

Decision of the European Ombudsman on complaint 1769/2002/(IJH)ELB as it relates to the European Anti-Fraud Office

Decision

**Case 1769/2002/(IJH)ELB - Opened on 28/10/2002 - Recommendation on 26/06/2003 -
Decision on 22/07/2004**

Strasbourg, 22 July 2004

Dear Mr B. and Mr B.,

On 9 October 2002, you lodged a complaint with the European Ombudsman against the European Commission and the European Anti-Fraud Office (OLAF) concerning alleged fraudulent diversion of LEADER II funds that were intended to benefit a company, Blue Dragon 2000, of which you are the directors.

I already informed you, on 12 March 2004, of my decision closing the inquiry into your complaint as it concerns the Commission, following the latter's acceptance of a draft recommendation.

As regards OLAF, your complaint was sent to the Director General of OLAF on 28 October 2002. OLAF sent its opinion on 7 January 2003. This opinion was forwarded to you with an invitation to make observations, which you sent on 14 March 2003.

On 26 June 2003, I requested further information from OLAF. On 2 October 2003, OLAF sent me its reply. On 22 October 2003, a copy of OLAF's reply was forwarded to you with an invitation to make observations, which you sent on 21 November 2003.

On 16 February 2004, I made a draft recommendation to OLAF. On 18 March 2004, OLAF sent me its detailed opinion concerning this draft recommendation. On 15 April 2004 and 3 June 2004 respectively, a copy of OLAF's detailed opinion was forwarded to you in English and in French, with an invitation to make observations, which you sent on 18 April 2004, 12 and 28 May 2004. After having received the French version of OLAF's detailed opinion, you informed me, on 8 July 2004, that you did not wish to submit any additional observations.

You called my services to obtain information on progress made in the inquiry on the following dates: 17 February 2003, 19 February 2003, 19 March 2003, 10 April 2003, 20 May 2003, 24 June 2003, 26 June 2003, 6 October 2003, 13 October 2003, 21 October 2003, 27 October 2003, 5 November 2003, 6 November 2003, 18 December 2003, 8 January 2004, 27 January



2004, 2 February 2004, 9 February 2004, 23 February 2004, 1 March 2004, 9 March 2004, 11 March 2004, 22 March 2004, 26 March 2004, 30 March 2004, 14 April 2004, 27 April 2004, 10 June 2004 and 19 July 2004.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complainants, who are of French nationality, are directors of the company Blue Dragon 2000, which was set up on 4 June 1999 in Agullana, in the Catalan region of Spain.

In summary, the relevant facts according to the complainants are as follows:

The complainants' project was selected by the Local Action Group (LAG) Salines-Bassegoda to benefit from Community funds granted in the framework of the Community Initiative LEADER II. The complainants learnt that the aid application was dated 20 April 1999. However, they are not the authors of this aid application and did not sign it.

On 15 May 2000, the LAG paid part of the Community funds to Blue Dragon 2000 in the form of two drafts, one for 7 million pesetas and one for 2.8 million pesetas. These two drafts were kept by the bank de Sabadell and should have been destroyed when a cheque for the same amount was issued. The complainants were given the relevant cheque on 15 June 2000.

On 18 September 2000, the complainants contacted the European Anti-Fraud Office (OLAF) because they suspected that the Community funds that had been requested on behalf of their company were subject to fraud. On 19 September 2000, the complainants met two investigators from OLAF. After considering the information given by the complainants, the investigators concluded that Blue Dragon 2000 should have received only a very small amount of Community funds, as most of the eligibility criteria were not met.

In October 2000, the complainants informed the Spanish authorities of irregularities in the granting of funds in the framework of the Community initiative LEADER II.

On 15 December 2000, the complainants handed over to OLAF a set of relevant documents.

On 2 April 2001, the regional government (Generalitat) of Catalonia gave the complainants a copy of the LEADER file concerning Blue Dragon 2000 (a document of 309 pages). According to the complainants, most of the documents in this file are false, since they have been backdated. On 4 May 2001, the complainants personally handed a copy of this file to two OLAF investigators.

In June 2001, the complainants learnt that OLAF was opening an inquiry.

In November 2001, the complainants were informed that two OLAF investigators dealing with



the matter had been transferred to other duties.

At the same time, the complainants received a copy of the report of an inspection carried out by the regional government of Catalonia. The report found a number of problems in the Blue Dragon 2000 project, in particular, that the project had not started and recommended that the Community funding that had been paid for the project should be recovered.

On 20 and 25 February 2002, the complainants wrote to the Commission (Directorate General for Agriculture). They requested the assistance of the Commission to obtain compensation for the damage they had suffered. They also wished to have access to the findings of the OLAF inquiry and information on European Community services which could provide them with advice on their case. Finally, they asked for protection.

On 9 March 2002, the complainants lodged a complaint with the European Commission against Spain concerning problems in the management, the control and the distribution of Community funds in the framework of the Community Initiative LEADER II in the Region of Catalonia.

