

SUPERVISORY COMMITTEE



Opinion N° 2/2012

Analysis of the case OF/2012/0617

Brussels, 11 December 2012



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INTRODUCTION

1. The aim of the analysis of the case OF/2012/0617

1. The Supervisory Committee (SC) seeks to guarantee the proper conduct of OLAF's investigations and it assesses the quality of OLAF's cases requiring information to be sent to the national judicial authorities. In particular and following the case law of the General Court¹ the SC is to monitor the respect for fundamental rights and procedural guarantees in OLAF's cases prior to transmission to those authorities.
2. The aim of the current analysis is to monitor the conduct of OLAF's investigation OF/2012/0617 that was transmitted to the Attorney General of Malta on 19.10.2012 without the prior checking by the SC. On 22.10.2012 the SC appointed Mme Catherine Pignon as a "*rapporteur*" to deal with the analysis of the case.
3. The SC's task is therefore to monitor the conduct of the case in question and, in conformity with its remit, it has focused its attention on three main areas that were scrutinised throughout the life cycle of the investigation:
 - (i) The independent conduct of OLAF's investigation;
 - (ii) The legality check of the investigation activities;
 - (iii) The respect for fundamental rights and procedural guarantees.
4. In this analysis reference is regularly made to the legal basis on which OLAF must conduct investigations, in particular Regulation (EC) No 1073/1999, the Staff Regulations and related legislation, the Charter of Fundamental Rights of the EU as well as the jurisprudence of the Court of Justice of the EU relating to OLAF matters. Consideration has also been given to the compliance with the Instructions to Staff on Investigative Procedures (ISIP) as circulated by the Director-General of OLAF on 1 February 2012. Several annexes are also appended containing, *inter alia*, jurisprudence of the European Court of Human Rights (ECtHR) that are relevant to the case.

¹ See Case T-48/05 *Franchet and Byk v Commission* interpreting Article 11 (7) of Regulation (EC) No 1073/1999.



1.1. The case file

5. The case file made available to the SC consisted of five volumes: persons concerned (I), witnesses (II), communication screening (III), phone toll requests (IV) and final report (V). The case file documents were not numbered, documents were not organised in a chronological order and there was no list of documents contained in each file. The file was not scanned in the Case Management System, only the list of the registered documents had been introduced into the system. The SC received a CMS list of the documents contained in the files. Not each and every document contained in the files had a registration number nor was reference made to the number of pages per document. The SC established a "list of documents in the paper file" which was handed to the OLAF investigation unit.²

MONITORING OF THE CASE

2. Opening of the investigation

6. The SC would point out that the Director General of OLAF shall neither seek nor take instructions from any government or any institution, body, office or agency in the performance of his duties with regard to the opening and carrying out of external and internal investigations or to the drafting of reports following such investigations.³

2.1. Initial information: the assessment and the selection process

7. According to the case file, on 24.05.2012, at 20:15 the Director General of OLAF received a letter addressed to him from the Secretary General of the European Commission (EC henceforth) on the subject: *Allegations by Swedish Match*. This letter indicated that on 21.05.2012 she received a letter from the General Counsel of Swedish Match making allegations of improper behaviour relating to a Commissioner. It also indicated that the EC President had asked the EC Legal Service for its advice. The Legal Service recommended referring the matter to OLAF quoting Articles 2 and 4 of the Commission Decision 1999/396 and that the President requested that OLAF deal with this issue as a matter of priority. Attached was the note sent by Swedish Match on the possible involvement of Commissioner D. in relation to the EU ban on snus and the exchange of notes between the Secretary General and the Head of Cabinet of the President of the EC on this matter⁴.

² See annex 1 (this list was originally handwritten and signed by the secretariat of the OLAF Director General).

³ See Article 12 of Regulation (EC) No 1073/1999 Articles 3, 4 and 5 of Regulation (EC) No 1073/1999 .

⁴ See annex 2 note 1.

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8. It must be noted that the “Opinion for a Decision to open a case” indicates the "EU Commission" as the source of information. However, the Commission was not the genuine source of the information but the initial addressee of a private complaint made by Swedish Match.
9. The SC notes that the assessment and selection process was carried out by the Investigation Selection and Review Unit (ISRU) in less than 24 hours. On 25.05.2012, the above referenced letter was formally registered in OLAF and the same day the Head of the ISRU wrote a favourable “Opinion for a Decision to open a case”. In drafting this opinion he included a summary of the complaint ("short description of the allegation" ⁵) and a "short description of the activities" completed (by OLAF).
10. In the selection process the Head of the ISRU indicated that *"In the short time available"*, Open Sources Intelligence searches were carried out on the company and on two other persons who were also mentioned in the allegations. It was found that Swedish Match had a leading position in Sweden in snus and snuff, in other tobacco and light products and that it was a partner with Phillip Morris in a joint venture. The identity of the members of the Board of Governors was also established. With regard to the other two persons, one of them, Mrs K., appeared to work currently for the Malta lottery and gaming authority and to have served as a legal advisor in the EU Council from 2004 to 2011. The other –Mr. Z. - was the current Deputy Mayor of the Maltese town of Sliema.
11. The Head of the ISRU concluded that *"the source of information was the EU Commission"*; that OLAF was competent to act as *"the allegations concerned a possible failure to discharge obligations on the part of a Member of the Commission"*; that *"the information provided was sufficient to open an investigation"*; that *"the possible impact on the reputation of the EU Institutions was very high"*; that *"there was not potential impact on EU financial interests"* but the special policy objective of *"suspected corruption"* was met. He believed that *"OLAF was the only body within the European Institutions that can investigate a Member of an EU institution"* and as *"the case concerned a Member of an Institution, it was proposed to assign it to a special investigation team"*.

2.2. The opening decision: the characterisation of the investigation

12. The SC has noted that the Opening Decision of the case was also adopted by the Director General of OLAF that day, 25.05.2012 and it was hand delivered to the Secretary General of the EC in the evening. Though not explicitly said in the “Decision of Opening”, it was an “Internal investigation” since it related to *"possible failure to discharge obligations on the part of a member of the Commission"* and was

⁵ See annex 2 note 2.

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based on Article 4 of Regulation (EC) N° 1073/1999 which covers “Internal investigations”.

The jurisprudence of the European Court of Justice has established that a decision by OLAF’s Director General to open an investigation cannot be taken unless there are “sufficiently serious suspicions” relating to acts of fraud, corruption or other illegal activities detrimental to the financial interests of the Communities (cases C-15/00 *Commission of the European Communities v European Investment Bank* and C-11/00 *Commission of the European Communities v European Central Bank*).

