NOTE FOR THE ATTENTION OF MR TUOMAS PÖYSTI,
CHAIRMAN OF THE OLAF SUPERVISORY COMMITTEE

Via the Secretariat of the Supervisory Committee

Subject: Supervisory Committee comments on OLAF 2015 Investigation Policy Priorities

Dear Mr Pöysti,

As foreseen by article 17(5) of Regulation 883/2013 and article 1 of the Working Arrangements, OLAF transmitted to the Supervisory Committee (SC) the 2015 Investigation Policy Priorities (IPPs) by note of 8 December 2014. During the SC plenary of 18 December 2014, we had a general discussion on the IPPs.

By note of 7 January 2015, the SC commented on OLAF’s IPPs for 2015. OLAF would like to thank the SC for its comments and provide further clarifications to address those comments.

Should you consider that a technical meeting is needed, my staff are available to respond to any questions that you might have. The SC Secretariat can contact Ms Charlotte Arwidi, Head of Unit OLAF.D3, to set up the meeting.

Yours sincerely,

Annexes: OLAF’s reply on SC’s comments on the 2015 IPPs IPPs 2015

Copy: M. Hofmann, C. Scharf-Kroener, M. D’Ambrosio, C. Ullrich, L. Kuhl, C. Arwidi, M. Kaduczak
OLAF reply to the Supervisory Committee analysis of the OLAF draft Investigative Policy Priorities for 2015

1. Background

In line with article 17(5) of Regulation 883/2013 “The Director-General shall each year determine, within the context of the annual management plan, the investigation policy priorities of the Office”. As specified in article 5(1) of the same Regulation, “The decision by the Director-General whether or not to open an investigation shall take into account the investigation policy priorities [...]”.

The Investigation Policy Priorities (IPPs) are used by OLAF during the selection process, as one of the several criteria used by OLAF for prioritising the opening of its investigations. The IPPs do not aim at excluding the cases not falling under their scope. The IPPs intervene later in the analysis of conditions for opening, once all the other criteria, including proportionality, availability of resources, subsidiarity and added value have been verified.

In practice, the IPPs therefore function as a cross check to verify whether the analysis and verification of the factual and legal criteria has led to an overall acceptable conclusion. Exceptionally, they may then become a decisive element which overturns a dismissal into an opening decision, should it reveal that relevant opening considerations need to be revisited with a view to the priority nature of the matter at stake.

As foreseen by article 17(5) of Regulation 883/2013 and article 1 of the Working Arrangements between OLAF and the SC, OLAF transmitted to the Supervisory Committee (SC) the 2015 IPPs by note of 8 December 2014. During the SC plenary of 18 December 2014, OLAF and the SC had a general discussion on the IPPs. By note of 7 January 2015, the SC commented on OLAF's IPPs for 2015, referring to its previous Opinion 1/2014 on IPPs of 13 February 2014, to which OLAF replied on 6 March 2014.

2. Clarification of OLAF statements during the SC plenary of 18 December 2014

In its note of 7 January 2015, the SC attributes to the OLAF Director-General (DG) a number of statements made in the SC plenary of 18 December 2014. Given that some of these statements have been misunderstood, OLAF would like to clarify them.

SC referring to OLAF DG statement: “The IPPs are applied for opening of investigations only after the legal criteria of proportionality and efficient use of resources are considered.”

OLAF clarification: The IPPs are used when there is a need to prioritise, i.e. when there is a resource restriction. They come into play only after other principles (such as OLAF's competence and subsidiarity) have been considered. As they are discretionary principles they can only be applied when there is a margin of discretion.

SC referring to OLAF DG statement: “Most of the cases are opened without considering the principles of proportionality and subsidiarity.”
OLAF clarification: The SC has misunderstood OLAF’s explanation. On the contrary, OLAF always applies the principles of proportionality and subsidiarity, in line with the requirement under Article 5(1) of Regulation 883/2013. All OLAF cases are therefore opened after careful consideration of these principles.

SC referring to OLAF DG statement: “A constructive dialogue was set with stakeholders, the SC may request this information in written and OLAF would reply.”

OLAF clarification: OLAF discussed its 2014 IPPs with the members (representatives of Commission DGs) of the Fraud Prevention and Detection Network during meetings on 29 January 2013 and 28 January 2014. As far as the other institutions are concerned, OLAF consulted its 2014 IPPs in the inter-institutional Exchange of Views in April 2014 in which, apart from the Commission, the European Parliament and the Council participated. For the 2015 IPPs which are largely identical to those of 2014, OLAF discussed its draft with the members of the Fraud Prevention and Detection Network on 1 December 2014 and transmitted to the SC the draft summary of the meeting. There are no other documents that OLAF could provide to the SC.

