



OLAF Supervisory Committee

Opinion No. 5/2008

OLAF de minimis policy

2 December 2008



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INTRODUCTION

OLAF has limited investigative resources in relation to the number of investigations it is called upon to undertake. To carry out investigations into serious cases of fraud and irregularity to the prejudice of the financial interests of the EU with all due speed and efficiency, it is imperative that effective use is made of the resources available to OLAF. The Supervisory Committee (SC) has in the past expressed its concern¹ that OLAF has not yet developed a clear and consistent investigation policy and strategy.

The EC Regulations and the Commission Decision establishing OLAF² make no specific reference to prioritisation of incoming information or complaints involving small sums of money (“de minimis” cases). It therefore follows that information received and investigations carried out by OLAF, including de minimis cases will, in principle, be treated on an equal basis by OLAF. OLAF’s investigation priorities are set out in the Manual³ and in the current annual management plan. OLAF’s note addressed to the SC in June 2007⁴ outlines OLAF’s practice concerning “zero tolerance” and the de minimis rule in the internal investigations.

The SC has therefore decided to examine the way in which OLAF deals with de minimis cases, for the purpose of evaluating the practice and effectiveness of OLAF’s present de minimis policy.

1. THE SELECTION OF CASES

For the period of December 2005 to November 2008 (36 months) OLAF had around 2000 closed cases in the CMS database. From this list, the SC selected 45 cases (See more details in Annex 1⁵) with an estimated financial impact of less than 50,000 EUR. The 50,000 EUR threshold was chosen on the basis of a cost-efficiency calculation of a minimum cost of an average investigation, taking into account the length of an average OLAF investigation (28 months) and

¹ See for example conclusions and recommendations of SC’s annual activity reports December 2005 to May 2007 and June 2007 to May 2008.

² Regulations (EC) No 1073/1999 and No 1074/1999; Commission Decision of 28 of April 1999 (OJ L 136/20, 31.5.1999).

³ OLAF Manual of 25 February 2005 point 3.2 Operational priorities: In the area of internal investigations the following criteria are taken into account: seriousness of criminal or disciplinary offence, involvement of a conspiracy or a single actor, or senior officials, involvement of an abuse of power, negative impact on the reputation/credibility of the EU or whether an investigation has been requested by a service/institution. In the area of external investigations there are fifteen criteria such as importance of the financial impact, public interest etc.

⁴ Internal note dated 18 June 2007 on OLAF’s practice concerning zero tolerance and the de minimis rule in the field of internal investigations dated 18 June 2007. The note outlines the general principles of the zero tolerance policy of the Commission and the de minimis rule in the area of internal investigations when opening investigations and forwarding final reports to national authorities. The note concludes that OLAF has to remain within the limits of its own competencies when opening an investigation, and that minor wrongdoings with no connection to the financial interests of the Communities should be dealt with by services other than OLAF.

⁵ Annex 1: 12 page document analysing case related information, will not be made public.



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resources involved (two investigators with an average of 15 cases per person). The financial impact of selected cases was divided as follows :

| <i>Financial impact EUR</i> | <i>Number of cases in the sample</i> |
|-----------------------------|--------------------------------------|
| 0- 500 | 6 |
| 501 – 25,000 | 20 |
| 25,001 – 50,000 | 19 |
| <i>Total</i> | 45 |

The sample represents all different types of OLAF cases from internal and external investigations to assistance, monitoring and coordination cas es. The SC has monitored these cases by reviewing evaluation, interim, final, and follow -up reports to determine the following:

- Ø Whether the opening of each case was in accordance with the rules set out in the OLAF Manual
- Ø Whether OLAF was the only or the most appropriate body to investigate the case (particularly in relation to internal cases)
- Ø Length of the investigation (in months) and the type of case
- Ø Impact of the investigation and the follow -up actions taken by national authorities/EU - institutions and bodies following closure of an investigation
- Ø Estimated resources used (number of people involved in investigation)
- Ø Handover of incoming information or closed cases to appropriate Commission services



2. ANALYSIS AND CONCLUSIONS

2.1 General remarks

OLAF took an average of five months to evaluate the incoming information and 15 months to investigate the selected cases. The large majority of the cases involved two investigators and were classified as low priority by the initial evaluator. In six cases no follow-up was recommended at the end of the investigations.

