



OLAF Supervisory Committee

**Opinion No 5/2010**

**Respect for fundamental rights and procedural guarantees in investigations  
by the European Anti-Fraud Office**

Brussels, 29 November 2010



## OLAF Supervisory Committee

<b>1. INTRODUCTION.....</b>	<b>3</b>
1.1. OBJECTIVE OF THE OPINION AND METHOD .....	3
<b>2. GENERAL PRINCIPLES TO BE RESPECTED BY OLAF.....</b>	<b>4</b>
2.1. IMPARTIALITY IN THE CONDUCT OF INVESTIGATIONS .....	5
2.2. REASONABLE TIME FOR INVESTIGATIONS .....	5
2.3. CONFIDENTIALITY OF INVESTIGATIONS .....	7
<b>3. PROCEDURAL GUARANTEES.....</b>	<b>9</b>
3.1. INTERNAL INVESTIGATIONS .....	9
3.1.1. <i>Opening stage of an investigation</i> .....	9
3.1.1.1. Right of the person concerned to be informed of their personal involvement in an investigation .....	9
3.1.2. <i>Implementation stage of an investigation</i> .....	10
3.1.2.1. Obligation of authorisation for OLAF staff .....	10
3.1.2.2. The right of the interested party to express their views on all the facts concerning them.....	10
3.1.2.3. Right to express views in the official language of their choice.....	13
3.1.2.4. Right to be assisted by a person of their choosing .....	13
3.1.2.5. Right not to incriminate oneself .....	14
3.1.2.6. Right to the protection of personal data.....	14
3.1.2.7. Right of access to investigation files and/or final report .....	14
3.1.3. <i>Closing stage of an investigation</i> .....	16
3.1.3.1. Obligation to make reference to comments by the person concerned in the conclusions drawn on the completion of an investigation.....	16
3.1.3.2. Right of the person concerned to be informed of the completion of the investigation.....	16
3.2. EXTERNAL INVESTIGATIONS .....	17
3.2.1. <i>Opening stage of an investigation</i> .....	18
3.2.1.1. Notifying the party concerned .....	18
3.2.2. <i>Implementation stage of an investigation</i> .....	19
3.2.2.1. Obligation of authorisation for OLAF staff .....	19
3.2.2.2. Ability of the interested party to express their views on all the facts concerning them.....	19
3.2.2.3. Right to express views in the official language of their choice.....	20
3.2.2.4. Right to be assisted by a person of their choosing and confidentiality of client-lawyer correspondence .....	21
3.2.2.5. Right not to incriminate oneself .....	21
3.2.3. <i>Closing stage of an investigation</i> .....	22
3.2.3.1. Possibility of being informed of the completion of an investigation.....	22



## OLAF Supervisory Committee

### 1. Introduction

1. The European Anti-Fraud Office (hereinafter "OLAF") has significant powers to conduct administrative investigations in order to combat successfully fraud, corruption and any other illegal activity adversely affecting the financial interests of the EU. The exercise of these powers is subject to, in particular, respect for human rights and fundamental freedoms<sup>1</sup>. In making the Charter of Fundamental Rights (hereinafter "the Charter") binding, the Treaty of Lisbon further heightened this obligation. The rules of Community law and, in particular, the Protocol on the privileges and immunities of the European Communities, the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the Communities must also be respected.
2. The Supervisory Committee (hereinafter "the SC") notes the specific characteristics of OLAF: it is an investigatory body; it acts initially on an administrative basis; this may, where necessary, lead to judicial, financial or disciplinary proceedings during which the guarantees of fundamental rights must be upheld in full. Consequently, Community case-law has characterised certain investigative measures by OLAF as preparatory measures which do not adversely affect officials and, therefore, cannot be annulled<sup>2</sup>. However, breaches of essential procedural requirements during preparatory investigations might affect the legality of the final decision taken on the basis of investigations by OLAF<sup>3</sup>. They would moreover incur the legal liability of the Commission.
3. That is why respect for procedural guarantees during the administrative stages of investigations by OLAF is vital. Furthermore, the SC is of the opinion that the effectiveness and efficiency of OLAF's activities depend directly upon its respect for fundamental rights and procedural guarantees. It is also essential for OLAF's reputation. If OLAF's credibility is called into question, it is more likely to be put under pressure and to have its independence impaired.

#### 1.1. Objective of the opinion and method

4. The SC has consistently emphasised the need for rules of procedure which are sufficiently precise and adapted to the different stages of investigations. Compliance with a body of clear rules makes it possible to ensure the quality, efficacy, transparency and independence of investigations, as well as their observance of legality and legal certainty.

---

<sup>1</sup> Article 2(1) of Decision 1999/352/EC, ECSC, Euratom establishing OLAF provides that for the purposes of investigations the Office shall exercise the powers conferred by the Community legislator, subject to the limits and conditions laid down thereby. See also recital 10 of Regulation (EC) No 1073/1999. This requirement was, moreover, reiterated by the Court of Justice in case C-11/00, *Commission v ECB*, 10 July 2003, para. 139.

<sup>2</sup> See, in this respect, the most recent interpretation in the judgment handed down by the General Court on 20 May 2010 in Case T-261/09 P *Commission v Violetti and others*.

<sup>3</sup> Order of the Court of First Instance of 18 December 2003 in Case T-215/02 *Gómez-Reino v Commission*, para. 65. See also para. 31 of the Order of 9 June 2004 in Case T-96/03 *Camós-Grau v Commission*, in which the Court of First Instance noted that, while measures of a purely preparatory character may not themselves be the subject of an application for annulment, any legal defects affecting them may be relied upon in proceedings against the final measure of which they represent a preparatory stage.



## OLAF Supervisory Committee

5. These rules exist in part in the current legislation and in the instructions contained in the OLAF Manual – Operational Procedures (hereinafter "the Manual"). However, the principles applying are scattered among numerous sources (Regulation (EC) No 1073/1999 and Regulation (EC, Euratom) No 2185/96, the Interinstitutional Agreement, the Staff Regulations, etc.) and clarification is necessary. On this point, the SC holds that it is very important that advantage should be taken of the reform of Regulation (EC) No 1073/1999 for a legal clarification of OLAF's powers<sup>4</sup>. The SC hopes that this Opinion will contribute to the debate.
6. Drawing on the experience it has acquired in the regular monitoring of investigations and its role acknowledged by the EU judiciary in the *Franchet and Byk v Commission* ruling<sup>5</sup>, the SC has examined 28 investigations which required transmission of information by OLAF to the national judicial authorities for the period from December 2009 to October 2010<sup>6</sup>, in particular the case reports and the summaries produced by the Judicial and Legal Advice unit, summarising how certain procedural guarantees were respected over the course of the investigations<sup>7</sup>. It has also analysed the legal context and current practice, and the existing legislative proposals regarding reform of Regulation (EC) No 1073/1999<sup>8</sup>.
7. In this opinion, the SC gives recommendations aimed at clarifying respect for the general principles which must underpin OLAF's exercise of its powers, and for procedural guarantees for the different stages of investigations. Several annexes are also appended hereto, containing in particular a suggested analysis grid on respect for fundamental rights and procedural guarantees, which could be used as a guide by investigators<sup>9</sup>.

## 2. General principles to be respected by OLAF

8. OLAF's investigations must be performed in accordance with a series of rules and principles: legality, proportionality, impartiality, objectivity, fairness, reasonable time, observance of the presumption of innocence, confidentiality and professional secrecy, etc. The SC has chosen to examine only those principles which might affect its independence and for which settled case-law concerning OLAF exists.
9. The SC also wishes to point out the option available to OLAF staff of reporting to the President of the SC any factual information and evidence on possible illegal activities or serious professional misconduct within OLAF of which they become aware<sup>10</sup>.

---

<sup>4</sup> See also the SC's Opinion No 3/2010 on reform of Regulation (EC) No 1073/1999.

<sup>5</sup> Judgment of the Court of First Instance of 8 July 2008 in Case T-48/05 *Franchet and Byk v Commission* (No 2), upholding the obligation on OLAF to inform the SC before forwarding any information to national judicial authorities for the sake of protecting fundamental rights.

<sup>6</sup> See Annex 4 (confidential).

<sup>7</sup> See Annex 2 (OLAF internal document).

<sup>8</sup> See Annex 1; for reform of Regulation (EC) No 1073/1999, see the European Commission's Reflection Paper of 6 July 2010 and Annex II thereto, which contains the legislative resolution of the European Parliament of 20 November 2008 and the position of the European Council.