They also complained to the European Court of Human Rights. In June 2002, the European Court of Human Rights declared their complaint inadmissible because domestic judicial remedies had not been exhausted.

On 26 June 2002, the complainants received a reply from the Commission to their letters. The Commission's reply showed that their complaint of 9 March 2002 had been treated as ordinary correspondence.

The complainants consider that there are three levels of collusion in their case: the first between the Local Action Group Salines-Bassegoda, various local actors and the bank de Sabadell, the second between the French diplomatic service, OLAF and the regional government of Catalonia and the third between the Directorate General for Agriculture, the European Commission, France and Spain. According to the complainants, the Commission should have begun legal proceedings, thus allowing the complainants to have joined the Commission's action.

The complainants also state that they have received death threats, from unknown persons, linked to the present case.

The complainants lodged a complaint with the European Ombudsman on 9 October 2002. They allege that the Commission and OLAF have failed to deal properly with their allegations of fraud and that the system of distribution of LEADER II funds through private sector bodies, as well as inadequate controls by the Commission, have facilitated the fraud. The complainants claim public exoneration, restitution of what has been stolen from them and compensation for economic and non-material losses they have suffered.

The complaint to the Ombudsman was accompanied by detailed annexes of several hundred pages. The complainants later sent additional documents.



In their original complaint, the complainants requested that the complaint remain confidential, in accordance with Article 2 (3) of the Statute of the Ombudsman. On 8 April 2003, they informed the Ombudsman that they no longer wished their complaint to be confidential.

The present complaint is against both the Commission and OLAF. On 26 June 2003, the Ombudsman addressed a draft recommendation to the Commission, that it should re-examine the complainants' letter of 9 March 2002 and deal with it in accordance with the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (1). On 16 September 2003, the Commission accepted the draft recommendation. On 12 March 2004, the Ombudsman therefore closed the case relating to the Commission.

THE INQUIRY

The European Anti-Fraud Office's opinion

The opinion of the European Anti-Fraud Office (OLAF) on this complaint can be summarised as follows:

On 18 September 2000, one of the complainants contacted OLAF by telephone. On the following day, a meeting took place between both complainants and an OLAF investigator at which the complainants provided information on their allegations of mismanagement of Community funds and irregularities concerning the administration of the LEADER II initiative. On 3 October 2000, the OLAF investigator wrote a memorandum on the complainants' allegations. On 15 December 2000, the complainants provided OLAF with a file of 309 pages supporting their allegations. After an initial evaluation of this information, the Director General of OLAF decided to open an inquiry on 1 February 2001. The complainants sent additional documents in the following months.

In the memorandum of 3 October 2000, the OLAF investigator planned an on the spot inspection of the offices of the LAG Salines-Bassegoda. OLAF contacted the Spanish authorities on 28 February 2001 to inform them of this inspection. The Spanish Ministry of Agriculture indicated that it had already carried out an inspection of the Blue Dragon 2000 project on 21 December 2000 and that the Department of Economy and Finances of the Regional Government of Catalonia was planning to check all activities of the LAG Salines-Bassegoda in March 2001. OLAF therefore decided to suspend its on the spot inspection and to wait for the findings of the inspections carried out by the Spanish authorities.

On 10 July 2001, OLAF received the reports of the two Spanish authorities. On 14 November 2001, OLAF informed the complainants that it was examining these two reports.

At the end of this examination, OLAF found that the inspections carried out by the Spanish authorities concerned the same elements, the same period and the same economic operator as OLAF had planned to inspect. The Spanish Agriculture Ministry stated that a number of irregularities were found in the Blue Dragon 2000 project:



- the required signature on the aid application was missing,
- the required annexes were incomplete,
- a required signature was missing on the contract between Blue Dragon 2000 and the LAG,
- Blue Dragon's request for the first advance payment was not supported by documentation of costs incurred.

The Department of Economy and Finances stated that the management of the different stages of the 72 projects for which the LAG is responsible was satisfactory. The on the spot inspections of 50 % of the projects found that all projects, except the Blue Dragon 2000 project, had started and that the works were progressing.

OLAF considered that there was no reason to question the findings of the Spanish authorities and therefore decided not to carry out an additional on the spot inspection.

In accordance with Regulation (EC) No 1073/99 of the European Parliament and of the Council (2) , a Final Case Report was written and approved on 10 December 2002 by OLAF's Management Board. According to this report, the findings of the Spanish authorities on the occasion of their inspections did not enable them to confirm the allegations of irregularities by the LAG, but irregularities were found in the Blue Dragon 2000 project. The report recommended that the case be closed with a financial follow-up in order to recover the funds allocated to the Blue Dragon 2000 project. On 12 December 2002, the Director General of OLAF closed the inquiry.

The complainants' observations

In their observations, the complainants find it surprising that they were not invited to any interview during the inspections carried out by OLAF and the Spanish authorities. This would have enabled them to correct some erroneous findings made during these inspections. Moreover, in view of the findings of the Spanish inquiries, the Spanish authorities and OLAF should have expressed some doubts, in particular about the fact that EU funds can be granted while basic documents are not signed, or about the difference in the planned amount of EU funds and the approved amount.