The SC examined the rationale supporting the opening of an investigation in the light of the criteria laid out in the Manual and concluded that, for most of these cases, the justification for opening an investigation was poorly defined and lacked clear supporting reasons in the initial assessment forms. The initial assessment form describes the allegations, the OLAF legal basis and source reliability, but does not explain the reason for opening a case based on Manual criteria. The “sufficiently serious suspicion”⁶ is used as an opening criterion for cases but is not defined anywhere in the Manual. This criterion therefore appears to depend entirely on the evaluator to decide upon its method of interpretation and implementation. Many cases had been recommended for opening by the evaluator and subsequently approved by the Head of Unit, the Director and the Board, even though no clear opening criteria or reason was stated in the initial assessment form and no other written justification existed in the case files to support the opening.

The OLAF Manual currently in force, for use by investigators and evaluators, does not provide the clear guidance necessary to enable evaluators who are performing an initial assessment of incoming information to recommend whether or not to open an investigation. Better defined criteria for opening an investigation would improve transparency and would enable more consistent, appropriate and coherent treatment of incoming information.

Current practice is for the person conducting the initial assessment of incoming information to carry out the investigation itself. This practice, while it is not unique to OLAF, may prevent a neutral and unbiased assessment of the information if not balanced by clear and transparent criteria for opening cases as well as thorough management control.

While investigations are classified as being of high, medium or low priority, the SC was unable to identify any specific treatment for low or average priority cases. Clarification is needed with regard to the treatment of low priority cases if and when resources are released from other cases. It would appear that the sample investigations were treated in the same way as any other investigations, even though they were initially classified as being of low or average priority.

It appears that very little information is available in general on measures taken to plan an investigation after the decision to open it has been made. A clear and concise investigation plan (i.e. specific objectives, expected results, risk analysis, timelines, benchmarks and resource

⁶ EJC-11/00 EC / ECB - 10 July 2003 point 141 and C-15/00 EC / EIB - 10 July 2003 point 164.



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allocation) is essential for each investigation , to guide and structure the work and to be updated when necessary.

Recommendations

1. The section “Operational priorities” of the Manual to be developed to include clear de minimis guidance and policy. Indicative de minimis thresholds for different types of investigations to be determined, together with criteria on whether to open a de minimis case or not.
2. The practical implication of low, medium and high priority definitions for investigations needs clarification.
3. Prior to launching an investigation, an investigation plan to be drafted, outlining the aim of the investigation.
4. OLAF to ensure separation of roles between the evaluator and the investigator when possible (language skills permitting).

2.2 Internal investigations

OLAF follows the Commission’s zero tolerance policy⁷ in this area and, in its capacity as the Community body entrusted with protecting and safeguarding the Community’s financial interests, considers all internal cases to be of equal importance. As well as the potential financial impact on the Community budget, OLAF is also obliged to consider other factors, including the political importance of the information, the Community’s reputation and/or seriousness of the case, particularly with reference to the professional conduct of the Community staff⁸. As a consequence, OLAF has stated⁹ that it has little room to decide whether or not to open an investigation; rather, it is required to investigate all cases which fall within its competence except so-called minor wrongdoings, which may be referred to other Commission services, such as the Commission’s Security Office or IDOC (the Commission Investigation and Disciplinary Office).

OLAF’s core mission is to protect the financial interests of the Community. In cases where allegations concerned the loss or the risk of loss of relatively small amounts of Community funds as a result of unjustified or falsified reimbursement claims, conflicts of interest, non-eligible expenditure or non-disclosed outside activities, the incoming information could, in the SC’s view, have been immediately referred to IDOC. The exception is for cases where senior officials

⁷ Internal note dated 18 June 2007 on OLAF’s practice concerning zero tolerance and the de minimis rule in the field of internal investigations dated 18 June 2007.