SC referring to OLAF DG statement: “The OLAF DG did not understand how an evaluation of the implementation of IPPs could be conducted, as they are stable.”

OLAF clarification: The SC has misunderstood OLAF’s explanation. OLAF has carried out an evaluation of the implementation of the IPPs for 2014 which is included in its 2014 Annual Activity Report to be published at the beginning of April. For details concerning the evaluation, please see OLAF’s reply under section 3.3, below.

SC referring to OLAF DG statement: “OLAF received a lot of complaints in the fields of agriculture and structural funds and focused on common modus operandi instead of focusing on impact - consequently, the financial indicators disappeared.”

OLAF clarification: In the area of structural funds, OLAF received a high number of incoming information, many of them anonymous and concerning minor frauds. The Office therefore focused on “cases of fraud of significant impact or of a structural nature”. The reason why financial indicators have been abolished is that their use had been misunderstood by a number of stakeholders and had therefore created some confusion among them. Furthermore, the practical use of financial thresholds is very limited since, at the opening of an investigation, it is often not possible to determine the financial impact sufficiently precisely.

3. OLAF reply to SC’s comments on the 2015 IPPs

OLAF notes that the current SC analysis of the 2015 IPPs makes reference to the same three recommendations that the SC had included in its SC Opinion 1/2014 on the IPPs. OLAF has already replied to the SC Opinion 1/2014 on 6 March 2014 and would like now to provide replies to the current SC’s analysis of the 2015 IPPs:

3.1 Recommendation on issuing guidelines

- SC recommendation no 1 in SC Opinion 1/2014 on the IPPs: the OLAF DG to “issue guidelines on application of the three selection principles established by the Regulation, including on the application of financial indicators as a proportionality criterion”.

- SC comments on the 2015 IPPs: the SC concludes that “the DG has failed to issue guidelines on the application of the selection principles”, and that the principles of
added value and subsidiarity “seem to be applied by the selectors as one single selection criterion, regardless of the type of case”. The SC also notes that instead of reviewing the financial indicators, to adapt them to the reality of spending programmes, the financial indicators have been abolished completely.

OLAF’s reply to SC’s comments on the 2015 IPPs: Following SC’s recommendation for OLAF to issue guidelines on the selection principles, and SC’s recommendations concerning the case selection activity in OLAF’s Investigation, Selection and Review Unit (ISRU), a Vademecum for the use of workforms for case selections has been prepared by ISRU and already internally used and effectively implemented by the unit. The Vademecum proposes guidance, together with indicators and criteria for the application of the selection principles. This guidance has been tested in practice by selectors and applied by ISRU in its selection activities since September 2014. Following an internal discussion of the first experiences made, the Vademecum will be adopted as guidelines of the Director-General and will be sent to the SC shortly.

At the beginning of the selection phase, as soon as OLAF’s competence is confirmed, the available information is verified with a view to check the existence of a sufficient suspicion. This comprises a preliminary evaluation of the likelihood of an OLAF investigation to produce evidence which might lead to findings of fraud on the basis of three indicators: (a) reliability of the source, (b) credibility of the allegations and (c) availability of sufficient information to justify the opening of an investigation or coordination case. Only after establishing the existence of a sufficient suspicion, OLAF selectors proceed to the analysis of the criteria of (i) “proportionality”, (ii) “efficient use of investigative resources”, (iii) “subsidiarity or institution, body, office or agency best placed to act”, and (iv) “added value” of an OLAF intervention before checking (v) the IPPs. "Added value" and "subsidiarity" are indeed always addressed and analysed separately from one another. The selection criteria and sequence of their verification in the selection process are as follows:

(i) Proportionality

The criterion of proportionality comprises analysing whether a possible OLAF investigation would be appropriate, necessary, and proportionate with respect to the benefits of the expected results in comparison with the investment of human and material resources that will foreseeably be needed in order to bring the case to a successful conclusion. This analysis will therefore regularly include, but is not limited to, a consideration of the potential financial impact of the matter under selection (if identifiable at that stage), and a consideration of its other impact (e.g. reputational benefits to the EU). The likelihood of recovery, prosecution and need to ensure prevention for the protection of the EU financial interests are equally to be considered under the proportionality principle as well as the sensitivity of the matter, considering a particular need for deterrent action.

In this context, OLAF would like to recall that the financial impact was never a condition sine qua non for the opening of an investigation. On the contrary, the financial indicators were used by OLAF as one of several criteria to assess whether an investigation should be opened or not. Since it is very difficult in most cases to assess the potential financial impact of a new case for which only limited information is available during the selection phase, and given that the indicators had a limited weight in the overall assessment, it was decided not to include financial indicators in the IPPs for 2014. The same reasoning about the financial indicators continues to be valid also for the year 2015.