The complainants question the date of the inspection, i.e. 21 December 2000, carried out by the Spanish Ministry of Agriculture, because the inspection report refers to documents that were only available at a later date. They consider that, as this inspection was carried out at a later date, OLAF should have carried out its own on the spot inspection.

The complainants argue that the memorandum of the OLAF investigator, dated 3 October 2000, cannot have been written on that date, because some of the information it contains was not then available to OLAF. The complainants had only given OLAF a few documents on 15 December 2000 and these did not include the LEADER file, which they had not yet themselves received. Similarly, they consider that the OLAF inquiry was not in fact opened on 1 February 2001 and point out that they were informed of the opening of this inquiry only in June 2001.



Moreover, they do not understand how OLAF could close the inquiry on 10 December 2002, since OLAF had informed them in January 2002 that their case had been transferred to the Directorate General for Agriculture.

OLAF's opinion does not mention at any time the name of one investigator, who replaced the first investigator in charge of the complainants' case following the latter's transfer. In September and October 2001, the complainants had interviews with the first investigator and, in November 2001, they were informed that he had been replaced. However, according to the information available to the complainants, it seems that both the first investigator and a second one were transferred in May 2001.

They also point out that the EU funds involved amounted to 16.85 million pesetas and not 9.85 million pesetas. This question was never brought up by OLAF or the Spanish authorities.

FURTHER INQUIRIES

After careful consideration of OLAF's opinion and the complainants' observations, it appeared that further inquiries were necessary. The Ombudsman asked the Director General of OLAF to comment on the following:

- the complainants' allegations about the quality of the checks carried out by the Spanish authorities;
- the complainants' concerns as to who in OLAF was responsible for dealing with their dossier at the various stages of OLAF's investigation (from September 2000 until December 2002) and the reason why there was a change in the responsible investigators;
- the complainants' argument that, contrary to OLAF's assertion, the 309-page LEADER file concerning Blue Dragon 2000 was not available to OLAF in December 2000 and was only given to OLAF on 4 May 2001, as well as the complainants' query about the date when OLAF's investigation was opened.

OLAF's reply to the further inquiries

OLAF's reply can be summarised as follows:

As regards the quality of the checks carried out by the Spanish authorities, the investigator dealing with the file initiated the appropriate steps to carry out an on the spot audit. On that occasion, OLAF learnt that the same beneficiary had been the subject of a check by the "national" (3) authorities and that a supplementary check was to be carried out by the "federal"¹ authorities. OLAF consequently decided to suspend its audit mission and to await the results of both checks. OLAF received the reports on these checks on 10 July 2001. According to these reports, the various steps of the managing procedure had been exhaustively examined, the checks complied with the generally accepted auditing standards and were carried out without any constraint. It was stated in the second report that the accounts of the LAG had been certified without any reservation by an auditor in 1997, 1998 and 1999. Their structure and the



details presented in them were those normally contained in this type of report. There was no element showing that these reports could be of poor quality. Examining the quality of these checks could mean auditing the control systems set up by the Member State. This type of audit is within the competence of Directorates General for Agriculture and for Regional Policy and not within OLAF's competence. OLAF was not informed by other Directorates General that the quality of these checks could be questioned.

As regards the investigators dealing with the complainants' file, there have been three different investigators because of transfers to other Commission services:

- The first investigator, assisted by the co-ordinator for Structural Funds, was responsible for the file from 1 February 2001 until 12 October 2001. This person was also the designated person for evaluating the first information received by OLAF.
- When this person left OLAF, the above-mentioned co-ordinator took over the file from 9 November 2001 until 24 June 2002 and was assisted by a third person.
- Finally, when this second investigator left OLAF, the above-mentioned third investigator took over from 24 June 2002 until 12 December 2002 when the inquiry was closed.

The changes that took place in the responsible investigators were the logical and normal consequence of the departure of the previous investigators.

As regards the LEADER file concerning Blue Dragon, OLAF indicated that there are two acknowledgements of receipt dated 15 December 2000 and 4 May 2001, which do not indicate the number of pages received from the complainants. OLAF is unable to confirm the date of receipt of this file. The investigator responsible for the final evaluation considered that this file had been received on 15 December 2000. Furthermore, a pre-evaluation phase was initiated on 19 September 2000 when the complainants came to OLAF to give information to the first investigator. The decision to open an inquiry was made on 1 February 2001 by the Director General of OLAF and the decision to close the inquiry was made on 12 December 2002. The difference in dates for the receipt of the LEADER file had no influence on the progress of the inquiry, as all documents were taken into account in the final evaluation before the closure of the inquiry.

The complainants' further observations

The complainants' further observations can be summarised as follows:

The complainants argue that OLAF failed to fulfil its mandate. It did not in fact carry out an inquiry on the dates indicated and created false documents to conceal this fact.