<sup>9</sup> See Annex 3 (SC internal document).

<sup>10</sup> See Article 22a of the Staff Regulations and the note for OLAF staff of 10 November 2008.



## OLAF Supervisory Committee

### 2.1. *Impartiality in the conduct of investigations*

10. Impartiality in the conduct of investigations goes hand in hand with OLAF's operational independence. It requires a total lack of prejudice and of any conflict of interests on the part of staff<sup>11</sup>. The EU judiciary has attributed a broad definition to this second notion, defined as "any situation where an official [...] is called upon to decide on a matter which could appear, in the eyes of an external third party, as a possible source affecting the official's independence on the matter"<sup>12</sup>.
11. The SC regrets that, despite its repeated recommendations<sup>13</sup>, the measures taken by OLAF to establish the strict internal control mechanisms necessary to prevent any conflicts of interest likely to harm OLAF's independence and reputation remain insufficient. The Manual lays down the obligation for investigators to notify the Director-General of any potential conflict of interest, but does not indicate any obligation to remove from the record any conclusions which might affect the objectivity of the case file<sup>14</sup>. The SC has noted the existence of cases in which the investigators were relieved of their responsibilities in the course of an investigation, without reasons being provided. The SC is of the opinion that such reasoning is essential for identifying the grounds on which an investigator may be removed from an investigation.

The current control mechanisms concerning impartiality in investigations must be bolstered:

- (i) reasons must duly be given for any decision to relieve an OLAF staff member of their responsibilities in the course of an investigation;
- (ii) where a conflict of interest is revealed, the Manual must lay down the obligation to remove from the case file all the findings which may be affected by partiality.

The SC appreciates the inclusion of the principle of impartiality among the guarantees listed in the proposals for reform of Regulation (EC) No 1073/1999<sup>15</sup>.

### 2.2. *Reasonable time for investigations*

12. The right of people to have their affairs handled by OLAF within a reasonable time is guaranteed by Article 41 of the Charter.

<sup>11</sup> See Article 11 of the Staff Regulations, as well as the *Camós Grau v Commission* ruling, Case T-309/03.

<sup>12</sup> Judgment of the Court of First Instance of 11 September 2002 in Case T-89/01 *Willeme v Commission*, para. 47.

<sup>13</sup> See the SC's Activity Report, 2005-2007 OJ C 123, 20.5.2008, p. 7); the SC's Activity Report, 2008-2009 (OJ C 314, 22.12.2009, p. 38).

<sup>14</sup> *Camós-Grau v Commission*, paras. 104-141. Although reference is made to this judgment in the Manual, it does not lay down any distinct rules for investigators on the matter. In addition, the form which investigators must complete is not updated as far as its legal basis is concerned (see Note O/F1).

<sup>15</sup> See the Council and European Parliament proposals (Article 7(a)).



## OLAF Supervisory Committee

13. A lengthy investigation out of proportion to the circumstances and complexity of the case may have serious negative consequences on both the rights of the defence of the persons concerned and the follow-up to the investigation. With respect to inspections carried out by the Commission in the field of competition, it was therefore decided that the time which elapses can make it more difficult for exculpatory evidence, in particular statements from witnesses for the defence, to be collected, or even unlikely that they will be collected<sup>16</sup>. Similarly, the administrative, disciplinary or judicial follow-up may be compromised, in particular due to limitation periods for the acts in question<sup>17</sup>, a lack of interest on the part of national judicial authorities in prosecuting acts that took place too long ago in those States which weigh the appropriateness of prosecution, or the administrative procedure exceeding a reasonable time limit<sup>18</sup>.
14. The SC has noted that the increase in the length of investigations is due to a number of factors:
- a) shortcomings in the management of some investigations, such as successive changes of the investigators in charge; the SC does not dispute the fact that OLAF can encounter administrative difficulties, but notes that the persons concerned by the investigations must not suffer the consequences<sup>19</sup>;
  - b) insufficient management supervision of the real reasons for the length of investigations<sup>20</sup>, of the estimates of time-limits for their completion, of the scheduling of investigative measures to be performed<sup>21</sup>, or the effective conduct of investigations (the SC has, for example, noted some unexplained periods of inactivity of up to one year<sup>22</sup>).
15. The SC has also noted that periodic reports (covering periods of three months or 18 months) were written up for certain files to record the progress made in the investigations. They do not, however, always cover the whole period of the investigations,

---

<sup>16</sup> See, for an application of this notion *mutatis mutandis*, the judgment of the Court of Justice of 21 September 2006 in Case C-113/04 P *Technische Unie BV v Commission*, on the length of the administrative proceedings in a competition case which gave rise to fines for the undertakings concerned. The Court of Justice reiterated that the reasonable time requirement also applied to the investigations phase, which is the first phase of the administrative proceedings, and that excessive duration of that phase may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence where they are relied upon in the second phase of the procedure (paras 54-55).

<sup>17</sup> See the limitation periods for proceedings concerning the irregularities referred to in Regulation (EC, Euratom) No 2988/95.

<sup>18</sup> On this point, it should be noted that Community case-law has clearly laid down, with respect to competition rules, that a procedure exceeding a reasonable length of time can constitute a ground for annulment in the case of a decision finding infringement and imposing penalties when the breach of the reasonable time principle prejudiced the rights of the defence of the undertakings concerned (*Technische Unie BV v Commission*, para 47).

<sup>19</sup> See cases Nos 9 and 20, which lasted two years and three years respectively for a relatively limited period of work carried out and, *mutatis mutandis*, *Franchet and Byk v Commission* (No 2) cited above, para. 280.

<sup>20</sup> In particular in the nine-month reports (see SC Opinion No 2/2009, OJ C 314, 22.12.2009, p. 22).

<sup>21</sup> See on this point the SC's Opinion No 4/2010 on investigation planning.

<sup>22</sup> See case No 9; see also case No 17, in which the assessment period lasted ten months, during which only one meeting with a Commission department was held and checks were carried out by the Operational Intelligence Unit: after being opened, the investigation lasted another seven months during which no operational activity took place.



## OLAF Supervisory Committee

and the estimates of the time required to complete them are sometimes insufficiently well grounded<sup>23</sup>.

The SC notes that, despite its repeated recommendations, the measures implemented to achieve regular verification of the length of investigations are not applied in a sufficiently systematic way.

The SC reiterates the need:

- (i) for greater supervision of the compilation of nine-month reports<sup>24</sup> and the systematic establishment of a system of regular reporting beyond this time-limit;
- (ii) for the establishment of a mechanism whereby periods of inactivity of more than three months are signalled (a "three-month list"<sup>25</sup>, backed up by an automatic alert in the Case Management System (CMS)).

The SC notes that regular operational meetings have helped to enhance management of the length of investigations<sup>26</sup> and encourages their use.

The SC appreciates the inclusion of the reasonable time of investigations among the guarantees listed in the proposals for reform of Regulation No 1073/1999<sup>27</sup>.

### 2.3. Confidentiality of investigations

16. The rule regarding the confidentiality of investigations is laid down in Article 8 of Regulation (EC) No 1073/1999. It also follows on from the principle of sound management guaranteed by the Charter (right to have his or her affairs handled with due respect for confidentiality<sup>28</sup>). It is aimed at upholding the secrecy of the investigation and at safeguarding the presumption of innocence (particularly with respect to the reputation of officials and other staff concerned by OLAF investigations<sup>29</sup>) and the confidentiality of personal data<sup>30</sup>.

<sup>23</sup> See cases Nos 5, 6, 7, 24 and 28, for which the "three-month" reports do not cover the whole length of the investigations; cases Nos 7, 24 and 28 were completed on average six months after the estimated date, although no operational activity took place in that period and no explanation was given for the delay; in case No 28, four "three-month" reports were made, according to which the activities carried out during the periods covered by the reports were the examination of the documentation relating to the project under investigation and the drafting of the final case file.

<sup>24</sup> The SC has found on a number of occasions that the legal obligation to write such reports has not been complied with.

<sup>25</sup> See the SC's Opinion No 2/2009 (OJ C 314, 22.12.2009, p. 39).

<sup>26</sup> See case No 13.

<sup>27</sup> See the Council proposal (Article 7(a)).

<sup>28</sup> Court of First Instance *Franchet and Byk v Commission* (No 2) cited above, para. 218.

