC notes the limited use of references to the relevant legal instruments¹⁷. This is a clear indicator that the appropriate legal knowledge is either missing or not being sufficiently applied within the unit.
- 35. Language expertise** - The ISRU must be able to handle incoming information potentially drafted in all the 24 EU official languages, which is clearly impossible given the current number of selectors¹⁸. As a result, the lack of language expertise has sometimes prevented the selectors from properly assessing the incoming information¹⁹.
- 36.** The lack of appropriate language expertise has been supplanted by the attribution of cases for selection to the reviewers²⁰, based mainly on their language skills²¹, leading to an increase in their workload, while they were already in charge of providing opinions to the DG on the legality of OLAF's key investigative activities²², on the requests to extend the scope of cases²³ and on case closures²⁴.

¹⁶ 1 opinion.

¹⁷ See part II.2 of this opinion.

¹⁸ According to the 2012 Activity Report of the ISRU, this unit was comprised of 11 different nationalities and was able to deal with information in 16 languages.

¹⁹ At least in 2 opinions.

²⁰ The unit had 7 reviewers. A statistical search in the CMS showed an average of 60 cases dismissed per reviewer (2012 and 2013 cases).

²¹ 71 out of 293 opinions analysed were drafted by the reviewers.

²² Article 12.2 of the ISIP. In 2012 OLAF performed 97 on-the-spot checks and inspections, 66 interviews with persons concerned, 38 investigative missions to third countries, 11 inspections of EU premises, 10 digital



37. The SC believes that this may represent only a temporary solution of an exceptional nature, more especially considering that the workload of reviewers will likely continue to increase in the future given that the new GIP foresee that, in addition to the opinions provided under the ISIP, they will also need to advise the DG on interviews with witnesses²⁵ as well as to provide opinions on the requests to split and merge cases²⁶.

38. **Trainings** - The SC would like to stress that the lack of previous experience or knowledge need not be an impediment to performing a good selection process, at least for "simple" cases (e.g. cases clearly outside OLAF's competence, the so-called "prima facie" non-cases or where allegations are not substantiated), as long as appropriate training has been provided. The SC was surprised to note that, on the one hand, the training courses followed by the selectors did not cover all the different sectors of OLAF's field of work while, on the other hand, the specialized courses were followed by only a very limited number of selectors²⁷.

(1.2) Time resources

39. The percentage of selections which the selectors completed within the 2-month period foreseen in the ISIP²⁸ was 76%²⁹. Some cases were dismissed (mainly on the grounds of the insufficiency of information), because it was not possible to acquire the necessary information within the fixed time limit imposed³⁰. At the same time, it appears that some cases which were previously dismissed have been opened later, on the basis of the information provided by the source after the fixed period³¹. Moreover, it was ascertained during the interviews conducted by the SC that the assessment of the incoming

forensic examinations (Source: OLAF 2012 Activity Report, page 21). These activities were authorized by the DG, on the basis of opinions provided by the reviewers of the ISRU.

²³ Article 12.3 of the ISIP. The SC has no statistical information as to the number of opinions provided by the ISRU in this respect.

²⁴ 465 investigation and coordination cases were closed by OLAF in 2012 (Source: OLAF 2012 Activity Report, page 18).

²⁵ Article 11.2, a) combined with Article 12.2 of the GIP. In 2012, OLAF carried out 108 interviews with witnesses (Source: OLAF 2012 Activity Report, page 21).

²⁶ Article 12.4 of the GIP.

²⁷ In January 2012, training for selectors was provided comprising several modules. Module 1 was followed by three participants; module 2 was followed by twelve participants; modules 3 and 5 were followed by seven participants; module 4 was also followed by seven participants. Specialized training courses were also provided later, e.g. in the area of Agricultural funds – Investigations by OLAF (one participant); New financial Regulation (three participants); EIB training on internal procedures (three participants); DEVCO – Budget support (one participant); SPS/SPAS training (four participants); Computer forensics in support of OLAF's investigations (one participant); Operational analysis in support of OLAF's investigations (one participant). Source: OLAF.

²⁸ Article 5.5 of the ISIP.

²⁹ Ares (2013) 3357296.

³⁰ The source of information did not reply to OLAF's requests in 24 out of 125 cases dismissed on the grounds of insufficiency of information (19%).

³¹ 1 case dismissed on the grounds that the information fell outside the IPPs was reopened later on as an investigation.



information was affected by time pressure. These examples show that it was not only impossible, but sometimes also counterproductive to adhere strictly to the 2-month time limit, in the absence of a procedure, in the ISIP, allowing extending this period, in duly justified situations. The SC believes that a flexible approach is recommendable taking into account that sometimes the necessary supplementary information may emerge after the 2-month period or the source of information may take some time to reply to supplementary questions.