According to the complainants, the OLAF inquiry was not opened on 1 February 2001 because a number of documents are false and were created to reply to the Ombudsman's inquiry, in particular the file note dated 3 October 2000, the note dated 1 February 2001, and the decision to open an inquiry dated 1 February 2001. Moreover, the decision to open an inquiry seems to be signed by the Director General of OLAF, Mr BRUENER. However, the letter from the Director



General of OLAF dated 24 February 2003 bears a different signature.

According to the complainants, OLAF deliberately refused to carry out an inspection in Spain, although from September 2000 it had sufficient evidence to do so. A letter from OLAF dated 14 November 2001 explained to the complainants that OLAF requested the Spanish authorities to carry out checks on the file in question and that it was now examining their findings.

Furthermore, the complainants question the statement made in the reports by the Spanish authorities that all management procedures in the LAG had been thoroughly examined. First, because there is no mention of the draft of 7 million pesetas, which casts doubt on the sums given by the LAG to Blue Dragon and should lead to unbalanced accounts of the LAG. Second, the Spanish checks did not notice any false documents and that members of the LAG benefited from the fraud. The Spanish inquiry was limited to administrative problems and did not take into account criminal elements. The complainants conclude that the various Commission services were aware of the problems and chose not to question the Spanish checks.

As regards OLAF's investigators, the complainants, according to information at their disposal, identified the three persons mentioned by OLAF in its reply. They point out some inconsistencies between information given by OLAF and information at their disposal.

As regards the LEADER file concerning the Blue Dragon project, the complainants consider that the date of receipt by OLAF is important, because it shows that some documents provided by OLAF are false and that the final OLAF report does not take into account criminal elements.

Finally, the complainants claim compensation for non-material and financial losses and, if no agreement is found, they request that the Ombudsman transfer their case to the competent court and inform the President of the Commission of the situation.

THE DRAFT RECOMMENDATION

On 16 February 2004, the Ombudsman addressed the following draft recommendation to OLAF in accordance with Article 3 (6) of the Statute of the Ombudsman:

OLAF should examine whether it should re-open its inquiry, or conduct a new inquiry into the complainants' case.

This draft recommendation was based on the following considerations:

As regards the alleged failure to deal properly with the complainants' allegations

1 The complainants allege that OLAF has failed to deal properly with their allegations of fraud and that the system of distribution of LEADER II funds through private sector bodies, as well as inadequate controls by the Commission, have facilitated the fraud. The complainants claim public exoneration, restitution of what has been stolen from them and compensation for economic and non-material losses they have suffered.



The complainants argue that a memorandum of the OLAF investigator, dated 3 October 2000, cannot have been written on that date, because some of the information it contains was not then available to OLAF, including the 309-page LEADER file on Blue Dragon, which they had not yet themselves received from the Spanish authorities. They also raise questions concerning who in OLAF was responsible for their case at different periods.

2 OLAF explains that, on 1 February 2001, following a meeting with the complainants, it decided to open an inquiry and to carry out an inspection on the spot. However, OLAF learnt that inspections had already been, or would be, carried out by the Spanish authorities. OLAF therefore decided to suspend its on the spot inspection and to await the findings of the inspections carried out by the Spanish authorities. OLAF considered that there was no reason to question the findings of the Spanish authorities and therefore decided not to carry out an additional on the spot inspection. A final report on the OLAF inquiry was written and approved on 10 December 2002 by OLAF's Management Board. According to this report, irregularities were found in the Blue Dragon 2000 project. The report recommended the case be closed with a financial follow-up in order to recover the funds allocated to the Blue Dragon 2000 project. On 12 December 2002, the Director General of OLAF closed the inquiry.

According to OLAF, as a result of transfers of personnel to other services, three different investigators were successively responsible for the complainants' case.

Finally, OLAF was unable to confirm the date of receipt of the LEADER file concerning Blue Dragon.

3 In accordance with 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) (4) , *"In order to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community, the European Anti-Fraud Office established by Commission Decision 1999/352/EC, ECSC, Euratom (hereinafter 'the Office') shall exercise the powers of investigation conferred on the Commission by the Community rules and Regulations and agreements in force in those areas. (...) the Office shall conduct administrative investigations for the purpose of: fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community, (...)."*

4 The Ombudsman considers that principles of good administration require administrative investigations by OLAF to be carried out carefully, impartially and objectively. The Ombudsman notes that OLAF was informed in September 2000 of the complainants' case, opened an inquiry in February 2001 and closed it in December 2002. However, on the basis of his examination of the evidence available, the Ombudsman notes a number of points which give rise to concern about the adequacy of the OLAF inquiry.

(a) The opening date of the inquiry carried out by OLAF

The Ombudsman notes that, in accordance with Article 5 of Regulation (EC) No 1073/1999, investigations *"shall be opened by a decision of the Director of the Office."* The Ombudsman has carefully examined the documentary evidence available and notes that the signature of the Director General of OLAF on the decision to open the inquiry seems to be different from the



signature on other documents apparently signed by the Director General. The Ombudsman points out, however, that OLAF has not yet been asked to clarify this point during the present inquiry.

