

Opinion No. 1/2007

**OLAF's Reports of Investigations
that have been in progress for more than nine months**

Brussels, 25 April 2007

INTRODUCTION

The task of the Supervisory Committee

The Supervisory Committee of the European Antifraud Office (OLAF) reinforces OLAF's independence by regular monitoring of its investigative function. Within this task, the Committee also supervises the duration of OLAF's investigations in order to check that they are conducted continuously over a period proportionate to the circumstances and the complexity of the case¹.

Therefore, where an investigation has been in progress for more than nine months, the Director-General of OLAF is obliged to inform the Supervisory Committee of the reasons for which it was not possible to conclude it and of the expected time for completion.

From the beginning of its term of office in December 2005 the newly elected Supervisory Committee has received monthly summaries of the said investigations (henceforth "nine months reports"), which have been carefully examined as established in its own rules of procedure².

The aim of this examination is to analyse the information provided by the Director General in order to assess the duration of investigations and the reasons for potential undue delays. However, given that currently 75 % of the investigations opened by OLAF have been in progress for more than nine months³, this exercise has now taken on a different perspective. Exceeding this period is not infrequent and, as a consequence, the nature of the "nine months reports" as a warning system to control the length of investigations appears to have changed and lost its impact.

When examining the "nine months reports" transmitted to the Committee two different aspects have been evaluated:

- The extent to which they contain adequate information to enable the Supervisory Committee to perform its monitoring function, particularly with regard to the potential existence of undue delays,
- The extent to which they can be used as a management tool by OLAF in order to bring the investigation to a successful conclusion within a proportionate period.

¹ Article 6.5 of Regulation (EC) No 1073/1999.

² OJ L 33, 7.2.2007 Article 13.3 of the Rules of Procedure of the OLAF Supervisory Committee.

³ Statistics extracted from the Case Management System (CMS).

Methodology

Under the title “*Information to the OLAF SC, cases open for more than nine months*”, the Director General of OLAF has transmitted to the Supervisory Committee monthly summaries of investigations containing the following main elements⁴:

- Ø Legal basis;
- Ø Description of the case;
- Ø Date of opening of the case;
- Ø Financial economic impact;
- Ø Reasons for non completion of the case assigned to one (or more) of the following criteria: significant resources were allocated but even so the volume of investigative work means that more time is needed; tactical hold in investigation; lack of resources; low priority combined with limited resource allocation; lack of cooperation;
- Ø Future steps;
- Ø Expected time for completion.

On the basis of this information as provided by OLAF, the Supervisory Committee has endeavoured to identify the elements which would allow the Committee to assess whether investigations are being conducted continuously over a period proportionate to the circumstances and the complexity of the case as follows:

- Ø The subject matter of the investigation, which is the legal description of the irregularity;
- Ø Reference dates: the date or period on which the acts under investigation were executed, the date of receipt of the information by OLAF, and the duration of the “assessment stage” of the case prior to the opening decision;
- Ø Potential sanctions or legal consequences of the acts under investigation: disciplinary, administrative, financial or criminal ones;
- Ø Time barring periods of acts under investigation: both under national and community law regimes;
- Ø The relevance of the reasons invoked for the non conclusion of the case;
- Ø Justified expected time for completion.

OLAF’S REPORTS

For the purpose of delivering this opinion the Supervisory Committee has examined the “nine months reports” sent by OLAF covering the period from January to December 2006 which amounted to 150 investigations over all sectors, as follows: 19 internal investigations:

⁴ See annex 1.

European institutions, 9 internal/external investigations: EU bodies, 30 direct expenditure and external aid, 21 external aid, 27 agriculture, 19 customs and 25 structural measures.⁵

Taking into consideration the specific nature of each sector and the different procedural rules applicable to each, the analysis was carried out using an approach by sector. However the aim is to reach global conclusions.

Internal investigations: European institutions

OLAF plays the lead role in these types of investigations and enjoys clear procedural competences⁶.