40. The SC notes that Regulation No 883/2013 does not impose a mandatory selection period, except for cases where a Member State concerned or an EU institution, body, office or agency requests that OLAF open an investigation and where a decision whether or not to open an investigation shall be taken within two months of receipt by OLAF of the request, otherwise OLAF shall be deemed to have decided not to open an investigation³². The new GIP eliminated the overly rigid 2-month time limit, while at the same time maintaining strict deadlines for the Registry to register the incoming information and transmit it to the ISRU³³.

(1.3) Instructions

41. Selectors carry out their tasks on the basis of instructions given by the DG, namely the ISIP (and, since 1 October 2013, the GIP) and of standardized work-forms³⁴. The SC has analysed these instructions and already provided the DG with a number of comments³⁵. The SC also makes some recommendations with regard to the work-form "Opinion on opening decision" used by the selectors in part I of this opinion.
42. During the interviews carried out with OLAF staff it was stated, *inter alia*, that in all probability many cases are not reported to OLAF due to the lack of a clear procedure for dealing with whistle-blowers. The SC notes that the selectors are instructed to comply with general rules³⁶, but do not have specific instructions or any formal procedure for dealing with whistle-blowers (e.g. formal contact points, work forms, process for the selectors to contact the OLAF's Legal Advice Unit). As a result, different approaches have sometimes been noted amongst the selectors³⁷. While taking note of the increase over the past few years, of the number of cases where the source of information was a whistle-blower (*figure 2*), the SC believes that the adoption of clear and detailed guidelines on how to deal with them would be helpful for the selectors.

³² Article 5(2) and 5(4) of Regulation No 883/2013.

³³ Selection period of no longer than 2 months nevertheless remained a target in OLAF 2013 Management Plan.

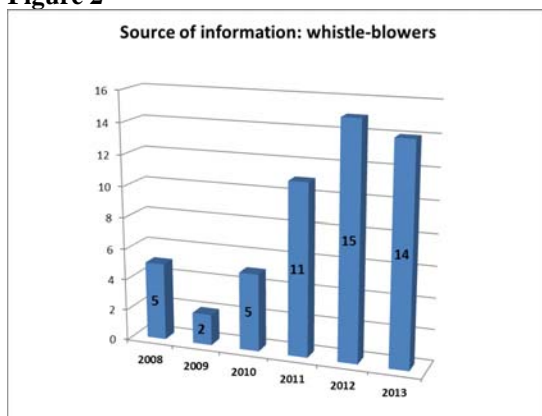
³⁴ General guidelines on the selection appear also in the "Starter Kit".

³⁵ On 5 July 2013 the DG provided the SC with a copy of an amended version of the ISIP, which the DG envisaged adopting at the date of the entry into force of the new OLAF Regulation. The SC provided its first comments by letter of 30 July 2013.

³⁶ Articles 22a and 22b of Staff Regulations and Commission Guidelines on Whistleblowing (SEC(2012)679 final).

³⁷ In one opinion the identity of the whistle-blower is clearly mentioned, while in another opinion it is anonymised. Both opinions recommended the opening of an investigation.

Figure 2



Source: CMS

(1.4) IT/technical resources

43. Successful assessment of incoming information depends to a great extent on IT/technical tools available to the ISRU which is able to access various internal and external databases. The SC noted that, for the most part, the opinions make clear mention of the consultation of databases and of the results of the research carried out by the selectors.
44. The IT tools made available to the public to report fraud are also important. One of them is the OLAF Fraud Notification System (FNS), a web-based information system that may be used to submit information to OLAF, and through which the selectors may communicate with the source of information³⁸. On several occasions, the opinions of the ISRU mention that the informants have tried to send documents through the FNS, but these documents have not been received because of the restrictions imposed by the FNS, which blocks the upload of overly large files or limits the number of characters that can be used, without, however, informing the sender.

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(2) *The selection process: compliance with the selection criteria*

45. The selection process consists of a step-by-step application of three selection criteria: OLAF's competency to act, the sufficiency of information to open an investigation or coordination case and the Investigative Policy Priorities (IPPs) established by the DG³⁹. If the first selection criterion (or the first and second selection criteria) is not fulfilled, the case is dismissed and the information assessed no further⁴⁰. **Figures 3 and 4** show the distribution of cases dismissed and opened by sector.

³⁸ Through the FNS, OLAF collects information supplied by users of the system in a questionnaire, including a free text field. Messages are recorded and analyzed by OLAF staff. If the user chooses to register for ongoing communications, OLAF collects the information subsequently transmitted in all following communications between OLAF and the user. This information is recorded on a dedicated server, and used as a source of intelligence/evidence.

³⁹ Article 5.3 of the ISIP, which corresponds to Article 5.3 of the GIP. The latter was not significantly changed.

⁴⁰ See the Annex which illustrates this approach.