(b) The investigators in charge of the inquiry

The Ombudsman notes that, according to OLAF, there were three investigators. The Ombudsman notes from the documents available that, particularly from May 2001 until December 2002, OLAF does not appear to have kept the complainants informed of the name of the person in charge of their case and that there appears to be some uncertainty as to who was the investigator in charge between 12 October 2001 and 9 November 2001.

(c) The documents at OLAF's disposal

The Ombudsman notes that OLAF is unable to confirm the date when it received the 309-page LEADER file concerning Blue Dragon 2000.

(d) OLAF's decision not to carry out an inspection

The Ombudsman notes certain differences between the information given by OLAF in its opinions and the information contained in documents annexed to the complainants' and OLAF's correspondence with the Ombudsman. According to OLAF's opinion, it decided in February 2001 not to carry out an on the spot inspection because the Spanish authorities had informed OLAF that they had already carried out one inspection and that they planned to carry out further inspections. However, according to a letter from OLAF to the complainants dated 14 November 2001, it was OLAF that requested the Spanish authorities to carry out such inspections.

(e) The findings of the OLAF inquiry

From the examination of the documents included in the file, it appears that among the irregularities found in the Blue Dragon project by the Spanish authorities were missing signatures, in particular on the aid application. According to the complainants, they never signed the aid application. Despite the fact that EU funds therefore seem to have been granted and paid without appropriate documentation, the OLAF inquiry, based on the checks carried out by the Spanish authorities, concluded that problems occurred only at the level of the recipients of LEADER II funds. In this context, the Ombudsman recalls that, on 9 March 2002, the complainants lodged a complaint with the European Commission concerning problems in the management, the control and the distribution of Community funds in the framework of the Community Initiative LEADER II in the Region of Catalonia. The Ombudsman also recalls that the European Commission has accepted a draft recommendation from the Ombudsman to re-examine the complainants' letter of 9 March 2002 and deal with it in accordance with the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.

5 In the light of the above, the Ombudsman considers that there are grounds for OLAF to examine whether it should re-open its inquiry, or conduct a new inquiry into the complainants' case and that failure to do so would be an instance of maladministration.

OLAF's detailed opinion

OLAF's detailed opinion can be summarised as follows:

OLAF has further reflected on each of the points raised by the European Ombudsman and reconsidered whether its investigation should be re-opened or a new inquiry should be opened.

(a) The opening date of the inquiry carried out by OLAF



The Director General of OLAF has reviewed the signature on the decision, along with the transmission sheet that accompanied this document when it was signed. He can state with complete certainty that the signature on the decision is his; in addition, the paraph on the transmission sheet for this document is also his. To the extent that this signature differs from other signatures of his, this can be explained simply by the fact that, at a certain point in time, he adapted his signature in order to make it more legible. He also asked the OLAF archives to verify that this document was in its proper place and that there was no reason to question its authenticity. The archives assured him that the document was exactly as it should be. Moreover, as with all official OLAF's documents, the decision was registered on ADONIS, the Commission's document registration system, by which it is assigned a unique number and bar code which cannot be modified.

(b) The investigators in charge of the inquiry

OLAF conducts investigations solely for the reason specified in Regulation 1073/99: *"to step up the fight against fraud, corruption and any other illegal activity affecting the financial interests of the European Community."* OLAF is not obliged to provide the public with information about an ongoing investigation. OLAF's policy with respect to informing an individual who may have an interest in the outcome of an investigation and who has provided OLAF with information is specified in OLAF's manual, paragraph 3.4.9.4: *"In some instances, the initial information that triggered a case may have come from an individual who may have an interest in the outcome. It is OLAF's practice not to provide such individuals with any information about the investigation while it is still in course. Upon completion of the case, it is good administrative practice to send a brief letter to such person, informing him of the completion of the case and, in general terms, of its main results. However, the letter should not reveal any confidential information or professional secrets"* .

While the case remained under the overall control of the relevant adviser during this period, there was a gap between the departure of the first investigator in charge (12 October 2001) and the appointment of the second investigator in charge (9 November 2001). From the time Mr BRUENER became Director General of OLAF in 2000, almost all of OLAF's operational staff was changed. Given this level of staff turnover, it was not always possible to have an investigator assigned full time to all investigations that had been open. However, even if for less than one month there was no investigator formally assigned to the case, the co-ordinator with respect to Structural Funds cases at the time was responsible for the case.

(c) The documents at OLAF's disposal

At the time when Mr BRUENER arrived in office, OLAF did not have in place an archiving system that would permit OLAF to provide the exact date of arrival of this document. This problem has since been remedied, and all documents arriving at OLAF are now registered, stamped with a number and date, scanned, and distributed to the responsible persons in electronic format. The originals are maintained in OLAF's registry.

Whether the date that the LEADER file was provided to OLAF was 15 December 2000 or 4 May 2001, it has no bearing on the allegation of the complainants that OLAF did not have this document on 3 October 2000, the date on the file note which they claim is false. More importantly, the LEADER file was part of the dossier when a final decision was taken on the case.