Apart from OLAF verification of the existence of the persons/companies whose names figured in the complaint, the SC has not found any trace of any other check made or any other additional information gathered by OLAF with regard to the allegations and their credibility, as it is foreseen in Article 5(4) of the OLAF Instructions to Staff on Investigative Procedures (ISIP) relating to OLAF’s obligation to evaluate the accuracy, the reliability and the supporting evidence of the incoming information.

It seems that the Investigation Selection and Review Unit (ISRU) was given a short timeframe within which to carry out the assessment of the incoming information. Bearing in mind also the existing difference between the seriousness of the allegations and the “seriousness of suspicions” to be assessed, the SC would point out that the need for a measured assessment was important for the safeguarding and consolidating of OLAF’s independence *vis à vis* the European Commission when this latter is at the origin of the referral. The SC recommends that OLAF give consideration to this key aspect in the future.



2.3 Notifications of the EU institutions concerned of the opening of the investigation

13. The SC notes that the Secretary General of the EC was informed on 25.05.2012, by a hand delivered note of the opening of the OLAF investigation with regard to a Member of the College of Commissioners. She was also informed of OLAF's decision not to inform the Member of his personal implication quoting the second paragraph of Article 4 (5) of Regulation (EC) No 1073/1999 as the legal basis.
14. OLAF deferred the provision of information to the Council of the EU on the personal involvement of one of its staff members (Mrs K.) by a reasoned decision in order to maintain absolute secrecy for the purposes of the investigation.⁶ OLAF informed the Secretary General of the Council of the EU on 09.10.2012 that a staff member of the "European Court of Auditors" could be personally involved in a matter under investigation. The identity and function of the staff member involved were rightly indicated.
15. It has been noted that OLAF also requested of the Secretary General of the EC that strict confidentiality be observed and "*not to inform the President*" or any other Member or official of the EC on the opening of the investigation. This request was lifted when the Member of the College was informed of his personal involvement in an OLAF investigation⁷. Though no explicit reference is made in Article 4(5) of Regulation (EC) No 1073/1999 of the requirement to inform the President of the EC and only "the institution" is referred to, it seems appropriate that when a Member of the Commission is involved in an investigation the President should not be prevented from being informed. Indeed, the draft Memorandum of Understanding between OLAF and the EC⁸ states that OLAF shall inform the President of the EC in writing where a case concerns a Member of the EC or an inspection of his premises. Besides, it appears from the file that the President was informed by the Secretary General of the EC of the initial complaint and that the Secretary General forwarded it to OLAF following instruction from the President. Moreover, OLAF informed the EC of the closure of the investigation and transmitted the recommendations to the President.

⁶ Article 4(5) of Regulation (EC) No 1073/1999: "*Where investigations reveal that a member, manager, official or other servant may be personally involved, the institutions, body, office or agency to which he belongs shall be informed. In cases requiring absolute secrecy for the purposes of the investigation or requiring recourse to means of investigation falling within the competence of a national judicial authority, the provision of such information may be deferred.*"

⁷ This letter reiterates the mention that Article 4 (5) paragraph 2 of Regulation (EC) 1073/1999 was the legal basis for initially deferring the information of Mr D.

⁸ Draft Memorandum of Understanding concerning a code of conduct in order to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission. The draft Memorandum was considered to be applicable in a letter by the Secretary General of the Commission to the Supervisory Committee dated 25.11.2011

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OLAF seems to have indicated an incorrect legal basis in the letter addressed to the Secretary General of the EC when informing her on the opening of the investigation and on its decision to defer the information of Mr. D. as personally involved. Indeed, the legal basis mentioned by OLAF (second paragraph of Article 4 (5) of Regulation (EC) No 1073/1999) applies to deferring the provision of information to the institution to which the person involved belongs, but not those deferring the provision of information to the person concerned as in the current case. In the SC's view the proper legal basis to be quoted would have been Article 4 of the Commission Decision 1999/396.

The SC recommends that OLAF pay rigorous attention to the legal basis used for its actions when notifying the European institutions concerned by the opening of an investigation. In particular, the SC considers appropriate that when a Member of the Commission is involved in an investigation, the President should be the initial addressee of the notification.

2.4 Notifications of the persons concerned of their involvement in OLAF's investigation

16. The SC notes that Mr D. and Mrs K. were both informed of their personal implication in OLAF's investigation. When a decision was initially taken to defer informing one of them, this deferral was justified – *via* a written reasoned decision – by the need not to jeopardize the investigation. On the other hand, Mr Z. was notified of the OLAF investigation in the “invitation to the interview” hand delivered to him following an on-the-spot check inspection carried out at the premises of his restaurant on 04.07.2012.



OLAF has complied with the requirements set out in Article 4 of the Commission Decision 1999/396 and in Article 4 of the Council Decision 1999/394 relating to the notifications of Mr D. and Mrs K. concerned within the framework of the “internal investigation” (Article 4 of Regulation (EC) No 1073/1999).⁹

However, OLAF informed Mr Z. involved of his status as a “person concerned” in the framework of an “external investigation” (Article 3 of Regulation (EC) No 1073/1999) and following an on-the-spot check control. The SC has made some remarks regarding this interview as a “person concerned” within the framework of the Regulation (Euratom, EC) No 2185/96 (see *infra* point 3.2.4 of this opinion).

3. The conduct of OLAF’s investigation: analysis of the respect of the principles for gathering evidence

17. OLAF’s investigations must be performed in accordance with a series of rules and principles: legality, proportionality, impartiality, objectivity, fairness, observance of the presumption of innocence, subsidiarity and confidentiality. The general principles applicable to gathering evidence in OLAF’s investigations are also established in Recitals (10) and (21) of Regulation (EC) No1073/1999, and in the Charter of Fundamental Rights of the EU. The SC has examined the compliance of the investigation with these principles and has paid particular attention to some investigation actions which could be put into question.

3.1 Assignment of the case to a special investigation team: the principle of impartiality

18. The SC notes that the Director General assigned the case to a special investigation team made up of four investigators and with no involvement of the Director of Directorate A. The Director General himself participated directly in several investigative tasks such as

⁹ Commission Decision 1999/396/EC, ECSC, Euratom of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, *OJ L 149, 16.6.1999, p. 57–59*: “Where the possible implication of a Member, official or servant of the Commission emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation”. Article 4 of the Commission Decision 1999/396 and of the Council Decision 1999/394/EC, Euratom of 25 May 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, *OJ L 149, 16.6.1999, p. 36–38*: “Where the possible personal implication of a Member of the Council or one of its bodies, or of an official or servant of the General Secretariat emerges, the interested party shall be informed rapidly provided that this does not jeopardize the investigation”. External investigations: the current OLAF legal framework does not impose a similar obligation in external investigations.



the interviews of some witnesses, the carrying out of the on-the-spot check and the interviews of the persons concerned.