Figure 3: Distribution of cases dismissed by sector

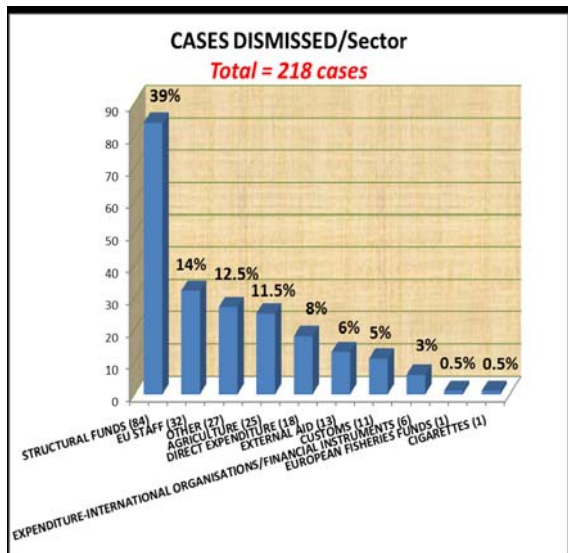
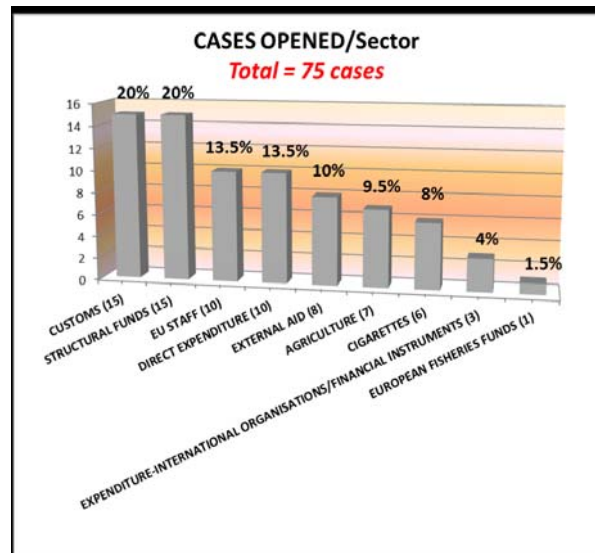


Figure 4: Distribution of cases opened by sector



46. The ISIP and the IPPs contain instructions on how to apply each of the selection criteria. The SC's review of the opinions was thus aimed at assessing their conformity with these instructions.

(2.1) OLAF's competency to act

ISIP, Art. 5.4: In assessing whether OLAF is competent to act, consideration must be given to relevant EU Regulations, Decisions, Interinstitutional Agreements and other legal instruments relating to the protection of the financial and other interests of the EU⁴¹.

47. The SC notes that the lack of OLAF's competence to act, being the reason given for the dismissal of 15% of the cases (*figure 5*), was in general well explained⁴². On the other hand, little consideration was given to the relevant legal instruments in those cases where OLAF was considered to be competent to act⁴³. Moreover, the assessment of OLAF's competency to act is not sufficiently substantiated: in many opinions there is a general

⁴¹ This provision was slightly changed in the GIP: " In assessing whether OLAF is competent to act, consideration shall be given to relevant EU Regulations, Decisions, Interinstitutional Agreements and other legal instruments relating to the protection of the financial interests of the EU, and any other interest of the EU the protection of which falls under OLAF's mandate."

⁴² 34 cases, concerning mainly civil/private disputes between individuals/companies where EU funds were not concerned, questions of interpretation of the EU legislation, matters falling within the exclusive competence of the Member States such as criminal offences (e.g. kidnapping).

⁴³ Reference to legal instruments was made in 25 out of 259 opinions where OLAF was considered to be competent to act (9,6%).



and unsubstantiated reference to a potential impact on the EU financial interests or to the fact that EU funds were involved⁴⁴; in some opinions it is just stated "yes" in the parts referring to the potential impact on the EU financial interests/potentially serious matter relating to the discharge of professional duties⁴⁵; other, very few, opinions only mention that "OLAF is competent" without giving any further explanation⁴⁶.

48. In general, the SC notes that the quality of the assessments varies according to selectors and their experience in specific sectors: opinions concerning customs, cigarettes and EU staff are comprehensive and generally contain a clear explanation as to the irregularity arising from the allegations, the way it impacts the EU budget and the amount at stake (when determined).
49. The SC also notes that the work-form "Opinion on opening decision" used by the selectors includes two different options for referring to the potential impact on the EU financial interests and to possibly serious matters relating to the discharge of professional duties: one in the "summary" part of the work-form, where the selectors need to tick the relevant boxes, and one in the body of the opinion (part 3 of the work-form), where the selectors need to assess *in concreto* OLAF's competency to act. This double option might have created some confusion amongst the selectors, since some of them seem to assume that ticking the boxes in the "summary" part exempts them from carrying out a concrete analysis of OLAF's competency to act in part 3 of the opinion, which should not be the case.

(2.2) Sufficiency of information

ISIP, Art. 5.4: In evaluating whether the information is sufficient to open an investigation or coordination case, consideration must be given to the reliability of the source and the credibility of the allegations. In addition, all information collected during the selection process must be taken into account when justifying the opening of an investigation or coordination case⁴⁷.