It has been noted that the subject matter of the investigation which is the legal description of the irregularity has been mentioned only on very few occasions⁷. In those cases the legal descriptions used are, variously, “a conflict of interest (Article 14 of the Staff Regulations)”, “a breach of Article 22 of the Staff Regulations and Article 57.2 of the Financial Regulation” or “the leaking of confidential information, Article 86, 2 of the Staff Regulations” such description allowing the evaluation of the relevance of the investigative measures taken and the proportionate duration of investigations.

Special attention has been paid to the consideration given to the time barring periods of the acts under investigation. However, neither the date of execution of those acts⁸, nor the duration of the “assessment stage” made by OLAF prior to the decision to open an investigation is ever referred to although the date of receipt of the information by OLAF is sometimes mentioned. Reference is never made to potential sanctions or legal consequences of the acts under investigation.

The relevance of the reasons for the case not being concluded has been carefully examined; in general the reasons ticked in the model report do not often correspond to those explained in the reports afterwards. Particular attention has been paid to “tactical hold in investigation” as a reason frequently quoted. This reason is not clearly explained and justified; “operative reasons”, the complexity of the case or lack of response from other services have been given as justifications for a “tactical hold” approach frequently leading to long periods of inactivity⁹. This sort of inactivity has also been detected in other investigations¹⁰.

It has equally been verified that the expected time for completion of investigations is given, however, without mention of any specific details justifying the time proposed. This does not usually depend on the conduct of investigative actions by OLAF, but on external factors.

Internal/external investigations: EU bodies

OLAF plays the lead role in these types of investigations¹¹.

⁵ See annex 2. The total amount of active investigations per sector in December 2006: 62 internal investigations: European institutions, 24 internal/external investigations: EU bodies, 69 direct expenditure and external aid, 49 external aid, 65 agriculture, 83 customs and 52 structural measures.

⁶ Article 4 of Regulation (EC) No 1073/1999.

⁷ See annex 2: cases number 25, 24 and 125.

⁸ See annex 2: only in case number 59 is there a reference to the period where acts under investigation could have been committed.

⁹ See annex 2: cases number 20, 21, 22, 25, 59, and 101 inter alia.

¹⁰ See annex 2: cases number 1, 2 and 101 inter alia.

¹¹ Article 3 of Regulation (EC) No 1073/1999.

It has been verified that the subject matter of the investigation, which is the legal description of the irregularity, is not always mentioned.

The date of the receipt of information by OLAF is often referred to. Nevertheless, neither the date of the execution of the acts under investigation nor the duration of the assessment period is mentioned. As a consequence, the potential sanctions are not cited and the time barring periods are not mentioned in the “nine months reports”.

The most common reasons quoted for the case not being concluded are “low priority combined with lack of resources” and “the volume of investigations”.

It should be noted that the expected time for completion is almost never mentioned.¹²

Direct expenditure and external aid

OLAF has the lead role in this field where the rules for the conduct of investigations are also based “on the agreements in force with third countries”¹³.

A systematic and detailed mention of the legal basis on which investigations are based has been observed. The subject matter of the investigations is clearly explained although the legal description of the irregularities concerned is not made. In this context the potential sanctions or legal consequences of the irregularities are only mentioned where they are of a criminal nature. In a few cases, reference is made to time barring periods¹⁴.

As far as reference dates are concerned, notice of the date of receipt of information by OLAF is not always visible¹⁵ in the reports. Similarly neither the duration of the “assessment stage” nor the date or period on which the acts under investigation were executed appear.

Of particular note is “the volume of investigative work” and “low priority combined with limited resource allocation” as well as “lack of resources” as being the reasons commonly used for not having concluded investigations.

The expected time for completion is always mentioned and further steps to be taken in the investigations are well explained.

External aid

As mentioned in the previous sector, OLAF has the lead role in this field¹⁶. It has been noted that there is not always a legal reference to agreements with the third countries where investigations take place.

Long periods of “assessment stage” prior to the decision to open investigations have been observed.¹⁷ The dates of the receipt of information by OLAF are rightly mentioned. However, there is neither reference to the date of execution of the acts under investigation nor to the potential sanctions or legal consequences. There is no allusion to the time barring periods in the reports.

Particular attention has been paid to the reasons for investigations not having been concluded: reasons such as “tactical hold in investigation” and “the volume of investigative work” often

¹² See annex 2: only in cases number 77 and 87.

