



---

OLAF Supervisory Committee

**OPINION No 2/2011**

**Powers of the European Anti-Fraud Office (OLAF) for the independent  
conduct of internal investigations within the EU institutions**

Brussels, 13 June 2011



## OLAF Supervisory Committee

### **Background**

1. On 20<sup>th</sup> March 2011 The Sunday Times newspaper published a press article entitled “An MEP claims to earn more than € 450.000 a year moonlighting for clients. He is one of three ready to take cash to help change EU laws”. The press article explained how reporters “posing as a lobbying firm” offered cash for amendments to legislation to three Members of the European Parliament (MEPs) (up to €100.000 per year in two cases) and “they went on to do so” and amendments were tabled. Journalists reported meetings in the EP premises and outside, phone conversations, e-mails, correspondence and sending of invoices between them and some of the MEPs. Following the disclosure of this undercover investigation by the Sunday Times two of them resigned as MEPs by the next day and a third one was expelled from his group.<sup>1</sup>
2. On 22<sup>nd</sup> March the European Anti-Fraud Office (OLAF) opened an internal investigation on the following legal basis: “Article 4 of Regulation (EC) 1073/99 in conjunction with European Parliament Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests (Annex XII Rules of Procedure of the European Parliament).”
3. On 15<sup>th</sup> April 2011 the Director General of OLAF requested an Opinion from the Supervisory Committee (SC) on OLAF’s powers to open and conduct internal investigations within the institutions and the limitation posed by the privileges and immunities of their Members, in particular in the case of MEPs to the right of immediate and unannounced access to any information held by the institutions and to their premises.

### **OLAF’s powers for the independent conduct of internal investigations**

4. Article 12 of Regulation (EC) 1073/99 provides that the Director General of OLAF shall not take instructions from any institution in the performance of his duties with regard to the opening and carrying out internal investigations.

### **Internal investigations in relation to irregular conduct**

5. OLAF is responsible for the initiation and conduct of administrative investigations within the institutions for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Union.

It has powers to investigate to that end any serious matter relating to the discharge of professional duties such as to constitute a dereliction of the obligations of the officials

---

<sup>1</sup> The Sunday times press article 20, March, 2011



## OLAF Supervisory Committee

liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of the members of institutions.<sup>2</sup>

6. The SC notes that the responsibility of OLAF concerning internal investigations within the institutions includes all activities relating to the need to safeguard **Community interests against irregular conduct liable to give rise to administrative or criminal proceedings.**
7. These activities have been listed in detail in the European Parliament (EP) Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, based on recital (5) and on Article 4 (1) of Regulation (EC) 1073/1999.

Situations such as **conflict of interest, the duty to behave with integrity as regards the acceptance of benefits, refraining from action or behaviour which might reflect adversely upon the member's position or serious misconduct**, fall within the scope of OLAF's investigations.<sup>3</sup>

8. The SC takes the view that all these matters form part of the facts allegedly committed, and, as such, they fall within the scope of OLAF's investigation powers as indicated in Rule 10 of the Rules of Procedure of the EP: "Internal investigations conducted by the European Anti-Fraud Office-OLAF".

### Internal investigations on activities affecting the financial interests of the EU

9. The SC considers that fraud, corruption and any illegal activities affecting the "financial interests of the European Union" encompass those which even if not directly related to the *budget* of the Community, are capable of harming *the financial interests* of the Community **in a broad sense** by adversely affecting its assets.<sup>4</sup>
10. The SC agrees with the Advocate General's Opinion in the case referred to above, that "the source of the assets in question is not decisive (...); **ensuring the proper use of all funds held by the institutions**, bodies, offices or agencies of the Community **must be**

---

<sup>2</sup> Article 1 of Regulation (EC) 1073/99.

<sup>3</sup> See Article 10 of the Rules of Procedure of the EP, recitals (2), (3) and (4) of the Interinstitutional agreement on 25 May 1999 and of the EP Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests of 18 November 1999, as well as articles 11, 12, 13, 14, 16, 17 and 22 of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities.

<sup>4</sup> Opinion of the Advocate General Jacobs, case C-11/00 *Commission v ECB* para 118.