The direct participation of the Director General in investigative activities may have an impact on the respect of the principle of impartiality. In particular Article 90a of the Staff Regulations states that any person to whom these Staff Regulations apply may submit to the Director of OLAF a complaint against an act adversely affecting him in connection with investigations by OLAF¹⁰.

The SC would point out that the case law has attributed a broad definition to the notion of conflict of interest and recommends that OLAF follow it rigorously. The SC recommends that the Director General refrain from taking the risk of putting himself in a potential situation of conflict of interest that could jeopardize the review of OLAF's actions.

3.2 Extensions of the scope of the investigation, on- the-spot checks and interview of Mr Z. as a person concerned: the principle of legality and the principle of subsidiarity

19. It must be borne in mind that, under Regulation (EC) No 1073/1999, the investigations carried out by OLAF consist of external investigations (Article 3), that is to say, investigations outside the EU Institutions, and internal investigations (Article 4), that is to say, investigations carried out within those Institutions. The procedural rules and guarantees differ according to the nature of the investigation. The characterisation of the investigation is a relevant matter in this particular case in view of the fact that the Director General of OLAF "extended" the scope of the investigation twice in a five day period firstly on 22.06.2012 and secondly on 27.06.2012.
20. It should be pointed out that Regulation (EC) No 1073/1999 does not foresee the extension of the scope of an investigation but it makes a clear distinction between external investigations (Article 3) and internal ones (Article 4). This distinction is subsequently made in Article 9(3) and Article 10 (1) and (2) of Regulation No 1073/1999.
21. The SC notes that a procedure to "extend" the scope of an investigation was a new feature added to the ISIP for OLAF staff by the Director General. A "legality check" by the ISRU prior to the extension to be adopted by the Director General was also conceived.¹¹

¹⁰ Article 90a of the Staff Regulations - Any person to whom these Staff Regulations apply may submit to the Director of OLAF a request within the meaning of Article 90(1), asking the Director to take a decision relating to him in connection with investigations by OLAF. Such person may also submit to the Director of OLAF a complaint within the meaning of Article 90(2) against an act adversely affecting him in connection with investigations by OLAF.

¹¹ Taking into account that Article 12(3) of the ISIP ("Legality check during the investigation") reads "*where the investigation unit envisages conducting an investigative activity outside the existing scope of the investigation...it must submit a request for a decision to extend the scope to the Investigation Selection and Review Unit. The*

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The SC has analysed how OLAF made use of this internal procedure to “extend” the investigation scope and its impact on the principle of legality.

3.2.1. The first extension of the scope of the investigation on 22.06.2012

22. OLAF's investigation opened on 25.05.2012 was an “internal investigation” (Article 4 of Regulation (EC) No 1073/1999); it was considered that *"there was not potential impact on EU financial interests"*. On 22.06.2012 the first extension quoted both Article 3 (“external investigations”) and Article 4 (“internal investigations”) as the legal basis but no mention was made to any fraud or irregularity concerning the financial interests of the EU.

The SC considers that it is important that OLAF carry out a legal check to ensure that the content of the request of the extension of the scope of the investigation is in line with the nature of the investigation.

3.2.2 The second extension of the scope of the investigation on 27.06.2012

23. On 27.06.2012 a new request “for an authorisation to extend the scope of the investigation” was introduced and a decision was adopted accordingly. This request also indicated as a target “to carry out an on-the-spot check and interview a person concerned”. The SC has noted that the same day the Head of the ISRU drafted a favourable Opinion and the Director General adopted a new decision again on the basis of Article 3 (“external investigations”) of Regulation No. 1073/1999. On this occasion reference was made to *possible frauds detrimental to the EU budget* on the grounds of a private recording of a telephone conversation between the Secretary General of ESTOC (who in her quality of witness had handed it over to OLAF on 02.06.2012) and Mr Z. where this latter allegedly mentioned “*a company that he would use when dealing abroad to help to get more funds from the EU*”.
24. The SC has read the comment made by the Head of the ISRU in his opinion: “as the investigation already covers Articles 3 and 4 the need to extend it appears doubtful. However, it can be considered acceptable in order to better protect the fundamental rights of SZ”.
25. The legal basis mentioned in this new decision to extend the scope of the investigation was Article 3 of Regulation (EC) No 1073/1999 “*to cover all external aspects related to possible frauds detrimental to the EU budget involving the company Peppi’s kiosk owned by SZ and/or other companies directly or indirectly managed by SZ or companies or Institutions on behalf of which he intermediated in order to make them benefit of EU funded projects. Mr SZ should be considered as a person concerned*”.

ISRU must verify the proposed extension of the scope and provide an opinion to the Director-General on the basis of which he may take a decision”.

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26. The SC notes that analysts in OLAF had provided the investigators with information on the company owned by Mr Z. (Peppi's Kiosk) and indicated that it was a family run business with café, pizzeria and grill. The SC also notes that no information on EU funds relating to this company or to any other companies from which Mr Z. could benefit appeared in the case file examined.
27. It is important to point out that in the "Opinion" delivered on 27.06.2012 prior to the Director General's decision to authorize the on-the-spot check, the "*very limited evidence in the case so far*" was highlighted whereas, in the request for the extension of the investigation made on the same date, the Head of the investigation unit indicated that the reference to a company made by Mr Z. in a telephone conversation was "*clearly related to untransparent procedures which imply the interposition of a company controlled by SZ for unduly benefitting of EU funded projects*".

The SC notes that the second decision on the extension of the investigation scope to deal again with external aspects of the case (Article 3 of Regulation (EC) No 1073/1999) does not seem to be based on an evaluation of the accuracy and reliability of the information provided by the witness or on an evaluation of the existing information in OLAF with regard to the company owned by Mr Z., which did not indicate any EU funds.

The SC notes that the Instructions to Staff on Investigative Procedures (ISIP) included the possibility of extending the scope of the ongoing investigation rather than opening two separate but complementary internal and external investigations.

The SC considers that this possibility does not release OLAF from evaluating whether there are "sufficiently serious suspicions" covering the extended scope of the investigation. The SC would point out that OLAF must pay particular attention to this aspect throughout the conduct of the investigation as OLAF's powers and obligations differ in internal and external investigations, in order to avoid any confusion as to the nature of the investigation while it was in progress and as to the accuracy of the investigation activities that OLAF can carry out, in particular, on-the-spot checks and inspections and interviews of persons as person concerned.

