

The Controller

Brussels

**NOTE FOR THE ATTENTION OF MR VILLE ITÄLÄ
DIRECTOR-GENERAL OF THE EUROPEAN ANTI-FRAUD OFFICE**

Subject: Consultation on the draft Guidelines on Investigation Procedures for OLAF Staff (GIPs) – Article 9b (9) of Regulation 883/2013

Dear Mr Itälä,

By Note of [redacted] you have informed me about OLAF's process of revising its Guidelines on Investigation Procedures for OLAF Staff (GIPs) and transmitted a preliminary draft of those GIPs. By Notes of [redacted] you also have informed and updated me on the progress of this exercise.

Based on Article 9b (9) of Regulation 883/2013 (the OLAF Regulation), which provides that the Director-General of OLAF “*may request the opinion of the Controller on any matter related to procedural guarantees or fundamental rights that falls within the Controller's mandate*”, you asked for my opinion on the newly revised text of the GIPs given the references and provisions therein to the procedural guarantees and fundamental rights that fall under Article 9 of the OLAF Regulation and the Controller's mandate to ensure OLAF's compliance with them under the Complaints mechanism (Article 9b of the OLAF Regulation).

I would like to thank you for consulting me on this important matter. I see this constructive approach as a continuous reflexion of the good cooperation and mutual trust established between our offices since the start of my activities as the Controller of procedural guarantees.

The procedural guarantees of a person concerned within the meaning of Article 2(5) of the OLAF Regulation, set out in its Articles 3, 4 and 9 include, amongst other, the right of that person to comment on the facts concerning him/her before conclusion referring to him/her are drawn up by OLAF (right to be heard); the presumption of innocence; the right to avoid self-incrimination; respect for the rights of defence; the right to an independent, impartial and fair investigation, conducted within a reasonable time; as well as compliance with the general principles of legality and proportionality.

For citizens and the EU legislator, it is of paramount importance that OLAF investigations are conducted in full compliance with the procedural guarantees of the person under investigation and the Charter of Fundamental Rights of the European Union, and comply with the highest standards of transparency, equal treatment, and fairness, amongst other.

In that regard, the adoption of clear and comprehensive guidelines which provide coherent instructions to investigators on how to go about the different steps of an OLAF investigation will certainly help to achieve these goals and in turn, contribute to strengthening public confidence and trust in the work of OLAF.

Since the start of my functions as the Controller of procedural guarantees in September 2022, I have handled up to this day almost 40 complaints submitted by persons concerned. Having had to solve numerous and varied legal issues raised in those complaints and benefited from the privileged access to the case-files of the related OLAF investigations, I have acquired a unique insight into and an understanding of OLAF's investigative activities. In particular, the way OLAF strives to ensure compliance with the procedural guarantees of those under investigation and the rich and still evolving jurisprudence of the European Court of Justice and of the European Court of Human Rights.

It is my understanding that you have already asked for the Supervisory Committee's opinion on the draft revised GIPs pursuant to Article 17(8) of the OLAF Regulation. I trust that the Supervisory Committee will provide a comprehensive assessment on the GIPs.

Thus, my opinion will only focus on issues that I have had already the opportunity to deal with under the Complaints Mechanism of Article 9b of the OLAF Regulation. I will therefore address below only those parts (Articles) of the draft revised GIPs that refer to and concern specifically OLAF's compliance with the procedural guarantees of a person concerned.

Controller's General Remarks

The Controller notes that the new revised text of the GIPs repeals and integrates a number of pre-existing instructions and sectoral guidance notes to investigators. The Controller recognizes the difficulty of such an integration task and acknowledges the effort OLAF has done in order to draft GIPs which are clear, consistent and as comprehensive as possible.

The Controller also understands that certain investigation-related issues are better addressed in separate documents (e.g., specific guidelines on digital forensic operations or investigation workflows) due to their specific nature and the need for OLAF to have a more flexible procedure to adapt and align them with ongoing technological, legal and jurisprudential developments. I trust that those instructions will also be in line with the current OLAF Regulation and of course with the Charter of Fundamental Rights of the European Union, the general principles of EU law, as well as the relevant case-law of the European Courts and respect the procedural guarantees of a person concerned.

Next, the Controller would also like to acknowledge the improvement of the structure of the GIPs especially with regards to the Chapter I, which refers to the fundamental principles applicable during the lifecycle of an OLAF investigation.

As a general remark the Controller would like to stress that the control of legality, proportionality and necessity exercised by the Review team during an investigation represents an important safeguard to the procedural guarantees enjoyed by the persons concerned.