<sup>29</sup> See the judgment of the Civil Service Tribunal in Case F-23/05 *Giraudy v Commission*, para. 161, in which the EU judiciary gave a particularly broad interpretation of this rule, in the light of recital 10 of Regulation (EC) No 1073/1999; see also the *Franchet and Byk v Commission* (No 2) ruling, cited above, in which the EU judiciary held that the principle of the presumption of innocence "has its corollary in the obligation to maintain confidentiality placed on OLAF pursuant to Article 8(2) of Regulation No 1073/1999", para. 213.

<sup>30</sup> Court of First Instance Case T-259/03 *Nikalaou v Commission*, cited above paras. 189-216.



## OLAF Supervisory Committee

17. The SC notes that the Manual does not provide clear instructions as to the material means of implementing the obligation of confidentiality.
18. More specifically, with respect to the transmission of information, a distinction should be made between two types of situation: the cases in which OLAF will have to forward information to the institutions and/or the national authorities and those instances in which OLAF is called upon to respond to a request for information from a third party.

### Ø Forwarding of information by the Office

19. Two cumulative conditions must be met concerning the communication of information arising from OLAF's investigations: (i) the "need to know" principle with respect to the recipient and (ii) the exact purpose of communicating the information (for example, ensuring a follow-up to the investigation or in order to be able to add an economic operator to the Early Warning System, etc.)<sup>31</sup>.
20. The SC notes that this lack of clarity results in divergent practices in drawing up dissemination sheets indicating the persons who, within the institutions or in Member States, may, in view of their responsibilities, have to be informed of information disclosed or obtained in the context of OLAF's investigations<sup>32</sup>. These sheets are not compiled for all investigations and do not cover all the information transmitted.
21. The SC has also noted errors in the communication of information<sup>33</sup>.

### Ø OLAF's response to a request for information/access to documents from a third party

22. OLAF frequently receives requests for information or access to documents from third parties concerning ongoing or completed cases. The EU judiciary recently ruled that, where a request is based on Regulation (EC) No 1049/2001 and seeks to obtain access to documents including personal data, the provisions of Regulation (EC) No 45/2001 concerning the protection of individuals with respect to the processing of personal data by Community institutions or bodies and the free flow of such data, become applicable in their entirety<sup>34</sup>.
23. Moreover, the SC notes that, in the state aid field, the EU judiciary has acknowledged the existence of a general presumption of confidentiality as to documents relating to the Commission's investigative activities. This presumption may release the Commission from the obligation, when it refuses a demand for access to documents, to provide explanations for each individual document in order to substantiate how access to that

<sup>31</sup> Second paragraph of Article 8(2) of Regulation (EC) No 1073/1999 and second paragraph of Article 8(1) of Regulation (EC, Euratom) No 2185/96.

<sup>32</sup> Dissemination sheets were only drawn up for X investigations.

<sup>33</sup> The SC has noted in this respect that (i) in the case of a number of investigation reports concerning the same person, OLAF mistakenly sent Commission departments and/or national authorities reports which were not those on which they were due to take follow-up action and (ii) a letter containing information on an investigation was sent to a third party without any indication as to the purpose of sending it (see Investigations Nos 9 and 13).

<sup>34</sup> Judgment of 29 June 2010 in Case C-28/08 *Commission v The Bavarian Lager Co. Ltd.*





## OLAF Supervisory Committee

document could specifically and effectively undermine its investigative activities, and allow it to base itself on general presumptions applying to documents of the same nature<sup>35</sup>. The SC wonders whether this argument might also apply to OLAF's investigations.

The SC is of the opinion that OLAF should systematically draw up dissemination sheets every time information is transferred indicating (i) the persons who, within the institutions and in Member States, may have, in view of their responsibilities, to be informed of it and (ii) the purpose of sending it, in order to ensure respect for the rule on confidentiality.

The SC wishes to obtain access to the dissemination sheets so that it can carry out its mission of ensuring respect for confidentiality further to Article 8(4) of Regulation (EC) No 1073/1999.

When third parties request information or access to documents relating to investigations, OLAF must take into consideration the need to comply with the legislation on the protection of personal data.

### 3. Procedural guarantees

24. The acts investigated by OLAF are often of a serious nature and may have serious consequences for the persons concerned, including criminal proceedings. In the interests of the persons concerned, as much as for the sake of the effective follow-up of investigations by the competent authorities, it is therefore necessary to define the procedural guarantees applicable at the various stages of an investigation and enhance respect for them.

25. In view of the different ways in which these procedural guarantees are applied, the SC has distinguished between internal and external investigations.

#### 3.1. *Internal Investigations*

##### 3.1.1. *Opening stage of an investigation*

###### 3.1.1.1. Right of the person concerned to be informed of their personal involvement in an investigation

26. **Time for informing** the person concerned – The person concerned must be informed "rapidly" or "whenever" an investigation reveals the possibility of personal involvement<sup>36</sup>. In the cases examined, the time taken to inform the persons concerned ranged from two to three weeks to two months. This length of time can be regarded as reasonable.

<sup>35</sup> Judgment of 29 June 2010 in Case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH*.

<sup>36</sup> See Article 4 of the Model Decision of the Interinstitutional Agreement and Decisions of each institutions and agencies together with Article 1 of Annex IX to the Staff Regulations.



## OLAF Supervisory Committee

27. **Decision to defer notification** – The right to be informed may be deferred if it may prove harmful to the investigation. By requiring a written reasoned submission<sup>37</sup>, it is possible to verify the existence and relevance of the reasons for recourse to this exception, and thereby avoid any risk of arbitrary treatment.

The letter informing the persons concerned of the opening of an investigation and the acts concerning them should ensure respect for their right to be informed. The SC appreciates the fact that the Manual requires a reasoned written submission for the decision to defer notification of the persons concerned.

### 3.1.2. *Implementation stage of an investigation*

#### 3.1.2.1. Obligation of authorisation for OLAF staff

28. According to Article 6(2) and 6(3) of Regulation (EC) No 1073/1999, OLAF employees must have written authorisation to take part in an investigation and must possess written authority indicating its subject matter before carrying out each measure concerned<sup>38</sup>. For on-the-spot checks under Regulation (EC, Euratom) No 2185/96, the written authorisation must be supplemented by a document indicating both the subject matter and the purpose of the check<sup>39</sup>.

#### 3.1.2.2. The right of the interested party to express their views on all the facts concerning them

29. Conclusions referring by name to a person may not be drawn, on completing an investigation, without that person having been enabled to express their views on all the facts that concern them<sup>40</sup>.

30. **Obligation to inform the person concerned** – In order to exercise effectively their right to express their views, the person concerned must be informed of all the facts concerning them. Consequently, OLAF is under an obligation to present them with those facts, orally or in writing – an obligation that goes hand in hand with the obligation to record the comments of that person<sup>41</sup>.

---

<sup>37</sup> Point 5.1.1.1 of the Manual.

<sup>38</sup> According to the Manual, specific powers of investigation are exercised in the following situations: interviews with the person concerned and witnesses, access to the personnel file of a staff member of a Community institution, inspections of institutions' premises, data searches of computers, on-the-spot checks (point 3.2.2). The SC has noted that, in one of the investigations, the investigator and the employee responsible for inspecting a computer were chosen after performing investigation work for which they had written authority (see case No 23).

<sup>39</sup> See point 5.2 below.

<sup>40</sup> Article 4 of the Model Decision.

<sup>41</sup> Court of First Instance Case T-259/03 *Nikalaou v Commission*, cited above, para. 238.



## OLAF Supervisory Committee

31. The information provided must be exhaustive. If new allegations come to light during the investigation, the person concerned must therefore be informed of them on the day of their interview at the latest. The person concerned could possibly submit written explanations at a later date or request a further interview<sup>42</sup>. No provision is made for such a possibility in the Manual.
32. If new allegations come to light, the investigators must phrase them unequivocally to distinguish them from previous allegations<sup>43</sup>. The Commission has already lost a case in which the EU judiciary held that the person concerned had not been informed of a distinct and specific allegation made against them during an investigation, which OLAF assessed and subsequently referred to in its final report<sup>44</sup>.
33. **Obligation to enable the person concerned to express their views** – OLAF must take all necessary steps to enable the person concerned to express their views before, during and after the interview:
- a) before the interview:
    - a letter must be sent *sufficiently in advance* to enable the person to make the necessary arrangements to be accompanied by a person of their choice and/or to indicate their choice of language;
    - the contents of the letter must be *sufficiently precise*, in particular with respect to the facts at issue;
    - the letter must be written in the *mother tongue* of the person concerned or in a language of which they have an in-depth knowledge;
  - b) during the interview:
    - the allegations must be *clearly phrased*, in particular in the event of multiple allegations;
  - c) after the interview:
    - the person interviewed must have a *real opportunity* to read and comment on the written record of the interview, to annex thereto any documents in their possession and to obtain a copy thereof.
34. The SC is of the opinion that the rules established by OLAF in this respect are insufficient. Neither the Manual nor the model letter of invitation to an interview make any reference to the obligation to send an updated summary of the allegations to the person concerned if new allegations have been added to those of which they were

---

<sup>42</sup> As was the case in Investigations Nos 3 and 20.