(d) OLAF's decision not to carry out an inspection

The Spanish authorities had informed OLAF that they were looking to the alleged irregularities. The letter from OLAF sent to one of the complainants on 14 November 2001 was simply confirming that OLAF had asked the Spanish authorities to make all necessary controls and verifications, as deeply as possible, with respect to the Blue Dragon dossier.

(e) The findings of the OLAF's inquiry

OLAF's final case report concluded, on the basis of the Spanish authorities' inspections, that irregularities had occurred with respect to the Blue Dragon project, and recommended that the case be closed with financial follow-up to recover funds with respect to the Blue Dragon project.

As regards the complaint lodged by the complainants with the European Commission, OLAF recalls that the Commission has requested clarification from the Spanish authorities concerning several points. It has not yet received a reply.

For the above reasons, OLAF concluded that the points made by the Ombudsman do not call into question the adequacy of the inquiry that it conducted and considers that there are, therefore, no grounds for re-opening its inquiry or opening a new inquiry.

The complainants' observations on OLAF's detailed opinion

The complainants' observations on OLAF's detailed opinion can be summarised as follows:

(a) The opening date of the inquiry carried out by OLAF

The complainants recognise that Mr BRUENER may have different signatures but they consider that there should be an internal document identifying his official signature and that Mr BRUENER should have indicated when he changed his signature. They are still doubtful about the authenticity of Mr BRUENER's signature which appears on the document dated 1 February 2001 by which he decided to open an inquiry.

The complainants maintain that the note dated 3 October 2000 is false and that consequently the note dated 1 February 2001 and the decision to open an inquiry are also false. According to information at their disposal, they consider that the note dated 3 October 2000 was registered in OLAF's registry and ADONIS afterwards. The complainants conclude that Mr BRUENER is thus unable to prove the existence of the note dated 3 October 2000 and to confirm the opening date of the inquiry.

Finally, the complainants note that Mr BRUENER did not sign the decision closing the inquiry but instructed one of his collaborators to do so. They note that this person seems to have different signatures.

They learnt that ADONIS and OLAF's registry were probably not operational at the date given by Mr BRUENER. They request the Ombudsman to obtain information on the establishment of these two registration systems of documents.

(b) The investigators in charge of the inquiry

The complainants take note of OLAF's communication policy with individuals who have an interest in the outcome of an inquiry. They consider that OLAF should have explained earlier its policy and how an individual having an interest in the outcome of an inquiry and who provided OLAF with information was kept informed about this inquiry. OLAF should comply with the



principles of European law, and in particular the principle of good administration. OLAF's manual, which is an internal document, should comply with these principles.

The complainants note contradictions in OLAF's replies, in particular as regards the persons in charge of the inquiry. They do not understand why their case is considered as minor, although more than 10 persons took part in the OLAF's inquiry which started in September 2000 and was closed in December 2002.

(c) The documents at OLAF's disposal

According to the complainants, the date of receipt of the LEADER file by OLAF is important. They assert that it was received on 4 May 2001, at a time when OLAF's archiving system did not exist. Therefore, this system did not exist either when the inquiry was opened or when the note of 3 October 2000 was written. If OLAF had acknowledged that this file had been received on 4 May 2001, it would have recognised that the opening date of the inquiry was wrong. According to the complainants, from July 2001, OLAF had at its disposal all necessary information to question the Spanish authorities' checks. Finally, the complainants think that OLAF closed the case in December 2002 because the Ombudsman opened an inquiry, of which OLAF was informed on 28 October 2002. Furthermore, they note that OLAF's final report on this case is not registered and not signed. On 8 January 2002, OLAF requested the Directorate General for Agriculture to recover the funds. OLAF's inquiry was closed only on 5 December 2002.

(d) OLAF's decision not to carry out an inspection

The complainants note that no information is given on who initiated the inquiry: OLAF or the Spanish authorities. As regards the letter dated 14 November 2001, the results of the Spanish authorities' checks were sent to OLAF in July 2001. It therefore seems difficult to consider this letter as meaning that OLAF had asked the Spanish authorities to undertake an in-depth inquiry, when in fact the checks had already been carried out.

(e) The findings of the OLAF's inquiry

The complainants do not understand why an inquiry into a case in which only administrative problems were found took so long and why so many persons were involved.

They wish to know whether the OLAF Supervisory Committee was informed of the delays in this inquiry and whether OLAF's final report was sent to the Spanish authorities. Moreover, during an interview between the complainants and OLAF's investigators, one of them indicated that, if the complainants collaborated with OLAF, they could be associated to the court actions initiated by OLAF. They wish to know whether this statement complies with procedures established by OLAF, if OLAF can compensate victims of European fraud, and, if this is possible, whether this compensation is paid because of OLAF's failure or because of a failure of the system of allocation of European funds set up by the Commission.

The complainants hope that the Ombudsman will conclude that there was maladministration in the handling of their file. They request him to inform the President of the Commission and the Budgetary Control Committee of the European Parliament of their case and to transfer their file to the Court of First Instance in Luxembourg.