## OLAF Supervisory Committee

**regarded (...) as forming part of the financial interests of the Community** and may thus be the subject of measures adopted on the basis of Article 280(4) EC”.<sup>5</sup>

11. The SC recalls the Court of Justice rulings on this matter which considered that the expression “financial interests of the Community” seems wider than the expression “items of revenue and expenditure of the Community”: “...the fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the European Community’s objectives and places it within the framework of the Community, so that **the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.**”<sup>6</sup>
12. The SC underlines that **the proper use of the funds** that the EP has at its disposal in order to cover the exercise of the Parliamentary mandate: salary of its members, reimbursement of expenses (travel, telephone expenses...), payment of allowances etc. is based on the compliance with the Financial Regulation and on the principle that those funds are reserved **exclusively for the funding of activities linked to the exercise of a Member’s mandate**<sup>7</sup> and not to work for purposes determined by a private payment.

### *Duty to inform and to cooperate with OLAF*

13. Article 7.1 of Regulation (EC) 1073/1999 provides that the institutions, bodies, offices and agencies shall forward to the Office without delay any information relating to possible cases of fraud or corruption or any other illegal activity.
14. The SC stresses the fundamental **duty to fully cooperate with OLAF**, to supply information and to provide assistance in the practical conduct of investigations that all institutions and their members have. The unequivocal fulfilment of these duties allows OLAF to carry out investigations **under equivalent conditions** in all the Community institutions, bodies, offices and agencies.<sup>8</sup> The lack of cooperation puts into question the credibility of the tools that the institutions adopted to fight against any kind of fraud, corruption, illegal activities or irregular conduct.

---

<sup>5</sup> Current Article 325 of the EU Treaty. See case C-11/00, Opinion of the Advocate General Jacobs para 118.

<sup>6</sup> See cases C-11/00 *Commission v ECB* and C-15/00 *Commission v EIB*.

<sup>7</sup> See Statute for Members of the EP-Decision of the EP of 28 September 2005 (articles 9 and 10), Decisions concerning implementing measures for the Statute for the Members of the EP of 19 May and 9 July 2008 and subsequent Decisions amending those Implementing measures (articles 10, 25, 28, 32, 61, 62, 66, 67, 68...) and Rules of Procedure of the European Parliament March 2011 (Rule 9 and Rule 10)

<sup>8</sup> See Article 3 « **Assistance from the security office** » “At the request of the Director of the Office, the European Parliament’s security office shall assist the Office in the practical conduct of investigations” and Recital para 6 EP Decision of 18 November 1999.



## OLAF Supervisory Committee

15. The SC considers that the rules laid down in the Rules of Procedure of the EP **comprising the measures needed to facilitate the smooth running of investigations conducted by OLAF shall be** rigorously respected.<sup>9</sup>

### Initial stage of the investigation

16. The SC considers that it is premature to categorically deny OLAF's powers to investigate the alleged facts at the initial stage of the investigation; especially in cases of alleged corruption and irregular behaviour, the complexity of which does not allow for verification of all illegal activities at the beginning of the investigation.

### OLAF's access to premises of the institutions: privileges and immunities of MEPs

17. The SC points out that those internal investigations can be conducted **only if OLAF is guaranteed access to all premises** of institutions, bodies, offices and agencies and to all information and documents held by them. This key power must be exercised in full independence by the Director General of OLAF and the institutions' security offices shall assist OLAF in its practical conduct.<sup>10</sup>
18. **OLAF shall carry out administrative investigations** within the institutions that shall be carried out **subject to the rules of the Treaties, in particular the Protocol on Privileges and Immunities**. OLAF shall **have the right of immediate and unannounced access** to any information held by the institutions, bodies, offices and agencies, and **to their premises**. It shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. OLAF may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing.<sup>11</sup>
19. The Protocol of Privileges and Immunities of the European Union contains several rules on privileges and immunities of the MEPs (articles 7 to 9), in particular that MEPs shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties. However, immunity cannot be claimed when a member is found in the act of committing an offence.
20. The SC points out that, on this matter, the Court of First Instance held that **“the Protocol refers to the Members of Parliament only in a general fashion and contains no**

---

<sup>9</sup> See Rule 10 of the Rules of Procedure of the EP and EP Decision concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests adopted on 18 November 1999.