<sup>43</sup> For example, during an investigation in which a new allegation was brought to the attention of the person concerned for the first time during an interview, this was done by way of a single, ambiguous question, worded in such a way as to leave scope for interpretation (see case No 9).

<sup>44</sup> Court of First Instance Case T-259/03 *Nikalaou v Commission*, cited above paras. 255-265.



## OLAF Supervisory Committee

informed when the investigation was opened. In addition, the Manual does not indicate in which language the letter of invitation to interview must be drafted.

35. Furthermore, the SC has noted some procedural shortcomings in practice<sup>45</sup>.

36. **Decision to defer the obligation of hearing the person concerned** - The SC notes that OLAF has made limited use of this exception and in duly justified cases, after obtaining the prior agreement of the Secretary-General or the President of the institution concerned<sup>46</sup>.

37. The prior agreement required appears to represent a guarantee of the rights of the defence<sup>47</sup>. Nevertheless, as responsibility for this decision is shared with the President or General Secretary of an institution, body, office or agency and the possibility of OLAF conducting its investigation is conditioned by the requirement to obtain such prior agreement, the SC wishes to draw attention to the risks related to this formality, which may compromise the independence of OLAF's Director General, in particular in the event of refusal or delay. This procedure may lead to significant delays, which could paralyse an investigation and have consequences in terms of the time limitation on the acts concerned. In two recent cases, the SC has noted that the time required for obtaining such agreement varied between five months and a year. These delays prevented the transmission of the case files to the national judicial authorities<sup>48</sup>. Consequently, the SC views such a period of time as excessive.

The SC is generally satisfied with the rules laid down in the Manual<sup>49</sup>, but notes certain problems in practice.

It recommends that OLAF:

- (i) should pay particular attention to ensuring that allegations are phrased clearly;
- (ii) should indicate explicitly in the written record of interview whether the person concerned had the possibility of obtaining a copy of it, and should give reasons for any deferral in sending the record in a decision appended to the file.

The SC holds that a refusal by the President or Secretary-General of an institution to grant agreement to defer hearing a person, or a delay in so doing, may impair the operational independence of OLAF. The SC is in favour of amending Regulation (EC) No 1073/1999 as part of its reform so that the obligation is limited to that of informing the institution concerned<sup>50</sup>.

<sup>45</sup> For example, the letter of invitation to interview being sent after the deadline set for the person concerned to indicate their choice of language (case No 9); incomplete reference in that letter and subsequently to all the allegations which OLAF was to investigate and ambiguous phrasing of questions during the interview, resulting in a skewed answer (case No 9); failure to send the written record of the interview, despite the explicit indication that it would be sent after the investigation had been closed (case No 3);

<sup>46</sup> This exception was used in two of the internal investigations reviewed (see cases Nos 16 and 27).

<sup>47</sup> Court of First Instance *Franchet and Byk v Commission* (No 2) cited above, para. 151.

<sup>48</sup> See cases Nos 16 and 27.

<sup>49</sup> See point 3.3.3 of the Manual and the rules concerning the letter of invitation to interview, the conduct of interviews and the recording of statements.

<sup>50</sup> See the European Parliament proposal (Article 7(a)).



## OLAF Supervisory Committee

As the guardian of OLAF's independence, the SC wishes to be informed systematically of all cases in which institutions have refused to give and/or delayed giving their agreement to defer the obligation to hear the person concerned.

### 3.1.2.3. Right to express views in the official language of their choice

38. Although this right is not expressly provided for by the current legislation, the SC observes that, in practice, the interested parties have the possibility to express themselves in the official language of their choice. Sufficient notice must, however, be granted for them to identify their choice.

39. When they have agreed to express themselves in a language other than their mother tongue, this has been expressly indicated in the written record of the interview, although this is not laid down in the Manual. This sound practice enables OLAF to keep a written trace of their consent and to prove that the waiving of this right was unequivocal.

The SC appreciates the current practice which consists of noting the choice of language of the person concerned in the written record of the interview. The Manual should be amended to take account of this.

The SC recommends that the length of time set aside for sending the letters of invitation to interviews should be respected to enable the interested parties to make use of their right to choose the language in which they wish to express their views.

The SC appreciates that fact that this right is explicitly referred to in the reform of Regulation (EC) No 1073/1999 and notes that the proposals also allow for the possibility of asking officials and other EU staff to express themselves in an official language of which they have sufficiently in-depth knowledge.

### 3.1.2.4. Right to be assisted by a person of their choosing

40. This right is not expressly laid down in the current legislation. Nonetheless, in practice, OLAF generally offers interested parties the option of being assisted by a person of their choosing. The SC consequently supports the proposal by the three institutions to include it among the procedural guarantees to be applied in OLAF's investigations<sup>51</sup>.

41. The SC appreciates the rules implemented by the Manual concerning the means by which the person concerned is informed of the possibility of exercising this right<sup>52</sup>. It is of the view that a waiving of this right must also be expressly mentioned, as, moreover, is most often the case. This sound practice enables the OLAF employees involved in the interview to ensure compliance with the requirements according to which the waiving of a right

<sup>51</sup> See Article 7(a)(2) of the three proposals.

<sup>52</sup> OLAF Manual, points 3.3.2.2.2, 3.3.3.3, 3.3.3.4 and 5.13.



## OLAF Supervisory Committee

must be shown to have been made unequivocally, must have been made in full awareness of that right (on the basis of informed consent<sup>53</sup>) and must have made without compulsion<sup>54</sup>.

The SC recommends that any waiving of the right to be assisted by counsel of one's choice should be formalised unequivocally in the written record of the interview, duly signed by the person concerned. The Manual should be amended to take account of this.

### 3.1.2.5. Right not to incriminate oneself

42. Officials and other servants are under an obligation to cooperate fully with OLAF and to lend any assistance required for the investigation. To that end, they must provide OLAF's staff with all useful information and explanations<sup>55</sup>. According to the Manual, they also benefit, as interested parties, from the right not to incriminate themselves<sup>56</sup>. These two principles must be taken together, even if the right not to incriminate oneself remains the key concern. Thus one can take the view that the person concerned cannot be compelled to admit to having committed an irregularity, whereas their duty of loyalty means that they are not allowed, for example, to refuse to respond to summonses from OLAF.

The SC appreciates the explicit inclusion of this right in the reform of Regulation (EC) No 1073/1999.

### 3.1.2.6. Right to the protection of personal data

43. This right is guaranteed by Article 8 of the Charter and the European Convention on Human Rights, as well as by Article 8 of Regulations (EC) No 1073/1999 and (EC, Euratom) No 2185/96, and by Regulation (EC) No 45/2001. The SC is of the opinion that the importance of this question merits greater consideration going beyond the scope of this Opinion.

### 3.1.2.7. Right of access to investigation files and/or final report

44. According to case-law, the person concerned cannot usefully rely on either the principle of respect for the rights of the defence or Article 41 of the Charter (right of every person to have access to their file) in order to obtain access to the investigation files and/or final report. The EU judiciary has consistently concluded that the effectiveness and confidentiality of the mission entrusted to OLAF and OLAF's independence could be

---

<sup>53</sup> European Court of Human Rights, judgment of 25 February 1992 in *Pfeifer and Plankl v Austria*, Series A, No 227, paras. 37-38.

<sup>54</sup> European Court of Human Rights judgment of 27 February 1980, *Deweert v Belgium*, Series A, No 35, para. 51.

<sup>55</sup> See Article 1 of the Model Decision and Article 4(6) of Regulation (EC) No 1073/1999.

<sup>56</sup> OLAF Manual, points 3.3.3.4, 5.1.1.1 and 5.13.



