



OLAF Supervisory Committee

Opinion No 4/03

on the draft Memorandum of Understanding

between OLAF and the Commission

**concerning a code of conduct in order to ensure a timely exchange of information
between OLAF and the Commission with respect to OLAF internal investigations
in the Commission**

Luxembourg, 16 December 2003

Since Regulation No 1073/99 came into force, there have been several attempts to settle the question of relations between OLAF and the Commission or its departments. They concerned relations in general terms and specific communication problems. Several formulas were tried out, depending on the problem to be solved: a code of conduct governing all aspects of relations between OLAF and the Commission, memorandums of understanding governing relations between OLAF and certain Commission departments (IAS, IDOC), guidelines for communication questions.

The Committee is aware of the difficulties flowing from the ambiguities in the regulations and has encouraged these procedures, but also observed that there were hesitations on both sides.¹ It therefore recommended that communication questions be addressed as a matter of urgency and proposed that OLAF give effect to the agreed in this respect.²

The EUROSTAT crisis gave a new impetus to these efforts. At the end of May 2003 OLAF began preparing “operational instructions” to provide OLAF staff with a coherent basis for questions of information for the Commission and persons concerned by internal investigations.³ Then, following the Commission decisions of 9 July 2003, a draft agreement on timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission was prepared and approved by the Commission on 23 July 2003.⁴

By letter dated 25 July 2003 Mr Brüner, Director of OLAF, stated that he wished to consult the Supervisory Committee on the draft, stating that OLAF needed to be sure of complying with the law “as regards its operational independence”, and by letter dated 24 September 2003 he shared with the Committee his views on the content of the draft code of conduct.

The Committee has accordingly considered the draft and another memorandum of understanding between OLAF and the IDOC⁵ that Mr Brüner also presented to the Committee.

¹ See in particular point 2.2.1 of the report for September 2001 – July 2002.

² *Ibid*, point 2.3. Major points of the guidelines have not been put into effect, in particular the establishment of a communication unit.

³ Note from Mr Perduca to Mr Brüner, 17 June 2003.

⁴ SEC(2003)871 consolidated.

⁵ SEC(2003)885/2.

It believes it is both urgent and a salutary exercise to find a solution to the problems brought to light by the EUROSTAT case but feels that it would not be right to focus solely on these aspects of the problem as the effect might be to neglect other aspects such as the responsibilities of the other institutions and the rights of persons concerned by investigations. It has therefore wished to take account of the opinions of other interested parties.

The Committee notes that the principles set out in the guidelines would have settled the difficulties that arose in the EUROSTAT case: OLAF's communication policy must be based on the principle of transparency, itself interpreted in conjunction with the rules and regulations applicable to the Office. The value of these guidelines lay in the fact that they offered an overall approach to all OLAF's communication problems. But this solution still had to be put into effect, which was done to some extent by the operational instructions of June 2003.

The aim of the Commission's approach when on 9 July 2003 it proposed concluding a code of conduct was to solve specific practical problems. It wished to obtain an assurance that the information needed for the exercise of its various responsibilities would be made available in good time. The draft code of conduct has the merit of being an attempt by OLAF and the Commission to provide a solid and transparent basis for settling their communication problems and thus meets an urgent need. It is to be welcomed since it proposes a solution to the apparent contradictions between the need for confidentiality in investigations and the constraints in the exercise of management responsibility in the institutions and respect for individual rights. But further details might have to be added as regards transmission to the Commission of information transmitted to the judicial authorities so as to secure the confidentiality of criminal proceedings in accordance with national law.

Point 6 of the draft Memorandum is ambiguous. It seems to provide that OLAF must usually share with the Commission, at the same time as the judicial authorities concerned, information on criminal conduct gathered in the course of an internal investigation.

The Committee stresses that this is a possibility available on the responsibility of the Director of OLAF (Article 10(3) of Regulation No 1073/99) and that OLAF is not totally free to use this type of information, since in each case it must obey constraints of compliance with the confidentiality of criminal investigations, data protection and specific conditions imposed by the Member State of origin (Guidelines for a communication policy for OLAF, 14.6.2002).

This draft code of conduct is not in conflict with the guidelines, which take a broader approach, nor with the operational instructions, from which it does not depart to any great extent. But this type of procedure by definition offers no more than partial solutions leaving a need for fresh provisions when fresh problems arise.

The Committee has taken note of the Commission's intention of proposing a legislative solution to these problems, possibly in the form of a specific amendment to Regulation No 1073/99. The principles defined by the guidelines should be taken into consideration here, and in particular the rule that all the institutional actors (Parliament, Council, Commission, Court of Auditors) should be treated in parallel, reflecting their respective responsibilities.

Pending the entry into force of a legislative solution along these lines, the Committee considers that the code of conduct can be applied since it is compatible with the approach of the guidelines and takes due account of the responsibility of the Director of OLAF for investigations.
