



OLAF Supervisory Committee

OPINION No 5/2011

Transmission by the European Anti-Fraud Office (OLAF) to the institutions of final case reports drawn up following internal investigations closed without follow-up

Brussels, 17th November 2011



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Background

1. The European Anti-Fraud Office (OLAF) conducts internal administrative investigations to determine whether fraud, corruption or any other illegal activity affecting the financial interests of the European Union have occurred. OLAF also investigates allegations of dereliction of the obligations of officials and other servants of the EU liable to result in disciplinary or criminal proceedings¹. If evidence is revealed which tends to show that such has occurred, OLAF refers the results of its investigations to the appropriate authorities for disciplinary, administrative, financial or, if necessary, judicial follow-up. Reports drawn up following an internal investigation and any useful related documents are sent to the institution, body, office or agency concerned².
2. It has been OLAF's practice, until recently, to forward only reports of internal investigations closed with follow-up. When internal investigations were closed without any further action taken, OLAF would inform the institution, body, office or agency concerned by sending a note³ stating that the case had been closed without follow-up action being taken⁴.
3. The Supervisory Committee (SC) took note that OLAF decided to take into account a "request [from the European Commission] for also receiving all final case reports closed without follow-up". In addition, OLAF decided to inform "the other institutions that a similar policy will apply to them unless otherwise requested".⁵
4. The SC understands that this transmission of final case reports drawn up following internal investigations closed without follow-up will henceforth be carried out automatically, at the end of each investigation and on a systematic basis. The SC therefore took the decision to assess this practice, with the express purpose of determining whether it could jeopardize OLAF's investigative independence. The SC examined 17 internal cases closed without follow-up in which the final case reports were forwarded to the institutions or bodies concerned and assessed the legal basis for these transmissions, as well as the compliance of this practice with EU law.

¹ Article 1 of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), *OJ L* 136, 31.5.1999, p. 1–7.

² Article 9 (4) of Regulation (EC) No 1073/1999.

³ Notification of case closure without follow-up letter.

⁴ This was foreseen in the OLAF Manual – Operational Procedures under point 3.4.3.6.2. This point has disappeared in the new version of the Manual, updated in July 2011.

⁵ See the minutes of the Directors' meeting of 23 June 2011.



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A - Analysis of case files

5. When examining the case files, the SC found two notes sent by the Secretariat General of the EC to OLAF. The first note is drafted as follows: "Comme vous le savez et comme discuté lors de la dernière réunion du Clearing House, la Commission ne peut accepter que, depuis mai 2010, l'OLAF ne communique plus les rapports finaux d'enquêtes internes clôturées sans suite concernant ses services"⁶. The Secretariat General indicates in this note that this transmission is foreseen by Article 9(4) of Regulation (EC) No 1073/1999. The second note⁷ makes reference to the first one "par laquelle je [the Secretary General of the EC] rappelais l'obligation faite à l'OLAF par le Règlement 1073/1999 de transmettre tous les rapports finaux des enquêtes internes, y compris celles clôturées sans suite"⁸.
6. Following analysis of the cases mentioned above, the SC determined that:
 - OLAF closed these investigations without any further action being taken because the alleged irregularities or frauds were unsubstantiated;
 - OLAF forwarded the final case reports drawn up following these investigations to the EC, in response to its request;
 - On its own initiative OLAF also forwarded these reports to the other institutions and bodies concerned, namely the Council, the European Parliament and the European External Action Service;
 - OLAF quoted Article 9 (4) of Regulation (EC) No 1073/1999 as the legal basis for this transmission⁹;
 - These reports contain information forwarded or obtained in the course of internal investigations, including the name of the staff member involved and his employing EU institution, the initial source of information, an explanation of the alleged fraud or irregularity, the steps taken and the facts gathered during the investigation, the statements of the persons involved in the matters under investigation (including, where appropriate, those of the person concerned, whistleblower or witness), OLAF's findings and the main results of the investigation;

⁶ Note ARES (2011) 687782 of 27 June 2011: "As you know, and as discussed at the last meeting of the Clearing House, the Commission can not accept that, as from May 2010, OLAF no longer forwards the final reports of internal investigations closed without further action concerning its services" (our translation).

⁷ Note ARES (2011) 725801 of 5 July 2011.

⁸ The note "in which I recalled OLAF's obligation according Regulation 1073/1999 to forward all final reports of internal investigations, including those closed without follow-up" (our translation).

⁹ However, only in two investigations the letter accompanying the final case report explicitly mentions this article as the legal basis for the transmission.