<sup>10</sup> See recital (11) of Regulation (EC) 1073/99 and article 3 of the Inter-institutional agreement and of the relevant Decisions of each institution.

<sup>11</sup> Article 4 of Regulation (EC) 1073/1999.



## OLAF Supervisory Committee

**provision explicitly governing internal investigations in the Parliament (...).** As the President of the Court of First Instance was able to observe in paragraph 107 of the order in *Rothley and Others v Parliament*, **the risk cannot be excluded a priori that, in conducting an investigation, the Office [OLAF] might perform an act prejudicial to the immunity enjoyed by every Member of the Parliament. However, if that were to occur, any Member of the Parliament faced with such an act could, if he considered it damaging to him, avail himself of the judicial protection and the legal remedies provided for by the Treaty.”**<sup>12</sup>

21. The SC considers this to be a sensitive area where the position upheld by the Advocate General in case C-167/02 is worth reading; “As regards the measures taken by OLAF during the course of an internal investigation, whilst it is difficult to pronounce in the abstract on the admissibility of future proceedings, it seems probable to me that, as the Court of First Instance held and as the other parties have suggested, Members of the Parliament who considered their rights to have been infringed would have various opportunities to bring judicial proceedings. The Commission points to a number of legal acts which might be challenged in that way: the decision of the Director of OLAF to open an internal investigation as required by the second paragraph of Article 5 of the Regulation; various measures taken by OLAF in the course of an investigation, **including the decision to have access to an office, to seize documents** or to request oral information; as well as the agreement, explicit or implicit, of the institution in question.

It appears to me, however, **that the need for discreet and expeditious action in the detection of fraud renders some such risk unavoidable.** It should, moreover, be noted that the contested measure contains **provisions designed to minimise the danger.** Thus, Article 5 of the model decision requires **Members to be informed rapidly of their implication in an investigation, as long as that would not harm the investigation.** That article also prevents Members from being named in OLAF’s conclusions without their first having been heard except insofar as national investigative procedures require the maintenance of absolute secrecy”.<sup>13</sup>

22. The SC considers that OLAF should act with scrupulous respect of those rules and following a thorough assessment of the risk involved on each case and the proportionality of the measure to be taken.
23. The SC recalls that the Court of Justice found that, in case T-17/00, the provisions “relating to cooperation with OLAF or to supplying it with information are intended – whatever their exact scope may be – **to impose obligations upon Members** of the Parliament, so that it is in the first instance for Members, in any given case, either to act

---

<sup>12</sup> See Case T-17/00, *Willi Rothley and Others v European Parliament*, judgement of 26 February 2002, para 72 and 73.

<sup>13</sup> See Opinion of Advocate General Jacobs in Case C-167/02 P, *Willi Rothley and Others v European Parliament* para 56 to 61.



## OLAF Supervisory Committee

upon those obligations or not to comply with them if they are persuaded that it is open to them to do so without infringing Community law. If, **in a specific case, one of the Members of the Parliament adopts that approach, any subsequent measures taken by the Parliament with regard to that Member and to his disadvantage will, in principle, be subject to judicial review.**<sup>14</sup>

As regards the various measures that OLAF could take when exercising its investigative powers, the Court of Justice bore in mind the risk that OLAF might perform an act prejudicial to the immunity enjoyed by every Member of the EP and recalled that the review of the legality of acts of the institutions has been entrusted to the Community Courts.<sup>15</sup>

24. The SC considers that the institutions, bodies, offices and agencies (which are not the “person concerned” by an OLAF investigation) shall fully cooperate with OLAF and refrain from taking measures hindering OLAF’s investigation powers.

The SC believes that preventing OLAF from exercising this key investigative activity following an interpretation made by an institution, body, office and agency of OLAF’s mandate is a limitation of OLAF’s independent conduct of investigations.

25. The SC recommends that OLAF follow a rigorous implementation of the rules of procedure and the existing jurisprudence in this area.

---

<sup>14</sup> See case C-167/02 P para 49.

<sup>15</sup> See case C-167/02 P para 46, 50 and 51.