THE DECISION

1 Preliminary remarks

1.1 The complaint was made against both the Commission and OLAF. However, the present decision concerns only OLAF. On 26 June 2003, the Ombudsman made a draft recommendation to the Commission, to re-examine the complainants' letter of 9 March 2002 and deal with it in accordance with the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (5). On 16 September 2003, the Commission accepted the draft recommendation. The inquiry into the complaint against the Commission was therefore closed by a decision of the Ombudsman of 12 March 2004.

1.2 The Ombudsman recalls that the EC Treaty empowers him to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The present decision therefore concerns the activities of OLAF. The Ombudsman's inquiry has not examined the activities of the Spanish authorities.

1.3 The Ombudsman notes that, in their observations on the Commission's detailed opinion, the complainants submit several new allegations and requests. They question the closing of the inquiry, on the grounds that the decision to close the case might not have been signed by Mr BRUENER, because the person who signed for him seems to have different signatures and because the case was closed after the opening of an inquiry by the Ombudsman. Moreover, they wish to know whether:

- the OLAF Supervisory Committee was informed of the delays in the inquiry, - OLAF's final report was sent to the Spanish authorities, - the possibility to be associated to the court actions initiated by OLAF, as indicated by one OLAF's investigator, complies with procedures established by OLAF, - OLAF can compensate victims of European frauds and, if this is possible, whether this compensation is paid because of OLAF's failure or because of the failure of the system allocating European funds set up by the Commission.

They request the Ombudsman to obtain information on the date when the archiving system was set up by OLAF and when ADONIS was operational. Finally, they request the Ombudsman to inform the President of the Commission and the Budgetary Control Committee of the European Parliament of their situation and to transfer their case to the Court of First Instance.

1.4 The Ombudsman notes that these allegations and requests were not included in the original complaint. He considers that he already has available all the information necessary to make a decision on the case. Therefore, he takes the view that it is not appropriate, at this stage, to extend the scope of the present inquiry to include the new allegations and requests presented in the complainants' observations on OLAF's detailed opinion. The complainants are free to address their new allegations and requests to OLAF and to lodge a new complaint with the Ombudsman if they consider that OLAF's reply is not satisfactory.



1.5 The Ombudsman points out that the complainants could inform, if they so wish, the President of the Commission and the Budgetary Control Committee of the European Parliament of their situation and take the matter to the Court of First Instance in accordance with the latter's rules of procedure. The statute of the Ombudsman makes no provision for the Ombudsman to transfer a complaint to the Court of First Instance.

2 Alleged failure to deal properly with the complainants' allegations

2.1 The complainants allege that OLAF has failed to deal properly with their allegations of fraud. They claim public exoneration, restitution of what has been stolen from them and compensation for economic and non-material losses they have suffered.

2.2 OLAF explains that, on 1 February 2001, it decided to open an inquiry. A final report on OLAF's inquiry was written and approved on 10 December 2002 by OLAF's Management Board. According to this report, irregularities were found in the Blue Dragon 2000 project. The report recommended that the case be closed with a financial follow-up in order to recover the funds allocated to the Blue Dragon 2000 project. On 12 December 2002, the Director General of OLAF closed the inquiry.

2.3 On 16 February 2004, the Ombudsman addressed, in accordance with Article 3 (6) of the Statute of the Ombudsman, a draft recommendation to OLAF according to which OLAF should examine whether it should re-open its inquiry or conduct a new inquiry into the complainants' case.

2.4 In its detailed opinion issued on 18 March 2004, OLAF informed the Ombudsman that it had examined the points raised by him and had considered whether it should re-open its inquiry or open a new inquiry. OLAF concluded that the points made by the Ombudsman did not call into question the adequacy of the inquiry conducted by OLAF and that therefore there were no grounds for re-opening its inquiry or opening a new inquiry.

2.5 The Ombudsman will examine OLAF's detailed opinion as regards each of the points in the Ombudsman's draft recommendation:

(a) The opening date of the inquiry carried out by OLAF

The Ombudsman notes that the Director General of OLAF states with complete certainty that the signature on the decision is his signature and that if this signature differs from other signatures of his, this can be explained simply by the fact that, at a certain point in time, he adapted his signature in order to make it more legible. The Ombudsman takes the view that this statement from the Director General of OLAF confirms the authenticity of the document and hence the opening date of the inquiry. However, the Ombudsman notes that OLAF did not attach to its reply a copy of an official document, established when the change in the signature of the Director General of OLAF took place and attesting to this change. The Ombudsman considers that it would have been in accordance with the principles of good administration for OLAF to have established such a document. The availability of such a document would have helped quickly to remove any possible doubt about the authenticity of the decision opening the inquiry. The Ombudsman therefore considers that it is useful to make a further remark to this effect below.

(b) The investigators in charge of the inquiry



The Ombudsman notes a certain lack of consistency in the application of OLAF's communication policy with individuals who have an interest in the outcome of an inquiry. It seems in fact that some information was given to the complainants during the inquiry, although OLAF's manual does not provide for the communication of that information. This lack of consistency is unfortunate, because, as a general matter, it could lead to confusion and even give rise to suspicion on the part of individuals interested in inquiries carried out by OLAF. However, the Ombudsman considers that the complainants in this case have now at their disposal the necessary information to clarify the handling of their case.