¹³ Article 3 of Regulation (EC) No 1073/1999 and “agreements in force with third countries”

¹⁴ See annex 2: cases number 31 and 92.

¹⁵ See annex 2: cases number 64, 92, 93, and 106 inter alia.

¹⁶ Article 3 of Regulation (EC) No 1073/1999 and “agreements in force with third countries”.

¹⁷ See annex 2: cases number 9, 27, 28, 29, and 120 inter alia.

correspond to OLAF waiting for the completion of audits carried out by external firms, without any active participation or close follow up by OLAF. The added value of OLAF's work in this field is not clear from the content of the "nine months reports".

The expected time for completion is always indicated and clear further steps in the investigations are often listed.

Agriculture

OLAF has strong and well established legal powers to conduct investigations in this field.¹⁸ However, this sector also covers customs cases where agricultural products are involved and where OLAF plays primarily a co-ordination and assistance role. Most of the "nine month reports" transmitted to the Supervisory Committee belong to the latter category.

In the customs domain, the legal basis is usually well defined as is the legal description of the irregularity. However, there is neither reference to the legal consequences of irregularities nor to the expiry of the time barring periods to take actions against those who are evading payment of customs duties. Furthermore, the date of receipt of information by OLAF is seldom referred to and the duration of the evaluation period is not reported.

It has been checked that often in these types of cases, several Member States are involved and do not respond in due time to the request for assistance sent by OLAF. Although in many summaries the reason given for not having concluded the investigation is the "volume of investigative work", this is often combined with "long delays in receiving a response from the Member States". It is possible that as a result of this, the expected time for completion is not always mentioned¹⁹ and, when it is, no clear justification is provided to explain the date specified.

In the pure agriculture investigations domain, it has been noted that the financial impact with regard to Community funding is sometimes not clearly identified in the "nine months reports"²⁰. This then has an impact on the legal description of the irregularity which is not mentioned nor is there mention made of the eventual administrative or criminal consequences. There is also a lack of clear reference to the dates or period when the acts under investigation were executed and to the time barring period.

Customs

OLAF plays a coordination and assistance role in this field and the duration of cases depends highly on the action of the Member States or third countries involved. This is the reason consistently cited in the "nine months reports" for the case not having been wound up.

It has been more difficult to determine to what extent the "nine month" period has been formulated for these types of cases, given that it is the Member States' ultimate responsibility.

It has been noted that the legal basis is well explained and the summary of the case is detailed and valuable. However, there is neither reference to the dates on which the acts under investigation have taken place nor is mention made of time barring periods.

¹⁸ Article 3 of Regulation (EC) No 1073/1999, Regulation (EC, Euratom) No 2988/95, Regulation (Euratom, EC) No 2185/96 and Regulation (EC) No 515/97 inter alia.

¹⁹ See annex 2: cases number 32, 33, 34, 35, and 36 inter alia.

²⁰ See annex 2: cases number 12, 36, and 70.

It was also observed that the expected time for completion mentioned in the “nine months reports” is also related to the steps to be taken by the Member States.

Structural Measures

OLAF enjoys a solid basis for conducting investigations in this field.²¹ However, in many of the “nine month reports” transmitted, OLAF does not conduct an investigation but rather provides assistance to national judicial or administrative authorities.²²

The subject matter of the investigation which is the legal description of the irregularity is mentioned. However there is no clear overview of the Commission funding process specific to the Community budget for the case in question in the “nine months reports”.

The date of receipt of information by OLAF is mentioned and reference is made to the “assessment stage” in some cases, although the date of the execution of acts under investigation is never mentioned.

Potential sanctions or legal consequences of the acts under investigation are not specifically referred to and the time barring periods both under community law or national law regimes are never analysed notwithstanding the fact that in several investigations there are clear references to potential criminal offences²³.

“Lack of resources” or “volume of the investigative work” are often quoted as reasons for the case not being concluded, although some times they do not entirely correspond to those explained either in the reports afterwards or relate to specific tasks of the investigators in this field²⁴.

In the area of provision of assistance to the national judicial authorities, the reason cited is “the nature of the case (criminal assistance)”²⁵.

The expected time for completion is usually determined although without mention of any specific details.