The SC notes that OLAF appears to have made the legality check of the three measures proposed within a very short timeframe, the same day as the request. The complexity of such a new request (to extend the scope of the case, to carry out an on-the-spot check on an "other economic operator" and to conduct an interview with a person concerned in the framework of an external investigation) required a thorough legal analysis.



3.2.3 *On-the-spot checks and inspections carried out on the premises of an “other economic operator”*

28. The SC notes that OLAF carried out an on-the-spot check on premises of the company owned by Mr Z. (*Peppi's kiosk*), which was considered as an "other economic operator" on the basis of the third paragraph of Article 5 of Regulation (Euratom, EC) No 2185/96. Prior to the control, the Head of the ISRU indicated that in the consideration given to "*the very limited evidence in the file so far*", it appeared that "*the performance of an on-the-spot check was strictly necessary in order to verify whether an irregularity actually existed*".
29. The notification of the control appears to have been hand delivered to the Maltese National Authority on the day the control took place (4.07.2012). Articles 3 and 4 of Regulation (Euratom, EC) No 2185/96 was quoted as the legal base.
30. According to the information in the case file, OLAF planned to conduct this control to gather evidence on the arrangements made by Mr Z. with the purpose of requesting a bribe and in relation to possible irregularities in obtaining EU funded projects and/or in the management of EU funded projects via the interposition of a company directly or indirectly controlled by Mr Z.
31. According to the rules governing the on-the-spot checks and inspections contained in Regulation (Euratom, EC) No 2185/96 and in the "Guidelines on OLAF's application of Regulation (Euratom, EC) No 2185/96", on-the-spot checks may be carried out on economic operators to whom Community measures and penalties may be applied where there is a reason to think that irregularities prejudicing the EU budget have been committed¹². It is required to ensure that checks and inspections are not being carried out at the same time in respect to the same facts with regard to the economic operator concerned.¹³ Therefore "*a vital piece of preliminary work is to check with other Directorates-General whether the economic operator is already being inspected in respect of the same facts*".
32. It is noted that the rules governing the inspection on the premises of the category "other economic operator" seem to be stricter and in order "*to ensure that civil liberties are protected and that third parties are not wrongly implicated, this method of investigation requires appropriate justification*" which is not clear in the current case.

¹² See Article 7 of Regulation (EC, Euratom) No 2988/95.

¹³ Article 3 of Regulation (Euratom, EC) No 2185/96 "...it shall ensure that similar checks and inspections are not being carried out at the same time in respect of the same facts with regard to the economic operators concerned on the basis of Community sectoral regulations..."

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OLAF did not consider *Peppi's kiosk* owned by Mr Z to be the economic operator involved in the irregularity but rather an "other economic operator". This category covers, inter alia, all the providers used by the economic operator under investigation. In the information available in the case file examined, there is no substantial information concerning irregularities detrimental to the EU financial interests potentially committed by any clearly identified economic operator.

OLAF cited the "very limited evidence contained in the case file so far" in order to justify the necessity of this type of inspection. The SC questions whether "very limited evidence" was a satisfactory basis to implement the provisions of Regulation (Euratom, EC) No 2185/96 whose application requires justification in terms of the scale of fraud or of the seriousness of the damage done to the EU financial interests.

The SC recommends that OLAF put in place a scrupulous legality check of its actions.

3.2.4. Interview of a "person concerned" within an external investigation

33. The SC observes that OLAF interviewed Mr Z. as a "person concerned" on the premises of the Internal Audit and Investigation Directorate (IAID) of Malta following the on-the-spot inspection on the restaurant owned by him on 4.07.2012 and on 05.07.2012. OLAF's interview was preceded by informing Mr Z of his rights on the basis of a provision of the Criminal Code (Article 335AD), by the Deputy of the IAID in the presence of the Director-General of the IAID, of the Director General of OLAF and of two OLAF's investigators. Mr Z. was allowed to consult privately "a lawyer or legal procurator" in person or by telephone for a period not exceeding one hour¹⁴ and it is indicated that he choose not to exercise such right.
34. It was noted that the OLAF model form listing the rights of a person concerned was also read out to Mr. Z. some minutes later. OLAF's interview was afterwards conducted by OLAF's officials with the assistance of the IAID representatives for interpretation purposes (Mr Z. answered the questions in the Maltese language). This interview was conducted in the framework of an "external investigation" (Article 3 of Regulation (EC) No 1073/1999) but Mr Z. was mainly interviewed on the facts relating to the internal investigation.

¹⁴ This article is a part of Subtitle IX concerning the "Rights of a person detained".



The SC is concerned by the fact that the interview of Mr Z. as a person concerned was carried out on the legal basis of Article 3 (“External investigations”), however the majority of the questions posed referred to those allegations made in the framework of the “Internal investigation” (Article 4) for which no legal basis has been referred to.

The SC would also point out that the interview as a "person concerned" within the framework of an "external investigation" does not appear to be foreseen under Article 3 of Regulation (EC) No 1073/1999.

3.3 Request and use of telephone toll records: the respect for private life and communications:- (Article 7 of the Charter of Fundamental Rights of the EU)

35. The SC would point out that this measure not only requires a concrete legal basis but also a clear justification and must be strictly necessary and proportionate to the purpose. The SC notes that the ECtHR has consistently held that telephone communications are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 of the European Convention of Human Rights¹⁵. Article 7 of the Charter of Fundamental Rights of the EU also covers those rights. The SC has analysed how OLAF complied with those requirements.¹⁶

3.3.1. Respect by OLAF of the right to private life and to communications of the persons involved in OLAF's investigation

36. According to the information available in the case file, on 10.07.2012 OLAF sent a "request for telephone toll records" addressed to the Maltese Director General of the Antifraud Coordination Service (AFCOS)-in the IAID. OLAF requested AFCOS that the Maltese Authorities provide it with a list of incoming/outgoing telephone calls regarding two Maltese mobile telephone numbers in the name of/used by Mr Z. and by Mr D. respectively covering concrete periods from January to July 2012. Other similar requests were later sent by OLAF, between July-August 2012. OLAF further requested the identification of the owners/users of other telephone numbers.

37. The SC notes that the lists of telephone toll records requested and received by OLAF in fact included the date of the phone calls made, their duration, the caller and receiver numbers, the type of the communication (call or SMS) and answer indicator (if the call was answered or not).

