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'I' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee

Subject: OLAF Supervisory Committee's Activity Report for the year 2020
- *Outcome of proceedings*

1. On 12 August 2020, the OLAF Supervisory Committee submitted to the Council its 2019 Activity Report¹.
2. Pursuant to point (b) of Article 16(2) of Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF², an interinstitutional exchange of views shall take place every year, allowing for a discussion, at political level, on the activities carried out by the European Anti-Fraud Office, including in relation to the opinions and reports of the Supervisory Committee.

¹ WK 8486/2020.

² Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1.).

3. In view of the above and in order to facilitate the preparation of the next interinstitutional exchange of views to be held in December 2020, the members of the Working Party on Combating Fraud examined the report during an informal videoconference held on 22 September 2020 and agreed to establish an outcome of proceedings. An agreement on the text of the outcome was reached on 28 October 2020.
 4. The Permanent Representatives Committee is invited to endorse the outcome of proceedings as set out in the Annex to this document.
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DRAFT OUTCOME OF PROCEEDINGS

At its meeting on 22 September 2020, the Working Party on Combating Fraud held an exchange of views with the representatives of the OLAF Supervisory Committee (SC) and with OLAF on the SC's Activity Report for the year 2019 in an informal videoconference.

Mr Lambros PAPADIAS, Head of the Secretariat of the SC presented the latter's activity report.

Mr Papadias, while recalling some periods of tense relations in the past, highlighted in particular the improvement of the relationship between OLAF and the SC, especially during the last quarter of 2019. In that context, Mr Papadias reiterated that the SC's role is to ensure OLAF's independence and to monitor the duration of OLAF's investigations and ensure compliance with the procedural guarantees. The SC's intention would not be to interfere in OLAF's case management or case handling. Mr Papadias recalled, that the case remains however, that OLAF has considerable powers that can have a significant impact on the fundamental rights of those under investigation ("persons concerned"). For that reason, and given that the EU courts exercise minimal oversight on OLAF's operations, he explained, it is important that the SC has effective and meaningful access to information on cases, especially for those of a long duration. He expressed the expectation that when OLAF's new Case Management System (OCM), once finally completed (end of 2020 - early 2021), would further facilitate the access of the SC to the relevant case files. He added that in early 2020, the European Data Protection Supervisor also confirmed in an opinion¹, that the SC's processing of personal data within the context of its monitoring tasks under the OLAF Regulation was lawful and necessary.

¹ EDPS Opinion on "Modalities of provision of personal data by the European Anti-Fraud Office (OLAF) to the OLAF Supervisory Committee" (EDPS ref. 2019-0720 - D 0793), see also references in point 50 of the Supervisory Committee's Report, WK 8486/2020.

As regards the substance of the SC's mandate, Mr Papadias specified that in 2019 the SC focussed on (a) dismissed cases by OLAF and (b) on cases with a long duration. In relation to the protection of procedural guarantees, on the basis of an examination of the complaints submitted to OLAF, the SC found that OLAF has respected the applicable rules and procedural rights of those under investigation. Thus, persons concerned were given the opportunity to submit additional information to OLAF, to be heard, and were given access to documents in line with the applicable case law. As regards the issue that national authorities, including judicial ones, often do not follow OLAF's recommendations, the SC is in the process of finalising an opinion on this matter. The preliminary conclusions of the SC show that three main reasons often account for the fact that OLAF recommendations are not always followed by national/judicial authorities: first, the evidence gathered by OLAF is considered as insufficient by the competent authority, second, the acts committed do not constitute a criminal offence within the meaning of national (criminal) law and third, the case is time-barred. Of these, the lack of or insufficient evidence and time-barring are of concern to the SC, as they show room for improvement in OLAF's investigative activities. Mr Papadias confirmed that the SC and OLAF are working together to address the shortcomings in OLAF's procedures that were identified and the amendment of Regulation (EU, Euratom) No 883/2013 will resolve a number of those issues.

The SC considers that the creation of the Controller of procedural guarantees, as foreseen in the amendment to Regulation (EU, Euratom) No 883/2013, will be an important element to further show to the public that OLAF is a trustworthy investigative body. Mr Papadias considered it beneficial that the Controller function is attached administratively to the SC and would rely on the legal support of the Secretariat, and. Based on current figures, the new function would imply an average workload of about 20 cases per year for the Controller, although this may turn out to be a conservative figure. He stressed the importance of preventing that the two bodies, the SC and the Controller, take divergent views on the same issues or cases.

Speaking on behalf of OLAF, Mr Olivier SALLES, Head of Unit Coordination and Communication Unit, confirmed the positive developments in the relationship between OLAF and the SC. Mr Salles confirmed OLAF's continuing commitment to pursue the good cooperation and to engage in the ongoing dialogue. He also mentioned that the discussion on new working arrangements between the SC and OLAF were ongoing. He expressed his satisfaction with the largely positive report of the SC and agreed that the protection of procedural guarantees is quintessential for OLAF's operations.

Delegations were satisfied with the improvement of relations and of the SC's access to case files and expressed the wish that the dialogue between the two bodies is continued. It was asked how the SC's access to OLAF's case management system (OCM) works in practice, and how the SC's access compares to the EPPO's future access to that system. It was also acquiesced that a long duration of an investigation by OLAF would be of concern to delegations in view of its negative impact on follow-up proceedings, including at national level. One delegation made reference to points 77 and 78 of the SC's 2019 Activity Report, which explains that EU case law restricts access of persons concerned to OLAF's final report, as granting access would risk undermining the subsequent national proceedings. The delegation recalled that this principle of limiting access is important, also in the context of the current amendment of Regulation (EU, Euratom) No 883/2013. Another delegation was interested in further information on how the future function of the Controller of procedural guarantees will work in practice.

In response to these comments and questions, Mr Papadias agreed that improvements can be made regarding OLAF cases that last more than 12 months, while recognising that to some extent delays are unavoidable. With regard to the protection of subsequent national proceedings Mr Papadias mentioned that the case law of the European courts has established a strong protection of OLAF's ongoing investigations, which finds its expression in the inability of persons concerned to have access to OLAF's Final Case Report, at least for as long as national proceedings are still ongoing. It is therefore important that the SC, being a sort of gatekeeper, can function effectively and monitor OLAF's proper conduct of investigations.

Mr Salles confirmed that OLAF does not grant individual and public access to final case reports, but that press releases may be issued, where this is relevant. It was too early to reply to the more technical questions regarding access to case management systems by the SC and the EPPO or on the functioning of the controller, since neither the controller, nor the EPPO had taken up their functions.