## OLAF Supervisory Committee

undermined by access to these documents **before** a final decision adversely affecting the person concerned has been adopted<sup>57</sup>. As OLAF's investigation reports and the decisions to transmit information to national judicial authorities have not been viewed as adversely affecting people, OLAF is under no obligation to grant access to its files before such a decision has been taken. EU case-law has restricted this right precisely because it is upheld in full in the later (judicial, disciplinary or financial) stages of the investigation.

45. Nonetheless, the persons concerned submit requests for access to Commission documents, and thus OLAF documents, pursuant to Regulation (EC) No 1049/2001. Although this Regulation concerns public access to institution documents, it does not rule out the access of a person to a file concerning them, especially since that person is not required to justify their request. OLAF can, nonetheless, refuse to grant access to documents on the basis of Article 4 of Regulation (EC) No 1049/2001, especially in the course of an investigation, but also once the investigation has been completed and before any follow-up has been decided. Such refusal must be duly motivated, following concrete and individual examination of each document requested and justification of a genuine rather than hypothetical need for protection<sup>58</sup>.
46. The SC notes in this regard a certain contradiction, inasmuch as Community case-law, which has consistently interpreted Article 4 of the Model Decision as not implying an obligation on OLAF to grant access to its documents<sup>59</sup>, can easily be sidestepped by relying on Regulation (EC) No 1049/2001. The intention of the law-making instances, as is apparent from the Regulation's recitals, was to give the fullest possible effect to the right of public access to documents in order to ensure greater transparency in the work of the EU institutions and not specifically to grant interested parties a right of access to their own files. The Charter, moreover, makes the same distinction, since it refers, in Articles 41(2) and 42 respectively, to the access of a person to his or her file, on the one hand, and the access of any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, to documents of the Union's institutions, bodies, offices or agencies on the other. The contradiction between these different principles requires greater thought, and solutions need to be found.
47. In practice, the SC has noted that most requests for access to documents have been rejected by OLAF pursuant to the exceptions laid down in Article 4(1)(b), (2) and (3) of the Regulation. This is a position which the SC supports. OLAF must, nevertheless, provide appropriate and sufficient reasons for its decisions to refuse access, so as to prevent them from being annulled by the EU courts<sup>60</sup>.

---

<sup>57</sup> Court of First Instance *Franchet and Byk v Commission* (No 2) cited above, paras. 255-262; Court of First Instance *Nikalaou v Commission* cited above, paras. 240-246; order of the Court of First Instance in Case T-215/02 *Gómez-Reino v Commission*, para. 65.

<sup>58</sup> See, for the specific possibility of a request for access to documents after the completion of an investigation by OLAF and the conditions governing the treatment of such requests, the judgment of the Court of First Instance of 6 July 2006 in Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* (No 1).

<sup>59</sup> See the case-law cited above in footnote 60.

<sup>60</sup> Decisions for which insufficient reasons are provided may also be viewed as examples of poor administration by the European Ombudsman: see, with reference to external investigations, the decision of the European Ombudsman in Joined Complaints 723/2005/OV and 790/2005/OV.



## OLAF Supervisory Committee

48. A request for access to personal data under Regulation (EC) No 45/2001 may also constitute an indirect means of obtaining access to papers held by OLAF. As stated above, the SC has yet to agree to a position on this issue.

The SC is of the view that access to OLAF's confidential documents must only be granted in duly substantiated circumstances after a concrete and individual assessment of each document. In any event, such access must not impede OLAF in any way in the independent exercise of the mission conferred upon it.

Greater thought should be given to striking a balance between the need to protect the confidentiality of OLAF's investigative activities and the ability of the persons concerned to request access to the investigation documents.

### *3.1.3. Closing stage of an investigation*

#### 3.1.3.1. Obligation to make reference to comments by the person concerned in the conclusions drawn on the completion of an investigation

49. The SC regrets that this obligation imposed by the Staff Regulations<sup>61</sup> is not provided for in the Manual and is not fully respected in practice<sup>62</sup>.

#### 3.1.3.2. Right of the person concerned to be informed of the completion of the investigation

50. The right of the person concerned to be informed is only formally provided for in the event of an investigation being closed with no further action taken<sup>63</sup>. Nonetheless, in the cases reviewed in which there was follow-up, the SC is pleased to note that the persons concerned were systematically informed of the completion of the investigation and OLAF's recommendations for transmission. Such transmissions can be regarded as the processing of personal data within the meaning of Regulation (EC) No 45/2001 which can justify informing the person concerned. The SC, however, wishes for a clarification of the matter by the law-making instances when Regulation (EC) No 1073/1999 is reformed and is of the view that the possibility of an exemption should be retained for those cases in which confidentiality must be maintained.

51. The SC appreciates the inclusion in the reform of Regulation (EC) No 1073/1999 of the obligation on OLAF to submit its conclusions and recommendations to the person concerned before the final case file is sent to the competent authorities, subject to the need to keep them secret to avoid compromising follow-up action. However, the SC has

<sup>61</sup> Article 1(1) of Annex IX to the Staff Regulations.

<sup>62</sup> See case No 26.

<sup>63</sup> See Article 5 of the Model Decision and Article 1(3) of Annex IX to the Staff Regulations.





## OLAF Supervisory Committee

reservations about the necessity of obtaining the agreement of the institutions, bodies, offices and agencies in order to defer notification of the interested party<sup>64</sup>.

The obligation to make reference to the comments by the person concerned in the conclusions drawn from an investigation should be laid down in the Manual and respected in practice.

The SC holds that the legislative provisions on OLAF's investigations should provide for the notification of the persons concerned on the completion of investigations, except in duly justified situations. When OLAF takes a decision to defer such notification, it should only need to inform the competent institutions, bodies, offices or agencies.

### 3.2. *External Investigations*

52. Persons concerned by external investigations benefit from certain rights in the same way as persons concerned by internal investigations (right of access to documents, right to respect for personal data, etc.). Since the rules for exercising those rights are the same irrespective of the type of investigation, the SC refers back to the considerations indicated above on this point.
53. More generally, the SC notes that the existing Community legislative provisions concerning procedural guarantees in the context of OLAF's external investigations are insufficient. External investigations are directly dependent on the state of national legislation<sup>65</sup>. Referral to national legislation can, however, at times compromise the principle of equivalent and effective protection against fraud, laid down in Article 325 of the Treaty on the functioning of the European Union. Reform of Regulation (EC) No 1073/1999 must be used as the opportunity for necessary clarification<sup>66</sup>.
54. The SC observes that the lack of clear rules in Regulations (EC, Euratom) Nos 2988/95 and 2185/96 and (EC) No 1073/1999 leads to a wide variety of practices within OLAF. The guidelines laid down by the Manual do not appear to suffice to harmonise the differing approaches within the operational units. The diversity of national rules applicable might, moreover, justify the production of a comprehensive handbook for investigators.
55. The SC also notes the existence of shortcomings in the legislation concerning the conduct of external investigations in the area of direct expenditure. As far as projects financed exclusively by the European Union, and not jointly managed with Member States, are concerned, it is often difficult for OLAF to identify the national administrative authorities

<sup>64</sup> See the Council proposal (Article 8(a)); see also point 3.1.2.2 of this Opinion.

<sup>65</sup> The diversity of national legislation was recently highlighted in the 2009 Annual Report from the Commission to the Council and the European Parliament on Protection of the European Union's Financial Interests – Fight against Fraud (COM(2010) 382 final 2).

<sup>66</sup> See, in particular, the proposals contained in the SC's Opinion No 3/2010.



## OLAF Supervisory Committee

to which it can turn when on-the-spot checks are carried out. In addition, the scope of OLAF's investigative powers, to which Article 7 of Regulation (EC, Euratom) No 2185/96 refers, is not clearly defined. Cases in which these shortcomings have led to delays in, or serious difficulties with, investigations have been brought to the attention of the SC. The SC therefore holds that a clarification in this particular area is needed when Regulation (EC) No 1073/1999 is reformed.

56. The entry into force of the Charter has heightened awareness of the significance of fundamental rights and procedural guarantees irrespective of the type of investigation. However, account must be taken of the specific features of OLAF as an administrative investigation service. Simply bringing the procedural obligations for external investigations into line with those for internal investigations would disregard the difference in nature between them and might seriously compromise the effectiveness of investigations without strengthening the rights of the persons concerned in any useful or meaningful way.