¹⁵Malone v. the United Kingdom of 2 August 1984, Series A no. 82, p. 30, § 64; Kruslin v. France and Huvig v. France of 24 April 1990, Series A no. 176-A and B, p. 20, § 26, and p. 52, § 25; Halford v. the United Kingdom of 25 June 1997, Reports of Judgments and Decisions 1997-III, pp. 1016–17, § 48; Kopp v. Switzerland of 25 March 1998, Reports 1998-II, p. 540, § 53); Amann v. Switzerland [GC], no. 27798/95, § 44, ECHR 2000-II); Liberty and others v. the United Kingdom of 1 July 2008, no. 58243/00, § 56.

¹⁶ See also annex 3.

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38. The SC notes that OLAF has used the above mentioned telephone data in its analyses relevant to the investigation, and to support OLAF's findings and conclusions in its Final report. OLAF based its first request on Article 4(2) of Regulation (EC) No1073/1999 and subsequent requests on Article 4 of the said Regulation. No internal verification on the legal grounds and on OLAF's powers for sending such requests appears to have been made by the Investigation Selection and Review Unit (ISRU) prior to their execution.

The request for telephone toll records of personal mobile numbers appears to have been justified by OLAF on the basis of Article 4, in particular Article 4 (2) of Regulation (EC) No 1073/1999. The SC has analysed the content of this legal basis which empowers OLAF "to have access to any information held by the institutions, bodies, offices and agencies by means of inspecting their accounts, by taking copies and obtaining extracts from any document or the contents of any data medium held by them". This legal basis does not cover the request to national authorities.

Moreover, the subsequent use, collection and storage of the information thereby extracted could be seen, according to the ECtHR jurisprudence, as "interference by a public authority" with the exercise of the right to "private life" and "correspondence"¹⁷. Such interference is required to be "in accordance with the law"¹⁸ (Article 8 of the European Convention of Human Rights which corresponds to Article 7 of the Charter of Fundamental Rights of the EU).¹⁹

The SC recommends that OLAF make a thorough verification of the legal basis prior to the implementation of any measure that could result in a potential interference in the fundamental rights to "private life" and "communications" of persons involved in the investigation. Consideration should also be given to Regulation (EC) No 45/2001.²⁰

¹⁷ For example, the Court stated that the release, and subsequently the obtaining by the police of information extracted from records of metering relating to the numbers called, without the consent of the subscribers, interfered with their private lives or correspondence (in the sense of telephone communications). The Court also observed that the mere fact that the data relating to the date, length of telephone conversations and numbers dialed may have been legitimately obtained, in the form of telephone bills, is no bar to finding an interference with rights guaranteed under Article 8. Once that such data relating to the private life of an individual is stored, the Court found irrelevant that the data held were not disclosed or used against the applicant in disciplinary or other proceedings. See cases *Malone v. the United Kingdom*, § 84; *P .G. and J.H. v. the United Kingdom*, no. 44787/98, § 42. And *Copland*, § 43.

¹⁸ *Malone v. the United Kingdom*, §§ 66-68; *Kopp v. Switzerland*, judgment of 25 March 1998, Reports 1998-II, p. 540, § 55; *P .G. and J.H. v. the United Kingdom*, § 44; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008.

¹⁹ OJ 2007 C 303, p. 17. Moreover, in accordance with Article 52(3) of the Charter, the meaning and scope of the right to respect of private life and communications are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 § 2 of the ECHR.

²⁰ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.



3.3.2. Respect by OLAF of data protection requirements with regard to the persons concerned, witnesses and other persons unrelated to the investigation

39. According to the case file and in the framework of the implementation of the "Request for telephone toll records" made by OLAF to AFCOS in July and August 2012, OLAF requested and received, used and stored - in its paper case file personal data (name, address, phone number, ID number) relating to the persons concerned; the witnesses and also other persons unrelated to the investigation whose names appear in the file. This raises also a problem under Article 8 of the Charter of Fundamental Rights of the EU (right to protection of personal data) and under the relevant provisions of Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data
40. The SC notes that OLAF informed the persons concerned and the witnesses via privacy statements included in the letters addressed to them and/or in the interview records, of the rules on storage and processing of their personal data. However, OLAF does not seem to have informed the persons unrelated to the investigation as to the storage and processing by OLAF of their personal data contained in the file namely, names, addresses, ID numbers or of the listing of their telephone calls. Nor do eventual decisions taken by OLAF to defer their information pursuant to Article 20 of Regulation (EC) No 45/2001 appear in the case file.

To date, OLAF seems not to have complied with the requirements of the Regulation (EC) No 45/2001 to inform other persons unrelated to the investigations who were users/owners of telephone numbers and whose personal data and telephone listing appear in the case file.²¹

The SC recommends that OLAF fulfill this legal obligation.

3.4. OLAF's recording of a private telephone conversation: the respect for private life and communications (Article 7 of the Charter of Fundamental Rights of the EU)

41. According to OLAF's Final report a telephone call was made "in agreement with *the witness* and in the presence of OLAF", in order to obtain more details concerning the offer of "services" Mr Z. has previously made. The SC has analysed the content and annexes of a "Note for the file", which explains how on 03.07.2012 and in the presence of

²¹ See Guidelines for OLAF Staff regarding practical implementation of data protection requirements adopted in October 2010.



the investigator in charge and with his assistance²², the witness made a private telephone call to the mobile phone of Mr Z. This call was prepared and recorded by the OLAF investigator in charge.

42. It is noted that no transcription of the content of this recording of the telephone call appears in the case file but the report mentions that this telephone call did not provide any useful results with regard to the allegations.²³

The SC has examined the preparation and recording by OLAF of this private telephone conversation in the light of Article 7 of the Charter of Fundamental Rights of the EU, recognizing the right to respect for everyone's "private life" and "communications", which correspond to Article 8 of the European Convention of Human Rights.

The ECtHR considered that the recording of a telephone conversation of a person with a third party by the latter, in the presence of an official of a public authority, acting in the performance of his duties and making a crucial contribution by making available his office, his telephone and his tape recorder represented an interference in that person's right to respect for her correspondence.²⁴ Such interference shall be "*in accordance with the law*". This requires that the impugned measure should have some basis in domestic law. The ECtHR noted that the contested recording had no basis in domestic law and therefore found a breach of Article 8 of the ECHR²⁵.

OLAF's recording of a private telephone conversation was made in the framework of OLAF's investigation, by common agreement between the witness and the investigator in charge and with the direct assistance of the latter, who prepared the contents of the telephone conversation.