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- In some cases, this information will be used in the framework of other OLAF internal and external ongoing investigations;
- These reports also contain personal data relating, on occasions, to staff of the EU institutions or bodies who are subject to the investigation or otherwise involved in the matters under investigation, either as whistleblowers or witnesses and, in other instances, to persons outside the EU institutions or bodies who may be involved in the matters under investigation, either as informants or witnesses;
- The categories of the data processed¹⁰ are name, personnel number (for EU staff), date of birth, nationality, marital status, address, phone number, professional position, employer, bank account, statements made regarding the events under investigation by the person or about the person, evidence mentioning the person and notes regarding the relation of the person to the events under investigation;
- Some of these persons were informed only that there had been transmission to the EC of the results of OLAF's investigations and not that there had been transmission of the final case reports;
- In none of the investigations examined was personal data redacted.

B - Legal basis for the transmission of final case reports drawn up following internal investigations closed without follow-up

7. In a small number of the investigations examined OLAF has cited Article 9 (4) of Regulation (EC) No 1073/1999 as the legal basis for the transmission. Furthermore, the SC notes the existence of a draft and unsigned Memorandum of Understanding concerning a code of conduct designed to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission¹¹. The SC doubts that either Article 9 (4) of Regulation (EC) No 1073/1999 or Article 7 of the Memorandum of Understanding represents a sufficient legal basis for the transmission, for the reasons stated below.

¹⁰ See the opinion of the European Data Protection Supervisor on a notification for prior checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on OLAF internal investigations, 23 June 2006, case 2005-418.

¹¹ SEC(2003)871 consolidated, 14.8.2003.



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a) Article 9 (4) of Regulation (EC) No 1073/1999

8. OLAF does have a legal obligation to send the reports drawn up following an internal investigation and any useful related documents to the institution, body, office or agency concerned¹². However, on reading the first sentence of Article 9 (4) in conjunction with its second sentence, which stipulates that “the institution, body, office or agency shall take such action, in particular disciplinary or legal, on the internal investigations, as the results of those investigations warrant”, the SC interprets this provision as concerning only investigations closed with follow-up. Indeed, in the SC's view, the scope of this paragraph is such as to ensure that appropriate follow-up is given to OLAF's investigations.
9. This conclusion is reinforced by Article 1(3) of Annex IX of the Staff Regulations, specifying that, in cases where an investigation is closed without further action, the OLAF DG shall **inform** the official and his institution in writing¹³. Article 5 of the Commission Decision of 2 June 1999¹⁴ also stipulates that when an investigation has been closed without any further action, the DG shall **inform** the person concerned in writing. For the SC, this information clearly refers to the results of the investigation and not to the transmission of the case report.

b) Article 7 of the Memorandum of Understanding between OLAF and the Commission

10. The SC notes that the Memorandum of Understanding, whilst respected both by OLAF and the EC, is still in a draft version and, as far as the SC is aware, it has not yet been signed.
11. The SC notes that while the draft Memorandum provides in its Article 7(1) that DG OLAF "will promptly forward all final reports concerning internal investigations and any useful related documents to the Commission", it also foresees a different treatment for cases closed without follow-up. Article 7(2) clearly states that "whenever a case is closed without further action, OLAF will **inform** the Commission". Again, the SC interprets this provision as requiring OLAF to inform the EC as to the results of the investigation and not to forward it the final reports.

¹² Article 9(4) of Regulation (EC) No 1073/1999.

¹³ Article 1(3) of Annex IX of Staff Regulations: “If, following an OLAF investigation, no case can be made against an official about whom allegations have been made, the investigation in question shall be closed, with no further action taken, by decision of the Director of OLAF, who shall inform the official and his institution in writing”.

¹⁴ 1999/396/EC, ECSC, Euratom: Commission Decision of 2 June 1999 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 (SEC(1999) 802), *JO L* 149 du 16.6.1999, p. 57–59. For the other institutions, see their internal decisions implementing the Model Decision of the Interinstitutional Agreement.