Furthermore, the Controller notes that several Articles have been clarified in the new proposed text of the GIPs. In particular, Article [redacted] includes further safeguards when OLAF collects electronic documents, which might contain not only case relevant information. The Controller welcomes the fact that this action must be authorised by the OLAF's Director-General. Such authorisation represents an important procedural safeguard concerning data/information not pertaining to the case, which should not be acquired by OLAF and not be part of the case-file. The Controller trusts that that data

collection in the course of the OLAF's investigation will remain proportional to the objective and the scope of the investigation, thus OLAF will always abstain from interfering with personal data and will exclude from the case file information not related to the investigation.

The Controller notes with satisfaction that Articles [redacted] and [redacted] offer additional clarifications about the conduct of interviews and provide adequate reassurance to the person concerned on their rights. In particular, the right to be assisted by a person of choice, is a basic procedural guarantee, which should be maintained during investigations. The Controller considers these specifications useful, as they increase legal certainty for the person concerned.

The Controller also remarks that the proposed wording of Article [redacted] clarifies that a person concerned should be given the summary of facts with sufficiently detailed information necessary to exercise efficiently its right to be heard. Likewise, the new text of Article [redacted] makes it clear that in case of new facts established by OLAF, OLAF shall provide to the person concerned additional opportunity to comment. The Controller considers those specifications in line with the jurisprudence of the EU Courts thus strengthening the procedural safeguards of the person concerned.

Finally, the Controller takes note of the proposed wording of Article [redacted] of the draft revised GIPs which implements the Controller's invitation under Article 9b (3) of the OLAF Regulation, to the Director-General of OLAF in 2022 to ensure that means of communication used by OLAF should be such as to always enable a person concerned to become aware of the information provided by OLAF under Article 9(3) of the OLAF Regulation.

The Controller will make the following concrete remarks concerning the Articles of the draft revised GIPs.

Controller's First Remark - Scope of the investigation

[content of Article redacted]

The Controller recalls that a broadly and widely defined scope of the investigation would not be in line with the principle of legality and proportionality. Such a scope would risk rendering the selection process and the identification of sufficient suspicion for opening an investigation devoid of purpose, since whatever the concrete elements taken into consideration by OLAF to decide to open an investigation, other additional elements not assessed during the selection could become, at a later stage, part of the investigation only because they may fall within a broad and all-encompassing defined scope.

Thus, a well-defined and delineated scope of an investigation would allow the person concerned to understand the purpose of the investigation and meaningfully exercise their right of defence. It would also allow the Controller to assess OLAF's compliance with the principles of necessity and proportionality in the context of a complaint under Article 9(b) of OLAF Regulation.

In that sense, it would reinforce transparency and accountability if the revised GIPs make it more explicit that the scope of an investigation should always identify the kind and nature of the alleged breaches or irregularities that would need to be investigated. There should never be scope for persons concerned to believe that OLAF is after a "fishing" investigation.

<p>The Controller considers that Article [redacted] of the GIPs could be clarified in the sense that OLAF should always define the scope of an investigation in a clear and well-defined manner so that persons concerned have a certainty about the subject matter of the investigation.</p>
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Controller's Second Remark - Definition of "Person Concerned"

[content of Article redacted]

According to Article 2(5) of the OLAF Regulation, a 'person concerned' by an OLAF investigation means 'any person or economic operator suspected of having committed fraud, corruption or any other illegal activity affecting the financial interests of the Union and who is therefore subject to investigation by [OLAF]'.

The Controller notes that as far as internal investigations are concerned, according to Article 9(3) of the OLAF Regulation "*as soon as an investigation reveals that an official, other servant, member of an institution or body, head of office or agency, or staff member may be a person concerned, that official, other servant, member of an institution or body, head of office or agency, or staff member shall be informed to that effect, provided that this does not prejudice the conduct of the investigation or of any investigative proceedings falling within the remit of a national judicial authority*".

The Controller considers that whenever a person is named in the Decision of the Director-General to open the investigation, such a person should in fact be considered from the date of the Opening Decision a person under investigation and therefore a "person concerned" within the meaning of Article 2(5) of the OLAF Regulation. The investigation units are in fact bound by the investigative mandate as defined in the opening decision issued by the Director-General.

In this context the Controller notes that the GIPs do not provide any guidelines on the timing for the identification/registration in the case file of the status as a "person concerned" in the case where a person is already named in the Opening Decision. The Controller considers that for the EU staff members, the status of "person concerned" in an OLAF investigation is a key element in the investigative process, as it confers the rights associated to this status, such as the right to be informed of the fact that they may be personally implicated in an irregularity or suspected of wrongdoings so long as this information does not prejudice the conduct of the investigation.

For the sake of clarity, the GIPs should ensure that naming a person in an Opening Decision of an internal investigation triggers the obligation of OLAF to inform that person as being a person concerned, provided that this information does not prejudice the conduct of the investigation. The Controller will suggest that this is clearly reflected in the wording of the relevant provisions of the GIPs.