1 SC Opinion 1/2014
2 SC Opinion 2/2014
(ii) Efficient use of investigative resources

This principle of "efficient use of investigative resources" takes into account whether the investigative unit which would be competent to deal with the matter has a workload that would permit to begin and conduct investigative activities into the matter about which information has been received in due course and without prejudice to other more important investigation files.

(iii) Subsidiarity or institution, body, office or agency best placed to act

When assessing the subsidiarity principle, OLAF selectors take into account whether checks/investigations/proceedings conducted by the Member States or by other competent authorities or bodies have already started and been undertaken, and if so, whether they cover fully the subject matter of the case in question. It is also assessed whether due to the particularities of the subject matter of the case in question, OLAF has the best means of action for investigating the case or whether the performance of relevant verifications and checks falls in the primary domain of competence of other bodies, such as in particular relevant national authorities (e.g. criminal investigative authorities) and whether the other conditions are met for them to act.

(iv) Added value

The criterion of added value is analysed taking into account the particular considerations that necessitate an OLAF intervention. The added value is assessed taking account of, but not limited to, the following factors:

- whether a possible OLAF intervention would increase the chances for recovery, prosecution or deterrence;

- whether a possible OLAF intervention would bring in a specific competence, expertise or operational methodology for the successful investigation of the matter.

(v) Investigative Policy Priorities

In the course of the selection process, the IPPs are used as one of the several existing criteria to exercise OLAF’s discretion for prioritising the opening of investigations. Selectors are requested to indicate whether the IPPs are likely to be relevant based on information received and available. If relevant, the concrete investigative priority needs to be specified. Selectors are also requested to assess whether prima facie the case would have been dismissed had the matter not been included in the IPPs. However, the IPPs do not aim at creating an effect of exclusion of cases not falling under the IPPs. On the contrary, the IPPs come in place as a balancing factor for the use of the selection principles, in order to support and ensure the most efficient use of OLAF’s resources and to guarantee an additional priorities test.

3.2 Recommendation on dialogue with stakeholders

- SC recommendation no 2 in SC Opinion 1/2014 on the IPPs: OLAF to “enter into a constructive dialogue with stakeholders on the determination and implementation of IPPs, in particular with regard to financial indicators and possible follow-up of dismissed cases”.

- SC comments on the 2015 IPPs: the SC assesses that “no dialogue with the stakeholders took place with regard to financial indicators and to possible follow-up of the cases showing sufficient suspicion of fraud, but dismissed on the basis of the IPPs or selection principles”.
OLAF’s reply to SC’s comments on the 2015 IPPs: As set out in point 2 above, OLAF discussed its 2014 and 2015 IPPs with its most important stakeholders, including with the institutions during the inter-institutional Exchange of Views in April 2014 and with other DGs. Furthermore, OLAF has followed up on the concerns raised by the SC in its Opinion 1/2014 with meetings between the OLAF Director-General and the Directors-General of spending DGs, and the issue of financial indicators has been clarified. The DGs have no outstanding concerns regarding the IPPs. OLAF continues to be of the opinion that the use of financial indicators would create confusion among its stakeholders and would, in practice be of limited use.

Whilst OLAF continues to consider that the use of rigid financial indicators that can be perceived as an “exclusion criterion” is counterproductive, a few words of clarification were introduced under priority 2 referring to cases of fraud "of significant impact or of a structural nature". OLAF has seen an increase in incoming information and considers that in 2015 there may be a need for prioritising cases opened specifically on the basis of the IPPs, based on a flexible criterion among incoming information items that could be opened as OLAF investigations at a given point in time. Furthermore, in order to ensure that the IPPs do not discourage any public body from reporting suspected fraud to OLAF, based on a recommendation by IACs in AuditNet, a second introductory paragraph has been added.

3.3 Recommendation on assessment of the IPPs

- SC recommendation no 3 in SC Opinion 1/2014 on the IPPs: OLAF "to provide the SC, by 6 March 2014, with an assessment of the results of the implementation of the IPPs for 2012 and 2013 together with a summary of the feedback provided by the stakeholders; in the following years those documents should be attached to the new draft IPPs transmitted annually to the SC.”

- SC comments on the 2015 IPPs: the SC states that it did not receive from OLAF such an assessment for the IPPs of 2012 and 2013 and that “without any assessment of the impact of the IPPs it is impossible to conclude whether they are correctly identified and whether their application has positive or negative consequences for the fight against fraud and corruption.”

OLAF’s reply to SC’s comments on the 2015 IPPs: Assessing the implementation of the IPPs for 2012 and 2013 could only be obtained with a disproportionate effort by OLAF for the result achieved. Therefore, OLAF assessed the implementation of the IPPs only for 2014.

In total, 251 cases\(^3\) were opened in 2014 based on information received by OLAF in 2014. Out of these, 65 fell under the 2014 IPPs (this represents 26% of the opened cases). It is difficult to estimate to what extent the IPPs had a decisive effect on OLAF’s case opening.