### *3.2.1. Opening stage of an investigation*

#### 3.2.1.1. Notifying the party concerned

57. The current legislation does not establish any obligation on OLAF to inform the person concerned of their involvement in an external investigation. This lack of notification is justified by the requirements of the investigation. Indeed, the on-the-spot checks and inspections, in particular, are often carried out without prior notice. Notifying the Member State concerned in advance of the performance of an on-the-spot check (but not of an investigation being opened) is a practical requirement, in accordance with the principle of sincere cooperation<sup>67</sup>. It must be given "in good time" before the on-the-spot check. In contrast, the Manual provides for the notification of the person concerned when this would not be harmful for the investigation<sup>68</sup>. This approach has also been adopted in the reform of Regulation (EC) No 1073/1999.

58. The SC has noted that in most external investigations the natural and/or legal persons concerned were informed either by a notification of the opening of an investigation or of a forthcoming on-the-spot check or during an on-the-spot check. When the decision was taken not to inform the interested party, reasons were generally given for this. These reasons do not, however, appear in the documents drawn up when transmitting information to the national judicial authorities.

The SC is of the opinion that prior notification of the interested party concerning the opening of an investigation is liable occasionally to prejudice its effectiveness (especially of on-the-spot checks) and to add to the procedural burden on OLAF. The reform of Regulation (EC) No 1073/1999 should take account of this risk. Before establishing an obligation to notify the person concerned, greater research into the possible consequences for the effectiveness of investigations is required.

<sup>67</sup> See Article 4 of the Treaty of Lisbon.

<sup>68</sup> Point 5.1.1.2.



## OLAF Supervisory Committee

### 3.2.2. *Implementation stage of an investigation*

#### 3.2.2.1. Obligation of authorisation for OLAF staff

59. In the context of the on-the-spot checks provided for by Regulation (EC, Euratom) No 2185/96, the investigators must produce a written authorisation indicating their identity and position, and a document indicating the subject matter and purpose of the investigation<sup>69</sup>. The second requirement ensures that the rights of the defence are safeguarded<sup>70</sup>.
60. In practice, the SC notes that these rules are not applied uniformly. The written authorisation is made by way of an "appointment decision" for the persons authorised to carry out the investigation, signed by the head of unit. The written authorisation always states the subject-matter and the purpose of the investigation, but, in certain cases, the names of the investigators are not indicated, while, in others, the authorisation is accompanied by an acknowledgement of receipt for the economic operator subject to the on-the-spot check to sign. In addition, the written record of the interview or on-the-spot check does not systematically indicate whether the OLAF investigators produced their authorisation even though this would prevent any subsequent challenges.

The SC recommends that the practices in conferring authorisations on OLAF investigators should be harmonised and clear rules applied.

The written records of on-the-spot checks and/or interviews should indicate expressly whether the investigators produced their authorisations in order to avoid any subsequent challenge.

#### 3.2.2.2. Ability of the interested party to express their views on all the facts concerning them

61. The current Community legislation does not explicitly attribute any right to interested parties to express their views on all of the facts concerning them, unlike the stipulations for internal investigations. The Manual does, however, provide for the possibility of giving the interested party the opportunity to express their views before final conclusions are drawn<sup>71</sup>.
62. Article 7 of Regulation (EC, Euratom) No 2185/96 lists OLAF's powers during on-the-spot checks. The list is not exhaustive and does not make explicit reference to OLAF's

<sup>69</sup> Article 6(1), second paragraph of Regulation (EC, Euratom) No 2185/1996.

<sup>70</sup> The reason for this twofold requirement has been explained as follows by the Community judiciary: "the Commission is required to specify the subject-matter and the purpose of the investigation. That obligation is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence" (Judgment of the Court of Justice of 21 September 1989 in Joined Cases C-46/87 and C-227/88, *Hoechst AG v Commission*, para. 29).

<sup>71</sup> Manual, point 5.1.2.2.



## OLAF Supervisory Committee

powers to conduct formal interviews or to ask for oral explanations during on-the-spot checks<sup>72</sup>. Nonetheless, these powers of access "to all the information and documentation on the operations concerned" through on-the-spot checks can be exercised by the application of national legislation. In its review of investigations, the SC has noted that formal interviews have sometimes been conducted, whereas, in other cases, the persons concerned have had the possibility to express their views during the on-the-spot checks, but not in the form of formal interviews. In addition, reasons were only provided for the fact that no interviews were carried out when transmitting the information to the national judicial authorities.

63. The SC notes that the reform of Regulation (EC) No 1073/1999 proposes the imposition on OLAF of an obligation to hear the views of the persons concerned, subject to exceptions which would justify its waiver. The SC is of the view that the explicit addition to the reform of Regulation (EC) No 1073/1999 of powers of investigation, such as the possibility to conduct interviews or to ask for oral explanations, is necessary to ensure legal certainty and the consistent and uniform application of the procedural rules.
64. However, the SC takes the view that such a clarification of the powers of investigation must not necessarily lead to the imposition on OLAF of an obligation to hear the views of the persons concerned so as not to make investigations more cumbersome and prolong the already lengthy procedure through overregulation. OLAF's administrative investigation is only the preliminary part of a much broader process. Respect for the rights of the defence must be appreciated in relation to the investigation as a whole, that is taking into account the administrative, disciplinary or judicial follow-up of investigations based on full respect for the adversarial principle. Furthermore, for Community case-law as it now stands, OLAF's external investigations do not give rise to acts having adverse effects, so any failure to ensure the full and complete application of the adversarial principle and the rights of the defence at this stage does not, in theory, cause prejudice to the persons concerned<sup>73</sup>

### 3.2.2.3. Right to express views in the official language of their choice

65. Regulation (EC, Euratom) No 2185/96 lays down that investigation reports must be drawn up in keeping with national rules of procedure. Consequently, the oral explanations given by the persons concerned during on-the-spot checks must be transcribed in the language of the Member State on the territory of which the check took place. The SC has noted that OLAF has complied with this obligation. In addition, when formal interviews are conducted, the persons concerned have the possibility of expressing their views in the language of their choice.

---

<sup>72</sup> According to the Manual, OLAF derives its power to conduct interviews from Article 7 of Regulation (EC, Euratom) No 2185/96 combined with Article 2 of Regulation (EC) No 1073/1999 (see points 3.3.2.2.2 and 3.3.3.2).

<sup>73</sup> See *mutatis mutandis* the General Court's Judgment in *Nikolaou v Commission*, para. 246; see also the Order of the Court of First Instance of 13 July 2004 in Case T-29/03, *Comunidad Autónoma de Andalucía v Commission*.



## OLAF Supervisory Committee

### 3.2.2.4. Right to be assisted by a person of their choosing and confidentiality of client-lawyer correspondence

66. The right to be accompanied by a person of one's own choice is not expressly established in the current legislation. The SC consequently supports the proposal by the three institutions to include it among the procedural guarantees to be respected in OLAF's investigations<sup>74</sup>. This right might also be extended to economic operators when on-the-spot checks are conducted, particularly if it is acknowledged by national legislation.
67. On this point, the SC refers to Community case-law on the Commission's powers of investigation in competition matters. What investigations in this field have in common with OLAF's investigations is the fact that they are intended to gather evidence in order to check the actual existence and scope of a given factual and legal situation. The EU judiciary has consistently ruled that, although the rights of the defence apply only to administrative procedures which may lead to the imposition of penalties, it is, nonetheless, necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures, including, in particular, checks, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings [...], other rights, for example, the right to legal representation or the confidentiality of client-lawyer correspondence, must be respected even during the preliminary inquiry<sup>75</sup>.

The SC appreciates the fact that the right to be accompanied by a person of one's choice has been included among the procedural guarantees proposed in the reform of Regulation (EC) No 1073/1999 and is of the opinion that it should apply both to interviews and to on-the-spot checks.

### 3.2.2.5. Right not to incriminate oneself

68. As with internal investigations, there is no specific case-law on this right and its application to OLAF's external investigations. It is, nonetheless, one of the procedural guarantees referred to by the Manual and proposed by the reform of Regulation No 1073/1999.
69. The SC must refer once again to the case-law concerning competition and notes that, in this field, the EU judiciary has held that the right of economic operators not to incriminate themselves must be observed as of the preliminary stage of investigation which comes before the adversarial stage before the Commission. Thus an economic operator can be obliged to provide all necessary information concerning such facts as may be known to it

<sup>74</sup> See Article 7(a)(2) of the three proposals.