50. The insufficiency of information was the main reason for dismissing cases (*figure 5*). The SC therefore paid particular attention to the grounds on which the selectors based their conclusions.

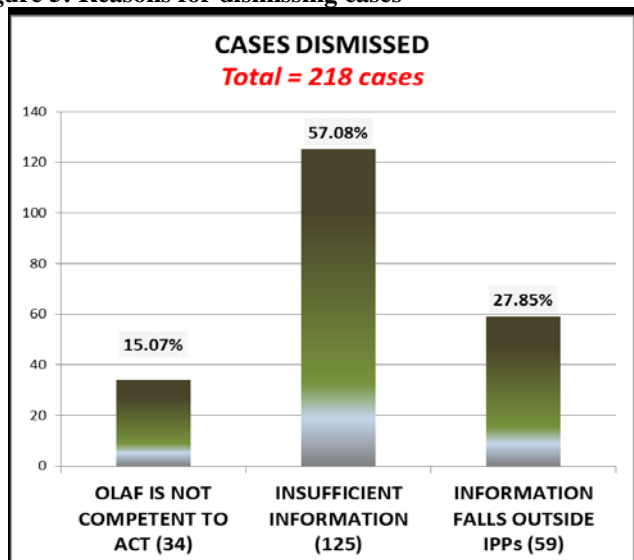
⁴⁴ 55 out of 259 opinions where OLAF was considered to be competent to act (21%).

⁴⁵ 6 out of 259 opinions where OLAF was considered to be competent to act (2,31%).

⁴⁶ 3 out of 259 opinions where OLAF was considered to be competent to act (1,15%).

⁴⁷ This provision was not significantly changed in the GIP.

Figure 5: Reasons for dismissing cases



51. The SC identified opinions where the assessment of the sufficiency of the information (reliability of the source and credibility of the allegations) is unsubstantiated⁴⁸, incomplete⁴⁹ or inconsistent⁵⁰. Equally, little consideration was given to a third parameter emerging from the EU case-law (sufficiency of suspicions), which was rather rarely used, mainly because it was not mentioned in the ISIP or in the work-form used by the selectors⁵¹. Moreover, it seems to have various meanings for the selectors: most of the time it was considered that the information was insufficient due to lack of "clear indications of fraud" or "absence of fraud elements" or because there was "no concrete information as regards possible irregularities or fraud"⁵²; in other cases the (in)sufficiency of suspicions was determined by the quality of the information at OLAF's disposal⁵³, sometimes the "seriousness of the allegations" was also an element taken into consideration⁵⁴. Bearing in mind the existing difference between the "seriousness of the allegations" and the "seriousness of suspicions", the SC would point out that this latter

⁴⁸ In 64 out of 259 opinions (24,71%) where OLAF was considered to be competent to act and the (in)sufficiency of information was evaluated, the SC noted the use of unsubstantiated statements - usually one sentence such as "the information is/would/should be sufficient/enough to open an investigation" (58 opinions), "all the elements needed to further investigate have clearly been identified" (1 opinion), "the information is sufficient and the sources are reliable" (3 opinions), or even a simple "yes" (2 opinions).

⁴⁹ No consideration was given either to the reliability of the source or to the credibility of the allegations in 22 out of 259 opinions (8,5%) where OLAF was considered to be competent to act and the (in)sufficiency of information was evaluated.

⁵⁰ In some cases where the source was anonymous, the selectors considered either that its reliability cannot be proved or assessed (5 opinions) or considered it to be unreliable (2 opinions).

⁵¹ The sufficiency of suspicions was clearly assessed in 69 out of 259 opinions (26,64%) where OLAF was considered to be competent to act and the (in)sufficiency of information was evaluated.

⁵² 58 opinions.

⁵³ 8 opinions.

⁵⁴ 3 opinions.



parameter should not have been considered as optional, since the EU case-law has established the "sufficiently serious suspicion" as a precondition for the opening of an investigation⁵⁵. The new Regulation No 883/2013 has now explicitly incorporated this requirement⁵⁶ and this change is reflected in an amended work-form accompanying the new GIP. The SC welcomes this improvement.