⁸ Article 2(1) of the Commission Decision of 28 April 1999 (OJ L 136/20, 31.5.1999).

⁹ Manual point 3.2.1.1. concerning operational priorities of the internal investigations.



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or serious and continuous irregularity or fraud allegations were involved, or where the case was related to another OLAF investigation or to a Community Agency where IDOC has no powers to act. The SC considers that further guidance is needed as to the type of information which could be classified as a “minor wrongdoing” and when information could be sent to other services.

With regard to cooperation with IDOC, the SC emphasizes that it is important for OLAF to hand over information regarding minor wrongdoings and/or cases with very low financial impact to IDOC early, thereby allowing a disciplinary procedure to be opened without delay. This would ensure effective and prompt sanctioning of any infringement. In 99% of the cases in the sample examined, OLAF investigations were followed by IDOC administrative inquiries and, thereafter, disciplinary actions.

Overall, the SC considers that disciplinary action should be undertaken without delay as stated by the European Court of Justice¹⁰. This requires the prompt handing over of information from OLAF to IDOC or other appropriate Commission services and any duplication of investigation should be avoided. This is of particular importance when the persons concerned are not officials or there is a danger that they may soon leave the service, which was the case in some of the sample investigations. The SC’s view is that there was no reason why in such cases the information should not have been forwarded to IDOC in the first place without opening an OLAF investigation.

The SC welcomes the recent efforts made by OLAF to strengthen its cooperation with both IDOC and other Commission services and encourages ever more activity in this area. Closer cooperation will improve the channelling of incoming information directly to the appropriate services without the need for OLAF’s intervention. In particular, OLAF should attempt to improve the process of exchanging information and cooperation with these services. The cooperation arrangements, however, should neither limit OLAF’s key competencies nor its independence to operate. The SC believes that by strengthening cooperation, OLAF would be able to release more resources to more serious fraud and irregularity cases, where it is clearly the only Community body which can investigate these cases. Since it is OLAF’s aim to provide value for money for the Community, the SC considers it would be an advantage for OLAF, as well as for other services, to share expertise and knowledge of the internal cases by regular exchange of information and discussion of ongoing cases without setting up over-strict and detailed rules.

A final observation concerns the judicial follow-up of the internal investigations. In the majority of the sample cases, no judicial follow-up was recommended or undertaken for various reasons, such as time barring or lack of sufficient evidence to launch a criminal investigation. The SC’s conclusion is that, in many of the sample cases, national judicial authorities were not able to process de minimis cases due to their workload and competing priorities. In the SC’s view, a more careful reflection on the feasibility of a successful judicial follow-up of de minimis cases is required before cases are opened or forwarded to them; similarly, that constructive communication with the national judicial authorities is highly important in order to ensure an effective follow up upon closure of cases.

¹⁰ ECJ C-270/99 27 November 2001; CFI T-307/01 10 June 2004; Opinion of advocate general C-270/99 22 March 2001.



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Recommendations

1. OLAF to better define its zero tolerance policy of internal investigations and, most importantly, decide on how to treat information with regard to low financial impact investigations. This should be clearly stated in the Manual.
2. OLAF to forward incoming information on minor wrongdoings and/or low financial impact cases when there are other means of investigation to other Commission services rather than to decide to open an OLAF investigation. There is a need to clarify when information should be forwarded to IDOC and other Commission services and to define the term “minor wrongdoing”.
3. OLAF to improve the process of exchange of information between relevant Commission services on internal de minimis cases.
4. OLAF’s overall operational priorities should be to focus on complex and serious cases to better use its scarce resources, thereby providing best value for money for the Community.