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C - Compliance with EU law

12. The SC considers that OLAF's decision to send to the institutions, bodies, offices and agencies concerned all final reports drawn up following investigations closed without follow-up at the end of each investigation and on a systematic basis may breach both the requirement of confidentiality of investigations and data protection rules. Since their protection is the shared responsibility of DG OLAF and the SC¹⁵, the SC is dismayed that this decision was taken by DG OLAF without any prior consultation of the SC in order to ascertain its opinion. Moreover, the SC is surprised that neither the OLAF Data Protection Officer nor the EDPS was informed of this decision.

a) Compliance with the requirement of confidentiality of investigations

13. According to Article 8 of Regulation (EC) No 1073/1999, OLAF is subject to professional secrecy when transmitting information forwarded or obtained in the course of internal investigations. Transmission of information arising from OLAF's investigations must respect two concurrent conditions: (i) the "need to know" principle in relation to the recipient and (ii) the exact purpose of communicating the information (for example, ensuring follow-up of the investigation).¹⁶

14. The SC interprets this provision in two ways:¹⁷ on the one hand, as sender of information forwarded or obtained in the course of internal investigations, OLAF has an obligation to assess the need to know of the recipient of its reports. In the SC's view, transmission of final case reports cannot therefore be carried out automatically, at the end of each and every investigation closed without follow-up, and on a systematic basis. On the contrary, such transmission must take place on a case by case basis, following a duly reasoned request from the EC or other institution or body. In any case OLAF cannot disclose to the recipient the information which it intends to use in other ongoing internal and external investigations without jeopardizing their successful outcome, as has been the case. On the other hand, as recipient of this information, the EC (or other institution or body) may not use it for purposes other than to prevent fraud, corruption or any other illegal activity. In the absence of any specific purpose relating to the prevention of fraud, corruption or any other illegal activity, as is the case for final case reports in investigations closed without

¹⁵ According to Article 8(4) of Regulation (EC) No 1073/1999, the OLAF DG and the members of the Supervisory Committee shall ensure that this Article [Article 8] and ex- Articles 286 and 287 of the Treaty are applied.

¹⁶ Article 8(2) of Regulation (EC) No 1073/1999: "Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities. Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity."

¹⁷ See also the SC Opinion No 5/2010, point 19.



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follow-up, the transmission of all final reports in investigations closed without follow-up does not appear to be necessary.

b) Compliance with the data protection rules

15. OLAF must respect the right to the protection of personal data which is protected by Article 8 of the Charter of Fundamental Rights of the EU, and is closely connected with the right to respect of private life expressed in Article 7 of the Charter. Moreover, Article 8(3) of Regulation (EC) No 1073/1999 imposes on DG OLAF an obligation to ensure that EU provisions for the protection of personal data are complied with¹⁸. When sending to the institution, body, office or agency concerned reports drawn up following an internal investigation and any related useful documents¹⁹, OLAF transfers personal data of the persons concerned, whistleblowers, informants, witnesses and OLAF staff. Consequently, OLAF is legally bound by both the provisions of the Charter and the rules of Regulation (EC) No 45/2001²⁰. The latter requires OLAF, in its capacity as a personal data controller, to transfer these reports and/or the related documents containing personal data only if this data is necessary for the legitimate performance of tasks covered by the competence of the recipient²¹. When doing so, OLAF must verify that (i) the recipient has the appropriate competence and (ii) the transfer is necessary²².
16. The SC is of the opinion that automatic and systematic transmission of final case reports in investigations closed without follow-up does not comply with these requirements. The SC points out that the European Data Protection Supervisor (EDPS) has stated that "even if the transfer of information is foreseen in relevant legislation, such transfer is only lawful if it meets these two additional requirements. Whether a given transfer meets such requirements will have to be assessed on a case by case basis. Accordingly, OLAF follow-up agents should apply this rule for each particular data transfer. Doing so will avoid unnecessary transfers of information as well as transfers of information to parties that do not have the appropriate competences. To ensure compliance with this rule, the EDPS suggests that OLAF puts in place a procedure whereby a note to the file is drafted establishing the necessity of the data transfers that have taken place or will take place in the context of a given case"²³.

¹⁸ See also the judgement of the Court of First Instance, *Nikolaou v Commission*, 12 September 2007, case T-259/03, para. 191.

¹⁹ Article 9(4) of Regulation (EC) No 1073/1999.

²⁰ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ L* 8, 12.1.2001, p. 1–22.

²¹ Article 7 (1) of Regulation (EC) No 45/2001. See also the opinion of the European Data Protection Supervisor on internal investigations quoted above, point 2.2.6.

²² Article 7 (2) of Regulation (EC) No 45/2001.

²³ See the EDPS' Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office on "follow-up" data processing operations (disciplinary, administrative, judicial, financial), Cases 2006-544, 2006-545, 2006-546, 2006-547, 27 March 2007, point 2.2.6.