- 52.** The SC believes that the deficiencies noted above could be explained, at least partially, by the fact that neither the ISIP nor any other internal document⁵⁷ provides the selectors with precise indicators for implementing this criterion, namely concrete situations when a source of information can be considered reliable (or not), when the allegations put forward are credible (or not) or when there are sufficient suspicions of fraud or irregularities (or not). Appreciation of these elements depends, therefore, very much on the personal approach of each selector, based on their investigative experience and specialised knowledge.
- 53.** The SC was, however, able to identify a number of concrete indicators used in some of the opinions. The reliability of the source was evaluated by using indicators such as (i) the verifiability of the source (anonymous or not), (ii) the type of the source (natural person; EU institution, body, office, agency or a Member State or third country authority; OLAF itself), (iii) the (in)direct knowledge of or connection with the matter reported to OLAF, (iv) the possibility for OLAF to contact the source to request further information (v) the degree of cooperation between the source and OLAF, (vi) the trustworthiness of the source, (vii) the motivation of the source and potential degree of subjectivism. As to the assessment of the credibility of the allegations, their appreciation was based on indicators such as (i) the quality of the initial information provided to OLAF⁵⁸, (ii) its verifiability⁵⁹, (iii) the context.
- 54.** On the other hand, the SC identified a number of objective reasons explaining the insufficiency of information gathered during the selection process, such as (i) the imprecision of the initial information, which did not allow further research; (ii) technical problems with the FNS preventing the reception of documents; (iii) time pressure of the 2-month period for selection, which did not allow in-depth searches for additional information; (iv) lack of response from stakeholders (EU, national or third countries

⁵⁵ Cases C-15/00 *Commission v EIB* and C-11/00 *Commission v ECB*.

⁵⁶ Article 5(1).

⁵⁷ In particular the "Starter kit".

⁵⁸ Clarity, preciseness, completeness: information has been considered to be detailed and substantiated/documentated when it provided the names of persons/entities involved, dates, location, and fraud mechanism.

⁵⁹ Information has been considered to be verifiable and accurate when confirmed after being cross checked with information otherwise provided to or gathered by OLAF.



authorities, sources of information) or even obstruction on their part⁶⁰. The SC regrets that, in the latter case, such obstruction was not reported to it.

(2.3) Investigation Policy Priorities

ISIP, Art. 5.4: The IPP set out the criteria to be applied in determining whether information falls within an established investigative priority⁶¹.

55. Each of the investigation policy priorities established by the DG - proportionality, efficient use of investigative resources, subsidiarity/added value and special policy objectives/criteria for 2012/2013 – can be assessed on the basis of the concrete and measurable indicators which are clearly indicated in the IPPs. The SC's review is aimed at assessing the way in which the selectors applied those indicators.⁶²

(2.3.1) Proportionality

IPPs: OLAF should focus on cases where it can expect a fair return for its efforts. The expected results need to be balanced against the human and material resources that will be needed to bring a case to a successful conclusion.

This entails formulating a reasonable forecast of the manpower required and other foreseeable costs (e.g. due to missions) in connection with the investigation while also taking into account:

- Likelihood of financial recovery;*
- Likelihood of prosecution - for example, whether there is sufficient time to investigate before time-barring and whether there are reasons prima facie to suspect a criminal intent.*
- Possible high deterrent value: for example action is taken in a high value area where little action has been taken before.*

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56. In general terms, the proportionality principle requires that there be a reasonable relationship between an objective to be achieved and the means used to achieve it. Applied to OLAF's decisions, these require an appropriate *equilibrium* between, on the one hand, the investigative **means** to be deployed by OLAF if a decision to open an investigation or coordination case is taken and, on the other, the **results** that are expected. This approach is well reflected in the IPPs, which provide the selectors with clear indications as to the elements that need to be weighed against each other, resulting in a “*fair return for [OLAF's] efforts*”.

57. The SC notes however that there are a limited number of cases where the indicators for proportionality, as mentioned in the IPPs (likelihood of recovery and of prosecution, possible deterrent value) are clearly indicated and where a balance is struck between the number and type/complexity of the investigative activities needed to be carried out and

⁶⁰ Lack of cooperation from a Member State was reported in one opinion. Obstructions from an EU Delegation were also reported in one opinion (disclosure of the existence of OLAF's case to the person concerned and lack of cooperation with OLAF, mainly by not providing the information requested by the latter).

⁶¹ This provision was removed from the GIP. However, the reference to the IPPs as a selection criterion was kept in Article 5.3 of the GIP.

⁶² The SC's comments on the IPPs themselves can be found in the SC's Opinion No 1/2014.



the expected amount to be recovered /the likelihood of action to be taken by a competent authority, or between the relatively low financial impact of the alleged irregularities and the workload of the investigative unit⁶³. However, the indicators contained in the IPPs were not rigorously applied in some cases: investigations were opened on the basis of only the two first selection criteria⁶⁴; the proportionality test consisted of unsubstantiated statements⁶⁵ or in remarks with regard to a different policy criteria⁶⁶; reference to a financial cost/benefit *ratio* of an investigation to be carried out was incomplete⁶⁷.

(2.3.2) Efficient use of investigative resources

IPPs: An efficient use of resources means inter alia that once opened, investigations should be dealt expeditiously.

This will entail checking whether:

- The workload of the relevant Unit will permit to begin investigative activities soon after the case has been opened*
- The workload of the relevant unit will permit to carry out work continuously as required by Regulation 1073/99*
- Investigations underway and whose priority is higher are not slowed down*
- Expertise required in order to carry out the investigation is available (language/sectoral/technical/legal knowledge).*

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58. The SC notes that the evaluation of the workload of the investigation units is often missing⁶⁸, unsubstantiated⁶⁹, inconsistent⁷⁰, or makes reference to indicators such as

⁶³ 37 out of 134 opinions (27,61%) where the IPPs were assessed (59 opinions recommending dismissing a case on the grounds outlined in the IPPs and 75 opinions recommending the opening of investigation/coordination cases).