The SC is seriously concerned by the fact that OLAF does not seem to have conducted an analysis of the legal provisions empowering OLAF's investigators to gather evidence by way of recording private telephone conversations. The interference with the person's concerned right to respect of his private life and communications without legal basis would be contrary to the Article 7 of the Charter and to Article 8 of the ECHR.

The SC recommends that OLAF make such a legal analysis.

3.5. OLAF's inspections of EC's premises and computer forensic examination: the principle of legality

²² See annex 2, note 3.

²³ See annexe 2 note 4.

²⁴ See *A. v France*, case 14838/89.

²⁵ *Idem*

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43. The SC has examined the conduct of the inspection of the premises of the EC, in particular, the offices of Mr D. and his assistant, together with the computer forensic examination, that were carried out in July 2012. The notifications of those investigative activities to the institution concerned, in particular to the Secretary General of the EC, were also analysed. OLAF carried out the inspection of the premises of the EC and the forensic operations in compliance with Article 4 (2) and (4) and Article 6 (2) and (3) of Regulation (EC) No 1073/1999, with Article 3 of the Commission Decision 1999/396 and with the instructions given in the ISIP (Articles 11, 12, 13 and 15).

In principle OLAF staff was duly authorized and mandated by the OLAF DG²⁶. The institution concerned was informed of OLAF's intention to conduct the inspection of premises and forensic operations. OLAF's investigators carried it out and drew up reports in compliance with the applicable rules.

3.6. OLAF's interviews of the persons concerned

3.6.1 Interview of Mr D. and Mrs K.

44. The SC has examined OLAF's compliance with the requirements for the proper conduct of interviews as described in Article 6 of Regulation (EC) No 1073/1999 and the rules of the ISIP (Articles 11 (6), 12 and 16) in particular the authorities to carry out the interviews, the invitations to the interview, the notifications of the interviewee rights and the conduct of the interview.
45. It must be noted that eight days after this first interview, on 24.7.12, one of the persons concerned sent a "defensive memorial" to the Director General of OLAF where he listed three potential reasons behind the complaint; he announced that he would seek legal advice and requested a copy of the complaint made by the SNUS lobby. This request was registered on 25.07.2012 and on 26.07.2012. Access to that document was refused on the grounds of a reasoned decision signed by an investigator delegated by the head of the investigation unit. This decision referred to the rules of Regulation (EC) No 1049/2001 on access to documents and to statements of the Court of Justice in the *Nikolaou* case²⁷. No information was provided as to the legal remedy against that decision in the response given by OLAF.

The SC noted that the person concerned did not reiterate this request in the course of the second interview on 17.09.2012 where he was accompanied by a legal adviser.

²⁶ See the addendum.

²⁷ Court of First Instance, *Nikolaou v Commission*, 12 September 2007, case T-259/03.



OLAF appears to have respected the rights of the persons concerned with regard to the interview notification requirements and the information regarding their rights both in the invitation letters and during the interviews.

See also *infra*, paragraph 4.1.1. point 48.

3.6.2. Interview of Mr Z.

46. See *supra*, point 3.2.4.

4. The closing of OLAF's investigations

4.1. OLAF's Final report: conclusions and recommendations on the action that should be taken

47. OLAF's investigation was closed by a decision signed by the OLAF Director General on 15.10.2012 and OLAF's Final report is also dated 15.10.2012. The SC notes that the investigation lasted four months and three weeks. The SC would point out that the conclusions of an investigation may be based solely on elements which have evidential value and that the investigation report shall specify the facts established, the financial loss, if any, and the findings on the investigations including the recommendations of the Director General on the action that should be taken according to Article 9 of Regulation (EC) No 1073/1999.

4.1.1 OLAF's conclusions: the right of the persons concerned to express views on all the facts

48. The SC is not certain as to whether Mr D was clearly informed by OLAF of all the facts concerning him and consequently was given the opportunity to comment on all of them before OLAF's drawing up conclusions referring to him by name. The SC notes that OLAF drew three different conclusions with regard to Mr D.²⁸ which appear under separate sub-headings in the final report. However, in the invitations to the interviews Mr D. was only informed of the allegations relating to the first two conclusions²⁹. The SC

²⁸ The conclusions in the Final report are related to: (i) the use of the name of the Commissioner for the alleged bribe requests, (ii) the involvement of the Commissioner in unofficial and confidential snus dealings/meetings and (iii) the lack of reporting by the Commissioner about the above mentioned meetings either to the Commission or DG SANCO.

²⁹ He was considered a person concerned in an OLAF investigation related to (i) the attempts to involve the company Swedish Match and the ESTOC through an intermediary in paying a bribe to obtain the lifting of the EU ban on snus and to (ii) have met with interested parties, lobbyist and economic operators to discuss subjects

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also notes that Mr D. was widely interviewed on the two first allegations but no specific question on the third one appears³⁰. Although an indirect reference could be inferred to this third allegation from the questions posed, no clearly phrased question was asked.

The SC is aware that the third conclusion may be interpreted as closely related to the second one. The SC notes, however, that OLAF itself made a clear distinction between the second and the third conclusions, since these are drawn up in distinct parts of the final report, under separate sub-headings. Mr D does not seem to have been given the opportunity to refute the third one, by either denying or explaining the facts.

related to the snus case in a possible infraction of the rules governing the impartiality of the Members of the Commission.

³⁰ Lack of reporting to the Commission or DG SANCO of his meetings with the representatives of the tobacco industry on snus.



The SC would point out that OLAF needs to inform the person concerned of each and every fact concerning him in a clear and accurate manner. According to the case law, the lack of an expressly separate question which concerns a different allegation was regarded as a violation of the right of the person concerned to express views on all the facts concerning him/her³¹. Therefore, the SC strongly recommends that OLAF pay rigorous attention to the clarity of the information it provides to the persons concerned with regard to the facts concerning them.

4.1.2. OLAF's recommendations

- 49.** It appears from the case file that the positive Opinion of the ISRU on the Final report and recommendations was drafted on 12.10.12 by two reviewers and signed by the Head of the ISRU the same day. According to the information in the case file, the reviewers appear to have had access to the paper file just on 12.10.2012.³²
- 50.** The recommendations were not included in the Final report, but in separate letters sent to the President of the EC and to the Maltese authorities. OLAF did not send any recommendation to the Council of the EU concerning the action that should be taken with regard to the Council staff member, Mrs K. It must be noted that the Opinion of the ISRU highlights that the investigative findings indicate the possibility of breaches of Staff Regulations provisions by Mrs K. and indicates that the conclusions could deal also with these disciplinary issues.