There was no case where an investigation was not opened for the reason that it did not enter within the scope of the IPPs 2014. On the contrary, in 2014, IPPs have led to the opening of at least two cases where otherwise the opening would not have been done.

\(^3\) An additional 37 cases that were opened in 2014 were not included as they had been assessed under the IPPs for 2013.
The table below provides an overview of the role of the IPPs in 2014 opening decisions:

<table>
<thead>
<tr>
<th>IPP</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>IPP 1</td>
<td>7</td>
<td>10.8%</td>
</tr>
<tr>
<td>IPP 2 *</td>
<td>24</td>
<td>36.9%</td>
</tr>
<tr>
<td>IPP 3</td>
<td>16</td>
<td>24.6%</td>
</tr>
<tr>
<td>IPP 4</td>
<td>18</td>
<td>27.6%</td>
</tr>
<tr>
<td>Total</td>
<td>65</td>
<td>100%</td>
</tr>
</tbody>
</table>

*This includes 2 cases in which the IPPs led to a different decision (opening instead of dismissal of the case).

4. Conclusions: OLAF’s assessment of the implementation of SC’s recommendations from its Opinion 1/2014 on the IPPs

SC recommendation no 1: OLAF will adopt the guidelines on the application of the selection principles and send them to the SC shortly. OLAF considers the implementation of this recommendation on-going.

SC recommendation no 2: OLAF’s established practice from previous years is to have a dialogue with stakeholders on the IPPs. Concerning more particularly the inclusion of financial indicators in the IPPs, OLAF has explained several times its decision not to include them in the IPPs for 2014. The same reasoning about the financial indicators continues to be valid also for the year 2015. OLAF considers this recommendation implemented.

SC recommendation no 3: OLAF has made an assessment of the implementation of the IPPs for 2014. OLAF considers this recommendation implemented for 2015.
ANNEX 1: THE 2015 INVESTIGATION POLICY PRIORITIES (IPPs) OF THE OFFICE

Art. 17(5) of Regulation No 883/2013 provides that the OLAF Director-General each year shall determine, within the Office’s annual management plan, the investigation policy priorities of OLAF. These IPPs are determined on the basis of the information resulting from OLAF’s activities, taking into account also key documents issued by stakeholders.

The OLAF IPPs should not be used by other Commission services, EU bodies or national authorities as justification not to report a suspected fraud to OLAF.

For 2015, the IPPs are established as follows:

1. Cases with indications of fraud and/or corruption in relation to public procurement for transport and infrastructure networks;

2. Cases of fraud of significant impact or of a structural nature concerning specific projects (co)financed by the European Social Fund, the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the Pre-accession Funds, in which action by the Member States or Candidate Countries is deemed to be insufficient;

3. Cases of fraud indicating possible abuses of origin rules, tariff classification in both preferential and non-preferential trade regimes and undervaluation, in order to evade payment of conventional customs duty and anti-dumping duties;

4. Cases of fraud involving smuggling of cigarettes and tobacco into the EU, in particular via maritime transport and along the EU Eastern border.

The documents from stakeholders that were considered in this context are in particular the following:

- The latest PIF Reports:
  - These reports indicate breaches of the public procurement rules and procedures as amongst the most significant causes for irregularities and frauds, given the financial amounts involved. Transports and infrastructures are the sectors most affected. A relevant outside study identified procedures relating to infrastructure networks as particularly vulnerable. In 2013 new rules were adopted at EU level to strengthen the

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1 In accordance with Article 5(1), the decision by the Director-General whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of the Office.


3 Study financed by the European Commission (OLAF): Identifying and Reducing Corruption in Public Procurement in the EU, conducted by PricewaterhouseCoopers and Ecorys, 2013.
legal framework, through a package of directives, which, therefore, will have to be progressively followed-up through implementation in the Member States. Therefore, currently, this particular area remains sensitive.

- The same PIF Reports also identify the Pre-accession Funds as an area in which fraud detection rates are consistently higher than any other sector.

- The European Court of Auditors Annual Reports: In the last five years\(^4\), these reports have indicated that the areas of the European Regional Development Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, the European Social Fund all present an Error Rate well above the materiality threshold.

- European Parliament Resolutions: These resolutions e.g. point out that abuses of origin rules and tariff classification in both preferential and non-preferential trade regimes remain an important problem\(^5\), and stress the significant impact on the budgets of both the EU and the Member States caused by tobacco smuggling\(^6\).

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\(^6\) EP Resolution, paragraphs 36-40. See also Commission Communication on stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products COM(2013) 324 and Action Plan SWD(2013) 193 and Council conclusions of 10 December 2013 on stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products in the EU (16644/13).