(c) The documents at OLAF's disposal

The Ombudsman notes that OLAF has recognised that it did not have an adequate system for registration of incoming documents at the time when the Blue Dragon case began. The Ombudsman considers that such a weakness is especially regrettable in view of OLAF's specific duties and responsibilities, which make it important for OLAF to win and maintain the trust of persons concerned by inquiries, of European and national institutions and of the citizens of the Union. The Ombudsman notes, however, that OLAF has already taken steps to deal with the problem by putting in place an effective and reliable system of registration. In the Ombudsman's view the operation of this system should help avoid, in the future, doubts about the reliability of OLAF's files.

Moreover, the Ombudsman notes that there is a conflict between OLAF and the complainants about certain facts, the origin of this conflict being linked to the date at which OLAF received certain documents. The Ombudsman notes that, according to OLAF, the most important thing is that the LEADER file was included in the file on the case when OLAF's final decision was taken. According to the complainants, if OLAF had acknowledged the date when it actually received the LEADER file, it would have recognised that the opening date of the inquiry was false.

The Ombudsman considers that the above conflict could only be resolved by a court of competent jurisdiction, which would have the possibility to assess conflicting evidence about the facts. He recalls that the complainants have the possibility to begin proceedings that would allow them to submit the matter to a court. The Ombudsman therefore takes the view that no further inquiries are justified as regards this aspect of the complaint.

(d) OLAF's decision not to carry out an inspection

The Ombudsman takes note of the clarification given by OLAF as regards the content of the letter dated 14 November 2001. He considers that the wording of this letter was equivocal and likely to lead to misunderstanding from the complainants about OLAF's activity.

However, the Ombudsman considers that, in the course of the present inquiry, the complainants have received the necessary clarifications on this matter.

(e) The findings of OLAF's inquiry

The Ombudsman notes that, in its detailed opinion, OLAF considers that the comments made by the Ombudsman in his draft recommendation "*did not call into question the adequacy of the inquiry that it conducted and that therefore there were no grounds for re-opening its inquiry or opening a new inquiry.*"

The Ombudsman also notes that OLAF recognises that its final report on the Blue Dragon case



is based on the checks that were carried out by the Spanish authorities.

The Ombudsman recalls that, following the draft recommendation addressed to the Commission by the Ombudsman on 26 June 2003, the Commission registered the complainants' letter of 9 March 2002 as a complaint against Spain for an infringement of Community law. According to OLAF's detailed opinion, the Commission has requested clarification from the Spanish authorities about several points and has not yet received a reply.

The Ombudsman considers that, at the present stage of the Commission's investigations into the alleged infringement by Spain, OLAF's conclusion that there is no ground to re-open its own inquiry or to open a new inquiry appears reasonable.

As regards the general issue of the relations between OLAF and the authorities of the Member States and in particular to what extent OLAF is to rely on the checks carried out by Member States without carrying out its own inquiries, the Ombudsman notes that, on 10 February 2004, the Commission submitted a 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) (6). This proposal is currently before the European Parliament. The Community legislator therefore has the opportunity to examine the merits of possible changes in the way OLAF carries out its internal and external investigations and in its co-operation with the authorities of the Member States.

As the matter is before the Community legislator, the Ombudsman does not consider that it is necessary for him to make further inquiries into this subject.

2.6 The Ombudsman takes the view that OLAF has accepted his draft recommendation, given that it has examined the file and considered whether it was appropriate to re-open its inquiry or to open a new inquiry. Furthermore, the Ombudsman notes from the information supplied in OLAF's detailed opinion that the Commission's investigations into the complainants' allegations of an infringement of Community law by Spain are on-going. The Ombudsman considers that, at the present stage of the Commission's investigations into the alleged infringement by Spain, OLAF's conclusion that there is no ground to re-open its own inquiry or to open a new inquiry appears reasonable.

In view of this conclusion, the Ombudsman considers that no further inquiries are justified.

3 Conclusion

For the reasons set out above, the Ombudsman considers that no further inquiries are justified and therefore closes the case.

FURTHER REMARK

The Ombudsman considers that it would have been in accordance with the principles of good administration for OLAF to have established, when the change in the signature of the Director General of OLAF took place, an official document attesting to this change. The availability of



such a document would have helped quickly to remove any possible doubt about the authenticity of the decision opening the inquiry.

The Director General of OLAF will also be informed of this decision. A copy of the decision will also be sent, for information, to the President of the OLAF Supervisory Committee.

P. Nikiforos DIAMANDOUROS

(1) 2002 OJ C 244/5.

(2) 1999 OJ L 136/1.

(3) The words between quotation marks are those used by OLAF in its reply.

(4) 1999 OJ L 136/1.

(5) 2002 OJ C 244/5.

(6) COM(2004)103 final.