³¹ Court of First Instance, *Nikolaou v Commission*, §§ 252-262.

³² Opinion of Unit 0.1 contains a formal legality check of the investigative activities undertaken

- With regard to the inspection of premises: the authority, the information to the SG of the EC, the information to the Head of Security, the report on the inspection of premises
 - With regard to the on-the-spot check: the authority, the notification to the national authority, the report on the on-the-spot check
 - With regard to the forensic operations: the authority, the framework within which they have been carried out
 - With regard to the interviews of the persons concerned: the authority, the invitations to the interviews (10 days' notice), the notification of the interviewee rights, the written record of the interview
 - . With regard to the telephone toll records: the Opinion mentions their existence and that the Maltese AFCOS obtained them under Maltese law and provided them to OLAF;
 - a check of the compliance with the rights and procedural guarantees of the persons concerned, namely:
 - , notification of the persons concerned of the opening of the investigation
 - the opportunity for the persons concerned to comment on facts concerning them
 - information of the EU institutions the opening of the investigation
 - . a check of the compliance with data protection requirements
 - information of the data subjects about the processing of their personal data
 - information of the recipients of any transfer of personal data of their obligations
- The Opinion states that the Final report complies with the ISIP requirements.

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4.2 Transmission of the final report: information to the EU institutions concerned and to OLAF's Supervisory Committee

4.2.1. Information to the EU institutions concerned

51. OLAF transmitted the entire final report (43 pages) to the President of the EC, together with the relevant annexes by letter hand delivered on 15.10.2012 to the Secretary General of the EC, who was informed of the closure of the investigation and of the case's future transmission to the national judicial authorities. The letter sent to the Secretary General also recommended to the President of the EC to take disciplinary action.
52. Pursuant to Articles 9 and 10 of Regulation (EC) No 1073/1999, the entire final report (43 pages), without annexes, was hand delivered to the Secretary General of the Council of the EU on 18.10.2012. The names of Mr D. and Mr. Z. were blackened.

4.2.2 Information to the Supervisory Committee

53. On 17.10.12 the Director General of OLAF formally informed the SC *via* its Secretariat that, pursuant to Article 11(7) of Regulation (EC) No 1073/1999, the Final Report concerning the investigation was being forwarded to national judicial authorities. The Director General also sent a part of the final report (the 11 first pages, not a summary) which was anonymised and the Opinion on the Final Report and Recommendations drafted by the ISRU. The evening before (16.10.2012) the Director General informed the SC Chairman by phone of the existence of the case and the intention to forward it to national judicial authorities swiftly.
54. In accordance with Article 11 (7) of Regulation (EC) No 1073/1999 as interpreted by the *Franchet and Byk* judgment,³³ a procedure was established by the SC and OLAF to enable the SC to verify OLAF's respect for fundamental rights and procedural guarantees **prior** to the transmission of cases to the national judicial authorities. This procedure, consisting in giving sufficient information to the SC by OLAF at least five days prior to OLAF's transmission of the case to those authorities was included in the 4th edition of OLAF Manual 2009 and in its updated version of July 2011.
55. The EC endorsed this procedure in its reply to the Special Report of the European Court of Auditors 2/2011 "*Follow up Special Report No 1/2005 concerning the management of the European Antifraud Office*": "*An adequate procedure has been defined and implemented by OLAF and the Supervisory Committee that takes account of the requirement for OLAF to inform the Supervisory Committee before transmitting cases to national judicial authorities as well as of the investigative independence of the OLAF Director. OLAF will take any advice of the Supervisory Committee into account and react on a case-by-case basis*".
To that end, the Rules of Procedure of the Supervisory Committee of OLAF foresee in the second paragraph of the Article 13(5):³⁴

³³ Case T-48/05, *Yves Franchet and Daniel Byk v Commission*.

³⁴ OJ L308/114 24.11.2011.

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"In particular, before the information is sent [to national judicial authorities], the Supervisory Committee shall request access to the investigation in question in order to ascertain whether fundamental rights and procedural guarantees are being complied with.(...)"

This procedure was also endorsed in "working arrangements between OLAF and the SC" concluded in September 2012: the Director General is obliged to provide the SC with the documents related to the planned transmission *"in general 5 working days before the transmission"*.

- 56.** In those cases where an urgent transmission of a case to the national judicial authorities by OLAF was required, OLAF and the SC had also agreed on an urgent verification by the SC prior to the transmission.³⁵ In the current case, the official written information was received on the 17.10.2012 and contained no request specifically calling for a derogation regarding the minimum period of 5 working days for access to the file by the SC. Nor was any such request received by the SC at a later date, as the SC had specifically asked the question to OLAF to make a prior verification within 2-3 days, from the moment the SC was in possession of all necessary information.
- 57.** On 17.10.2012 the Chairman of the SC requested by letter addressed to the Director General of OLAF full access to the case files since the documents sent to the Supervisory Committee did not provide it with sufficient information to fulfil its remit. At the same time the SC Secretariat was told by the Director General's acting adviser of the Director General's intention to transmit the case to the national judicial authority on 19.10.2012 around midday.
- 58.** Access to the file was granted by the Director General of OLAF in the evening of 18.10.2012 but in conditions that did not conform to those requested by the SC in its letter of 17.10.2012. Being immediately informed of these conditions, the SC considered it could not accept restrictions especially taking into account that it was not up to the Director General of OLAF to impose his own choice as to who from the SC Secretariat should deal with the case, while the urgency and the sensitivity of the case required the involvement of several staff members.
- 59.** Consequently, on the 19.10.2012 at the end of the morning, the SC Secretariat informed the Director General's acting adviser (the DG being still absent) that the SC Members consider they have not been given *"a time period guaranteeing compliance with this function (Article 13 (5) of the Rules of Procedure of the Committee) according to Article 11 (7) of Regulation (EC) No 1073/1999 as interpreted by the Court of Justice of European Union in its judgement Franchet et Byk. Under the working arrangements between OLAF and the SC (adopted on 11th September and confirming a long-standing practice), the necessary time period in such situation is 5 working days. Therefore, the date of transmission should not be earlier than 25th October"*.

³⁵ See notes between OLAF and the SC (D/02505-08.04.11 and D/2011 OSC 0040).

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60. Anyway, on 19.10.2012 around 13:00, OLAF sent the final report with the annexes to the Attorney General of Malta. On 19.10.2012, around 19:00 the SC Secretariat was informed by the Director General's acting adviser that the Director General had decided to grant access to the case file on the terms requested by the Chairman in his letter of 17.10.2012. The written authorization of access to the file in response to the request of 17.10.2012 was received by the SC on 22.10.2012.