⁶⁴ 2 cases.

⁶⁵ In 24 out of 134 opinions (18%) where the IPPs were assessed it was only stated that "it is/it would be proportionate/disproportionate" or "it would be/not be proportional" to open an investigation or coordination case or OLAF "can/cannot expect a fair return from its investigative efforts".

⁶⁶ E.g. when carrying out the proportionality test, reference was made to the subsidiarity/added value of OLAF's action (the assumption that an OLAF action would not be proportionate because action was already taken at national level and OLAF cannot bring any added value was found in 15 out of 59 opinions (25,42%) recommending dismissing a case on the grounds outlined in the IPPs).

⁶⁷ Where the potential financial impact of the irregular activity affecting the EU budget was estimated or the likelihood of prosecution in the Member State or of disciplinary action by the EU institution concerned was anticipated, there is no reference to the forecast of the human and material resources needed to investigate: 8 out of 59 opinions (13,55%) recommending dismissing a case on the grounds outlined in the IPPs.

⁶⁸ The evaluation of the workload is missing in 50 out of 134 opinions (37,31%) where the IPPs were assessed: some opinions mention that no investigative resources should be used (22 opinions), while others make no reference to the investigative resources (28 opinions).

⁶⁹ In the sense that it is stated that OLAF would be able to carry out an investigation or that a specific unit would be competent to investigate or would have the necessary resources available, but without any further explanation (30 out of 134 opinions (22,38%) where the IPPs were assessed).

⁷⁰ One opinion mentions that the workload of a specific investigation unit would not allow investigative activities to begin soon after the case has been opened and consequently recommended the dismissal of the case, while another opinion issued in the same period by a different selector indicates the contrary with regard to the same investigation unit, and as a consequence recommends the opening of an investigation case.



proportionality or the added value of OLAF's action⁷¹. When verification *in concreto* of the workload of the investigation unit is carried out, the selectors mention the number of cases per unit and the number of investigators per unit, without making any estimate as to the size of the workload of the investigation unit⁷². In the few cases where such an estimate was made, the heavy workload of the investigators was a reason for dismissing them, but always used in conjunction with subsidiarity reasons⁷³.

59. The number of opinions making reference to the possibility to carry out activities continuously and without slowing-down on-going or priority investigations is also very limited⁷⁴, while the availability of expertise within a specific unit seems to be better evaluated⁷⁵.
60. Few opinions make explicit reference to an internal consultation as to the availability of the human resources and/or expertise within the investigation units⁷⁶. From the interviews conducted by the SC it is also clear that the investigation units are only rarely consulted regarding the resources situation.

(2.3.3) Subsidiarity/added value

IPPs: OLAF will prioritise cases where it is the only authority with competence in a specific situation or when it can clearly add value to the actions of others.

This will entail checking whether:

- OLAF has sole competence (in certain matters in relation to EU staff) or whether there is an identifiable authority that can act*
- One or several authorities have requested the assistance of OLAF in a complex case and OLAF is therefore in a position to add value*
- An OLAF investigation could add value in terms of recovery, prosecution or deterrence to the control activities already carried out by other EU or national bodies.*

61. The SC notes that the criterion of subsidiarity/added value represents the main reason used for advising the dismissal of a case on the grounds outlined in the IPPs, taken alone or combined with other reasons⁷⁷. Apart from a small number of opinions giving it no consideration⁷⁸ or unsubstantiated⁷⁹, the reasons outlined as to why an OLAF action would not bring any added value in terms of recovery, prosecution or deterrence to the

⁷¹ 7 out of 134 opinions (5,22%) where the IPPs were assessed.

⁷² 40 out of 134 opinions (29,85%) where the IPPs were assessed.

⁷³ In 5 out of 59 opinions (8,47%) recommending dismissing a case on the grounds outlined in the IPPs.

⁷⁴ Such reference was made in 5 out of 134 opinions (1,49%) where the IPPs were assessed.

⁷⁵ 42 out of 134 opinions (31,34%) where the IPPs were assessed.

⁷⁶ 3 out of 59 opinions (5%) recommending dismissing a case on the grounds outlined in the IPPs.

⁷⁷ It was found that OLAF's action could have an added value only in 1 out of 59 cases dismissed on the grounds outlined in the IPPs. The case was however dismissed because it was considered that an OLAF action would not have been proportionate (financial *ratio* cost/benefit too high).

⁷⁸ 1 opinion, advising dismissal of a case exclusively on the grounds that the financial impact was too low.

⁷⁹ 2 opinions out of 59 opinions (3,38%) recommending dismissing a case on the grounds outlined in the IPPs.



control activities carried out by other EU or national bodies, which are better placed to act, are generally well explained⁸⁰.