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17. The SC believes that this statement also applies to those cases closed without follow-up. Therefore, OLAF needs to assess on a case by case basis whether a given transfer to EU institutions and bodies of personal data in cases closed without follow-up meets such requirements. The evaluation of the necessity of the transfer can also be made for a specific category of files. For example, it is reasonable to believe that in some cases the EC (or other institution or body) would need to know what action OLAF has carried out following initial information coming from one of its services. However, the SC notes that, in practice, OLAF not only sent to the EC the final case reports regardless of the source of information, but also to other institutions in the absence of a specific request from them and, consequently, without evaluating their need to know.
18. Even supposing that the requirements mentioned above are complied with, final case reports may contain personal data which is not necessary for the performance of the tasks covered by the competence of the recipient. This is especially the case for whistleblowers' and informants' personal data. In this regard, the SC draws attention to the statement of the EDPS that the EC does not need to know whistleblowers' personal data in order to take the necessary measures to protect the financial interests of the EU²⁴. OLAF cannot therefore transmit these case reports without protecting the whistleblowers, by redacting their personal data.
19. The SC also notes that Article 27 (1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS the processing of operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. The list of processing operations likely to present such risks includes “processing of data relating to ... suspected offences, offences, criminal convictions or security measures”, as well as “processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct”²⁵. The SC notes that the EDPS considers that the conduct of EU officials is analysed by OLAF in its internal investigations; moreover, the processing of personal data in the context of internal administrative investigations by OLAF could be seen as a processing operation relating to “... suspected offences, offences, criminal convictions or security measures”²⁶. Since the prior checking made by the EDPS on the processing of personal data in the context of internal investigations or of the “follow-up” data processing operations did not examine the specific issue of the transfer of final case reports in internal investigations closed without follow-up, the SC considers that OLAF should have notified the EDPS for prior checking and sought his opinion.

²⁴ See the EDPS' opinion on the Memorandum of understanding, case 2009-011, point 3.4. (Avis concernant une notification relative à un contrôle préalable reçue du délégué à la protection des données de la Commission européenne à propos de la gestion des informations transmises par l'OLAF dans le cadre du Memorandum of Understanding). The SC would also point out the statement from the European Court of Human Rights which says that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection, in particular where the employee concerned is a part of a small group of persons aware of what is happening at work and is thus best placed to act in the public interest (see the following judgements: *Guja v Moldova* [GC], no 14277/04, 12 February 2008, § 72; *Marchenko v Ukraine*, no 4063/04, 19 February 2009, § 46; *Heinisch v Germany*, no 28274/08, 21 July 2011, § 63).

²⁵ Article 27 (2) a) and b) of Regulation (EC) No 45/2001.

²⁶ See the EDPS' opinion on internal investigations quoted above, point 2.2.1.



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20. The SC is concerned that this transmission could affect the rights of the persons implicated in investigations and consequently lead them to bring an action for damages before the European Court of Justice. As the EU judiciary stated, the provisions of Regulation (EC) No 45/2001 and Article 8(3) of Regulation (EC) No 1073/1999, as well as the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation (EC) No 1073/1999 confer rights on individuals who are affected by an OLAF investigation²⁷. Where there has been violation of these rules, the EC would incur non-contractual liability for OLAF's unlawful conduct, which has already happened on several occasions. Such a conclusion would be detrimental not only to the EC, but, in particular, to OLAF whose credibility and reputation would be put into question.
21. Moreover, the SC is worried that this practice could jeopardize the success of investigations. In its capacity as an investigative body for internal cases, OLAF is highly dependent on being respected and trusted to be able to encourage witnesses and whistleblowers to come forward and point out suspected fraudulent or corrupt behaviour. This reporting practice directly threatens the necessary trust and confidence amongst potential witnesses and whistleblowers and is likely to discourage them from coming forward and assisting OLAF. On the other hand, it is important to note that where an investigation is closed without follow up it may have depended on factors that may change in the future. If the final case report in such a case is to be disseminated outside OLAF, a potential new investigation into the same matter could unnecessarily be made more difficult.

Conclusions and recommendations

22. Transmission of final reports drawn up following internal investigations closed without follow up can be questioned from a number of purely legal aspects relating both to professional secrecy and data protection issues as outlined above. Moreover, this practice will inevitably affect the efficiency of OLAF's investigatory functions and, at the very least, may give other institutions inappropriate means to influence OLAF's investigative activity, which would be detrimental to the public's trust and confidence in OLAF's independence.
23. The SC strongly recommends that OLAF reconsider its decision to transmit to the institutions, bodies, offices or agencies concerned the final case reports mentioned in this opinion without taking all necessary measures in order to ensure that this practice complies with EU law and does not jeopardize the efficiency and independence of its investigations.

²⁷ Court of First Instance *Franchet and Byk v Commission* (No 2), 8 July 2008, case T-48/05, para. 218 and *Nikolaou v Commission*, 12 September 2007, case T-259/03, para. 210.