<sup>75</sup> Judgment of the Court of Justice of 17 October 1989 in Case 85/87 *Dow Benelux NV v Commission*, paras. 226-27.



## OLAF Supervisory Committee

and to disclose such documents as are in its possession and which may subsequently be used against it or against another economic operator<sup>76</sup>. However, it cannot be obliged to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove<sup>77</sup>.

70. Nevertheless, the SC wonders to what extent these principles might be transposed to OLAF's investigations. Unlike the Commission in the sphere of competition, OLAF itself has no powers to impose penalties, although it may, in the event of opposition by economic operators to on-the-spot checks or inspections, benefit from the assistance of the Member State concerned, in accordance with national provisions.

### 3.2.3. *Closing stage of an investigation*

#### 3.2.3.1. Possibility of being informed of the completion of an investigation

71. OLAF is under no obligation to inform the persons concerned of the completion of an investigation and/or of its conclusions and recommendations. Such an obligation is provided for in the Manual, except in cases where it is liable to harm the follow-up to the investigation. In practice, such notification rarely occurred in the investigations reviewed. In the context of investigations concerning direct expenditure made by the Commission directly to the beneficiaries, OLAF has not been consistent in its practice.

72. The SC is aware of the fact that OLAF informs the Member State of the completion of an investigation by sending a final case report in the context of investigations concerning Community expenditure handled by Member States. Insofar as the investigation may be the subject of follow-up at the national level, the SC is of the opinion that it would be advisable to consult the competent national authorities before deciding whether or not to inform the person concerned of completion<sup>78</sup>.

The SC is of the opinion that the obligation for OLAF to inform the persons concerned of its conclusions and recommendations before the final case report has been sent to the competent Community and national authorities, as put forward by the reform of Regulation (EC) No 1073/1999, should be adapted to the rules of procedure of the Member State responsible for the follow-up.

<sup>76</sup> See the judgment of the European Court of Justice of 18 October 1989 in Case 374/87 *Orkem v Commission*, paras. 33-35; for a more recent interpretation see the judgment of the Court of Justice of 7 January 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission*, paras. 61-65, or the judgment of the General Court of 28 April 2010 in the Case T-446/05 *Amann & Söhne and Cousin Filterie v Commission*, paras. 325-329.

<sup>77</sup> *Orkem v Commission*, cited above paras. 34-35.

<sup>78</sup> See in this respect the Council's proposal for Article 8(a) of the draft reform of Regulation (EC) No 1073/1999.



## OLAF Supervisory Committee

### Annex 1

#### **Legislation:**

1. 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. Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF), *OJ L 136*, 31.5.1999, p. 15–19;
3. Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, *OJ L 292*, 15.11.1996, p. 2–5;
4. Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *OJ L 312*, 23.12.1995, p. 1–4;
5. Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (1999/352/EC, ECSC, Euratom), *OJ L 136*, 31.5.1999, p. 20-22;
6. Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ 45*, 14.6.1962, p. 1385, modified;
7. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L 145*, 31.5.2001, p. 43–48;
8. 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.

#### **Reform of Regulation No 1073/1999:**

1. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti Fraud Office (OLAF) {SEC(2006) 638 } /\* COM/2006/0244 final – COD 2006/0084;



## OLAF Supervisory Committee

2. European Parliament legislative resolution of 20 November 2008 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (COM(2006)0244 — C6-0228/2006 — 2006/0084(COD)), *OJ C* 16E, 22.1.2010, p. 201-223.

### Case-law:

#### *European Union's Courts:*

1. 21 September 1989, *Hoechst AG v Commission*, joined cases 46/87 et 227/88;
2. 17 October 1989, *Dow Benelux NV v Commission*, case 85/87;
3. 18 October 1989, *Orkem v Commission*, case 374/87;
4. 11 September 2002, *Willeme v Commission*, case T-89/01;
5. 10 July 2003, *Commission v BCE*, case C-11/00;
6. 18 December 2003, *Gómez-Reino v Commission*, case T-215/02;
7. 7 January 2004, *Aalborg Portland A/S and others v Commission*, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P;
8. 9 June 2004, *Camós Grau v Commission*, case T-96/03;
9. 13 July 2004, *Comunidad Autónoma de Andalucía v Commission*, case T-29/03;
10. 6 April 2006, *Camos Grau v Commission*, case T-309/03;
11. 6 July 2006, *Franchet and Byk v Commission* (No 1), joined cases T-391/03 et T-70/04;
12. 21 September 2006, *Technische Unie BV v Commission*, case C-113/04 P;
13. 2 May 2007, *Giraudy v Commission*, case F-23/05;
14. 12 September 2007, *Nikolaou v Commission*, case T-259/03;
15. 8 July 2008, *Franchet et Byk v Commission* (No 2), case T-48/05;
16. 28 April 2010, *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission*, case T-446/05;
17. 20 May 2010, *Commission v Violetti and others*, case T-261/09 P;
18. 29 June 2010, *Commission v The Bavarian Lager Co. Ltd.*, case C-28/08 P;
19. 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, case C-139/07 P.

#### *European Court of human rights:*

1. 27 February 1980, *Deweer v Belgium*, Series A No 35;
2. 25 February 1992, *Pfeifer and Plankl v Austria*, Series A No 227.





OLAF Supervisory Committee

**Annex 2**



**EUROPEAN COMMISSION**  
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Operational & Policy Support  
**Judicial & Legal Advice**

Brussels,

*OLAF OPERATIONS*

Annex to the note to the Supervisory Committee  
Summary for the OLAF Supervisory Committee, prior to the  
forwarding of information to judicial authorities by OLAF

**I. Investigation identification**

1. CMS N°	
2. CMS title	
3. Legal basis	
4. Type of case	
5. Head of unit in charge	
6. Investigator in charge	
7. Investigator associated	
8. Head of judicial and legal advice unit	
9. Judicial adviser	

**II. External investigation (To be repeated for each person concerned)**

1. Person concerned (natural or legal)	
2. Institution (Directorate General or Service within the Institution)/Community Body/Agency affected	
3. Sector	
4. Has the person concerned been informed of the opening of an investigation and if so on which date(s)?	
5. Has the person concerned been given the opportunity to express his/her views to OLAF on all the facts which concern him/her and if so on which date(s)?	



## OLAF Supervisory Committee

### III. Outcome (all investigations)

1. Factual conclusions	
2. Legal evaluation	
3. Competence of the identified judicial authorities to deal with the matter	
4. Relevant section of the report with regard to the absence of time-barring	
5. Recommendations	

Joaquín González-Herrero

#### **Statement concerning the transfer of personal data**

The transfer of personal data to you falls within Article 7 of Regulation (EC) 45/2001 on the protection of personal data by the Community institutions. Accordingly, as the controller of the personal data hereby transmitted, you are responsible for ensuring that they are used only for the purpose for which they are transmitted. Processing in a way incompatible with that purpose, such as transferring it to another recipient where this is not necessary or legally required on important public interest grounds, is contrary to the conditions upon which this data has been transferred to you. Moreover, according to article 4(2) of Regulation 45/2001, you are required as the Controller of the personal data concerned to ensure that all obligations of the Controller are complied with.



**Table on the respect of fundamental rights and procedural guarantees in the investigations of OLAF**  
**Assessment on the probative value of the evidence on which the conclusions of the investigation are based- respect of the rules of the Member State (MS) concerned**

<b>GENERAL PRINCIPLES</b>	
<b>Impartiality</b>	
(1) Was there a risk of conflict of interest on the part of the investigators?	
(2) If “yes”, was the Director General of OLAF informed?	
(3) If “yes” what measures did he take?	
(Art. 11 Staff Regulations)	
<b>Reasonable time for investigations</b>	
(1) Was the investigation conducted continuously over a period proportionate to the circumstances and complexity of the case?	
(2) If “no”, for which reasons?	
(Art. 6(5) Reg. 1073/1999)	
<b>Confidentiality</b>	
(1) Was the principle of confidentiality of investigations respected?	
(2) Was the information forwarded or obtained in the course of the investigation communicated <b>only</b> :	
(i) to persons within the institutions of the EU or in the Member States whose functions require them to know (the “need to know” principle)	
<u>and</u>	
(ii) for the purpose of prevention of fraud, corruption or any other illegal activity?	
(3) If “no”, to whom was it forwarded and for what purposes?	
(Art. 8 Reg. 1073/1999 and Reg. 2185/96)	