The SC points out that the final report was transmitted to the Maltese national judicial authority before the SC had received access to the case file in conformity with the conditions requested by the SC. This has prevented the SC from carrying out the examination of the respect for the fundamental rights and procedural guarantees in OLAF's investigation case file prior to said transmission as required by the case law. According to the judgement of the General Court³⁶, OLAF's failure to inform the SC properly prior to transmission of case reports to national judicial authorities was an infringement of Article 11(7) of Regulation (EC) No 1073/1999. It also stated that the SC must be consulted prior to the transmission for the sake of the protection of fundamental rights.

³⁶ Case T-48/05, *Yves Franchet and Daniel Byk v Commission*.

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Annex 1 and 2

[The SC has decided unanimously to grant public access to the text of its Opinion 2/2012. The SC has, however, decided that it cannot grant public access to annexes I and II of the Opinion, because they contain a list of documents in the OLAF case file (annex I) and quotes from the documents in the case file (annex II)]



ANNEX 3

Case-law of the European Court of Human Rights with regard to the telephone communications

The European Court of Human Rights (ECtHR) has consistently held that telephone communications are covered by the notions of “private life” and “correspondence” within the meaning of Article 8 of the European Convention of Human Rights (ECHR)³⁷. The Court accepted that the use of data obtained from metering (*Malone v UK*), whatever the circumstances and purposes, or of information relating to the date and length of telephone conversations and, in particular, the numbers dialed (*Copland v UK*), can give rise to an issue under Article 8 of the ECHR, as such information constitutes “an integral element in the communications made by telephone”³⁸. Moreover, storing of personal data relating to the private life of an individual also falls within the application of Article 8 § 1 of the ECHR³⁹.

Whenever an interference with the right of respect for private life and correspondence occurs, it has to be justified under Article 8 § 2 of the ECHR, notably to be “in accordance with the law” and “necessary in a democratic society” for one or more of the purposes enumerated in that paragraph.

(a) Existence of interference

The ECtHR has always considered that the collection and storage of personal information relating to the telephone usage of a person, without his/her knowledge, amounts to an interference with his/her right to respect for the private life and correspondence within the meaning of Article 8.

For example, the Court stated that the release, and subsequently the obtaining by the police of information extracted from records of metering relating to the numbers called, without the consent of the subscribers, interfered with their private lives or correspondence (in the sense of telephone communications)⁴⁰. The Court also observed that the mere fact that the data relating to the date, length of telephone conversations and numbers dialed may have been legitimately obtained, in the form of telephone bills, is no bar to finding interference with rights guaranteed under Article 8⁴¹. Once such data relating to the private life of an individual is stored, the Court found irrelevant the fact that the data held was not disclosed or used against the applicant in disciplinary or other proceedings⁴².

(b) Justification for the interference

³⁷ *Malone v. the United Kingdom* of 2 August 1984, Series A no. 82, p. 30, § 64; *Kruslin v. France and Huvig v. France* of 24 April 1990, Series A no. 176-A and B, p. 20, § 26, and p. 52, § 25; *Halford v. the United Kingdom* of 25 June 1997, Reports of Judgments and Decisions 1997-III, pp. 1016–17, § 48; *Kopp v. Switzerland* of 25 March 1998, Reports 1998-II, p. 540, § 53); *Amann v. Switzerland* [GC], no. 27798/95, § 44, ECHR 2000-II); *Liberty and others v. the United Kingdom* of 1 July 2008, no. 58243/00, § 56.

³⁸ *Malone v. UK*, § 84; *Copland v. the United Kingdom*, no. 62617/00, 3 July 2007, § 43.

³⁹ *Amann v. Switzerland*, § 65 and §§ 69-70.

⁴⁰ *Malone v. the United Kingdom*, § 84; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 42.

⁴¹ *Copland*, § 43.

⁴² *Ibid.*

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In order to be justified under Article 8 § 2 of the ECHR, any interference must be in accordance with the law, pursue one of the listed legitimate aims and be necessary in a democratic society.

(i) “In accordance with the law”

According to the established case-law of the ECtHR, the requirement that any interference must be “in accordance with the law” under Article 8 § 2 means that the impugned measure must have some basis in domestic law and be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8 (requirement of existence of the law). The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (requirement of quality - accessibility and foreseeability - of the law). For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise⁴³.

(ii) Purpose and necessity of the interference

When the interference appears not to be “in accordance with the law”, it is not necessary to review compliance with the other requirements of paragraph 2 of Article 8. When the Courts find that the interference is founded on a foreseeable and accessible legal provision, it further examines if such interference was “necessary in a democratic society”, by means of a control of proportionality.

It should be noted that Article 7 of the Charter of Fundamental Rights of the EU recognizes the right to respect for everyone’s private and family life, home and communications. According to the explanatory remarks on the Charter⁴⁴, the rights guaranteed in its Article 7 correspond to those guaranteed by Article 8 of the European Convention of Human Rights (ECHR). Moreover, in accordance with Article 52(3) of the Charter, the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 § 2 of the ECHR.

⁴³ *Malone v. UK*, §§ 66-68; *Kopp v. Switzerland*, judgment of 25 March 1998, Reports 1998-II, p. 540, § 55, PG and JH, § 44; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008.

⁴⁴ OJ 2007 C 303, p. 17.

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ADDENDUM

TO THE OPINION No 2/2012 OF THE SUPERVISORY COMMITTEE OF OLAF

adopted on 11 December 2012
and delivered to the Director General of OLAF on 17 December 2012

After adopting the Opinion No 2/2012, the Committee has discovered a new piece of information concerning the status of a staff member taking part in the investigation subject to the Committee's analysis (cf. in particular section 3.5 of the Opinion).

No mention was made in the case file that one of the investigators (participating, *inter alia*, in the inspection of the Commissioner's office) had the status of a national expert seconded to OLAF from Sweden.

That fact should be taken into account when assigning investigators to investigative actions, given the different powers they are authorised to exercise depending on their status.⁴⁵

It is, however, possible that this issue was examined by OLAF separately (e.g. at the moment of the secondment of the expert) and the relevant document is not included in the case file.

The Committee recommends to OLAF to verify whether there was no potential conflict of interest between the duties of the national expert and his participation in investigation activities.

If such verification had been done, the Committee recommends including it into the case file.

⁴⁵ See Article 6(1) of Regulation (Euratom, EC) No 2185/96 and Article 6 of the Commission Decision of 12.11.2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training