CONCLUSIONS AND RECOMMENDATIONS

The information currently contained in the “nine months reports” sent to the Supervisory Committee is pertinent and useful. Elements such as the description of the case, the steps taken, the financial impact and future steps proposed remain essential to the understanding of the investigation under evaluation. However, on examination of the “nine months reports”, it has become clear that crucial elements necessary for the Supervisory Committee to perform its monitoring task with regard to the duration of investigations are missing. Moreover, the Supervisory Committee believes that incorporation of these elements into the “nine months reports” will be also helpful for improving the management of the investigation in progress at that stage of the case.

²¹ Article 3 of Regulation (EC) No 1073/1999, Regulation (EC, Euratom) No 2988/95, Regulation (Euratom, EC) No 2185/96.

²² See annex 2: cases number 41, 42, 55, 57, 75, and 112 inter alia.

²³ See annex 2: case number 17.

²⁴ See annex 2: cases number 54 and 75.

²⁵ See annex 2: cases number 41, 55, 57 and 112.

The monitoring function of the Supervisory Committee

- The current format of the “nine months report” does not contain all relevant information necessary in order for the Supervisory Committee to determine whether investigations are conducted continuously over a period proportionate to the circumstances and the complexity of the case.

The format of the summary of the “nine months reports” should change so as to incorporate supplementary elements which would allow an efficient evaluation of the progress of investigations. These elements should include: the legal description of the irregularity, the date or period on which the acts under investigation were executed, the duration of the “assessment stage” prior to taking the decision to open the case, the potential sanctions or legal consequences of the acts under investigation and time-barring periods for the acts under investigation.

- The lack of reference to time-barring periods in the “nine months reports” does not allow the Supervisory Committee to assess the proportionate duration of the steps taken and proposed for conducting investigations.

Time barring periods should be specifically highlighted and analysed in the summaries of the “nine months reports”.

- The information contained in the “nine months reports” in some sectors is not sufficient to have a clear picture of the aim of the investigations, the reasons for delays and their legal consequences. In particular, a reason such as “tactical hold in investigation” where an investigation has not been concluded is neither well justified nor explained in most cases.

Furthermore, frequent use of a reason such as “low priority combined with lack of resources” could suppose a lack of a clear investigation policy.

The term “tactical hold in investigation” used in the “nine months reports” should either be strictly defined or omitted. The use of this reason for not having concluded an investigation should be prudent and precise.

Reflection on the implications of a reason such as “low priority combined with lack of resources” is also recommended.

- The expected time for completion of investigations is not accurately reflected in the “nine months reports”. It is not mentioned in one third of the cases and when mentioned, it is never respected.

An indication as well as a reasoned explanation with regard to the expected time of completion is necessary. Future investigative steps should be better outlined.

The management of OLAF’s investigations

- The “nine months reports” transmitted to the Supervisory Committee is not longer a warning system with regard to the length of investigations but rather a reporting exercise carried out at this stage of the case. A vast majority of OLAF’s investigations have been in progress for a longer period. In many cases long periods of inactivity are detected. The Supervisory Committee believes that the current “nine months report” does not constitute a management tool for OLAF aiming to re-examine the strategy of

the investigation and to clarify its targets. That 75% of investigations have been open for over nine months is a strong indicator of the need of urgent managerial action to be taken.

The implementation of a management control system which would efficiently prevent stagnation of investigations is recommended. Regular close scrutiny by the heads of Unit of the continuous progress of the investigation should then be appropriate.

FUTURE ACTION

Continued examination of the “nine months reports” received from the Director General for the period 2007 will be carried out by the Supervisory Committee. Further scrutiny will be made of the reasons for the non completion of investigations within the specified time period and particular attention will be given to the cooperation from the Member States. The development of a clear investigation policy and an improved case management system will also be followed closely by the Committee.

It should be noted that OLAF’s quick reaction to improve the content of the “nine months reports” following a meeting between themselves and the Supervisory Committee²⁶ leads the Committee to anticipate an equally swift response to the above mentioned recommendations. Incorporating the suggested changes as outlined would lay the ground for all future examinations of the “nine months reports” by the Supervisory Committee.

²⁶ See Note I/01068 05.02.07