2.3 External investigations

For external investigations, the protection of the Communities’ financial interests is a shared responsibility with the competent Member States authorities¹¹. In this area, OLAF has generally more freedom and flexibility to decide whether or not to open an investigation. In accordance with the Manual¹² certain criteria, such as the principles of subsidiarity and proportionality, should be taken into account when opening an investigation. On the other hand, where no responsible authority to initiate an investigation exists in a Member State, OLAF is the only organisation entrusted with powers of investigation.

The areas of the sample cases concerned minor irregularities in the implementation of Community programmes and, most typically, represented cases where there was a suspicion of a conflict of interest, unjustified payments or mismanagement of project funds. During the monitoring of these cases the SC looked particularly at the seriousness of the cases, their opening criteria and actions taken by the national authorities and follow-up.

As in the internal de minimis cases examined, the SC found that no clear criteria were used when deciding to open these cases. The SC therefore considers that the present strategy and prioritisation of external investigations is not clear. There is a need to further develop the criteria for the opening (including the indicative minimum thresholds) of an external case and thus avoid opening the de minimis cases. In the SC’s view a strategy and clear priorities would ensure better

¹¹ EC Treaty Art. 280 (2).

¹² Point 3.2.1.2 External investigations – principle of discretion p. 63



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use of scarce Community resources and would enable better allocation of resources wherever possible to investigate more serious cases. The SC is not convinced that optimal use is made of OLAF's resources if cases of very low financial impact, exceeding the costs of investigation, are regularly undertaken.

The SC observes, from the sample cases, that very often the financial follow-up or recovery of unduly paid monies and/or the disciplinary actions (e.g. putting the company's name in the early warning system) where appropriate, had been successfully undertaken or were well under way by the relevant Community service or an Agency during or before OLAF's investigation. It was not clear for the SC, from the reports, as to the added value brought to the process by the OLAF investigation into these minor irregularities, particularly concerning the financial follow-up, since a recovery order had already been issued by the service in charge of the implementation of the programme and this service was in a position to do that as soon as information about possible fraud or irregularity had become available. The SC also noted the practice where, once an OLAF investigation had been opened by the Board, it was processed until the end and no measures were taken to close a case, even though anticipated follow-up actions may have been closed during the investigation.

Concerning judicial follow-up, the SC observed that it is often cumbersome for OLAF, for reasons beyond OLAF's control, to gather information from non-member states regarding the status of follow-up. For this reason this information is mostly processed by the Commission Delegations in the countries concerned and OLAF's input is, therefore, limited.

Recommendation

1. There is a need to develop/define a de minimis strategy for external investigations and to define the minimum thresholds for such investigations.

2.4 Assistance, monitoring and coordination cases

In the monitoring of the de minimis cases a number of assistance, monitoring and coordination cases were included in the sample. In general the legal basis for these activities is the EC treaty and relevant regulations¹³, which oblige OLAF to assist the Member States in organising cooperation and coordinating their activities for the purpose of protecting Communities' financial interests against fraud.

As in the external and internal de minimis cases, the SC concluded that it would be extremely useful to provide guidance in the Manual on the way OLAF treats incoming information concerning these types of cases, particularly as to the prioritisation and selection of cases (criteria

¹³ Article 280 of the EC Treaty, Article 1(2) of the Regulation 1073/99 and Article 9(1) of Regulation 2988/95.



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on whether or not to open a case). In the case sample, the SC concluded that ownership of the case files (conduct of investigation and follow-up activities) was always assumed by the national authorities and OLAF's role was, therefore, very limited in comparison to the external and internal cases where actual investigation activities such as inspections, checks and verification of information, were carried out by the Office. For this reason it was difficult for the SC to see the potential added value contributed by OLAF in this area and it would seem wise to reflect on the extent to which OLAF's resources should be used in these activities if there is a lack of resources in the areas of external and internal investigations.

Recommendation

1. OLAF Manual to include prioritisation and selection criteria for cases of assistance, monitoring and coordination.