



Brussels, 22 November 2019
(OR. en)

14357/19

GAF 84
FIN 764

'I' ITEM NOTE

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

Subject: OLAF Supervisory Committee's Activity Report for the year 2018
- *Outcome of proceedings*

1. On 17 July 2019, the OLAF Supervisory Committee submitted to the Council its 2018 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 reports of the Supervisory Committee.

¹ WK 8633/2019.

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 on 11 December 2019, the Working Party on Combating Fraud examined the report on 24 September 2019 and agreed to establish an outcome of proceedings. An agreement on the text of the outcome was reached on 20 November 2019.
 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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OUTCOME OF PROCEEDINGS

At its meeting on 24 September 2019, 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 2018.

Mr Jan Mulder, current Chair of the Committee presented the SC report together with the other four members of the Committee, Ms Grażyna Stronikowska, Ms Helena Fazenda, Mr Petr Klement and Mr Rafael Muñoz López-Carmona.

Mr Mulder asked to include in the current revision of Regulation No 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF) (the "OLAF Regulation") clear provisions concerning the information that must be provided by OLAF to the SC and for the SC to be consulted when waiving the immunity of the OLAF's Director General (OLAF DG). In order to find a solution for the appropriate location of SC, Mr Mulder also asked for the current Article 15 of the OLAF Regulation to be modified by deleting the words "independently from the Office".

Ms Fazenda spoke about the importance of the Investigation Policy Priorities (IPPs). She explained that these are not formally binding, as they are linked to the management of inquiries and allow OLAF to focus on the most important cases. Ms Fazenda underlined the importance of taking initiative in detecting and analysing risks in the fight against fraud on the basis of the work of internal operational intelligence units and regular exchange of information with other Commission Directorates-General. However, she noted that in 2018 only 25 % of OLAF's investigations fell under the IPPs and that in defining its IPPs for 2019 OLAF maintained the reactive investigation policy approach of previous years.

Ms Stronikowska focused on the duration of OLAF investigations. She underlined that for the SC the duration of OLAF cases was not a pure statistical information and that they analysed it to ensure that investigations were conducted continuously over a period proportionate to the circumstances and the complexity of the case and to exclude interferences in their impartial conduct. She noted that OLAF had no formal authorization for the extended duration of an investigation. Speaking of the content and quality of OLAF's reports on investigations lasting more than 12 months, Ms Stronikowska noted that they were not appropriate for the monitoring purposes of the SC, but that the discussions with OLAF on this issue were ongoing. For this reason the SC also proposed an amendment to Article 7 of the OLAF Regulation.

Mr Rafael Muñoz López-Carmona spoke about resources of OLAF, pleading against further cuts. He thought that OLAF should have a special budgetary position and reaffirmed that an eventual transfer of posts to the EPPO should be handled with care. Mr Muñoz also approached the subject of OLAF's case management system, OCM, arguing that this should be adapted to the investigative necessities of OLAF, which was not necessarily the case in the period subject to the report. He also expressed concern about costs for the implementation of the system and called for its complete audit once the system was fully up and running. He also welcomed OLAF's efforts to improve the OCM governance, namely a new governance model put in place by the OLAF Director-General to streamline the reporting channels and to speed up the delivery of the needed improvements.

Mr Klement spoke about the follow-up given to OLAF's recommendations at national level. He underlined that in a number of cases the problem was in the burden of evidence (the admissibility of OLAF's evidence). He explained that OLAF's administrative investigations are based on the principle of reasonable suspicion and possible cause, and not on the "beyond reasonable doubt" principle of the criminal proceedings, so not all evidence gathered is admissible in criminal cases. However, another problem is the differences between various national legislations that make it difficult to decide what to do with evidence. The result is that half of cases are dismissed because, in absence of admissible evidence, they cannot be pursued in national courts.

Speaking on behalf of OLAF, Ms Charlotte Arwidi, the head of unit for Inter-Institutional relations, was pleased to note that the SC Report acknowledged joint efforts by OLAF and the SC to further improve relations and maintain sincere dialogue. She underlined that the OLAF Director-General had made efficient cooperation and open communication channels with the SC one of its top priorities. As part of these efforts, OLAF enhanced its reporting system in a number of areas, including the reporting on investigations lasting more than 12 months and on complaints received by OLAF.

As for OCM, OLAF was taking the utmost care to resolve the remaining technical issues and to facilitate the SC's monitoring tasks. The SC dashboard would be delivered in 2020. In the meantime, OLAF stood ready to provide the SC and its Secretariat with training and support whenever needed.

As for the so-called 12-month report, following the extensive discussions with the SC, OLAF revised the template to take into account most of the SC's concerns. For the remaining issues, OLAF consulted the European Data Protection Supervisor and his opinion was still pending.

Ms Arwidi also explained that, when determining its IPPs, OLAF consulted its stakeholders, including the SC. She stated that habitually OLAF performs its case selection on incoming information from public and private sources, rather than opening cases on its own initiative on the basis of a pro-active data analysis. OLAF manages to handle all cases where the application of all selection criteria points towards the opening of an investigation and does not need to discard cases only because they do not fall under the IPPs. As regards the SC's call for a more proactive and strategic approach to identifying a larger number of cases falling under the IPPs, Ms Arwidi noted that the Commission's new Anti-Fraud Strategy, adopted in April 2019, paved the way for more data-driven anti-fraud measures, giving OLAF a more strategic role and providing for expansion of OLAF's data analysis function.

The Presidency and one delegation expressed their satisfaction with the improvement in the relationship between OLAF and its SC. The same delegation praised the report for being well structured and easy to read, agreed with the SC on the need to clarify, before the starting of the activities of the EPPO, the relationships between the latter and OLAF, and encouraged OLAF to share as soon as available the pending Opinion of the European Data Protection Supervisor mentioned by OLAF during its intervention.

There was also a debate about where the SC should be located in the future, with the SC stating that the most reasonable solution would be that the OLAF Regulation does not specify the location of the Secretariat. One delegation stated that it had no fundamental opposition to the solution proposed by the SC.