<p>The Controller considers that Article <i>[redacted]</i> of the GIPs should clarify that whenever the Opening Decision of the Director-General refers by name to a person, this person is considered from that moment a "person concerned" within the meaning of Article 2(5) of the OLAF Regulation. This will trigger the obligation of OLAF under Article 9(3) of OLAF Regulation either to inform that person as being a person concerned or to defer such information in justified cases.</p>

Controller's Third Remark - Complaints in the mandate of the Controller of Procedural guarantees

[content of Article redacted]

The Controller considers that before forwarding a complaint by a person concerned to the Controller, OLAF should first inform the person concerned about the existence of the Complaints mechanism of Article 9b of the OLAF Regulation and obtain his/her consent for forwarding the complaint to the Controller. It may well be that the person concerned may not wish to submit a

complaint to the Controller at that particular moment in time. It should be clear that OLAF's action is at the request of the person concerned. OLAF should also inform the person concerned about the strict deadline to submit a complaint to the Controller of procedural guarantees under Article 9b (2) of the OLAF Regulation.

The Controller considers that [redacted] **OLAF should first inform the person concerned about the existence of the Complaints mechanism of Article 9b of the OLAF Regulation and obtain its consent for forwarding the complaint to the Controller. OLAF should also inform the person concerned about the time limits to submit a complaint to the Controller of procedural guarantees under Article 9b (2) of the OLAF Regulation.**

Controller's fourth Remark – Controller's Invitation to resolve the complaint v. Controller's Recommendation

[content of Article redacted]

The Controller notes that the text as it stands does not provide a sufficient clarity between the Controller's "**invitation to resolve the complaint**" under Article 9b (3) of OLAF Regulation and the Controller's "**Recommendation**" under Article 9b (5) of the OLAF Regulation. Those are two different procedural steps in the complaint's mechanism as set out in Article 9b of the OLAF Regulation.

In fact, the Controller's "*invitation to resolve the complaint*" under Article 9b (3) of OLAF Regulation is a first attempt of the Controller to propose a solution in cases where it has found a breach of the complainant's right by OLAF. As the practice of the Controller has demonstrated, if OLAF response to the Controller invitation is satisfactory, the Controller closes the case and informs the complainant accordingly.

On the contrary, the Controller's "*Recommendation*" under Article 9b (5) of the OLAF Regulation is a tool that the Controller has in case the reply by OLAF to the Controller's proposal for solution is not satisfactory to remedy the breach of the complainant's rights. Only in this case the Controller, after having consulted the Supervisory Committee and received its opinion, can issue a "*Recommendation*" to the DG OLAF under Article 9b (5) of the OLAF Regulation.

The Controller considers that [redacted] of the new GIPs should be redrafted to clarify that those are two different steps of the complaint's mechanism. [redacted]

Controller's fifth Remark – Final Case Report

[content of Article redacted]

The Controller notes that the opportunity given to the person concerned to comment on the facts concerning him is the expression of the right to be heard in the context of the OLAF investigations and an essential procedural guarantee.

The right to be heard guarantees every person the opportunity to make known its views effectively during an administrative procedure and before the adoption of any decision liable to affect its interests adversely. The right to be heard pursues a dual objective. First, to ensure that the person concerned is in fact protected and can submit information relating to his personal circumstances as

well as argue in his favour and, secondly, to enable the competent authority to examine the case and establish the facts in as precise and correct a manner as possible.

In that regard, the practice of simply annexing in the Final Report the comments of the person concerned on the facts concerning it may not be enough to show that OLAF did indeed take them into consideration. Instead, making reference to these comments in the corresponding parts of the Final Report where material facts are set out by OLAF to support its conclusions and thus assessing their relevance is a more appropriate way to show that the comments of the person concerned have been properly taken into consideration. Such practice constitutes good administration and should be reflected as guidance to investigators in the relevant provisions of the GIPs. Annexing the comments of the person concerned to the Final report is essential for transparency purposes but cannot, as such, suffice and replace the obligation to demonstrate that OLAF did actually consider these comments.

The Controller considers that *[redacted]* It would constitute a good administrative practise if OLAF **clarified that taking in consideration the persons' concerned comments is done by the following cumulative steps: a) annexing the comments of the person concerned on the facts concerning him/her to the Final Report, b) describing where necessary these comments in the corresponding relevant parts of the Final Report and c) explaining how OLAF took these comments into consideration or, on the contrary, considered them unfounded or not pertinent.**

I trust that you will consider my remarks useful and I remain available for any further clarification or additional comments OLAF might need.

Yours sincerely,



Julia LAFFRANQUE

cc: *[redacted]*