- 62.** The SC received information, from other Directorates-General of the Commission, pointing out that OLAF is dismissing cases, while at the same time forwarding them for action to those Directorates without, however, checking whether they had the necessary competence and powers to act. The SC notes with concern that the Directorates-General of the Commission, which have been considered by OLAF to be better placed to act and thus receive from OLAF information on dismissed cases, are not required to report back to OLAF on actions taken⁸¹.
- 63.** Moreover, the SC notes that cases concerning Members of the European Parliament (EP), where OLAF has clearly competence to act⁸² were dismissed on the grounds of subsidiarity, although it was stated that in similar cases the EP did not report back to OLAF, despite an explicit request, on the action taken with regard to the information sent by OLAF⁸³. The SC would draw attention to the *Practical Arrangements* recently agreed between the EP and OLAF⁸⁴ which do not include such situations on the list of activities which usually/probably do not lead to serious situations requiring OLAF investigations and where OLAF is presumed not to intend to open an investigation or where there is a high probability that OLAF will not open an investigation⁸⁵.

(2.3.4) Special policy objectives/criteria

- 64.** According to the IPPs, OLAF will focus its investigative activity on sectors considered to be a priority and also on those cases where financial indicators determine the seriousness of fraud⁸⁶. When it comes to the prioritized sectors, the SC noted that the reference to

⁸⁰ E.g. the EU/national authorities were aware or already dealing with the matters submitted to OLAF or with similar matters; due to the nature of the denounced acts they were better placed to conduct a national enquiry or they had more powerful means to investigate than OLAF; there would be duplication of work if OLAF was involved and consequent risk of jeopardizing a national investigation; it was considered that, in accordance with principles of subsidiarity and proportionality, the Member State had the primary responsibility for the management and control of the EU funded projects). Those explanations were found in 56 out of 59 opinions (95%) recommending dismissal of a case on the grounds outlined in the IPPs.

⁸¹ According to the replies by the EC to the EP's written questions to Commissioner Šemeta, in the framework of the 2012 discharge to the Commission (questions 6d and 6e).

⁸² 2 cases regarding allegations of possible irregular cost declarations or possible irregular defrayal of parliamentary assistance expenses, with direct impact on the EU financial interests and representing a potentially serious matter relating to the discharge of professional duties of Members of the European Parliament.

⁸³ The 2 cases referred to in the previous footnote were dismissed on subsidiarity grounds five and, respectively, seven months after another similar case was dismissed and referred to the EP. It was proposed to refer the two cases to the EP, despite the fact that, at the time of the drafting of the opinions, OLAF had not received any feedback from the EP.

⁸⁴ 19 July 2013. The cases referred to above were however dismissed several months before the signature of the Practical arrangements.

⁸⁵ See Annex II of the Practical arrangements with the EP.

⁸⁶ See the IPPs for 2012 and 2013 and the SC's Opinion no 1/2014 on the IPPs.



them was quite rare⁸⁷. Similarly, the financial indicators were not always used: in some cases there is no reference at all, even when the financial impact is known⁸⁸. When they are referred to, mainly in sectors such as EU staff or structural funds, they are used either to dismiss cases on the grounds that the financial impact was non-existent or too low, taken alone or in conjunction with other IPPs, or to recommend the opening of an investigation or coordination case. The SC noted that the financial indicators were not always a determining factor when proposing to dismiss or open a case: when the financial indicators correspond to the IPPs, the case may, however, be dismissed on subsidiarity/added value grounds⁸⁹ or, conversely, when a case does not fall within the special policy objectives it may however be opened as an investigation if the other selection criteria are fulfilled⁹⁰.

65. As a general remark, the SC would point out that the financial indicators should not be used as thresholds for justifying the dismissal or opening of cases, but rather as an indicator for estimating or measuring the seriousness of the fraud risk involved (proportionality test)⁹¹.

(3) The information flow during the selection process

66. A centralised system where the number of OLAF staff aware of specific incoming information is very limited⁹² may lead, in the SC's opinion, to a lack of transparency and of accountability in the decision-making process, especially with regard to the cases dismissed. It should be balanced by a procedure for providing the appropriate information to the relevant EU or national authorities with which OLAF shares competence in the antifraud fight, to the investigation directorates and also to the sources providing OLAF with the initial information. The SC therefore examined the transparency of the selection process in the light of these three information-sharing requirements.

⁸⁷ 17 out of 134 opinions (12,68%) where the IPPs were assessed.

⁸⁸ The financial impact was known in 80 (out of 134) cases where the IPPs were assessed. In 13 of them (16,25%) the opinions did not make explicit reference to the financial indicators.

⁸⁹ The financial impact was known in 34 (out of 59) cases dismissed on the grounds outlined in the IPPs. In 7 of them the financial impact corresponded to the IPPs, but they were dismissed on subsidiarity/added value grounds.