OLAF Supervisory Committee

<b>Presumption of innocence</b>	
Has the presumption of innocence been respected in the course of the investigation?	
<b>OPENING STAGE OF THE INVESTIGATION</b>	
<b>Information to the person concerned</b>	
<u>Internal investigations</u> (1) Has the person concerned been informed of the opening of the investigation?  (2) If yes, when?  (3) Has OLAF taken the decision to defer notification in a reasoned written submission?  (Art. 4 Model Decision Inter-institutional Agreement, Art. 1 Annex IX Staff Regulations).  <u>External investigations</u> (1) Has the natural and/or legal person concerned been informed of the opening of the investigation?  (2) If “yes” when and for which reasons?	
<b>IMPLEMENTATION STAGE OF THE INVESTIGATION</b>	
<b>Obligation of authorisation for OLAF staff</b>	
(1) Have OLAF employees been duly authorised to carry out their tasks and equipped with a written authority indicating the subject matter of the investigation prior to each and every intervention?  (2) When carrying out on-the-spot checks, did OLAF employees exercise their powers on production of a written authorization showing their identity and position, together with a document indicating the subject matter and purpose of the on-the-spot check or inspection?  (Article 6 Reg. 1073/99 and Art. 6 Reg. 2185/96).	
<b>Right/ability for the interested party to express their views on all facts concerning them</b>	



OLAF Supervisory Committee

<p><u>Internal investigations: Right to express their views</u></p> <p>(1) Has a letter of invitation to an interview been sufficiently precise with respect to the facts at issue?</p> <p>(2) Has each and every allegation been clearly phrased during the interview so as to allow the person concerned to express their views on all the facts concerning them?</p> <p>(3) Has the person interviewed had the opportunity to read and comment on the written record of the interview?</p> <p>(4) Has the obligation of hearing the person concerned been deferred?</p> <p>(5) If “yes”, has the prior agreement of the Secretary-General or the President of the institution concerned been obtained? When? In case of refusal or delay of this agreement, which were the reasons?</p> <p>(Art. 4 Model Decision, Art.1 Annex IX Staff Regulations)</p> <p><u>External investigations: Ability to express their views</u></p> <p>(1) Was the person concerned provided with the possibility to express their views: during an interview and/or explanation during the on-the-spot check and/or in writing?</p> <p>(2) If “yes, state reasons for this choice.</p> <p>(Art.7 Reg. 2185/96)</p>	
<p><b>Right of the interested party to express their views in the official language of their choice</b></p>	
<p><u>Internal investigations</u></p> <p>(1) Has the letter been sent sufficiently in advance to enable the person to indicate the language of their choice?</p> <p>(2) Has the letter for an interview been written in the mother tongue of the person</p>	



OLAF Supervisory Committee

<p>concerned or in an official community language of which they have a thorough knowledge?</p> <p>(3) Has the interview been conducted in the official language chosen by the person concerned? If “no”, was the person concerned assisted by an interpreter?</p> <p><u>External investigations</u></p> <p>When an interview was carried out, did the person concerned have the possibility to express views in the official language of their choice?</p>	
<p><b>Right to be assisted by a person of their choosing</b></p>	
<p>(1) Has the letter of invitation to an interview been sent sufficiently in advance to enable the person concerned to be assisted by a person of their choice?</p> <p>(2) During the on-the-spot checks, did the person concerned express their wish to be assisted by a person of their choice?</p> <p>(3) Has the confidentiality of client-lawyer correspondence been respected during the on-the-spot checks?</p>	
<p><b>Interview record</b></p>	
<p>(1) Has the person interviewed had the opportunity:</p> <p>(i) to be assisted by a person of their choosing?</p> <p>(ii) to read, comment and sign the written record of the interview?</p> <p>(iii) to have a copy of it?</p> <p>(iv) to annex any document in their possession?</p> <p>(2) If “no”, for which reasons?</p>	
<p><b>Right not to incriminate oneself</b></p>	
<p>Has the right not to incriminate oneself been respected during the investigation?</p>	
<p><b>Data protection</b></p>	
<p>Has the right to protection of personal data</p>	



OLAF Supervisory Committee

been respected during the investigation? (Reg. 45/2001)	
<b>Right of access to the investigation file and/or final case report</b>	
(1) Has the person concerned requested access to investigation files and/or to the final report?  (2) If “yes”, on what grounds was their request accepted or rejected? (Reg. 1049/2001)	
<b>CLOSING STAGE OF THE INVESTIGATION</b>	
<b>Obligation to mention the comments of the person concerned</b>	
<i>Internal investigations</i>  Do the conclusions of the case report make reference to the comments of the person concerned?  (Art. 1 Annex IX of Staff Regulations)	
<b>Right/ability to be informed of the completion of the investigation</b>	
(1) Was the person concerned informed of the completion of the investigation?  (2) If “yes”, when? If “no”, for which reasons?	
<b>ASSESSMENT ON THE PROBATIVE VALUE OF THE EVIDENCE ON WHICH THE CONCLUSIONS OF THE INVESTIGATION ARE BASED</b>	
<b>Probative value in the MS concerned of the evidence collected</b>	
(1) Was the assessment of probative value according to national procedural law carried out during the investigation?  (2) Were the procedural requirements as laid out in national law of the MS concerned taken into account in the drawing up of the OLAF investigation report?  (Recital (10) and Art. 9 Reg. 1073/99)	



## OLAF Supervisory Committee





OLAF Supervisory Committee

**Annex 4**

**Table of investigations**

	CMS N°	CMS Title	Unit	Type of investigation	Stage of investigation
1.	OF/2007/0272	<i>OLD AND SAD Internal</i>	A1	Internal	Active investigation
2.	OF/2009/0339	<i>ECD South Africa Landlord</i>	A1	Internal	Follow-up
3.	OF/2008/0674	<i>Malfaçons candides</i>	A1	Internal	Follow-up
4.	OF/2007/0817	<i>ERDF-IT Preforme In Pet</i>	B4	External	Follow-up
5.	OF/2006/0548	<i>ESF-PT-Villa Real</i>	B4	External	Follow-up
6.	OF/2006/0549	<i>ESF-PT-Baiao</i>	B4	External	Follow-up
7.	OF/2007/0127	<i>ES-Audio visuel sur le réseau de téléphonie</i>	A3	External	Follow-up
8.	OF/2007/0016	<i>Irregularities in agricultural payments in Greece</i>	B1	External	Follow-up
9.	OF/2007/0783	<i>ENISA OH Consulting</i>	A2	Internal	Follow-up
10.	OF/2010/0083	<i>Factories</i>	A3	External	Active investigation
11.	OF/2006/0716	<i>LT- Sewage Collection System</i>	B4	External	Follow-up
12.	OF/2005/0823	<i>IT-JOP/Environment</i>	A3	External	Active investigation
13.	OF/2008/0183	<i>TUG/LT/Radioactive waste study</i>	TUG	External	Follow-up
14.	OF/2006/0043	<i>Mines Advisory Group MAG</i>	A4	External	Follow-up
15.	OF/2009/0201	<i>UK/INFSO Projects Hydra – Mytreasury – EU-Domain</i>	A3	External	Active investigation
16.	OF/2007/0256 OF/2007/0682	<i>Falcon</i>	A1	Internal and external	Active investigation
17.	OF/2007/0868	<i>OIB/Travaux de rénovation</i>	A3	External	Follow-up
18.	OF/2007/0267	<i>I/LF/UK/Computer science projects</i>	A3	External	Active investigation
19.	OF/2005/0377	<i>Greece-ERDF-Cretan Dam</i>	B4	External	Follow-up
20.	OF/2007/0278	<i>Over night</i>	A1	Internal	Follow-up
21.	OF/2008/0184	<i>TUG/SLO/Technical assistance</i>	A3	External	Follow-up
22.	OF/2006/0480	<i>RO/ISPA/Waste Management</i>	A3	External	Follow-up
23.	OF/2009/0386	<i>FRONTEX</i>	A2	Internal	Follow-up
24.	OF/2006/0551	<i>ESF-PT-Porto</i>	B4	External	Follow-up
25.	OF/2009/0135	<i>ESF/BG/Blagoevgrad and Ecofriends</i>	B4	External	Follow-up
26.	OF/2007/0885	<i>IAS-CEPOL</i>	A2	Internal	Follow-up
27.	OF/2007/0886	<i>ATAME</i>	A1	Internal	Active investigation
28.	OF/2006/0550	<i>ESF-PT-Armamar</i>	B4	External	Follow-up