⁹⁰ The financial impact was known in 46 (out of 75) cases opened (investigation or coordination cases). In 6 of them the financial impact was below the financial indicators as mentioned in the IPPs.

⁹¹ See the SC's Opinion no 1/2014 on the IPPs.

⁹² With regard to dismissed cases, the information flow includes staff of the Registry (the person registering the incoming information), of the ISRU (the selector in charge and/or the Head of Unit) and the DG, who takes the ultimate decision to dismiss the case. The circulation chain may thus include from two persons (the Director-General and the Head of the ISRU, when the latter is acting as selector - this was the case in two of the opinions analysed) – when the incoming information is transmitted exclusively and directly to one of them) up to a maximum of four persons (the Director-General, the Head of the ISRU, the selector and the Registry staff).



(3.1) Information provided to the competent EU or Member States' authorities

- 67.** Whenever an EU or national authority is better placed to deal with a case, OLAF should transfer it there. Such follow-up is necessary for every case where a sufficient suspicion of fraud has been established, but where OLAF decides not to open an investigation. Otherwise, not only would areas of impunity be created, but the transparency and coherence of the selection process would also be compromised.
- 68.** Opinions advising dismissal of a case on the grounds of subsidiarity/added value usually indicate that information should be forwarded to the authority considered better placed to act⁹³. However, it is not always clearly stated in the "conclusions" part of the opinion, but can sometimes only be deduced from other sections.
- 69.** Another important aspect that OLAF needs to take into account when transferring information to a competent authority is the necessity to protect the identity of the source, in particular of whistle-blowers. The SC notes the very limited number of opinions recommending non-disclosure of the identity of the source to those authorities, sometimes upon request by the source itself⁹⁴.

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(3.2) Information provided to the investigation directorates

- 70.** During the interviews with OLAF staff, the lack of transfer of information on dismissed cases to the investigation units was described as inhibiting the exchange of knowledge and experience. On the other hand, the SC was informed by OLAF notes⁹⁵ that there was a regular contact between the ISRU and the investigation units during the selection phase, principally in order to check the availability of investigative resources in a specific unit, or connections between new incoming information and already existing cases.
- 71.** However, the opinions reviewed by the SC do not reflect regular contacts. Few opinions make explicit reference to an internal consultation⁹⁶ or to the forwarding of information on a dismissed case of possible interest for an on-going investigation to the investigator in charge⁹⁷. This lack of consultation is even more evident in a few other cases where the

⁹³ 47 out of 59 opinions (79,66%) recommending dismissing a case on the grounds outlined in the IPPs.

⁹⁴ In cases dismissed where it was proposed to forward relevant information to the competent authority, recommendations of non-disclosure of the identity of the source was found in 7 opinions (out of 42 cases where the identity of the source is known by OLAF).

⁹⁵ Ares (2013)1903286 and (2013)3417726.

⁹⁶ 29 out of 134 opinions (21,64%) where the IPPs were assessed make reference to an internal consultation, with regard to the availability of the human resources and/or expertise (3 opinions), verification of connection of the information being assessed to existing investigations (3 opinions), or discussions on the proposal to dismiss a case or to open an investigation/coordination case (23 opinions - mainly in those cases where the initial information was forwarded for assessment to the ISRU by the investigation units themselves).

⁹⁷ 1 out of 59 opinions (1,69%) recommending dismissing a case on the grounds outlined in the IPPs.



selectors faced difficulties in carrying out searches or assessing information drafted in a language with which they were not familiar and where the investigation units (possessing the relevant language expertise) were never consulted⁹⁸, as well as in instances where investigation/coordination cases similar to or connected with the information being assessed were identified⁹⁹. That situation could raise problems in cases where it is recommended to send the information under assessment to a competent national judicial authority but not to the investigation unit dealing with the connected case, or to the SC¹⁰⁰.

(3.3) Information provided to the source of information

72. The SC notes that the opinions of the ISRU do not systematically propose informing the source of information of OLAF's decisions¹⁰¹. While this is understandable with regard to decisions to open investigation/coordination cases (for confidentiality reasons)¹⁰², it may be questionable with regard to dismissed cases.

Adopted in Brussels, on 12 March 2014

For the Supervisory Committee

Chairman

⁹⁸ 2 out of 59 opinions recommending dismissing a case on the grounds outlined in the IPPs.

⁹⁹ 3 out of 59 opinions recommending dismissing a case on the grounds outlined in the IPPs.

¹⁰⁰ 1 out of the 3 cases mentioned in the previous footnote.

¹⁰¹ The identity of the source was known by OLAF and/or OLAF can communicate with the source in 132 out of 218 cases dismissed. It was proposed to inform the source of information of OLAF's decisions to dismiss cases in 22 out of these 132 opinions (16,66%).

¹⁰² 1 out of 75 opinions recommending the opening of investigation/coordination cases proposed that the source of information be informed of OLAF's decision.



Annex : The selection process - a step-by-step approach

